REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

February 7, 1919 to May 9, 1919.

JOSEPH COGHLAN
REPORTER

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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. Nuessle.
District No. Seven,
Hon. W. J. Kneeshaw.
District No. Eight,
Hon. K. E. Leighton.
District No. Nine,
Hon. A. G. Burr.
District No. Ten,
Hon. W. C. Crawford.
District No. Eleven,
Hon. Frank Fisk.
District No. Twelve,
Hon. 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

D. R. JACOBSEN and Peter Fugelso, Copartners Doing Business under the Firm Name and Style of Jacobsen & Fugelso, Appellants, v. JOHN FORBRAGD, Respondent.

(171 N. W. 624.)

Sales — liens and mortgages — judgments.

1. Where the owner of a harness claimed to have sold it on the 22d day of April, 1915, and took a mortgage back from the purchaser on the harness, and claimed to have filed it on the date of the sale, and another took a mortgage on the same harness dated April 20, 1915, and claimed to have seen the harness in the possession of the mortgagor prior to the date of his mortgage, the question of the priority of the mortgages was a question of fact for the jury. The jury having returned a verdict for the defendant and judgment having been entered thereon, it is *held* that such judgment is supported by the evidence.

Pleadings — amendment.

2. The complaint substantially stated the value of certain property to be $59, the answer stated it $50. The proof showed it to be $59. Defendant, during the course of the trial, made a motion to amend his pleading to correspond with the proof. He did not redraw the pleading. The court allowed the amendment. The trial was had on the theory that the answer had been amended to correspond with the proof; *held* that this was in accordance with the provisions of § 7482, Compiled Laws 1913.

Opinion filed February 7, 1919. Rehearing denied March 15, 1919.

Appeal from a judgment of the County Court of Ward County and from an order denying a new trial, *Wm. Murray,* J.

Affirmed.

W. H. Sibbald, for appellants.

The permission to amend is not sufficient, the pleadings must be redrawn. Satterland v. Beal, 12 N. D. 122; Bergh v. John Wyman Farm Land & Loan Co. 30 N. D. 165; Clark v. Ellingson, 35 N. D. 546.

E. R. Sinkler and *M. O. Eide,* for respondent.

The court will not disturb the verdict unless the errors are prejudicial. McGregor v. G. N. R. R. Co. 31 N. D. 471; Buchanan v. Occident Elev. Co. 33 N. D. 346.

GRACE, J. Appeal from the judgment of the county court of Ward county and from an order denying a new trial, Wm. Murray, Judge.

The action is one in claim and delivery to recover the possession of a certain set of double harness complete with collars. The plaintiff claims possession thereof by reason of a certain chattel mortgage on the harness dated April 22, 1915, and on that day filed in the office of the register of deeds of Ward county, North Dakota. The defendant claims the right to possession by reason of a chattel mortgage upon the same property dated April 20, 1915, and filed on the 21st day of April, 1915, in the office of the register of deeds of said Ward county. Each of said mortgages was executed by one Olof Olson as mortgagor. Olof Olson purchased the harness from Jacobsen & Fugelso for $59. The principal question in the case is: Which of the two chattel mortgages is a prior lien upon the harness? The testimony of Jacobsen, one of the plaintiffs, is very positive that he sold the harness to Olson on the 22d day of April, 1915, for $59, and took his note for that amount, which was secured by the chattel mortgage dated and filed as above stated. Defendant's testimony is equally positive that prior to the 20th day of April, 1915, the date of the chattel mortgage from Olson to the defendant, he had seen the harness in question in the possession of Forbragd, where he was living, two or three days prior to the 20th day of April, 1915. He identified the harness, which he saw at Olson's place two or three days prior to the time he took his mortgage, as the same harness described in his mortgage. This, in substance, being the

state of the testimony, it is apparent there is a direct conflict between the testimony of Jacobsen and that of the defendant. If Jacobsen's testimony relative to the sale of the harness to Olson is correct, then defendant's statement, that he saw the harness in question at Olson's place two or three days before Olson executed the chattel mortgage on the harness to him, cannot be correct; and, if the defendant's statement is correct, then Jacobsen's statement is not correct. Hence a direct conflict in their testimony.

This disputed question of fact was properly one for the jury. It decided in favor of the defendant. Upon this disputed question of fact the verdict of the jury is conclusive. The mortgage to the defendant is prior in point of time as to its date of execution and its filing to that of the plaintiff. In addition to this, the jury placed the stamp of credibility on the testimony of the defendant. The effect of the verdict of the jury is to find that Olson had possession of the harness in question at and prior to the time he executed the mortgage to the defendant. This being true, the defendant's mortgage, which is prior in point of time of execution and filing, is a first lien upon the harness, and the defendant is entitled to the possession of the harness or the value thereof. The defendant, in its answer, claims the value of the harness was $50. The plaintiff, in its complaint, shows that the selling price of the harness was $59, and alleged that the value thereof is $100. The proof showed the value of the harness to be $59. The testimony and the complaint having shown that the value of the harness was $59, the defendant moved to amend his answer and increase his demand for judgment from $50 to $59. The court granted the motion. Upon this plaintiff predicates error. It was not error. The amendment in no manner constituted a variance, nor did it occasion surprise nor mislead the plaintiff. The sole matter affected by the amendment was the allegation in the answer with reference to the value of the harness. The complaint shows that the selling price of the harness was $59. The proof shows the value thereof the same. The amendment was proper under § 7482, Compiled Laws 1913, which reads thus: "The court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by

inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

What the court did, in this case, was to conform the answer to the proof. In such case, it is not necessary to redraw the pleading which is amended. In the case at bar, if there had been no application to amend, the judgment would have been supported by the pleadings. The complaint, itself, in effect shows the value of the harness to be $59; the proof clearly shows it, and whatever defect there is in the answer in this regard is cured by the complaint. If the amendment asked for was such as would constitute a variance, or if the amendment was such as would substantially change the nature of the claim or defense, or if the amendment was an extended and complicated one, it would be proper practice to redraw the amendment, following the rule in Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Clark v. Ellingson, 35 N. D. 546, 161 N. W. 199. In such case the court having granted the amendment, any party to the action, whose rights are affected by it, may insist that the pleading which the amendment affects be redrawn. If, however, the amendment is allowed and none of the parties to the action insists that the pleading affected by the amendment be redrawn and it is not, and the trial proceeds on the theory that the amendment is allowed, one, a party to the action, who had an opportunity to insist that the pleading be redrawn and did not do so, cannot complain and should be held to have waived it, and, having tried the case on the theory that the amendment was allowed, he should not be allowed to change his position after the close of the trial nor be heard to insist that the pleading affected by the amendment should have been redrawn.

The object of the trial is to determine the matters in dispute between the parties to the action. Fair and full opportunity should be granted to each party to an action to present fully all matters concerning the subject of litigation. He should not, however, be permitted, knowingly, to remain inactive and impassive and neglect or fail to act to protect his right, and then assign as error that which was as much within his power to prevent as any other party to the action. The trial should not be a contest of skill to see which party to the action may be successful in placing error in the record, but should be an earnest endeavor of

each party to fairly ascertain and determine the respective rights of the parties with reference to the subject of litigation.

We have examined, with considerable care, each of the instructions of the trial court objected to by the appellant, and find no reversible error in the giving of such instructions. It is not necessary to act out the instructions objected to in full, nor discuss them further. There was no error in denying plaintiff's motion for a new trial.

Judgment and order appealed from are affirmed, with statutory costs.

B. M. TORGERSON, A. E. Ringey, Carl Meyer and Alfred P. Johnson, Voters and Taxpayers of Golden Valley School District No. 65 of Williams County, North Dakota, Respondents, v. GOLDEN VALLEY SCHOOL DISTRICT NO. 85 OF WILLIAMS COUNTY, NORTH DAKOTA, and Fred Jorgenson, P. J. Hamers, and O. A. Haerstad, as the School Board of Said School District, and John Van Wagenen as Clerk of the School Board of Said School District, and Ira Rush, Appellants.

(171 N. W. 626.)

Schools and school districts — removal of school to new location — vote necessary for removal.

Where a consolidated school is formed and a site chosen by the electors of the district, acting under § 1190, Compiled Laws of 1913, such school cannot be removed from the location so selected without a two-thirds vote of the electors, proceeding under §§ 1184 and 1185 of the Compiled Laws of 1913.

Opinion filed February 8, 1919. Rehearing denied March 15, 1919.

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

George H. Stillman (*John A. Van Wagenen*, of counsel), for appellants.

The policy expressed in § 1188, Compiled Laws 1913, is that no child shall be deprived of that education and an equal opportunity to

the same even though the taxpayers are unwilling to vote to remove or build a school site. State v. Mostead (N. D.) 158 N. W. 349.

Greene & Stenersen, for respondents.

The public schools of North Dakota are under the control of the legislature, and the respective school boards have no other powers than those expressly conferred upon them. Pronovost v. Brunnette, 162 N. W. 300; Kretchmer v. School Board, 158 N. W. 993.

The right to hold an election cannot exist, or be lawfully exercised, without an expressed grant of power by the Constitution, or by the legislature acting under constitutional authority. 15 Cyc. 316; State v. Taylor, 12 L.R.A. 202; State v. Gardner (S. D.) 54 N. W. 606; People v. Palmer, 51 N. W. 999; Brewer v. Davis, 49 Am. Dec. 706; State v. Jenkins, 43 Mo. 261; Stephen v. People, 89 Ill. 337; Forest v. Batavia, 61 Ill. 99.

BIRDZELL, J. This action is one involving the validity of an election held in the defendant school district on May 22, 1918, for the purpose of changing the location of the consolidated school therein. Prior to the consolidation in August, 1917, three schools, located in different parts of the district, were conducted. Under the authority of § 1190, Compiled Laws of 1913, an election was held on August 1, 1917, resulting in the consolidation of the schools, and the site of the consolidated school was determined to be a site already owned by the district, near the village of Temple. In the month of May following, a petition was presented to the school board, signed by more than one third of the electors of the district, asking that an election be called to submit the question of the removal or change of site of the consolidated school from the village of Temple to a site in section 16 in the same township. In pursuance of the petition an election was called and held, at which a majority voted in favor of the site in section 16.

The only question considered by the district court, and the only question that is here for consideration, is as to the legality of the last election. The proper solution of this question depends upon the construction of certain sections of the School Code. Section 1184 of the Compiled Laws of 1913 authorizes the board of directors of common school districts to call an election to vote upon the question "of the selection, purchase, exchange, or sale of a schoolhouse site (or) of the

erection, removal, or sale of a schoolhouse," whenever, in the judgment of the board, it is desirable or necessary to the welfare of the schools in the district; and it is also therein provided that such elections may be called in response to petitions signed by one third of the voters of the district. It is contended by the appellant that this section authorized the election which was held in May, and that consequently the site of the consolidated school was legally changed from the village of Temple to the site in section 16. The respondents, on the other hand, contend that no authority exists for the changing of the site of the consolidated school, and to support this contention they rely upon § 1190 of the Compiled Laws of 1913. This section is of more recent origin than § 1184. It provides for the holding of elections to determine the questions of conveying pupils at the expense of the district to and from schools already established in common school districts, of consolidating two or more schools, and of selecting a site and erecting a suitable building or of making suitable additions to buildings already erected to accommodate pupils of the schools to be vacated. The argument is advanced that, since § 1184 originally applied only to such schools as were customarily maintained within common school districts, before authority existed for the establishment of consolidated schools, the section has no application to the location or relocation of schools of the latter sort. It is claimed that §§ 1184 and 1185 are inconsistent with the policy of consolidation as expressed in the statutes; but we are not convinced that there is such inconsistency as to require us to hold the former sections wholly inapplicable to proceedings looking to the removal or relocation of a consolidated school.

The effect of an election under § 1190 of the Compiled Laws of 1913, where the majority of the votes are in the affirmative, is to create a consolidated school and to select a site therefor. The provisions of the statute bearing upon the operation of a consolidated school clearly contemplate that there shall be but one such school within a district, and the powers of the board of directors, with respect to the selection, purchase, exchange, or sale of a site or the removal of a schoolhouse from the site of a consolidated school, are certainly no more extensive than the powers of the same board with respect to similar matters affecting ordinary schools; and the same is true as to the voters of the district. Sections 1184 and 1185 provide for these matters, and, in

our opinion, these sections are as applicable to consolidated schools as to any other schools within a common school district. Upon the hypothesis that these sections are applicable, it becomes necessary to determine whether or not they authorized the election held in the instant case, and the further proceedings pursuant thereto.

The school having been located upon the site near the village of Temple, in August, 1917, it could only be removed therefrom by the combined action of the board and the voters of the district, acting under the authority of §§ 1184 and 1185 of the Compiled Laws of 1913. Section 1184 seems to authorize a vote upon any question which may arise in connection with the locating or relocating of a school within a district. The section immediately following provides that it shall require a vote of two thirds of the voters present and voting at a meeting to order the removal of a schoolhouse, and that a schoolhouse so removed cannot be again removed within three years from the date of such meeting. We are of the opinion that the expression "removal of the schoolhouse," as used in this section, implies all of the proceedings incident to the relocation of a school, including the purchase of a site and the erection thereon of a school building. The meaning of such statutes is not to be gathered from exact grammatical analysis and definition. The plain meaning is that schools are to be moved only with the consent of the voters, and that the best interests of the schools demand that the right be exercised under prescribed limitations as to time. To give full effect to the election held in 1917, as a result of which the schools were consolidated and the site chosen near the village of Temple, it must be held that that election located the consolidated school; and in order that the school may be removed from the location so established it is requisite that the proposition should receive the two-thirds vote required for removal. Not having received that vote, the consolidated school within the defendant district is still legally located upon the site near the village of Temple. For like interpretations of similar statutes, see State ex rel. Jay v. Marshall, 13 Mont. 136, 32 Pac. 648; Kessler v. State, 146 Ind. 221, 45 N. E. 102. See also Stayton v. Butcher, 16 Okla. 232, 82 Pac. 726. While so located the board has no authority to expend moneys incident to the improvement of a site to which they are not, and may never be, authorized to remove the school. It follows from this that the order appealed from is correct, and it is affirmed.

GRACE, J. (dissenting). I respectfully dissent from the conclusion arrived at by my associates. It is conceded that in the election held in August to consolidate the school that but two questions were submitted, —that of consolidation of the school and the selection of the site. It is our understanding that the question of selecting suitable buildings or of making suitable additions to buildings already erected to accommodate pupils of schools to be vacated was not submitted. That at said election the schools of the district were consolidated there can be no doubt, and that at the same election a site for the consolidated school was selected is equally without doubt. After such election, another election was legally brought on to select another site than the one selected at the election on August 1; the latter election was held in the month of May of the following year. The election in May was to select a new site in section 16, which is in the center of the school district. The election was held for this purpose and a majority of the voters were in favor of selecting a site in section 16. The election having been legally called and held, the effect of this election is the selection of a new site for the consolidated school, and upon which the school board, when duly authorized by the electors of the school district, may build a new central school building. The effect of the election in May is to select a new site, to discontinue the site selected at the election held in August of the previous year, and effects a change of site from that designated at the first election to that in section 16. It is our contention under §§ 1184 and 1185 that to select, purchase, exchange, or sell a schoolhouse site, or purchase, exchange, or sell a *schoolhouse,* a majority vote is all that is required. It is so specifically provided in § 1185. The language of the statute in this regard is so plain it would seem to be impossible to misunderstand it. It is as follows: "If a majority of the voters present at such meeting shall by vote select a schoolhouse site or shall be in favor of the purchase, exchange or sale of the *schoolhouse,* as the case may be, then the board shall proceed to carry out the decision of the voters of the district."

To remove a schoolhouse from where it is located to some other point within the district is an entirely different question, and requires a higher percentage of the electors participating in the election in order to effect a removal thereof. The language of the statute which governs the removal of a schoolhouse from where it is located to another point

within the district is as follows: "Provided it shall require a vote of two thirds of the voters present and voting at such meeting to order the removal of the *schoolhouse, and such schoolhouse so removed cannot again be removed within three years from the date of such meeting;* and, further, if the question of removing the *schoolhouse* fails to carry, then the question of removing such schoolhouse cannot again be raised within one year."

The object of the statute last quoted is to prevent the too frequent removal of the school building or schoolhouse. Hence it is observed that if at an election for that purpose it is voted to remove the schoolhouse, and it is so removed, it cannot be removed again for three years. If, however, the question failed to carry and there was no removal of the schoolhouse, then the question of removing the schoolhouse cannot again be presented within one year. The election above referred to, which was held in May, effected the selection of a new site or another site than that selected at the election in August. It received the required number of votes, to wit, a majority of the electors of the district participating in that election. The effect of the election in May was to choose a new site on section 16 and discontinue the old site selected in the August election. The majority of the voters at the last election expressed themselves favorably to the site on section 16. It constitutes and is the legal site upon which the consolidated school building should be built when the building of the same has been duly authorized according to law. It seems to us the meaning of the sections of the statute quoted are plain and easily understood. There is no room for construction. In my opinion, the only legal site now existing is that selected by the majority of the electors at the latter election held in May following the former election.

GEORGE M. LYNESS, Respondent, v. FESSENDEN LIGHT & POWER COMPANY, a Corporation, Appellant.

(171 N. W. 827.)

Contracts — Statute of Frauds.

The laborer is worthy of his hire.

Opinion filed March 15, 1919.

Appeal from the County Court of Wells County, Honorable *Fred Jansonious*, Judge.

Affirmed.

B. F. Whipple, for appellant.

"When an agreement is not made for the benefit of a third party it cannot be enforced by him." Jefferson v. Asch (Minn.) 55 N. W. 604; Parlin v. Hall (N. D.) 52 N. W. 404.

"A third party cannot sue unless he is plainly designated by the instrument as the beneficiary and the covenant or promise is made for his sole benefit." Newberry Land Co. v. New Berry (Va.) 27 S. E. 899. See also Ansteel v. Humphries (Ga.) 27 S. E. 736; Wood v. Mariority (R. I.) 14 Atl. 855; Clare v. Hatch (Mass.) 62 N. E. 250; Washburn v. Interstate Co. (Or.) 38 Pac. 620; Edwards v. Clement (Mich.) 45 N. W. 1107; Rietzloff v. Glover (Wis.) 64 N. W. 298; Bates v. Donnelly (Mich.) 24 N. W. 788; Fisher v. Lutz (Wis.) 132 N. W. 598; Clark v. Hennessey (Minn.) 142 N. W. 873.

John A. Layne, for respondent.

"If the defendant received property as an individual in his own behalf and agreed from that property to pay the debt of the plaintiff then he can be held." McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Moore v. Becker, 4 N. D. 314, 62 N. W. 607.

ROBINSON, J. This is an appeal from a judgment for $220.47, including costs, and from an order denying a motion for judgment contrary to the verdict. The claim is for dray work done at the request of Baldwin, and for the use and benefit of himself and the defendant. Baldwin had arranged with the defendant to construct for its operation a power line, and as a part of the arrangement it was to furnish the materials. The poles were shipped by rail to Fessenden and were billed to "the Fessenden Light & Power Company." The drayage work of the plaintiff was to get from the railroad depot and yards the material shipped to the defendant and to distribute the same along the line, so in reality the building of the line was a joint venture between Baldwin and the defendant. When the work was done Baldwin made to the company a bill of sale for his interest in the line and his interest in contracts with some ten persons, who each agreed to pay and contribute a nice sum of the expense of the line, and defendant assumed and agreed

to pay for the work of constructing the line. It was not merely an agreement to pay the debt of another. The construction of the line was a joint enterprise; the work of distributing the poles and materials was done as much for the benefit of the company as for the benefit of Baldwin. Indeed, the company was the real and principal party and the only party that has enjoyed, and continues to enjoy the benefit of the plaintiff's work. The verdict and judgment is clearly right.

Affirmed.

BOVEY-SHUTE LUMBER COMPANY, a Corporation, Appellant, v. EDMORE (EVORE) THOMAS, Fred S. Cropper, Peter J. Keefe, H. C. Bear, and Farmers & Merchants Bank of Leeds, North Dakota, a Corporation, Respondents.

(171 N. W. 859.)

Liens — seed lien — compliance with statute.

1. A seed-lien statement under Comp. Laws 1913, § 6852, which is signed by the vice president of a bank, and which directly claims a seed lien in favor of such bank, and which further states the kind and quantity of seed furnished, its value, and the name of the person to whom furnished, and a proper description of the land upon which the same was sown, substantially complies with the statute, as against the objection raised that the lien statement does not show affirmatively that the bank furnished the seed, or possessed any interest in the grain.

Liens — owner's share of crop — right to lien for seed furnished.

2. In an action brought by the holder of a sheriff's certificate of sale to recover the owner's share of certain wheat under its right to receive the rents, or the value of the use of land during the period of redemption, where a defendant bank has interposed a counterclaim alleging a seed lien to exist upon such wheat for the seed furnished therefor, and from which the same was grown, and where the evidence discloses that the bank furnished such seed wheat to the party, either as a chattel mortgagee in possession of such seed wheat, or as a party to whom the owner thereof had turned over such seed wheat, it is *held* that the bank is entitled to enforce a seed lien upon such grain, as the party who furnished the same, within the meaning of §§ 6851 and 6852, Compiled Laws 1913.

Opinion filed March 15, 1919.

Action to recover certain grain; defendant bank interposed counterclaim alleging a seed lien thereupon.

From a judgment rendered for the bank, and from the order of the District Court, Benson County, *Buttz*, J., overruling a motion for judgment *non obstante*, the plaintiff appeals.

Affirmed.

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

The seed lien was unknown at common law; and hence can neither be acquired nor enforced unless there has been a substantial compliance with the act of the legislature from which the lien arises. Kelly v. Seely, 27 Minn. 385, 7 N. W. 821; Mushlitl v. Silverman, 50 N. Y. 360; Hooper v. Flood, 54 Cal. 218; Malter v. Mining Co. (Nev.) 2 Pac. 50; Gordon Hardware Co. v. San Francisco R. Co. (Cal.) 22 Pac. 406; Phil. Mech. Liens, 428; Lindley v. Cross, 99 Am. Dec. 610; Goss v. Strelits, 54 Cal. 640; Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384.

The findings must be sufficient to support the judgment. Holt v. Van Eps, 1 Dak. 206, 46 N. W. 689; Dole v. Burleigh, 1 Dak. 227, 46 N. W. 692; Anderson v. Alseth (S. D.) 62 N. W. 435.

No action for conversion can be maintained unless the plaintiff shows a general or special ownership in the property converted, and possession or a legal right to immediate possession at the time of the conversion. Parker v. First Nat. Bank (N. D.) 4 N. W. 313; Martin v. Hawthorne (N. D.) 63 N. W. 895.

The benefits of statutory liens can be realized only by strict compliance with the statute. Martin v. Hawthorne, supra; Moher v. Rasmussen (N. D.) 95 N. W. 152; Chaffee v. Eidinger (N. D.) 151 N. W. 223; Smith v. Dawler, 141 N. W. 786; Mark Paine Lumber Co. v. Douglas County Improv. Co. 94 Wis. 322, 68 N. W. 1013; Rosholt v. Corlett, 106 Wis. 474, 82 N. W. 305; Caylor v. Thorn, 125 Ind. 201, 25 N. E. 217; Robbins v. Blevins, 109 Mass. 219; Berry v. McAdams, 93 Tex. 431, 55 S. W. 1112; Neeley v. Searight, 113 Ind. 316, 15 N. E. 598; Schulenburg v. Bascom, 38 Mo. 188; Clark v. Edwards, 119 N. C. 115, 25 S. E. 794; Shafer v. Archbold, 116 Ind. 29, 18 N. E. 56; N. D. Lbr. Co. v. Bulger, 125 N. W. 883; Stoltz v. Hurd (N. D.) 128 N. W. 115; First Nat. Bank v. Peavey Elevator Co. 72 N. W. 402. See also Joslyn v. Smith, 2 N. D. 53; 25 Cyc. 683; 17 R. C. L. pp.

597 and 600; 2 Current Law Text (1903–4) p. 738, § 1; Browing v. Belfad, 83 App. Div. 144; Taylor v. Smith, 87 App. Div. 78.

Sinnes & Duffy and *Adrian Buttz,* for respondents.

It would not be equitable to permit the plaintiff to obtain the crop grown from the seed furnished and escape paying for such seed, through the merest technicality. Coburn v. Stephens, 137 Ind. 683, 45 Am. St. Rep. 218.

To furnish or supply necessarily carries with it the idea of ownership of, property in, or dominion over, the thing furnished by the one who furnishes. Southern Exp. Co. v. State, 107 Ga. 670, 73 Am. St. Rep. 149; Winslow v. Urquhart, 39 Wis. 268.

Although statutory liens must be substantially complied with, yet it is also true that these liens are remedial in nature, are to be liberally construed, and not to be defeated by mere technicalities. Freeman v. Clark, 2 N. D. 578; Dahlund v. Lorntzen, 30 N. D. 275; Mitchell v. Monarch Elevator Co. 15 N. D. 495, 11 Ann. Cas. 1001; Kehoe v. Hansen, 8 S. D. 198, 59 Am. St. Rep. 759.

Bronson, J. This is an action of claim and delivery brought by the plaintiff for the possession or the value of certain wheat grown in the year 1917. In substance, the facts disclosed by the record are as follows: The plaintiff foreclosed a real estate mortgage upon the land involved, and received a sheriff's certificate therefor on September 16, 1916; prior thereto it had also redeemed from a prior foreclosure. In the year 1917, the real estate involved was seeded with Marquis wheat, and the landlord's share for that year was 844 bushels, valued at approximately $1,500. The premises during such year were farmed by Edmore Thomas, a cropper, under an oral agreement with Fred S. Cropper, who was then the owner of the premises. Between April 10, 1917, and May 6, 1917, 186 bu. of Marquis wheat were furnished to Thomas, and by him sown upon the land involved. The wheat involved, so grown from this seed, was seized by the plaintiff pursuant to process issued herein. The plaintiff claiming the right thereto under the statute (Comp. Laws 1913, § 7762) granting to the holder of a sheriff's certificate the right to the rents, or value of the use of the property during the period of redemption, maintains this action. The defendant bank interposed an answer setting up a counterclaim alleging that it

had a statutory seed lien upon such grain by reason of having furnished the seed to said Thomas, which was sown upon such land and which produced such crop.

The sole issue presented in the action tried was the right of the bank to enforce its lien upon such grain so taken by the plaintiff.

Upon the trial it was stipulated between the plaintiff and the defendant bank that the amount of the grain taken, the owner's share, was 844 bushels, of the value of $1,509.22; that the land involved was farmed by the defendant Thomas, and that the grain involved was raised upon such farm from the seed wheat furnished to said Thomas. Further, that the only issue for trial was the question of the validity of the seed lien asserted by the defendant bank. The defendant bank, accordingly, at the trial, submitted evidence concerning its right to such seed lien and concerning the value of the said grain so furnished; the trial court upheld the validity of the seed lien, and submitted to the jury only the question of the value of the grain so furnished. The jury returned a verdict for the defendant bank for the sum of $578.09, the amount claimed by the defendant bank, it being stipulated by the parties that, if any recovery were had by the defendant bank, it should be in the nature of a money judgment. Judgment was entered for the defendant bank pursuant thereto. The plaintiff thereafter moved for judgment notwithstanding the verdict. From the judgment so entered, and the order overruling such motion, plaintiff has appealed to this court. The appellant specifies seventeen alleged errors of law. Its principal contentions are: First, that the seed lien of the defendant bank is void; and, second, that the bank had no interest either in such lien or in the grain furnished.

Concerning these contentions, it appears from the record that the defendant bank in 1916 had a chattel mortgage upon the crop of one H. B. Cropper, upon the land involved; that the bank took possession of the crop produced in 1916 and handled the same for Mr. Cropper, giving him certain credits from moneys realized from such crop upon notes owing by Cropper to the bank; that from the proceeds of this crop raised in 1916, there remained some wheat on the land, kept there, including the specific seed wheat involved herein; that H. B. Cropper had turned this wheat over to the bank; that in the spring of 1917 the defendant bank made arrangements with said Thomas to furnish to him

seed wheat out of this wheat so raised in the year of 1916; that the vice president of the bank went out to the place and measured up the wheat; that he instructed Thomas to clean the wheat and to take the screenings to town and sell the same; that Thomas so did, receiving 186 bushels of Marquis seed wheat cleaned; that thereafter Thomas hauled and sold the screenings, and the bank received therefor $233.05; that the bank credited this amount upon notes in the bank owing by said Cropper, and also the sum of $558, the price charged for such seed wheat so furnished to Thomas. The vice president of the bank made and signed a seed lien which in substance states that on April 10, 1917, for and in behalf of H. B. Cropper, he, the vice president, agreed to furnish and deliver, and did furnish and deliver to said Thomas between April 10, 1917, and May 6, 1917, 186 bushels of Marquis wheat, at $3 per bushel upon the land involved herein, and that the bank claimed a seed lien therefor. The plaintiff contends that the lien filed is void for the reason that the lien shows that the bank did not furnish the seed; that the only person entitled to a lien was H. B. Cropper, that, furthermore, the evidence discloses that the bank was not the owner of such grain, and did not furnish the same, and, if it did furnish the same, that it did so as the agent of Mr. Cropper.

These contentions are without merit. It is true that one claiming the benefits of a statutory seed lien must substantially comply with the statute. Lavin v. Bradley, 1 N. D. 291, 47 N. W. 384; Chaffee v. Edinger, 29 N. D. 537, 151 N. W. 223. The seed lien involved herein, in our opinion, does substantially comply with the statutory requirements. Compiled Laws 1913, §§ 6851 and 6852. Although not drawn artistically, it nevertheless states the kind and quantity of seed, its value, the name of person to whom furnished, and a proper description of the land upon which the seed was sown, and the name of the person entitled to such lien. The construction claimed by the appellant, that the lien statement shows that the grain was furnished for and in behalf of said Cropper (whose duty it was to furnish the grain) to said Thomas, cannot be upheld. The only reasonable construction in view of the claim specifically of a lien in favor of the bank made therein is that the bank delivered the grain to Thomas for and in behalf of said Cropper, not that the grain was furnished by Cropper to Thomas. The evidence amply sustains the conclusions of the trial court that the bank furnished

the grain and had an interest in the lien and in the grain furnished; whether the ownership of the bank be predicated upon an absolute ownership on account of the grain having been turned over to the bank by the owner thereof, or a special ownership through a chattel mortgage, accompanied by possession is immaterial; in either event, it had a property right in the grain involved and the right to assert a lien for this grain furnished, as the party furnishing the same, and thereby, releasing its property rights therein. It clearly came within the provisions of the statute granting a seed lien to one who furnishes seed grain. Comp. Laws 1913, § 6851. Furthermore the evidence substantially shows that the defendant bank had paid, or credited Mr. Cropper, for this very seed wheat so furnished to Mr. Thomas. This warrants a finding that the grain was turned over to the bank. The owner thereof had a right so to do without a foreclosure of the chattel mortgage. Taugher v. Northern P. R. Co. 21 N. D. 124, 129 N. W. 752. Furthermore, the law stated fully accords with the equities in this case. The appellant, under the statutory rule granting to it the right to receive the rents or value of the use of this land during the period of redemption, is receiving a direct benefit, to wit, the right to receive grain of the value of $1,500 less the price for the seed wheat involved, which was produced by reason of the fact that the defendant bank had furnished this seed wheat to Mr. Thomas, from which the crop in question was grown.

The other specifications of error herein relate to the rulings of the trial court upon the admission of evidence. We have examined the same and find no prejudicial error to have occurred. It therefore follows that judgment was properly rendered for the defendant bank pursuant to the stipulations of the parties upon the trial and the verdict of the jury rendered. The judgment accordingly is affirmed, with costs to the respondent.

OLAF FOSSUM, Respondent, v. SAMUEL HALLAND and David Askegaard, Copartners Doing Business as Halland & Askegaard, Appellants.

(171 N. W. 870.)

Sales — contracts of sale.

1. In an action to recover the purchase price of certain potatoes at the contract price of $.50 per bushel, we *hold* that the evidence shows a delivery by the plaintiff to the defendant of the potatoes; that plaintiff is entitled to recover the contract price of the potatoes so delivered.

Sales — marketable condition — necessity of counterclaim.

2. The defendants claim the potatoes were not marketable and were frozen. They did not, however, set forth any counterclaim in their answer, thus, if there were delivery of the potatoes, defendants were liable for the contract price. Evidence shows the delivery.

Opinion filed March 18, 1919.

Appeal from the District Court of Richland County, North Dakota, *Frank P. Allen,* J.

Affirmed.

W. E. Purcell, for appellants.

"In the sale of an article to be used for food for human beings there is an implied warranty that the article is sound and is in fact suitable and proper to be used as food." Nelson v. Armour Packing Co. 76 Ark. 352; Wiedman v. Keller, 171 Ill. 93; Hoover v. Peters, 18 Mich. 51; Burch v. Spencer, 15 Hun, 504; Divine v. McCormick, 50 Barb. 116; Houck v. Berg (Tex.) 105 S. W. 1176; Jones v. Murray, 19 Ky. 83; Emerson v. Brigham, 10 Mass. 70; Ryder v. Neitge, 21 Minn. 70; Moses v. Meade, 1 Denio, 378; Farrell v. Manhattan Market Co. 198 Mass. 271.

Wolfe & Schneller, for respondent.

"To be available for defense the Statute of Frauds must be pleaded." 9 Enc. Pl. & Pr. 705, 706.

GRACE, J. Appeal from the judgment of the District Court of Richland County, Frank P. Allen, Judge.

The action is one to recover the purchase price of 650 bushels of potatoes at $.50 per bushel. The action is based upon contract. Plaintiff, in substance, claimed the following agreement between the defendants and himself: That prior to the 22d day of October, 1913, plaintiff sold and agreed to deliver to said defendants at Christine, North Dakota, in a railway freight car, a certain quantity of potatoes to be weighed by the wagon load on scales at Christine as the same were hauled from the plaintiff's farm to said car; that defendants agreed to pay for the potatoes at the rate of $.50 per bushel, the potatoes were to be delivered in sacks, the defendants to furnish the sacks; that plaintiff delivered 650 bushels of potatoes on the 20th, 21st, and 22d days of October, 1915.

To the complaint, the defendants interpose a general denial. They further allege that in the month of October, 1913, plaintiff offered to sell the defendants a carload of first-class, marketable, early Ohio potatoes loaded in a car at Christine, in the state of North Dakota, at the price of $.50 per bushel; that plaintiff notified defendants that they had loaded such potatoes on the car at Christine, and defendants examined the same in said car and found them frozen and mixed with mud and wholly unmarketable, unsalable, and worthless, and notified the plaintiff of said facts and refused to accept the same. The following appear to be the facts:

The plaintiff is a farmer residing about 3 miles from Christine, in Richland county, North Dakota. Defendants are merchants and reside and do business at the village of Comstock in Clay county, Minnesota. The two villages are about 9 miles distant from each other. In the fall of 1913, defendants were engaged in buying and shipping potatoes. About the 13th of October, plaintiff was in the defendants' store at Comstock, Minnesota, and while there, the defendants agreed to purchase plaintiff's potatoes, which were to be of the early Ohio variety. Plaintiff claimed to have hauled to Christine 400 sacks of early Ohio potatoes, and to have placed them in the box car on track at Christine on the 20th, 21st, and 22d days of October. The potatoes were weighed on the scales of one Johnsgaard, a merchant at Christine, and weight tickets issued for them; there were twelve loads. The weight tickets for ten loads are in evidence and are marked as certain exhibits in the case. The exhibits representing two other loads were not received in evidence, the party

who weighed them not being present and they could not be identified by the plaintiff. Defendants contend they were to furnish the sacks in the first instance which should be delivered to plaintiff at Christine; that on final settlement plaintiff should pay for the sacks at the rate of 10 cents each. Plaintiff finished loading the car on the 22d day of October, 1913. On that day, plaintiff's father notified defendants by phone that the car was loaded, and requested that one of the defendants come to Christine and inspect the potatoes. It is claimed by the defendant that later on the same day, the defendant Halland rode to Christine and inspected the potatoes. Plaintiff does not concede that Halland came over that day to inspect the potatoes. Plaintiff claimed that his father called the defendant Halland over the phone and told him that plaintiff had the car of potatoes loaded, stating that plaintiff could get a little more in the car, and telling the defendant there were between 600 and 700 bushels in the car, and that Halland said, "You better ship what you got. If you got any more left, we will get another car;" and that he asked him if he were coming over to look at the potatoes, and he said, no, he would not be there; Fossum asked to whom they should be shipped and Halland told them, "Halland & Askegaard at Kansas City. Send me the bill of lading and the weights." Fossum answered that would be done. The potatoes were billed by Olaf Fossum, the plaintiff, on the 22d day of October, 1913, to Halland & Askegaard at Kansas City, Missouri. This is also shown by the testimony of Clark, station agent at Christine. The plaintiff claims he mailed bill of lading and original weight tickets to defendants at Comstock. It appears the bill of lading was returned by the defendants to plaintiff's father, who again returned it to the defendants, and they retained the same. Plaintiff claimed to have loaded the potatoes in the box car No. 1739, bearing the initials "D. & M;" that it was not a Milwaukee car; that the car was billed out October 22, 1913, and was shipped out on the morning of the 24th to the consignees. Halland admits he received the bill of lading and the weights. Defendants claim that Halland went to Christine and inspected the potatoes on the day the loading was completed, and went to the store of Johnsgaard and notified him that he would not accept the potatoes on the ground that they were frozen, were not marketable, and were worthless. They claim, also, that the plaintiff caused the car to be billed to the defendants as consignees at Kansas City, Missouri, the

bill of lading with the weight tickets sent to the defendants; that defendants on receipt of the bill of lading and weights returned them to plaintiff's father, with the statement that, owing to the condition of the potatoes, they would not be received, and that later the plaintiffs returned the bill of lading and weights to the defendants without any note or explanation. The defendants contend that in the talk over the phone plaintiff's father instructed the defendants that if, upon inspection, the potatoes were found to be satisfactory, the defendants should settle for them with Johnsgaard, who was engaged in the merchandising business at Christine. This is denied by the plaintiff and his father.

Considering the pleadings upon which the issue was formed, we are of the opinion that there is presented but a single issue namely, Was there an acceptance by the defendants of the potatoes? If, as claimed by the plaintiff, his father, acting for him, called by telephone Halland at Comstock and from him received orders and directions that plaintiff should bill the car to Kansas City, Missouri, to Halland & Askegaard, and that was done in the manner as testified to by plaintiff, this would constitute an acceptance of the potatoes. If, on the other hand as defendants claim, they examined the potatoes and found them frozen, and not merchantable, and notified Johnsgaard, then there was no acceptance of the potatoes.

It appears to us, the testimony in this regard being conflicting, it was a proper question for the jury. It decided in favor of the plaintiff and must have believed his testimony in this regard instead of that of the defendants. The verdict of the jury disposes of this question, and its verdict finds substantial support in the evidence. The testimony in regard to the merchantable condition of the potatoes at the time of their delivery in the car is in hopeless conflict, though in this case it is not a material question, as we view it; for the effect of the verdict in plaintiff's favor is that the defendants accepted the potatoes as claimed by plaintiff. If the potatoes were not merchantable and the defendants accepted them in the manner claimed by plaintiff without knowledge of that fact, two remedies were open to the defendants. They could, in this action, have pleaded a counterclaim based upon the alleged fact, if it were a fact, that at the time of the acceptance they had no knowledge of the unmerchantable condition of the potatoes, and then have shown the actual value of the potatoes at the time of acceptance, and whatever

the jury found was the actual value at that time would be deducted from the contract price, and the balance would be the amount plaintiff was entitled to recover; or, if the facts are as defendants contend, they could have sued to recover the difference between the actual value of the potatoes at the time of the acceptance and the contract price based upon the same reasons above given. Defendants have not seen fit to resort to either of these remedies, and have relied upon their assertion of fact that they never accepted the potatoes by reason of their examination of the potatoes before shipment and their notice to Johnsgaard that they refused to accept the potatoes for the reasons above stated, and in this contention of fact, failed before the jury.

Defendants introduced in evidence the records of the weather bureau at Wahpeton, which is some distance from Christine and Comstock; it shows the maximum and minimum temperature at Wahpeton for the entire month of October. In the view we have taken, this matter becomes unimportant in this case as it now stands. If the defendant were relying upon the counterclaim, or if the suit had been brought to recover the difference between the contract price of the potatoes and their actual value as disclosed by evidence as to fitness for food or merchantable qualities, the maximum and minimum temperature in the vicinity of Christine, Comstock, and the vicinity where the potatoes were produced would at least be competent testimony in connection with the other testimony to determine whether or not the potatoes were frozen and thus became unmerchantable. In view of the fact that no counterclaim was pleaded, and the jury having determined there was an acceptance of the potatoes, the matter of temperature is an immaterial question in the present case. Defendants claim the case comes clearly within the Statute of Frauds in this, that it is claimed no part of the purchase price had been paid at the time the contract was made, or at any other time, and the parties having not entered into any written contract nor ever signed or delivered any note or memorandum showing purchase of potatoes.

The effect of the verdict of the jury, however, is to find that the defendants accepted the potatoes. It is clearly shown that the potatoes were delivered in the car. This disposes of the acceptance and delivery of the potatoes, and delivery having been made, it takes the matter out of the Statute of Frauds. The verdict of the jury appears to be for the

value of the weight of the ten loads of potatoes at $.50 per bushel, and does not include the two loads, the weight tickets of which were not received in evidence. We do not find any reversible error in the instructions when considered as a whole. We think there is no prejudicial, reversible error in the record, and judgment should be affirmed, and is affirmed, with statutory costs.

CHRISTIANSON, Ch. J. (dissenting). I dissent. It is undisputed that the potatoes which the defendants agreed to purchase from the plaintiffs were to be marketable potatoes. It was understood that they were to be shipped to Kansas City and placed on the market there. The defendants contend that Halland examined the potatoes in the car, found them to be worthless, and refused to accept them. It is undisputed that the defendants returned the bill of lading to the plaintiff, but that plaintiff refused to accept it. It is also undisputed that the plaintiff dug, hauled, and loaded the potatoes on the 18th, 20th, 21st, and 22d of October, 1913. And the testimony of the plaintiff shows that eight out of the twelve loads which went into the car were hauled on October 22d. The evidence of disinterested witnesses was to the effect that, before any of the potatoes were dug, the ground had frozen so hard that it was impossible to plow. The weather report made at the State School of Science at Wahpeton, a distance less than 30 miles from where the potatoes were dug and loaded, was offered in evidence, and it shows that the thermometer registered below freezing on each of the days the potatoes were dug and hauled, and that it recorded 22 degrees below freezing on the 22d of October. It seems that under these circumstances, it is more than likely that some of the potatoes were frozen. As already stated the defendant Halland claimed that he examined the potatoes and found them to be frozen. Apparently some of the jurors were of the opinion that some of the potatoes were frozen. After they had retired they returned into court for further instruction. A colloquy then took place between the court and some of the jurors. During the colloquy a juror, Brand, said: "As I understand it, we had to ascertain whether the defendants accepted the carload of potatoes, and the question in my mind was whether they ever did accept the carload of potatoes." Later, the juror Brand addressed the following inquiry to the court: "If we find that this contract had been accepted

by the defendant in any way, have we got to allow the full amount, value of the potatoes in that car, for the amount they made the deal for?"

To this inquiry the court replied: "If you find that there was a contract, then it is for you to determine from the evidence in this case, the value of those potatoes and to give a verdict accordingly. You cannot arbitrarily give a verdict for more, or arbitrarily give a verdict for less. But from the evidence, provided you find that such a contract existed for the sale, upon the one hand and purchase from the other hand, of these potatoes, then from the evidence you are to give a verdict for whatever you deem the testimony shows to be the value of that carload of potatoes. There is no dispute, gentlemen, in regard to the 50 cents per bushel. There is no dispute in regard to that. But there seems to be some question in regard to two loads of those potatoes. It is for you, gentlemen of the jury, from that contract, that is, provided that you find in favor of the plaintiff in the action, then it is for you to determine from the evidence as to the number of bushels of potatoes in that car, and to figure that number of bushels at 50 cents per bushel, because there is no contention in regard to the 50 cents per bushel. That is agreed upon. But there is some question in regard to the number of bushels in this car."

Whereupon, the juror Brand made the following inquiry: "Are we allowed to take into consideration the condition of the potatoes in the car?"

To this inquiry the learned trial court replied: "You may take into consideration the condition of the potatoes."

Whereupon, the juror Brand further inquired: *"If we find they are wholly or partly damaged, can we allow damages then? That is the point I was after when we came in here."*

To that inquiry the court said: "Yes, you should consider all the evidence."

To this the juror Brand replied: "I think that covers it all."

The court said: "Consider all the evidence."

In connection with what has just been recited, it should be mentioned that the defendants requested the trial court to instruct the jury that potatoes are an article of food, and that the plaintiff had the burden of showing that the potatoes in controversy were fit for food.

As already stated, there was a square conflict in the testimony as to

whether the potatoes had been injured by frost. From what occurred during the colloquy, it seems clear that at least the juror Brand believed that some of the potatoes were frozen. The question that bothered him was what verdict to return under the circumstances. He said: *"If we find they are wholly or partly damaged, can we allow damages then? That is the point I was after when we came in here."* The court answered this inquiry: "Yes."

It seems to me that under the evidence in the case the final instructions were at least misleading. There was little or no dispute as to the original arrangement between the parties. There was no question but that the plaintiff put the potatoes into the car, and billed it to the defendants at Kansas City. But the defendants had agreed to buy, and the plaintiff had agreed to furnish, marketable potatoes. Plaintiff brought suit. In order to be entitled to recover he must prove that he had complied with the terms of his agreement. He must prove that he had delivered to the defendants what he had agreed to deliver to them. Mechem, Sales, § 1154. Manifestly the delivery of potatoes damaged by frost would not constitute a delivery of what he had agreed to sell and the defendants had agreed to buy. 35 Cyc. 214, 216; Barrow v. Penick, 110 La. 572, 34 So. 691; D. Rosenbaum's Sons v. Davis & A. Co. 111 Miss. 278, 71 So. 388. But the court refused to instruct the jury that plaintiff must show that the potatoes delivered were fit for food, and, in response to the inquiry from a member of the jury, he in effect stated that the jury might return a verdict for the plaintiff even though the potatoes which plaintiff had put in the car were in fact frozen. In my opinion a new trial should be ordered.

C. H. BACH, Plaintiff, v. HELEN LYONS, Chester M. Lindemann, the New Albany Trust Company, a Corporation, and Cleves Kinkead, et al., Defendants.

(171 N. W. 890.)

Action to quiet title — claim for attorneys' fees as interest in land.

1. In an action to quiet title to land, where the plaintiff bases his right, title, or interest therein upon an agreement made for legal fees in connection

with certain contest proceedings upon a homestead entry, and which provides that the attorney shall be entitled to receive an undivided one-third interest in the land involved, or the equivalent thereof in money at the option of the parties, it is *held* that the agreement is a contract, executory in its nature, and not a conveyance of a right, interest, or estate in realty.

Contracts — agreement to pay fees not a conveyance or contract to convey land.

2. In such action, where the parties have agreed upon the amount to be paid the attorney in money, and the evidence discloses an intention to pay such attorney the equivalent of the land value in money, it is *held* that no action will lie against the heirs of the deceased patentee upon this agreement as a conveyance, or a contract to convey real estate.

Opinion filed March 18, 1919.

Action to quiet title to real estate in District Court, Divide County, *Leighton*, J.

From a judgment rendered in favor of the defendants dismissing plaintiff's action and quieting title in the defendants, the plaintiff appeals, and demands a trial *de novo*.

Modified and affirmed.

D. A. Greenleaf and *John H. Lewis*, for appellant.

Proof may be completed by the children of a deceased entryman. U. S. Rev. Stat. § 2292; Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152.

When the right to patent has been earned, the public policy against alienation ceases, and the land becomes in equity the property of the person entitled to patent. Adams v. McClintock, 21 N. D. 483; United States v. Fryberg, 32 Fed. 195; Pacific Coast Min. Co. v. Spargo, 16 Fed. 348; Simmons v. Wagner, 101 U. S. 260, 25 L. ed. 910; Barney v. Dolph, 24 L. ed. 1063; Deffeback v. Hawke, 115 U. S. 392; Stark v. Starr, 18 L. ed. 925; Martyn v. Olson, 28 N. D. 317; Anderson v. Carkins, 34 L. ed. 272; Bellinger v. White, 5 Neb. 399; Chesser v. De Prater, 20 Fla. 691.

McGee & Goss, for respondents.

Whenever there is independent evidence tending to prove an agency, it is competent to prove all of the facts of the alleged agency. 2 Jones, Ev. 256. This court has held to the same effect in Grant County State Bank v. N. W. Land Co. 28 N. D. 503; Short v. Northern Pacific Elevator Co. 1 N. D. 163; Mechem, Agency, 714; Clark & S. Agency, 466; North River Bank v. Aymar, 3 Hill, 266.

Any deed, assignment, or mortgage conveying an interest in real estate must be in writing. Flinner v. McVey, 19 L.R.A.(N.S.) 879; Comp. Laws N. D. § 5888, subdiv. 5, §§ 6330, 6331; Dougherty v. Catlepp, 21 N. E. 932; Counter v. Trippett, 57 Miss. 594; Morgart v. Lamouse, 115 Am. St. Rep. 357.

The verbal assignment of an interest in lands is as much within the operation of the Statute of Frauds as the transfer of legal interest. Hacket v. A. Watts, 40 S. W. 113; Wilkins v. Womble, 90 N. C. 254; Smith v. Clark, 7 Wis. 551; Richardson v. Johnson, 22 Am. Rep. 712; Smith v. Burnham, 3 Sumn. 345, Fed. Cas. No. 13,019.

If such contract existed it is void under the provisions of chapter 5, Homestead, U. S. Rev. Stat.

BRONSON, J. This cause is in the nature of an action to quiet title to an undivided one-third interest in certain land in Divide county, based upon a contract for attorney's fees. In the trial court judgment was rendered dismissing plaintiff's cause of action and quieting the title as between the parties, in the defendants interested. From such judgment the plaintiff appeals and demands a trial *de novo* in this court. In substance the record discloses the following facts: John Lindemann made a homestead entry on 160 acres of land in Divide county on November 18, 1902. While in actual occupation of such land, and before final proof, he died, on April 25, 1905. He left surviving him as his only heir, Louis Lindemann, a son aged twenty years, his former wife having secured a divorce sometime previously. On October 30, 1905, one McKibben initiated a contest against the entry, claiming abandonment; the entry was canceled December 20, 1907. McKibben then made a new entry on January 22, 1908. In February, 1908, Louis Lindemann made an application for a rehearing of the contest proceedings of McKibben; this was granted, and, upon subsequent proceedings had in the United States Land Office, the original entry of his father was reinstated, and thereafter, pursuant to § 2291, U. S. Rev. Stat., Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. p. 557, on April 24, 1909, a final register's or receiver's receipt was issued to Louis Lindemann as the heir of John Lindemann, deceased, upon final payment made, and thereafter, on May 27, 1909 a United States patent to such land was issued to the heirs of John Lindemann.

In the proceedings to secure reinstatement of the original entry of John Lindemann and in thereafter making final proof and securing the patent, one Barrett, an attorney at law, represented Louis Lindemann. Upon the arrangement made for his fees this cause of action rests. Barrett the attorney testified that one Foley, another attorney, of New Albany, Indiana, came up to Minot to investigate concerning this entry and land of John Lindemann, deceased, and made the arrangements with Barrett that Louis Lindemann was to pay all necessary disbursements as they were needed, and that if he was successful in securing the issuance of a patent with the assistance of two other lawyers at Washington, he was to have one-third interest in the land or its equivalent in money, if they could agree what that was. Again he testified that he was to have one-third interest in the land or its equivalent in cash in case they decided to let someone take the land, or, if they wanted to keep it, to pay him one third of the value. Barrett further testified that he had received thereafter letters from Louis Lindemann which confirmed and ratified this arrangement, but that the letters were lost. He did represent Louis Lindemann, and secured a power of attorney from him so to do. Louis Lindemann was married in September, 1907. He died on August 15, 1909. He left surviving him a wife and a son, Chester, aged one year. His wife subsequently, on February 14, 1913, married Walter Lyons. Shortly after the death of Louis Lindemann, one Moser of New Albany, Indiana, apparently became the administrator of his estate. He came to Minot and saw Barrett. He looked over the land. They agreed that its value was about $3,500. The administrator told Barrett that he would give him a check for his fee if he needed the money, or that if it was not needed he could wait until the land was sold. Barrett testified that he did not then need the money, and the only reason why he did not take the money then was because he did not need it. He further testified that he has never been paid, that Moser had not declined to pay the money, but said that the land would have to be sold to get the money out of it. On April 21, 1913, Barrett granted, bargained, and sold an undivided one-third interest in such lands to the plaintiff, an attorney at Minot. Thereafter this plaintiff instituted this action against Helen Lyons, the widow of Louis Lindemann, Chester M. Lindemann, his minor son, and the Albany Trust Company, the guardian, and one Kinkead, who the plaintiff alleged claims some lien on the premises. The plaintiff

alleged in substance the proceedings hereinbefore mentioned, excepting that it alleged the agreement to be an undivided one-third interest to said land, or the one-third appraised cash value thereof at the option of said Barrett, and demanded judgment decreeing the plaintiff to be the owner of an undivided one-third interest of such land free from any lien or encumbrance, and further praying that the sum of $60, expense moneys disbursed, be decreed a lien upon the interest of the defendants in the balance of such lands. The record shows no appearance or any claim of any lien by Kinkead. The remaining defendants interposed an answer which alleged, beyond a general denial, that the agreement of the plaintiff is within the Statute of Frauds, and further is void under the United States statutes providing against nonalienation, and affirmatively demands that the title be quieted in them. The trial court, in its findings, held the contract to be against public policy and contrary to the statutes of the United States, inhibiting the alienation of homestead lands, and therefore void.

Upon this record, we are clearly of the opinion that the plaintiff has established no cause of action upon the allegations of his complaint.

We deem it wholly unnecessary to consider whether the alleged agreement is within the Statute of Frauds or void because within the prohibitory provisions of the United States statute.

Upon elementary principles the plaintiff has no cause of action. The contract, if it existed as plaintiff claims, created no title or estate in the plaintiff in the land involved. At the best it was merely an agreement to either convey to plaintiff's assignor the land or to pay the value thereof, upon an option to be exercised by the parties. The contract was executory in its nature. 8 R. C. L. 929; 39 Cyc. 1301; Stewart v. Lang, 37 Pa. 201, 78 Am. Dec. 414; De Bergere v. Chaves, 14 N. M. 352, 51 L.R.A.(N.S.) 50, 93 Pac. 762.

It did not even give to such assignor a right to have a conveyance of the land unless and until the deceased preferred to so do instead of paying one third the value of such land. Furthermore, in accordance with assignor's own testimony, he did agree to take one third the value of such land,—they appraised it at $3,500. The administrator even offered to pay him, and he says that the only reason that he did not take the money at that time (he is now sorry he did not) was because he did

not then need it, and the administrator said that he could use such moneys otherwise until they sold the land.

The agreement of the deceased was, if anything, a contract, not a conveyance. Plainly the appellant has no standing upon his alleged cause of action either in law or in equity. No legal obligation is owing by these defendants to the plaintiff. If this alleged contract is valid, which we do not determine, his claim and demand is against the administrator of the estate of the deceased, not against these defendants.

The judgment of the trial court dismissing plaintiff's cause of action and quieting the title of the defendant heirs at law as to this cause of action is affirmed, with costs to the respondents. Judgment is ordered entered in the trial court pursuant thereto.

G. L. STROBECK and J. S. Ulland, Respondents, v. G. W. McWILLIAMS and H. E. Shears, Appellants.

(171 N. W. 865.)

Contracts — sale of good will — breach of — injunction — when issued.

This action presents an appeal from an order restraining defendant from selling lands to persons residing within the territory naturally tributary, for business purposes, to the village of Cogswell. *Held:* That under the statute in selling the good will of a business it is only competent for the party to agree with the buyer to refrain from carrying on a similar business within a specified county or city, and also that the remedy by injunction is summary, peculiar, and extraordinary, and lies only to prevent general and irreparable mischief; and that the power to grant an injunction should be exercised with the greatest caution, and only in very clear cases, and when there are circumstances to bring the cause under some recognized head of equity jurisdiction.

Opinion filed March 19, 1919.

Appeal from the District Court of Sargent County, Honorable *Frank P. Allen,* Judge.

Reversed and dismissed.

Engerud, Divet, Holt, & Frame, for appellants.

Isolated and disconnected sales of land, without regard to the location

of the land or the residence of the parties, does not amount to engaging in business in violation of a contract in which the parties agreed not to engage in the real estate, farm, loan, etc., business.

The terms, "engage in business" and "carry on business," are synonomous expressions. Graves v. Knight, 199 N. Y. 397, 92 N. E. 792; United States v. Jackson, 26 Fed. 556; State v. Nopin, 41 S. E. 13; Guiltinan v. National L. Ins. Co. 38 Atl. 315; Marshall v. R. Co. 24 So. 450; Berkler v. Gunther (Iowa) 96 N. W. 895; People v. Wright, 96 N. E. 362; Hart-Parr Co. v. Robb-Lawrence, 15 N. D. 55; Sucker State Drill Co. v. Wertz, 17 N. D. 55; El Dorado Co. v. Weiss, 34 Pac. 716; Brown v. Edsall (S. D.) 122 N. W. 658; Nelson v. Johnson (Minn.) 36 N. W. 868.

The agreement not to carry on business cannot be broader as to territory than a single county. Comp. Laws 1913, § 5929; Thomas v. Mills, 3 Ohio St. 275.

The good will of the corporate business is not an incident of the corporate stock, and an attempt to sell a good will even if it was stated as the good will of a business is not binding unless the party selling same is in fact possessed of and can in fact sell such good will. Merchants Sign Co. v. Sterling (Cal.) 46 L.R.A. 142, 57 Pac. 468; Spring Valley v. Schottler, 62 Cal. 69, 118; Dodge Stationery Co. v. Dodge, 79 Pac. 881; Griffin v. Dunn (S. D.) 120 N. W. 890.

A plaintiff who has no cause of action at the time of filing his complaint cannot by amendments or supplemental complaint introduce one which accrues thereafter. Mellor v. Smithers (C. C. A.) 114 Fed. 116, 31 Cyc. 503 and 504, and notes; Morse v. Steele (Cal.) 64 Pac. 690; Lewis v. Fox (Cal.) 54 Pac. 826; Comp. Laws 1913, § 7486.

An injunction will not issue to protect from mere theoretical and possible or unsubstantial injuries. 22 Cyc. 760, 761; 14 R. C. L. p 354, § 57.

A. Leslie Forman and *W. S. Lauder,* for respondents.

One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein. Comp. Laws 1913, §§ 5928–5930; 6 R. C. L. ¶¶ 190 et seq.; 9 Cyc. 523 et seq.

It is not necessary that a wrong should have been actually committed

before a court of equity will interfere. 1 High, Inj. § 18; 2 High, Inj. § 1168.

If the restraint is reasonable, and is not greater than is necessary for the proper protection of the purchaser in enjoying his property, a breach will be enjoined. 22 Cyc. p. 866, subdiv. "c" and cases cited in notes.

The whole context of a contract is to be considered in ascertaining the intention of the parties, even though the immediate object of the inquiry is the meaning of an isolated clause. 6 R. C. L. §§ 224, 229 et seq.

To effect the sale of the good will of a business it is not necessary that the contract should in express words provide that the good will of the business is sold. Mapes v. Metcalf, 10 N. D. 601; National Ben. Co. v. Union Hospital Co. (Minn.) 47 N. W. 806.

Robinson, J. In September, 1913, the defendants and one Mott owned the Cogswell State Bank. The defendants owned nearly all the bank stock, consisting of 150 shares. In connection with the bank business, and as a part of the business, there was done a real estate, farm, loan, and insurance business. Pursuant to a written agreement defendants sold to the plaintiff the entire stock of the bank at $260 a share, and agreed to this covenant: "In selling the stock of the bank it is understood, and the sellers agree, that the good will is included, and that they will not engage in the banking business here, nor in territory tributary where the bank draws business from, or in the insurance business, or real estate business, or farm loans." The complaint avers that in violation of the contract the defendants did a real estate business at Cogswell and in territory tributary to it, thereby competing with the plaintiffs in the real estate business, and greatly injuring and damaging them, and that they threaten to continue such business.

The trial court found that, subsequent to the making of the contract and upon the trial of this action, the defendants threatened to engage generally in the business of selling lands not located in Sargent county, to persons residing within said territory, and have claimed a legal right to engage in the business of selling lands to people residing in said territory; provided, only, that the said lands should not be located in said territory. The court also found that the evidence did not show that up to the time of the commencement of the action the defendants had

done any act that was a breach of the contract, or that the plaintiffs had suffered any damage. On such findings the court directed that the defendants be perpetually enjoined from carrying on the business of selling land to persons residing in the territory naturally tributary, for business purposes, to the village of Cogswell, and this without regard to where the lands are located, excepting that they are not enjoined from selling their own lands. As the court finds that at the time of the commencement of the action the defendants have not done anything that was a breach of the contract, it is manifest that the findings do not sustain the judgment—and the findings are in accordance with the testimony. The threats on which the judgment is based were called out by an improper cross-examination of one defendant; but a party cannot in that way and at the same time make and try a cause of action.

Preventive relief may be given by injunction: (1) When pecuniary compensation is not an adequate remedy; (2) when it would be extremely difficult to ascertain the amount of compensation; (3) when the restraint is necessary to prevent a multiplicity of suits. Section 7213.

In this case there is no showing that defendants are not perfectly responsible and that an ordinary action for damages would not afford an adequate remedy. The contract not to do a certain business—a real estate business—within a territory tributary to Cogswell, is too indefinite. For instance, a contract not to do a certain business in the territory tributary to St. Paul might preclude the doing of business in Minnesota and in North Dakota.

In selling the good will of the business it was only competent for the defendants to agree with the buyer to refrain from carrying on a similar business within a specified county, city, or part thereof, so long as the buyer or any person deriving title to the good will from him carries on a like business therein. Section 5929. There is no claim that after selling the good will of their banking business the defendants ever attempted to do a similar business or a real estate business in the city of Cogswell, or to carry on any similar business adjacent to the village of Cogswell. They removed to Ward county, and there commenced doing a banking and a real estate business, and occasionally sold Ward county lands to persons in the vicinity of Cogswell, as they had a perfect right to do.

The remedy by injunction is summary, peculiar, and extraordinary.

and lies only to prevent great and irreparable mischief. It is not *ex debito justitiæ* for any injury threatened or done to the estate or rights of a person. But a granting of it must always rest in the sound discretion, governed by the nature of the case. The power, being extraordinary, ought to be exercised with great caution and only in very clear cases. And it is also necessary that there should be some special circumstances to bring the case under some recognized head of equity jurisdiction. 14 R. C. L. 307. Recently the courts have been too ready to grant injunctions on little pestiferous matters. This case presents no appeal to equity. Neither the findings of the trial court, nor the evidence, shows any cause for granting an injunction. The judgment is reversed and the action dismissed, with costs.

BIRDZELL, J. (dissenting). I dissent. The record in this case discloses the existence of a valid, binding agreement whereby the defendants sold the good will of a certain banking, insurance, and real estate business, at Cogswell, and it also discloses the existence of an intention on the part of the defendants to engage in a course of conduct in the future that would involve a breach of the agreement. As I view the case, the finding of the trial court to the effect that the defendants, up to the time of the commencement of this action, had done no act that was a breach of the contract, is not borne out by the record. As I read the record, it shows quite conclusively that the defendants had broken that part of their contract in which they agreed not to engage in the real estate business in competition with the plaintiff, in the territory tributary to the bank, and their announcement of an intention to continue transacting business in the future as in the past constituted a threatened injury which should be enjoined. The evidence, however, going to establish actual damages for past breaches of the contract is not sufficient to warrant a money judgment.

The injunctional order entered in the court below was, however, broader than the contract warranted in that it restrained the defendants from selling land to persons residing within the territory tributary to the village of Cogswell, without regard to where the land sold was located. It is my opinion that the order should be so modified as not to prevent the defendants from selling lands to persons residing within

the territory tributary to Cogswell, provided such sales are not specially solicited or induced by the defendants through agents or otherwise, and that, as so modified, the order should be affirmed.

SECURITY STATE BANK OF STRASBURG, NORTH DAKOTA, a Corporation, Appellant, v. S. A. FISCHER, Respondent.

(171 N. W. 866.)

Banks and banking — officers — accounting — estoppel.

In an action for accounting for certain commissions and profits claimed to have been wrongfully appropriated by the defendant while acting as managing officer of the plaintiff bank, it appeared that during the period when the commissions and profits were earned the defendant was the owner of 60 per cent of the stock of the plaintiff bank and one B. the owner of 40 per cent; that the commissions and profits were earned in transactions not coming within the legitimate scope of the business which the plaintiff corporation was authorized to transact; that there were settlements from time to time between the defendant and the other stockholder; that defendant sold his stock to third parties who purchased it at book value plus an agreed bonus, the book value being arrived at after an inspection of the assets of the bank and upon a statement disclosing its true condition and the claim of the defendant to commission notes held outside the bank, which were also sold as a part of the same transaction, it is *held:*

(1) An officer of a bank who participates in the settlement of business transactions as the personal business of himself and another stockholder, which business is, in fact, *ultra vires* the powers of the bank, is estopped, upon later gaining control of the corporation, to use the corporate name for the purpose of compelling an account.

(2) Stockholders who purchase a controlling interest in a bank at book value plus an agreed bonus, relying upon a true statement of the condition of the bank, and who also purchase the defendant's personal interest in outside securities, a share of which is later claimed in an action for an accounting brought in the name of the bank, are estopped to use the corporate name to gain an interest in past *ultra vires* transactions.

Banks and banking — bank as loan agent — ultra vires transactions.

3. The fact that a bank is designated as the agent for certain companies for whom loans are made by the officers of the bank, the commissions of which are either divided between them or retained by the officer negotiating the loans, does not, in a suit by the bank for accounting, preclude the officer so retaining the commissions from asserting the *ultra vires* character of the transactions, where the corporate name of the bank is being used by persons who either participated in settling such transactions on a personal basis or who purchased stock, relying upon a true statement of the assets which excluded the transactions in question.

Opinion filed March 19, 1919.

Appeal from Emmons County District Court, *Nuessle*, J.

Affirmed.

Lynn & Lynn, for appellant.

Scott Cameron, Charles Coventry, and *W. S. Lauder*, for respondent.

"A banking corporation as a general rule has no power to act as a broker for third persons." 3 R. C. L. p. 423, § 51; Grow v. Cockrill, (Ark.) 36 L.R.A. 89; Bank of United States v. Dunn, 31 U. S. 6; Western Nat. Bank v. Armstrong, 152 U. S. 346; Weckler v. Bank, 20 Am. Rep. 95; Dresser v. Traders Nat. Bank, 165 Mass. 120; Rouns v. Third Nat. Bank, 94 Tenn. 57; First Nat. Bank v. Hoch, 89 Pa. 32; Pepperday v. Citizens Nat. Bank, 183 Pa. 519.

"Equity will not interfere where parties had the same means of knowledge." 1 Cyc. 464 et seq.

"A purchaser of stock cannot complain of the prior acts and management of the corporation." 7 R. C. L. p. 489, § 470. See also Alexander v. Searcy (Ga.) 12 Am. St. Rep. 337; United Electric Securities Co. v. Louisiana Electric Light Co. 68 Fed. 673; Da Ponte v. Louisiana etc. Lottery Co. Fed. Cas. No. 3,569; Clark v. American Coal Co. 86 Iowa, 436, 53 N. W. 291; Rankin v. Southwestern Brewing Co. (N. M.) 73 Pac. 614; Hawes v. Oakland, 104 U. S. 450; Foote v. Cunard Min. Co. 17 Fed. 46; Dimpfel v. Ohio etc. R. Co. 110 U. S. 209; Taylor v. Homes, 127 U. S. 489; Citizens Savings etc. Co. v. Illinois C. R. Co. 173 Fed. 556; Price v. Union Land Co. 110 C. C. A. 20, 187 Fed. 866.

"A party will not be allowed to rescind a contract in part and affirm it in part, he must rescind entirely or not at all, and must return or offer to return everything of value which he received from the party

against whom he seeks to rescind." Black, Rescission & Cancellation of Contracts, §§ 583–585; Guild v. More, 32 N. D. 432; Sell v. Mississippi River Logging Co. 88 Wis. 581; Fargo Gas & Coke Co. v. Fargo & Gas & E. Co. 4 N. D. 219; Beare v. Wright, 14 N. D. 31; Gordon-Tiger Min. & Reduction Co. v. Brown, 56 Colo. 301; J. H. Carter & Co. v. Swift Fertilizer Works (Ga.) 71 S. E. 494; Jennings v. Gage, 12 Ill. 610; Baum Iron Co. v. Berg, 47 Neb. 21; Getchell v. Kirkby, 113 Me. 91; Nass v. Chadwick, 70 Tex. 157; Faye v. Oliver, 20 Vt. 118; Grant v. Law, 29 Wis. 99.

BIRDZELL, J. This is an action for an accounting, and the appeal is from a judgment in favor of the defendant. The action is here for trial *de novo*. In the complaint it is alleged that from January 1, 1906, to November 16, 1912, the defendant was president of the plaintiff corporation; that during this period, as president of the bank, he negotiated loans for other persons, receiving promissory notes payable to the bank as compensation or commissions; that he caused the commission notes to be collected, and without the consent or knowledge of the plaintiff corporation he appropriated the proceeds, for which he has since refused to account. Also that, during the same period of time, he caused certain commission notes to be made payable to his own order and to the order of his wife without the knowledge of the plaintiff, though the loans were made through the offices of the plaintiff corporation and the commissions properly inured to its benefit; that the defendant has collected the notes last mentioned and converted the proceeds to his own use.

It is also alleged that the defendant appropriated to his own use the benefit properly accruing to the bank from certain transactions, such as the discounting of a note in which the plaintiff's profit amounted to $380; the sale of a lot for $420; cash commissions of $192 and $160 in real estate loans; and a broker's commission of $100, earned in the sale of a bowling alley; the proceeds of all of which transactions are alleged to have been wrongfully converted by the defendant.

It is further alleged that, after the defendant severed his connection with the bank, on November 16, 1912, certain commission notes were made payable to him and collected by him, which represented commissions on loans in process of negotiation and which properly belonged to plaintiff bank. The concluding paragraphs of the complaint

embrace allegations, upon information and belief, charging the defendant with the appropriation of various commissions earned by the plaintiff in the negotiation of loans and of sales, purchases, and exchanges of real estate. Attached to the complaint are three schedules embracing, in all, thirty-eight notes, the proceeds of which are alleged to have been appropriated by the defendant during the period between March 1, 1910, and December 23, 1912.

The conceded facts are that, in January, 1906, the defendant Fischer, Michael Baumgartner, and M. A. Kline purchased all of the stock of the plaintiff bank, which consisted, at that time, of fifty shares of $100 each. Defendant purchased thirty shares and Baumgartner and Kline ten shares each. Thereafter, and until November 16, 1912, the defendant Fischer was president of the plaintiff bank, always owning 60 per cent of its stock. In 1909, Kline sold his stock to Michael Baumgartner, who thus became the owner of 40 per cent. Ten shares, however, were carried in the name of John Baumgartner, a brother of Michael, for the purpose of complying with the state banking law. During all of the period in question, after Kline disposed of his interest, the ownership of the bank as between Fischer and Baumgartner was in the proportion of 60 to 40. During this period the stock of the bank was doubled. The stockholders, however, contributed no extra capital, the added capital being supplied from the undivided profits. The defendant was also interested in a general store known as the Bazar, in an elevator, and a machinery business. During all of the time that he was president of the bank, however, he was the active managing officer. The other principal stockholder of the bank, Michael Baumgartner, was likewise interested in outside pursuits, such as farming and stock business. In November, 1912, the defendant Fischer sold his sixty shares of stock to Michael Baumgartner or John Baumgartner (to which is immaterial), M. J. Fischer, Lauinger, and Henn, the latter of whom had been assistant cashier of the bank for some time. After disposing of his interest in the bank, the defendant moved to St. Paul, where he lived for approximately two years. He then returned to Strasburg to re-engage in the banking business, whereupon this suit was instituted.

In addition to the facts above stated, the trial court found that, during the time the defendant was acting as president and manager of the plaintiff bank, he was also carrying on a real estate and farm loan

business, from which he made a profit aggregating more than $10,000; that this profit never became the property of the plaintiff bank, and that it had no interest therein. The court made no finding as to any agreement between the defendant and Michael Baumgartner with respect to the profits arising from the real estate and farm loan business, for the reason that the action is brought in the name of the bank which purports to be the real party in interest. In these circumstances, the trial court considered that any arrangement which might have existed between the defendant and Baumgartner would be immaterial.

Judgment having been entered in accordance with the findings, the appellant urges that the trial court erred, both in its interpretation of the facts proved upon the trial and in applying the law thereto. The first proposition presented is that the real estate and farm loan business was conducted by the plaintiff bank as a bank, and that the commissions and profits realized therefrom were the property and assets of the bank. The transcript of the evidence covers more than 860 pages and there are numerous exhibits. The testimony and the exhibits relate to so many transactions that it is extremely difficult to analyze the particular transactions and to weigh the evidence with a degree of candor that would insure confidence in any conclusion depending for its correctness upon an isolated transaction. However, we are confident, from our examination of the record, that certain conclusions can be drawn with a fair degree of accuracy relative to the character of the business relations between the plaintiff bank and the defendant as a whole, as well as between the defendant and Michael Baumgartner, who seems to be the party primarily interested in this litigation.

At the outset it appears that the plaintiff bank, under the management of the defendant, has always been successful; that dividends were paid from time to time, and that surplus and undivided profits had accumulated to such an extent that the stock of Kline, who purchased ten shares for $1,200 in 1906, had become worth $2,200 in 1909, when he disposed of it; that later, when the capital stock of the bank was doubled, the accumulated profits only were applied in making the contribution of new capital; and that when the defendant sold his stock in November, 1912, those who were affiliated with Michael Baumgartner in the purchase (though it may be assumed that Michael Baumgartner purchased none for himself) were willing to pay a premium above

the book value of $2,250 upon sixty shares. It appears that, during the earlier period, prior to about 1909, the commissions earned in the negotiation of real estate loans had gone into the bank and had been treated as its property. The defendant testifies, however, that in 1908 there had been some disagreement between him and Kline relative to the payment of a salary claim made by the defendant as managing officer of the bank, and that he had had some further disagreements with Baumgartner arising out of alleged outside transactions of Baumgartner, upon which he claimed that Baumgartner refused to divide the profits; that following these disagreements, he stated that in future he would take the commission from loans negotiated by him. Baumgartner denies that the defendant ever told him in substance that unless he turned into the bank the profits made by him he (Fischer) would take all the commissions on the real estate loans from that time on. But it appears, nevertheless, that the defendant, for a considerable period following these disagreements,—in fact until he sold his interest in the bank,—did take the commissions on real estate loans made by him, and that he shared other commissions with Baumgartner, where Baumgartner appeared to have been instrumental in promoting the loans. The latter disclaims knowledge of the defendant's acts in this respect, but it is beyond dispute that Henn, the assistant cashier, at all times had full knowledge, although he says that he did not communicate the information to Baumgartner until early in 1915. It is difficult, however, to give full credence to the testimony of Henn, the assistant cashier, and of Baumgartner upon this subject, when we take into consideration the methods according to which the loan business was transacted in the bank, including Fischer's apparent openness in having the commission notes credited to his personal account. Fischer had an office in the bank from which most of his business was done, and it seems to have been the custom to keep the commission notes in a separate pouch or pouches. They were not carried upon the books of the bank as assets. Henn testified that the personal account of the defendant would be credited with these items from time to time as the defendant handed them to him with directions to credit his account. The method of handling the commission notes which the defendant claims belonged to him, though in some instances made payable to the bank, does not differ materially from the method of handling paper given in connection with

the other businesses operated by the defendant. For instance, it appears that notes were occasionally given by debtors of the implement company owned by the defendant which were made payable directly to the bank. When these notes were turned into the bank they would be crdited to the account of the implement company, and the same is true of some transactions of the general store in which the defendant was interested.

The appellant, however, argues that the bank is entitled to the commissions because it was in reality the agent of the different loan companies for which the loans were made and in connection with which the commissions were earned; also because in many of the applications the bank was named as the agent of the borrower in obtaining the money. These facts are not controlling in determining the arrangement which existed for the disposition or division of the profits derived from this source. Acting as agent for lenders or borrowers in negotiating real estate loans is not part of the business banks are authorized to transact under the laws of this state. According to subdivision 7 of § 5150, Compiled Laws of 1913, banking corporations may exercise such powers as are incidental to carrying on the business of banking "by discounting and negotiating promissory notes, bills of exchange, drafts and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money upon real or personal security or both." It needs no argument to demonstrate that acting as a loan broker in transactions where the funds of the bank are not loaned is not exercising a power incident to the banking business. In but few, if any, of the transactions in question were any funds of the bank loaned. It may be true, of course, that the defendant would be estopped to assert the *ultra vires* character of transactions purporting to be had by and on behalf the bank in which profits were realized, which, as between him and the other stockholders, should be considered as belonging to the bank. But there is convincing evidence in this record that the defendant openly asserted his claim to the commission notes, and not only openly dealt with them so as to secure credit on his personal account at the bank, but that, from time to time, he settled with the only other interested stockholder; namely, Michael Baumgartner. In these settlements Baumgartner was allowed a *pro rata* share of commissions in transactions in which the defendant considered he was entitled to share,

and there is no evidence that the settlements were unsatisfactory or fraudulent. In these circumstances, there can be no estoppel, operating as against the defendant, to prevent him from asserting the *ultra vires* character of the transactions in so far as the corporation may seek to claim the benefit. Baumgartner, who, as will be seen later, is shown to have received the proceeds of some of the commission notes that are now sought to be recovered by the bank, is rather estopped to use the bank name for the purpose of such recovery. Henn expressly disclaims any interest in this litigation, and, from facts that will appear later, it is perfectly apparent that those who purchased Fischer's stock can have no legitimate interest in it; so it results that Michael Baumgartner is the only one who could, by any possibility, be considered as interested. It is clear, from the record, that Michael Baumgartner is using the corporate name as a vehicle to garner the profits which he claims have been wrongfully retained by Fischer.

For proof that the settlements referred to above were had from time to time between Baumgartner and the defendant, we are not dependent upon the testimony of the defendant alone. There is an exhibit in the case consisting of a small bank book which is labeled on the outside "S.A.F. and M.B.," these being the initials of the defendant and of Michael Baumgartner. This book contains memoranda of sixteen or more transactions had in 1910 in which Baumgartner and the defendant were apparently interested and concerning at least five of which the bank is endeavoring to share in this suit. The items are entered in the handwriting of Henn and he admits having made the memoranda, although both he and Baumgartner exhibit a lack of knowledge as to the settlement for the transactions recorded. Nevertheless, Baumgartner admits that on January 4, 1911, he received a check which represented 40 per cent of the amount shown to be due him on account of the transactions entered in the memorandum book, and which he says might have been given him to pay the balance shown to be due him according to the memoranda. In addition to this testimony, it also appears that, at the time Fischer disposed of his interest in the bank, a statement was drawn up showing the net book value of the stock of the bank, 60 per cent of which was placed at $13,448.42. (One item entering into this aggregate is "commissions," amounting to $2,502.01, which concededly belong to the bank.) To this was added a bonus of

$2,250, which the testimony shows the purchasers of Fischer's interests were paying upon his stock; also $1,563.74, which represented 60 per cent of "commission paper" items aggregating $2,606.24. The statement contained additional items, making a total credit due the defendant upon the sale of his stock and outside interests of $18,457.76. This aggregate credit was reduced by certain debit items, leaving a net amount to be paid to the defendant of $14,520.94. There is abundant testimony in the record to the effect that the purchasers of Fischer's interest in the bank were also buying his share in the commission paper and in the other items embraced in the statement; that the purchasers were present when the statement was prepared and must have known exactly what they were purchasing. It is true that Baumgartner affects ignorance of the items embraced in the statement, at least in so far as the commission paper item is concerned, but, in view of his interest in the sale and of the facilities for information which were at all times open to him, it is difficult to believe that he was not well aware of the fact that Fischer was disposing of his interest in commission paper held outside the bank, aggregating $2,606.24, 40 per cent of the value of which was conceded in the statement to belong to Baumgartner.

It would serve no good purpose to analyze the evidence upon these matters more fully. Suffice it to say that the record contains convincing proof that Fischer at all times during the period in question was asserting his right to retain commissions on deals for which he considered himself personally responsible; that he conceded to Baumgartner the right to share in other deals in which Baumgartner participated to the extent of 40 per cent; that settlements were made between them from time to time on this basis; that the course Fischer pursued was known at all times to Henn, cashier of the bank, and that the purchasers of Fischer's interest in 1912 purchased upon full knowledge as to what they were buying, and that they received fair value for their money. There is no evidence of any concealment or that any profit has been taken by the defendant that he did not at all times assert his right to take as his own individual earnings.

It appearing in this case that the business conducted by the defendant did not compete or come within the scope of business the plaintiff was authorized to conduct, and there being no evidence of an agreement to turn the profits so earned over to the plaintiff, and no basis for an estop-

pel which would operate to preclude the defendant from asserting the *ultra vires* character of the claims of the plaintiff, the findings and judgment of the trial court are manifestly correct and are in all things affirmed.

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA EX REL. CLAUDE ROSSEN, Petitioner, v. ROLLIN WELCH, Respondent.

(172 N. W. 234.)

Fraud — sale of speculative securities — writ of habeas corpus denied.

Claude Rossen, having been arrested for violation of the so-called "Blue Sky Law" (Laws 1915, chap. 91), applies for a writ of habeas corpus. He claims that the criminal complaint fails to set forth facts showing that he sold "speculative securities," within the purview of said act. For reasons stated in the opinion, it is *held* that the contract or certificate which he sold was a "speculative security" within the meaning of that term as defined by the "Blue Sky Law" of this state.

Opinion filed March 19, 1919.

Original application by Claude Rossen for a writ of habeas corpus against Rollin Welch, sheriff of Burleigh county. Writ denied.

E. T. Burke, for petitioner.

William Langer, Attorney General, *Edw. B. Cox,* and *Geo. K. Foster,* Assistant Attorney Generals, for respondent.

CHRISTIANSON, Ch. J. This is an original application for a writ of habeas corpus presented to this court after a denial of an application for such writ by Judge Nuessle of the sixth judicial district. It appears from the petition, that the petitioner has been arrested and is held in the custody of the sheriff of Burleigh county by virtue of a commitment duly issued by a justice of the peace in Burleigh county, in a criminal action properly instituted before him, wherein the petitioner is charged with violating the provisions of the so-called "Blue Sky Law;" to wit, chapter 91, Laws 1915. The act makes it "unlawful for any person,

copartnership, association, or corporation, . . . either as principal, or through agents, to sell or offer for sale (except to banks, bankers, trust companies, dealers, or brokers in securities, corporations, or partnerships) or by means of any advertisement, circulars, or prospectus, or by any other form of public offering, to attempt to promote the sale of any speculative securities in this state, unless there first shall have been filed with the state examiner: (1) A copy of the securities so to be promoted; (2) a statement in substantial detail of the assets and liabilities of the person or company making and issuing such securities and of any person or company guaranteeing the same, including specifically the total amount of such securities and of any securities prior thereto in interest or lien, authorized or issued by any such person or company; (3) if such securities are secured by mortgage or other lien, a copy of such mortgage or of the instrument creating such lien, and a competent appraisal or valuation of the property covered thereby, with a specific statement of all prior liens thereon, if any; (4) a full statement of facts showing the gross and net earnings, actual or estimated, of any person or company making and issuing or guaranteeing such securities, or of any property covered by any such mortgage or lien; (5) all knowledge or information in the possession of such promoter relative to the character or value of such securities, or of the property or earning power of the person or company making and issuing or guaranteeing the same; (6) a copy of any general or public prospectus or advertising matter which is to be used in connection with such promotion, and no such prospectus or advertising matter shall be used unless the same has been filed hereunder; (7) the names, addresses, and selling territory in this state of any agents by or through whom any such securities are to be sold, and no such agents shall be employed unless such statement with respect to them has been filed hereunder, and there shall have been paid to the state examiner a registration fee of $1 for each such agent. The payment of such fee shall be payment in full of all fees for registration of such agent until and including the first day of March next following; (8) the name and address of such promoter, including the names and addresses of all partners, if the promoter be a partnership, and the names and addresses of the directors or trustees, and of any person owning 10 per cent or more of the capital stock, if the promoter be a corporation or association; (9) a statement showing in detail the plan on

which the business or enterprise is to be transacted; (10) the articles of copartnership or association, and all other papers pertaining to its organization, if the securities be insured or guaranteed by a copartnership or unincorporated association; (11) a copy of its charter and by-laws if the securities be issued or guaranteed by a corporation; (12) a filing fee of twenty-five ($25) dollars."

The terms "securities" and "speculative securities" are defined by the act as follows: "The term 'securities' as used in this act shall be taken to mean stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or instalment plan, or other instruments in the nature thereof by whatsoever name known or called. The term 'speculative securities' as used in this act shall be taken to mean and include: (1) All securities into the specified par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; (2) all securities the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions; (3) any securities based in whole or material part on assets consisting of patents, formulæ, good will, promotion, or intangible assets; (4) securities made or issued in furtherance or promotion of any enterprise or scheme for the sale of unimproved or undeveloped land on any deferred payments or instalment plan when the principal value of such securities depends on the future performance of any stipulation by the promoters of such enterprise to furnish irrigation or transportation facilities, or other value enhancing utility or improvement." Violation of the statute is made a crime, punishable by fine or imprisonment, or both.

The criminal complaint in this case charges that the petitioner did wilfully, unlawfully, and feloniously, and without first having complied with the provisions of said law, sell "an agreement for buyers' certificates of the Lignite Consumers Mining Company of North Dakota" to one Christ Olson; that the said agreement is in reality a share and a speculative security. The certificate is set forth in the complaint *in hæc verba*. It provided in substance that in consideration of the sum of $100, to be paid in cash or note to the Lignite Consumers Mining Company, a corporation to be formed under the laws of this state not

later than October 1, 1919, the said mining company agrees to utilize 90 per cent of all the moneys secured to establish a mine at or near Havelock, North Dakota, until the sum of $200,000 shall be so applied; and that all surplus subscribed over said sum may be used either to maintain a mine or other mines within this state, or to carry on educational work or experiments with the lignite coal, or its by-products; that the Lignite Consumers Mining Company agrees to establish its mine at or near Havelock, North Dakota, not later than October 1, 1919, or as soon thereafter as is possible; and that it will immediately thereafter issue to each member or signer of the agreement, a certificate granting him or it the right to purchase lignite coal at said mine or any other mine or mines said company may establish at a price not to exceed $1.50 per ton, or as much lower as the board of directors may deem advisable to sell coal per ton.

It is further alleged in the criminal complaint that there had been no compliance whatever with the provisions of said chapter 91, Laws 1915, at, or prior to, the time the said defendant, Claude Rossen, made said sale to said Christ Olson.

The relator claims that he is unlawfully in custody; that the commitment under which he is held is void for the reason that the facts set forth in the complaint do not constitute a violation of the statute. It is contended that the contract or agreement which the defendant sold is not a "speculative security," within the terms of the act. In our opinion the contention is wholly untenable. The statute expressly declares that the term "speculative securities" as used therein shall be taken to mean all stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or instalment plan, or other instruments in this nature by whatsoever name known or called, into the par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; or the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions.

The certificate which the relator sold for $100 is to be issued in the future. It is to be issued by a corporation to be organized in the future. The mines from which coal is to be sold are to be developed in the

future. It seems too clear for argument that the transaction falls squarely within the terms of the statute. The value of the certificate which the relator sold is manifestly dependent upon the future promotion and development of the mines. It also seems entirely clear that reasonable men would be entirely justified in finding that the element of chance, speculative profit, or possible loss, equal or predominate over the elements of certainty, safety, and investment.

The writ prayed for is denied.

GRACE, J. I concur in the result.

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

FARGO SILO COMPANY, a Corporation, Respondent, v. PIONEER STOCK COMPANY, a Corporation, and H. N. Tucker, Appellants.

(171 N. W. 849.)

Judgments — default judgment — change of place of trial — service by mail.

This action was brought in Cass county. The defendant Pioneer Stock Company was domiciled at Stutsman county and defendant Tucker was a resident of Stutsman county at the time of the bringing of the action. The defendants were entitled to have the case tried in Stutsman county if demand therefor was duly made in time; *held* under the evidence in this case that such demand was made in time. This being true, the right of the defendants to have the case tried in Stutsman county became absolute, and further *held*, that the district court of Cass county, from the time of making of proper and legal demand for a change of venue, was without jurisdiction to enter judgment in the case or to do any other act excepting to make an order granting the change of venue and transferring the case and all matters connected therewith to the jurisdiction of the district court of Stutsman county.

Opinion filed March 25, 1919.

Appeal from the District Court of Cass County, *A. T. Cole*, J.

Reversed and remanded.

George H. Stillman, for appellants.

"Service of demand and answer were complete upon the dropping of the envelop containing them in the United States Postoffice within the statutory time." Clyde v. Johnston, 4 N. D. 92, 58 N. W. 512; Cedar Rapids N. Bank v. Coffey, 25 N. D. 459, 141 N. W. 997; Comp. Laws 1913, § 7887; Nind v. Myers, 15 N. D. 400, 109 N. W. 335.

Judgment entered before time for answer expired is erroneous and void. Hogg v. Christensen, 29 N. D. 8, 149 N. W. 562.

"The right to demand change of place of trial is an absolute right." Comp. Laws 1913, § 7418; Smail v. Gilruth, 8 S. D. 287, 66 N. W. 452, Dak. Rev. Codes 1877, § 95.

A general denial presents a valid, legal, substantial defense, and cannot be struck as sham or frivolous. Kline v. Harris, 30 N. D. 424, 152 N. W. 688.

Pierce, Tenneson, & Cupler, for respondent.

"Service by mail is not personal service." Comp. Laws 1913, § 7951; 31 N. D. 375.

"Service by mail may be made only when statute provides for it." Comp. Laws 1913, §§ 7952, 7953; People v. Alameda Turnp. Co. 30 Cal. 182, and cases cited on page 185 from New York; Clark v. Adams, 33 Mich. 164; Moore v. Besse, 35 Cal. 186; People v. Alameda Turnp. Road Co. 30 Cal. 186.

"Where a question of fact is decided on a motion, the decision of the trial court will not be disturbed on appeal, unless clearly opposed to the weight of the evidence." Totten v. Sale, 72 Ala. 488; Haley v. McCarty (Neb.) 67 N. W. 857; Bowker v. Goodwin, 7 Nev. 135.

"Findings of fact by the court on conflicting affidavits will be sustained on appeal." Barrett v. Graham, 19 Cal. 632; Flannigan v. Duncan (Minn.) 49 N. W. 981; Tyler v. Hildreth, 77 Hun, 580; Reigner v. Spang, 5 App. Div. 237, 39 N. Y. Supp. 127; Johnson v. Steele (Neb.) 36 N. W. 358; Wheeler v. Catlin, 44 Wis. 464; 23 Cyc. 958 and cases cited; Wheeler v. Castor, 11 N. D. 347.

"While a general denial will suffice as an answer, if made within the required time, an answer making a prima facie showing of a good defense is essential to the opening of a default." Doulan v. Thompson Falls Copper Co. (Mont.) 112 Pac. 445; Mougey v. Miller (N. D.) 169 N. W. 735; Racine v. Pavlecik, 21 N. D. 222, and cases cited.

GRACE, J. Appeal from the district court of Cass County, North Dakota, A. T. Cole, Judge.

This action is one to recover upon a promissory note for $193.50. The action was instituted in the district court of Cass county on November 12, 1917, by the service of the summons upon each of the defendants. The defendant Pioneer Stock Company was domiciled at Courtenay, Stutsman county. The defendant Tucker had been a resident of Foster county for thirty-three years. The note in question was signed "Pioneer Stock Company by H. N. Tucker, President." The complaint was in the ordinary form. The defendants being domiciled or residing in Stutsman county, it was the proper county in which to try the case. The county of Cass designated in the complaint was not the proper county, though the action could be tried therein unless the defendant, before the time of answering expired, demanded in writing that the trial be had in the proper county and the place of trial be changed either by the consent of the parties or by order of the court, as and for the reasons, or some of them, as provided in § 7418, Compiled Laws 1913. H. N. Tucker made affidavit dated December 12, 1917, in which he set forth that the Pioneer Stock Company is domiciled at Courtenay, Stutsman county, North Dakota, and that it had never been domiciled in any other place, and that the affiant Edwards had been a bona fide resident of Stutsman county for thirty-three years, and had never been a resident of Cass county. The affidavit further showed that the action was brought in the wrong county and demanded a change of venue of the action from Cass county to Stutsman county. If the defendants in time made a proper demand for a change of venue, then the district court of Cass county had no jurisdiction to enter the judgment in this case. Herein lies the principal contention. Summons having been served on the 12th day of November, 1917, the defendants had until the expiration of the 12th day of December within which to demand change of venue; for their right to answer did not expire until that time. George H. Stillman made affidavit in which he positively stated under oath that on the 12th day of December, 1917, in the village of Courtenay, Stutsman county, North Dakota, he prepared an answer to the complaint in said action, and also prepared a demand for change of venue from the district court of Cass county to the district court of Stutsman county, and also prepared a stipulation for a change of venue

of the action pursuant to the demand; that on the 12th day of December, 1917, at 8:30 o'clock P. M., he deposited a full, true, and complete copy of the answer, and the original and copy of the demand for a change of venue and the original and copy of the stipulation for a change of venue in a securely sealed envelop with postage fully prepaid, in a United States postoffice in the village of Courtenay, Stutsman county, North Dakota, addressed to Pierce, Tenneson, & Cupler, of Fargo, who were the attorneys for plaintiff; that there is a regular communication by mail between the village of Courtenay and the city of Fargo.

Section 7952, Compiled Laws 1913, is as follows: "Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places, between which there is a regular communication by mail."

The attorneys for the plaintiff reside in Fargo; attorney for defendant, Mr. Stillman, resides at Carrington. Stillman in his affidavit did not show that he resided at Carrington. The counter affidavit on behalf of the plaintiff made by Mr. Tenneson clearly shows Stillman's place of residence. It is a fact that the party sending the notice and the party to whom it was sent reside in different places between which there is a regular communication by mail which entitled the sender of the notice to send it by mail, but it does not follow from that, that the notice must be mailed at the postoffice in the place where the sender resides.

Section 7953, Compiled Laws 1913, reads thus:

"In case of service by mail, the paper must be deposited in the postoffice, addressed to the person on whom it is to be served, at his place of residence, and with postage prepaid."

This affidavit of Stillman is not controverted. While it is true the envelop in which the demand for change of venue and other papers were inclosed bears the postmark at Courtenay of date of December 13th at 7 A. M. of said day, this does not, however, establish the point of time when the letter was deposited in such postoffice. There is nothing to show what time the letter was deposited in the postoffice at Courtenay except the affidavit of Stillman, and it is entirely uncontroverted and must be accepted as true. It thus appearing that the demand for change of venue having been served in time by mail upon the plaintiffs, the right of the defendants in this case to a change of venue became abso-

lute, and from the time of the mailing of such demand in the manner as above set forth, the district court of Cass county ceased to have jurisdiction of the cause of action. Under the circumstances of this case, where it clearly appears the defendants are residents of another county than that of which the venue is laid, and the defendants in time, as in this case, make a demand for a change of venue in the manner required by law, the right to a change of venue does not depend upon the discretion of the court, but is an absolute right of the defendants. The defendants having in time duly demanded the change of venue in this case and they having an absolute right to such change, there was nothing for the court to do but to make the order granting the change of venue. It could exercise no discretion in the matter.

It is entirely unnecessary to discuss any other feature of this case. The court did not have jurisdiction to enter the judgment, and it should make an order vacating its judgment and make an order changing the place of trial to the proper county. It is so ordered. The order appealed from is reversed; the case is remanded for further proceedings not inconsistent with this opinion. Appellant is entitled to statutory costs.

JAMES J. EARLEY and Walter Coop, Appellants, v. W. H. FRANCE, Respondent.

(172 N. W. 73.)

Bills and notes — transfer of — passing of vendor's lien.

1. Where negotiable promissory notes are made, evidencing payments stipulated in a contract for a deed for the purchase price of land, such notes are the principal obligation and the contract, evidencing a lien, the incident thereto, and upon the transfer of such notes, or a part thereof by the vendor, the contract evidencing such lien, passes *pro tanto* as an incident therewith.

Same — right of vendor.

2. The vendor in such contract cannot both cancel and rescind such contract and enforce payment upon such notes.

Same — rights of assignee of transferee.

3. Where a portion of such notes, so given, has been transferred by the

vendor to one who has, in turn, surrendered his equity in the land involved to the vendor, even though so done through negotiation theretofore had with the vendee, and has agreed in a contract that the vendor may enforce a default against the vendee for such notes so given for his equity, the assignees of such person, taking with full notice, cannot enforce an action upon such notes, after the vendor has declared a default and rescinded such contract.

Opinion filed March 28, 1919. Rehearing denied April 15, 1919.

Action on two promissory notes, in District Court, Barnes County, *Coffey*, J., from a judgment rendered for defendant, and from an order denying judgment *non obstante* or for a new trial, plaintiffs appeal.

Affirmed.

Winterer, Combs, & Ritchie, for appellants.

It is a well-settled principle of law that where the maker of commercial paper voluntarily places his paper in the hands of another for negotiation, or who stands by and sees the note indorsed to a party without having his right to defend against the payment of the notes indorsed thereon, or where a failure of the consideration complained of is occasioned by his noncompliance with his own agreement or obligation, he is estopped from defending against the notes when suit is brought on them by the purchaser or holder for value on the ground of failure of consideration. 8 Cyc. p. 64, note B. See also Auten v. Manistee National Bank, 57 Ark. 243, 47 L.R.A. 329, 54 S. W. 337; Yeomans v. Lane, 101 Ill. App. 228; Firman v. Blood, 2 Kan. 496.

C. S. Buck, for respondent.

There is no way that France could prohibit the bank from buying these notes, and the only duty that he owed to the bank was to see that it had full knowledge of the transaction, and what the consideration for the notes actually was. 8 C. J. pp. 747, 748.

The defense of failure of consideration is available against the holder of paper who is not a holder in due course. Ibid.; Earl v. Stump, 13 N. W. 701.

When the holder of a land contract exercises his option and cancels the same for the failure to make payments by the vendee he waives all of his right to recover upon the debt. Warren v. Ward, 97 N. W. 886; Roney v. Halvorson, 29 N. D. 13.

When the land contract was canceled by Mr. R. B. Beeson, it was

canceled for the benefit not only of himself, but for the benefit of all his cotenants. 38 Cyc. p. 40.

BRONSON, J. This is an appeal from judgment rendered in the district court of Barnes county upon a verdict for the defendant, and from the order of the trial court denying a motion for judgment *non obstante*, or for a new trial. In the district court two actions were submitted upon the same evidence and separate verdicts returned by the jury. The Bank of Sanborn is the plaintiff in one of the actions, and the appellants herein, the plaintiffs in the other. In the action brought by the Bank of Sanborn a verdict was rendered in its favor. In substance the record discloses the following facts: One Beeson, a resident of Wilkin county, Minnesota, has been engaged in the real estate business for some twenty-five years. He had a contract for a deed from one Porter covering 320 acres of land in Wilkin county, Minnesota. On October 29, 1912, he made a contract for a deed concerning this land with one Deree, of Kandiyohi county, Minnesota, for an expressed consideration of $9,920. Deree paid him on this contract $2,000. On July 9, 1914, Deree made a written contract with Beeson which recited therein that Deree desired to sell and transfer to Beeson his interest in such lands so that Beeson could sell the same under a contract for a deed to the defendant, France, who agrees to deliver to Beeson a stock of merchandise valued at $3,500, which amount is to be credited as payment on Deree's interest in the lands; that Deree's interest in the lands, after deducting the price of such merchandise, is $2,480, less the amount that was owing to Beeson on the contract and other indebtedness. That under a contract for a deed made between Beeson and France on the same date for the sale of such lands, there were three notes signed by the defendant payable to Beeson,—one for $800, due on or before November 1, 1915; one for $800, due on or before November 1, 1916; and one for $880, due on November 1, 1916, evidencing payments to be made on such contract. That it was agreed that Deree should sell to Beeson his interest in such lands and surrender to Beeson his contract therein, in consideration of which Deree was to receive from France the stock of goods, and also the three notes above mentioned for the balance of his equity in the lands; such notes to be indorsed by Beeson without recourse; and such notes further to be held by Beeson as security for the payment of his indebtedness. That it was further

agreed that in case the notes in question were not paid when due Beeson should use his best endeavors to collect the same under his contract for the deed.

On the same day, July 6, 1914, Beeson entered into a contract for a deed with the defendant, France, whereby he agreed to convey to the defendant the land involved for an expressed consideration of $14,400 to be paid as follows: $500 in cash; $3,500 through a stock of merchandise; $1,800 on or before November 1, 1915; $1,800 on or before November 1, 1916; $1,880 on or before November 1, 1917, and $4,920 on November 1, 1918, with interest at 6 per cent payable annually. The three payments of $1,000 and $1,880, respectively, were to be evidenced by six notes for $1,000 and $800, and $1,000 and $880, respectively, made by said defendant, France, payable to Beeson. It was further agreed in this contract that Beeson had a contract for a deed from one Porter and was to get proper conveyance from Porter. In connection with these contracts some preliminary negotiations were had between the defendant, France, and Deree. Deree had this land under such contract; France had his stock of goods at Sanborn. Some sort of an agreement was signed with reference to an exchange. The written agreement was not introduced in evidence; witnesses testify that it provided that Mr. Deree was to take over the stock of merchandise and the defendant, France, to take the land in Minnesota with the provision that the agreement should not be binding unless the real estate in Minnesota proved to be as represented, and also that the defendant, France, should go down and look at the land, and if the deal did not go through he was to receive his expenses if the land was not as represented; the defendant then went down the same evening to see the land in Minnesota. He found out that Deree had a contract for the land with Beeson. While in Minnesota he went to Beeson's office and there signed a contract for a deed, which he testifies was on July 11, 1914. While there he paid Beeson $450 by check and delivered a bill of sale of his stock to Deree. At the time the defendant made and delivered to Beeson the promissory notes; namely, two for $800, and one for $880, and the promissory notes for $1,000 each, mentioned in the contract.

On the next day France, Mr. Deree, and a son of Mr. Beeson returned to Sanborn. Beeson testified that it was not a fact that Deree was to receive the three notes in question so that he could raise money

by using such notes and pay Beeson what he owed before Beeson was willing to enter into the contract with France. Further, that his son took the notes to Sanborn for the reason that Deree thought he could get money on the notes sufficient to pay Beeson what he owed him at that time on an outside matter. He further testified that France said to Deree that his note was good at the Bank of Sanborn, and that such bank would take his notes. Deree and a son of Beeson came to Sanborn and Deree there sold one $800 note to the bank and borrowed $1,100 upon his own note by putting up the other two notes with such bank as collateral security. The bank had knowledge of this entire transaction concerning these contracts for a deed. Later, the two notes put up as collateral security were transferred by the bank to the plaintiffs herein, who were directors of such bank. The defendant, France, paid $164.70 interest on such contract up to November 1, 1914. He did not, and was unable to, make further payments. Thereafter proceedings to cancel the contract for a deed were initiated by Beeson by notice thereof dated November 30, 1915. Such notice was served upon the Bank of Sanborn and on the defendant, France, and upon Deree during the first week of December, 1915. Prior to that time, on November 8, 1915, the bank commenced action on the notes so purchased, and at the same time caused a warrant of attachment to be issued. Later, on September 26, 1916, the appellants herein instituted action against the defendant upon the other two notes not then due, and caused a warrant of attachment to be issued, alleging in their complaint that the action was so commenced before the debt became due for the purpose of obtaining an attachment against the property of the defendant. The defendant in his answer to the complaint of the plaintiffs set up a failure of consideration and that the defendant was not indebted to said Beeson or any of his assigns on said notes. The evidence shows that these two notes involved herein were taken over by the appellants apparently still as collateral notes to the indebtedness of Mr. Deree of the $1,100 note which was a demand note.

The appellants challenge, by specifications of error, the judgment and order of the trial court, principally upon the ground that the evidence is insufficient to support the verdict, and that under the instructions given by the court to the jury it was possible for the jury to render a verdict for the defendant even though the defendant knew at the time he made

the notes that they were to be used for the purpose of paying Deree for his equity in the land, and though they were in fact used for such purposes.

Upon this record, it is clear that Beeson could not recover upon these notes if action had been brought by him; such notes are simply evidences of the purchase price to be paid in accordance with the payments stipulated in the contract. The purchase price to be paid is the principal obligation; the contract for the deed is incident thereto. Although the vendor holds the legal title to the land through the contract it is nevertheless in the nature of a lien to secure the purchase price stipulated. Woodward v. McCollum, 16 N. D. 49, 111 N. W. 623, and cases cited. The vendor may either enforce the same upon the covenants therein to pay through specific performance, or he may declare a forfeiture and rescind the contract under the express terms thereof. He cannot both enforce the contract and rescind the same. As stated in Warren v. Ward, 91 Minn. 254, 94 N. W. 886, "There is no difference in the authorities upon the proposition that one cannot have the specific performance of the contract and its rescission. This is but the application of the very hackneyed truism that 'one cannot have his cake and eat it.' "

The main proposition involved in this case is the question whether Deree and the appellants are placed in the same position legally as the vendor, Beeson, or whether the defendant, France, gave these notes in question as a direct consideration for the equity of Deree in the land covered by the contract.

If, in fact, France had executed these notes direct to Deree, and Deree had assigned his contract with Beeson to France, the foreclosure of the contract by Beeson would not in any way affect the liability of France to Deree upon his notes made to Deree. This, however, in our opinion, is not the legal situation which was so expressly created between the parties. Deree had an equity in this land, its value was $2,480. Instead of turning this equity over to France, he turned it over by his own contract shown in the evidence to Beeson; he surrendered his contract to Beeson. Beeson assumed, therefore, both the legal and equitable title that Deree formerly had. Beeson then made his contract with France, and although there was credited on this contract the amount of such equity to Deree to the extent of $3,500, the stock of

goods turned over, nevertheless this equity, as to the title therein, and as to Deree's equity represented by the notes, was retained by Beeson, and the contract made with Deree specifically provided that Beeson might declare a default and rescind the contract for failure to pay the very notes which France gave and Deree received. Furthermore, in the contract with France, Deree authorized Beeson to collect on such notes through such contract so made by Beeson to France. Beeson indorsed these notes to Deree; Deree put them up as collateral security with the bank; the bank turned them over to the appellants. All of the parties have notice of this entire transaction. In legal effect, therefore, the situation is just the same as if Beeson in fact had purchased Deree's equity, and had assumed the same and had made a direct bargain himself with France concerning it. The fact that France gave a bill of sale of the stock to Deree does not alter the situation. The contract provided that such stock should pass to Beeson. The situation is just the same as if France had turned over $3,500 to Beeson and Beeson had turned over the same $3,500 to Deree for his equity.

Furthermore, upon this legal situation, when Beeson indorsed the transfer of these notes to Deree, the transfer of the same operated to assign *pro tanto* the security which was incident thereto, or at least the right to enforce as an assignee an assignee's right in such security. 39 Cyc. 1810; 2 R. C. L. p. 633; 5 C. J. 951; Smith v. Mills, 145 Ind. 334, 43 N. E. 564, 44 N. E. 362. See Funk v. Voneida, 11 Serg. & R. 110, 14 Am. Dec. 621; Terry v. Woods, 6 Smedes & M. 139, 45 Am. Dec. 277.

Deree was not satisfied to turn his equity in the land over to France and take the notes; he wanted further the security of the contract that Beeson had. He directly authorized Beeson, impliedly at least, to make collections and to enforce default for failure to pay these very notes. Neither in law nor in equity is he entitled to have both his equity, now, in the face of the record, in Beeson's hands, who was authorized to collect his obligations, and also his money. If it be argued that this holding serves to permit the defendant to take advantage of his own default, the answer is that Deree should not be entitled to take advantage twice of defendant's default.

The fact that France knew that Deree was surrendering his equity is no reason why Deree should be permitted either in law or in equity to

recover back through Beeson both the land and his money. The appellants stand in no better position than Deree; they received the notes with full notice, and are maintaining this action apparently as holders of these notes put up as collateral security.

The notes as such were subject to the same defense as if they were non-negotiable. Comp. Laws 1913, § 6943. Deree was not a holder in due course; the appellants were not holders in due course. Comp. Laws 1913, § 6937.

The notes, therefore, were subject to the defense that there existed, at the time this action was instituted, no obligation therefor, and that the contract covering the same had been rescinded. This was set up in the answer, and the record shows that the instructions of the trial court were favorable, rather than otherwise, to the appellants, and that the verdict as rendered by the jury is proper. The judgment is affirmed with costs to the respondent.

GRACE, J., concurs.

ROBINSON, J. (concurring specially). The plaintiff brings the action to recover on two promissory notes dated July 9, 1914, made by defendant to R. B. Beeson and by him indorsed, without recourse, to Deree, and by him transferred thus:

Louie Deree.

For value received I hereby sell and assign to ———— all my right, title, equity and interest in and to the within note and the debt evidenced by it.

Louie Deree.

One note is for $800 and the other for $880. About the date of the notes they were given to the Bank of Sanborn as collateral security for $1,100. The plaintiffs are bankers and own the Bank of Sanborn and took the notes to bring suit on the same in their own name. The defense is a total failure of consideration.

As it appears, R. B. Beeson, of Breckenridge, Minnesota, is a real estate trader,—of skill and long experience. In July, 1914, he was the owner of E½ sections 1–134–57, in Wilkin county, Minnesota. He was the owner under L. B. Porter. He had contracted to sell the same to

Deree, who had paid $2,000 on the contract. On July 9, 1914, having arranged to take up the Deree contract, Beeson made a written contract to sell the land to France for $14,400; $500 to be paid in cash, $3,500 by a stock of goods, and the balance in promissory notes. For his equity in the land Deree received the stock of goods and the note in question. France paid $500 cash. He paid interest, $146.70, and turned over the stock of goods. Then he made default and in January, 1916, Beeson canceled the contract, leaving France to charge to expense or profit and loss $4,146.70, which he had paid. Now the notes in question were given to Beeson as a part of the land contract, and to secure each of said notes he retained a vendor's lien on the land just the same as if the land had been mortgaged to secure the notes, and if he transferred a note he transferred the lien securing the same, and such lien was in no manner affected by the cancelation of the contract. Were it otherwise, then by transferring all the notes, except the very smallest one, and then canceling the contract, Beeson might hold and retain both the land and its price. The cashier of the bank had full notice and knowledge of all the particulars relating to the notes and the land contract, and that was notice to the plaintiffs, who owned the bank. And aside from that, Mr. Early testified that, long before taking the notes, he and Coop had full knowledge of the contract. (15) They knew that the notes were taken as a part of the land contract. Hence, their remedy is to enforce the vendor's lien, or by suit against Beeson if he has impaired the lien by conveying the land to a good-faith purchaser. Certainly neither the plaintiff nor Beeson are in any position to ask this court to aid them in further plundering the defendant.

Judgment affirmed.

BIRDZELL, J. I dissent, and reserve the right to file the reasons within the time allowed for a petition for rehearing.

BIRDZELL, J. (dissenting). The statement of facts contained in the main opinion in this case is so framed that it appears to obscure the real transaction. As I read the record in this case, the main transaction and the one involved here was between Deree, who held the land under contract under which he had paid $2,000, and France, who purchased it from him. It is true that Deree held his contract from Beeson, and

that Beeson in turn held a contract from one Porter, but nevertheless *Deree sold to France* his interest in the land, which was a substantial one, and by mutual arrangement it was agreed that Beeson would hold the title which he might subsequently acquire from Porter as security for the deferred payments that were to go to Deree for his equity. It is believed that a better understanding of the case may be had by referring to what is considered by the writer of this opinion to be a more correct statement of the transaction.

In the early part of July, 1914, the defendant France and one Deree entered into negotiations for a trade involving the transfer of some land in Wilkin county, Minnesota, to France for a stock of goods which was owned by the latter in Sanborn, North Dakota. A preliminary contract looking to the exchange of the lands, at $45 an acre, for the stock of goods, at the agreed price of $3,500, was drawn up by one Isansee, cashier of the bank of Sanborn, but the consummation of the deal was conditioned upon the land proving as represented. Immediately after the preliminary contract was made, the defendant France went to Breckenridge, Minnesota, for the purpose of inspecting the land, and upon arrival there he discovered that Deree did not own the land, but that he was purchasing it under a contract with one R. B. Beeson, who in turn held it under one Porter. The deal, according to the testimony of Beeson and the defendant, was completed within a day or two after arrival at Breckenridge, Minnesota; although it seems to be contended by the plaintiff that it was not consummated until the parties returned to Sanborn. At any rate, a contract was drawn up under which Beeson obligated himself to sell the land to France for $14,400, France turning over $500 in cash, his stock of goods at $3,500, and giving some notes representing the deferred payments. A separate contract was entered into between Beeson and Deree and witnessed by France, whereby three notes, one for $800, upon which the Bank of Sanborn has sued in a separate action, the two notes in controversy, and the stock of goods, were agreed to be turned over to Deree. Immediately after the execution of these contracts at Breckenridge, Deree, France, and a son of R. B. Beeson returned to Sanborn, the latter having possession of the three notes which were to go to Deree and which had been indorsed by his father without recourse. Deree arranged with Isansee, the cashier of the Bank of Sanborn, for the sale of one of the notes, and obtained a

loan of $1,100 for which the other notes were pledged to the bank as collateral.

With part of the proceeds of the notes, Deree paid some indebtednesses owed to Beeson on an outside matter. The notes in suit, being the collateral notes, were later transferred to the plaintiffs, who were officers of the Bank of Sanborn. There seems to be ample evidence that the plaintiffs had full knowledge of the character of the transaction in which the notes were given, and it is certain that the bank, through its cashier, had ample notice. France later defaulted in payments under his contract of purchase from Beeson, and the contract was foreclosed pursuant to a notice dated November 30, 1915.

This action and the action of the Bank of Sanborn v. France, post, 68, 172 N. W. 79, were tried under a stipulation that the evidence taken should suffice for both and that the jury should render separate verdicts.

In submitting the cases to the jury, the court gave the following instruction: "The plaintiff, the Bank of Sanborn, claims to have purchased this note from Louie Deree and claims that at the time of purchase the defendant knew that the plaintiff was about to purchase the same, and plaintiff claims that the defendant acquiesced and consented to the purchase of the note by the plaintiff. If you find that such was the case, then I instruct you that your verdict in this case should be for the plaintiff. The defendant denies this contention of the plaintiff, and it is a question of fact for the jury to determine from the evidence. As I have already stated, if the plaintiff has satisfied you by the greater weight of the evidence of its contention in this respect, then you should find for the plaintiff for the sum of $800, and interest at 6 per cent per annum from the 9th day of July 1914, to date, or such amount as the testimony shows due thereon. However, if you find that the defendant did not consent or acquiesce in the purchase of said note, then your verdict in this case should be in favor of the defendant."

The foregoing instruction was given with special reference to the note held by the Bank of Sanborn, but was also made applicable to the notes in suit by the following instruction: "Gentlemen of the jury, the same principles of law apply in this case as in the former one, which I will not reiterate. If, under the instructions already given in the former case, applying the principles there laid down to this case, then you should find in favor of the plaintiff for such a sum as you find due

and owing to the plaintiffs upon the two notes in question, otherwise you should find in favor of the defendant."

The appellants complain of the giving of the foregoing instructions on the ground that under them the jury could return a verdict for the defendant even though the defendant knew at the time the notes were given that they were to be used for the purpose of paying Deree for his equity in the land, and though they were in fact used for that purpose.

If it is the fact that the notes in question were given to compensate Deree for the sale of his interest in the land, then it is immaterial whether or not the defendant assented to or acquiesced in the purchase of the notes. The giving of the notes for this purpose would be but the consideration for the surrender by Deree in favor of the defendant of his interest in the land contract he held from Beeson, and this consideration is one that could not be said to have failed by reason of the failure of France to make subsequent payments that would entitle him to a conveyance from Beeson, and this would be true even though Beeson, upon France's default, subsequently foreclosed the latter's interest.

There is ample testimony in the case showing that defendant understood full well that the notes in suit were given as the consideration for Deree's relinquishment of his interest in the land. The defendant testified:

Q. You knew these three notes that have been referred to which had been or were to be delivered to Mr. Deree represented his equity in the land you purchased?

A. Yes, sir.

Q. That was talked over down at Breckenridge?

A. Yes, sir.

Q. You had full knowledge that Mr. Deree had this interest in this way?

A. Yes, sir.

Q. That is the reason the notes were drawn as described in the contract, one for $800 and the other one for $1,000—that is the reason that it was drawn up that way?

A. Yes, sir.

Q. So, Mr. Deree's interest could be delivered to him in that form?

A. Yes, sir.

Again on cross-examination, defendant testified as follows:

Q. Why were these notes made in six instead of three notes?

A. Why, I understood Mr. Deree that was his equity in the land.

Q. They were made in that way so that these notes, the two $800 and one $880 note, could be turned over to Mr. Deree as representing the balance of his equity in the land?

A. Yes, sir.

Q. And at the time you executed and signed these notes, Mr. France, you knew they were to be disposed of, that that was to be the disposition to be made of them?

A. That was his equity in the land.

Q. You knew these three notes as described, being a part of these payments to be made, were to be turned over by Beeson to Deree in payment of Deree's equity in the land?

A. Yes, his equity.

Q. You knew that Deree's equity in this land was to be paid out by taking over this stock of goods at Sanborn and by the taking of these three notes?

A. Yes, sir.

Q. That knowledge was yours before you signed the notes? That had been explained to you before you ever signed the notes?

A. Yes, it was explained before I signed the notes. He wanted the notes or security he was to have for that first contract.

Q. That was to be security to Deree?

A. Yes, sir.

Q. That was why it was put in the contract?

A. Yes, sir.

Q. But it was thoroughly understood to be turned over to Deree in payment of this equity you were trading for?

A. I didn't know what disposition they were to make of the notes.

Q. No, but you knew that Deree was to get them?

A. I knew he was to get them, yes.

Q. And at the time you signed them you had this knowledge?

A. Yes, sir.

The defendant testified not only that he knew that the notes in question were to be delivered to Deree for his equity in the land, with the

understanding that he (the defendant) was to take a direct contract from Beeson, but also that the stock of goods which he was trading was to be turned over to Deree, and that he understood from Deree before they left Sanborn that Deree expected to raise money upon the obligations that the defendant would execute in the purchase of this real estate. It appears, furthermore, that the defendant was a witness upon the contract entered into between Beeson and Deree at Breckenridge, Minnesota, in which it was expressly stated that the notes in suit and the stock of goods were to be transferred by Beeson to Deree in payment of Deree's interest, and that this contract was read to France before he witnessed it.

Under the defendant's own testimony his liability upon the notes is not, as a matter of law, dependent upon his acquiescence in their transfer; nor is it contingent upon his completion of the land contract which he entered into with Beeson. Furthermore, under the defendant's own evidence, he did acquiesce, and no other finding would be warranted. But the notes in suit represent the present consideration for an interest which was transferred to France through the surrender of Deree's contract with Beeson and the making of the new contract between Beeson and France. In short, defendant's own testimony shows conclusively that the consideration for the notes in suit has not failed.

Even accepting defendant's theory that there is a failure of consideration as between himself and Beeson, or, for that matter, as between him and Deree, and that the plaintiffs are chargeable with notice of the actual consideration upon which the notes were executed, it does not follow that the liability of the defendant is disproved. As a general proposition, knowledge of the consideration for a note is not notice of a subsequent failure thereof, nor is a transferee subject to a defense on that account. See 8 C. J. 509–518. This is so, even where the note contains on its face a statement of the consideration for which it is given, and where it appears that the consideration is to be enjoyed by the maker in the future. Even the statement of a future consideration does not put the indorsee upon notice of a subsequent failure thereof. Siegel, C. & Co. v. Chicago Trust & Sav. Co. 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417. We see nothing in the instant case to take it out of the operation of the general rule. For additional

authorities on this subject, see 7 Cyc. 706, 948; notes in 29 L.R.A. (N.S.) 382; 33 L.R.A.(N.S.) 589; and 46 L.R.A.(N.S.) 864.

The evidence shows that the instruments in question were transferred as collateral security for a loan negotiated by Deree with the Bank of Sanborn, and that they were subsequently transferred to the plaintiffs. This transfer was made before the notice of cancelation was served by Beeson, and there is no evidence (though we regard this as immaterial) that either the plaintiffs or the bank knew at the time that the defendant had defaulted under his contract. We find nothing in the record to impugn the lien of the bank or the right of the plaintiffs as transferees to collect the pledged paper. It is true that in the contract between Beeson and Deree, of which France had knowledge and which he witnessed, Beeson obligated himself to use his best endeavors to collect the notes in suit under the contract for deed which he gave at the same time to France. But the existence of a contract between Beeson and Deree, whereby, as between them, the legal title to the land should be held by Beeson as security for the notes representing the purchase price of Deree's interest, does not, in our opinion, qualify the plaintiff's right to recover the consideration which, in reality, according to the defendant's own understanding, passed from him to Deree. Whether or not Beeson, had he remained the holder of the notes in suit in his own right, could recover upon them after foreclosing the land contract (2 Warvelle, Vendors, 2d ed. § 916), is a question that is not involved in this suit, and we express no opinion concerning it. To allow the defendant, however, to take advantage of his own default to defeat the notes in suit is to enable him to deprive the other party to the transaction (Deree) of the benefit of a trade which must be presumed, in the absence of evidence, to have been fairly made. The defendant's contentions, and the holding of the majority of the court, if carried to their logical conclusion, would enable him by his own default, not only to defeat the payment of the notes, but at the same time deprive Deree of whatever money he had invested in the land under his preexisting contract. Deree has no escape from this consequence. His equity is gone and Beeson is under no obligation to him, as intimated by the majority; for he has faithfully performed his contract with Deree by using his best endeavors to collect the notes under his contract with France. It was not incumbent on Deree, upon France's default, to

step in and make the payments in France's stead, at the peril of losing the benefit of his bargain. In fact to so hold operates in itself to deprive him of his bargain without any cause whatever; for it requires him to perform the very contract by which his own profit is measured. We confess our inability to see any justification for a holding that results as above. It seems clear to us that the only effect of the failure of Deree, the plaintiffs, or the bank to relieve France's default would be the loss of the security, and not the loss of the primary obligation itself.

It must be borne in mind that the defendant claims no right to rescind the sale as against Deree, and that under the contract he was vested with the right to possession, and became the equitable owner. As such, he was entitled to any increment of value and to whatever other advantages attached to ownership. Where such rights pass, even under a conditional contract for the sale of chattels, it is held in some jurisdictions that the destruction of the property before the passing of the title does not deprive the vendor of the right to collect the agreed price. Tufts v. Griffin, 107 N. C. 47, 10 L.R.A. 526, 22 Am. St. Rep. 863, 12 S. E. 68; Williston, Sales, § 304; Mitcherson v. Dozier, 7 J. J. Marsh. 53, 22 Am. Dec. 116. This principle applies with greater force where the defendant's loss is attributable directly to his own breach of contract.

By § 6912 of the Compiled Laws of 1913, it is expressly provided that where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of his lien. Under § 6936, Compiled Laws 1913, every holder of an instrument is given the right to sue thereon in his own name, and all that is necessary to constitute one a holder is that he shall be a payee or indorsee in possession, or, in case of instruments payable to bearer, that he shall be the bearer. Comp. Laws 1913, § 7075. Whatever might be the application of § 6913, Compiled Laws 1913 (to the effect that absence or failure of consideration is a matter of defense as against any person not a holder in due course) if the instruments in question were being enforced by Beeson after the foreclosure of the land contract, we are satisfied that it has no application where, as in the case at bar, the action is brought by one who has in good faith advanced money on the strength of notes fair on their face and which represent an

agreed purchase price, of an interest in property bought by the defendant,—and interest he would still own were it not for a loss incident to his own breach of contract. As we view the record, there is no evidence which tends to impugn the title of the plaintiffs.

The holding of the majority not only runs counter to the whole theory upon which the case was tried below, and presents as an absolute defense a matter that was not urged as such a defense, but it contradicts what seem to us to be well-established, controlling legal principles. If the holding of the majority is correct, it would follow logically that one taking a secured note, with knowledge that it is secured, would be chargeable with any personal defenses that might subsequently arise on account of the manner in which the security is dealt with by the original payee. If absolute promises to pay money in the shape of negotiable instruments, which are given even an additional element of currency by the fact of being secured, are thus rendered subject to conditions inherent in the original transaction, it is manifest that new and artificial precautions will have to be taken in dealing with commercial paper.

I am authorized to say that Mr. Chief Justice CHRISTIANSON fully concurs in all that is said in this dissenting opinion.

BANK OF SANBORN, a Corporation, Respondent, v. W. H. FRANCE, Appellant.

(172 N. W. 79.)

Subrogation — vendor's lien — failure of consideration.

This is a suit to recover on a promissory note given on a contract for the payment of land. As the contract was canceled by the vendor of the land, and as there was a total failure of consideration, the defendant, on paying the note, must be subrogated to all the rights of the bank to enforce the vendor's lien against the land, or to recover the same from the vendor.

Opinion filed March 28, 1919.

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

Affirmed conditionally.

C. S. Buck, for appellant.

It is a well-settled principle of law that where the maker of commercial paper voluntarily places his paper in the hands of another for negotiation, or who stands by and sees the note indorsed to a party without having his right to defend against the payment of the notes indorsed thereon, or where a failure of the consideration complained of is occasioned by his noncompliance with his own agreement or obligation, he is estopped from defending against the notes when suit is brought on them by the purchaser or holder for value on the ground of failure of consideration. 8 Cyc. 64, note B. See also Auten v. Manistee Nat. Bank, 57 Ark. 243, 47 L.R.A. 329, 54 S. W. 337; Yeomans v. Lane, 101 Ill. App. 228; Firman v. Blood, 2 Kan. 496.

Winterer, Combs, & Ritchie, for respondent.

There is no way that France could prohibit the bank from buying these notes, and the only duty he owed the bank was to see that it had full knowledge of the transaction, and what the consideration for the notes actually was. 8 C. J. pp. 747, 748.

The defense of failure of consideration is available against the holder of paper who is not a holder in due course. Ibid.; Earl v. Stump, 13 N. W. 701.

When the holder of a land contract exercises his option and cancels the same for the failure to make payment by the vendee, he waives all of his right to recover upon the debt. Warren v. Ward, 97 N. W. 886; Roney v. Halvorson, 29 N. D. 13.

When the land contract was canceled by Mr. R. B. Beeson, it was canceled for the benefit not only of himself, but for the benefit of all his cotenants. 38 Cyc. 40.

Robinson, J. As the complaint avers, on July 9, 1914, defendant made to R. B. Beeson a promissory note to pay to the order of R. B. Beeson $800, with interest at 6 per cent, and due November 1, 1915. Beeson indorsed the note without recourse to Deree, and he, without recourse, indorsed it to the bank. The defense is a total failure of consideration. The jury found a verdict for the plaintiff, on which judgment was entered, and defendant appeals.

As it appears, in July, 1914, R. B. Beeson, of Breckenridge, Minnesota,—a person skilled in land trading,—owned a half section of land under one L. B. Porter. He had a contract to sell the same to Deree,

who had paid $2,000. Having arranged with Deree to give up the contract, Beeson made a written contract to sell the land to France for $14,400. Five hundred dollars was paid in cash, $3,500 in a stock of goods, and the balance in several promissory notes. To secure each note the law gave the seller a vendor's lien on the land, and as he transferred each note he transferred to the purchaser the lien securing the same. The lien went with the note, and it was not affected by a cancelation of the land contract. The bank accepted the note, with full notice and knowledge of all the particulars, so it was not a purchaser in good faith of a negotiable promissory note, but the bank insisted and offered proof to show that by France himself it was induced to buy the note from Deree, and that the note was given to be used at the bank; and the court very properly instructed the jury as follows: "If you find that the defendant did not consent and acquiesce in the purchase of the note, then your verdict in this case should be for the defendant." It was on that instruction that the jury found a verdict against the defendant, and it does appear that there is evidence sufficient to sustain it. However, it is manifestly just that on payment of the judgment, or the note, the defendant should be subrogated to all the rights of the bank,—to all the rights of the bank as a holder of the note to enforce the lien of the same against the land, or to recover damages from R. B. Beeson. Hence the judgment will be affirmed on condition that forthwith on the filing of the remittitur, the Bank of Sanborn do file said promissory note with the clerk of the court for the benefit of defendant, with an assignment or transfer of the same, without recourse, to W. H. France, with all the rights that at any time accrued to said bank to enforce the lien of said note against the land in question, or to sue and recover the same from R. B. Beeson, if he has in any way transferred or disposed of the land.

On filing such note and assignment with the clerk of the court, the judgment will be affirmed, without costs.

Bronson and Grace, JJ. (concurring specially.) This is a companion case with Earley v. France, just decided, ante, 52, 172 N. W. 73. Both cases were tried upon the same evidence. My views of the law upon such evidence are stated in my opinion in that case. I concur in the result as stated by Justice Robinson and in the order of conditional affirmance based upon the propositions of law stated in my opinion in

the other case, for the reasons that the bank herein instituted this action prior to the cancelation and rescission of the contract involved, and that the jury found that the defendant had acquiesced in the sale of the notes involved herein to the bank.

BIRDZELL, J. and CHRISTIANSON, Ch. J. (concurring in part and dissenting in part). We concur in the affirmance of the judgment. No error was committed upon the trial and the jury decided the issues involved in favor of the plaintiff. In our opinion, there is no occasion for qualifying the order of affirmance as is done by the majority of the court. The reasons leading to this conclusion are more fully stated in the dissenting opinion in the case of Earley v. France, ante, 52, 172 N. W. 73.

SCANDIA STATE BANK OF FERGUS FALLS, MINNESOTA, a Corporation, Respondent, v. D. A. DINNIE, Appellant.

(172 N. W. 62.)

Judgments — dismissal.

1. A corporation which was not a party to prior litigation is not bound by a judgment of dismissal, where the litigation was not conducted on its behalf.

Judgments — mistake in bringing action — estoppel does not apply.

2. Where, through mistake of a managing agent common to two corporations, a suit was begun in the name of one corporation which should have been begun in the name of the other, and such suit resulted in a final judgment against the plaintiff corporation, in the absence of circumstances sufficient to create an estoppel, the corporation in whose name the original suit should have been begun is not precluded from maintaining a subsequent action on the same subject-matter.

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

Fisk & Murphy, for appellant.

"Where the judgment recites that the plaintiff has submitted to the court and jury all of its evidence in support of its complaint, and that judgment was rendered against them, it is a judgment upon the merits." Comp. Laws 1913, § 7599.

"The doctrine of estoppel by judgment proceeds upon the principle that one person shall not litigate a second time, with the same person, a matter that has been finally determined upon its merits." United States v. California Bridge & Constr. Co. 245 U. S. 337, 62 L. ed. 332, 38 Sup. Ct. Rep. 91; 15 R. C. L. § 430.

"In this connection the term 'parties' includes not only those who are technically named in the record, but all those who are directly connected therein, or who actively participated therein." See 15 R. C. L. p. 1010, § 483, and cases cited. The rule stated in 23 Cyc. 1249, B; Briggs v. McAllister, 106 Ky. 791, 45 L.R.A. 803, 90 Am. St. Rep 267, 51 S. W. 603; See Emery v. Fowler, 63 Am. Dec. 627; Robbins v. Chicago, 4 Wall. 672, 18 L. ed. 430, and cases cited; Pew v. Johnson, 35 Mont. 173, 88 Pac. 770; Courtney v. Knabe Mfg. Co. 99 Am. St. Rep. 456, 55 Atl. 649; Plumb v. Crane, 123 U. S. 560, 31 L. ed. 268; McMillan v. Barber Asphalt Paving Co. (Wis.) 138 N. W. 94, Ann. Cas. 1914B, 53; Kolpack v. Kolpack, 137 N. W. 437; Baxter v. Myers (Iowa) 39 Am. St. Rep. 398, 152 N. W. 234; Tootle v. Coleman, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41; Parson v. Urie (Md.) 8 L.R.A.(N.S.) 559, 10 Ann. Cas. 1078; Loodie v. Larson, 78 N. J. Eq. 237, 37 L.R.A.(N.S.) 957, and an exhaustive note; Boyd v. Wallace, 10 N. D. 78; Hill v. Bayne, 2 Am. St. Rep. 877.

Halvor L. Halvorson, for respondent.

"In the former trial the real question not having been submitted for determination, the matter is not *res judicata.*" Comp. Laws 1913, § 7579; Mason v. Kansas City Belt R. Co. 26 L.R.A.(N.S.) 914; 15 R. C. L. p. 955.

"Under our statutes all actions must be brought by the real party in interest. The respondent is the real party in interest, as assignee of the claim; nothing the assignor could do after assigning the claim could change its right, nor can the assignor defeat the rights of the assignee by bringing suit." 4 Cyc. 98; Gregory v. Claybrough, 129 Cal. 475, 62 Pac. 72; Aultman v. Sloan, 115 Mich. 151, 73 N. W. 123; Richardson v. Warner, 28 Fed. 343; Lawrence v. Milwaukee, 45 Wis. 306; Nashua Trust Co. v. Edwards Mfg. Co. (Iowa) 68 N. W. 587; 15 R. C. L. title Judgments, § 484, p. 1011, § 502; Cockins v. Bank of Alma, (Neb.) 122 N. W. 16.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff in an action brought to recover for materials supplied by the Scandia Manufacturing Company to the defendant, a general contractor. Error is predicated upon the denial of the defendant's motion for dismissal upon the ground that the plaintiff was estopped to maintain this action by a former adjudication.

The facts are that the Scandia Manufacturing Company supplied certain materials to the defendant, Dinnie, which were used by the latter in the construction of a certain building. In June, 1914, the manufacturing company commenced an action against Dinnie upon the account; which action was tried in March, 1915, resulting in a judgment of dismissal. The judgment recited: "The plaintiff having submitted to the court and jury all its evidence in the support of its complaint, and having rested its case, and thereupon defendant having moved that said action be dismissed by reason of the failure of the plaintiff to prove or establish its case, and the court being duly and fully advised in the premises thereupon granted said motion, and having pursuant thereto made and filed herein its order in favor of defendant and against the plaintiff for dismissal of said action, now, therefore, pursuant thereto, . . . It is adjudged that the said action be, and the same is hereby, in all things, dismissed."

When the action was commenced which resulted in the dismissal as above indicated, one A. G. Anderson, of Fergus Falls, Minnesota, was cashier of the Scandia State Bank, the plaintiff in this action, and as such had business relations with the Scandia Manufacturing Company of the same place, the plaintiff in the former action, and had in prior years been a director of the latter concern. At the same time, and for a while prior thereto, Anderson was secretary of the Scandia Manufacturing Company. It seems that prior to the beginning of the former action, the account upon which both actions were based had been assigned by the manufacturing company to the bank, and that through some mistake, either on the part of Anderson or the attorney consulted in Fergus Falls, the original action was begun in the name of the manufacturing company.

The appellant relies upon § 7597, Compiled Laws 1913. The first six subdivisions of this section treat all situations in which civil action may be dismissed without final determination on their merits. Sub-

division 7 provides: "In every case, other than those mentioned in this section, the judgment in the action shall be rendered on the merits." Subdivision 8 abolishes all other modes of dismissing actions or nonsuiting litigants. It is argued that, since a dismissal of the former action without a determination of its merits was not authorized under any of the first six subdivisions of the section, it must be now conclusively presumed that the judgment of dismissal was rendered on the merits as required by subdivision 7. The respondent, however, argues that the action might have been dismissed without a final determination under subdivision 3 which reads, "By the court, when upon the trial and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover." In the view we take of the case it is not necessary for the court to decide whether or not the action was dismissed under subdivision 3 as a "final determination of its merits," or whether the judgment was "rendered on the merits" under subdivision 7. If it be assumed that the former judgment was a final determination, it was only a final determination as between the parties to the litigation; and, viewing the contention made under § 7597 in the light most favorable to the appellant, it amounted to a final determination only as between the appellant and the Scandia Manufacturing Company.

The appellant further contends, however, that Anderson's official connection with both corporations was such as to make him the common agent of both, and for this reason the plaintiff in this action is bound by the former adjudication to the same extent as though that action had been begun in its name. Authorities are cited in support of the rule that the term "parties" within the doctrine of *res judicata,* includes not only those who are technically named in the record, but all those who are directly connected or who actively participate in the trial. 15 R. C. L. p. 1010; 23 Cyc. 1249; Freeman, Judgm. § 174; also a number of adjudicated cases bearing out the text of the authorities cited. We do not question the correctness of the rule invoked, but we do not deem it applicable to the situation presented in the case at bar. The principle according to which those who were not technically parties to the record in some prior proceeding are bound is that by their actual participation for the purpose of having their interests determined or their rights litigated they have had all of the advantages that

would attach to the judgment, and there would consequently be no reason for allowing them to maintain another suit to determine the same questions.

In the present action it does not appear that any attempt was made on the part of the bank, or by anyone acting for the bank, to have its right litigated in the former suit. On the contrary, it rather appears that through an error made, either by Anderson or one of the attorneys, the prior suit was actually begun, as it was, in ignorance of the fact that there had previously been an assignment. To hold, therefore, that the bank was bound by the previous judgment would be equivalent to holding it estopped to assert its ownership of the claim on account of a mistake made by its agent, rather than on account of the fact that it had participated in the former litigation. The conclusion that we draw from this record is that it did not participate.

The crucial question then is, Is the bank estopped on account of the mistake made? To constitute estoppel, binding upon the bank to the extent contended for, its agent must not merely have held out to the defendant that the manufacturing company was still the owner of the claim, but it must appear that the reliance of the defendant upon such representations has been such as to render it inequitable to allow the bank to now assert the truth of its own ownership of the claim. It appears from an exhibit in this case, which was also an exhibit in the prior case, that the defendant had been advised before the original action was begun that the claim had been assigned to the bank. Furthermore, the only reliance shown by the defendant is the inconvenience and expense necessary to defeat the prior action. The statutes giving to a successful litigant the right to tax his costs make sufficient provision for this expense and inconvenience that we are not justified in holding the plaintiff estopped to set up its ownership of the claim and to enforce it.

For the foregoing reasons the judgment is affirmed.

RED RIVER VALLEY LAND COMPANY, a Corporation, Appellant, v. LYMAN HARRIS, as Administrator of the Estate of S. Harris, Deceased, Respondent.

(172 N. W. 68.)

Contracts — tax record — application of caveat emptor — void tax titles.

The maxim *"caveat emptor"* applies with full force to one who purchases land from the vendee of a purchaser of a tax title; and where the tax records disclose several jurisdictional defects rendering the tax title void, such purchaser has no cause of action against the original owner of the tax title merely because at his suggestion and solicitation the officer who issued the tax deed inserted therein a more complete description of the lands than that which appeared on the tax record.

Opinion filed March 31, 1919.

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

Affirmed.

Geo. A. Bangs and *Geo. R. Robbins*, for appellant.

"A person who gives to a worthless object the form and substance of something of value with the purpose and intent of setting afloat such worthless objects in the markets and channels of trade, knowing and intending that people will purchase, trade, and deal therein, paying out their money therefor, which money somebody must necessarily lose, is liable to anyone sustaining such loss or damage." Baker v. Hallam, 103 Iowa, 43, 72 N. W. 419; Bank v. Ward, 100 U. S. 195; Bank of Achison v. Beyers, 139 Mo. 627, 41 S. W. 325; Bartholomew v. Bentley, 15 Ohio, 659, 45 Am. Dec. 596; Blood Balm Co. v. Cooper, 82 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; Boyd v. Cocoa Cola Bottling Works, 132 Tenn. 23, 177 S. W. 80; Bruff v. Mali, 36 N. Y. 200; Clark v. Edgar, 84 Mo. 106; Cincinnati, N. O. & T. P. R. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249; Craft v. Parker, W. & Co. 96 Mich. 245, 55 N. W. 812; Crigger v. Cocoa Cola Bottling Works, 132 Tenn. 545, 179 S. W. 155; Darks v. S. G. Grosser Co. 146 Mo. App. 246, 130 S. W. 430; Gerkins v. Brown of Sehler Co. 177 Mich. 45, 143 N. W. 48; Gerner v. Mosher,

58 Neb. 135, 46 L.R.A. 244, 78 N. W. 384; Henry v. Dennis, 95 Me. 24, 85 Am. St. Rep. 365, 49 Atl. 28; Houston v. Thornton, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827; Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 2 L.R.A.(N.S.) 203, 111 Am. St. Rep. 691, 75 N. E. 1098, 5 Ann. Cas. 124; Lobdell v. Baker, 3 Met. 469; Leonard v. Springer, 197 Ill. 532, 64 N. W. 299; Mazetti v. Armour & Co. 75 Wash. 622, 48 L.R.A.(N.S.) 213, 135 Pac. 633; Morgan v. Skiddy, 62 N. Y. 319; Nash v. Trust Co. 159 Mass. 437, 34 N. E. 625; National Bank v. K. O. M. 120 C. C. A. 362, 202 Fed. 90; O'Brien v. Am. Bridge Co. 110 Minn. 364, 32 L.R.A.(N.S.) 980, 136 Am. St. Rep. 503, 125 N. W. 1012; Peters v. Jackson, 50 W. Va. 644, 57 L.R.A. 428, 88 Am. St. Rep. 909, 41 S. E. 190; Schubert v. Clark, 49 Minn. 331, 15 L.R.A. 818, 32 Am. St. Rep. 559, 51 N. W. 1103; Scott v. Abbot, 87 C. C. A. 475, 160 Fed. 573; Skin v. Reutter, 135 Mich. 57, 63 L.R.A. 743, 106 Am. St. Rep. 284, 97 N. W. 152; Statler v. Ray Mfg. Co. 195 N. Y. 478, 88 N. E. 1063; Sticket v. Atwood, 25 R. I. 456, 56 Atl. 687; Sykes v. P. F. C. Co. 157 Iowa, 601, 138 N. W. 554; Torgeson v. Schultz, 192 N. Y. 156, 18 L.R.A.(N.S.) 726, 127 Am. St. Rep. 894, 84 N. E. 956; Tomlinson v. Armour & Co. 75 N. J. L. 748, 19 L.R.A.(N.S.) 923, 70 Atl. 314; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833; Waters Pierce Co. v. Deselms, 212 U. S. 159; Watson v. Augusta Brewing Co. 124 Ga. 121, 1 L.R.A.(N.S.) 1178, 52 S. E. 152; Windram v. French, 151 Mass. 547, 8 L.R.A. 750, 24 N. E. 914; Woodward v. Miller, 119 Ga. 618, 64 L.R.A. 932, 100 Am. St. Rep. 188, 46 S. E. 847; Cooley, Torts, p. 946; 20 Cyc. 70, Statements made to Mercantile Agencies; 2 Kinkead, Torts, § 725, p. 1378; 4 Sutherland, Damages, § 1166, p. 3386; 1 Thomp. Corp. 2d ed. § 748.

Newton, Dullam, & Young, for respondent.

"It cannot be presumed that the person making a false representation knew it was false or that he made it to deceive, but those facts must be affirmatively made out by evidence." 12 R. C. L. 72.

An alleged fraud is not actionable unless six certain conditions exist, and the absence of any of them is fatal to recovery. 20 Cyc. 13; Southern Development Co. v. Silva, 31 L. ed. 679.

"Misjudgment however gross, or want of caution however marked, is not fraud." Boddy v. Henry (Iowa) 85 N. W. 771.

"Where a purchaser buys tax titles on land occupied by owners, the buyer is bound to look up for himself as to what the rights of such occupants are, and cannot hold the vendor for damages." Bianco v. Smith (Ariz.) 28 Pac. 880; Andrus v. Smelting Co. 130 U. S. 645, 32 L. ed. 1054; Peabody v. Phelps, 9 Cal. 213; Caldwell v. Pierson, (S. D.) 159 N. W. 124.

"The proof of fraud must be clear and convincing, and be evidenced by facts which are inconsistent with an honest purpose." Reitsch v. McCarty, 35 N. D. 555. To the same effect see 20 Cyc. 120; 12 R. C. L. 436.

"In this state a cause of action sounding in tort does not survive the death of the tort-feasor." Williard v. Mohn, 24 N. D. 386; Rev. Codes 1905, § 8169, Comp. Laws 1913, § 8799.

"Where the facts are not disputed, but have been found by the jury, the question whether they constitute actionable fraud is for the jury." 20 Cyc. 123; Reynolds v. Munch (Minn.) 98 N. W. 187.

"Contracts affecting the administration of justice are not enforceable." 6 R. C. L. 157; Comp. Laws 1913, § 5870; Lowe v. Crocker, 143 N. W. 176; Lindsey v. Smith, 24 Am. Rep. 463; Quirk v. Miller (Mont.) 25 L.R.A. 87.

ROBINSON, J. The plaintiffs are a small speculative corporation of Fargo, North Dakota. It is composed of John Mahon, C. W. Andrus, and others. This is an action based on fraud in the manufacture and sale of worthless tax deeds. The claim of plaintiff is that in April, 1912, by fraud and artifice, defendant, Harris, palmed off on them a lot of worthless tax deeds to nearly 10,000 acres of land in Tennessee, for which they paid 75 cents an acre, amounting to $7,135.37; and that their loss by reason of defective titles was $103,000 and interest. As the evidence shows, the plaintiffs secured the tax deeds under written contract with Walker & Company, of Omaha, Nebraska, and Walker & Company obtained the deeds from S. Harris at 60 cents an acre, and made on the deal $1,500.

Exhibit A is a contract made by Harris to Walker Company for tax titles covering 30,000 acres at 60 cents an acre. Exhibit B is a contract made by plaintiffs with Walker Company to purchase tax titles covering 10,000 acres at 75 cents an acre. In the written con-

tract with Walker the plaintiffs did not bargain for good tax titles; they bargained only for tax titles, and they got tax titles, though of a very defective quality. They did not contemplate the purchase of good titles, but of titles that might be good to sell and palm off on some innocent person. Walker was called as a witness for plaintiffs and testified to a contract of March 12, 1912, by which S. Harris agreed to secure tax deeds for Walker & Company, and to have the same confirmed by order of the court, for about 30,000 acres at 60 cents an acre. Pursuant to contract Harris secured the tax deeds and took them in the name of Ben Hayden, his bookkeeper. He made to Walker Company the tax deeds in question, leaving a blank for the name of the grantee. Walker took the blank deeds and delivered them to the plaintiffs and received 75 cents an acre. S. Harris never had any contract or deal with the plaintiffs, and he received no money from them. In the deal with the plaintiffs Walker or Walker & Company were independent contractors, and not in any way the agent of Harris. Though not alleged in the complaint, it is stated as a fact, and there is evidence, that the tax deeds were fatally defective because the lands were not described in the tax records; and that Harris employed a surveyor to locate the lands and to make descriptions which were inserted in the records by the clerk of the court. But that is all a matter of little or no consequence. For several other reasons the deeds were all clearly void, and each deed is void on its face. It recites that for a certain sum the clerk of the court conveys to Ben Hayden a specified acreage of land in the county of Van Buren, Tennessee, as appears of record in the office of the register of deeds in certain book and page; that the land was sold to the state treasurer for the delinquent taxes properly assessed to a certain person for a certain year, and the time for redemption has expired. Each deed is made in the name of the clerk of the court, and not in the name of the state or the state treasurer, who bid in the land; and no deed gives any description of the land, except by reference to a book and page in the office of the register of deed. The land descriptions are everywhere defective, but that is of no consequence because with the most perfect descriptions the deeds would still be void on their face. Then it appears that before sale all the taxes were paid and the lands were not sold for delinquent taxes.

Counsel for plaintiff insists on this principle of law: "A person

who gives to a worthless object the form and *substance of something of value* with the *purpose and intent of setting* afloat such *worthless objects in the markets and channels of trade commerce, knowing and intending that people will purchase, trade, and deal therein, paying out their money therefor, which money someone must necessarily lose, is liable to anyone sustaining such loss or damage.*"

Now it is true that Harris and Walker, the clerk of the court, and the plaintiffs either knew or should have known that the deeds were worthless, except for the purpose of trade and deception. No person seriously counted on obtaining a good title to the land at 60 or 75 cents an acre, but at such a price the plaintiffs were willing to take the chance of palming off the worthless titles onto some person more innocent than themselves. But as it fell out the deeds were too bad for any purpose. They did not have "the sum or substance of anything of value." And so in this state thousands on thousands of worthless tax deeds have been issued and the tax title transferred from one to another, and still we have never heard that the clerk or auditor issuing the deeds or party quitclaiming title has been held liable because of defective titles, unless upon covenant or contract. Of course it is true that one who sells personal property as his own warrants that he has a good title. Comp. Laws, § 5975. And one who sells an instrument purporting to bind anyone to the performance of an act thereby warrants the instrument to be what it purports to be, and that he has no knowledge of any facts which tend to prove it worthless; but that does not refer to tax titles such as those in question. To a purchaser of a tax title and to a person who tries to get for 75 cents an acre land that is worth $10 an acre, the maxim *"caveat emptor"* applies with full force. The testimony convincingly shows that Harris, Hayden, Walker, and the plaintiff were not innocent parties. Each party knew, or should have known, that the titles were void on their face and good for nothing only to sell and palm off on a class of innocent persons, commonly known as suckers. That was the purpose and the only purpose for which Walker and the plaintiffs purchased the titles. Hence it is that neither party has any remedy or cause of action against the other. Between those who are equally in the wrong, the law does not interfere. Section 7258. The judgment of the District Court should be affirmed.

Judgment affirmed.

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

ROBERT M. POLLOCK, James W. Pollock, and John C. Pollock, Copartners under the Firm Name and Style of Pollock & Pollock, Respondents, v. MARTIN H. JOHNSON, Appellant.

(172 N. W. 62.)

Appeal and error — necessity of assignment of errors and statement of the case on appeal.

When a party appeals from a judgment on a verdict, he must serve and file an assignment of errors and cause a statement of case to be served and settled as prescribed by the statute.

Opinion filed March 31, 1919.

Appeal from the District Court of Cass County, Honorable *A. T. Cole*, Judge.

Affirmed.

Tim A. Francis, for appellant.

Fowler & Green and *Pollock & Pollock, pro se*, for respondents.

The offer of the respondents to accept $50 in payment for services was an offer for settlement only, was not accepted, and was not admissible in evidence. Grabau v. Nurnberg (N. D.) 166 N. W. 510; Busch v. S. D. Central Drug Co. (S. D.) 135 N. W. 757; Reagan v. McKibben (S. D.) 76 N. W. 943, 945; Wigmore, Evi. §§ 1061, 1062; 16 Cyc. 946; note in 27 L.R.A. 811, 817, 818; Nauman v. Zoerhlaut, 21 Wis. 466; Stryker v. Cassidy, 76 N. Y. 50.

This court has repeatedly held that it will not reverse the judgment of the trial court for errors in ruling upon evidence unless it is affirmatively shown that the complaining party had been prejudiced thereby. Anderson v. First Nat. Bank, 6 N. D. 497; Aultman Miller Co. v. Jones, 15 N. D. 130; Bristol & S. Co. v. Skapple, 17 N. D. 271; Vidger v. Gt. Northern R. Co. 15 N. D. 501; Hart Parr Co. v. Rob Laurence Co. 17 N. D. 257; Miller v. N. P. R. Co. 18 N. D. 19; Willoughby v. Smith, 26 N. D. 209; Madson v. Button, 16 N. D. 281; Smith v. Barnes County, 32 N. D. 4.

On appeal this court has repeatedly held that it will not reverse the judgment of the trial court upon a question of fact where there was evidence sustaining the verdict and the judgment entered thereon, even

though the evidence disputing such finding of fact in the verdict and judgment entered thereon might be equally cogent and credible. Finney v. N. P. R. Co. 3 Dak. 270, 16 N. W. 500; Heyrock v. McKenzie, 8 N. D. 601; Muri v. White, 8 N. D. 58; F. A. Patrick Co. v. Austin, 20 N. D. 261; Lowry v. Piper, 20 N. D. 637; Nelson v. Horton, 19 N. D. 345; Montana Eastern R. Co. v. Lebeck, 32 N. D. 162; Northern Trust Co. v. Brusger, 35 N. D. 150; Senn v. Steffen, 37 N. D. 491.

ROBINSON, J. The plaintiff brings this action to recover from defendant $94.95, with interest, for professional services as attorneys, rendered for and at the request of the defendant. The appeal is from a judgment on a verdict for $94.95, with interest and costs. The judgment must be affirmed for several reasons:

(1) A party desiring to move for a new trial or to appeal from a judgment on a verdict must serve with the notice of motion or notice of appeal a concise statement of the errors of law. In this case the appeal was taken in March, 1918, and the specification of errors was not filed or served until August 18, more than five months after the date for service and filing had expired. Hence, the specification is of no avail.

(2) When an appellant desires to settle a statement of a case, he must within a certain time "furnish a copy thereof to the adverse party, with a notice that at a time and place not less than fifteen, nor more than twenty-eight, days from the service of such notice, he will present the same to the judge for certification as a correct transcript of evidence, etc." The record shows no attempt to comply with this statute. It shows no authorized settlement of any statement of the case. Hence, there is no evidence before this court for review.

(3) From the matter furnished as a copy of the evidence and a statement of the case it does appear that the verdict is well sustained by the evidence. It does so appear quite conclusively from the testimony of D. B. Holt, Edward Engerud, and James Pollock. Indeed, the jury could not have well found a different verdict, but as there is no legal assignment of errors, nor any testimony legally before the court, there is no occasion for any discussion of it.

Affirmed.

GRACE, J. I concur in the result.

JULIUS J. OSTLUND, Petitioner and Respondent, v. CHRISTINE ECKLUND, Respondent and Appellant.

(171 N. W. 857.)

Appeal and error — order refusing to require costs not appealable.

An order refusing to require a party to give security for costs is not appealable.

Opinion filed April 1, 1919.

Appeal from the District Court of Cass County, *Cole*, J.

Christine Ecklund appeals from an order denying her motion that the petitioner, Julius J. Ostlund, be required to give security for costs.

Appeal dismissed.

Augustus Roberts, for appellant.

Pfeffer & Pfeffer, for respondent.

CHRISTIANSON, Ch. J. The last will and testament of one Westlund was duly admitted to probate in and by the county court of Cass county on April 7, 1917. Thereafter, on November 23, 1917, the above-named petitioner, Julius J. Ostlund, filed his petition in said court contesting said will. Such proceedings were thereafter had that on or about March 23, 1918, a decree was rendered by said county court revoking and annulling the probate of said will and the letters testamentary which had been issued to the executor named in such will. The respondent, Christine Ecklund, appealed from the last-mentioned decree, and that appeal is now pending in the district court of Cass county. The respondent, Christine Ecklund, thereafter moved in said district court that the petitioner be required to furnish security for costs on the ground that he was a nonresident. In support of the motion an affidavit was submitted setting forth the above-stated facts. The affidavit further stated that upon the hearing of the contest in the county court said Julius J. Ostlund testified under oath that he was a resident of the city of Minneapolis, Minnesota; that said Christine Ecklund did thereupon in said county court, by her attorney, demand and move that said petitioner be required to give security for costs;

that such motion was denied by the county court, and that no security for costs was furnished by the petitioner in said county court. The district court entered an order denying the motion, and Christine Ecklund has appealed therefrom. In this court the petitioner moves to dismiss the appeal on the ground that the order is nonappealable.

It is well settled that interlocutory orders are not appealable unless made so by statute. Stimson v. Stimson, 30 N. D. 78–80, 152 N. W. 132; Ryan v. Davenport, 5 S. D. 203, 58 N. W. 568. The appealable orders are enumerated in § 7841, Compiled Laws 1913. If the order involved in this case is appealable, it must be classified with those orders covered by subdivision 4 of this section, which grants an appeal from an order "when it involves the merits of an action or some part thereof." In fact it is not contended that the order falls within any of the other provisions of § 7841, supra. Does the order in question involve the merits of an action or some part thereof? We think not. The meaning of the phrase, "involves the merits of an action or some part thereof," has frequently been considered by the courts and legal writers of this country. The question was before this court in Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357. The court said: "The term 'merits' as used by the profession, when applied to actions, usually denotes the subject or ground of an action as stated in the complaint, or the grounds of defense as stated in the answer; and a trial of the merits of an action generally means the elicitation of evidence in support of the averments of fact set out in the pleadings. But the courts, in construing statutes governing appeals from interlocutory orders, have frequently enlarged this meaning, and have held that the phrase, 'involves the merits,' must be so interpreted as to embrace orders which pass upon the *substantial* legal rights of the suitor, whether such rights do or do not relate directly to the cause of action, or subject-matter in controversy." 9 N. D. 577.

The Encyclopedia of Pleading and Practice says: "Where statutes allow an appeal from interlocutory orders 'affecting a substantial right' or 'involving the merits,' *an order in the nature of a final judgment decisive of some question or point in the case is meant, as distinguished from mere rulings on matters of practice arising during the progress of the cause.*" 2 Enc. Pl. & Pr. 75.

And Corpus Juris says: "An order 'involving the merits,' within

the meaning of the statute, must be decisive of the question involved in the cause or of some strictly legal right of the party appealing as distinguished from mere questions of practice. The phrase, 'involves the merits,' has been construed by the courts to embrace orders which pass upon the *substantial* legal rights of the party complaining, whether such rights do or do not relate directly to the cause of action or subject-matter in controversy." 3 C. J. 452.

This court has held that the following orders are not appealable under subdivision 4, § 7841, supra: (1) An order refusing an application for judgment upon the findings of a jury (Persons v. Simons, 1 N. D. 243, 46 N. W. 969); (2) an order denying defendant's motion to dismiss the action, and granting plaintiff's countermotion for leave to amend the complaint (Strecker v. Railson, 19 N. D. 677, 125 N. W. 560); (3) an order in an action for damages on appeal from a judgment for plaintiff in a justice court, denying a motion by the defendant to reverse and set aside the judgment of the justice court upon the ground that the damages involved were for injury to real property, and that the justice court had no jurisdiction because the pleadings were not in writing and verified as required by law (Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676); (4) an order allowing an amended complaint to be filed (Holobuck v. Schaffner, 30 N. D. 344, 152 N. W. 660); (5) an order denying a motion to dismiss an action for non-prosecution (John Miller Co. v. Minckler, 30 N. D. 360, 152 N. W. 664).

The supreme court of our sister state South Dakota, in Ryan v. Davenport, supra, held that an order denying a motion to set aside the service of a summons was nonappealable. The court said: "An order setting aside the service of the summons would have affected a substantial right, as such order would, in effect, determine the action, and prevent a judgment from which an appeal might be taken. The effect of this order is not to determine the action and prevent a judgment; nor is it in a special proceeding, nor upon a summary application in an action after judgment; neither does it involve the merits of the action, or any part thereof. Orton v. Noonan, 32 Wis. 104; Rahn v. Gunnison, 12 Wis. 529. The overruling of an objection made to the jurisdiction of a court, or the denial of a motion to set aside the service of a summons on jurisdictional grounds, is not a final order affecting

a substantial right, and is not appealable under the provisions of our statute, nor reviewable in this court before the entry of final judgment. An order that involves the merits of an action is one that goes to its substance or subject-matter, and affects the justice of the cause; and it cannot be said that the order from which this appeal is taken is of that character." 5 S. D. 204, 205.

While the precise question presented in this case was not determined in any of the cases cited, the questions involved in Strecker v. Railson, and Whitney v. Ritz, and Ryan v. Davenport, supra, were somewhat analogous, and the reasoning adopted in those cases seems quite applicable to the instant case. Other courts, however, have determined the precise question involved in this case. And the authorities upon the proposition are thus summarized in Corpus Juris: "Although there are decisions to the contrary in some jurisdictions, the general rule is that no appeal will lie from orders requiring a party to give a bond or other security for costs . . . , or from orders refusing to require the giving of such security." 3 C. J. § 376, p. 540.

We are of the opinion that the order sought to be reviewed on this appeal does not involve the merits of an action, or any part thereof. It was merely an interlocutory order. It left the rights of the parties upon the merits of the matter entirely unadjudicated. It did not in any manner interfere with or impede appellant's right or means of presenting her side of the controversy. So far as the merits of the controversy are concerned, it is not before us, but still remains pending in the court below. In fact it is possible that the matter has been tried on its merits while this appeal has been pending. As was aptly remarked by the territorial supreme court (Harris Mfg. Co. v. Walsh, 2 Dak. 41–44, 3 N. W. 307): "Why should this court be burthened with this appeal at this time? For aught that can be made to appear legally and regularly to this court, while this appeal is pending, and under consideration and advisement, the defendant may have judgment upon the other issues in the case in the district court, and this court has been pursuing but a myth, a delusion, a mere nothing."

It follows from what has been said that the appeal must be dismissed. We express no opinion as to whether the contest of a will can be deemed an action within the purview of the provisions of our laws requiring a nonresident, before commencing an action, to furnish security for costs.

The court of appeals of Kentucky, in deciding a somewhat analogous question, has held to the affirmative. Cape v. Cape, 136 Ky. 625, 124 S. W. 869. The supreme court of California in deciding the identical question has held to the negative. Re Joseph, 118 Cal. 660, 50 Pac. 768.

Appeal dismissed.

GRACE, J. I concur in the result.

C. J. ANDERSON, Respondent, v. WALTER JACOBSON, Appellant.

(172 N. W. 64.)

In an action to recover damages resulting from a fire alleged to have been occasioned by the negligent operation of a threshing machine engine, near the barn of the plaintiff, it is *held:*

Damage — negligence.

1. The plaintiff's acquiescence in the defendant's act of driving a threshing rig through the plaintiff's pasture and barn yard, and near the windward side of the barn, on a windy day, does not constitute contributory negligence, as a matter of law.

Damages — exclusion of testimony.

2. It was not error for the trial court to deny the defendant's motion to exclude testimony, under the allegation of damages for personal injuries occasioned by fighting the fire.

Damages — opinion evidence.

3. It was not error for the trial court to exclude opinion evidence in response to questions which would have required the experts to judge of the credibility of the other witnesses testifying in the case.

Damages — technical error in instructions to jury.

4. The instructions are examined and, though found to be technically erroneous, it is *held* that in giving them, reversible error was not committed.

Opinion filed April 1, 1919.

NOTE.—On negligence with respect to spark arresters on threshing machine or similar stationary engines, see note in 1 L.R.A.(N.S.) 530.

Action for negligence; appeal from District Court, La Moure County, *Coffey*, J.

Affirmed.

Davis & Warren, for appellant.

"Where plaintiff's evidence established his contributory negligence defendant may avail himself of same by asking for advised verdict, irrespective of the allegations of the answer." Mellon v. Great Northern R. Co. 134 N. W. 116; 29 Cyc. 605.

"When both parties have been negligent there can be no recovery." 20 R. C. L. pp. 99, 107, 117.

"No liability is predicable of the injury when it appears that the injured person's knowledge of the danger surpassed or equaled that of the defendant." Ibid.

"Knowledge of facts and acquiescence in acts is contributory negligence." Scherer v. Schlaberg, 18 N. D. 421.

"Where the plaintiff's own evidence conclusively shows contributory negligence on his part, a nonsuit will be granted. Hart v. Peters, 13 N. W. 219; Martin v. Bishop, 18 N. W. 337; Hill v. Minnesota Street R. Co. 128 N. W. 831; Farmers Mercantile Co. v. N. P. R. Co. 146 N. W. 550.

"It makes no difference that negligence chargeable to the plaintiff is slight in comparison with the negligence of the defendant." 20 R. C. L. p. 101; Birschall v. Detroit R. Co. 73 N. W. 551; Martin v. Bishop, 18 N. W. 337; Hill v. Minnesota Street R. Co. 128 N. W. 831.

"It was error to submit the case to the jury when plaintiff failed to establish some circumstance from which defendant's negligence may be fairly inferred, and in which the plaintiff himself was not a willing actor." Knight v. Willard, 26 N. D. 140; Garreghty v. Hartstein, 26 N. D. 148; Sherlock v. Soo R. Co. 24 N. D. 40; West v. N. P. R. Co. 13 N. D. 221; Miller v. Railway Co. 115 N. W. 794.

"Motion is proper method to have pleading made definite when material facts are stated in the alternative." N. D. Comp. Laws 1913, § 7459; Johnson v. G. N. R. Co. 12 N. D. 423.

"Defendant's opinion as to the safety of operating his engine at the time and place should have been admitted for what it was worth." Jones, Ev. 2d ed. p. 191; Cook v. Doud Sons & Co. 133 N. W. 40; Underwood v. A. W. Stevens Co. 112 N. W. 487.

Doane & Porter for respondent.

Where the undisputed facts are of such a nature that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury. Farmers Mercantile Co. v. Northern P. R. Co. 27 N. D. 302, 146 N. W. 550.

The case of Rober v. Northern P. R. Co. 142 N. W. 22, is approved by Farmers Mercantile Co. v. Northern P. R. Co. supra, and uses the following words: "The burden of proof of contributory negligence is upon the defendant." Kunkle v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 112 N. W. 972; Pyke v. Jamestown, 15 N. D. 157.

Those persons who are skilled in mechanical matters are competent to testify as to relevant facts which are familiar in the mechanical arts. 17 Cyc. 71–73.

BIRDZELL, J. This is an appeal from a judgment for $1,970.26 in an action to recover damages occasioned to the plaintiff by fire communicated from an engine owned and operated by the defendant. The appeal is also taken from an order denying a motion for new trial.

On October 10, 1917, about noon time, the defendant was engaged in moving his threshing rig, and, to better serve his convenience, instead of keeping upon the public highway, he drove the engine through a wire fence surrounding the plaintiff's pasture, went in a northerly direction in the pasture until he reached a creek, the crossing of which gave him some trouble and resulted in damaging the blower on the separator, which he was drawing behind the engine. Upon leaving the creek, which was as nearly as we can ascertain from the record some 15 to 25 rods from the plaintiff's barn, the engine had to climb a grade of about 20 per cent. While climbing the grade it approached the plaintiff's barn from a southeasterly direction, passing the southeast corner of the barn at a distance of some 30 or 35 feet, and going through the gate at the southwesterly corner about 20 or 25 feet from the barn. The engine was burning coal, and the wind was blowing from the south, so that sparks might readily be blown from the engine through the hay door in the east end of the barn, which was open. There were also some small openings near the center of the roof of the barn for ventilating purposes. The plaintiff was eating dinner when he first learned of the presence of the defendant with his threshing rig in the pasture,

and he went down to the creek where the defendant was having some trouble, and rode all or part of the way from the creek to the gate through which the defendant drove his rig. The engine had a good fire and was compelled to labor some to get up the grade. It was not provided with a spark arrester, although one had formerly been a part of its equipment. After the defendant drove the rig through the gate near the southwest corner of the barn he was invited into the plaintiff's house for lunch. About ten minutes later the barn was discovered to be on fire, and in the course of a short while it was completely destroyed. The barn contained a large quantity of hay as well as some grain, an automobile, machinery, and five horses; three of the horses were consumed by the fire; one was burned so badly it had to be killed, and the other is still living though injured. This action is for the recovery of the plaintiff's damages in excess of the insurance. In addition to the above allegations of damage the plaintiff claims damages for mental anguish and physical pain suffered from burns received in fighting the fire.

It is first contended by the appellant that the court erred in not directing a verdict for the defendant for the reason that when the evidence is considered in the light most favorable to the plaintiff, it appears that he was guilty of contributory negligence. We cannot so read the evidence. It is true that the plaintiff testified that he was a man of considerable experience in the operation of steam engines, and that he should, therefore, have had practically the same appreciation of the dangers incident to the operation of this engine under the particular circumstances as the defendant, and it may also be considered that the plaintiff's conduct amounted to the granting of a license to the defendant to cross his pasture and barn yard with the rig; also that the plaintiff had knowledge of the absence of a visible *spark arrester,* but all of these circumstances combined do not amount, as a matter of law, to an act of negligence on the part of the plaintiff contributing to the fire. The defendant was in the uninterrupted and undisputed control of the engine, and was the one primarily responsible for its safe operation. For aught the plaintiff knew it might have been properly equipped with a nonvisible spark arrester. We cannot assume, as a matter of law, that the engine might not have been so carefully operated by the plaintiff under the existing conditions, as to have entirely

avoided the fire. No affirmative act of the plaintiff is shown to have contributed in the slightest degree.

It is next contended that the court erred in denying the defendant's motion to exclude all testimony under paragraph 4 of the complaint. This is the paragraph containing the allegations of mental suffering incident to burns received in fighting the fire. The defendant contends that it is prejudicial to his case to have the plaintiff's injuries detailed to the jury. The court in its instructions did not refer to the element of damages embraced in this paragraph of the complaint, and the verdict is so moderate in amount, and so amply supported by the testimony relating to the value of the items of property destroyed, concerning which there was little or no dispute, that it is not at all likely that this element was considered by the jury. In any event we are not satisfied that any error would have been committed by the trial court in submitting this element of damage to the jury along with the others. See Wilson v. Northern P. R. Co. 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429. Where the plaintiff is injured both in his property right and in his right to bodily security, and such injuries result from the same cause, he is not bound to seek reparation in separate actions. King v. Chicago, M. & St. P. R. Co. 80 Minn. 83, 82 N. W. 1113, 50 L.R.A. 161, 81 Am. St. Rep. 238; Comp. Laws 1913, § 7466; 1 C. J. pp. 1058 and 1086.

In the amended complaint it is alleged that the defendant "carelessly allowed burning coals and fire to be thrown or dropped from said engine." The defendant moved that the plaintiff be directed to elect as to the manner in which the fire occurred,—as to whether from coals which were thrown from, or coals which were dropped from, the engine. Error is predicated upon denial of the motion. The argument in support of this assignment is too technical to merit consideration.

The plaintiff and one Fredenberg were allowed to testify as experts concerning the operation of engines of the character of the one operated by the defendant. They both qualified by showing that they had had years of experience as engineers of such engines. We have carefully examined their testimony and fail to find any prejudicial error in the admission of such opinion evidence as they were permitted to give. Error is also predicated upon the exclusion of certain opinion evidence that was sought to be elicited from the defendant and one Herbert

Peterson. The questions, however, were not asked in proper form. Instead of being put in the shape of hypothetical questions so that the jury would be given the benefit of the opinions of the witnesses, under conditions stated, it was sought to have the witnesses answer directly the ultimate questions which the jury was to pass upon.

The following questions are illustrative of the erroneous method of examination pursued:

Have you heard the testimony in this case?

Yes, sir.

I ask if, in your opinion, it was safe and proper to operate the threshing machine engine, and to drive by the barn with it under the conditions in which Mr. Jacobson drove this machine, if it was a proper method of operating the engine.

This method of examining is so clearly improper that it is unnecessary to cite authorities condemning it.

Errors are also predicated upon the instructions. The court left it to the jury to say whether the "plaintiff had knowledge of the appliances of the said engine, and the method of handling the same."

It is true that the plaintiff did profess to have some knowledge of engines and of some of the appliances of the particular engine. It is also true that he did not profess to have a great degree of familiarity with the engine in question, and his acquaintance with it was only from casual observation. The defendant contended that the plaintiff's knowledge of his engine and its appliances was more extensive than the plaintiff was willing to admit. In this state of the record, it was clearly proper to submit the question to the jury as it was submitted.

In a portion of the instructions complained of, the court directed that if the jury should find "by reason of said acts the plaintiff sustained an injury and that said act was the proximate cause of the injury, such would constitute contributory negligence, and the plaintiff could not recover." The instruction was not correct in that it stated in substance that contributory negligence, sufficient to deprive the plaintiff of the right to recover, must have been the proximate cause of the injury. Such is clearly not the law, but it is by no means apparent that the defendant was prejudiced by the erroneous statement. We do not think it could have misled the jury, since in the immediately

following paragraph the jury was again told: "If you so find that the plaintiff was guilty of contributory negligence, or, in other words, that the plaintiff committed some negligent act which the defendant sets up, and to which I have called your attention, then the plaintiff cannot recover, though you may find that the defendant himself was guilty of negligence."

We have examined the record in the light of the other assignments of error, and we are of the opinion that no error prejudicial to the defendant was committed. The judgment and order appealed from are affirmed.

JAMES J. DUFFY, Respondent, v. SEVERIN JOHNSON, Appellant.

(172 N. W. 237.)

Appeal and error — new trial.

1. Upon an appeal from a judgment and an order denying a new trial, *held* the evidence is sufficient to support the judgment.

Contracts — lease of horses and machinery — notice to quit using same — plaintiff justified in hiring other horses.

2. Where one had leased his farm and personal property, consisting of horses and machinery, to another with the understanding that the horses might be used during the time of the lease in doing other work for other persons and in farming other lands than that leased from the lessor, with the further agreement that the lessor was to receive one sixth of such earning, and, upon the lessee proceeding to do such other work and harvesting crops other than those on the land leased, is notified by the lessor to refrain from doing so, and, upon the lessee's refusal, the lessor brought an action in claim and delivery and took possession of the personal property in question, and the lessee rebonded, and the lessor, after such rebonding, again served notice upon the lessee not to take the horses off the farm for the purpose of doing the other work and the lessee complied with such order; it is *held* he could rely upon such second order given after rebonding and receiving possession, and comply therewith, and that it was not necessary there be evidence of threats of violence against him, or that he be placed in fear before he would be justified in hiring other horses to do the work, instead of using the ones leased, and paying for

their use and feed, with which to do the work of the horses he was prevented from using by the lessor.

Opinion filed April 1, 1919.

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

Johnson & Meilke and *Greenleaf, Wooledge, & Lesk*, for appellant.

McGee & Goss, for respondent.

GRACE, J. Appeal from the district court of Ward county, K. E. Leighton, Judge.

This is an action by the plaintiff against the defendant to recover damages for the violation of certain terms of an oral lease of certain land and personal property. The undisputed facts, or as substantially proved by the evidence, are as follows: The defendant was the owner of a certain farm in McLean county, North Dakota. In the fall of 1916, the plaintiff and the defendant entered into a contract by the terms of which the plaintiff leased defendant's farm on shares for the farming season of 1917. Under the terms of the lease, the defendant was to furnish the plaintiff with ten head of horses for use on the defendant's farm. The plaintiff claims that the horses were to be furnished also for use on other places and farms as plaintiff might see fit to use to work the same for himself and others.

This contention finds ample support in the evidence. Plaintiff fully performed his agreement with defendant with reference to farming the land which he leased from the defendant. Plaintiff, during the harvest season of 1917, undertook the performance of and did perform certain labor for other parties in which he desired to use the defendant's horses, which, under the terms of the oral lease, he had a perfect right to do. At the time he was about to enter upon the performance of such work with such horses, he was notified by defendant not to take the horses off the defendant's farm. Plaintiff insisted on taking the horses and performing such work for other parties. Thereupon the defendant commenced an action in claim and delivery, and the sheriff, executing the writ therein, took the possession of the horses in question from plaintiff on the 25th day of August, 1917, and during the time when plaintiff was using said horses in cutting grain for one Bondley. There-

after the plaintiff rebonded and said horses were returned to defendant. After the return of the horses to plaintiff, the defendant again notified him not to take the horses off defendant's farm. At the time defendant by the sheriff took the possession of the horses from plaintiff, the plaintiff procured other horses to do the work which he was doing for other parties, for the use and feed of which he had to pay, as shown by the testimony. After the return of defendant's horses to the plaintiff and after the second notice by defendant to plaintiff not to take the horses off defendant's farm, plaintiff did not do so, but left the horses upon the defendant's farm, and fed and took care of them, and did not work them, but hired and used other horses to do the work for other parties, who were Bondley, and also for a party by the name of Dale. The plaintiff and one Gage had also rented from one Dale other land to the amount of about 400 acres. All of this work was outside of and exclusive of the work done upon defendant's farm in pursuance of the terms of the oral lease. The plaintiff also claimed $140 for the use of a new header which he bought and used in harvesting the crop upon the land he leased from the defendant.

The terms of the lease were that defendant was to furnish all the seed, machinery, and horses with which to farm said land, and the plaintiff was to do all the work and receive one third of the grain so raised. It seems the grain in 1917 was very short, and, in order to save the grain, it was necessary to use a header instead of a binder. Whether the defendant refused to furnish the header, and whether the plaintiff was justified in procuring another header to cut the grain, were questions of fact for the jury, which have been decided in favor of the plaintiff. The jury returned a verdict in favor of plaintiff, and a judgment was entered for $549.44. A considerable share of this judgment is for the hire and feed of the horses procured by the plaintiff to do outside work for various parties. It is also shown by the evidence that the defendant was to get one sixth of whatever was earned by such outside work. This credit has been allowed defendant by plaintiff. There is sufficient evidence to support the judgment, and there is really but a single question involved in the case, which is: After the horses were rebonded by plaintiff, and after being so rebonded and taken back into plaintiff's possession, and upon the defendant again notifying plaintiff not to take them off the place to do other work, was

the plaintiff justified in not using the horses and in hiring other horses to take their place? We think he was justified in not using defendant's horses after notice not to do so after the horses had been returned to plaintiff's possession by rebonding. We do not think it necessary that the plaintiff would have to show he was prevented from using such horses by force, or that he desisted from using such horses by reason of threats of violence, etc., and that by reason of such threats, he was put in fear and did not work the horses. He had every reason to believe, after the second notice, that if he undertook to use such horses, he would, in some manner, be prevented from doing so by the defendant. The defendant had already taken the possession of them from him once, thus compelling the plaintiff to rebond, and from this plaintiff had every reason to believe the defendant, in some manner, would make his second notice good. It must also be remembered it was harvest time, the crops were being harvested, and there was no time to be lost, and we think the plaintiff was fully justified in hiring the other horses and proceeding with the work which he had a right to do. Under the contract, he had a right to perform outside work; he had a right to use defendant's horses in doing so, and all the defendant was entitled to receive was the one sixth of what was earned, and that the plaintiff was willing to give him. The verdict and judgment are sufficiently sustained by the evidence. There was no error in the instructions given by the court. There is no other error in the record.

Judgment is affirmed, with statutory costs on appeal.

CHRISTIANSON, J. I dissent.

STATE OF NORTH DAKOTA, Respondent, v. O. S. LESSLE-YOUNG, Appellant.

(172 N. W. 814.)

Indictment and information.

1. Where one is prosecuted for a crime and a criminal information is filed in which the acts constituting a crime are alleged, it is incumbent upon the

state to prove, beyond a reasonable doubt, each and every material allegation of the information.

Indictment and information — failure of proof.

2. An information was filed against the defendant charging him with obtaining money and property under false pretenses. Evidence examined and *held* to show a failure of proof of material allegations contained in the information.

Opinion filed April 1, 1919.

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

J. E. Burk and *E. T. Burke*, for appellant.

William Langer and *Wm. G. Owens*, for respondent.

"The information may be amended." Comp. Laws 1913, § 10,633; State v. Wood, 24 N. D. 156.

"As to what constitutes false pretense." State ex rel. Spriggs v. Craig, 36 N. D. 162, and cases cited; State v. Merry, 20 N. D. 349, and cases cited; State v. Stewart, 9 N. D. 409, 6 L.R.A.(N.S.)366–370.

GRACE, J. Appeal from a judgment of the district court of Divide county, K. E. Leighton, Judge.

This is an action in which the defendant was, in the district court of Divide county, tried and convicted for obtaining money and property under false pretenses. A motion for a new trial was made and denied. Judgment was entered and an appeal duly perfected therefrom to this court. A long and involved information was filed, which was in what is termed two counts,—one of which charges the obtaining of money and property from one Arneson, and the other, money and property from one Gulson. The information was amended striking out the second count with reference to the obtaining of money and property under false pretenses from Gulson. To the information, as amended, the defendant interposed a demurrer which was overruled, and the defendant was tried by the court and jury upon the allegations of the amended information. A demurrer having been interposed to the information, it will be necessary to set the information out at length. Omitting formal parts, it is as follows:

"That heretofore, to wit: On the 17th day of August, in the year of our Lord one thousand nine hundred and fifteen, at the county of Williams, in said state of North Dakota, one O. S. Lessleyoung, late of said county of Williams and state of North Dakota, did commit the crime of obtaining money and property under false pretenses, committed as follows, to wit:

"Count one

"That at said time and place the said O. S. Lessleyoung then and there devising and intending by unlawful ways and means, and by false and fraudulent pretenses and representation to obtain and get into his custody and possession, money and notes of Halvor M. Arneson, with intent then and there had in him the said Lessleyoung to cheat and defraud, and thereby then and there to cheat and defraud the said Halvor H. Arneson of the same, did then and there wilfully, unlawfully, and feloniously, knowingly and designedly, falsely and fraudulently, pretend and represent to the said Halvor M. Arneson that the Consumers Service & Supply Company of Minneapolis was a co-operative organization of farmers and buyers throughout the Northwest, principally of the states of Minnesota, North and South Dakota, and Montana, organized for the purpose of mutual benefit and service for the purchase of farmers' supplies and the selling of farm products, with its principal office and headquarters in the city of Minneapolis, and that the stock of the said corporation and organization was of the worth and value of thirty dollars ($30) per share, and that the said defendant Lessleyoung was the duly authorized, recognized, and empowered officer, solicitor, and agent of the said Consumers Service & Supply Company, and that he had authority to sell the farmers of the Northwest and particularly to the said Halvor M. Arneson five shares of stock at the sum of $30 per share, for which the said Halvor M. Arneson was to pay to the said organization one hundred fifty-two dollars ($152), and that it was necessary, to become a member and to obtain such stock, for each and every subscriber and member, and particularly the said Arneson, to sign a proposed contract, which, when signed and accepted by the said represented organization, would permit all such subscribers, and particularly the said Arneson, to purchase goods, wares, merchandise, groceries, clothing, farm machinery, and farm supplies, and in fact any commodities or goods which the said Arneson

may desire, together with attorneys,' veterinary's, and doctor's services at greatly reduced and discounted charges, and as a part of such false and fraudulent pretenses and representations, the said Lessleyoung did then and there exhibit to and in the presence of the said Arneson, catalogues, pictures, printed matter, price lists, and statements, which the said Lessleyoung did then and there falsely and fraudulently offer and pretend the same to the said Arneson to be the authorized original and genuine catalogue and sale sheet of the said Consumers Service & Supply Company; and did further falsely and fraudulently state and represent and pretend to the said Arneson that all of the same and all of such statements were true and genuine and of the property and powers of the said co-operative organization and corporation of farmers, and that if the said Arneson purchase such stock he would become a member of such Consumers Service & Supply Company, and, by reason of such membership, participate in the sale and profits of the same, and be able to purchase and obtain all goods, wares, and supplies at a greatly reduced rate, and particularly of about 50 cents on the dollar of the cost if purchased from a local merchant in his community, whereas in truth and in fact the said O. S. Lessleyoung did not represent an organization or corporation or any business excepting a cousin, one S. P. Lessleyoung, and that there was no such an organization of farmers legally organized or existing under the laws of the state of Minnesota or North Dakota, and that the said O. S. Lessleyoung had no power, trust, or authority to sell stock in any such organization, and that such catalogues, price lists, pictures, and other printed matter so shown and exhibited in the presence of and to the said Arneson by the defendant Lessleyoung, were fictitious, old, and out of date catalogues of a fraudulent company theretofore existing and known as the Farmers General Service Company, which was a false and fictitious name used by one S. P. Lessleyoung and the defendant, O. S. Lessleyoung, for fraudulent purposes; and the said service contract was false and fraudulent and did not give to the said Arneson any particular discount or credits, and that he could not purchase goods from the said defendant or such organization cheaper than elsewhere, all of which the said O. S. Lessleyoung well knew, and the said Halvor M. Arneson then and there believing the said false and fraudulent pretenses and representations so made and as aforesaid, and being influenced by

such statements, catalogues, pictures, price lists, and statements of the said defendant, and believing all of the same to be true, and being deceived thereby, was induced by reason of the same and all of the same and such false and fraudulent pretenses and representations so made as aforesaid to deliver, and did then and there deliver, to the said O. S. Lessleyoung cash and promissory notes, which notes were executed by said Arneson in the sum of $150 and of the then and there value of $150, and of the foods, moneys, property, and credit of the said Arneson, and the said Lessleyoung then and there by means of the said false and fraudulent representations as made as aforesaid, did then and there wilfully, unlawfully, and feloniously, knowingly, designedly, and fraudulently, receive and obtain from the said Halvor M. Arneson the said promissory notes hereinbefore described and herein set forth, with intent then and there had in him the said O. S. Lessleyoung to cheat and defraud the said Arneson of the same, and the said Lessleyoung did then and there wilfully, unlawfully, and fraudulently take and carry the same away.

"Whereas, in truth and in fact the said pretenses, pictures, and representations so made and presented to the said Arneson as aforesaid was and were then and there in all respects utterly false, untrue and fraudulent, and whereas in truth and in fact the said defendant Lessleyoung well knew the said pretenses, pictures, and representations so made by him as aforesaid to be utterly false and untrue and fraudulent at the time of making the same, and the said defendant Lessleyoung then and there in the manner and by the means aforesaid did then and there wilfully, unlawfully, and feloniously, fraudulently, knowingly, and designedly cheat and defraud the said Arneson of the said money and notes hereinbefore described and set forth, all to the great damage of the said Halvor M. Arneson."

Assuming that the information charged public offense of which there is considerable doubt, we will pass to the consideration of one of the principal assignments of error, that is, that the court erred in not advising a verdict of acquittal. Under this head may be considered all the other errors assigned by the defendant. It is an elementary principle of criminal law that where one is accused of crime and an information is filed in court to which the defendant pleads not guilty, and the case proceeds to trial to a court and jury in the ordinary and reg-

ular manner, it is incumbent upon the state to prove beyond a reasonable doubt, the truth of each and every material allegation of the information. In the case at bar, the information alleges in substance that defendant made certain representations to one Arneson; that such representations were false and fraudulent and made with the intent to deceive the said Arneson; that defendant by means of such false pretenses, while Arneson relied thereon, obtained certain money and property from him. The information contains many other material allegations to the same effect, all of which will appear from the information itself. Conceding that the evidence shows the defendant made certain representations to Arneson, there is no competent evidence in the record to prove the very essence of the offense charged; that is, that such representations were false, fraudulent, and made with intent to deceive and defraud Arneson. There was a complete failure of proof in this respect. It would be a useless waste of time and serve only to make this opinion of great length to include herein a large share of the evidence for the purpose of demonstrating proof of what we have said with reference to the failure of proof of the material allegations of the information. There being no competent proof of the material allegations of the information in the respect above stated, it must follow that the court should have advised a verdict of acquittal. It did not do so and in this it was in error. It is clear there is no competent evidence to support and prove the material allegations of the information.

The judgment appealed from is reversed and the defendant's bail is exonerated.

CHRISTIANSON, Ch. J. (concurring specially). The false pretenses involved in this case are certain oral statements, which it is claimed the defendant made to one Arneson; and by means of which, it is charged, he obtained from Arneson certain notes. Arneson testified that the statements were made, and that in reliance thereon he executed and delivered certain notes to the defendant. But Arneson's testimony is not corroborated in any manner whatsoever. Hence, the state has failed to establish its case by the degree of proof required by § 10,842, Compiled Laws 1913, which provides: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense,

obtained the signature of any person to a written instrument, or having obtained from any person any money, personal property or valuable thing, the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, *unless the pretense, or some note or memorandum thereof, is in writing, either subscribed by, or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances. . . .*"

In view of the rule announced in this statute the verdict in this case is clearly against the evidence.

JESSE WATSON, Respondent, v. EDWARD NELSON, Appellant.

(172 N. W. 823.)

Damages — instructions of trial court.

1. Certain instructions of the trial court examined. *Held* they do not contain prejudicial, reversible error.

Damages — value.

2. The plaintiff having lost certain personal property by fire, which loss was caused by the defendant negligently setting on fire certain straw stacks on his premises from which the fire spread and consumed and destroyed plaintiff's property. *Held* the plaintiff is a competent witness as to the value of his own property without showing any further qualification than ownership; that though part of his testimony was incompetent, it remains in the record unless proper objection is made and sustained to its reception, or unless stricken out upon a proper motion.

Damages — sufficiency of evidence.

3. *Held*, further, that there is competent evidence in the record, aside from the incompetent testimony admitted, to sustain the verdict of the jury.

Opinion filed April 1, 1919.

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

Bradford & Nash, for appellant.

The court in instructing the jury shall only instruct as to the law

of the case, and must stop where in any reasonable view of the evidence there is room for debate as to where the truth lies. 14 R. C. L. 738–740; N. D. Comp. Laws 1913, § 7620; 2 Thompson, Trials, p. 1535.

An instruction referring to a controverted fact "as shown by controverted evidence" is erroneous. Marble v. Lyps, 82 Ala. 322, 2 So. 701; Commercial & F. Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34; People v. Casey, 65 Cal. 260, 3 Pac. 874; Weyburn v. Kipps, 63 Mich. 79, 29 N. W. 517; Hill v. Graham, 72 Mich. 659, 40 N. W. 779.

"An instruction that the evidence tends to show certain disputed facts is erroneous." Yundt v. Hartrunft, 41 Ill. 9; Junction City v. Blades, 1 Kan. App. 85, 41 Pac. 677; Davis v. Gerber, 69 Mich. 246, 37 N. W. 281.

Palda, Aaker, & Greene, for respondent.

GRACE, J. Appeal from a judgment of the district court of Ward county, K. E. Leighton, Judge.

This appeal is from a judgment of the district court of Ward county. Complainant states a cause of action in negligence for the destruction of certain of his personal property by fire. Such property was then situated on section 24, township 154, range 86, upon which plaintiff then lived. The fire is alleged to have been caused by the defendant on or about the 9th day of April by wilfully, negligently, recklessly, and in violation of law setting fire to certain stacks of straw on defendant's premises without properly protecting the same and without taking proper precautions to prevent the fire from spreading, and that by such negligent acts on the part of the defendant the fire escaped from the stack, over the premises of others and upon the premises of plaintiff, setting fire to the buildings on plaintiff's leased premises. Plaintiff alleged the destruction by such fire of his farm machinery, wagons, and other implements, household goods, hogs, poultry, and other personal property mentioned in the complaint. The defendant interposed a general denial and demanded a dismissal of the action. The case was tried to the court and jury. The jury returned a verdict in plaintiff's favor for $972. Appellant has assigned several errors which are grouped under two points. Point 1 refers to alleged error committed by the court in a certain instruction; point 2, to errors claimed to have been committed by the trial court in allowing the de-

fendant to testify in the manner he did as to the value of the property destroyed. We will first consider the instruction complained of. It is as follows:

"In this case, the plaintiff is asking for damages from the defendant by reason of loss by fire, and the plaintiff for his cause of action alleges he was in possession of a certain farm southwest of Deslacs, and was engaged in stock and grain raising, and was in possession of certain live stock and stock of machinery, household goods, etc.; that about April 9, 1915, the defendant set fire to a straw stack, which fire got away and resulted in the destruction of certain of plaintiff's property *as is shown by the evidence,* and the plaintiff claims by reason thereof damages in the sum of $2,000."

It is claimed by the appellant that in the use by the court of the words, "as is shown by the evidence," the court assumed facts to be true which were in issue. As we view it, the court, in that instruction, was simply stating what the plaintiff alleged in his complaint; that is, that the plaintiff alleged that about April 9, 1915, defendant set fire to a straw stack, which fire got away and destroyed certain of plaintiff's property. The court, by that instruction, did not say that the defendant set the fire which destroyed plaintiff's property. The words, "as is shown by the evidence," were no doubt used by the court to direct the attention of the jury to the evidence to determine the identity of the property destroyed, which property was referred to in a more or less general way in the complaint, without describing each and every article of property separately therein. Appellant also complains of the following language of the court:

"However, should the jury fail to find that the fire, which destroyed plaintiff's property, was the same fire *set by plaintiff* at the time he originally burned the stacks, and fail to find that he thereafter set the fire, then you should find for the defendant for a dismissal of the action."

It is apparent that where the word "plaintiff," above underscored, is used, the word "defendant" should have been used. This instruction, standing alone, possibly might be prejudicial error; for, to a certain extent, it assumes that the fire was set by defendant. Whether the fire was set by defendant is a disputed question of fact for the jury to decide. We think, however, that the part complained of must be read

together with that which immediately precedes it, which referred to the same subject-matter, which is as follows: "Should the jury find that the defendant set the fire which caused the destruction of the property of plaintiff, then I charge you that the defendant would be liable for the damages proximately resulting to plaintiff from such fire by reason of the burning of the property above referred to."

When the instructions are read together in the order in which they were given by the court, we think they were not misleading to the jury; that no prejudice resulted to the appellant thereby. The last instruction complained of was given just preceding the other instruction complained of, and not subsequent to it, and when placed and read in the proper order it appears to us would be readily understood by the jury, and would, in no way, prejudice their minds. The court was not undertaking to weigh any evidence nor speak of established facts. It was only telling them what the law would be in case they found certain facts to exist. We are clear that under point 1 there was no error.

Under point 2 may be considered the remainder of the errors assigned which relate to the evidence of the defendant as to the value of the articles burned. It is claimed by the appellant that the sole evidence of value is that wherein the plaintiff testified what the articles which were burned were "worth to him," and not what the articles were worth at the time and place of the fire. Under the circumstances in this case and the state of the record, we are satisfied there is no real merit in this contention. Plaintiff was sworn as a witness in his own behalf, and upon direct examination testified fully, fairly, and without equivocation as to the value of each of the articles which were burned. Toward the close of his direct examination, he testified that the household goods, groceries, and meat destroyed by the fire were worth about $1,000. This was after he had largely testified to the value of the major part of the articles separately.

Upon cross-examination the plaintiff was asked the following questions:

Q. You have testified that this stuff was worth $1,000?
A. It was worth that much to me.
Q. That is what you mean; it was worth that much to you?
A. Yes.

The appellant then moved that all testimony of the witness with

respect to value be stricken out on the ground of no foundation laid in the case for his testimony, as to value. This motion was overruled. The witness was then taken, in his cross-examination, over most of the ground covered in the direct examination, and again testified, under cross-examination, as to the separate value of most of the articles. At the close of his cross-examination the defendant, in substance, testified that he was testifying as to what the property destroyed was worth to him. No other objection was made to the testimony than that above stated. At the close of all the testimony, the appellant moved to strike out the testimony with reference to the value of various articles, upon the ground that there is no foundation laid.

We are of the opinion that the objection that there was no foundation laid for certain introduction of this testimony was properly overruled. This objection went to the qualification of the witness only. The plaintiff, being the owner of the property destroyed, was fully qualified to testify as to the value of such property, it appearing he was then owner thereof. The objection that there was no foundation laid for the plaintiff's testimony as to value is, therefore, without merit. The objection which should have been made should have had reference to the competency of the evidence. If the evidence with reference to value was incompetent to prove value, the objection should have been to that effect. What the property destroyed was worth to the plaintiff was certainly incompetent evidence, but unless the same were excluded or sought to be excluded by proper objection timely made, or upon the ground of its incompetency stricken out upon motion, it would remain in the case. Incompetent evidence may be admitted if no proper objection is made to its reception. It is clear, in this case, no such proper objection was made, and that evidence, which is manifestly incompetent, remains in the record with that which was competent. There is plenty of evidence in the record aside from the incompetent testimony to establish the value of the articles burned at the time and place of the fire. The plaintiff's testimony in this regard is quite conclusive. Aside from this, there is a bill of particulars marked exhibit A, which was in evidence. It was made by the plaintiff upon the demand of the defendant; it was made under oath and was an exhibit in the case.

The plaintiff also claimed damages by reason of the burning of the old grass on his pasture land. After showing that such old grass, at the

time of the year the fire occurred, was valuable for feed, and that it would be a month and twenty-one days before the new grass would come, he testified that the value of the old grass would be about $.75 per acre. The whole amount of damages awarded the plaintiff was as above stated. We are of the opinion that the evidence fairly shows that the verdict is abundantly sustained by the evidence. The jury must have found that the defendant set the fire. It must have also found that the fire thereafter spread, reached plaintiff's farm, and destroyed the property in question. There is no competent evidence to controvert the value of the property as fixed by the plaintiff. We have examined all the errors assigned in this case and find no prejudicial, reversible error in the record.

Judgment is affirmed, with statutory costs on appeal.

ERASTUS A. WILLIAMS, as Executor of the Last Will and Testament of Dan Williams, Deceased, Respondent, v. MRS. BETSA CLARK, Appellant.

(172 N. W. 825.)

Wills — action to determine adverse claims to a certain note — mortgage and assignment of decedent's property.

1. In an action to determine title and adverse claim to a certain note, mortgage, and assignment between Erastus A. Williams, who claimed title thereto as sole devisee in the will of his brother, Daniel, to whom the note was payable and who during his lifetime was the owner of same and the mortgage securing it, and Mrs. Betsa Clark, an acquaintance of Daniel Williams, she having obtained possession of the note and mortgage and claimed to have an

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NOTE.—On competency of witness to testify to possession of note, deed, or other articles at one time in possession of the decedent, where witness would be incompetent to testify directly to a transaction by which it is claimed decedent parted with his possession, see note in 45 L.R.A.(N.S.) 583, where a majority of the cases hold that a witness who is incompetent to testify directly to the transaction by which it is claimed decedent parted with his possession is also incompetent to testify as to his possession of an instrument or other property during the lifetime of the decedent, where such evidence is offered for the purpose of establishing a state of facts from which a delivery by the decedent may be inferred.

alleged assignment of the mortgage, the trial court found that Erastus A. Williams was the owner of the note and mortgage, and that the same had never been transferred to Mrs. Betsa Clark; *held* that the findings of the trial court in this regard are sustained by the evidence.

Wills — introduction of testimony under subdivision 2 of § 7871, C. L. 1913.

2. Subdivision 2 of § 7871 provides that "in civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party." The court properly prohibited the defendant and her witnesses from giving any testimony violative of the above section.

Wills — execution and proof of blank assignment and mortgage — evidence as to insertion of name in blank assignment.

3. Daniel Williams executed an assignment in blank of the mortgage in question. The note, mortgage, and assignment came into the possession of the defendant. The blank assignment became completed in form by the insertion therein of the name "Mrs. Betsa Clark." Defendant claims those words were written in the assignment in the handwriting of Daniel Williams, and adduced testimony to that effect. Plaintiff introduced competent testimony tending to prove that the words "Mrs. Betsa Clark" were not in the handwriting of Daniel Williams, but in that of defendant. The court found there was no transfer of the note, interest coupon notes, or mortgage. That finding is supported by the evidence.

Pleading — filing amended answer — discretion of court in granting amendment.

4. Under the circumstances in this case, the refusal of the court to grant permission to file an amended answer at the time of the trial rests upon the principle of whether the amendment should have been allowed in furtherance of justice. In this case, it is clear the granting of the amendment would not have been in the furtherance of justice. The court had the discretion, under the circumstances, to either grant or refuse the amendment. It refused it and in this there was no abuse of discretion.

Opinion filed April 4, 1919.

Appeal from the District Court of Burleigh County, *A. T. Cole,* J. Affirmed.

Sullivan & Sullivan, for appellant.

"Judgment in action of claim and delivery must be supported by a verdict of the jury in the absence of a proper waiver." Hart v. Wynd-

mere, 21 N. D. 383, 131 N. W. 271, Ann. Cas. 1913D, 169; Gorth v. Jarvis, 15 N. D. 509.

"Plaintiff cannot deprive defendant of a jury trial of legal issues by advancing fictitious claims for equitable relief." Davison v. Associates Jersey Co. 71 N. Y. 333; Wheelock v. Lee, 74 N. Y. 504; People v. A. J. S. R. Co. 57 N. Y. 333; Yager v. Exchange Nat. Bank, 72 N. W. 211.

"It is error for the court to substitute itself for a jury without consent or waiver of parties." Yankton F. Ins. Co. v. R. Co. 7 S. D. 428, 64 N. W. 514; 24 Cyc. 110, see cases cited therein. Burleigh v. Hecht (S. D.) 117 N. W. 366.

"The plaintiff having introduced in evidence a negotiable note, properly assigned to her, establishes prima facie her case and the ownership of such documents." Brynjoldson v. Osthus, 12 N. D. 42, 96 N. W. 261.

"Testimony tending to show that the deceased was present at time the defendant received the papers should have been admitted." St. John v. Lofland, 5 N. D. 140, 64 N. W. 930; Cowen v. Lagburn, 116 N. C. 526; Pritchard v. Pritchard, 69 Wis. 373, 34 N. W. 506; (Iowa) 110 N. W. 435; Umstead v. Bowling, 64 S. E. 368; Smith v. Smith, 89 S. E. 1032; Borum v. Bell (Ala.) 31 So. 454; Yoder v. Englebert (Iowa) 136 N. W. 523; Seybold v. Bank, 5 N. D. 460.

Benton Baker and *Fisk & Murphy*, for respondent.

"An amendment that materially changes the issues should not be allowed at time of trial." Beauchamp v. Insurance Co. 38 N. D. 499, 165 N. W. 545.

"The note being payable to the deceased, and not having been indorsed by him, the law presumes that same is the property of the estate; and possession of the note by another is insufficient to overcome this presumption." 8 C. J. 386–1006, 1007; 3 R. C. L. p. 981, and cases cited; see note in 50 L.R.A.(N.S.) 582–591; Vastine v. Wilding, 45 Mo. 89, 100 Am. Dec. 347; Escamella v. Pingree (Utah) 141 Pac. 103; Kiefer v. Tolbert (Minn.) 151 N. W. 529; Sheperd v. Hanson, 9 N. D. 249; Swanby v. Payne (Wis.) 137 N. W. 763; Baker v. Warner (S. D.) 92 N. W. 383; Shea v. Doyle, 65 Ill. App. 471.

"At most, defendant can claim only a mere equitable title to the note, the same not having been indorsed by the payee." 7 Cyc. 812–818.

"In this case there was no delivery prior to payee's death, therefore no transfer of title." 7 Cyc. 814, and cases cited, 3 R. C. L. p. 967, § 175.

"It is elementary and well settled that a legal consideration is essential to a valid transfer; there was no consideration for alleged purchase by defendant." 7 Cyc. 815.

"There was no gift either *inter vivos* or *causa mortis*. Delivery is just as essential in case of gift as in case of purchase; there must be a delivery in order to pass title." See 12 R. C. L. 932–937, 941, 957, and cases cited; Comp. Laws, § 5539; Knight v. Tripp (Cal.) 54 Pac. 267; Van Eman v. Stanchfield, 10 Minn. 255; Cavitt v. Tharp, 30 Mo. App. 131; Dorn v. Parson, 56 Mo. 601; Merlin v. Manning, 2 Tex. 351; Ross v. Smith, 19 Tex. 171; 4 Am. & Eng. Enc. Law, 2d ed. 319; Dan. Neg. Inst. § 812; Rand, Com. Paper, § 792; Escamella v. Pingree (Utah) 141 Pac. 103, citing numerous authorities; see also Comp. Laws, § 3541. As to what constitutes a gift *causa mortis*, see 12 R. C. L. 959, 962, and cases cited; Zeller v. Jordan (Cal.) 38 Pac. 640; Luther v. Hunter, 7 N. D. 544, 75 N. W. 916; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500.

"Gifts *causa mortis* are not favored, as they are against the policy of the law." Hatch v. Atkinson, 56 Me. 324, 96 Am. Dec. 464; Harris v. Clark, 51 Am. Dec. 352, and note, 3 N. Y. 93; Gano v. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532; Hall v. Howard, Rice, L. (S. C.) 310, 33 Am. Dec. 115; note in 85 Am. Dec. 638; Gilmore v. Lee, 237 Ill. 402, 127 Am. St. Rep. 330, 86 N. E. 568; Hawn v. Stoler, 208 Pa. 610, 65 L.R.A. 813, 57 Atl. 1115; Willis v. Secor, 31 Mich. 185, 18 Am. Rep. 178.

"Defendant was not competent to testify as to transaction with the deceased." Comp. Laws 1913, § 7871; Regans v. Jones, 14 N. D. 591, 105 N. W. 613; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Larson v. Larson, 19 N. D. 160, 23 L.R.A.(N.S.) 849, 121 N. W. 202. See especially Wagenen v. Bonnot, 74 N. J. Eq. 843, 18 L.R.A.(N.S.) 400, 70 Atl. 143; Smith v. Burnet, 35 N. J. Eq. 322; Woolverton v. Van Syckel, 57 N. J. L. 393, 31 Atl. 603; Provost v. Robinson, 58 N. J. L. 222, 33 Atl. 304; Dickerson v. Payne, 66 N. J. L. 35, 48 Atl. 528. See also valuable note to the case of Wall v. Wall, 45 L.R.A.

(N.S.) 583; 20 Cyc. 1232; Schultz v. Becker (Wis.) 110 N. W. 213; Beebe v. Coffee (Cal.) 94 Pac. 766.

"Until the gift is legally perfect and complete, a *locus pœnitentiæ* remains, and the owner may make any other disposition of the property that he or she may think proper." Taylor v. Henry, 48 Md. 557, 30 Am. Rep. 486; Gorman v. Gorman, 87 Md. 338; Pennington v. Gittings, 2 Gill & J. 208; Murray v. Cannon, 41 Md. 476; Dougherty v. Moore, 71 Md. 249; Bunn v. Markham, 7 Taunt. 224; Keepers v. Fidelity Title & D. Co. 56 N. J. L. 393, 23 L.R.A. 184.

GRACE, J. Appeal from the district court of Burleigh county, A. T. Cole, Judge, sitting in the place of Judge Nuessle.

This action is brought by Erastus A. Williams as executor of the estate of Dan Williams, deceased, against one Betsa Clark, to recover possession of a certain promissory note secured by a real estate mortgage upon the following land, to wit: The west one half of the S. E. ¼ and the S. W. ¼ of section 15, and the north one half of the N. E. ¼ and east one half of the N. W. ¼ of section 22, township 142 north of range 81, containing 358 acres more or less according to the United States government survey thereof, owned by Erastus A. Williams, the executor, who is a surviving brother of Dan Williams, and to recover a certain assignment of said mortgage. The further, and in fact real, purpose of the action is to determine title and adverse claims to the note, mortgage, and assignment as between Erastus A. Williams and Betsa Clark, who had obtained possession of the above-described evidence of indebtedness. Erastus A. Williams made, executed, and delivered the note and mortgage in question to his brother, Daniel, at or about the time or date of the same. About the 26th day of October, 1915, in the city of Bismarck, North Dakota, Daniel Williams executed an assignment of such mortgage in blank. The acknowledgment of the assignment was before Benton Baker, Esq., a notary public, and one of the attorneys of record in this action for Erastus A. Williams. Daniel Williams died on or about January 29, 1917, in Bismarck, North Dakota, at the home of his brother, Erastus A. Williams. As one of the exhibits in the case there appears the last will and testament of Daniel Williams. By the terms of the will, Daniel devised and bequeathed to Erastus A. Williams, his brother, all his estate

whether the same be real or personal property. This will was dated the 20th day of June, 1910, and appears to be properly signed and witnessed. After the execution of the note, mortgage, and assignment, the same came into the possession of Betsa Clark. The assignment of the mortgage executed in blank had become, in form, completed by the insertion therein of the name of "Mrs. Betsa Clark" as assignee, and this gives rise to one of the main questions in the case, namely; Was the name of "Mrs. Betsa Clark" inserted in the assignment by Daniel Williams in his own handwriting, or was it inserted therein by Betsa Clark in her own handwriting? We will discuss this matter more fully later in the opinion. Defendant claims that it was error not to have submitted the questions involved in this suit to a jury on the ground that the complaint stated on its face an action in claim and delivery. The appellant devotes a large portion of his brief to the discussion of her right to trial by jury. The record discloses no demand of the right of trial by jury, and we must assume there was none. The defendant proceeded to try the case to the court as purely a court case, and from its beginning to its close, it was tried as such under the provisions of the Newman Act. From the judgment against defendant in the trial court defendant prosecutes an appeal to this court and demands a trial *de novo*. In addition to this, the prayer of the complaint almost entirely demands equitable relief, and at least a portion of the prayer of the defendant demands equitable relief; and though the prayer does not wholly determine whether the action is one in equity only, it must be taken into consideration to determine if, upon the facts and pleadings of the entire case, the relief to be granted is such that it is rendered in equity rather than in law. The action was not alone for the purpose of determining who was entitled to the possession of the property in question, but was in fact to determine the title and adverse claims respecting it. Assuming, however, that the action is one in which there were legal questions which could be submitted to a jury and also equitable ones which should be decided by the court, the defendant made no demand to have the legal questions, if any, first submitted to and determined by the jury, and at least tacitly consented that all questions of law which might have been properly tried by a jury should be tried to the court. As disclosed by the record, the defendant's entire conduct

denoted that she well understood the action was one in equity, and she tried it to the court upon that theory, and the whole action was tried as an action in equity by both parties. To show this more clearly and especially for the purpose of showing that the defendant consented, in open court, to the trial of the action to the court without a jury, we submit the following: At the very inception of the trial and at the first steps therein, Erastus A. Williams was called to testify by plaintiff's attorney, Mr. Murphy.

Before a single question had been asked of him, Mr. Sullivan, the attorney for the defendant, interposed the following objection:

At this time, the defendant objects to any testimony being taken from this witness, Mr. Erastus A. Williams, on the ground that it is apparent from the complaint that he is the executor of the estate of Dan Williams, deceased, at least it is so alleged, and all such testimony taken from this witness is violative of the terms of subdivision 2, § 7871, of the Compiled Laws of North Dakota for 1913.

The Court: It all goes in under the Newman Act.

Mr. Sullivan: I understand that the objection raised by this statute is prohibitive,—the witness is not permitted to testify.

The Court: That is, as to conversations with the deceased and transactions with the deceased.

Mr. Murphy: That goes to the competency of the witness.

Mr. Sullivan: I understand that, under the prohibitive statute, the court is required to prohibit the witness from testifying.

It will be noticed that at the very threshold of the case, the defendant knew the action was being tried under the Newman Act, and she proceeded to and did try the entire case under the Newman Act without objection. The record as a whole shows it. The remainder of appellant's assignments of error relate to alleged errors of the court in sustaining objections to certain questions asked by defendant, and in excluding the answers thereto and in excluding certain evidence sought to be introduced by her, which was held by the court to be incompetent for the reason that its reception would be in violation of subdivision 2 of § 7871, wherein it is provided: "In civil action or proceeding by or against executors, administrators, heirs at law, or next of kin in which judgment may be rendered or ordered entered for or against them,

neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testators or intestate, unless called to testify thereto by the opposite party."

The questions to which the answers were excluded were those asked of the defendant, who was an incompetent witness so far as her testimony or her intended answer to any question propounded to her showed that her testimony or the excluding of the answer related to any transaction with the deceased with reference to the subject-matter of the action. She was prohibited, under the statute, from testifying to any such transaction connected with the subject-matter of the action. Upon a thorough examination of all questions asked of this witness by her counsel, we are satisfied there were no errors in prohibiting her from answering the same, nor in excluding her testimony concerning the matters inquired about, or in prohibiting any other witness from giving testimony of like character; for it is apparent that such questions or answers and testimony of that character, if given, would be violative of the section above referred to. It may be that certain of the questions, upon thorough examination, do not bear this construction, but if not, such questions and answers appear to be immaterial, and it was harmless error to exclude them. The rule of law which excludes such questions, answers, and testimony of that character may seem, and indeed is, a harsh one. However, it must be conceded that the rule is a salutary one and based upon sound public policy, when it is considered the great evil that might result and the loss that might occur to the estates of deceased persons were persons who had transactions with the deceased permitted to testify as to such transaction; and when we take into consideration the fact that the lips of the other party to the transaction are forever sealed, and that but for such law the survivor to the transaction would be free to give his own version of the facts and circumstances connected with the transaction, oftentimes the whole of which would go unchallenged, the necessity for such law becomes apparent. We are quite certain there is no real merit in any of the errors assigned. It might be just as well to close this opinion at this point without any further analysis of the case. It will do no harm, however, to briefly review the merits of the case so that it may more clearly appear that the judgment of the trial court is correct.

One of the principal contentions in the case is that relative to the

filling in of the blank in the assignment with the name of "Mrs. Betsa Clark." Is the name of "Mrs. Betsa Clark" therein written, in the handwriting of Betsa Clark or is it in that of Dan Williams? Defendant testified positively that the words "Mrs. Betsa Clark" in the assignment were in the handwriting of Daniel Williams. She sought to corroborate this testimony by that of one Plummer, a banker of Forest City, Iowa, to whom she had sent the note, mortgage, and assignment after the death of Daniel. Plummer had never seen Dan Williams. He had received two letters from him,—one of the letters having been received two years prior to the time he gave his testimony, and the other in 1916. The last time Plummer saw these letters was in the spring of 1917. He said, in effect, he filed these letters away for safekeeping, but that he had not been able to find them, though he searched everywhere for them, including his desk, safety deposit box, and vault; in other words, made a complete search. With no further acquaintance with the handwriting of Dan Williams other than the receipt of the two letters which have become lost, he was asked to examine certain exhibits of letters, and to state whether the handwriting on the exhibits of letters was the same as the handwriting on the letters which he received. He testified positively that it was. On the strength of the knowledge which he claimed in this regard, exhibit 15, being a letter to Sullivan & Sullivan in answer to one which he had received from them, becomes quite important. With exhibit 15, Plummer inclosed the mortgage and note and the assignment. With reference to the assignment, the letter states, "Also an assignment dated October 26, 1915, from Dan Williams to Mrs. Betsa Clark, same properly signed and acknowledged by Benton Baker, N. P., and witnessed by two witnesses. I know Dan Williams's writing well and he has written in 'Mrs. Betsa Clark' in the assignment himself."

To controvert the testimony of defendant and her witnesses with respect to whose handwriting the words "Mrs. Betsa Clark" is in, the plaintiff introduced several expert witnesses, among whom were E. M. Thompson and J. A. Graham, who were cashiers of banks and who were familiar with the handwriting of Dan Williams. They testified in their opinion the words "Mrs. Betsa Clark" were not in the handwriting of Daniel Williams. F. E. Shepard, who had thirty years' experience as a banker, qualified as an expert in this respect, and, though he was not

familiar with the signature of Dan Williams, testified, in his opinion, the words "Mrs. Betsa Clark" and the admitted signature of Dan Williams to the assignment were in different handwriting. C. C. Curtis, a noted handwriting expert, one who had been witness in various cases, some of which were quite noted, wherein was inolved the authenticity of handwriting of signatures, examined the various exhibits in the case including letters written by Dan Williams to Mrs. Betsa Clark and her address on the envelops in which such letters were inclosed, which address consisted of the words "Mrs. B. Clark," and also examined the words "Mrs. Betsa Clark" in exhibit 1, and testified that they were not written by the same hand. He also testified that the words "Betsa Clark" written upon exhibit A, being the mortgage note and the coupons in question, was the same handwriting as that of the words "Mrs. Betsa Clark" in the assignment. On exhibit A the words "Betsa Clark" were written five times, once upon the main note and once on each of four coupons thereto attached. In the hearing in the county court Mr. Benton Baker, an attorney at law, appeared as the attorney for the estate of Dan Williams. At that time, he examined exhibit 1 with reference to the writing "Mrs. Betsa Clark" appearing thereon. He stated those words appeared fresh and very much lighter in color than the other, ink writing with pen, on the instrument. To the same effect is the testimony of H. C. Bradley, who was county judge at the time of the proceeding in the county court. The trial court had all the witnesses before it and had full opportunity of noting the demeanor of the witnesses while on the stand. It found in favor of the plaintiff to the effect that the note, and interest coupon notes, and the mortgage securing the payment of the same, were never transferred by the decedent to the defendant or to any other person. This finding means that the words "Mrs. Betsa Clark" were not written in the assignment by Daniel Williams. There is no testimony showing that he ever authorized anyone else to write his name therein. It follows from such finding that the defendant acquired no interest in the notes or mortgage by reason of such assignment. We think the finding is correct. Testimony of Captain I. P. Baker, one of the witnesses to the assignment, adds strength to plaintiff's claim. He stated that Dan Williams asked him to witness the assignment, and at that time stated the purpose of it was that "he might want to go down to the Bismarck

bank and get some money, but he was not sure, and for that reason there was no name put on it, and he left it blank. He said he might need some." The note was payable to Dan Williams, and, from all the testimony in the case, we must conclude that it was not indorsed by him. He is in law, therefore, presumed to be the owner at the time of the death. If that be true, the title to the same is in his estate. Such presumption is not overcome by mere naked possession of the note by defendant at the time of said decedent's death. 8 C. J. 386–1006, 1007; 3 R. C. L. 981; Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Vastine v. Wilding, 45 Mo. 89, 100 Am. Dec. 347; Kiefer v. Tolbert, 128 Minn. 519, 151 N. W. 529; Baker v. Warner, 16 S. D. 292, 92 N. W. 383.

If the assignment of the mortgage was not made to the defendant, and we hold it was not, and the signatures on exhibit A, the note in question and the coupon notes, were not the signatures of Daniel Williams, and, under the finding of the trial court and the evidence in this case, we hold such signatures were not his, there was no delivery of the note and the coupon notes nor the mortgage; hence there was no transfer. 7 Cyc. 814; 3 R. C. L. 175. There was no consideration for the alleged transfer, and there being no delivery, which there must be in order to pass title, there could have been no gift. The evidence with reference to the gift is not at all convincing, and when it is considered there is no blood relation between the defendant and Dan Williams, the testimony with reference to a gift based merely upon a friendly acquaintance should be scrutinized with great care. It would be in obedience to the natural law and in accord with general experience that one would not dispose of his property in such manner as to prevent those who were entitled to inherit the same, in this case a brother, from receiving the same. It would be in direct opposition to the natural law of esteem, respect, and affection which it must be presumed generally exists between those closely related by the ties of blood, in disposing of property under circumstances similar to those in this case, to prefer a friendly acquaintance to those related by the ties of blood. The transfer of the large amount of property to one who is a stranger in blood and bears no other relation other than that of a friendly acquaintance will be scanned with much particularity to determine whether such a transfer was actually intended or in fact made. If it may be done, the proof

thereof must be clear and convincing. No enmity is shown to have ever existed between Daniel Williams and Erastus A. Williams, and the will, which is an exhibit in this case, declares the latter to be the sole legatee of Daniel Williams. It is only important as tending to show that Daniel Williams intended his property to go to those lawfully entitled under law to receive it, and as tending to establish the fact that he never transferred the note or mortgage. We think, under the circumstances in this case, there is no reversible error nor abuse of discretion by the court in not permitting the defendant to amend her pleadings. The sole defense relied upon by the defendant until the time of the trial was that she had paid a consideration for the note and mortgage. This defense becoming untenable, she then tendered an amended answer in which the main defense sought to be relied upon was that the note and mortgage were a gift to her by Daniel Williams. This defense was entirely different from and inconsistent with the first defense. Though inconsistent, we believe it might have been pleaded together with the defense of good consideration in the original answer.

Under the circumstances in this case, the granting of permission to amend the pleadings by permitting the service and filing of an amended answer or the refusal to permit such to be done, rests upon the principle of whether the amendment should or should not be allowed in furtherance of justice. The court, in this case, disallowed the amendment, and in effect such disallowance means that the amendment was not in furtherance of justice. Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197. We do not think in this case there was any error in not permitting the amendment, for it is clear to have done so would not have been in furtherance of justice. There was no abuse of discretion of the trial court, in this case, in refusing to permit the amendment. Under all the evidence, it is clear defendant is not entitled to recover. The $500 check was not really an issue in this case, and we make no decision with reference to it. We are satisfied from the whole record and from what we have said, judgment should be affirmed, and same is affirmed, with statutory costs.

ROBINSON, J., concurs.

BRONSON, J., and COOLEY, District Judge, concur in result.

CHRISTIANSON, Ch. J. (concurring specially). I concur in an affirmance of the judgment. In my opinion the evidence fully supports the findings made by the trial court, and the statement of facts contained in the opinion prepared by Mr. Justice Grace. The record shows that the court did not rule upon objections to evidence, and all evidence offered was received. The court did, however, sustain an objection to the competency of the defendant as a witness to transactions between herself and the deceased, and refused to permit her to testify upon that subject. At the time the ruling was made the record before the trial court clearly showed that the testimony sought to be elicited from the defendant was within the bar of subd. 2, § 7871, Compiled Laws 1913.

R. C. McCANN, Respondent, v. GEORGE E. GILMORE, Appellant.

(172 N. W. 236.)

Appeal and error.

1. An appeal from a judgment and a motion for a new trial are independent remedies.

Appeal and error — appeal from judgment — motion for new trial — effect on judgment of order granting new trial.

2. Where an appeal has been taken from a judgment, and also a motion has been properly and timely made for a new trial, and an order is made granting a new trial, the legal effect of such order is to vacate the verdict upon which the judgment was entered.

Appeal and error — vacation of verdict.

3. Where a verdict has been vacated, there is nothing to support the judgment.

Appeal and error — effect of new trial in lower court upon an appeal.

4. Where an appeal has been taken from a judgment, and a proper motion has been made for a new trial, the judgment is subject to the contingency that it may become ineffective by the granting of a new trial on all the issues of fact, thereby setting aside the verdict.

Opinion filed April 5, 1919.

Appeal from the District Court of Pierce County, *A. G. Burr,* J. Reversed and remanded.

Fisk & Murphy and *H. B. Senn,* for appellant.

A motion for new trial is not directed at the judgment, but at the verdict, or at the decision of fact; for a new trial is a re-examination of an issue of fact. Sawyer v. Sargent (Cal.) 3 Pac. 872; Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22; 3 C. J. p. 1264, § 1380 and also 2 Cyc. 975, notes 32 and 33 and cases cited; Carpentier v. Williamson, 25 Cal. 154; Spanagel v. Dellinger,38 Cal. 278; Naglee v. Spencer, 60 Cal. 10; Raynor v. Jones, 90 Cal. 78, 27 Pac. 24; Bryson v. Bryson, 90 Cal. 323, 27 Pac. 186; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Kaltschmidt v. Weber, 136 Cal. 675, 69 Pac. 497; Hellman v. Adler (Neb.) 83 N. W. 846; Smith v. Goodman (Neb.) 159 N. W. 418; Indiana R. Co. v. McBroom, 103 Ind. 310, 2 N. E. 760; Cook v. Smith, 58 La. 607, 12 N. W. 617; Molt v. Northern P. R. Co. 44 Mont. 471, 120 Pac. 809; Ex parte Fuller, 182 U. S. 562, 45 L. ed. 1230, 21 Sup. Ct. Rep. 871; 1 Hayne, New Trial on Appeal, p. 14; Holmes v. Warren (Cal.) 78 Pac. 954; Marzion v. Pioche, 8 Cal. 522; Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 32; McDonald v. McConkey, 67 Cal. 325; Sharron v. Sharron, 79 Cal. 633.

In cases of appeal from a judgment, the lower court loses jurisdiction over the judgment, but it still retains jurisdiction over the motion for a new trial with power to rule thereon. Naglee v. Spencer, 60 Cal. 10; Raynor v. Jones, 90 Cal. 78, 27 Pac. 24; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468; Cook v. Smith, 58 Iowa, 607, 12 N. W. 617; Gibson v. Manley, 15 Ill. 140; Cook v. Smith, 58 Iowa, 607, 12 N. W. 617.

A new trial may be granted while an appeal is pending from the original judgment. United States v. Young, 94 U. S. 258, 24 L. ed. 153; 4 Enc. L. & P. 45, 252, and cases cited; Voorhees v. John T. Noye Mfg. Co. 151 U. S. 135, 38 L. ed. 101; Henry v. Allen, 147 N. Y. 346; Smith v. Lidgewood Mfg. Co. 64 App. Div. 467, 69 N. Y. Supp. 975; Vernier v. Knauth, 7 App. Div. 57, 39 N. Y. Supp. 784.

The effect of granting a new trial is to set aside both the verdict and the judgment, without any specific mention of either, and if, during the pendency of an appeal from the judgment, a new trial is granted by

the trial court, the appeal will be dismissed. 20 R. C. L. 308, 313; United States v. Young, 94 U. S. 258, 24 L. ed. 153; Scott v. Waggoner, 48 Mont. 536, L.R.A.1916C, 491, 139 Pac. 454.

Flynn & Traynor (*Honorable L. N. Torson,* of counsel) for respondent.

After the cause has been removed by appeal or writ of error, the trial court has no jurisdiction to entertain and no power to grant a motion for new trial or rehearing. 3 C. J. 1264, § 1380; Getchell v. G. N. R. Co. 22 N. D. 325; 3 C. J. p. 1265, § 1381; Minkkinen v. Quincy Min. Co. (Mich.) 135 N. W. 448; Winans v. Grable (S. D.) 99 N. W. 1110; Parkside Realty Co. v. McDonald (Cal.) 139 Pac. 805; Robinson v. Helena Light & R. Co. (Mont.) 99 Pac. 837.

GRACE, J. Appeal from an order of the district court of Pierce county, setting aside a previous order for a new trial, A. G. Burr, Judge.

The original action was brought by McCann to recover damages against defendant for alleged malicious prosecution of a certain criminal action against this plaintiff and respondent. In that action a judgment was entered for plaintiff on the 7th day of March, 1918. Thereafter notice of entry of judgment was served. Thereafter and on March 8, 1918, defendant served notice of motion, and motion for a new trial which was returnable on March 18, 1918, at Rugby, North Dakota. For different causes, the motion was not disposed of by the court until about August 10, 1918, when the court made its order granting a new trial, which was thereafter and on August 14th filed. On August 7, 1918, an appeal was duly perfected by the defendant from the judgment. August 27, 1918, the court made its order requiring the defendant to show cause why the order granting the motion should not be vacated. This was returnable on September 10th. On the 16th day of September, 1918, the court made its order setting aside the order granting a new trial and declaring it null and void, and declaring the judgments in the action and other proceedings therein should be and remain the same as if the order granting a new trial had not been made. The sole error assigned on this appeal is that the court was in error in holding that it had no jurisdiction to grant defendant's motion for a new trial and in setting aside and vacating

the order granting said motion for a new trial. The appeal from the judgment was perfected under the erroneous belief that the time for appeal therefrom would expire August 8th instead of September 8, 1918, but in this appeal this is of no consequence.

Manifestly the court erred in holding that it was without jurisdiction to grant a new trial. The motion for the same was made within the proper time, and the court had jurisdiction to grant the motion for a new trial, and it erred in holding it had not. It also erred in setting aside and vacating the order granting the motion for a new trial on the ground that it had no jurisdiction to grant it. It is so manifestly clear that a motion for a new trial and the appeal from the judgment are each separate and independent remedies that it would seem a needless waste of time and energy to discuss the subject at any great length. An appeal may be perfected from the judgment without it in any manner interfering or devesting the court of jurisdiction to hear and determine a motion for a new trial, if the same is duly made in the manner and within time limited by statute for making such motion. A motion for a new trial is an application addressed to the sound discretion of the court, in which application is made upon certain grounds for a re-examination of the facts. If it be granted, the effect is to set aside the verdict and present all issues of fact for re-examination. The granting of a new trial operates as a matter of law to vacate and set aside the judgment. It would be an anomalous situation to grant a new trial, thus reinstating the case in the trial court for a retrial on all the issues of fact and of law, at the conclusion of which a verdict might be rendered and a valid judgment entered thereon, and still contend that the former judgment is effective.

If the motion for a new trial were made and granted prior to the time of entry of judgment, it is apparent no judgment could be entered. If the motion is made and granted after the entry of judgment, thenceforth the judgment is ineffective. Where the judgment has been entered and a motion for a new trial has properly been made, the judgment may be said to be contingent until the disposition of the motion for a new trial, when, after the new trial is granted, judgment becomes ineffective. If a new trial is denied, the judgment remains effective unless for other reasons in a proper case it is modified by the trial court or vacated and set aside by it, or unless it is re-

versed on appeal if an appeal has been taken. There is abundant authority to sustain the views above expressed. See King v. Hanson, 13 N. D. 93, 99 N. W. 1085. The case of Spanagel v. Dellinger, 38 Cal. 278, is one which clearly illustrates that an appeal from a judgment and a motion for a new trial are independent remedies. We feel it unnecessary to cite the long list of authority which sustains the same principle expressed in the case last above cited. If the motion for a new trial is made within the time limited by statute, it is an independent remedy. The trial court has judisdiction to grant such motion for any of the causes specified in § 7660 or upon its own motion for the causes set forth in § 7665, Compiled Laws 1913. It may grant such new trial upon a proper motion either after or before the entry of judgment, and is not, after entry of judgment, limited in the scope of its jurisdiction to grant a new trial to the single cause of newly discovered evidence. It retains jurisdiction of the case for the purpose of exercising its discretion in granting or refusing a new trial, and this, though judgment has been entered and an appeal taken therefrom; for the granting of a new trial has the effect to vacate the verdict, and when the verdict is vacated there is nothing to support the judgment; and though, in an appeal from a judgment, an appellate court acquires jurisdiction of the case from the time an appeal is perfected from it, it acquires such jurisdiction subject to the contingency that the judgment may become ineffective by a vacation of the verdict upon which it rests, by the granting of a motion for a new trial where such motion is properly and timely made.

The order appealed from is reversed and the case is remanded for further proceeding not inconsistent with this opinion. Appellant is entitled to statutory costs on appeal.

CHRISTIANSON, Ch. J. (concurring specially). In the case at bar the defendant moved for a new trial on the ground of insufficiency of the evidence to sustain the verdict. After the motion had been made, and fully submitted to, and pending consideration thereof by, the court, the defendant appealed from the judgment. The appeal was taken through an abundance of caution so as to avoid any question as to whether the action still remained pending within the rule announced by this court in 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. Manifestly the defendant did not intend to waive the motion for a new trial. And I agree with my associates that the appeal from the judgment under the circumstances existing in this case did not devest the trial court of jurisdiction to determine the pending motion for a new trial. Whether a motion for a new trial can be made after an appeal from the judgment has been taken is a different question. That question is not involved in this case, and I express no opinion thereon.

EDMUND DUBS, an Infant, by Rudolf Dubs, His Guardian ad Litem, Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

(171 N. W. 888.)

Appeal and error — when judgment non obstante veredicto should be granted.

1. Upon an appeal from an order of the district court granting judgment *non obstante veredicto*, it must appear clearly from the whole record, as a matter of law, that the defendant was entitled to judgment on the merits.

Appeal and error — contributory negligence — wilful negligence.

2. Where a boy, nine years of age, a trespasser on railway tracks, and guilty of contributory negligence in being thereon, was in a position of peril, while lying on such railway tracks, it is wilful negligence to fail to exercise ordinary care to avoid injury to him after discovering him to be in such position.

Appeal and error — duty to exercise ordinary care.

3. *Held*, under the evidence, that the jury were justified in finding that the engineer of the defendant did see the boy in a place of peril and did fail to exercise ordinary care to avoid injury to him, after discovering his position.

Opinion filed February 26, 1919. Rehearing denied April 10, 1919.

Action for personal injuries.

Appeal from order granting judgment *non obstante*, District Court, Grant County, *Hanley*, J.

NOTE.—Authorities passing on the question of duty of railroad company after discovery of child in danger on track are collated in a note in 32 L.R.A.(N.S.) 569.

Reversed and remanded for further proceedings.

Jacobson & Murray, for appellant.

"A verdict can be vacated or new trial granted only upon statutory grounds." Comp. Laws 1913, § 7660.

"The supreme court cannot go outside the specifications to find out whether or not the verdict can stand on other points not specified." Erickson v. Wiper, 33 N. D. 193; Buchanan v. Occident Elev. Co. 33 N. D. 346; Pathman v. Williams, 32 N. D. 365; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366; McLain v. Nurnberg, 16 N. D. 145; Howie v. Bratrud (S. D.) 86 N. W. 747; Kolka v. Jones (N. D.) 71 N. W. 558.

"The fact that the defendant did not see the plaintiff does not absolve it from the liability imposed by the "last clear chance doctrine." They must go one step further and show that they exercised ordinary care, and by the exercise of such ordinary care they did not see him." Davis v. Saginaw-Bay City R. Co. (Mich.) 157 N. W. 390; Palon v. G. N. R. Co. (Minn.) 151 N. W. 894, 160 N. W. 670; Nichols v. C. B. & Q. R. Co. (Colo.) 98 Pac. 808; 8 Thomp. Neg. p. 48, § 238; Neary v. Northern P. R. Co. (Mont.) 97 Pac. 944; Cahill v. C. M. & St. P. R. Co. (Iowa) 121 N. W. 553; Purcell v. C. & N. W. R. Co. (Iowa) 91 N. W. 933; Christiansen v. Illinois C. R. Co. (Iowa) 118 N. W. 387; Johnson v. C. M. & St. P. R. Co. (Iowa) 98 N. W. 312; Tennessee C. R. Co. v. Cook, 146 Ky. 372, 142 S. W. 683; Becker v. L. & N. R. Co. 110 Ky. 474, 53 L.R.A. 267, 96 Am. St. Rep. 459, 61 S. W. 997; Nehring v. Connecticut Co. 86 Conn. 109, 45 L.R.A.(N.S.) 896, 84 Atl. 301.

"The fact that the engineer says that he did not see the boy until he was within 40 feet of him is not binding on the jury, but must be weighed in the light of the physical facts." Cahill v. Chicago, M. & St. P. R. Co. 121 N. W. 553; Purcell v. C. & N. W. R. Co. (Iowa) 91 N. W. 933; Christiansen v. Illinois C. R. Co. (Iowa) 118 N. W. 387; Johnson v. C. M. & St. P. R. Co. 98 N. W. 312; 8 Thomp. Neg. § 239, p. 48, note 4, and cases cited; Anderson v. G. N. R. Co. (Idaho) 99 Pac. 91, 24 N. D. 463, 16 N. D. 217.

"The defendants knew that the children played upon the tracks at that point. This imposed upon them a greater duty of lookout than on other points of the line." Trojanowski v. C. & N. W. R. Co. (Wis.)

157 N. W. 536; Krumack v. Missouri P. R. Co. (Neb.) 154 N. W. 541; Kunkel v. Minneapolis St. P. & S. Ste. M. R. Co. 18 N. D. 367, 131 Pac. 656; Lewis v. Rio Grande Western R. Co. (Utah) 123 Pac. 97; Anderson v. G. N. R. Co. 99 Pac. 91.

"The fact that the defendant might be entitled to a directed verdict is not sufficient grounds for granting that motion." First State Bank v. Kelly, 30 N. D. 84; Beleal v. N. P. R. Co. 15 N. D. 318; Meehan v. G. N. R. Co. 13 N. D. 432.

Watson, Young, & Conmy, for respondent.

"Persons who use railroad tracks in rural communities are not licensees merely because the railroad company does nothing to keep them off." Helton v. Chesapeake & O. R. Co. 163 S. W. 224; Miller v. Illinois C. R. Co. 118 S. W. 348; Chesapeake O. & R. Co. v. Farrow, 55 S. E. 570; Chesapeake & O. R. Co. v. Nipp (Ky.) 100 S. W. 246; Beiser v. R. Co. 92 S. W. 928; Krenzer v. R. Co. (Ind.) 43 N. E. 648; L. & N. Ry. Co. v. Mitchell (Ala.) 32 So. 735; Burg v. C. R. I. & P. R. Co. (Iowa) 57 N. W. 680; McCoy v. R. Co. 192 S. W. 45; McKnight v. L. & N. R. Co. 181 S. W. 947; Malott v. R. Co. 160 Pac. 978; Schreiner v. G. N. R. Co. (Minn.) 90 N. W. 400; Hamlin v. C. P. & S. R. Co. 79 Pac. 991; Southern R. Co. v. Sanders (Ky.) 79; Petur v. Erie R. Co. 136 N. Y. Supp. 79; Southern R. Co. v. Stewart, 51 So. 324; Illinois C. R. Co. v. Johnson, 115 S. W. 798; Curties v. So. R. (Ga.) 61 S. E. 539; Egan v. R. Co. (Mont.) 63 Pac. 831; Dotta v. N. P. R. Co. (Wash.) 79 Pac. 32; Riordan v. New York C. R. Co. 87 N. Y. Supp. 364; St. Louis R. Co. v. Shiflet (Tex.) 83 S. W. 677; Leduc v. R. Co. 87 N. Y. Supp. 364; Watson v. C. & O. R. Co. 185 S. W. 852; Willis v. L. & N. R. Co. 175 S. W. 18; L. & N. R. Co. v. Davis (Ky.) 172 S. W. 966; Cannon v. Cleveland R. Co. (Ind.) 62 N. E. 8; Piper v. C. M. & St. P. R. Co. (Minn.) 133 N. W. 984; Anderson v. R. Co. (Wis.) 58 N. W. 79; L. & N. R. Co. v. Petren, 180 S. W. 370.

"One who sits down upon a railroad track and goes to sleep is a trespasser, though at a point where persons are accustomed to cross." Southern R. Co. v. Smith, 50 So. 391; Lyons v. Illinois C. R. Co. 59 S. W. 507; M. K. & T. Ry. Co. v. Malone, 102 Tex. 269, 115 S. W. 1158; Massey v. International & G. N. R. Co. 162 S. W. 372; Krenzer v. R. Co. (Ind.) 43 N. E. 648; Missouri K. & T. R. Co. v. Malone, 115 S. W.

1158; Wagner v. C. & N. W. (Iowa) 98 N. W. 141; Over v. R. Co. (Tex.) 73 S. W. 535.

"If the deceased was a trespasser on its tracks or right of way the defendant owed him no duty except not to wilfully, wantonly, or recklessly injure him, and there is no allegation or proof of such wilful or reckless injury." Kunkle v. Soo (N. D.) 121 N. W. 832; Wright v. R. Co. 12 N. D. 159, 96 N. W. 324.

And this rule of law is followed by practically every court in the land. Lapp v. L. H. & S. R. Co. (Ky.) 199 S. W. 798; McCarthy v. N. Y. R. Co. 240 Fed. 602; Gregory v. R. Co. (Iowa) 101 N. W. 761; Ellington v. R. Co.(Minn.) 104 N. W. 827; Thomas v. R. Co. (Iowa) 72 N. W. 783; Ward v. So. P. R. Co. (Ariz.) 26 Pac. 166; Thompson v. Illinois C. R. Co. 154 Ky. 820; Kayden v. A. T. & S. F. R. Co. (Kan.) 124 Pac. 165; Reynolds v. Cincinnati R. Co. 148 Ky. 252; Hammers v. Colorado Southern R. Co. 128 La. 648; St. Louis R. Co. v. Humbert, 101 Ark. 532; Atlantic Coast Line R. Co. v. Barton (Ga.) 80 S. E. 530; Massy v. R. Co. (Tex.) 162 S. W. 371; R. Co. v. Bolton (Ind. Terr.) 51 S. W. 1085; Egan v. R. Co. (Mont.) 63 Pac. 831; Kansas R. Co. v. Cook, 66 Fed. 115; Illinois C. R. Co. v. Murphy, 97 S. W. 729; Kenmare v. R. Co. 114 Ill. App. 230; Sheenan v. R. Co. 76 Fed. 201; De Vries v. Chicago R. I. & P. R. Co. 167 Ill. App. 331; Holmes v. R. Co. (Mich.) 137 N. W. 540; Yazoo R. Co. v. Smith (Miss.) 71 So. 752; C. & Q. Ry. Co. v. Stephen (Ky.) 182 S. W. 938; Joy v. C. B. & Q. R. Co. (Ill.) 105 N. E. 330; Baltimore & O. R. Co. v. Stale (Md.) 87 Atl. 676; Khinovcik v. Boston & M. R. Co. (Mass.) 96 N. E. 52; Erie R. Co. v. McCormack (Ohio) 68 N. E. 571; Dotta v. N. P. (Wash.) 79 Pac. 32; Brooks v. R. Co. (Ind.) 62 N. E. 694; Young v. R. Co. (N. J.) 37 Atl. 1013; Ry. Co. v Rocks (Va.) 44 S. E. 709; Raines v. C. & O. R. Co. (W. Va.) 19 S. E. 565; Remer v. Long Island R. Co. 48 Hun, 352; Farrow v. Chesapeake & O. R. Co. (Va.) 55 S. E. 569; Bartlett v. R. Co. 77 N. E. 96.

Generally as to the duty owed toward trespassing children upon railroad tracks. McCarthy v. New Haven R. Co. 240 Fed. 606; Crawford v. R. Co. (Ga.) 33 S. E. 826; Thomas v. R. Co. (Iowa) 72 N. W. 783; Western & A. R. Co. v. Rodgers, 30 S. E. 804; Alabama G. S. R. Co. v. Moorer, 22 So. 900; Dull v. R. Co. (Ind.) 52 N. W. 1013; Wagner v. R. Co. (Iowa) 100 N. W. 332; A. T. & S. F. R. Co. v. Todd (Kan.)

38 Pac. 804; Felton v. Aubrey, 74 Fed. 350; Ellington v. G. N. R. Co. (Minn.) 104 N. W. 827; O'Barmion v. So. R. Co. (Ky.) 110 S. W. 329; Palmer v. R. Co. (Utah) 98 Pac. 689; C. & O. R. Co. v. Price (Ky.) 200 S. W. 927; Norfolk R. Co. v. Dunaway (Va.) 24 S. E. 698; Tuker v. R. Co. (W. Va.) 24 S. E. 229; Murch v. R. Co. (N. Y.) 29 N. Y. Supp. 490; R. Co. v. Williams (Miss.) 12 So. 957; R. Co. v. Prewith (Kan.) 54 Pac. 1067; R. Co. v. Kelley, 93 Fed. 745; Goodman v. R. Co. 77 S. W. 174.

"Even in a case of a licensee there can be no recovery unless negligence amounting to wantonness is shown." Illinois C. R. Co. v. Arnola (Miss.) 29 So. 768; Scharf v. Spokane R. Co. (Wash.) 159 Pac. 797; Railroads Decennial Digest No. 358; Rosenthal v. R. Co. 98 N. Y. Supp. 476; Carr v. Missouri P. R. Co. 92 S. E. 874; Feech v. Delaware & H. R. Co. 158 N. Y. Supp. 825; Laporta v. New York C. R. Co. (Mass.) 112 N. E. 643; Long v. P. R. Co. & Nav. Co. 145 Pac. 1068; Pittsburg R. Co. v. Forest (Ind.) 99 N. E. 493; Adams v. L. & E. R. Co. 104 S. W. 363; L. & N. R. Co. v. Lawson, 170 S. W. 198; C. & O. R. Co. v. Sanders (Va.) 83 S. E. 374; Burg v. C. R. I. & P. R. Co. (Iowa) 57 N. W. 680.

Bronson, J. On July 5, 1912, Edmund Dubs, then nine years of age, was run over and seriously maimed, through the loss of an arm and leg, by the train of the defendant near New Leipzig. Through his guardian *ad litem,* the appellant, this action is maintained for injuries so sustained. In the district court, upon trial, the jury rendered a verdict for $3,000 in favor of the plaintiff. Thereafter the trial court granted judgment *non obstante* upon the ground that the evidence adduced was insufficient to justify the verdict because no actionable negligence of the defendant was shown. From such order and judgment entered thereon, the plaintiff appeals, and specifies error of the trial court in making such order.

The sole question in this case requiring our attention is whether upon the record, and the verdict of the jury, actionable negligence of the defendant is shown through its failure to avoid injury to the boy after discovering him to be in a position of peril.

To sustain the order of the trial court granting judgment *non obstante,* it must appear clearly upon the whole record, as a matter of

law, that the defendant was entitled to a judgment in the merits. First State Bank v. Kelly, 30 N. D. 84, 98, 152 N. W. 125, Ann. Cas. 1917D, 1044.

It was the duty of the defendant to exercise ordinary care to avoid injury to the boy after discovering him to be in a place of peril. Failure to do so was wilful negligence. Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 103 Minn. 224, 14 L.R.A.(N.S.) 886, 114 N. W. 1123; Palon v. Great Northern R. Co. 129 Minn. 101, 151 N. W. 894; Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 680.

The fact that the boy was a trespasser on the tracks of the defendant railway, and that he was guilty of contributory negligence, did not absolve the defendant from its performance of this duty. If it failed to perform its duty in this regard, its negligence is deemed the proximate cause of the injury, while the boy's negligence is deemed the remote cause of it. 1 Thomp. Neg. p. 177; 8 Thomp. Neg. p. 240; Acton v. Fargo & M. Street R. Co. and Welch v. Fargo & M. Street R. Co. supra; De Noma v. Sioux Falls Traction Co. 39 S. D. 10, 162 N. W. 746.

The jury, upon special questions submitted, found that the boy was negligent in lying on the railway track, that he was there asleep just before the accident occurred, and that the engineer's view was not obstructed by a dog lying on such track so that he could not see the boy in time to stop the train.

There is evidence to show that the boy, on the day in question, was herding cattle along the right of way of the defendant at or near New Leipzig; that he had with him a small black dog, about seven months old, size about 10 to 12 inches high and 1½ feet long; that the boy was dressed in blue overalls and a light colored blue shirt; that he was wearing a straw hat with a black band; that in the afternoon, between 3 and 4 P. M., the boy was on the track about one-half mile west of the depot, playing and digging in the ground there; that he lay on his stomach stretched out between the rails with his head to the west, his dog with him also between the rails, about a foot from him. The train of the defendant consisted of four cars, the engine was a three wheeler mogul type. As it proceeded from New Leipzig westward at the time mentioned, the sun was shining; the track was level and straight; for

a half mile westward the tracks could be seen; there were no weeds or grass thereon; the engineer was keeping a watch of the track in front of him; when 200 or 300 feet away, the engineer observed the dog. He did not blow any whistle except a whistle at the crossing first west of the depot.

The engineer testifies that the dog stayed there until the engine was close, about 30 or 35 feet away, then the dog left the track and he saw the boy. He then blew the whistle, applied the brakes, and made an emergency stop; the brakes were working well and a good stop was made. The boy was pulled out just back of the front tracks of the refrigerator car attached to the engine. The fireman testified that he saw the dog when about 80 feet away. He was on the left side of the cab; the cab window extends over the rails probably about a foot; between the outside of his cab window and that of the engineer's on the right side, the distance is about 8 feet. The boy testified that he was not asleep, that he was lying between the tracks sort of crossways; that the dog was there with him about a foot away to the north of him between the rails; he did not hear the train until it was 5 or 6 feet away; he tried to get off the track; he got his right arm and right leg across the rail and these were caught by the train. The engineer testified that it seemed to him that the boy must have been sleeping or in a dazed condition, because he blew the whistle continuously and he never moved. The jury found that the boy was asleep just before the accident occurred. The train was proceeding at the rate of 8 to 15 miles per hour. One witness stated the rate to be 8 or 9 miles per hour. Under this evidence, it is perfectly clear that if the engineer did see the boy 200 to 300 feet distant, he could easily have stopped this train and avoided the injuries sustained. There is no dispute in the evidence that the brake appliances were in fine working order and that a fine emergency stop was accomplished when some 30 to 35 feet away from the boy. Some witnesses testified that the blowing of the alarm whistle and the stopping of the train occurred practically at the same time. It was so good that passengers were thrown out of their seats. It is fairly clear that if the fireman did see the boy about 80 feet distant, the train could likewise have been stopped and the injuries avoided. The record discloses that children frequently played on this track where the injuries

were sustained, and were frequently there on such tracks; this boy of tender years was in a position of peril.

Necessarily from the special findings made, the jury, pursuant to the instructions of the court in this regard, must have found, to support the general verdict rendered, that the engineer did see the boy about the time he first saw the dog and in time to have avoided the injuries sustained by the exercise of ordinary care. This court is not prepared to say as a matter of law, that the jury were not warranted in so finding under the evidence. The jury did find that the dog did not obstruct the view of the engineer so that he could not see the boy. There is, however, no special finding of the jury that the engineer did in fact see the boy in time, after such discovery, to avoid the injuries. It is clear, therefore, under the evidence, that the doctrine of last clear chance applied, if the engineer saw the boy at or about the time he first saw the dog.

The majority of the court are of the opinion that there is some substantial evidence upon which the jury might base a finding that the engineer did see the boy in time to avoid the injury. But they doubt if the jury did in fact so find, or have any intention of so doing. This is especially so in view of the finding of the jury that the boy had been asleep, which finding was contrary to the testimony of the boy. Accordingly a majority of the court are of the opinion that the judgment should not be reinstated, but that the case should be remanded for further proceedings upon the motion of a new trial. The majority also deem it proper to suggest that, in the event a new trial is ordered and had, special interrogatories ought to be submitted to the jury upon the controlling questions of fact arising under the last clear chance doctrine. Ballweber v. Kern, 38 N. D. 12, 164 N. W. 272.

The order of the trial court is reversed and the case is remanded to the District Court for further proceedings herein, with costs to the appellant.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). The infant plaintiff, when a boy of nine and one-half years, was herding the town cattle adjacent to the line of defendant's railway. He fell asleep on the track and was run over by a locomotive, causing the loss of his arm and a leg. The jury gave

plaintiff a verdict for $3,000. The court gave judgment for defendant notwithstanding the verdict, and the plaintiff appeals.

The question presented is one of negligence and contributory negligence. When the plaintiff rested and defendant rested, the defendant moved the court to direct a verdict in its favor because the record failed to show any negligence on the part of the defendant and because the undisputed testimony showed that the boy was guilty of contributory negligence as a matter of law. The motion was denied and exception taken.

The law of the case is given by statute: Section 5948: "Every one is responsible not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter wilfully or by want of ordinary care brought the injury upon himself. . . ."

The accident occurred in July, 1912, and about five years afterwards, this action was commenced. The train which run over the boy consisted of four cars, two of which were passenger cars. The engineer testified he saw nothing on the railroad track until about a half a mile from the village. Then he noticed a dog on the track at a distance of about two or three hundred feet. When at a distance of 30 or 35 feet the dog left the track. Then the engineer saw a boy lying there. He was lying between the rails, flat down. The engineer blew the whistle, shut off the steam, set the brakes, and, as he testifies, the boy did not move. He made an emergency stop, put on the brakes with all force, and when the train stopped the boy was lying behind the front tracks of the head car.

The boy testified that he lay on the track, facing east; that his black shepherd dog, a small pup about seven months old, lay behind him and about a foot from him. He did not hear the train till it was within 5 or 6 feet, and then, without seeing the train, he tried to roll off the track and had just got his right leg and arm on the track when he was caught. The train cut off the leg below the knee and the arm above the elbow. He testifies he was not asleep,—and there is no claim that he was deaf. His story is not credible. If not asleep, he would have heard the train in time to get off the track. But whether asleep or awake, it appears the boy was guilty of contributory negligence of the grossest kind. The engineer was not guilty of any negligence. He did

not suspect, and he had no occasion to suspect, that a boy lay on the track; and when he saw the boy he did all that was possible to stop the train. Then he took him from under the train; took him back to New Leipzig. The testimony shows conclusively and beyond all doubt the plaintiff has no cause of action. Order should be affirmed.

THOMAS R. MACDONALD, Plaintiff and Appellant, v. GERALD FITZGERALD and James H. Ross, Defendants and Respondents, JOHN U. HEMMI, Intervener and Respondent.

(171 N. W. 879.)

Attachment — warrant of attachment — levy — how made.

1. A warrant of attachment is not rendered *functus officio* by the fact that levy has been made thereunder; but under § 7545, Compiled Laws 1913, the sheriff, to whom a warrant of attachment is delivered, may levy from time to time and as often as is necessary, until the amount for which it was issued has been secured, or final judgment has been rendered in the action.

Judgment — levy of execution — second levy upon property released by mistake.

2. In the absence of fraud and where no other rights intervene, there is no reason which will prevent a second levy upon personal property, under the outstanding writ, where such property has once been taken but afterward surrendered by mistake or otherwise.

Attachment — not dissolved by amending complaint.

3. An attachment is not dissolved by an amendment of the complaint which merely increases the amount of damages; but the lien of the attachment remains effective for the amount claimed in the original complaint and specified in the warrant of attachment.

Attachment — evidence.

4. Where a person who claims to have purchased certain personal property from the defendant in an attachment suit brings an action in claim and delivery against the sheriff to recover such property, it is proper to permit the attaching creditor to testify as to the indebtedness involved in the suit in which the attachment was issued.

Fraudulent conveyance — change of possession.

5. Where it appears that a vender of personal property has the same in his possession or under his control, the sale thereof, unless accompanied by an

actual and continued change of possession of the property sold, is presumed to be fraudulent and void as against creditors of the vender, unless those claiming under such sale make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors. Comp. Laws 1913, § 7221.

Instructions — error in.

6. Certain assignments of error predicated upon instructions given and refused considered, and *held* to be without merit for reasons stated in the opinion.

Opinion filed March 1, 1919. Rehearing denied April 10, 1919.

From a judgment of the District Court of Stutsman County, *Coffey*, J., plaintiff appeals.

Affirmed.

John A. Jorgenson, for appellant.

A mere naked possession of property confers some rights as against a mere wrongdoer and trespasser. Sanford v. Millikin, 144 Mich. 311, 107 N. W. 884; Anderson v. Gouldberg, 51 Minn. 294, 53 N. W. 636; Smith v. Lydick, 42 Mo. 209; Rogers v. Arnold, 12 Wend. 30; Freshwater v. Nighols, 52 N. C. 251; Taylor v. Brown, 49 Or. 423, 90 Pac. 673; Kellogg v. Adams, 51 Wis. 138, 37 Am. Rep. 815, 8 N. W. 115; Hall v. Johnson, 21 Colo. 414, 42 Pac. 660; Stockwell v. Robinson, 9 Houst. (Del.) 313, 32 Atl. 528; Van Namee v. Bradley, 69 Ill. 299; Moorman v. Quick, 20 Ind. 67; Odd Fellows v. McAllister, 153 Mass. 292, 11 L.R.A. 172, 26 N. E. 862; N. D. Comp. Laws 1913, § 7546.

Under S. D. Comp. Laws, § 4599, the sheriff cannot, as against the owner seeking to recover his property in replevin, justify its seizure under an attachment on which a return was not made within twenty days. Carson v. Fuller, 11 S. D. 502, 74 Am. St. Rep. 823, 78 N. W. 960.

In order to be protected from liability for acts done in the execution of measure process, the sheriff must make his return therein within the time prescribed by statute. 35 Cyc. 1746, notes 41 and 42, 1749, notes 51 and 52; Vail v. Lewis, 4 Johns. 450, 4 Am. Dec. 300; Jordan v. Henderson, 30 Tex. Civ. App. 89, 86 S. W. 961; Barnard v. Stevens, 2 Aik. (Vt.) 429, 16 Am. Dec. 733.

An increase in the amount declared for in the writ dissolves and

discharges any attachment made upon the original writ. Clough v. Monroe, 34 N. H. 381; Beyer v. Dobeas, 141 Wis. 89, 123 N. W. 638; Austin v. Burlington, 34 Vt. 506; Smead v. Chrisfield, 1 Handy (Ohio) 573; Clark v. Foxcroft, 1 Pick. 204; Adams v. Anthony, 18 Pick. 238; Fairfield v. Baldwin, 12 Pick. 388; Page v. Jewett, 46 N. H. 446; Hild v. Hunnewell, 1 Pick. 192; Pierce v. Patridge, 3 Met. 49; Oconto v. Erson, 112 Wis. 89, 87 N. W. 855; Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490.

Where it is alleged that the property was transferred to the debtor's wife in fraud of his creditors, the pleadings in the action in which judgment was rendered against the debtor are not competent evidence against the wife to show where the debt was incurred. Arnett v. Coffey, 1 Colo. App. 34, 27 Pac. 614; Eggleston v. Sheldon (Wash.) 148 Pac. 575.

Where a sale has been made and possession does not change but the purchaser proves that he paid full and adequate price he disproves the fraud prima facie, and shifts the burden back upon him who asserts it. Norwegian v. Hanthorn, 71 Wis. 537, 37 N. W. 825; Cook v. Van Horne, 76 Wis. 520, 44 N. W. 767; Densmore v. Shong, 98 Wis. 385, 74 N. W. 114; Morrison v. McCluer (Colo.) 148 Pac. 380; Petrie v. Wyman, 35 N. D. 126, 159 N. W. 621; 20 Cyc. 784, subd. 3 and cases cited in notes 11 and 12.

F. G. Kneeland (*John U. Hemmi*, of counsel for defendants and *in propria persona*), for defendants and intervener.

Increasing the damages claimed by amendment does not release sureties on a bond given to discharge an attachment. Gettman v. Baxter, 42 L.R.A.(N.S.) 484, note.

In an action to try title by the judgment creditor against an alleged fraudulent grantee of the debtor, a judgment regularly rendered and entered by a court of competent jurisdiction is, in the absence of allegation and proof of fraud or collusion, conclusive evidence of the debt and its amount. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Thompson v. Crane, 73 Fed. 327–331; Hunsinger v. Hoffer, 110 Ind. 390, 11 N. E. 463; Bowen v. State, 121 Ind. 235, 23 N. E. 75; Yeend v. Weeks (Ala.) 16 So. 165; Jameson v. Bagot, 106 Mo. 24, 16 S. W. 697; Holladay Case, 27 Fed. 830–844; Hinde v. Longworth, 11 Wheat. 211.

A conveyance of property by a debtor made in good faith, but with intent to defraud creditors, is not relieved from the condemnation of the statute by the fact that it was given for a valuable consideration or to pay an honest debt. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; 20 Cyc. 752, 754; Wick v. Hickey, 103 N. W. 471.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover the possession of a certain automobile. The automobile was seized by the defendant Fitzgerald, as sheriff of Stutsman county, under a warrant of attachment issued to him in an action then pending in the district court of that county, wherein one John U. Hemmi was plaintiff and one C. A. Shaw was defendant. The defendant Ross is the successor in office of Fitzgerald and as such received the automobile into his possession, when he entered upon his duties as sheriff. John U. Hemmi, the plaintiff in the action in which the warrant of attachment was issued, intervened in the instant action. The case was submitted to a jury which returned a verdict in favor of the defendants and the intervener for a dismissal of the action. Judgment was entered pursuant to the verdict, and defendant has appealed from the judgment.

The evidence shows that C. A. Shaw and one J. A. MacDonald came to Jamestown, North Dakota, from Seattle, Washington, in the spring of 1916 and engaged in the construction business. Among others they entered into a contract to construct a house for John U. Hemmi. J. A. MacDonald afterwards died, and C. A. Shaw was the sole surviving member of the firm. In November, 1916, said John U. Hemmi brought an action against C. A. Shaw as such surviving partner for breach of the building contract. It was in this action that the warrant of attachment involved herein was issued. Said C. A. Shaw owned an automobile. He kept it in a certain barn in Jamestown which he had rented for that purpose. It is undisputed that he was originally the owner of the automobile, but he claims that he sold it to the plaintiff, Thomas A. MacDonald, on the 10th day of November, 1917. Thomas R. MacDonald is a brother of J. A. MacDonald, Shaw's former partner. He was employed by the firm during the summer. He is a married man and his home is in Alabama. The plaintiff MacDonald did not testify either personally or by deposition, and the testimony by which the plaintiff's claim is sought to be established is the testimony of

Shaw. Shaw testified that he sold the automobile to Thomas R. MacDonald on November 10, 1917, receiving therefor a consideration of $175, $105 of which was cash, $40 a certain freight bill MacDonald had paid for Shaw, and $30 for back pay owing by Shaw or his firm to MacDonald. There was a balance due of $300 to the Oakland Company of the original purchase price, which it is claimed MacDonald assumed and agreed to pay. There is no evidence whatever of any actual change of possession. The purchaser MacDonald did not drive the automobile at all. Shaw, however, drove the automobile after he claims to have sold it to MacDonald. Shaw also testified that he made the payments to the Oakland Company without any arrangement whatever with MacDonald, and that MacDonald has never repaid such payments. The evidence also shows that the plaintiff MacDonald, subsequently to the time when it is claimed that he purchased the automobile, filed a mechanic's lien against the Hemmi house for labor which he claims to have performed upon it while working for Shaw and MacDonald prior to November 10, 1916. If the mechanic's lien statement sworn to by MacDonald is true, then the amount for which he filed the lien was due and owing to him at the time it is claimed he purchased the automobile and paid Shaw the $105 in cash. A witness also testified that on November 17, 1916, the day when the sheriff levied upon the automobile, C. A. Shaw was driving the car and trying to find a purchaser for it.

Appellant's first assignment of error is predicated upon the admission in evidence of the judgment roll, including the warrant of attachment and return, in the case of Hemmi v. Shaw. The specific objections made to the admission of these papers being: (1) That the sheriff had failed to make a return upon the warrant of attachment within twenty days after the commencement of the action; and (2) that upon or immediately prior to the trial of said action the plaintiff's complaint was amended so as to increase the amount of plaintiff's demand, and that no new undertaking was filed in the attachment proceeding covering the new amount demanded.

The first objection is based upon § 7546, Complied Laws 1913, which requires a sheriff within twenty days after seizure of property under a warrant of attachment to file an inventory of the property and a return of his doings upon such attachment. It is unnecessary to

consider the statute, or the effect of a failure to comply with its provisions, for in this case such noncompliance has not been shown. It is undisputed that a return was filed on December 11, 1916. In the complaint in intervention it is alleged that the automobile was first levied upon on the 17th day of November, 1916, and that a second levy was made on the 11th day of December, 1916,—the day on which the inventory and return was filed. The plaintiff filed an answer to the complaint in intervention. In such answer he expressly admitted "that a second levy of attachment was made by the then sheriff of said county in the same action on the same automobile hereinafter mentioned on or about the 11th day of December, 1916." The evidence also shows that the sheriff, upon being served with a third-party claim by the plaintiff, did in fact release the first levy on December 9, 1916, and exercised no dominion over the automobile from that time until he made the second levy upon it on the 11th day of December, 1916. A warrant of attachment is not rendered *functus officio* by the fact that a levy is made thereunder. Our statute expressly provides that "the sheriff, to whom a warrant of attachment is delivered, may levy from time to time and as often as is necessary, until the amount for which it was issued has been secured, or final judgment has been rendered in the action." Comp. Laws 1913, § 7545.

And it is well settled that "in the absence of fraud there is no reason which will prevent a second levy upon personal property, under the outstanding writ, where such property has once been taken but afterward surrendered by mistake or otherwise, no other rights intervene, and the legal owner interposes no protest against such second levy." 6 C. J. p. 242.

The second objection is, in our opinion, also without merit. The statute requires the plaintiff to furnish an attachment bond in a sum "at least equal to the claim specified in the warrant." Comp. Laws 1913, § 7543. The undertaking furnished by the plaintiff in the case of Hemmi v. Shaw was concededly for a sufficient amount at the time it was furnished. The amendment to the complaint in no manner changed the cause of action. It merely increased the *ad damnum*. The sureties upon the attachment bond were not released from liability. The subsequent claim of the larger damages did not invalidate the attachment. Pope v. Hunter, 13 La. 306. See also Hemmi v. Grover,

18 N. D. 578, 120 N. W. 561. The lien of the attachment still remained effective for the amount of the claim as stated in the warrant of attachment. Fellows, J. & Co. v. Dickens, 5 La. Ann. 131.

Appellant next contends that the court erred in admitting certain evidence offered to show that Hemmi was a creditor of Shaw on November 10, 1916.

Under our statute, a creditor is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money. Comp. Laws 1913, § 7216. And "every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor and their successors in interest." Comp. Laws 1913, § 7220. The answer of the defendants, and the complaint in intervention, both allege that the action of Hemmi v. Shaw was brought on for trial and judgment rendered therein in favor of Hemmi and against Shaw for $605.41, on July 19, 1917. These allegations were specifically admitted by the plaintiff in his answer to the complaint in intervention. Plaintiff at no time raised any question as to the materiality of these allegations, but on the contrary, in his answer to the complaint in intervention, expressly admitted that they were true.

The specific evidence to which objection was made was the testimony of Hemmi as to the amount he had overpaid Shaw. The testimony tended directly to show that Hemmi was a creditor of Shaw on and prior to November 10, 1916. In connection with the objection to Hemmi's testimony, plaintiff's counsel also asserted that the judgment and the judgment roll in the case of Hemmi v. Shaw (which had already been received in evidence) were as to MacDonald only secondary evidence of the indebtedness. The judgment was at least prima facie evidence of the indebtedness of Shaw to Hemmi. 23 Cyc. 1286, 1287. But there was certainly no error in permitting Hemmi to testify to such indebtedness. And in view of the objections made by the plaintiff to the judgment in Hemmi v. Shaw, it is indeed difficult to understand why he should complain of the fact that the creditor was permitted to testify directly with respect to the indebtedness.

Our statute provides that "every sale made by a vender of personal property in his possession or under his control and every assignment

of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vender or assignor, or subsequent purchasers or encumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or encumbrancers." Comp. Laws 1913, § 7221.

The court instructed the jury in the language of the statute. This instruction was manifestly proper. There was ample evidence to sustain a finding that there had been no change of possession, and it is indeed difficult to see where there was any substantial evidence to the contrary. But appellant asserts that the trial court erred in its instructions as to the effect and application of the statute. The court instructed the jury that "the burden of proof is upon the plaintiff upon the whole case to show you that he is entitled to a recovery, and if the plaintiff shows to you that this transfer from Shaw to him of the automobile was made in good faith, and for value, it is immaterial as to whether or not possession of the property changed. But it is necessary that the plaintiff should show that the transfer from Shaw to him, Thomas R. MacDonald, was made in good faith, and for value, and without any intention of hindering, delaying, or defrauding creditors, purchasers, or encumbrancers for value; so that, upon the whole case, gentlemen of the jury, the burden of proof rests upon the plaintiff to show you that MacDonald purchased this automobile in good faith, without any intention of hindering or delaying the creditors of said C. A. Shaw, and particularly this defendant, J. U. Hemmi, the intervener, and the sheriff who stands in his position."

The term "burden of proof" is generally used by the courts in two senses. The matter was fully discussed by this court in Guild v. More, 32 N. D. 432, 466, 155 N. W. 44. We do not, however, deem the question of any material importance in the instant case. In this case, the plaintiff asserted that he was the owner and entitled to the immediate possession of a certain automobile. The defendants and intervener denied this. Plaintiff had the burden of proof. He must establish his ownership and right of possession. To do this he introduced evi-

dence tending to show that he purchased the automobile from Shaw on November 10, 1916. But the evidence also tended to show that the alleged sale was not accompanied by an actual and continued change of possession of the automobile. Hence, under the plain words of the statute the alleged sale was presumptively fraudulent and void as against the creditors of Shaw, and the plaintiff was further required to establish that the sale "was made in good faith and without any intent to hinder, delay, or defraud" any of such creditors. See also 20 Cyc. 450, 555, 753.

Plaintiff asserts that an instruction similar to the one involved in this case was held prejudicial by the supreme court of Wisconsin in Griswold v. Nichols, 117 Wis. 267, 94 N. W. 33, under a statute similar to § 7221, supra. An examination of the case cited shows that plaintiff is in error. The instruction condemned in that case was characterized by the court in its opinion as follows: "The effect of this instruction is that, although the property was conveyed and received for the purpose of paying a bona fide debt, nevertheless there is a presumption that it was fraudulent, unless the complete change of possession required by § 2310, Rev. Stat. 1898, took place." Manifestly the instructions complained of in the instant case are not subject to this criticism. For in the instant case, the court expressly charged that "if the plaintiff shows to you that this transfer from Shaw to him of the automobile was made in good faith, and for value, it is immaterial as to whether or not possession of the property changed."

Appellant also assigns error upon the court's refusal to instruct that "ponderous and bulky articles difficult to remove will pass by bill of sale without further change of possession." And further that when chattels are in the possession of a bailee no actual delivery is necessary to obviate any presumption of fraud. The requested instructions were so manifestly inappropriate and inapplicable in this case that a mere statement of appellant's contention answers it.

Appellant also contends that the trial court should have instructed the jury to return a verdict for the plaintiff. The contention is entirely devoid of merit. We have already alluded to some of the facts disclosed by the evidence. There were other things tending to establish the fraudulent character of the alleged sale. There was ample evidence to justify a verdict for the defendants.

Judgment affirmed.

JOHN WEBER et al., Appellants, v. WILLIAM BADER, Respondent.

JOHN WEBER et al. v. KLAUDT.

(172 N. W. 72.)

Contracts — trust relationship — Statute of Frauds.

An oral contract between several parties that one shall purchase school land in his own name, with his own money, and hold the same in trust for the benefit of other parties, is within the Statute of Frauds and is void.

Opinion filed March 10, 1919. Rehearing denied April 10, 1919.

Appeal from the District Court of McIntosh County, Honorable *A. T. Cole,* Special Judge.

From an order sustaining a demurrer to complaint, plaintiffs appeal. Affirmed.

Lynn & Lynn (*H. A. Bronson,* of counsel), for appellants.

Where the lessors of each quarter of land were holding their right, title, and interest in the premises so used in trust for the benefit of the joint enterprise, same constituted a partnership. Comp. Laws 1913, § 6386; Kayser v. Maughan, 8 Colo. 232; See notes in 115 Am. St. Rep. 400, and 43 Am. St. Rep. 429.

Where a party purchases common property put up at a trust deed sale under an express agreement to hold the legal title for the joint benefit of himself and copartners, he holds legal title charged with a constructive trust, and equity will compel its fulfilment. Hadgson v. Fowler, 24 Cal. 278, 50 Pac. 1034; See notes in 37 L.R.A. (N.S.) 899, and 4 L.R.A.(N.S.) 427; Floyd v. Duffy, 68 W. Va. 339, 33 L.R.A.(N.S.) 883, 69 S. E. 993; See also Vaught v. Hogue, 32 Ky. L. Rep. 1061, 107 S. W. 757; Mallon v. Buster, 121 Ky. 379, 123 Am. St. Rep. 201, 89 S. W. 257; Griffin v. Schlenk (Ky.) 102 S. W. 837; Koyer v. Willmon (Cal.) 90 Pac. 135; Jones v. Davies, 60 Kan. 309, 72 Am. St. Rep. 354; Berry v. Evendon, 14 N. D. 1; Morris v. Rugel (S. D.) 101 N. W. 1086.

Where the parties concerned in the purchase of land occupy a con-

NOTE.—On Statute of Frauds as affecting legal remedy for breach of contract for and in the name of another, see note in 5 L.R.A.(N.S.) 123.

fidential relation to each other, they will be held to be trustees for each other. Comp. Laws 1913, § 6395; Carr v. Craig, 116 N. W. 720.

Remington & Burke, for respondent.

A contract uncertain both as to its parties, the time of its performance, and the extent of the obligation, is void. Johnstone v. Platnor (S. D.) 8 N. W. 926; 13 C. J. 329; Berry v. Hooper (Mich.) 146 N. W. 275.

Where there is no other consideration for a contract the mutual promise must be binding upon both parties. 6 R. C. L. 687.

A party against whom redress by specific performance cannot be sought cannot himself as a rule seek it. 6 R. C. L. 692; Wardell v. Williams (Mich.) 4 Am. St. Rep. 814; Gunner v. Carlton (Cal.) 27 Am. St. Rep. 171; note in 27 Am. St. Rep. 173, 174.

This action was brought to establish a trust, rather than for specific performance in order to get around the Statute of Frauds. N. D. Comp. Laws 1913, §§ 5888, 5963; 20 Cyc. 312 and cases cited.

The Statute of Frauds applies to an agreement to buy for another. Brosnan v. McKee (Mich.) 30 N. W. 107; McDonald v. Maltz (Mich.) 44 N. W. 337; Raub v. Smith (Mich.) 28 N. W. 676; Seymour v. Cushvag (Wis.) 76 N. W. 769.

Robinson, J. This is an appeal from an order sustaining a demurrer to the complaint. It avers that in February, 1918, the plaintiffs were jointly, with others, engaged in the business of pasturing stock for themselves and others and in the joint possession of a half section of school land which they held under a lease from the state, with improvements worth $400; that as the half section was about to be exposed for sale at public auction the parties agreed among themselves that some one of their number should purchase the same in his name for the use and benefit of all the plaintiffs and the defendant and *for those who should come in and contribute equally to the cost and the purchase price of the land.* This the defendant promised and agreed to do. Then he went to Ashley and purchased the land in his own name at $25 an acre, paying $979, and expenses $10; and he now holds the contract of purchase in his own name and denies the plaintiffs any beneficial interest in the contract, though each has offered to pay his

share of the price and expense; wherefore, the plaintiffs ask the court to adjudge defendant a trustee of the land for their benefit.

The defense is that the alleged agreement is within the Statute of Frauds, and that the complaint fails to show a mutual agreement between the defendant and the plaintiff "and the others" who now claim no interest in the land. It is contended that the complaint shows a special partnership, and that in purchasing the land the defendant acted as one of the partners, and hence the agreement is not void because of the statute.

But a partnership is an association of two or more persons for the purpose of carrying on a business together and dividing the profits between them. Section 6386. And under the lease the plaintiffs held the land as tenants in common, each person using it for the pasturage of his cow or cows, or for his own individual benefit, and such was the use contemplated by the purchasers. There was no association for the purpose of carrying on a business and dividing the profits. Hence, there was no partnership. If we concede that the complaint shows an oral contract between the defendant and the plaintiffs, and not between them "and others who might choose to contribute to the cost and the purchase price," then the question is: Was it competent for defendant to make a valid oral contract to purchase the land in his own name, with his own money, and to hold the same in trust for the other parties? A purchaser of school lands must execute a contract of purchase, which must be in writing and in the name of the purchaser. Section 308. Without written authority a person may not contract to purchase school land in the name of another. The authority to do an act required to be in writing can only be given by an instrument in writing. Section 6330. Now, every contract for an interest in real property must be in writing. Section 5888. If defendant promised to buy the school land in his own name, with his own money, and to hold the same for the benefit of another, it was a contract for an interest in real property, and, not being in writing, it is void. It is not a contract of agency. Schmidt v. Beiseker, 14 N. D. 587, 5 L.R.A.(N.S.) 123, 116 Am. St. Rep. 706, 105 N. W. 1102. The oral contract is clearly void for want of mutuality, and because it is a contract for the purchase of an interest in land and it is not in writing. Affirmed.

There is pending another case between the same plaintiffs and

John Klaudt, which is in all respects the same as this—and the decision is the same. It is affirmed.

BRONSON, J., being disqualified, did not participate, Honorable C. M. COOLEY, Judge of First Judicial District, sitting in his stead.

LARK EQUITY EXCHANGE, a Corporation, Appellant, v. E. E. Jones, Respondent.

(171 N. W. 863.)

Trials — trial de novo.

1. Where an action properly triable by a jury is tried to the court without a jury, the supreme court will not try the case *de novo*, but the findings of the trial court are presumed to be correct. Appellant has the burden of showing error, and a finding based upon parol evidence will not be disturbed by the appellate court, unless shown to be clearly opposed to the preponderance of the evidence.

Trials — when legal liability arises.

2. To render a person liable at law, it must be shown that he has violated some legal duty which he owed to another.

Trials — money paid by mistake — when recoverable.

3. To entitle a plaintiff to recover moneys paid under mistake, he must show not only that he has paid the money, but also that the action of the defendant in accepting or retaining it is inequitable and against conscience.

Trials — corporations — recovery of dividends paid by mistake.

4. Whether a corporation can maintain an action to recover back from a stockholder a dividend paid to him out of the capital, where the stockholder receiving the dividend acted in good faith, believing the same to be paid out of the profits made by the corporation, considered, but not decided.

Opinion filed March 15, 1919. Rehearing denied April 10, 1919.

Appeal from the District Court of Grant County, *Hanley*, J., and *Nuessle*, Special Judge.

Plaintiff appeals from a judgment, and from an order denying a motion for judgment or for a new trial.

Jacobsen & Murray, for appellant.

"Dividends can be declared only from surplus profits derived from the business." Comp. Laws 1913, § 4543; 10 Cyc. 549, and cases cited under note 38.

"In an action at law tried before a court, no motion for directed verdict is necessary in order to enable the supreme court to grant such motion." 167 N. W. 72; Comp. Laws 1913, § 7637.

Nuchols & Kelsch, for respondent.

"A party who has submitted his cause to trial by the court without a jury may be estopped to assign lack of waiver of his right to trial by jury as reversible error on appeal." Smith v. Junert, 17 N. D. 120; Comp. Laws 1913, §§ 7249, 7250. See also 4 C. J. 717 *et seq.*

CHRISTIANSON, Ch. J. The plaintiff corporation brought this action to recover back from the defendant the sum of $244.79, which it is alleged that the plaintiff corporation paid to the defendant as one of its stockholders as a dividend. The complaint alleges in substance that in June, 1916, the manager of the plaintiff corporation rendered a statement to its stockholders, and that the directors of the corporation relying upon the correctness of such statement, declared a dividend whereby the said sum of $244.79 was paid to the defendant as his proportionate share of the dividend so declared; that the said statement was erroneous, and that in truth and fact the defendant company had no profits whatever; that after discovering the error the directors rescinded the resolution declaring a dividend and ordered the money paid back to the corporation; and that defendant has failed and refused to do so.

The answer admits the corporate character of the plaintiff; that the defendant was and is a stockholder therein, and that he received the dividend alleged in the complaint. The answer further alleges, among other things, that the declaration of dividend was made without the knowledge of the defendant. The case was tried to the court without a jury. The trial court found that "the evidence introduced on the part of the plaintiff was such that the court is unable therefrom to determine the financial condition of the plaintiff corporation at the time the divi-

dend was declared, and as to what amount, if any, the plaintiff would be entitled to recover." Judgment was entered in favor of the defendant for a dismissal of the action. The plaintiff subsequently moved for judgment notwithstanding the decision or for a new trial upon the ground, among others, that the evidence was insufficient to justify the decision. The motion was denied. The order denying the motion recites that it is based upon the minutes of the court, exhibits, stenographic report, and all pleadings, records, and files in the case. Plaintiff has appealed from the judgment and from the order denying its motion for judgment or for a new trial.

Appellant's argument is devoted almost entirely to the question of the sufficiency of the evidence. It is contended that the evidence shows that the plaintiff corporation in fact had no profits whatever at the time the directors voted to declare a dividend, and that their action in declaring a dividend was due to a mistake as to the amount of the assets and liabilities of the corporation.

The record shows that the only evidence adduced by the plaintiff in support of its contention that the corporation had no profits on hand at the time the dividend was declared was the testimony of an expert accountant who claimed to have made an audit of the affairs of the corporation, and ascertained its assets and liabilities. He stated that it was impossible to obtain a correct statement from the books of the corporation, and that his statement was not based upon such books alone, but also upon investigations which he had made, including, among other things, the books of a bank through which the corporation conducted some of its business. The original books, upon which the expert accountant's testimony, in part, is based, were not offered in evidence. The defendant placed upon the stand the manager of the plaintiff corporation, and his testimony in many respects was at variance with that of the expert accountant. Their estimates as to the value of certain of the assets differed; and when the evidence is considered, as a whole, it is indeed difficult to find any basis upon which any accurate deduction can be made as to the assets and liabilities of the corporation.

The case was tried before, and the findings of fact therein made by, Judge Hanley of the twelfth district. The motion for judgment or for a new trial was made before Judge Nuessle of the sixth judicial dis-

trict, who sat in the place of Judge Hanley during the latter's absence in military service. We have already quoted from the findings made by Judge Hanley. In the order denying plaintiff's motion for judgment or for a new trial, Judge Nuessle expressly found that the decision was in accord with the evidence.

The action is one properly triable to a jury. It is not triable anew in this court. The trial judge saw and heard the different witnesses. He found that the plaintiff had failed to establish the allegations of the complaint. The findings are presumed to be correct. They will not be disturbed unless shown to be clearly opposed to the proponderance of the evidence. State Bank v. Maier, 34 N. D. 259, 158 N. W. 346; Botnen v. Eckre, ante, 171 N. W. 95. The correctness of the findings was also reviewed and reaffirmed by Judge Nuessle in denying the motion for judgment or for a new trial. We are not prepared to say, upon the record before us, that there was any error committed in denying a new trial.

What has been said above is decisive of the case, and requires that the judgment be affirmed. While the point has not been made by the respondent, it seems that plaintiff's proof was also deficient in another respect. In the case at bar there is no contention that defendant was guilty of any wrong in obtaining the dividend. He was neither a director nor an officer. He was merely a stockholder. He had nothing whatever to do with the declaration of the dividend. He merely accepted the dividend when it was tendered to him. There is not even a suggestion of bad faith on the part of the defendant. It must be remembered that in order to render a person liable at law, it is necessary to show that he is a wrongdoer, *i. e.*, that he has violated some right *in rem* or some right *in personam* of the plaintiff. Holland, Jur. 5th ed. 128, 144; Markby, Elements of Law, 3d 417. See also Compiled Laws 1913, §§ 5763, 7330. It must also be remembered that, to entitle a plaintiff to recover moneys paid under mistake, he must not only prove that he has paid the money without receiving the equivalent contemplated by him, but he must also show that the defendant has acted inequitably and against conscience. Keener, Quasi Contr. pp. [illegible] 140. Hence the better rule seems to be that where a p[illegible] faith receives money paid by another under mista[illegible] take and demand for a return of the money [illegible]

an action to recover such moneys. See Keener, Quasi Contr. pp. 139–141; 37 Cyc. 872, 873. In this case, there was no showing whatever that any notice was given to, or demand made upon, the defendant before the commencement of the instant action.

Whether an action will lie at all against a stockholder to recover a dividend paid out of the capital of a solvent corporation, where the stockholder receives the dividend in good faith believing it to be paid out of the profits, is a question upon which the courts have differed. The supreme court of Kentucky has held that such action will lie. See Lexington Life F. & M. Ins. Co. v. Page, 17 B. Mon. 412, 66 Am. Dec. 165. But the United States Supreme Court has held that such action will not lie even on the part of the receiver of the corporation. See McDonald v. Williams, 174 U. S. 397, 43 L. ed. 1019, 19 Sup. Ct. Rep. 743. See also Great Western Min. & Mfg. Co. v. Harris, 63 C. C. A. 51, 128 Fed. 321; New Hampshire Sav. Bank v. Price, 58 C. C. A. 294, 121 Fed. 956; Lawrence v. Greening, 66 C. C. A. 546, 97 Fed. 906. The question has not been raised in this case, and we therefore express no opinion thereon. We make reference hereto to show that the question is not determined, so that in the future it may not be contended that the decision in this case impliedly recognized the right to maintain such action.

The judgment and order appealed from are affirmed.

GRACE, J. I concur in the result.

F. ORTH, George E. Towle, J. R. Orth, and E. E. [illegible] for Citizens State Bank of Regent, North Dakota, [illegible] pellants, v. CHARLES PROCISE and Nellie Procise, [illegible] Respondents.

(171 N. W. 881)

Judgments [illegible]

[illegible] Act—[illegible] fraudulent representations. In [illegible] the Kansas [illegible] judgment. After the remittitur [illegible] plaintiffs herein made a motion for a

appears from the opinion of the court, or the language used, that a new trial is ordered or may be granted.

Judgment — appeal under Newman Act — authority of trial court to grant new trial.

2. Where an appeal has been had to this court in an action which is triable, and has been tried and submitted under the Newman Act, and this court in its opinion indicated a final disposition of the case and ordered the judgment to be reversed, it is *held* that the trial court had no authority to grant a new trial in such action, upon motion made therefor, and that it was proper to enter a judgment of dismissal, and for costs in the trial court against the appellants herein.

Judgment — judgment for foreclosure of mortgage — effect of judgment in lower court where only one of two defendants appeals.

3. Where judgment is rendered upon an action brought upon a note and mortgage, and for the foreclosure thereof, against two defendants, and one only of the defendants appeals therefrom, the reversal of such judgment by this court, on such appeal, does not operate to reverse the judgment rendered against the other defendant who has not appealed.

Opinion filed March 15, 1919. Rehearing denied April 10, 1919.

Appeal from order of District Court, Hettinger County, *Crawford,* J., denying motion for new trial.

Affirmed.

F. C. Heffron, for appellants.

There are two ways in which supreme courts order new trials in the trial court. One is by express words, and the other is by use of the phrases "judgment reversed" "remanded for further proceedings." Daniels v. Butler (Iowa) 155 N. W. 265; Sanders v. Sutlive (Iowa) 154 N. W. 610; Kirshman v. Swehla (Iowa) 17 N. W. 908; Jordan v. Winser, 48 Iowa, 180; Howell v. Sherwood (Mo.) 147 S. W. 810; Heidt v. Minor (Cal.) 45 Pac. 700; Myers v. McDonald (Cal.) 8 Pac. 809; Backus v. Burke (Minn.) 53 N. W. 1013; Laithe v. McDonald, 7 Kan. 254; Hays Bank v. Edwards (Kan.) 115 Pac. 118; Merrill v. Merrill, 65 Me. 79; Schley v. Schofield, 61 Ga. 528; Benbow v. Robbins, 71 N. C. 338; 4 C. J. 1239, note 96; Laithe v. McDonald, 7 Kan. 287; Crockett v. Gray, 2 Pac. 809.

The words "judgment reversed" means the same in equitable actions as in law actions, and in states having trial *de novo* in the supreme court

in equity actions. Daniels v. Butler, 155 N. W. 265; Kirshman v. Swehla, 17 N. W. 908; Jordan v. Winser, 48 Iowa, 180; Sanders v. Sutlive, 154 N. W. 610.

"Judgment reversed" has the same meaning in a trial *de novo* in the supreme court as it has in a law action. Daniels v. Butler, 155 N. W. 265.

The judgment having been reversed, there is no judgment upon the findings and conclusions made at the original trial and the district court cannot enter judgment for defendant. Burke v. Backus, 53 N. W. 1013; Schley v. Schofield, 61 Ga. 528.

Plaintiffs having obtained judgment on a motion which in effect was a demurrer to defendants' evidence, it is only fair that plaintiffs should have an opportunity in a new trial to rebut defendants' testimony. First State Bank v. Kelly, 30 N. D. 84; Thompson v. McKee, 5 Dak. 172; Towner v. Lucas, 13 Gratt. 705; Duty v. Sprinkle, 60 S. E. 882; Kulekamp v. Groff, 71 Mich. 675, 1 L.R.A. 594, 40 N. W. 57; Union M. L. Ins. Co. v. Mowry, 96 U. S. 545, 24 L. ed. 675; Martin v. Hamlin, 18 Mich. 365; Knoblauch v. Crossman, 37 N. W. 586; Jackson v. Bank, 46 S. W. 295; Earle v. Enos, 130 Fed. 467; Stiles v. Van de Water, 48 N. J. L. 67, 4 Atl. 658; Ockington v. Law, 66 Me. 551; Crocker v. Hamilyon, 59 S. E. 722; McCallum v. Boughton, 132 Mo. 601.

Jacobsen & Murray, for respondents.

The decision of the supreme court was a decision upon the merits of the whole case, and every piece of evidence in it was introduced in the lower court. Neither the remittitur nor the decision orders that a new trial be had in the lower court. Orth v. Procise, 38 N. D. 580; Comp. Laws 1913, § 7846.

Bronson, J. This is an appeal from an order denying a motion for a new trial. The parties were before this court in a former appeal (38 N. D. 580, 165 N. W. 557). In that appeal Nellie Procise appealed from a judgment rendered against her and her husband, and her defense was that she signed the note without consideration, and that she was induced to do so by false and fraudulent representations. In that appeal, this court reversed the judgment. After the remittitur was sent to the trial court, the appellants herein made a motion for a

new trial, upon the grounds that the entire judgment was reversed in this court, both as to Nellie Procise and her husband, thereby granting to the appellants the right to have a new trial, and upon the further ground that, if a new trial were granted, the plaintiffs would be able to show by evidence that they could then produce, that the testimony of the defendants in the former trial was untrue. The trial court in its order denying the motion for a new trial stated that, upon the showing made, the appellants herein were entitled to a new trial on the merits, but was prohibited from granting such new trial by the decision of this court. Thereafter, the trial court entered judgment in this action, pursuant to the decision of this court in the former appeal, vacating, canceling, and annulling the judgment against Nellie Procise theretofore rendered, and awarding judgment for her against the appellants for her costs and disbursements in the trial court and in this court.

The appellants contend that the order given by this court in the former appeal, to wit, the words "judgment reversed," in effect only vacates the judgment of the trial court and grants the right to the trial court to permit a new trial, or it operates by the words used to reverse the judgment and order a new trial. The appellants further contend that the effect of such reversal by this court was to vacate the judgment against both defendants in such action even though only one appealed from the judgment entered. It is clear from the reading of the opinion of this court, and the record in that case in the former appeal, that such action was an action triable and tried under the Newman Act, and appealed and determined under that act, and that this court intended to reverse in fact the judgment rendered against Nellie Procise; that is, to reverse the judgment against her, and to enter a judgment of dismissal in her favor. It is clear, also, that the trial court so interpreted the judgment of this court in such former appeal. The contentions of the appellant must be answered by a consideration of the express statutory provisions applicable in this state upon appeals had under the so-termed Newman Act. Comp. Laws 1913, § 7846. Under this act this court is required to try *de novo* the case appealed where a retrial is demanded, and are required to finally dispose of the case whenever justice can be done without a new trial, and may either affirm or modify the judgment, or direct a new judgment to be entered,

but this court may, if deemed necessary, order a new trial of the action. It is apparent that this statute requires the final disposition of a case so appealed, unless this court deems it necessary, in order to accomplish justice, that a new trial be ordered. The ordinary and customary practice in appeals under such act, where a new trial is granted by this court, is to directly order such new trial. Landis v. Knight, 23 N. D. 450, 137 N. W. 477; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; Tronsrud v. Farm Land & Finance Co. 18 N. D. 417, 121 N. W. 68; Sutherland v. Noggle, 35 N. D. 538, 160 N. W. 1000; Williams County State Bank v. Gallagher, 35 N. D. 24, 159 N. W. 80. This court further, under such statute, may reverse the judgment and dismiss the action. Hammond v. Northwestern Constr. & Improv. Co. 19 N. D. 699, 124 N. W. 838. See Hoellinger v. Hoellinger, 38 N. D. 636, 166 N. W. 519. The contention of the appellants that the reversal of the judgment in the former appeal reversed the judgment as to both parties does not apply in this state. Parties severally liable may be joined in the same suit. Comp. Laws 1913, § 7404. A judgment severally may be taken against joint debtors. Comp. Laws 1913, § 7435. Even the release of one of two or more joint debtors does not extinguish the obligations of the others unless they are mere guarantors. Comp. Laws 1913, § 5835. This was an action on a promissory note to foreclose a mortgage given therefor and for a deficiency judgment. The release or discharge of Nellie Procise would not operate to release her husband upon the judgment rendered. It therefore follows that this court in the former appeal disposed of this action with regard to Nellie Procise, and the trial court did not err in refusing to grant a new trial. The order of the trial court is affirmed, with costs to the respondent.

HAROLD EDWARDS, Respondent, v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, and Bruce R. Hill, Appellants.

(171 N. W. 873.)

Damages — negligence — negligence of locomotive engineer — separate acts of one defendant.

1. This action was brought jointly against the railway company and Bruce R. Hill, an engineer who was in charge of the railway's engine in question by which plaintiff's automobile was struck while passing over a railway crossing and plaintiff thereby seriously injured. The jury returned a verdict against the defendant railway company only. The evidence discloses several acts of negligence of the railway company apart from the acts of negligence of the defendant engineer. The evidence of the separate acts of negligence of the defendant railway company is sufficient to sustain a verdict against it.

Damages — speed of trains — speed in corporate limits.

2. The power of a municipal corporation to regulate the speed, movement, and operation of railroad trains, cars, and engines within its corporate limits by proper ordinances, is well settled. The effect of such an ordinance is to render the streets safer and more convenient to the public. It is the exercise of a police regulation. The reason upon which such an ordinance rests is public safety and convenience.

Trial — misconduct of court officer.

3. The defendant railway company alleges misconduct of a court officer during the trial, namely, the bailiff who was in charge of the jury during the time of its deliberations; *held*, the evidence in this case does not show misconduct by said court officer.

Opinion filed March 15, 1919. Rehearing denied April 10, 1919.

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

Affirmed.

Murphy & Toner, for appellants.

NOTE.—On power of municipal corporation to regulate speed of, and signals from, trains at highway crossings, see note in 17 L.R.A.(N.S.) 561, where it is held that ordinances regulating the speed of railroad trains are police regulations; and therefore the power to pass such ordinances need not be given in express terms, but may be implied from the power conferred upon the city to pass "all ordinances necessary to the health, peace, convenience, good order, and protection of the citizens."

The ordinary precaution required of 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 all his faculties to inform himself and avoid collision. West v. R. Co. 13 N. D. 230; Chicago R. Co. v. Houston, 95 U. S. 702; Sherlock v. Minnesota St. P. & S. Ste. M. R. Co. 24 N. D. 40; Haugo v. Great Northern R. Co. 27 N. D. 368; Gast v. N. P. R. Co. 28 N. D. 118, 147 N. W. 793; Christofferson v. Minnesota St. P. & S. Ste. M. R. Co. 28 N. D. 146.

Where the relations between two parties are analogous to that of a principal and agent or principal and surety, or master and servant, the rule is that a judgment in favor of either in an action brought by a third party rendered upon a ground equally applicable to both should be accepted as conclusive against the plaintiff's right of action. Featherston v. Newburg & C. Turnp. R. Co. 71 Hun, 109, 24 N. Y. Supp. 603; Warfield v. Davis, 14 B. Mon. 40; Kansas v. Mitchner, 85 Mo. App. 36; Castle v. Noyes, 14 N. Y. 329; Emma Silver Min. Co. v. Emma Silver Min. Co. 7 Fed. 401; Doremus v. Root & O. R. & Nav. Co. (Wash.) 63 Pac. 572; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Ransom v. Pierre, 101 Fed. 665; Hill v. Bain, 15 R. I. 75, 23 Atl. 44; State v. Coste, 36 Mo. 437, 88 Am. Dec. 148; McKenzie v. Baltimore etc. R. Co. 28 Md. 161; Lyons v. Stanford, 42 N. J. Eq. 411, 7 Atl. 869; Gallagher v. Moundsville, 34 W. Va. 730, 12 S. E. 859; Faust v. Baumgartner, 113 Ind. 139, 15 N. E. 337; Schweickhardt v. St. Louis, 2 Mo. App. 571; Mcginnis v. Chicago R. Co. 200 Mo. 359, 98 S. W. 590; Bradley v. Rosenthal (Cal.) 97 Pac. 875; Thompson v. Southern P. R. Co. 161 Pac. 21; Portland Gold Min. Co. v. Strattons Independence, 158 Fed. 68; Young v. Rohrbough (Neb.) 129 N. W. 167; O'Brien v. American Casualty Co. (Wash.) 109 Pac. 52; Hayes v. Chicago etc. R. Co. 218 Ill. 417, 73 N. E. 1003; Indiana, N. & T. Co. v. Lippencott Co. 165 Ind. 365, 75 N. E. 649; Stevick v. N. P. R. Co. 81 Pac. 999; Morris v. N. W. etc. Co. 152 Pac. 402; Sipes v. Puget Sound, etc. R. Co. 102 Pac. 1057; Chicago etc. R. Co. v. McManigal, 103 N. W. 305; Muntz v. Algiers, etc. R. Co. 40 So. 688; Southern R. Co. v. Harbin, 135 Ga. 125, 68 S. E. 1103.

As a matter of law the verdict returned in this case and the subsequent judgment completely acquits the individual defendant of negli-

gence. Howard v. Johnson, 18 S. E. 132; Kinkler v. Junica, 19 S. W. 359; Gulf etc. v. James, 10 S. W. 744; Jones v. Gimmet, 4 W. Va. 104; Westfield v. Abernathy, 35 N. E. 399; Lawson v. Robinson, 75 Pac. 1012; Doremus v. Root, 63 Pac. 572.

The conflict in the evidence that prohibits the court from interfering with the verdict of the jury on a question of fact should be substantial, and not an illusionary conflict. Fuller v. Elevator Co. 2 N. D. 220; Duncan v. Great Northern R. Co. 17 N. D. 618.

The bailiff in charge of the jury was guilty of conduct prejudicial to the rights of the defendant in that he told the jury without consulting the court, that the court would not accept a disagreement. Cole v. Swan, 4 G. Greene, 32; Obear v. Gray, 68 Ga. 182; Green v. Telfar, 11 Ohio St. 61; Flater v. Mead, 53 Ohio St. 67; Terra Haute v. Saxony, 1 Ind. 19; Taylor v. Jones, 2 Head, 561; Chesapeake v. Barlow, 83 Tenn. 537; Physioc v. Shay, 75 Ga. 466; Gholston v. Gholston, 31 Ga. 625; Brown v. State (Wis.) 106 N. W. 536; Hudson v. State (Wis.) 86 N. W. 596; State v. Langford, 14 So. 182; State v. Murphy, 17 N. D. 50.

F. B. Lambert, for respondent.

The rule is that where fair-minded men might honestly differ under all the facts as disclosed by the evidence, the question is one for the jury. Berry, Automobiles, § 160; Pendroy v. Great Northern, 17 N. D. 433, 117 N. W. 534; Coulter v. Great Northern, 5 N. D. 584, 67 N. W. 1046; Chambers v. Soo, 37 N. D. 378; Peterson v. Fargo-Moorehead St. R. Co. 37 N. D. 441; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Borough v. Soo (Iowa) 167 N. W. 177.

An affidavit filed in a motion for new trial by an attorney in the case, based entirely upon alleged statements of jurors to affiant, was hearsay, and not entitled to consideration. Johnson v. Seel, 26 N. D. 299; Waltham Piano Co. v. Freeman, 159 Iowa, 567, 141 N. W. 403; 2 Thomp. Trials, § 2603; 2 Jones, Ev. p. 644, and cases cited.

That the bailiff remarked to members of the jury that if they did not agree they would be kept from Saturday to Monday,—*held* not misconduct warranting new trial. Becker v. Churdan (Iowa) 157 N. W. 221; 17 Am. & Eng. Enc. Law, 2d ed. 1204; Wiggins v. Downer, 67 How. Pr. 65; Melling v. Industrial Mfg. Co. 78 Ga. 260.

Misconduct or irregularity on the part of the jurors, if not induced

by the prevailing party, will not ordinarily be ground for setting aside the verdict, unless it was calculated to prejudice the unsuccessful party. 17 Am. & Eng. Enc. Law, 2d ed. 1204; Wiggins v. Downer, 67 How. Pr. 65; Nelling v. Industrial Mfg. Co. 78 Ga. 260.

Although the plaintiff has negligently placed himself in a dangerous position, he can recover if the defendant, after knowing of the plaintiff's danger, could have avoided the injury by the exercise of ordinary care. Berry, Automobiles, § 156; Green v. Los Angeles Terminal R. Co. 143 Cal. 40, 101 Am. St. Rep. 68, 76 Pac. 719; Denver & R. G. R. Co. v. Buffehr, 30 Colo. 27, 37, 69 Pac. 582; Tully v. Philadelphia, W. & B. R. Co. 3 Penn. (Del.) 464, 50 Atl. 95; Hawley v. Columbia R. Co. 25 App. D. C. 5; Illinois Central R. Co. v. Hutchinson, 47 Ill. 408; Indianapolis & C. R. Co. v. McClure, 26 Ind. 374, 86 Am. Dec. 467; Keefe v. Chicago & N. W. R. Co. 92 Iowa, 182, 54 Am. St. Rep. 542, 60 N. W. 503; Baltimore City Pass. R. Co. v. Cooney, 87 Md. 267, 39 Atl. 859; Wise v. St. Louis Transit Co. 198 Mo. 558, 95 S. W. 898; Rapp v. St. Louis Transit Co. 190 Mo. 161, 88 S. W. 865; Mapes v. Union R. Co. 56 App. Div. 508, 513, 67 N. Y. Supp. 358; Deans v. Wilmington & W. R. Co. 107 N. C. 689; Kerwhacker v. Cleveland, C. & C. R. Co. 3 Ohio St. 172, 62 Am. Dec. 246; Texas & N. O. R. Co. v. Brown, 14 Tex. Civ. App. 699; Norfolk & W. R. Co. v. Spencer, 104 Va. 659, 52 S. E. 310; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; Inland & S. C. Co. v. Tolson, 139 U. S. 551, 558; Garside v. New York Transp. Co. 146 Fed. 588, 595, affirmed in 157 Fed. 521.

Under the doctrine of "the last clear chance" the defendant should have avoided the accident. Acton v. Fargo & M. St. R. Co. 20 N. D. 434, 129 N. W. 225.

In order that the estoppel of a judgment may become operative and effective, a party claiming its benefits must plead the adjudication in bar of a subsequent action and on the trial establish it by competent proof, and a failure to do either will be deemed a waiver of the rights depending on such estoppel. Borden v. Graves, 20 N. D. 225, 127 N. W. 104; 2 Van Fleet, Former Adjudication, § 685; Union v. Memphis, 111 Fed. 561; McLean v. Baldwin, 69 Pac. (Cal.) 259; Donaldson v. Rogers, 2 Bibb, 57; Howks v. Truesdell, 99 Mass. 557; McReady v. Rogers, 1 Neb. 124; Re Herbert, 57 Cal. 257.

A verdict without judgment cannot be given in evidence. Donaldson v. Rogers, 2 Bibb, 57; Howks v. Truesdell, 99 Mass. 557; McReady v. Rogers, 1 Neb. 124; Re Herbert, supra.

A master may sometimes have a right of action against a servant because of whose negligent act he has been subjected to liability to a third person. This is not the case where the master has concurred with the servant in creating the liability. Central R. Co. v. Macon (Ga.) 71 S. E. 1076; Cincinnati R. Co. v. Louisville & N. R. Co. (Ky.) 30 S. W. 408; 9 Cyc. 805; Southwestern v. Krause (Tex.) 92 S. W. 431; Deleplain v. Kansas City (Mo.) 83 S. W. 72.

It was the duty of the railroad company to keep a proper lookout for themselves at a highway crossing which is within the limits of a city. Rober v. N. P. R. Co. 25 N. D. 394, 142 N. W. 22; Stone v. N. P. R. Co. 29 N. D. 480, 151 N. W. 36; Severtson v. N. P. R. Co. 32 N. D. 200, 155 N. W. 11; Pendroy v. G. N. R. Co. 17 N. D. 433, 117 N. W. 531; Kunkel v. Soo R. Co. 18 N. D. 367, 121 N. W. 830.

GRACE, J. Appeal from the district court of Ward county, North Dakota, Honorable K. E. Leighton, Judge.

This appeal is from a judgment in plaintiff's favor for $8,000, and from an order of the court denying defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

The complaint is in the usual form. Among other matters, it charges Bruce R. Hill was the servant, employee, and agent of the Great Northern Railway Company, and engaged as an engineer in the running and operating of locomotive engines of the railway company; that he was in charge and control of the operating of a certain switch engine and the cars thereto attached which caused the injuries to the plaintiff; that plaintiff was driving and traveling a Ford automobile on Third street, N. E., in the city of Minot, North Dakota, a public street, and while in the act of crossing the railway track of the defendant, at said point, he was struck by the defendant railway company's locomotive while it was being run and operated under instructions from and for the use and benefit of the Great Northern Railway Company by the defendant Hill, as the agent, employee, and servant of the railway company, with such force that the automobile was completely demolished and the plaintiff thrown with great force and violence from

the automobile to the ground; was pushed and dragged by said locomotive over the track and railway bridge of the Mouse river, thereby rendered unconscious for a period of sixteen days; that his face and body were permanently maimed and disfigured; that he was rendered sick and sore; his eyes and ears injured to such an extent that both his sight and hearing are permanently impaired, one of his ears permanently disfigured; his mind and memory seriously affected and injured; his nervous system so shocked and broken down that he is permanently disabled from ever concentrating his mind to mental work, and his body so injured and broken in health that he is not and never will be able to perform manual labor or earn a livelihood in any way. An ordinance of the city of Minot is pleaded, the terms of which prohibit any person, firm, or corporatoin from driving any locomotive engine, railroad car, or train of cars within the limits of the city of Minot at a greater rate of speed than 6 miles per hour. Further allegations of the complaint are that the train which caused the accident and injured the plaintiff consisted of a locomotive and two cars; that the locomotive was a switch engine, and the crew consisted of the defendant Hill and the fireman; that they had been engaged in switching cars in the yard of the defendant; that the rear end of the locomotive as it approached the crossing was not provided with the statutory or sufficient headlight or tail-light, and was in fact provided with no light; that the plaintiff knew the time of trains and knew that none were due at that place, and relied upon that fact, in part, for safety; that the night upon which the accident occurred was dark and foggy, and a cold rain fell from time to time during the night; that the automobile had side curtains on, and that the view of plaintiff from a point east of the crossing where the accident occurred was obscured by buildings near the track and an accumulation of cars on numerous sidetracks; that the crossing was and is of a highly dangerous character; that the defendant for a long time prior to the accident had kept and maintained, at said crossing, a gateman with danger signals for protection of travelers and the public; that at the time of the accident the gates were open and no danger signals were displayed and no gateman was present or in charge of the gates; that the defendants and each of them were grossly negligent in the operation of said locomotive and cars, and propelled the same across the crossing at a dangerous and reckless

speed without any regard for the life and rights of the plaintiff or the public in general; that the automobile in which the plaintiff was riding was not property of plaintiff. The amount of damages claimed by plaintiff in his complaint for defendant's alleged negligence was $25,297.35.

The answer of the railway company admits it is a corporation and that Bruce R. Hill was the employee of the defendant railway company in the capacity of engineer, and was operating the engine and train described in the complaint. Defendant denies that the train which collided with the automobile was proceeding at a speed alleged by the plaintiff, and claimed that the train was proceeding at a lawful rate of speed at the time; denies there was no light burning on the engine as it approached the crossing, and avers that the proper and legal lights were displayed and shown upon the engine at that time. Denials are made by the defendant railway company to the material allegations of the complaint. The defendant railway company avers that the damages occasioned to plaintiff were caused through his negligence and contributory negligence.

The facts are as follows:

The plaintiff at the time of the accident was a man twenty-three years of age, and was then and for about six weeks prior thereto engaged in operating a taxi in Minot. The taxi consisted of a Ford car which, on the night in question, as it attempted to cross the defendant's railway track at the crossing on third street, had a curtain on the east side. The curtain, according to the testimony of plaintiff, did not fit tight. At the time of the collision and injury, a switch engine and tender attached was being operated backward by the defendant, and Hill was in charge as engineer thereof. The engineer was on the right side in the cab of the engine, the fireman on the left. There were three switchmen on the front switch footboard.

The fireman, on cross-examination, testified as follows:

Q. In which way did you look? You was looking west, you say.
A. Yes, sir.
Q. Did you look out to the north at all?
A. Yes, sir.
Q. And you saw the car about 30 feet before it reached the track?

A. Yes, sir. I should judge it was about that.
Q. You were going 3 miles and a half per hour?
A. I should judge it was about that.
Q. And did you immediately shout to the engineer to stop the train?
A. When they hit.
Q. You didn't tell him to stop until after they had struck?
A. No, sir.
Q. Well, you had plenty of time, didn't you, to have shouted?
A. If I had known he was coming in, I should have.
Q. You saw him coming toward you 30 feet away, didn't you?
A. I saw him coming that way. Yes, sir.
Q. But you didn't say a word until after you had struck him?
A. No, sir.

The engine and tender were being operated along the main track. The switch engine and the Ford car which the plaintiff was driving collided on the crossing, and the plaintiff received serious injuries, to recover damages for which this action is maintained. From the photographs and the testimony, it would appear that the automobile was badly wrecked by the collision. The plaintiff's view toward the east was obstructed, as he approached the crossing, by a fence, buildings of the Lumber & Coal Company, a mill engine house, elevators, and cars.

The engine stopped about 40 feet beyond the bridge, 177 feet from the point of the accident. The plaintiff was taken out of the automobile while it was on the bridge.

The appellant assigns nine specifications of error. The first two assignments of error are based upon the refusal of the court to direct a verdict in defendant's favor. In this, the court was not in error. The third assignment of error is based upon the court's failure to instruct the jury that no negligence had been shown by failure to provide a headlight, and that such question should not have been submitted to the jury. In this regard the trial court gave the following instruction: "In this connection, there was a duty upon the part of the defendant company to provide a headlight upon the locomotive in question, but they were under no obligation to furnish an electric headlight or one

different than that claimed by the defendant to have been upon the locomotive in question."

There was no error in giving the instruction. The defendant while operating its switch engine within the yards was not required to have an electric headlight. The defendant, at such time, had the privilege of furnishing a sufficient headlight for its switch engine, other than an electric one, while the switch engine was being used within the yards. Whether the headlight furnished by the defendant for the switch engine in question was sufficient for the purposes for which it was used, or whether the defendant was negligent in not furnishing a more efficient headlight, was a question of fact for the jury, and was properly submitted to them under all the evidence in the case relative thereto. The fourth assignment of error relates to the failure of the court to instruct the jury that there had been no negligence shown in defendant's failure to furnish a bell or steam whistle which was rung or whistle blown for 80 rods before reaching a street crossing. The following was the instruction given by the trial court: "They were also under obligations to furnish a bell of at least 30 pounds in weight or a steam whistle upon each locomotive, which bell shall be rung or whistle shall be blown for a distance of at least 80 rods from the place where the said railroad crosses any road or street, and said bell shall be kept continuously ringing or the whistle blowing until they shall have crossed such road or street. A failure to furnish either a headlight, bell, or whistle would not be such negligence in themselves as would warrant a recovery by the plaintiff, but their lack of compliance would be merely evidence of negligence, which you may consider together with the other evidence in determining this question."

The substance of the provisions of § 4642, Compiled Laws 1913, is largely incorporated into the instruction given. The section in question relates to the size of the bell, and provides for the steam whistle, and provides for the ringing of the bell or the blowing of the steam whistle at a distance of at least 80 rods from where the railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street. There is nothing arbitrary about such statute, and it is one which really is as beneficial to the railroad as to the public. Its purpose is to prevent injuries to persons who may be about to cross a railroad at a point where the railroad

crosses the street or road. The ringing of the bell and the blowing of the whistle is useful for many other purposes, among which may be the frightening of stock from the railroad at crossings or other points on the line. It was a proper question for the jury, in this case, under the testimony, whether the bell of the switch engine or the whistle was blown as it came toward and passed over the crossing. It is contended that the switch engine did not come 80 rods, and therefore that part of the law relative to the distance for which the bell must be rung or whistle blown does not apply. The distance which the defendant's switch engine had traveled before reaching the crossing was not 80 rods. The defendant could have rung the bell or blown the whistle for the distance from the point where it did start until it had passed over the crossing. It would thus have complied with the spirit of the law and such compliance would have been sufficient. It was a question of fact for the jury under all the testimony relative thereto, whether or not the defendant railway company was negligent in this regard. The instruction, as we view it, was a proper one. The fifth error complained of was the submitting to the jury the question of the speed of the locomotive at the time of the accident, and as to whether such speed was in excess of 6 miles per hour. The city of Minot has an ordinance providing that no person, firm, or corporation shall run or drive or cause to be run or driven any locomotive engine, railroad car, or train of cars within the limits of the city of Minot at a greater rate of speed than 6 miles per hour. It has a commission form of government. It has authority under subdivision 15 of § 3818, Compiled Laws 1913, to enact such an ordinance. The power of a municipal corporation to regulate the speed, movement, and operation of railroad trains, cars, and engines within its corporate limits by reasonably proper ordinances, is well settled. The effect of such an ordinance is to render the streets safer and more convenient to the public. It is the exercise of a police regulation. It defines what is a proper and legitimate use of the streets by railroad companies with reference to public safety and convenience. Baltimore & O. S. W. R. Co. v. Peterson, 156 Ind. 364, 59 N. E. 1044; Meek v. Pennsylvania Co. 38 Ohio St. 632.

The question of the speed of the locomotive was properly submitted to the jury, in view of the state of the testimony in that regard and the physical facts attendant upon the accident. The sixth assign-

ment of error is that the court erred in instructing the jury that the defendant's failure to operate gates at the crossing in question or to have a flagman there was evidence of negligence; that it should have instructed the jury that the fact that the gates were not being operated at the time was immaterial. That part of the instruction complained of is as follows: "There is also no obligation, as far as the evidence in this case shows, for the defendant to operate gates at the crossing in question, or to maintain a flagman there; and even if the gates were in operation at said place and time or a flagman posted at this crossing, the failure to do so would be merely evidence of negligence, and would not, in any manner, relieve the plaintiff from the burden of exercising ordinary care when about to go upon the crossing."

Certainly there was no error in the giving of such instruction so far as defendant is concerned. It was entirely favorable to it. There is sufficient testimony in the record to show that the crossing in question was dangerous. The fact that a flagman is maintained there, and that there are gates, aside from any other evidence, denote the dangerous character of the crossing. The fact that there are gates and a flagman at such crossing indicates that the defendant established the same voluntarily in view of the necessity therefor, or that it was required by the city of Minot or the board of railroad commissioners acting under authority of law relative thereto to establish the same; such a proceeding by the city of Minot may have been initiated and conducted under §§ 4689 and 4690, Compiled Laws 1913, and addressed to the railroad commissioners, and a proper order by them may have been made requiring the gates and flagman at the crossing in question. Under subdivision 21 of § 3818, Compiled Laws 1913, cities having a commission form of government, have authority to require railroad companies to keep flagmen at railroad crossings of streets and provide protection against injury to persons and property. It is sufficient to say that at the crossing in question gates have been established and a flagman required, and we must presume for the purposes of this case that their installation has been duly and lawfully authorized and required. Where there are gates at a crossing, such as this, it is presumptively negligence on the part of the defendant railway to fail, at the proper time and occasion, to use or properly operate them and thus endanger public safety, and with like effect if it fail to give

the flagman perform and execute his duties. Notwithstanding there are gates and a flagman at such crossing, one desiring to cross the railroad at such point is not excused from the use of ordinary care when about to go upon the crossing. Whether one does use ordinary care under such circumstances, and whether the railroad company was negligent in the operation of the gates and in the failure to maintain a flagman at that point, and all kindred questions, are for the jury. The instruction, as we have before indicated, was entirely favorable to the defendant, and of this it cannot complain. There is no error in the instruction of the court complained of in the seventh assignment of error. There is no error in the court denying defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial. As we view it, the evidence is sufficient to support the verdict. The verdict is not against the law.

Defendant relies largely as a defense upon contributory negligence. This question was exclusively for the jury, and was whether or not the plaintiff exercised ordinary precaution in approaching the crossing. The verdict was for the plaintiff. The jury must have concluded there was no contributory negligence. Where gates and a flagman are maintained at a crossing, the public or one desiring to pass over the crossing, where such gates are up, have a right to assume that it is safe to cross and that there is no train approaching. Under such circumstances, it is an invitation to the public to pass over the crossing, and it greatly tends to assure one's mind that there is no danger in passing over the crossing. When the gates are down, it is a warning to the public that there is an approaching train which will pass over the crossing. The gates being up, the public is lulled into a sense of security, and while one approaching a crossing where there are gates and a flagman should use ordinary care, one should not be held to the same degree of care as at a crossing where there are no gates or flagman maintained. The average person of ordinary intelligence approaching a crossing at which there are maintained gates and flagman would assume, if the gates were up, that there was no train approaching and would feel safe in entering upon the crossing, and that he had nothing to fear from trains. He would not be bound to assume that the railroad company would neglect its duty and thus imperil his life. He would have a right to feel a sense of security. If this is not true, gates at a dangerous

railroad crossing, instead of becoming a protection and safeguard for the public, may many times increase the danger and result in loss of life or personal injury where otherwise no loss of life nor injury would occur. Gates at a railroad crossing, such as the one under consideration, mean, when up, it is safe to pass over the crossing and no train is approaching; and down, it is unsafe to pass over the crossing and a train is approaching. That is the interpretation which the public who use such crossing would give to such matters. If the defendant in this case failed to operate the gates after 12 o'clock at night, that, in no manner, would relieve it from liability so far as the public is concerned or anyone passing over the railroad crossing where gates and flagman are maintained. The gates should be operated at all times when trains are passing over such crossing. In such cases, it is required on the grounds of public policy for public safety.

We have examined with considerable care the different crossing cases cited by the appellant, and find nothing in any of the cases cited which would cause us to come to any other conclusion than that which we have reached. The facts in the case are necessarily different in many ways. Most of the cases cited relate to crossings where there are no gates, or where the injuries occurred at crossings in daylight, and there are other facts and circumstances which distinguish those cases from this. It is not necessary to examine and discuss each case separately, nor the wisdom of such decisions.

The negligence of the defendant and the contributory negligence of the plaintiff, if any, were submitted to the jury, who are the exclusive judges of the same. The jury have determined these matters, and necessarily have determined that the defendant was negligent, and the plaintiff was not guilty of contributory negligence. This finding of fact by the jury is conclusive upon this court.

Defendant also relies upon the further proposition that the action having been maintained against the Great Northern Railway Company and Bruce R. Hill, the engineer, as joint tort-feasors, and no verdict having been returned against Hill, who was in charge of the engine in question, and the verdict having been returned against the railway company only, the exoneration of Hill exonerates the railway company. If that principle of law were true, as we view it, it would have no application to this case, at least, is in no manner controlling.

This case is not one where negligent acts of the servant only contributed to the injury of the plaintiff, but, aside from that, the defendant railway company was guilty of numerous acts of negligence which would appear to be the proximate cause, or constitute at least a large part of the proximate cause, of the injury. The liability of the defendant railway company for this reason is not wholly dependent on the negligent acts of the servant. It is liable because of its own negligent acts separate and apart from the negligent acts of its servant. The plaintiff charges the defendant railway company with negligence for the insufficiency of the headlights upon the engine in question; the negligence in failing to maintain a flagman whose duty was to operate the gates at the crossing where the injury occurred; the presence of cars on the sidetrack obstructing the view eastward from the crossing; failure to keep proper lookout, and the failure of the fireman to give immediate warning to the engineer upon discovering the peril of the plaintiff. Such negligent acts, if they existed or occurred, were the negligent acts of the defendant railway company separate and apart from any negligent acts on the part of the engineer. Whether such negligent acts occurred or existed was a question of fact for the jury under all the testimony relative thereto. The jury returned a verdict in favor of the plaintiff and against the defendant railway company and thereby held the defendant railway company liable. The verdict is supported by the evidence. The exoneration, if any, of the engineer by failure of the jury to return a verdict against him, in no manner aids the defendant railway company, for it is liable because of its own acts of negligence which contributed to the injury of the plaintiff. The rule of law contended for by the defendant railway company, that the jury having returned no verdict against the engineer the defendant railway company is exonerated, has no application in this case or, if so, it is so remote as to be of no consequence. The tort was joint and the action maintained is joint. This, however, does not prevent recovering against the defendant railway company; for in this case it is severally liable for its acts of negligence which were apart from those of the engineer. The general rule is that where the negligence of two or more persons concurs in producing a single, indivisible injury, such persons are jointly and severally liable, and this though there were no common duty, common design, nor concert of action.

"If two or more persons owe to another the same duty and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort-feasors may be held." Matthews v. Delaware, L. & W. R. Co. 56 N. J. L. 34, 22 L.R.A. 261, 27 Atl. 919, 12 Am. Neg. Cas. 285.

The master and servant are in general jointly and severally liable for the tortious act of the servant committed in the course of the master's business. Central of Georgia R. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989, 10 Am. Neg. Rep. 30; Cincinnati, N. O. & T. P. R. Co. v. Cook, 113 Ky. 161, 67 S. W. 383; Whittaker v. Collins, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632; Schumpert v. Southern R. Co. 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813, 13 Am. Neg. Rep. 676. In the case of Schumpert v. Southern R. Co. the court said: "The servant is liable because of his own misfeasance or wrongful act in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is therefore bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of his agency. Both are liable jointly because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury," and we may add this to the rule in the Schumpert Case, the master is liable by reason of his own negligent acts in addition to his liability for the negligent acts of his servant when acting within the scope of his authority. In other words, the testimony shows that the defendant railway company was guilty of other negligent acts which contributed to the injury of the plaintiff than those committed by the engineer, and this though the action was maintained jointly against both and no verdict was returned against the engineer. In this case it was legal and proper for the jury to return a verdict against the defendant railway company, awarding plaintiff damages against it on account of its liability arising out of its act of negligence above referred to.

The last point necessary to notice is the alleged misconduct of a court officer, the bailiff who was in charge of the jury during the time of its deliberations. This point arises in connection with the defendant's motion for a judgment notwithstanding the verdict or for a new trial. In connection therewith, the defendant claims that the "jury

had been out substantially twenty-four hours; that they asked the bailiff to report to the court, inquiring whether or not the court would accept a verdict of disagreement. Thereupon, without any consultation with the court whatsoever, the bailiff informed the jury that the court would not accept a disagreement. Shortly thereafter the verdict was returned in this case." The affidavits of A. M. Thompson and B. H. Bradford were offered in support of the foregoing contention and of the motion. The affidavits set forth certain statements claimed to have been made by bailiff Roche, who was in charge of the jury, to the affiants as to certain conversations which Roche had with one of the jury, which the affiants claim was to the effect as above stated. The affidavits do not show that the affiants heard any of the conversation between the bailiff and the jury or any of them. The statements of Roche, if any, to the affiants, under these circumstances, would be of little or no value as evidence of the statement attempted thus to be proved. The statement of Roche to the affiants, under the circumstances under which it was made, was mere hearsay. The certificate of the presiding judge, the Honorable K. E. Leighton, shows the affidavits in question fell far short of stating what actually transpired relative to this matter. It shows that on the forenoon of the 20th day of December, 1917, prior to the time the verdict was rendered, bailiff Roche, then in charge of the jury, reported to Judge Leighton that the jury in said action had agreed to disagree and had asked him (Roche) to ask Judge Leighton that they be discharged; that he stated to the bailiff that he would not accept such report at that time, nor would the jury be discharged without further considering the case, and in effect stated that he would let the matter go for a while and give them further time to consider the case; that had the jury been brought in to report and a roll call had, "I would then have simply given the jury in substance the same information that I gave the bailiff."

In view of this plain statement by the court, it must be held that there is no prejudice in the statements claimed to have been made by Roche, even if it were conceded that they were made, of which there is no competent proof. Roche's affidavit should have been received in opposition to the motion. The motion was double in its character,—it was for the judgment *non obstante* or for a new trial. Under subdivision 1 of § 7663, Compiled Laws, 1913, relating to a motion for a

new trial, the plaintiff was entitled to serve and use, in said motion, counter affidavits.

We have examined the record with care and find no reversible error therein. The judgment is affirmed, with statutory costs.

ROBINSON, J. I dissent.

CHARLES COWAN, Appellant, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

(172 N. W. 322.)

Negligence — wilful — last clear chance.

1. In an action for personal injuries, under the "last clear chance" doctrine, wilful negligence is the failure to exercise ordinary care after discovering a person to be in a position of peril.

Question of fact — negligence — last clear chance.

2. In such action, where the conductor of the defendant received notice that a person was lying under some cars of the defendant about to be moved, and thereafter signaled for the movement of the same, to the injury of such person, the question of whether such person was then discovered in a position of peril and whether reasonable care was then exercised is a question of fact for the jury.

Verdict — general and special findings — inconsistency.

3. In such action, it is *held* that where, upon special interrogatory submitted to the jury, it is found that the conductor of the defendant did not know that the plaintiff was prostrate upon the rail of the house track of the defendant when he signaled the engineer to move the cars over the place where plaintiff was, and where, in the evidence, the issuable fact is presented that the

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NOTE.—On applicability of doctrine of last clear chance where danger not actually discovered, see note in 36 L.R.A.(N.S.) 957.

On intoxication of persons on railroad track as affecting applicability of doctrine of last clear chance, see note in 31 L.R.A.(N.S.) 1031.

On the question as to whether wantonness or wilfulness, precluding defense of contributory negligence, may be predicated of the omission of a duty before the discovery of a person in peril on a railroad track, see note in 21 L.R.A.(N.S.) 427.

On origin, function, and operation of doctrine of last clear chance, generally, see note in 55 L.R.A. 418.

plaintiff at the time was lying, not prostrate upon such rail, but under the cars beside such track, sufficiently to justify a finding in that regard upon the general verdict rendered for the plaintiff, the finding upon such special interrogatory is not necessarily inconsistent with, and does not control, the general verdict rendered, and particularly so where the jury, as in this case, appreciated the issuable facts involved in the general verdict, by requesting of the trial court, after retiring, further instructions.

Opinion filed April 1, 1919. Appellant's petition for rehearing denied April 11, 1919.

Action for personal injuries, District Court, Stutsman County, *Nuessle*, J.

From order and judgment granted notwithstanding the verdict in favor of plaintiff, plaintiff appeals.

Reversed.

Knauf & Knauf (*John A. Jorgenson*, of counsel), for appellant.

The true test of the engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellow man is in peril, and that the danger to his person can only be averted by stopping or reducing the speed of the train. Whart. Neg. § 301; Tanner v. Louisville & N. R. Co. 60 Ala. 640; Needham v. San Francisco S. J. R. Co. 37 Cal. 409.

When intestate acted like a drunken man, and made no effort to leave the trestle, the engineer should have stopped the train. 2 Wood, Railway Law, 1268, and note 1; Kenyon v. New York C. & H. R. R. Co. 5 Hun, 481; Sheridan v. Brooklyn City & N. R. Co. 36 N. Y. 39, 93 Am. Dec. 490; Buel v. New York C. R. Co. 31 N. Y. 314, 88 Am. Dec. 271; Galena & C. U. R. Co. v. Yarwood, 17 Ill. 509; Whart. Neg. § 304; Clark v. W. & W. R. Co. 14 L.R.A. 749.

Notwithstanding the previous negligence of the plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damage. This doctrine was subsequently approved in Saulter v. New York & W. S. S. Co. 88 N. C. 123, 43 Am. Rep. 736; Turrentine v. Richmond & D. R. Co. 92 N. C. 638; Roberts v. Richmond & D. R. Co. 88 N. C. 560; Meredith v. Cranbery Coal &

I. Co. 99 N. C. 576; Farmer v. Wilmington & W. R. Co. 99 N. C. 564; Bullock v. Wilmington & W. R. Co. 105 N. C. 180; Wilson v. Norfolk & S. R. Co. 90 N. C. 69; Carlton v. Wilmington & W. R. Co. 104 N. C. 365; Randall v. Richmond & D. R. Co. 104 N. C. 410; Pickett v. W. & W. R. Co. 30 L.R.A. 257.

The jury did not find on all of the issuable facts involved under the pleadings and in the evidence in the case, and therefore the special findings as to whether the conductor knew the plaintiff was actually partially over the rail of the track does not govern the general verdict. McDermott v. Higby, 23 Cal. 489; Bank v. Peck, 8 Kan. 665; Freedman v. New York, N. H. & H. R. Co. 71 Atl. 900; Baker v. New York, N. H. & H. R. Co. 101 Fed. 545; Kungan v. Foster, 102 N. E. 103; Pint v. Bauer, 16 N. W. 425; Lane v. Lenfest, 42 N. W. 85.

Lee Combs, S. E. Ellsworth, and *John L. Erdall,* for respondent.

"A complaint in an action to recover damages for negligence must state the act of negligence complained of, and the plaintiff must recover, if at all, upon the particular act of negligence stated in the complaint." Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609.

Where plaintiff in his complaint alleges merely specific acts of negligence on defendant's part, he will be restricted in the trial to proof of such acts. Gast v. Northern P. R. Co. 28 N. D. 118, 147 N. W. 793; 14 Enc. Pl. & Pr. 342; 29 Cyc. 584; Hart v. Northern P. Co. 116 C. C. A. 12, 196 Fed. 181.

"Wilful negligence is not simply greater negligence than that of injured party, nor does it necessarily include the element of malice or an actual intent to injure another; but it is a reckless disregard of the safety of the person or property of another by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 103 Minn. 224, 114 N. W. 1123; Alger Smith & Co. v. Duluth-Superior Traction Co. 93 Minn. 314, 101 N. W. 298; St. Louis & S. F. R. Co. v. Summers, 97 C. C. A. 328, 173 Fed. 358.

The liability of defendant does not arise "unless defendant's servants actually knew of decedent's peril and thereafter failed to exercise ordinary care to avoid injuring him." Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. supra; Fonda v. St. Paul City R. Co. 71

Minn. 450, 74 N. W. 166; Lando v. Chicago, St. P. M. & O. R. Co. 81 Minn. 279, 83 N. W. 1089; Olson v. Northern P. R. Co. 87 N. W. 843, 94 Minn. 258; Oklahoma City R. Co. v. Barkett (Okla.) 118 Pac. 350; Dahmer v. Northern P. R. Co. (Mont.) 136 Pac. 1059.

The railway company or the property owner, as the case may be, must refrain from injuring the trespasser only after, and not before, he has knowledge of his perilous situation. Hope v. Great Northern R. Co. 19 N. D. 438, 122 N. W. 997; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Costello v. Farmer's Bank, 34 N. D. 131; Bostwick v. R. Co. 2 N. D. 440.

"Where the special findings establish that plaintiff's injuries resulted from one of the ordinary risks which he had assumed when he entered into defendant's employ, it was the duty of the court to set aside the general verdict in his favor and render judgment for the defendant." Metz v. Missouri P. R. Co. (Kan.) 135 Pac. 578. See also: Felton v. C. R. I. P. R. Co. (Iowa) 29 N. W. 618; Colwell v. Parker (Kan.) 105 Pac. 524; Fairbanks v. Cincinnati R. Co. 66 Fed. 471; Plyler v. Pac. Portland Cement Co. (Cal.) 92 Pac. 56; Vogt v. Honstain, 85 Minn. 160, 88 N. W. 443; Roe v. Winston, 86 Minn. 77, 90 N. W. 122; Lando v. Chicago, St. P. M. & O. R. Co. 81 Minn. 279, 83 N. W. 1089; Olson v. Northern P. R. Co. 84 Minn. 258, 87 N. W. 843; Lathrop v. Fargo, M. Street R. Co. 23 N. D. 246; Welch v. Fargo & M. Street R. Co. 24 N. D. 463; Oakland v. Nelson, 28 N. D. 456; Swallow v. First State Bank, 35 N. D. 608.

Bronson, J. This is an action for personal injuries. In the trial court the plaintiff recovered a verdict of $17,000. Upon motion made thereafter, judgment was granted *non obstante*. The plaintiff has appealed from the order and judgment so made therefor.

On June 23, 1915, the plaintiff, while in an intoxicated condition and while prostrate upon the railroad tracks in the yards of the defendant at Wilton, North Dakota, was run over and injured by the train of the defendant, thereby occasioning the loss of his left arm and the major portion of his right hand. The plaintiff at the time was a trespasser and manifestly guilty of contributory negligence. There is evidence in the record that at the time the plaintiff, while

either in a drunken stupor or asleep, was lying prostrate under some cars on the house track of the defendant, either between or beside the rails, or thereupon or partly so; that the conductor of the defendant was notified of the perilous position of the plaintiff, but, disregarding such notice, he signaled the train to proceed, whereby the plaintiff was injured as alleged.

Upon the pleadings and the evidence there is involved only the consideration and application of the "last clear chance" doctrine. Under this doctrine, as announced in Dubs v. Northern P. R. Co. recently decided, ante, 124, 171 N. W. 888, wilful negligence is the failure to use reasonable care after discovering a person to be in a place of peril.

To the jury there was submitted a special interrogatory as follows: "Did the defendant's conductor Eggleston know that the plaintiff was prostrate upon the rail of the house track of the defendant company at Wilton at the time he signaled the engineer to move the cars over the place where plaintiff was lying?"

This interrogatory was answered, "No."

The plaintiff contends that this interrogatory, so answered, is not inconsistent with the general verdict rendered. In effect, he contends that the general verdict is a finding upon every issuable fact submitted under the pleadings not inconsistent with the special finding; that there were other issuable facts presented upon the evidence and the pleadings for the application of the doctrine stated, upon which the general verdict may be upheld and therefore the trial court erred in its order.

The defendant contends, in effect, that the special finding of the jury is a finding that the conductor did not know or did not have notice of the fact that the plaintiff was in a position of peril. That in any event notice that a person was lying under some cars about to be moved is not notice that such person is in a drunken or helpless condition. That therefore the special finding being inconsistent with the general verdict, it controls.

These contentions present the only questions requiring our consideration upon this appeal.

In addition to the special interrogatory heretofore stated, another special interrogatory was submitted to the jury as follows: "Did the defendant's servants exercise ordinary care to avoid injuring the

plaintiff at said time and place after the conductor Eggleston became aware that said plaintiff was lying under the cars?"

Under the instructions given, the jury were required to answer this interrogatory only in the event that they answered the former interrogatory in the affirmative.

These special interrogatories, accordingly, in accordance with the instructions given, were submitted upon the theory that a negative answer to the first interrogatory would imply a lack of knowledge of plaintiff's perilous position and therefore foreclose any application of the principle of the "last clear chance" doctrine.

The jury, however, after retirement and some consideration of the case, returned into open court for further instructions; then two jurors stated that the jury did not understand about the questions. The court then read to the jury a portion of the instructions relative to such interrogatories. The court then said:

"These two questions, gentlemen, are submitted to you so you may evidence your findings on these two particular matters, passing on the evidence relative to these two particular questions in the manner I have instructed you in the general instructions. Answer the questions, 'yes' or 'no.'

"If you answer No. 1 'yes' then it will be necessary for you to go further and pass on the evidence relative to question No. 2, and answer question No. 2 'yes' or 'no,' according as you find the facts under these instructions. These questions, gentlemen, are to be answered 'yes' or 'no' according as you find the facts."

A juror then said: "We understand that in the evidence here nothing is said about that man being on the rail. He was beside the track under the car. Now if we answered that question as it reads there, now will that affect our decision in any way so as to give the defendant any hold on our decision one way or the other?"

The court then said: "I will answer your inquiry with reference to this by modifying this question. I will modify the question, gentlemen, in this respect: 'Did the defendant's conductor Eggleston know that the plaintiff was prostrate upon the rail of the house track of the defendant company at Wilton at the time he signaled the engineer to move the cars over the place where the plaintiff was lying, or that the plaintiff was lying under the cars in a position of danger?" In other

words, gentlemen of the jury, I will add to the question there a clause, "Or that he was lying under the cars in a dangerous and perilous condition?"

Then a juror said: "When the signal was given."

The court then inquired of the defendant's counsel whether there was any objection. Then the counsel stated: "Certainly, we make the objection to your Honor's modification, as under the statute the court has no power to amend the question."

Then followed:

The Court: Very well, gentlemen, the question will have to be answered as it is submitted.

Juror: In case the question was answered "No," would that relieve the company from paying any damages?

The Court: I can't answer that. Very well, gentlemen, you will have to retire. Remember, gentlemen, the question will be submitted to you as it was originally submitted to you.

During these proceedings the entire jury were present. From these proceedings and the record it is evident that a negative answer to the first question did not foreclose an affirmative answer to the second question. By the instructions the jury were directly precluded from answering the second question. The first question required the jury to find knowledge of plaintiff's position of peril *"upon the rail of the house track;"* the second question required the jury to find knowledge of such position, *"lying under the cars."* The questions propounded by the jurors showed that they comprehended the evidence and the issues. There is evidence in the record that the position of the plaintiff was lying under the cars, and not prostrate upon the rail. The two questions so submitted were not consistent. The jury very evidently appreciated the inconsistency. Properly they asked the court concerning the same. Although the objection made by defendant's counsel to the modification of the first question was good for the reason that it would create a double or disjunctive question, nevertheless, no effort was made to assist the court to clear up this inconsistency by defendant's counsel. Such counsel apparently had framed, and did ask that these special questions be submitted to the jury.

If it was then desired to interpret by special questions the general

verdict about to be rendered, a special question could then have been framed and submitted that would have covered any question that might arise upon the record herein concerning the application of the last clear chance doctrine. There is evidence in the record which would justify the finding of the jury that the plaintiff was in a position of peril under the cars, and that the conductor had notice thereof in time to have avoided the injuries by the exercise of reasonable care. The finding made by the jury upon the special interrogatory submitted is not necessarily inconsistent with such finding that the jury might make upon a special interrogatory covering the precise matter indicated. The majority of this court are not clearly satisfied that the jury, through the general verdict rendered, answered the issuable question presented by the evidence, whether the conductor had notice of the position of peril of the plaintiff under defendant's cars, and that therefore a new trial should be had to the end that the finding of the jury may be free from doubt upon the issues presented and considered herein. The majority also deem it proper to suggest that, upon the new trial, special interrogatories should be submitted to the jury upon the controlling questions of fact arising under the last clear chance doctrine. See Dubs v. Northern P. R. Co ante, 124, 171 N. W. 888.

The contention of the defendant that notice given that a person is lying under some cars about to be moved is not notice that such person is in a drunken and helpless condition and therefore, in a position of peril, is without merit. It involves the assumption that such person, a trespasser, is possessed of his ordinary faculties, and in the exercise of them will take himself from the place of peril. Whether the defendant, in such case, has the right to so assume is a question of reasonable care, and this is a question of fact for the jury in any event in this case. 2 Thomp. Neg. §§ 1736 and 1737.

From the foregoing considerations, it therefore follows that the trial court erred. It is ordered accordingly that the judgment of the trial court be reversed, and a new trial granted, with costs of this appeal to the appellant.

GRACE, J. I concur in the result.

ALLIANCE HAIL ASSOCIATION OF NORTH DAKOTA, a Corporation, Appellant, v. J. T. LYNCH, Respondent.

(171 N. W. 859.)

Appeal — petty cases.

1. In this petty case there is no good reason for an appeal to the supreme court.

Insurance, note given for insurance premium — effect of nondelivery of policy.

2. In an action on a note for a hail insurance premium, findings of the trial court that the policy was never delivered are found to be sustained by the evidence.

Opinion filed March 5, 1919. Rehearing denied April 12, 1919.

Appeal from the District Court of McHenry County, Honorable *A. G. Burr,* Judge.

Affirmed.

C. S. Buck, for appellant.

The presumption is that the defendant did receive the policy, and after the lapse of nearly six years he cannot now be heard to deny it. 16 Cyc. 759.

The policy was not the insurance, but only an incident in connection with it. 19 Cyc. 594.

D. J. O'Connell, for respondent.

(Quoting from the memorandum opinion of the district court.)

The general rule is that no one becomes a member of a mutual hail insurance company unless he receives his policy. There is no distinction between mutual hail and mutual fire insurance companies, and this is the rule in the latter. Russell v. Mut. Fire Ins. Co. 45 N. W. 356.

ROBINSON, J. This is a suit to recover from defendant on a promissory note for $60, and an assessment, $15. As it appears, and as the trial court found, the note was given for an insurance policy that was never issued. The note was made in June, 1911, due October 1, 1911,

and this action was commenced in September, 1917, as the note was about to outlaw. On the trial plaintiff was unable to produce in evidence either the original policy of insurance or a copy of the same. In lieu thereof it offered exhibit 5-a document purporting to be a copy of an insurance policy, made from the application, and not from the policy. Of course it was not evidence. Mr. Boise, secretary of the company, testified that the practice of the company was to mail a policy to the insured, but aside from the custom he did not know that the policy had been mailed to defendant; but the defendant testified positively that he had never received from the company any insurance policy.

Counsel for plaintiff seek to discredit his testimony because of the fact that he never notified the company that he had not received the policy. But with greater force we may ask the questions: Why did not the company bring suit on the note before it was about to outlaw? Why did they not sooner insist on payment? Why did they not mail the policy by registered mail? Why did they not put in evidence one or a half dozen carbon copies of letters in regard to payment within one, two, or three years after the note became due? On the whole, the findings of the trial court are well sustained by the preponderance of evidence. In such a case, as in every petty and dubious case, there is no good reason for appeal.

Judgment affirmed.

GRACE, J. I concur in the result.

FRANK YUHA, Respondent, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

(171 N. W. 851.)

Damages — negligence — master and servant.

In an action brought by the plaintiff against the defendant to recover damages

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NOTE.—On excessiveness of verdicts in actions for personal injuries other than death, see comprehensive note in L.R.A.1915F, 30.

for carelessness and negligence of defendant in the construction and operation of a certain coal shed, and the failure to maintain the same in a reasonably safe condition so as to protect the plaintiff, its employee, while in the discharge of his duties, the jury returned a verdict in plaintiff's favor and against the defendant for $3,600. *Held* that the verdict is not excessive and is supported by the evidence.

Opinion filed November 23, 1918. Rehearing denied April 15, 1919.

Appeal from judgment and order of District Court of Divide County, North Dakota, Honorable *K. E. Leighton,* Judge.

Affirmed.

Greene & Stenersen and *John L. Erdall* (*Alfred H. Bright,* of counsel), for appellant.

There is no presumption of negligence on the part of the employer because of the happening of some injury to some of his employees.

The burden is on the employee, in an action to recover for such an injury, to prove negligence. Warren v. Harlan & H. Corp. Del. 84 Atl. 215; Campbell v. Southern P. R. Co. 21 Cal. App. 175, 131 Pac. 80; Brymer v. Southern P. R. Co. 90 Cal. 496, 27 Pac. 371; Betts Co. v. Hancock, 139 Ga. 198; Root v. Cudahy Packing Co. 88 Kan. 413, 129 Pac. 147; Pellerin v. International Paper Co. 96 Me. 388; Klebe v. Parker Distilling Co. 207 Mo. 480, 13 L.R.A.(N.S.) 140; Gleason v. Missouri River Power Co. 46 Mont. 395, 128 Pac. 586; Marceau v. Rutland R. Co. 211 N. Y. 203; Stearns v. Ontario Spinnin; Co. 184 Pa. 519, 39 L.R.A. 842, 63 Am. St. Rep. 807.

It is not enough for the plaintiff to show that he was injured, and th t there is a suspicion, or even a fair inference that defendant has bee negligent; but he must give evidence of some specific act of negligen on the part of the defendant. Longgrove v. London & R. Co. 16 . B. N. S. 692; 4 Thomp. Neg. §§ 3767, 3865; Lane v. R. Co. 64 Ka . 755, 78 Pac. 626; Armour & Co. v. Russell (C. C. A.) 144 Fed. 61 , 6 L.R.A.(N.S.) 603, 604, and see extended note pp. 602–609.

Defendant is bound to furnish place to work that is reasonably sa only. Streeter v. West Wheeled Scraper Co. 250 Ill. 244, Ann. C . 1913C, 204; 4 Thomp. Neg. § 3774.

The duty of reasonable care does not extend to such care as w reduce the liability of accident to the minimum. Jungnitz v. Michig

Malleable Iron Co. 105 Mich. 270, 63 N. W. 296; Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 982; Wood, Mast. & S. § 331; Bailey, Mast. & S. § 57; 26 Cyc. 1106–1108; 3 Elliott, Railroads, § 1274.

The assumption of risk may be free from any suggestion of fault or negligence on the part of the employee. Seaboard Air Line R. Co. v. Horton, 233 U. S. 504, 509, 58 L. ed. 1070, 1071; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 321, 57 L. ed. 852, 855, 33 Sup. Ct. Rep. 518; Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 94, 102, 58 L. ed. 521, 524, 34 Sup. Ct. Rep. 229; and cases cited. O'Malley v. Boston Gaslight Co. 47 L.R.A. 161; Streeter v. Western Wheeled Scraper Co. 250 Ill. 244, Ann. Cas. 1913C, 204.

Plaintiff knew the very danger that he complained of as constituting the negligence of the defendant, and it must be held as a matter of law that he assumed the risk. American Bridge Co. v. Valente (Del.) 73 Atl. 400; Elmer v. Mutual S. S. Co. 114 Minn. 257, 130 N. W. 1104; Ragon v. Toledo etc. R. Co. 97 Mich. 265, 56 N. W. 612; La Pierre v. Chicago, G. T. R. Co. 99 Mich. 212, 58 N. W. 60.

Geo. P. Homnes, for respondent.

It is the province of the jury to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable prudent men. 18 R. C. L. § 61, p. 547.

The master and servant do not stand upon the same footing, the mere fact that a servant knows the defects of premises does not necessarily charge him with contributory negligence, or the assumption of risks growing out of these defects. Wuotilla v. Duluth Lumber Co. 33 N. W. 553; Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; Cleveland R. R. Co. v. Keary, 3 Ohio St. 201.

The law, having consideration for the weakness of human nature, will not require of a person placed in circumstances of sudden danger, confusion, or excitement that deliberate forethought to be expected under other circumstances. Buswell, Personal Injuries, § 142, p. 256; Fero v. Buffalo & State Line R. Co. 22 N. Y. 209; Ernst v.

Hudson River R. Co. 24 How. Pr. 97; Cook v. New York C. R. Co. 3 Keyes, 476; McBrath v. Hudson River R. Co. 32 Barb. 144; Haas v. Chicago, M. & St. P. R. Co. 90 Iowa, 259; Kane v. Northern C. R. Co. 128 U. S. 91.

GRACE, J. Appeal from the judgment and order overruling the motion of the defendant for judgment in said action notwithstanding the verdict or for a new trial.

The action is one brought by the plaintiff against the defendant to recover damages for the alleged carelessness and negligence of the defendant by reason of which the plaintiff received certain injuries to his person. On the 1st day of January, 1917, the plaintiff was in the employ of the defendant and was in charge of the defendant's coal shed at the village of Fortuna, North Dakota. The coal shed was a place where the defendant's engines, or some of them, received coal. It was plaintiff's duty to fill the coal buckets and coal the engines and see that the coal buckets were kept filled. Plaintiff worked on the second floor of the coal shed, which was so constructed that there were two openings for the operation of the derrick in hoisting and lifting the large buckets of coal. Between the two openings there was a plank walk 2½ feet in width. When this walk was originally constructed it was 10 inches wider, a 10-inch plank having been removed, thus narrowing the walk to 2½ feet. The railroad track extended east and west through Fortuna. The coal shed is located in Fortuna, immediately north of the main railroad track. The coal shed is 30 feet long by 18 feet wide. It is open on the south side. There is a first and second floor in the coal shed. There are two openings in the second floor which are located toward the center of the building. One of the openings is on the south side of the shed, and in this opening the derrick or crane works and lifts the buckets of coal through the second opening, which is located immediately north of the opening to which we have referred. Between these two openings, on the second floor, is a narrow walk of 2½ feet. As above stated, to the east and west of these openings is the second floor, upon which the buckets are placed when filled with coal for the purpose of coaling the engines. On the upper floor there is room for only eight buckets; there are twelve buckets used. In coaling freight engines the buckets from the lower floor are used, or quite often used, as

the air from the engines furnishes power to elevate the loaded buckets which are deposited in the engine to be coaled. Otherwise than this, the derrick is operated by cranks which are turned by men. The passenger engines are coaled by use of the derrick being operated by means of a crank operated by men. The opening on the south side of the second floor is about 9 feet, and the other opening north of it is about 9 or 10 feet, and, as the testimony shows, a little narrower the other way. There is also a sidetrack to the north of the coal shed. Upon this track, at times, there stand carloads of coal for use in coaling the engines. Leading from the sidetrack to the coal shed is a small track upon which a small car is operated. The small car is loaded with coal from the car on the sidetrack and run into the coal shed, and the buckets are filled, and as many of the buckets as may be are elevated to the second floor to be in readiness for coaling the engines. To the crane is attached a cable, and the bucket of coal is either elevated from the lower floor to the most northerly opening and thence swung across and deposited on the tender; or the buckets are coaled and swung across and placed upon the floor on either side of the openings on the second floor. After the coal is deposited on the tender, the crane swings back to its original position. In coaling the engines, the bucket and boom are oftentimes pushed by the plaintiff and the fireman. The distance from the upper floor to the lower is 9 feet 3 inches.

On the 1st day of January, 1917, while in the performance of the duties of his employment in coaling an engine, the plaintiff was blinded by coal smoke and steam from the engine driven into the shed by strong wind, lost his footing on the walk on the second floor of the shed, and fell to the floor, a distance of 9 feet 3 inches, thereby sustaining injuries to his head, neck, side, and internally.

The defendant, in its answer, denies negligence on its part and further pleads assumption of risk on part of the plaintiff. The amount of damages claimed in the complaint was $7,500. The case was tried to the jury on June 21, 1917, and a verdict for the plaintiff for $3,600 damages was returned by the jury. On November 1, 1917, the defendant made a motion for a judgment notwithstanding the verdict or for a new trial,—all of which was denied.

The defendant, in its appeal, relies upon six assignments of error and also upon the claim that the evidence is insufficient to justify the

verdict. The trial court sustained the plaintiff's objection to the question asked of the defendant's witness, Michael Donovan, which question was as follows:

"Q. Will you state whether or not the equipment and the plan of the coal shed at Fortuna is of the usual, ordinary character used for the purpose of coaling engines?"

We are of the opinion it was no error in excluding the answer to such question, for the reason that the question and answer were immaterial. One of the main questions in this case is, whether or not the employer had used ordinary care to provide a reasonably safe place for the servant in which to perform his duties. How other coal sheds were constructed, or what they contained, or whether the plan of the coal shed at Fortuna and the equipment therein was of the usual and ordinary character, or corresponding in plan and equipment with other sheds, it seems to us, was immaterial, and the answer to the question above set forth was, by the trial court, properly excluded.

The second question to which the answer was excluded by the court, asked of the same witness, is as follows:

"Q. From your knowledge and experience, would it be practicable or advisable to encircle that deck where the derrick is with railing of any sort?"

And the further question, as follows:

"Q. From your knowledge and experience of such appliances, would it be practicable to operate the apparatus for hoisting this coal successfully or properly if the platform from which this derrick swings were railed in?"

Objection having been made to each of these questions by the plaintiff, the witness was, by the court, not permitted to answer, and we think properly so, for answers to such questions could have been only a conclusion of the witness.

The defendant's fourth assignment of error relates to the overruling of the defendant's motion made at the close of all the testimony, for a directed verdict on the ground that the evidence on the part of the defendant and as a whole fails to show any negligence on the part of the defendant as responsible for or contributing to the injuries sustained by the plaintiff, and for the further reason that the risk of dangers, if any existed, in the occupation in which the plaintiff was employed, was

assumed by the plaintiff. We are of the opinion that the court properly overruled such motion. It also properly overruled defendant's motion for judgment notwithstanding the verdict for a new trial. We are of the opinion that the evidence is sufficient to justify and sustain the verdict of the jury; that the verdict is not against the law, and was not contrary to the instructions of the court.

The question of negligence was one for the jury. If there was any negligence on the part of the defendant and there was competent evidence on the part of the plaintiff to show such negligence, the verdict should be sustained. Plaintiff testified to several changes which had been made in the coal shed since its construction, the most important of which was the removal of a 10-inch plank from the floor between the openings on either side. After the removal of the 10-inch plank there remained, between the two openings, but a narrow walk of 2½ feet along either side of which there was no railing of any kind or character. In view of the extreme narrowness of the walk between the openings, and the distance from the second floor to the first, and the failure to have any method to protect the plaintiff while using such narrow walk in the discharge of his duties, this court cannot say, as a matter of law, that defendant used ordinary care to provide a safe place for its servant, the plaintiff, in which to work; nor that the defendant, as a matter of law, was wholly free from negligence. The jury had all the testimony before it in regard to the narrow walk between the openings, the distance from the second floor to the first floor, and the fact that there was no guard or rail along said walk on either side. All this testimony tended to show negligence on the part of the defendant and failure to use ordinary care to provide a safe place for plaintiff in which to work. The jury, after considering all this testimony, rendered a verdict in plaintiff's favor, thus holding that the defendant was guilty of negligence. In view of the narrowness of the walk between the openings and the long distance from the second floor to the first floor, and the fact that there was no guard or rail of any kind to protect plaintiff, we think the verdict finds sufficient support in the evidence. Whether it was possible for the defendant to place a rail or guard along either side of said walk was a question of fact for the jury. Plaintiff claimed there could have been a railing, if constructed at an angle just the same as the boom. The defendant contends a railing constructed at an angle

as suggested by the plaintiff would render the narrow passageway between the two openings wholly useless and impassable. As we view the matter, these and kindred questions relating to negligence were all for the jury, and were by it determined in plaintiff's favor, and the defendant held to be negligent.

We are further of the opinion that the jury was justified in considering all the facts which were introduced in evidence which in any way tended to show negligence on the part of the defendant, including the failure to use ordinary care to provide a safe place for plaintiff in which to work, and that the court, by an instruction of law, could not take such facts from the jury. If the coal shed, at the time of the coaling of the engine, was filled with smoke and steam escaping from the engine, thus increasing plaintiff's danger of personal safety, and making it more difficult for him to find his way, or if the coal smoke overcame plaintiff, it must be apparent that this condition added to plaintiff's danger, and the jury was at liberty to consider such facts even if the court, by an instruction of law, had withdrawn such fact from the jury. If the facts were such as had direct relation to the accident and were such as were directly connected with the question of negligence of the defendant, they are to be considered by the jury. The jury are the exclusive judges of all facts which have any bearing or relation to the issues involved in the trial, and the court cannot, by an instruction of law, withdraw such facts from consideration by the jury except where they in no way have any relevancy to the issues involved. We do not think the court intended to do this when it gave the following instruction: "You are further instructed that the fact that large quantities of smoke and steam escaping from the engine on this occasion does not, in itself, constitute negligence."

It is true that the escaping of large quantities of smoke and steam from the engine on this occasion does not, of itself, constitute negligence. If, however, the large quantities of smoke and steam from the engine found its way into the coal shed, as the testimony shows it did, and of such density that it overcame plaintiff and he fell from the place where he was working, it is a matter which has a direct tendency to prove negligence on the part of the defendant, and was a question of fact exclusively for the jury.

The testimony shows that the upright which carried the boom and

derrick was slightly out of plumb, and that an iron guard which had once covered one of the cogwheels of the hoisting machinery was missing. There is no direct testimony that any of plaintiff's injuries were caused by coming in contact with this uncovered cogwheel, or that if the cogwheel had been covered, the injuries received might have been less serious. We think, however, it was a question of fact exclusively for the jury, whether or not the uncovered cogwheel contributed, in any degree, to plaintiff's injury. Such facts also might be pertinent as tending to show defendant's want of ordinary care in providing a reasonably safe place for the plaintiff in which to work.

Defendant places very much reliance upon that part of its defense which relates to the assumption of risk by the plaintiff. In this defense we really believe that defendant must fail. If the injuries which plaintiff received were the result of defendant's negligence, the defense of the assumption of risk by the plaintiff could have but little, if any, force. The jury, by their verdict, must have found that defendant was negligent. It is true the plaintiff had been in the employ of the defendant for several years as section foreman prior to the time he was placed in charge of the coal shed at Fortuna. He had been in charge of the coal shed from four or five months prior to the time he received the injuries. He knew the character of the construction of the coal shed at Crosby and had seen others of like kind, but that is largely immaterial. Plaintiff was, of course, in a general way familiar with the construction of the coal shed at Fortuna. The narrow walk between the openings in the shed at Fortuna was materially different than the one at Crosby, or those which plaintiff had seen, in that it was narrower by 10 inches. The narrowing of this walk between the two openings in the shed at Fortuna might greatly increase the danger of plaintiff's personal safety without him being conscious or aware of the increase of danger, and he might not know and appreciate the increased risk resulting from the material narrowing of the walk between the openings. He had a right to assume that the master would not reduce the width of the walk between the openings to such an extent that, under any condition that might arise, such reduction of the width of the walk would endanger or imperil plaintiff's personal safety. If the danger were greatly increased, it cannot, as a matter of law, be said to have been so obvious that the plaintiff was bound to know and appreciate

it. The plaintiff was not bound to know and appreciate every danger that might exist by reason of the improper construction or remodeling of the coal shed, nor the dangers to which he might be exposed under every condition that might possibly arise. He was not bound to know and appreciate that a condition would arise whereby the shed would be filled with smoke, gas, and steam which would cause the plaintiff to become unconscious and fall as he did, and was thereby injured, as the testimony shows.

If the master fails to use ordinary care and reasonable diligence in providing a safe place for the servant in which to perform his duties, or fails to use due diligence in informing himself whether or not the place where the servant is to perform his duties is safe; or, if the master permits the place in which the servant is performing his duties to become unsafe temporarily or permanently by causes which are under the master's control, such as in this case permitting his engines to emit large quantities of smoke, gas, and steam in close proximity to the place where the servant is performing his duties, in such manner that the shed was filled with smoke and steam thus subjecting the plaintiff to a danger which, by the use of ordinary intelligence, he could not have anticipated, the master, we think as the jury has found, would be negligent. Under such circumstances it could hardly be claimed the plaintiff assumed the risk and increased danger, nor that the danger was so obvious that the plaintiff should have known it, nor that it was an incident of his employment. The jury are the exclusive judges of the question of the assumption of risk. They have found in favor of the plaintiff and we think properly so.

We have examined with care the authorities cited by the defendant in support of the defense of the assumption of risk, including Ragon v Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 5 N. W. 612. We would like to discuss each of the cases at length. T do so would make this opinion unnecessarily long. We do not thin the cases are parallel with the case at bar. They are such cases, hov ever, as tend to support the doctrine of assumption of risk. We fee however, that the conclusion arrived at in the case at bar is legal sound. In the Ragon Case cited by the appellant, the honorable Cou in the syllabus, said: "Plaintiff, while attending in the daytime uncoupling a moving freight car from the engine in order that the c

might be left on a sidetrack, was injured by reason of stepping into an unfilled space between the ties near the rail from 2 to 4 inches deep caused by failure to ballast the sidetrack the whole width. The sidetrack had been in that condition during the time of plaintiff's employment, and he had passed the place of injury frequently in the discharge of his duties, but testified that he supposed the track was smooth. And it is held that there was a failure to show negligence on the part of the defendant; that the plaintiff was or ought to have been familiar with the sidetrack, *and if he was not, common prudence dictated that he should not venture between the moving car and engine without first looking under the car to examine the character of the roadbed, all of which defendant had a right to expect of him.*"

The following language is also found in the opinion: "Self-preservation should have prompted him to look at this track to see whether it was in such condition as to warrant his going between a moving train and engine, *though he had never seen the road before.*"

The court in the case, in effect, said the plaintiff should not recover because he ought to have been familiar with the sidetrack, and that if he were not familiar with the sidetrack he should have looked under the car to examine the character of the roadbed before stepping between the car and the engine,—all of which the defendant had a right to expect of him, and that if he did not do any of these things, he should then have invoked the law of self-preservation, which should have prompted him to look at the track to see if it were in such condition as to warrant his going between the moving train and engine though he had never seen the track before. That is surely the placing of very extensive duties on the brakeman in addition to the great number of duties which he has to perform, to do the actual work for which he is employed, and we cannot agree with the principle as thus so broadly stated. The injury, in the case we are discussing, might have occurred at any other sidetrack of the defendant over which the plaintiff passed in the discharge of his duties on his entire trip. The adoption of that principle, as we view it, would hold the brakeman to be thoroughly familiar with all of the sidetrack as well as of the main roadbed over which his trip or trips extended or his employment called him, no matter what the length might be. He must not only be generally familiar with the condition of the tracks, but he must know, or be held to know,

of every defect in the sidetracks or on the main track, or upon any part of the railway system where his duties might call him; or, in the event of his not being thoroughly familiar with all of the side or main track over which his trips extend, before he couples or uncouples a train from an engine or stepping between two cars to couple them, he must stoop down, make a thorough examination of the ground before stepping in to make the coupling. If he would do all the things, as we view the matter, he would be a man who would have a full realization of the principle of assumption of risk, but we believe he would be a decidedly poor brakeman. We must not forget that we are living in the present, —the age of electricity and of steam; that freight trains to-day are often between half a mile and a mile long; that employees of railways must use practically all of the time while they are on duty to perform the actual work and duties for which they are employed. It would, we believe, be impossible and at least impracticable for them, in the execution of their duties, to first examine each and every appliance or road bed which they use in the performance of their duties to determine if there be any defect in the same before they executed their duty. As we view it, under such rule, a brakeman who, in the execution of his duties, is on the top of a freight car and wishes to descend to perform some other duty, would, before descending, be required to examine the ladder and each rung thereof to determine if the same were in proper condition; for, under such rule, if he did not do so and one of the rungs were deficient and broke under his weight, and he fell to the ground and became injured by a train passing over his foot or some part of his body, he could not recover because he should have examined the ladder before descending. If he were going to set a brake, he should examine the brake and brake wheels, and see that it was not deficient for if he should take hold of the wheel with which the brake is set and turn it with a view of setting the brake, and the wheel or brake should give away and he fall between the cars and be injured, he could not recover because he had not examined the brake for defects. So it would be, it seems to us, in the performance of every duty, according to such rule. We feel we cannot agree that such is the correct rule. With reference to railways, we believe it to be the correct rule of law that holds it to be the duty of the master to keep his appliances in proper condition for the use for which they are intended. It is, we

believe, his duty to keep his roadbeds, both on the main track and sidetracks, in proper condition. If he does not do so, it is an act of negligence on his part. Why, then, should an employee suffer for the negligence of the master? If the hole had not been in the sidetrack the brakeman would not have been injured. It was no part of the brakeman's duty to see that there were no holes in the sidetrack, nor to keep the appliances of whatever kinds in proper condition for use. This is exclusively a duty of the master. It is the exclusive duty of the master not only to maintain his roadbeds, but all other appliances, in proper condition so that the brakeman or other employee could perform his respective duties with full reliance that all the appliances, including the roadbeds, are in no way defective. The master must use ordinary care to provide a safe place for the employee in which to work. If the master does not do so and the employee is injured, the proximate cause of the injury is the master's negligence, and he cannot, it seems to us, evade his liability by relying on the doctrine of assumption of risk and compel another to bear the burden of the master's own negligence. The rule in the Ragon Case is effective in Michigan, but is stated too broadly to be followed in this state, and it is valuable to us mostly in its educational character. Space forbids a detailed analysis of all the other cases cited by appellant.

We think the more correct rule, stated concisely, and more in harmony with the spirit of our statute, is that where assumption of risk is pleaded as a defense, and if there be merit in such defense, it is in cases where the servant has been shown to have actual knowledge of the defect in the appliances and fully knew and appreciated the danger from the continued use thereof, and continued to use such appliances after having actual knowledge and appreciation of danger. Even in such case, it can be readily understood that it is not the business of the servant to order the master to make the repairs. He has no power to do so. The servant could report to the master the need of repairs. The servant is compelled to earn his living and support himself and family. He must earn his daily bread in the sweat of his brow; he must labor. He has perhaps a wife and children at home whose demands for food and clothing must be met. He must labor even if the appliances are not safe. He is willing to yield his limb, even his life, in performing the duties of his employment, if need be, that those

dependent on him may have the necessaries of life. The master is usually a person of greater intelligence than his servant. He has the power, and it is his duty, to provide safe appliances for the servant in the performance of his duties; and it is his duty to use ordinary care and due diligence to do so, and if he fail and the servant is injured, the master should not be permitted to avoid the burden of his negligence. The question of assumption of risk in this state is exclusively a question of fact for the jury, and in this case the plaintiff received a verdict in his favor thus entirely disposing of that and other questions of fact.

The one remaining point is that of excessive damages. Upon a careful examination of this question, we are convinced the damages are not excessive, nor is there anything in the record to indicate they were founded upon passion or prejudice of the jury. It is true the physicians in giving expert testimony did not state positively what length of time would be required for the plaintiff to have permanent recovery from his injury. This does not necessarily prevent the jury from taking into consideration such question. The injuries which plaintiff received were all described in the testimony. The injuries having been shown by proper testimony and the character of such injuries having been fully shown, the jury, in fixing damages, could determine from such testimony the probability of the permanency of recovery and the time plaintiff would be wholly or partly incapacitated. It is conceded that plaintiff had an earning capacity at the time of the injury of at least $55 or $60 per month. The jury, being the exclusive judges of all the facts, fixed the plaintiff's damages, including costs, at $3,668.60. As a matter of law, we cannot say the same is excessive, and believe the verdict of the jury should stand.

The order appealed from overruling the motion of defendant for a judgment in said action notwithstanding the verdict or for a new trial, and the judgment appealed from, are affirmed, with costs.

BIRDZELL and ROBINSON, JJ., concur in the result.

CHRISTIANSON, J. (concurring specially). The principal points relied upon by the defendant in this case are: (1) That there is no evidence of negligence; (2) that in any event the plaintiff voluntarily

assumed the risk of the injuries; and (3) that the damages awarded, if any were assessable at all, are clearly excessive.

It is of course conceded by the defendant that the questions of negligence and assumption of risk are for the jury in all cases where the facts are controverted, or, if uncontroverted, are such that different minds might reasonably come to different conclusions as to whether the defendant was in fact negligent, or the plaintiff did assume the risk of the injury involved in the suit. But defendant contends that in this case only one inference can be reasonably drawn both as to negligence and assumption of risk; that these inferences are both in favor of the defendant, and that hence the court should have directed a verdict in its favor. The evidence in this case is very close upon both propositions, but I am not prepared to say that reasonable men might not reasonably draw the inference from the evidence that the defendant was negligent, and that the plaintiff did not assume the risk of the injuries for which he seeks to recover in this action. Hence, I cannot say as a matter of law either that the defendant was not negligent, or that the plaintiff assumed the risk of the injury. Neither can I say that the verdict is so excessive as to justify this court in interfering with the trial court's order denying a new trial. For these reasons I concur in an affirmance of the judgment and the order appealed from. I do not, however, concur in the discussion relative to the doctrine of assumption of risk, and the criticism of the decision of the supreme court of Michigan in Ragon v. Toledo, A. A. & N. M. R. Co. 97 Mich. 265, 37 Am. St. Rep. 336, 56 N. W. 612, contained in the opinion prepared by Mr. Justice Grace. The doctrine of assumption of risk has become firmly established as a part of the law of master and servant. It has been embodied in the statutory law of this state. See § 6107, Compiled Laws 1913. It is available as a defense under the Federal Employer's Liability Act, except in cases where the carrier has violated a statute enacted for the safety of the employees. See Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Jacobs v. Southern R. Co. 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588; Baugham v. New York, P. & N. R. Co. 241 U. S. 237, 60 L. ed. 977, 36 Sup. Ct. Rep. 592, 13 N. C. C. A.

138. If the doctrine of assumption of risk is wrong or undesirable, let it be modified or abrogated by legislative enactment, and not by judicial fiat.

BRUCE, J. I dissent.

C. D. CLOW and H. B. Hendricks, Copartners as Clow & Hendricks, Respondents, v. E. G. SWEENEY and J. G. Hyde, Copartners as Sweeney & Hyde, Appellants.

(172 N. W. 66.)

Negotiable instruments — non-negotiable order — lack of consideration as a defense.

1. Where a non-negotiable order is accepted by the debtor, and at the time of the acceptance or of the making thereof there existed no indebtedness between the debtor and the assignor, and the assignee paid no consideration for such order, the lack of such consideration, in an action upon such original promise of acceptance or upon such order by the assignee thereof, is a defense.

Negotiable instruments — consideration — question for jury.

2. *Held*, that the trial court erred in directing a verdict for the plaintiffs where there was evidence in the record sufficient to form a question for the jury, of want of consideration between the parties and also between the parties and the assignor.

Opinion filed March 21, 1919. Rehearing denied April 15, 1919.

Appeal from the District Court of Dickey County, *Cooley*, J.

Action on non-negotiable order.

Reversed and a new trial granted.

T. L. Brouillard and *Ira C. Doane*, for appellants.

"The order in question not being an unconditional promise or order to pay a certain sum of money not payable on demand or at a fixed or determined future time, or to order or bearer, is not negotiable." N. D. Comp. Laws 1913, § 6886.

"Failure of consideration is a defense against any person not a hold-

er in due course." N. D. Comp. Laws 1913, §§ 6913, 5881; 8 C. J. p. 331.

"The prima facie presumption of consideration is overcome by any testimony on behalf of defendants, however slight, that tends to show there was in fact a failure of consideration, and the burden then shifts to the plaintiffs." 16 Cyc. 1087, ¶D–(2); 38 Cyc. 1567 (B).

"When opposed by a mere technical presumption, the defendants were entitled to have the jury pass upon the question of failure of consideration." 38 Cyc. 1567 (B); 8 C. J. 331, note 73.

E. E. Cassels, for respondents.

"The rule is, where the damages are contingent as where the defendant may or may not suffer any loss or damage, no action or defense lies." 20 Cyc. p. 43, subd. B.

"The facts do no constitute fraud." 20 Cyc. 12.

Bronson, J. The plaintiffs sued the defendants, the appellants herein, upon an order which reads as follows:

Merricourt, N. D., Jan. 2, 1917.

Sweeney & Hyde,
Merricourt, N. D.

Please pay Clow and Hendricks three hundred and thirty dollars $330 upon your collecting that certain note and mortgage held by you against Christ Biederstedt for $2,000 due 11–15–17, a lien on S.W.¼ and N.E.¼ 32 and S.W.¼ 33–132–64, Dickey County, N. D.

The Webb-Stout Company,
By George T. Webb, V. P.
George T. Webb.

We accept above order.
Sweeney & Hyde.

The defendants in their answer set up lack of consideration for, and fraudulent representation in the securing of, such order. In the district court upon a trial of the action, a verdict was directed for the plaintiffs, and, from the judgment rendered thereupon, the defendants appealed. Among the specifications of error, the appellants principally challenge the ruling of the trial court in so directing the verdict, upon the ground that the question of the lack of consideration was for the

jury. The order in question plainly was a non-negotiable instrume practically a chose in action subject to the principles of law concern assignments. The rights of the plaintiffs herein to recover dep upon their rights, as assignees, or upon their rights under the origi promise of acceptance made by the appellants.

In the record there is evidence tending to show that the assign at one time owned a promissory note made by the defendants; that t note was sold to a bank by the assignors prior to the order herein; t the assignors, representing to the defendants that the note was and that they were about to go into the hands of a receiver, procu the consent of the defendants to accept the order herein given to plaintiffs; that at the time the plaintiffs received such order, the signors were not indebted to plaintiffs, received nothing for such ord but on the contrary the plaintiffs were indebted to assignors for so insurance; the trial court directed a verdict upon the theory that fendants had failed to establish any fraudulent representations, wh ignoring the defense of want of any consideration between the assign and assignees, and between the debtors, the defendants, and the signors, as plead by the defendants.

As assignees, it is well settled that the plaintiffs possessed no grea rights against the debtor than the assignors had. 5 C. J. 961; Co Laws 1913, § 7396; Emerson-Brantingham Co. v. Brennan, 35 N. 94, 159 N. W. 710; 2 R. C. L. 630, 631.

Although the assignment itself furnished, prima facie, a consid tion sufficient to support an action upon the original promise of acc ance by the debtor, and although ofttimes the question of the consid tion paid by the assignee is immaterial in an action upon assignm yet the want of the consideration is a defense in an action upon a cepted order, where it is shown that there existed at the time of ma such order and acceptance an entire want of consideration bot between the assignors and the assignees, and as between the debtors the assignors. 5 C. J. 840, 938, 963; 4 Century Dig. 1291, 1 Palmer v. Palmer, 112 Me. 149, 91 Atl. 281; Bank of Harle Bayonne, 48 N. J. Eq. 246, 21 Atl. 480; Comp. Laws 1913, § 7

. The trial court therefore erred in directing a verdict. It is unn

sary to consider other specifications of error. The judgment is reversed and a new trial ordered, with costs to appellants.

CHRISTIANSON, Ch. J. I concur in a reversal.

ROBINSON, J. (dissenting). As the amended answer avers, on November 15, 1910, the defendants Sweeney & Hyde made to Webb-Stout Company a promissory note for $250, due in one year. There is no claim that the note was not made for full and fair value; there is no claim that it was ever presented for payment by any person; there is no claim that it was ever paid, except by the giving and acceptance of the order in question. Webb-Stout & Company do not intervene or claim that the order was not given for value. A written instrument is presumptive evidence of a consideration. Section 5880. The burden of showing want of consideration sufficient to support a written instrument lies on the party seeking to invalidate or avoid it. Section 5881. The answer does not aver or state any facts to show that the order was made to the plaintiffs without consideration. So far as there is any defense, it relates only to the acceptance of the order. The answer avers that the $250 note was given by Sweeney & Hyde to Webb-Stout Company for a commission loan made by them, and that the note was transferred to the Farmers Bank of Merricourt. But the note is now outlawed, and there is not a word of testimony that the bank ever presented the note or made any claim under it. The answer does not aver that the bank ever asserted any claim under the note. If the bank or any party had asserted a claim to the note for which the order was given, the proper course was for the defendants to have impleaded the bank as an intervener. Section 7414. Defendant Sweeney is the party who signed the acceptance, agreeing to pay the order in lieu of the note. He testifies to the making of the note and acceptance of the order. He testifies the order was accepted at the request of George Webb of the firm of Webb & Stout. He says: "Webb asked me to pay the note or to sign the order. Webb said the note was lost. He wanted me to sign an order to pay the note or the money over to Hendricks. The note was for $250; the order for $330. He figured the interest, and had added it and said that was the accrued interest. I

remember that he read the order to me." He says: "The note was du in one year from the date it was given. The note has never been pre sented for payment."

"George Webb was an officer of the Farmers State Bank of Merr court. The note has never been paid and it has never been presented.

By the Court: "Q. The order was given in payment of the note A. Yes." (12).

Thus it conclusively appears there was no objection to the lost note the acceptance was given in payment of the note; it was given at th request of George Webb, an officer of the Webb-Stout Company and o the State Bank of Merricourt. Under the evidence it is manifest th defense was a mere sham. There was no question to go to the jury The verdict for the plaintiff was properly directed.

E. J. HURLEY et al., Respondents, v. VILLAGE OF FAIR MOUNT et al., Appellants.

(171 N. W. 833.)

Injunction — granting of temporary injunction — discretion of trial cour

1. As a general rule the granting or refusal, the continuing or dissolving, a temporary injunction, lies within the sound judicial discretion of the tri court, and its ruling will not be disturbed unless an abuse of such discreti is shown.

Injunction — restraining of village officers — necessity of permission of W Industries Board to engage in project.

2. In an action to restrain the officers of a village from installing a wat works system and a sewerage system, a temporary restraining order was issu *ex parte* at the commencement of the action. Upon the hearing as to the c tinuing or dissolving of such order it was conceded that no permission had eit been sought or obtained from the War Industries Board to construct such s tems, as required by the directions of said Board. The trial court thereu terminated the hearing and continued the restraining order in force until further order of the court. *Held*, that the trial court did not abuse its dis tion in so doing.

Opinion filed April 1, 1919. Rehearing denied April 15, 1919.

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

Defendants appeal from an order continuing a temporary restraining order in force.

Affirmed.

W. E. Purcell and *Jos. G. Forbes*, for appellants.

"Before an injunction is issued it must appear by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor. Comp. Laws 1913, § 7530; Hyde v. Gearhart, 168 N. W. 719; 22 Cyc. 942 and cases cited.

The general police power includes the usual means of carrying out such power, includes municipal water and lighting services. Dill. Mun. Corp. 143–146; Maudlin v. City Council (S. C.) 11 S. E. 434; Rushville Gas Co. v. Rushville (Ind.) 23 N. E. 72; Crawfordsville v. Braden (Ind.) 28 N. E. 849; Bluffton v. Studebaker, 106 Ind. 129, 6 N. E. 7; Ellinwood v. Reedsburg, 64 N. W. 885; 28 Cyc. 941, 950; Fitzgerald v. Stattler, 168 N. W. 599.

When the proper officials of a municipality proceed to install improvements, when discretion of doing same is vested in them, it is conclusive and is not reviewable by the courts. Harney v. Benson, 45 Pac. 687; Cooley, Tax. 449–451; Rogers v. St. Paul, 22 Minn. 494; 1 Dill. Mun. Corp. 94; Powers v. Grand Rapids, 57 N. W. 250.

The authority to construct sewers is a general one, and resides in all municipal corporations unless expressly denied to them by the legislature. Ft. Wayne v. Coqms, 7 N. E. 743; 28 Cyc. 943, 949, and cases cited; Torcent v. Muskegon, 10 N. W. 132; Kundinger v. Saginaw, 93 N. W. 914; Irving v. Ford, 32 N. W. 601; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103.

On having a motion for preliminary injunction or order to show cause, the court may go into the merits of the case, but is limited to the issues that are raised by the bill, answer, and affidavits, and cannot go into outside or collateral matters. 22 Cyc. 953, 999.

The existence of a right violated is a prerequisite to the granting of an injunction. 22 Cyc. 748, 749, 756, 975, 980; Burlington, C. R. & N. R. Co. v. Dey, 48 N. W. 98.

W. S. Lauder, for respondents.

CHRISTIANSON, Ch. J. This appeal is from an order continuing i force a temporary restraining order. The action in which the restrai ing order was issued was brought by the plaintiffs as taxpayers an property owners in the village of Fairmount, in Richland county, t restrain the board of trustees of said village from establishing or co structing, and from entering into any contract or contracts for the co struction of, a waterworks system and sewerage system within said vi lage. When the action was commenced an order was issued citing d fendants to show cause why a temporary injunction should not be issue The order to show cause restrained the defendants, until the further o der of the court, from proceeding with, or contracting for the constru tion of, such waterworks system and sewerage system. The order to sho cause came on to be heard on September 12, 1918. After defendan had made their showing and announced that they had no further ev dence to offer in support of their application for the continuance i force of the temporary restraining order, the court inquired of d fendants' counsel whether defendants had made application to th "War Industries Board" or the "State Council of Defense" for pe mission to construct the works in question, as required by the resol tions of said boards; and whether the said War Industries Board an the State Council of Defense had granted permission to the defen ants to construct said waterworks and sewerage systems. To this i quiry defendants' counsel replied in substance that the defendants h not made application to any board whatever for permission to co struct the works involved in this litigation, and asked for leave to i troduce evidence showing the good faith of the defendants, their co pliance with the statutes of this state having reference to the constr tion of such projects, and the public demand for such constructi The trial court thereupon said: "While there is no question, in r mind, as to the good faith of the village authorities in connection w this matter, it seems to me it would be futile for us to take up the ti and for the litigants to incur the necessary expense in connection w further testimony, in connection with this matter, because of the f that the court considers itself bound by the recommendations and fi ings of the "War Industries Board," and those associated with them reference to conservation of building materials and labor, at the pres time. Irrespective of any evidence heretofore offered, or that migh

offered by the defendants, in this action, and taking into consideration only so much of the evidence already offered as shows that this is a public enterprise, contemplated by the village of Fairmount, that the execution of this work in question would necessarily entail the use of certain materials and the use of certain laborers which the court considers is forbidden under the present exigency, excepting by a permit which the response of counsel for the defendants shows has not been obtained, and basing its decision as above, the court deems it to be its duty to now deny the application of the defendants to offer further evidence at this time and to continue in force the temporary injunction heretofore granted until the further order of the court."

In conformity with such pronouncement of the trial court, an order was entered continuing the restraining order formerly issued in force, until the further order of the court. This appeal is from such order.

The only question involved on this appeal is whether the trial court was justified in terminating the hearing and continuing the temporary restraining order in force.

As a general rule, "the right to a preliminary injunction is not *ex debito justitiæ*, but the application is addressed to the sound discretion of the court, to be guided according to the circumstances of the particular case." High, Inj. § 11. The same rule is applicable to the continuing or dissolving of a preliminary injunction. Cyc. says: "The continuing or dissolving of a preliminary injunction lies within the sound discretion of the court. However, this discretion is to be regulated by sound and just rules. But in the absence of any showing of abuse, the discretion of the chancellor will not be controlled by an appellate court." 22 Cyc. 982, 983. As a general rule the merits of the case, or difficult or doubtful questions of law or fact therein, will not be determined upon the hearing of a motion for a preliminary injunction. 22 Cyc. 953, 954.

The complaint in the instant case sets forth that the plaintiffs are citizens, residents, property owners, and taxpayers in the village of Fairmount; that such village has a total assessed valuation of $133,180; that the estimated cost of the waterworks and the sewerage systems which the defendants propose, and are about, to construct, is $85,768. The complaint assails the proposed action of the village officers for various reasons. The answer admits that plaintiffs are residents, prop-

erty owners, and taxpayers in the village of Fairmount, and alleges tha the actions of the village officers were and are in accordance with th public demand, and that public convenience and welfare demands th construction of the proposed waterworks and sewerage systems. W do not deem it necessary to set out at any great length the allegation of the pleadings. For it will be noticed that the trial judge based hi action continuing the temporary injunction in force altogether upo the proposition that no permission had been obtained from the Wa Industries Board to engage in the construction of the projects in que tion.

That the power to wage war which is granted to the government i the Federal Constitution is the power to wage war successfully is un deniable. That the Federal government in the exercise of this powe may provide for the necessary means to wage war successfully follow as a necessary corollary. To this end it may pass conscription law (Selective Draft Law Cases (Arver v. United States) 245 U. S. 366 62 L. ed. 349, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas 1918B, 856) and compel the men inducted into the Army to perfor military service beyond the territorial limits of the country. Cox v Wood, 247 U. S. 3, 62 L. ed. 947, 38 Sup. Ct. Rep. 421. That th Federal government may also mobilize the resources of the country, an to that end impose such regulations upon the use of property as ar reasonably necessary to secure the successful prosecution of the War, i we think, self-evident.

On March 21, 1918, the War Industries Board adopted a resolutio reading in part as follows: "Where plans are being considered by ce tain states, counties, cities, and towns for the construction of publ buildings and other improvements which will not contribute towa winning the War; and

"Whereas the carrying forward of these activities will involve t utilization of labor, materials, and capital urgently required for w purposes: Now, therefore, be it

"*Resolved,* by the War Industries Board that in the public inter all new undertakings not essential to and not contributing either direc or indirectly toward winning the War, which involve the utilization labor, material, and capital required in the production, supply, distribution of direct or indirect war needs, will be discouraged, notw

standing they may be of local importance and of a character which should in normal times meet with every encouragement; and be it further

"Resolved, that in fairness to those interested therein notice is hereby given that this Board will withhold from such projects priority assistance."

On September 3, 1918, the War Industries Board issued its circular No. 21, containing its directions with respect to the same subject. It enumerated and approved certain construction projects, and stated that no permits or licenses would be required therefor. But it further directed that "no building project not falling within one of the foregoing classes shall be undertaken without a permit in writing issued by or under the authority of the Chief of the Nonwar Construction Section of the Priorities Division of the War Industries Board." The projects involved in this litigation fall within the classes for which permits are prescribed.

It is suggested in appellants' brief that the construction of the waterworks and sewerage systems involved in this litigation would in no manner influence or affect the power or ability of the Federal government to carry on its part in the World War. It is probably true that the construction of these particular systems would not have had any noticeable effect upon the supply of labor or materials. But this same argument might with equal force have been urged by every state, county, city, or town in this country. And if carried to its logical conclusion the result would be that the Federal government would have been prevented from mobilizing and conserving the resources which were deemed reasonably necessary for a successful prosecution of the War. The argument might also have been urged by any person subject to the Selective Draft Law, that it would in no manner hamper or impede the prosecution of the War if he was relieved from such service. And it would probably have been true as applied to any individual case. But manifestly if one person might urge this, so might every person subject to the law. Of course the result would have been that no army could have been raised under the law.

In our opinion the trial court did not abuse its discretion in continuing the temporary injunction in force. On the contrary the discretion was wisely exercised.

Order affirmed.

JOHN ROEHL, Respondent, v. A. H. NIETER and A. G. Nieter, Appellants.

(172 N. W. 114.)

Contracts — recovery of true consideration — question for jury.

1. In an action to recover the true consideration for a deed other than that expressed in the deed, it is *held* that the evidence justifies the finding of the jury.

Contracts — liability of wife for purchase price when named as grantee.

2. In an action to recover the balance of the consideration for a deed other than that expressed in the deed, where the husband promised to pay the consideration therefor, and the wife received the delivery of such deed in her name she becomes a party to the transaction by the acceptance of the deed, and is liable for the true consideration promised, in the absence of any showing that she had no knowledge thereof.

Opinion filed April 15, 1919.

Action in District Court, Grant County, *Hanley*, J., to recover th consideration of a deed.

From a judgment rendered for the plaintiff, and from an orde denying new trial, the defendants appeal.

Affirmed.

Vincent Hogan and *B. W. Shaw*, for appellants.

"Where a case is based on fraud the facts to prove it must be esta lished by clear and satisfactory evidence in a higher degree than ordinary cases." Lipley v. Anderson, 125 N. W. 432.

In Dome v. Dunnam, 89 N. W. 640, the court say: "There w a defect of parties defendant." Riggs Land Co. v. Motely, 124 N. 438.

Jacobsen & Murray (*E. T. Burke*, on oral argument), for responde

Bronson, J. This is an action to recover the balance of a consid ation for a deed. In the trial court the plaintiff recovered a judgm against the defendants for such consideration, and from such judgme and an order of the trial court denying a motion for a new trial, defendants have appealed. The sole question involved is whether

true consideration of the deed in question is $3,400 or $2,200. The facts substantially are that the plaintiff owned a quarter section of land in Grant county, which was his homestead; he became financially embarrassed; as a result he sold this homestead to the defendant A. H. Nieter, and he delivered a deed therefor, with the wife of said A. H. Nieter designated therein as grantee. The consideration expressed in the deed is $2,200. There is testimony in the record by the plaintiff and his wife that the defendant A. H. Nieter agreed to pay the plaintiff, for this land, $3,400. The contention and evidence on the part of the defendants, on the other hand, is that the consideration to be paid was only $2,200. A square issue of fact was presented for the consideration of the jury. The jury determined this issue adversely to the defendants; this court will not disturb the finding of the jury so made. Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592; 2 Devlin, Deeds, 3d ed. § 823. The defendants complain that the trial court should have granted a new trial based upon the ground of newly discovered evidence. We find no abuse of discretion in the trial court refusing so to do. The appellants contend that the record discloses no agreement by the wife of the defendant, A. H. Nieter, to pay this consideration, and that therefore, by mistake, a judgment has been rendered against her. In this record the deed is considered delivered. The delivery of a deed implies acceptance by the grantee; and to the terms thereof to which she assented. 13 Cyc. 571. Its acceptance constituted a contract. 2 Devlin, Deeds, 3d ed. § 9400. No question is presented in the record that she did not know the agreement that her husband made concerning the consideration. The question raised by the appellants concerning a defect of parties is without merit.

The judgment is affirmed, with costs.

ED GILMORE, Appellant, v. WESTERN ELECTRIC COMPANY, a Corporation, Respondent.

(172 N. W. 111.)

Damages — settlement for injuries — repudiation of settlement — necessity of returning benefits.

1. A person who desires to rescind a contract of settlement made for personal injuries upon the ground of misrepresentation, fraud, or mistake, must upon discovery thereof, announce his decision to repudiate the settlement so made; and if thereafter he continues to treat and use the property received as his own, knowing well the facts, he is bound by the contract made, pursuant to § 5936, Compiled Laws 1913.

Damages — personal injuries — settlement for injuries — rescission ineffectual without repayment of benefits.

2. In an action for personal injuries where the plaintiff, some sixteen months prior to the institution of the action, executed a full release for the damages suffered, and thereafter having knowledge of his true condition, and of the facts upon which he claims the right to rescind the settlement, retains the settlement money then possessed by him amounting to some $700, and thereafter expends the same and within a period of fourteen months makes no complaint offer to restore, or restoration of the settlement money received, or any part thereof, it is *held* as a matter of law that no right to rescind exists.

Damages — personal injuries — courts will look closely for fraud in such settlements.

3. In such action it is the duty of the court to scrutinize the settlement made for personal injuries sustained, realizing the opportunities to practise deception and fraud upon persons while in a condition of physical and mental disability and it is sufficient under such circumstances if the evidence presented discloses a fair and clear question of facts concerning fraud or misrepresentation practised.

Opinion filed April 15, 1919.

NOTE.—According to a large number of cases it is unnecessary to return or tender the consideration for a release obtained by fraud as a prerequisite for the maintenance of a suit for damages resulting from an injury; however, a considerable number of cases hold that a party who repudiates a settlement for personal injuries because of fraud and sues upon the original cause of action must first return or tender the consideration received, as will be seen by an examination of the cases collated in notes in 35 L.R.A. (N. S.) 660, and L.R.A.1918F, 1073, on return or tender of consideration for release of claim for personal injuries set aside on the ground of fraud.

Action for personal injuries in District Court, Stutsman County, *Coffey*, J.

From a judgment, upon a directed verdict, for the defendant, plaintiff appeals.

Affirmed.

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

"The defendant was negligent in not furnishing gloves for plaintiff's protection." 3 Labatt, Mast. & S. § 949, and numerous cases cited, and annotations under note 2; see also § 939; 18 R. C. L. § 92, p. 589; 26 Cyc. pp. 1433, 1441, and citations. Snyder v. Mutual Teleph. Co. (Iowa) 112 N. W. 776; Traut v. Light Co. (Mo.) 132 S. W. 58.

"It is actionable negligence on the part of a master to fail to furnish his servant with such tools and appliances as may be required for the reasonably safe prosecution of his work." 26 Cyc. 1097, 1106, and cases cited; Lang v. Baylies, 19 N. D. 582; Herbert v. N. P. R. Co. 3 Dak. 38; N. P. R. Co. v. Herbert, 116 U. S. 642; Gates v. Co. (S. D.) 50 N. W. 907; Cameron v. R. Co. 8 N. D. 124; Bennett v. R. Co. 2 N. D. 112; Boss v. Co. 2 N. D. 128; Umsted v. Elevator Co. 18 N. D. 309; Mehan v. Co. 13 N. D. 432; Wyldes v. Patterson, 31 N. D. 282; Gerke v. Zimmerman (S. D.) 154 N. W. 812; Wyldes v. Patterson, 153 N. W. 630.

"When a master employs electricity in his business he must exercise every reasonable precaution known to protect his servants from injury." 26 Cyc. 1120; Mobile Electric Co. v. Sanges, 23 Ann. Cas. 461, note; Essex County Electric Co. v. Kelley (N. J.) 37 Atl. 619; Riker v. R. R. 72 N. Y. Supp. 168; Holden v. Teleph. Co. (Minn.) 122 N. W. 1018; Kelley v. Teleph. Co. (Minn.) 25 N. W. 76, and note; Clark v. Teleph. Co. (Iowa) 123 N. W. 327; Co. v. Tweed, 138 S. W. 1155; Indianapolis Teleph. Co. v. Sproul (Ind.) 93 N. E. 463; Pence v. Co. 155 Ill. App. 480; Will v. Teleph. Co. (N.H.) 30 L.R.A. (N.S.) 477.

"The master also owes the duty of inspecting all of the safety appliances and protecting his servants against injury." Cameron v. R. Co. 8 N. D. 124; Mehan v. Co. 13 N. D. 432; Bennett v. R. Co. 2 N. D. 112; Lang v. Baylies, 19 N. D. 582; Boss v. Co. 2 N. D. 128; Raymond v. Electric Light Co. (Idaho) 170 Pac. 88; Sanitonio Edi-

son Co. v. Dickson (Tex.) 42 S. W. 1009; DuPree v. Alexander (Tex.) 68 S. W. 739; Clairain v. Co. (La.) 3 So. 625; Berley v. Teleg. Co (S. C.) 64 S. E. 157; cases cited in note on page 776 of 21 L.R.A. (N.S.).

"The servant can recover unless his obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it." Umstad v. Elevator Co. 18 N. D. 309; Webb v. Dinney Bros. 22 N. D. 377; Swanson v. Co. 135 N. W. 207; Wyldes v. Patterson, 31 N. D. 282; Warehein v. Huseby, 165 N. W. 502; Raymond v. Co. (Idaho) 170 Pac. 88.

"It would be absurd to contend that when the work is done under directions of a master the time when the same can be safely continued is matter for the individual opinion of each of the employees interested." Oakland v. Nelson (N.D.) 149 N. W. 337; 18 R. C. L. pp. 655 to 659; Lang v. Baylies, 19 N. D. 582; Allison v. Stivers (Kan.) 106 Pac. 996.

DeNegre, McDermott, & Stearns, and *Knauf & Knauf,* for respondent.

"When the master has furnished his servant a reasonably safe place to work, he is not liable when the servant is injured by doing the work in an unsafe manner." Livengood v. Joplin, 77 S. W. 1077; Hayden v. Manufacturing Co. 29 Conn. 548; Dixon v. Teleg. Co. 68 Fed. 630 Greene v. Teleg. Co. 72 Fed. 250; Flood v. Teleg. Co. 131 N. Y. 603 30 N. E. 196; Teleph. Co. v. Loomis, 87 Tenn. 504, 11 S. W. 356.

The plaintiff assumed the risks because they were obvious and well known to him, or might readily have been seen by him. Thompson v. R. Co. 3 Am. Neg. Rep. 53; Chandler v. A. C. E. R. Co. Am. Neg. Rep. 189; 14 Am. & Eng. Enc. Law. 845; Bailey, Master's Liability for Injury to Servant, p. 145, and cases cited; Foley v. Light Co. 54 N. J. L. 411, 24 Atl. 487; Hayball v. Railway Co. (Mich.) 7 N. W. 145, citing Beach, Contrib. Neg. § 370; Kean v. Rolling Mill 66 Mich. 277, 33 N. W. 395; R. Co. v. Frawley (Ind.) 9 N. E. 59 citing Engine Co. v. Randall, 100 Ind. 293; R. Co. v. Adams, 105 In 151, 5 N. E. 187; see also Kean v. Rolling Mills, 66 Mich. 277, N. W. 395, citing Davis v. R. Co. 20 Mich, 105; R. Co. v. Dolan, Mich. 510; Cooley, Torts, 542.

BRONSON, J. This is an action for personal injuries. On April 20, 1915, the plaintiff was working as a lineman for the defendant at Jamestown upon an electric pole carrying high-tension wires, making repairs thereto; while so employed, he came in contact with the electric current and received a shock occasioning severe burns and injuries to his hands. On the date of the injuries the index finger of his right hand was amputated. Thereafter, at Jamestown, he received medical treatment daily for his injuries until June 24, 1915. During this time his hands were in bandages, being dressed almost daily; with the flesh, particularly on his fingers, burned and raw, and with some of the fingers badly cramped. About two weeks prior to June 25, 1915, he told the manager of the defendant company that he needed money; the manager said he would write to Minneapolis to see about a settlement. Prior to that time a claim agent representing a liability company came to Jamestown, saw the plaintiff, and received from him a statement concerning the injuries. About June 23d thereafter, the claim agent came to Jamestown and for two days conducted negotiations with the plaintiff with a view to making a settlement for his injuries. These negotiations concerned principally the amount of the settlement. The plaintiff was offered, first, $700, then $1,000, and finally $1,200, at which figure settlement was made. The plaintiff signed and executed an acknowledgment for a full release therefor. He read and understood the same. He went over to the bank and received $1,200 in cash. Almost immediately thereafter the plaintiff went to Minneapolis; before leaving he paid the doctors $150 and some other bills at Jamestown. His hands were then in a bad condition; bandaged, flesh raw, and fingers constricted. At Minneapolis he continued to receive there medical treatment, and, finally, in August, 1915, three more fingers, the second and third finger on the left hand, and the second finger on the right hand, were amputated. In September, 1915, he had then about $700 of the settlement money; in December, 1915, about $400, and the last of it, he spent in April, 1916. He made no complaint to anyone about the settlement except to his attorneys, and the defendant did not know about any complaint that he had concerning the settlement until he started suit, in October, 1916. To the complaint of the plaintiff alleging negligence, the defendant

interposed an answer alleging, in addition to contributory negligence and assumption of risk, the release made, as a bar to the action.

In the trial court the verdict was directed for the defendant; from the judgment rendered thereupon the plaintiff has appealed. The appellant specifies error of the trial court in directing a verdict, upon the ground that the evidence presented a question of fact for the jury upon mistake of fact and in law, of fraud and deceit, of undue influence and fraudulent representations, in the procurement of the release.

In view of our consideration and determination of these specifications, it will be unnecessary to consider other specifications urged.

The appellant testified and claims that at the time of the settlement he had not consulted with any lawyers; that he was advised by the claim agent that he could go to work about August 15, 1915; that the claim agent said that the doctor had told him that his fingers would be all right and that he could go to work at that time; that the manager of the defendant advised him to settle; that it would be better for him to settle because the insurance company would beat him in court; that he had no case; that he also told him that his fingers would come back and that he could use pliers as well as ever; that the claim agent told him that he had talked to his lawyers and that if he went to law he would not get anything, because it was a mere accident and he had no case; and, further, that they would carry the case to the Supreme Court of the United States, and would spend $20,000 before they would give him $1, in order to beat him; that the plaintiff was scared; that he relied on these statements and so made the settlement; that he first found out that his fingers would have to be amputated when he went to Minneapolis; that after his three fingers were amputated in Minneapolis, he then discovered that he was mistaken as to the extent of his injuries that then he did not have the money to go back; that he spent the money received in living expenses. The evidence discloses that the plaintiff was working for the Northern State Power Company at Minneapolis at a wage of $65 per month since November 6, 1916 (trial had June 25, 1917), and was also conducting a small confectionary store. The plaintiff did not restore nor offer to restore the consideration paid in the settlement, or any part of the same. Under the evidence, in the month of August, 1915, at least in September, 1915, he knew his con

dition and knew then the truth or falsity of the alleged statements made to him to induce settlement; he then had about $700 of the settlement money; then or thereafter, knowing the facts, he neither complained to the defendant, offered to restore, or even sought to restore, any of the money he then had.

In settlements of this character it is the plain duty of the court to scrutinize the same carefully, as manifestly there are great opportunities to pratise deception and fraud upon poor unfortunates, who then in a condition of physical disability, and mentally depressed over their misfortunes, and anxiety for their future, perhaps then in dire need of financial assistance, may not know or appreciate the real extent of their injuries, or the proper compensation that they ought to receive therefor. Primarily, for these reasons, chap. 175, Sess. Laws 1917, was enacted so as to relieve acts of undue influence or deception that might be practised by claim agents or others who may be overanxious to compromise claims of those who have been injured. It provides and discloses a legislative policy to hold voidable such settlements made while the person injured is under disability, or if made within thirty days of the date of the injury, and it permits such person, within six months after the date of such injury, to avoid such settlement without returning the consideration paid, and by further providing that the amount paid shall not be a bar to the prosecution of the action but may be offset against the amount of damages recoverable. Even though this act were in force at the time of the injuries received the plaintiff would not have come within its terms.

This court might be inclined to consider that a question of fact was presented upon the record within the specifications charged by the appellant, and that the action, therefore, should have been submitted to a jury, if the record did not disclose affirmatively that the plaintiff, knowing his condition and the falsity of the facts upon which he relies to rescind, retained the balance of the consideration then possessed by him, and failed in any manner to restore or offer to restore to the defendant such money then possessed by him. Though the consideration paid be deemed not compensatory, nevertheless it was substantial even when the appellant became aware of his true condition.

The defendant has cited and relied upon Pope v. Bailey-Marsh Co. 29 N. D. 355, 151 N. W. 18, 8 N. C. C. A. 516. The writer of this

opinion does not agree with the conclusion of this court in that case upon the record, or upon the principle of law announced, which requires a proof of such fraud and misrepresentation in executing settlement of personal injuries of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. In cases of this character it should be sufficient if the record discloses fairly and clearly a question of fact concerning fraud and misrepresentation that should be submitted to the jury. For in such cases, the jury is the judge of the facts, and not the chancellor.

Accordingly, this court is not disposed to determine such matters as a question of law where the trial court has found that there is a question upon the record properly and fairly to be submitted to a jury. The trial court in an extensive memorandum opinion, well stated, has found and determined that the appellant, as a matter of law, was not entitled to rescind this settlement. He heard all of the evidence of the case and is in a better position to judge of the same than this court, unless, upon the cold facts of the record, we are clearly of the opinion that he erred. We are unable to so find upon a careful investigation of the entire record. This case is governed by the principles of law stated in Swan v. Great Northern R. Co. ante, 40 N. D. 258, L.R.A.1918F, 1063, 168 N. W. 667, wherein particularly the principle is recognized and stated that a party who desires to rescind such contract upon the ground of misrepresentation or fraud must, upon discovery thereof, announce his decision to repudiate the settlement, and, if then he continues to treat the property received as his own, knowing well the facts, he is bound by his action and the provision of the statute concerning rescission. Comp. Laws 1913, § 5936. The judgment of the District Court is affirmed, with costs to the respondent.

C. T. MARTIN, Appellant, v. HATTIE CRAIG, Principal, Chris Waldie, J. A. Youngman, and Knut Larson, the Board of School Directors of Roscoe School District, La Moure County, North Dakota, an Educational Corporation, Respondents.

(173 N. W. 787.)

In order to prevent the spread of a communicable disease, trachoma, a county board of health issued an order requiring school officers to deny admission to public schools to children who were affected with the disease or who were suspected of being affected, and who were not at the time under treatment. A survey was made by a representative of the Public Health Service of the Federal government, which resulted in finding within the county 120 positive cases and 350 suspected cases. It is *held:*

School boards — right to exclude certain children.

1. The order of exclusion is reasonable.

County health board — diseased children — mandamus to compel admission — when exercised.

2. Where qualified physicians disagree upon the diagnosis of a diseased condition of particular persons, the health authorities and a school board, whose duty it is to execute the orders of the board of health, are justified in acting upon the opinion of their own competent experts.

County health board — diseased children — mandamus to compel admission — when exercised.

3. The discretion to issue or deny a writ of mandamus will not be exercised under the circumstances manifested in the instant case in such a way as might result in needlessly exposing healthful children to a serious disease.

Opinion filed April 22, 1919.

Appeal from District Court of La Moure County, *J. A. Coffey,* J. Order affirmed.

Knauf & Knauf, for appellant.

A father is the natural guardian of his minor children, and is charged by law with the duty of attending to their support and education. Under our statute he is guilty of a misdemeanor if he fails to send his children to the public schools according to law. Crawford v. District School Bd. (Or.) 50 L.R.A.(N.S.) 147, 137 Pac. 217; L. O. L. § 4120; Laws 1911, p. 428; High, Extra. Leg. Rem. 3d ed. § 438.

Where school children duly presented themselves for admission t school, and brought with them certificates of good health, and wer otherwise legally entitled to attend such school and were refused ad mittance, the peremptory writ of mandamus should have issued Heintz v. Moulton, 64 N. W. 135; Tape v. Hurley (Cal.) 6 Pac. 129 Perkins v. Directors, 54 Iowa, 476, and cases cited; Smith v. Board 40 Iowa, 518; Clark v. Board, 24 Iowa, 266; State v. Osburn, 2 Mo. App. 309; State v. White, 82 Ind. 278; Cook v. Board, 107 N. W 327.

Hutchinson & Lynch, for respondents.

The superintendent shall have full and complete control, subject t the supervisory control of the state board of health, of all matters ap pertaining to public health outside the limits of incorporated cities with in his county. Comp. Laws 1913, § 408.

Legislatures may invest boards of health with the power of makin rules and regulations for the protection of the public health, and whe such rules are reasonable they will be upheld by the courts. 21 Cyc 387.

BIRDZELL, J. This is an appeal from an order of the district cour of La Moure county, quashing an alternative writ of mandamus. Th plaintiff and appellant is the legal custodian of two children of scho age, and he petitioned for a peremptory writ compelling the defendan to admit them to school. The defendants justify the refusal on th ground that one of the children had been found by a reputable physicia and by a qualified representative of the Federal Health Service, o Major Oakley, to be affected with trachoma, and the other to prese a case where trachoma is suspected. It appears that during the pa few years the disease of trachoma has been present in La Moure coun

The school nurse directed the attention of the county health auth ities to a number of cases where school children appeared to be affect with granulations of the eyelids, and, when some of them were amined by the superintendent of the county board of health, he agnosed the cases as trachoma. When examined by other physicia however, and even by representatives of the state public health labo tory, the finding was negative as to trachoma. Some of the cases t had been pronounced trachoma by the superintendent of the cou

board of health, and not trachoma by the representatives of the public health laboratory, were sent to the government hospital located at Pikeville, Kentucky, for treatment, and were there diagnosed as trachoma. There being a considerable number of persons afflicted with this or similar eye trouble, representations were made by the governor of the state to the Federal Public Health Service, which resulted in a survey being made by a representative of the latter service, one Major Oakley. In his report he found in La Moure county 120 positive and 350 suspicious cases of trachoma. As a result of this survey, a government hospital has been established at La Moure, in which patients afflicted may be given the advantage of scientific treatment without charge.

The disease is communicable and of a very serious nature, frequently resulting in blindness and always in impairment of the normal functions of the tissues immediately affected. To prevent the spread of the disease and to secure proper treatment for those affected, the county board of health promulgated an order forbidding admission to school of children who, upon examination, were found to be or suspected of being afflicted, unless they were at the time under treatment for the disease.

In the instant case, the petitioner produced two doctors who presented what is generally considered to be first-class professional credential qualifying them to give expert testimony. They had had ample opportunity to examine the patients and to diagnose the cases. In fact, the children had been patients of one of the doctors. These doctors testify that the children are not afflicted with trachoma, but with folliculosis. One of them also testifies that it is injurious to the eye to treat it for trachoma when trachoma is not present, but a careful reading of his testimony discloses that the injury results from a species of treatment that is likely to be resorted to only when the disease is clearly present and when the necessity for radical treatment is indicated. We find nothing in the testimony or in the record that would justify us in presuming that any reputable physician would resort to treatment which must necessarily result in some degree of impairment, until the case indicates that such treatment is necessary.

The order of exclusion in the instant case cannot be said to be unreasonable. It only excludes those whose cases are positive and suspected, who are not at the time under treatment. The seriousness of

the disease and its communicable character afford ample foundation f such an order, and, even conceding that it may be doubted in the i stant case whether the children in question are affected, the doubt one that must be resolved in favor of the authorities charged with tl serious responsibility of preventing the spread of the disease. This a case where mandamus does not issue as a matter of right, but whe it will only issue in the exercise of a judicial discretion, and this di cretion should not be exercised in a way that might result in nee lessly exposing healthful children to a disease as serious as trachom See 26 Cyc. 143.

The order appealed from is affirmed.

GRACE, J. I concur in the result.

EDWARD D. CAMPBELL, Appellant, v. HARRY G. HAMILTO Respondent.

(172 N. W. 810.)

Animals — estrays — duty of party taking up — compliance with statute n essary.

Under the estray statute no person has a right to impound an animal as estray unless it is in truth and in fact an estray, and when a person does t up an estray, he must comply strictly with all the provisions of the statut

Opinion filed April 22, 1919.

Appeal from the District Court of Dunn County, Honorable *W. Crawford,* Judge.

Reversed and remanded.

W. A. Carns, for appellant.

"The animal must be an estray, and, if it is not, the taker up quires no interest in it." 3 C. J. 79; 1 R. C. L. 1143, § 84; Ra Davison, 24 Mo. 280; Walter v. Glats, 29 Iowa, 437; Sheper v. Haw 4 Or. 206; Roberts v. Barnes, 27 Wis. 422.

"The party taking up an estray and failing to advertise same is liable to the owner for damages. The statute must be followed." Comp. Laws 1913, §§ 2658, 2661; 14 N. D. 460; 3 C. J. 81, 82; 1 R. C. L. § 84, p. 1143.

J. P. Cain, for respondent.

ROBINSON, J. This is a replevin suit to recover a bay mare and her sucking colt. The defense is that while doing damage on his place the mare was taken up and sold by order of the defendant in accordance with the Estray Statute. As it appears, the plaintiff was the owner of the mare and the colt, and on December 26, 1915, the same with several other horses were trespassing on the land of defendant. He took the bunch, drove them into his pasture, took out the mare and one horse, put them in his barn and let the rest go. He separated the mare from the colt, and so it was lost. The mare was branded with a T on the left side of the neck. It was the plaintiff's brand and defendant well knew it. The next day he went to Campbell's place, saw his wife, said that he wanted Campbell to come and get the animals,—and that the damage was $15. On January 20, 1916, he went to Campbell's place again. Campbell had been kicked by a horse and had no help, and so he requested defendant to bring the horses to him and offered to pay the damages. Then, in March, 1916, Mike Fischer went to get the animals and offered, as he says, to pay $25 damages. In February, 1916, defendant caused this notice to be published.

Taken Up

One brown gelding and bay mare, both branded flying T on left side of neck. Owner may have property by paying damages and this notice.

H. G. Hamilton
Sec. 26—143—97
Fayette, N. D.

Then, on March 3, 1917, after publishing notice of sale on February 22, 1917, and on March 1, 1917, one Boyd, a justice of peace, offered the animal for sale and sold the same to defendant for $91.

It is manifest that, aside from the question of damages, the court should have directed a verdict for the plaintiff. There is no shadow of a compliance with the Estray Statute. In the first place the animal was

not an estray; she was not lost to her owner. She knew her master' crib and knew her way home just as well as the defendant knew it. Th plaintiff had raised her in the neighborhood and she had given hi several colts.

The fair presumption is that, if the defendant had not put the mar in his barn, she would have gone home with her colt. Under the statut on trespassing animals, defendant had a right to take the mare an the colt and to hold them for the damage done by them alone, but h had no right to separate the mare from her colt and to leave it peris for want of its dam. By that wrongful act the defendant became trespasser from the beginning.

An estray is a wandering animal whose owner is unknown,—a animal that has strayed away and lost itself. 2 Cyc. 558. "A wande ing beast which no one seeks, follows, or claims." Roberts v. Barne 27 Wis. 422. Under the estray statute a person has no right to impoun an animal as an estray unless it is in truth and in fact an estray; an when a person does take up an estray he must comply strictly with a the provisions of the statute. In this case there was no such con pliance in any particular. The excuse was that defendant knew t owner of the animals and the owner knew all about the impoundi of them. Were it not for the question of damages and the loss of t colt, judgment should be directed in favor of plaintiff. The case pr sents no other question. Judgment reversed and remanded for furth proceedings.

Reversed and remanded.

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

W. W. KUNKEL and George F. Hubert, Copartners Doing Busi under the Firm Name of Kunkel & Hubert, Respondents, DAVID McLEOD, Sr., Appellant.

(172 N. W. 811.)

Contracts.

In an action to recover upon a verbal contract for drilling a certain wel

the defendant upon his premises, the plaintiff had judgment. The record presents no error and the judgment is affirmed.

Opinion filed April 22, 1919.

Appeal from the District Court of Billings County, *Crawford*, J. Verdict, for plaintiffs and defendant appeals.
Affirmed.
H. A. Mackoff and *E. T. Burke*, for appellant.
W. J. Ray and *T. F. Murtha*, for respondents.
"The defendant cannot raise the question of law for the first time in the supreme court." De Lendrecie v. Peck, 1 N. D. 422, 48 N. W. 342; Stall v. Davis, 26 N. D. 373 (see especially syl. 3); Barnum v. Land Co. (S. D.) 147 N. W. 647; McNab v. Northern P. R. Co. (N. D.) 98 N. W. 353; 3 C. J. 689, 894 et seq; Stover v. Stevens (Cal.) 131 Pac. 332; Scott v. State, 37 N. D. 90; American Case & Register Co. v. Boyd, 22 N. D. 166; Massett v. Schaffner, 31 N. D. 579; Swords v. McDonnell, 31 N. D. 494; Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597; Mfg. Co. v. Kitts, 18 N. D. 556; Cochrane v. Elevator, 20 N. D. 169, syl. 3, 8; Kephart v. Casualty Co. 17 N. D. 380, syl. 7; Colby v. McDermott, 6 N. D. 495; Baskerville v. Thomas (S. D.) 143 N. W. 371; Markus v. Paulson (S. D.) 158 N. W. 406; McClain v. Nurnberg, 16 N. D. 144; 2d Decn. Dig. vol. 1, Appeal & Error, § 197 (3); Specifications of Error should be served with notice of appeal N. D. Comp. Laws, § 7656; Realty Co. v. Robinson (Okla.) 136 Pac. 585.

GRACE, J. Appeal from a judgment of the district court of Billings county, W. C. Crawford, Judge.

This action is one to recover upon a contract for drilling of a certain well by the plaintiff for the defendant. The contract between the parties with reference to the drilling of the well was a verbal one. Plaintiff claimed that on or about the 23d day of May, 1916, they entered into a certain verbal contract with the defendant whereby they were to receive as compensation for drilling said well the sum of 25 cents for each lineal foot which plaintiffs drilled in securing a certain artesian well. They claimed to have drilled to the depth of 891 feet and secured

a supply of water which defendant agreed to accept and which it i alleged was ample in quantity to constitute a fulfilment of the contract

The defendant claims the contract was that Hubert, one of th plaintiffs, agreed with the defendant to drill a well for the defendant o his premises, that it was expressly understood and agreed that plain tiff would secure for the defendant on his premises a flowing well an one with which it would not be necessary to use any power for th purpose of pumping the water to the surface, and in the event a flowin well were secured the defendant was to pay the plaintiff at the rate o $1 per lineal foot, payment to be made 25 cents per lineal foot in cas upon the securing and completing of a flowing well and 75 cents pe lineal foot to be paid in horses to be delivered by the defendant to th plaintiffs if the price of such horses could be agreed upon between th parties, and, in the event no agreement could be had thereon, the de fendant to pay 65 cents per lineal foot.

Defendant further claims it was agreed that, in the event a flowin well was not secured by the plaintiffs, he was to pay nothing to th plaintiff. The defendant alleged that the plaintiff failed to procure a flowing well.

What the terms of the verbal contract actually were between th plaintiff and defendant was exclusively a question of fact for th jury. The jury returned a verdict for plaintiff for the sum of $242 Judgment was entered upon such verdict and for the costs, in a $285.25. The defendant perfected an appeal to this court from suc judgment. The defendant sets forth four assignments of error,— three of which relate to the instructions given by the trial court to t jury, and one to the failure of the court to direct a verdict for the d fendant upon an alleged motion for that purpose by the defendant.

We have examined carefully the instructions given and find n reversible error therein. The record discloses no motion for a direct verdict, hence this ground of error must fail.

In oral argument before this court, the attorney for the appella in the effect conceded there was no merit to the assignments of err The judgment appealed from is affirmed. The respondents are titled to statutory costs on appeal.

SCHWEIGERT-EWALD LUMBER COMPANY, Appellant, v OTTO BAUMAN, Respondent.

(172 N. W. 808.)

Pleading — bankruptcy as a defense — order of discharge prima facie defense — burden of proof.

1. Where a person who has received a discharge in bankruptcy is sued on a debt which existed at the time of the filing of the petition, the introduction of the order of discharge makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued on was by law excepted from the operation of the discharge.

Pleading — proof of proceedings in bankruptcy — question of authentication.

2. A general objection to a certified copy of a discharge in bankruptcy, followed by a specific objection that it has not been shown that a petition in bankruptcy was filed, does not raise the point that the document is not properly or sufficiently authenticated.

Evidence — motion for directed verdict — duty of court to consider certain evidence.

3. Where documentary evidence tending to establish a discharge in bankruptcy has been admitted over objection and is permitted to remain as evidence in the case; and the defendant, acting on the supposition that such documents will be considered as evidence, properly there moves for a directed verdict, thereby consenting to a discharge of the jury and a trial of all questions by the court, the court may not in determining the action refuse to consider such documentary evidence, even though it was improperly admitted.

Opinion filed April 25, 1919.

Appeal from Mercer County, *Burr*, Special Judge. Plaintiff appeals from an order granting a new trial.

Affirmed.

S. P. Halpern, for appellant.

"Copies of judicial proceedings of a Federal court are inadmissible in evidence unless certified in accordance with the provisions of § 905, U. S. Rev. Stat." (Ala.) 44 So. 101; 33 Com. 419; 22 Mich. 275, (Tex.) 137 S. W. 1161; note in 5 L.R.A.(N.S.) 938; (La.) 35 So. 296; 10 Smedes & M. 298; 127 Tenn. 32; 13 Pa. 197; 4 Pa. 393;

Grant v. Levan, 4 Pa. 393; N. D. Comp. Laws, § 7911; Hamon v. Foust (Tenn.) 150 S. W. 418.

"The discharge in bankruptcy is not evidence on the question whether or not a particular claim is within the exempted classes." Re Marshall Paper Co. 43 C. C. A. 38, 4 Am. Bankr. Rep. 468, 102 Fed. 872; Bankruptcy Law, § 21 subd. F; Currier v. King, 81 Vt. 285, 69 Atl. 873; Balk v. Harris, 130 N. C. 381, 41 S. E. 940; Johnson v. Waxelbaum Co. 1 Ga. App. 511, 58 S. E. 56; Bennett v. Lewis, 23 Ky. L. Rep. 2037, 66 S. W. 523; Biela v. Urbanczyk, 38 Tex. Civ. App. 213, 85 S. W. 451. But compare B. E. Roden Grocery Co. v. Leslie, 169 Ala. 579, 53 So. 815; Morrison v. Woolson, 23 N. H. 11; Harrington v. McNaughton, 20 Vt. 293; Kellogg v. Kimbell, 138 Mass. 441; Cooper Grocery Co. v. Blume (Tex. Civ. App.) 156 S. W. 1157; Cogburn v. Spence, 15 Ala. 549, 50 Am. Dec. 140; Stewart v. Hargrove, 23 Ala. 429; Brereton v. Hull, 1 Denio, 75. Compare Shelton v. Pease, 10 Mo. 473; Re Peterson, 121 N. Y. Supp. 738; Re Peterson, 118 N. Y. Supp. 1077; Von Norman v. Young (Ill.) 81 N. E. 1060; Alling v. Straka, 118 Ill. App. 184; Weidenfield v. Tillinghast, 54 Misc. 90, 104 N. Y. Supp. 712; Graber v. Gault, 103 App. Div. 511, 93 N. Y. Supp. 76; Bailey v. Gleason, 76 Vt. 115, 56 Atl. 537; Fields v. Rust, 36 Tex. Civ. App. 350, 82 S. W. 331; Baker v. Hughes (Ga.) 63 S. E. 587, 166 N. Y. Supp. 110; Gregory v. Edgerl (Neb.) 22 N. W. 703, 9 N. J. Eq. 566; Bogart v. Cowboy State Ban & T. Co. (Tex.) 182 S. W. 678; Parker v. Murphy, 215 Mass. 72 Wineman v. Fisher (Mich.) 98 N. W. 404.

H. L. Berry, for respondent.

"The burden is upon the judgment creditor to show that his clai is not included in the general discharge in bankruptcy, but is one of t exceptions to the discharge." Re Peterson, 118 N. Y. Supp. 107 Lafoon v. Kerner (N.C.) 50 S. E. 654; Gatliff v. Mackey, 104 S. 379; Van Norman v. Young (Ill.) 81 N. E. 1060; Culver v. Torre 69 N. Y. Supp. 919; Mayer v. Bartels, 107 N. Y. Supp. 778; Alli v. Strake, 118 Ill. App. 184; Stevens v. King, 44 N. Y. Supp. 89 Broadway Trust Co. v. Vanheim, 95 N. Y. Supp. 93.

A compared copy of a writing is evidence of the same degree a certified copy. 4 Enc. Ev. p. 827, and notes 61 and 62; State v. Lyn 1 Atl. 687; Best Evi. 486; United States v. Johns, 4 Dall. 412; Wh

house v. Blackford, 29 N. H. 471; Spaulding v. Vincent, 24 Vt. 501; Harvey v. Cummings, 5 S. W. 513; 1 Greenl. Ev. 485, 508; 1 Whart. Ev. 94; Hill v. Packard, 5 Wend. 387; Lynde v. Judd, 3 Day, 499; 5 L.R.A.(N.S.) 943; 3 Horwitz's Jones, Ev. § 533.

CHRISTIANSON, Ch. J. This is an action upon a promissory note. The defendant in his answer pleaded a discharge in bankruptcy. The case was tried to a jury upon the issue thus framed. The plaintiff introduced in evidence a copy of the discharge in bankruptcy certified to by the clerk of the United States district court, and a certificate from the clerk of said bankruptcy court, in form as prescribed by § 7711, Comp. Laws 1913, stating that notice of the hearing of defendant's application for a discharge in bankruptcy had been duly mailed to the Schweigert-Ewald Lumber Company. When these documents were offered in evidence the plaintiff interposed the following objection: "Plaintiff objects on the ground that no proper foundation is laid. This purports to be a discharge and there is no proof of the filing of any petition." The objection was overruled and the documents received in evidence. The defendant was thereupon called as a witness. He testified that he was the person named in the documents; whereupon defendant rested. The plaintiff then moved for a directed verdict. The court intimated that as the proof then stood the motion ought to be granted, as defendant had not shown that the debt involved in this action had been scheduled in the bankruptcy proceeding. The case was reopened and defendant offered in evidence what purported to be a copy of the schedule filed in the bankruptcy proceeding. As a foundation for the introduction of the purported schedule, defendant's attorney testified that he was the attorney for the defendant in the bankruptcy proceeding; that he personally prepared the schedule in bankruptcy in quadruplicate; and that the schedule offered in evidence was one of the four so prepared and was identical with the ones filed in the bankruptcy court. Plaintiff objected to the admission of the schedule in evidence on the ground that it was not the best evidence. The objection was overruled and the schedule admitted. Thereupon defendant rested. The plaintiff then called its bookkeeper Schwenk. He testified that it was his custom to make a notation upon the books of the company when he received notice that any customer of the company had

been adjudged a bankrupt; that he had no recollection of having ceived notice of the bankruptcy proceeding of the defendant, and no notation had been made upon the books of the plaintiff comp showing the receipt of such notice. Schwenk admitted, however, notices relating to bankruptcy proceedings did not always pass thr his hands, and that he did not always make the notations, alth he generally received the notices and made the notations. He fur admitted that he had heard that defendant was going through b ruptcy, but could not say when it was he heard this.

At the conclusion of the trial both parties moved for directed dicts. The trial court made findings of fact and conclusions of in favor of the plaintiff. In a memorandum decision, the trial c held that the defendant had failed to prove that the debt involve this action was properly scheduled. In arriving at this conclusion court held that the copy of the schedule which had been receive evidence was in fact inadmissible; and that if such schedule was e inated there was no evidence tending to prove that the debt involved been scheduled in the bankruptcy proceeding.

The defendant moved for a new trial on the grounds, among otl that the evidence was insufficient to justify the decision, and that decision was against law. The motion was granted, and plaintiff appealed.

We have already referred to the memorandum decision filed by court in rendering judgment for the plaintiff. Upon the motion new trial the trial judge also prepared and filed a written opi wherein he said, in part: "Of course, such discharge in bankr does not release the bankrupt from liability on debts which wer 'duly scheduled in time for proof and allowance, with the name o creditor, if known to the bankrupt.' But who must show the deb not scheduled? This court held that this burden was on the defen I still believe this ruling is correct. The defendant claims th charge in bankruptcy is, of itself, sufficient proof of the sched of the debt in order to meet this burden of proof. Upon conside I believe this to be correct. The certified copy is evidence o regularity of the proceedings,' and scheduling of the debts is, cessity, one of the essential proceedings. The defendant therefo prima facie shown the scheduling of the debt, and if the pl

wishes to escape the effect of this certified copy of the order, so far as it bears upon the scheduling of the debt, it must show the debt was not scheduled, and if the plaintiff shows the debt was not scheduled, then it would be necessary for the defendant to furnish proof in support of the exception in subdivision 3 of § 17 of the Bankruptcy Law that the creditor had notice, or actual knowledge, of the proceedings."

Appellant earnestly contends that the trial court's views as expressed in the memorandum first filed were correct, and that the views expressed in the memorandum opinion filed with the order granting a new trial are erroneous. While there has been some conflict in the authorities, the question is no longer an open one since the decision of the United States Supreme Court in Kreitlein v. Ferger, 238 U. S. 21, 59 L. ed. 1184, 35 Sup. Ct. Rep. 685. For in that case the court held that "where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defense, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice, or other statutory reason, the debt sued on was by law excepted from the operation of the discharge." In discussing the purport and meaning of § 21f of the Bankruptcy Act, and the probative effect of an order of discharge, the court said: "Under the provisions of § 30 of the Bankruptcy Act [30 Stat. at L. 554, chap. 541, Comp. Stat. § 9614, 1 Fed. Stat. Anno. 2d ed. p. 852] this court has prescribed the form [59] of the 'order of discharge,' which, among other things, contains a recital that the bankrupt has been discharged from all provable debts existing at the date of the filing of the petition, 'excepting such as are by law excepted from the operation of a discharge in bankruptcy.' Section 21f further declares that a certified copy of such order 'shall be evidence o fthe jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.' This provision of § 21f was made in contemplation of the fact that the bankrupt might thereafter be sued on debts existing at the date of the filing of the petition in bankruptcy; and was intended to relieve him of the necessity of introducing a copy of the entire proceedings, so that he might obtain the benefit of his discharge by the mere production of a certified copy of the order." See also Brandenburg, Bankruptcy, 4th ed. § 1576.

Plaintiff, however, contends that the order of discharge was not prop-

erly authenticated. It is undisputed that the order was attested b clerk and the seal of the United States district court, but it is tended that there also should have been a certificate of the judge o court to the effect that the attestation was in due form. It is u essary to determine whether the point is well taken. For no obj was made to the document on the ground of defective authentic We have already noted the objection made, *viz.*, that no proper fo tion had been laid, in this, that it had not been shown that a petiti bankruptcy had been filed. This objection was obviated by the ex provision of § 21f of the Bankruptcy Act, which has been quoted a It will be noticed that the objection makes no reference to defe authentication. "A general objection to documentary evidence do raise the point that it is not properly or sufficiently authentica 9 Enc. Ev. 86. An objection will not be extended to points not co within its terms. And where a general objection is made, followed particular specification of the grounds of the objection, it wi confined to the grounds specified. "A party on appeal cannot objections or grounds of objection not stated in the court below. Enc. Ev. 100-102.

The order granting a new trial should be affirmed for another re It has already been mentioned that the trial court admitted in evi over objection, the order of discharge, the certificate of maili notices of hearing of the application for discharge, and a pur schedule in bankruptcy. This evidence was not stricken out. defendant made his motion for a directed verdict these documents part of the evidence, and he had the right to suppose they would b sidered as evidence properly there and act upon that supposition. v. Kirtland, 45 App. Div. 25, 60 N. Y. Supp. 812; Flora v. bean, 38 N. Y. 111; Kelley Lumber Co. v. Otselic Valley R. C App. Div. 146, 120 N. Y. Supp. 415. If these documents we properly received in evidence, that might constitute a ground for trial, but would hardly justify the court in disregarding th determining the action. "Such a view of the subject," said th York court of appeals (Flora v. Carbean, 38 N. Y. 111), "wo manifestly unjust. First, it would mislead and entrap the party prejudice. Second, if the court, upon the trial excluded the evi he could have his exception and bring the correctness of the

under review. And, third, which is most of all important, if the evidence had been rejected, he would have had the opportunity to supply the defect by other proof."

It follows from what has been said that the order appealed from must be affirmed. It is so ordered.

C. O. RUSSELL, Appellant, v. L. C. Mason, Respondent.

(172 N. W. 814.)

Appeal and error.

By prosecuting petty suits and appeals the counsel make little of themselves and the courts.

Opinion filed April 25, 1919.

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

Affirmed.

Cuthbert & Smythe, for appellant.

The rule is to allow amendments; to refuse is the exception. Kelroy v. R. Co. 1 S. D. 80, 45 N. W. 204; Nashua Sav. Bank v. Lovejoy, 1 N. D. 211, 46 N. W. 411; Anderson v. Bank, 5 N. D. 80, 64 N. W. 114; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Haggarty v. Strong, 10 S. D. 585, 74 N. W. 1037; Chaffee v. Runkle, R. & Co. 11 S. D. 333, 77 N. W. 583; J. I. Case Co. v. Erchinger, 15 S. D. 530, 91 N. W. 82; Hoegaard v. Trust Co. 3 S. D. 569, 54 N. W. 656; Martin v. Bank, 7 S. D. 263, 64 N. W. 127.

"The cross-examination must be confined to the facts and circumstances connected with the matters stated by the witness in his direct examination, and to questions tending to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character." Reynolds, Trial Ev. p. 281; 1 Green, Ev. § 445; 1 Whart. Ev. § 529; Wigmore, Ev. § 1368.

"Evidence of the condition of a thing or place at a time prior or subsequent to the time at which the condition of the thing or place

is a material fact, as bearing on the probable condition at that time incompetent unless preceded by prima facie proof that no change taken place in the meantime." Abbott, Proof of Facts, 3d ed. p. ¶ 6. See also: Lehigh Zinc & I. Co. v. Trotter, 42 N. J. Eq. 66 Atl. 694; Reed v. New York C. R. Co. 45 N. Y. 574; Fitzgeral Clark, 17 Mont. 100, 42 Pac. 273; Grant v. Raleigh G. R. Co. N. C. 462, 13 S. E. 209; Bretsch v. Plate, 82 App. Div. 399, 81 Y. Supp. 890.

J. C. Adamson, for respondent.

Century Dig. §§ 3912–3915, 3917–3921; Hoyer v. Good (Io 161 N. W. 691.

The terms of the oral contract being in dispute, the verdict of jury in favor of defendant establishes the contract as contended by him, and it must be so considered on appeal. Barr v. Cli Bridge Works (Iowa) 161 N. W. 695.

ROBINSON, J. For garage and repairs on an old, defunct, an most worthless automoblie, the plaintiff was paid $42.50, and bro suit in justice court to recover a balance of $81.50. In justice the plaintiff recovered judgment and the defendant appealed. I district court the jury gave the defendant a verdict for $1, and no his turn, the plaintiff appeals. Plaintiff asks this court to re twenty-eight assignments of error and the sufficiency of the evider sustain the verdict. The transcript and exhibits cover 150 pages show beyond doubt that there was a very decided conflict of testir The case was fairly submitted to the jury and there is no reaso reversing the verdict and judgment. By prosecuting such petty and appeals, the counsel make little of themselves and the courts

Judgment affirmed.

GRACE, J. I concur in the result.

CHRISTIANSON, Ch. J. (concurring specially). The plainti appealed from an order denying his motion for a new trial. He a as error: The denial of a motion to amend the complaint, ruli the admission and exclusion of evidence, and the giving of cert structions. The proposed amendment related to form rather t

substance. The amended complaint merely stated the matters set forth in the original complaint somewhat more fully, and it is difficult to understand why any objection should have been made to the filing of the amended complaint. But in any event the plaintiff was not prejudiced by the denial of the motion to amend, as no evidence would have been admissible under the amended complaint which was not admissible, and in fact actually admitted, under the original complaint.

Nor do I find any prejudicial error in the instructions. The rulings on evidence which are assailed relate almost entirely to matters more or less within the trial court's sound, judicial discretion, and in no instance can it be said that such discretion was abused. I find nothing in the record which would justify an appellate court in saying that the plaintiff was denied a fair trial. I therefore concur in an affirmance of the judgment and the order appealed from. I do not, however, concur in the implied rebuke in the opinion prepared by Mr. Justice Robinson. It might be a wise policy to prevent appeals to this court in cases where small amounts, and no important legal principles, are involved; but that is a matter for legislative, and not for judicial, determination. And under the existing laws it is the duty of this court to determine all matters which are properly submitted to it, and administer justice between litigants regardless of the amount involved.

BIRDZELL, J. I concur in the foregoing opinion.

WILLIAM M. EBNER, Respondent, v. PETER STEFFANSON, Appellant.

(5 A.L.R. 1261, 172 N. W. 857.)

Judgment — effect of appeal on actions in other states.

1. In an action in the superior court of Los Angeles county, state of California, by the plaintiff against defendant et al., a judgment was entered in plaintiff's favor for $7,399.99 upon which there was paid $358.40, leaving a balance due thereon of $7,041.40. Steffanson with other of the defendants appealed from such judgment to the supreme court of the state of California, and such appeal is still therein pending. The plaintiff, while the action was still

pending in the supreme court of California, brought suit in the district cou Burleigh county, North Dakota, upon the judgment, and recovered judg thereon in said court in the sum of $7,709.61.

Evidence — judgments from other states as evidence while appeal in ort state is pending.

2. The defense was that, under the laws of California and the decisio their supreme court, no action could be maintained on the judgment in I Dakota while the appeal from the judgment remained undetermined i supreme court of California, and that the judgment could not be offer evidence during that time. Construing the laws of California in this rega is *held* that the judgment was a proper basis for cause of action thereon; such judgment was competent evidence to prove its own existence and tents.

Procedure — foreign judgment properly admitted.

3. It is *held* that judgment was properly rendered in the district cou Burleigh county, North Dakota, upon the California judgment sued upo view of the fact that the appeal from the judgment to the supreme cou California would not suspend or stay the execution or other proceedin the judgment, there being no stay bond executed as required by § 942 o Code of Civil Procedure of California relative to an appeal from a n judgment.

Judgment — effect of appeal.

4. It is the general rule in California as announced by their decisions in an appeal from a judgment in that state, where their laws do not requir a stay bond shall be furnished in order to stay execution or other proce on the judgment, during the pendency of such appeal such judgment is intents and purposes suspended during the appeal, and is not competent s dence until a determination of the appeal. This rule does not apply to a peal from a judgment where a stay bond under the law of California is re to stay execution or other proceedings on the judgment.

Opinion filed April 26, 1919.

Action for the recovery upon a money judgment of the Sup Court of Los Angeles County, California, District Court, Bu County, *Nuessle*, J.

From a judgment in favor of plaintiff the defendant appeals. Modified and affirmed.

Newton, Dullam, & Young, for appellant.

"The effect of the judgment of California must be determin the laws of California." 23 Cyc. 1563; 2 Elliott, Ev. § 1535;

v. Duryee, 7 Cranch, 411, 3 L. ed. 478; Cole v. Cunningham, 133 U. S. 107; Fox v. Nick, 20 Cal. 599, 129 Pac. 972; 1 Rose's Notes (U. S.) p. 576.

J. A. Hyland, for respondent.

Where no bond has been given on appeal there can be no stay of execution, and judgment may be sued on in this state. Cal. Code Civ. Proc. § 942; Lonergan v. Lonergan (Neb.) 76 N. W. 641; Bank v. North America v. Wheeler, 73 Am. Dec. 683; 23 Cyc. 1504; McKannay v. Horton, 151 Cal. 711, 13 L.R.A.(N.S.) 661, 121 Am. St. Rep. 146, 91 Pac. 598; Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72; Sweeter v. Fox, 43 Utah, 40, 13 Pac. 599, Ann. Cas. 1916C, 620.

GRACE, J. This is an appeal from the judgment of the district court of Burleigh county. The judgment was for $7,709.61 in favor of plaintiff and against the defendant.

The material facts in the case are as follows:

The plaintiff maintained an action in the superior court of the county of Los Angeles, California, against the West Hollywood Transfer Company, a corporation, C. H. Barck, and P. Steffanson.

On the 19th day of June, 1917, the superior court of the county of Los Angeles duly rendered and gave a judgment in said action in plaintiff's favor for the sum of $7,399.99, upon which there was paid $358.40, leaving a balance due thereon of $7,041.40.

The defendants in said action appealed from that judgment to the supreme court of that state. In taking such appeal, the defendants did not give a supersedeas bond. After the said appeal was duly taken, the plaintiff commenced an action in the district court of Burleigh county, North Dakota, upon the judgment rendered in the superior court of Los Angeles county, California, and recovered a judgment in the district court of Burleigh county, North Dakota, on the 3d day of October, 1918, for the sum of $7,041.40 and interest thereon from the 19th day of June 1917, at 7 per cent per annum, together with the costs, amounting in all to $7,709.61. In the judgment of the district court of Burleigh county was inserted a condition that no execution issue out of that court on said judgment until the judgment sued upon shall have been affirmed by the supreme court of that state.

Specified errors in this appeal present a single question of law, *viz.,*

Can a judgment rendered in the superior court of Los Angeles coun
California, from which an appeal has been taken to the supreme co
of that state, no supersedeas bond having been filed therein, be m
the basis of a cause of action in North Dakota while the action is s
pending in California and while the appeal to the supreme court
that state remains undecided?

We are of the opinion that such judgment is a proper basis o
cause of action in the state of North Dakota. The judgment wh
we are considering is one for money only. In California the statut
requirements on appeal from a judgment of that character from
superior court (which corresponds in jurisdiction to the district c
of this state), to the supreme court, are similar to those of this st
In other words, California has by statute provided the time and n
ner in which an appeal may be taken to their supreme court fro
judgment of the character we are considering. An appeal may
taken from the superior court of the state of California to the supr
court, in the manner provided in § 940 of the Code of Civil Proce
of the state of California. It provides the appeal is ineffectual un
within five days after service of the notice of appeal, an underta
is filed or a deposist of money is made with the clerk as hereafter
vided, or the undertaking be waived by the adverse party in wri
Section 941 of the California Code of Civil Procedure sets fortl
character of the bond required on appeal, which is in fact a cost
and must be of such sum as to secure the payment of all damage
costs not exceeding $300.

Under § 940 of the Code of Civil Procedure of California, wh
notice of appeal has been filed with the clerk of the superior cour
served upon the adverse party, and the undertaking provided in
duly executed and deposited with the clerk of the court in which
ment was entered, such appeal is perfected and the supreme co
the state of California acquires jurisdiction of the action. If th
peal, however, is from a money judgment, it does not stay the
tion of the judgment or order, unless, as provided by § 942
Code of Civil Procedure of California, a written undertaking
cuted by the appellant and two or more sureties in double the a
named in the judgment or order, to the effect that if the judgm
order appealed from or any part thereof be affirmed or the app

dismissed, they will pay the amount directed to be paid by the judg ment or order, or the part of such amount as to which the judgment o order is affirmed, if affirmed only in part and all damages and cost which may be awarded against appellant, etc. Thus, this section pro vides for the supersedeas bond.

The foregoing requirements of the California Code of Civil Pro cedure are practically identical with the requirements contained ir the Code of Civil Procedure of the state of North Dakota with ref erence to appeal from the district courts of this state to the supreme court. It may be conceded that, upon appeal to the supreme court of California from the superior court of that state, that upon the perfec tion of such appeal the action is pending in the supreme court of that state.

Under § 941a of the Code of Civil Procedure of California, there is provided what is denominated an alternative method of appeal. Under this method, all that is necessary to do to effect an appeal from a superior to the supreme court of California is to file with the clerk of the superior court a notice of appeal as provided by § 941b. Mitchell v. California & O. S. S. Co. 154 Cal. 731, 99 Pac. 202. This section does not require service of notice of appeal. Potrero Neuvo Land Co. v. All Persons, 155 Cal. 371, 101 Pac. 12. Under this section no undertaking is essential to the jurisdiction of the appellate court. Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435.

We are fully convinced that a money judgment of the court of California is a proper basis for a cause of action in this state, and the judgment was properly received in evidence, it being competent evidence of its own existence. The courts of the state of North Dakota will give the same force and effect to the judgments of the courts of California as their courts give to them.

The judgment being one for money only, if the defendant in this case were possessed of property, real or personal, in California subject to a levy of execution under the laws of that state, an execution could be issued upon the judgment of the superior court of California, and such property levied upon, notwithstanding the perfecting of an appeal from the judgment to the supreme court of California, and such property so levied on may be sold on execution sale unless the right to

issue such execution and to sell such property on execution sale
been stayed by supersedeas bond.

There is a money judgment in the superior court of Los Ang
county, California, and the remedies to enforce the judgment in
state have in no manner been suspended by the appeal to their supr
court.

In these circumstances the courts of this state will permit the pl
tiff to sue upon that judgment, and to procure the entry of the judgm
in this state upon the proper procedure having been had to accomp
that purpose; thus in this state give effect to the judgment in the s
manner and to the same effect as the courts of the state of Califor
When an action is maintained in this state and judgment is ent
therein on such judgment, this state has then given full faith and cr
to the judgment of the court of the state of California.

The principal task presented in this case is to determine what
law of California is relative to the matters under consideration.
original judgment was one entered by the superior court of Califor
Appeal was taken from such judgment to the supreme court of
state. What the status of the judgment is until the final determina
on appeal must be determined, not by the laws of North Dakota or
decisions of this court, but by the laws of California and the decis
of their supreme court.

It is claimed by the appellant that an appeal having been t
from the judgment of the superior court to the supreme court of
fornia, the action is still pending in the courts of California, and t
fore is not a final judgment, and for this reason they assert that, u
the laws of California and the decisions of the supreme court of
state, the judgment, not being a final one, cannot in the courts of
state be made the basis of an action, and cannot be used as evi
to prove its contents nor any other purpose.

We are of the opinion that the contention of appellants as t
law of California and the decisions of their supreme court is i
main correct. They do not, however, take into consideration we
ognized exceptions to the general rule which exist by the laws of
fornia, and as announced by the decisions of their supreme cour
which have been recognized by their supreme court. The genera
that a judgment of the superior court or any inferior court of th

of California which is not a money judgment is not final where a appeal has been taken from the same, and cannot be used as evidenc for any purpose, is well sustained by the following decisions of th supreme court of that state:

By the provisions of § 1049 of the Code of Civil Procedure of Cali fornia: "An action is deemed to be pending from the time of it commencement until its final determination upon appeal, or until th time for appeal has passed, unless the judgment is sooner satisfied.'

In Feeney v. Hinckley, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac 580, that court in the syllabus said: "A cause of action upon a judg ment does not accrue until the judgment becomes final and admissible in evidence. The Statute of Limitation does not begin to run against an action upon the judgment from the date of its entry, but only after the lapse of the period within which an appeal might be taken from the judgment, if none is taken therefrom, or after the final determination following an appeal so taken."

In Gillmore v. American Cent. Ins. Co. 65 Cal. 63, 2 Pac. 882, the court said: "Until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the parties, although it may have become final for the purpose of an appeal from it."

In Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589, it is said: "Until the time for an appeal has expired, if the judgment has not been sooner satisfied, the action is, under § 1049 of the Code of Civil Procedure, to be deemed as pending."

In Re Blythe, 99 Cal. 472, 34 Pac. 108, it is said in the syllabus: "An action is deemed pending until the time for appeal has expired or the judgment is sooner satisfied; and a judgment is not admissible in evidence for the purpose of proving facts therein cited, so long as it is liable to reversal upon appeal or until the action is finally determined so that the judgment shall become *res judicata.*"

In Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757, it is said in the syllabus: "An action is deemed pending under § 1049 of the Code of Civil Procedure from the time of its commencement until its final determination upon appeal or until the time for appeal is past, unless the judgment is sooner satisfied, and a judgment in an

action so pending cannot constitute a bar to recovery in another ac
between the name parties relating to the same subject-matter.

In the case of Story v. Story & I. Commercial Co. 100 Cal. 41,
Pac. 675, it is said: "The court erred in holding that the judgn
rendered in the other action was a bar to the plaintiff's right of reco
for the moneys paid by her under the agreement. At the time that
court made its decision in the present case, the other action was
pending (Cal. Code Civ. Proc. § 1049), and, while that action
so pending, the judgment rendered therein could not be a bar to
prosecution of the present action. Naftzger v. Gregg, and Re Bly
supra. The justice of this rule is apparent in view of the fact that
judgment pleaded by the respondent and determined by the c
below to constitute a bar to the plaintiff's cause of action has b
reversed in this court."

In the case of Purser v. Cady, 120 Cal. 214, 52 Pac. 489, i
said in the syllabus: "The judgment of foreclosure is not evid
of the existence of the lien as against an execution purchaser who
not a party to the foreclosure suit, and does not preclude him f
contesting the title acquired under the foreclosure sale; nor can s
judgment have any effect as evidence of the facts therein determ
pending an appeal therefrom; and it is necessary for one clain
title under the foreclosure sale to prove the existence of the lien
other evidence than the judgment roll in the action of foreclosure,
if no other proof is offered no lien is shown to exist and the titl
quired under the sale cannot antedate the sale."

In the case of Woodbury v. Bowman, 13 Cal. 635, it is said in
syllabus: "Where a suit is pending in the supreme court on ap
the judgment below is suspended for all purposes, and is not evid
upon the questions at issue even between the parties."

It is plain from the foregoing decisions that in California it i
general rule that a judgment does not become final until it is sati
or, if an appeal is taken therefrom, until the appeal is determined
is also equally clear that, during the pendency of an appeal fr
judgment, it will not support a plea of *res judicata;* that the St
of Limitation will not begin to run excepting from the time of the
faction of the judgment or the determination of the appeal fro
judgment; and that a judgment in California pending the appeal

from is not generally to be received as evidence to prove its contents nor to be considered as evidence excepting in certain cases which we will now notice.

The case of California Mortg. & Sav. Bank v. Graves, 129 Cal. 649, 62 Pac. 259, construed § 945 of the Code of Civil Procedure of California, which is as follows: "If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency."

The court said in that case: "Appellant claims that the judgment roll in this case was improperly admitted in evidence because the case is on appeal to this court and is deemed to be pending; citing § 1049, Code Civ. Proc; Re Blythe, 99 Cal. 472, 34 Pac. 108; Naftzger v. Gregg, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757; Murray v. Green, 64 Cal. 363, 28 Pac. 118."

The court in that case called attention that no stay bond was given but only the ordinary appeal bond, and held that the cases cited by the appellant in that case did not reach the point made by him, and that the evidence was admissible, and that the writ should issue notwithstanding the appeal. The writ referred to is what is in California denominated a writ of assistance. In that state when an action is brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff he may have a writ

for the possession of the premises as against the defendants in the tion against whom the judgment has passed.

It will be seen from the examination of that case that most of authority cited by the appellant in the case at bar has been held to apply where the statute of California has provided that in cer cases judgment is not suspended nor the execution stayed unle proper stay bond is executed or, in other words, a supersedeas b

In the case of McKannay v. Horton, 151 Cal. 721, 13 L.R.A.(N 661, 121 Am. St. Rep. 146, 91 Pac. 598, a case involving a titl office, the court used the following language: "It is said—arguend that an appeal to the supreme court operates a suspension of the j ment of the lower court for all purposes. This, as every lawyer kn is not true. If in a civil cause the appellant does not file a suffic undertaking to stay proceedings upon the judgment, execution issue notwithstanding the pendency of the appeal, and may be le upon the property of the judgment debtor, and the property may be and an indefeasible title vested in the purchaser at the execution notwithstanding the result of the appeal may be a complete and reversal of the judgment of the trial court. And, as in civil c so in criminal cases, a judgment not final may be proved for e purpose for which it is effectual. It may be proved for the pur of showing a vacancy in office just as in a civil case it may be pr to justify the levy of an execution, or to establish the title of the chaser at the execution sale, and this even after it has been reverse appeal."

It would seem that in California the statute provides that on peal from certain kinds of judgments as distinguished from the nary judgment, a stay or supersedeas bond must be filed; that judgments, though not final, may be proved for every purpose for w it is effectual, as to prove vacancy in office: to justify the levy o execution to establish the title of the purchaser at the execution and such judgments may be proved for any purpose which wi fectuate their purpose unless they have been suspended or staye a proper supersedeas bond. From this we are convinced that the ment in the case at bar could be the basis of a cause of action i state. That it would be competent evidence to prove its own exis and its own contents for the purpose of effectuating the judgment

is, by assisting in enforcing the judgment by way of execution. In the case at bar, under the law of California, § 942 of the Code of Civil Procedure, the judgment being one for money, it is provided that an appeal from the judgment or order directing the payment of money does not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant and two or more sureties to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from or any part thereof be affirmed or the appeal be dismissed the appellant will pay the amount directed to be paid by the judgment or order or the part of such amount as to which the judgment or order is affirmed etc.

From this statute it is clear that the judgment in this action was not stayed, no stay or supersedeas bond having been filed, and that in California execution could issue on such judgment, and that any other proceeding upon the judgment might be taken there to effectuate the purposes of the judgment. If we are correct in this conclusion, and in order to give full faith and credit to the laws of California and the proceedings of their court, any proceedings could be taken upon that judgment in this state which might be taken upon it in the state of California. We are convinced it would be correct to hold that the judgment of the California court in the condition of this judgment is a proper basis for an action in this state: that it was proper for the trial court in this state to receive as evidence the judgment roll in the original action though that action is still pending in the supreme court of California; the judgment roll, as we view the matter under the law and decisions of California, was competent evidence to prove the existence of the judgment and its contents, and for the purpose of permitting a judgment to be entered in our court in an action, the basis of which is the judgment of the court of California, and after the judgment in the proper court in this state, the same proceedings may be had thereon as might be had upon the judgment in the state of California; in other words, give it the same faith and credit as the judgment would receive in that state.

This would seem to be the correct rule and the one to be followed unless there is a conflict in some respect with public policy, or unless there is a constitutional objection or a direct prohibition by the statutory

law of this state, and we find no such objection presented in
case.

The judgment of the district court of Burleigh county provi
that no execution issue on the judgment until the judgment suec
was affirmed by the supreme court of the state of California. T
properly held in abeyance all further proceedings after the entr
the judgment here until an affirmance of the judgment by the supr
court of California. This affords the defendant ample protection u
the determination of the appeal by that court. We are of the opin
however, that the trial court in this state should also have provi
that if the supreme court of California reversed the judgment, then
in that event the plaintiff should satisfy the judgment which was g
by the district court of Burleigh county. The judgment appealed f
is modified to that extent. In all other respects the judgment appe
from is affirmed; the respondent is entitled to the statutory costs on
peal.

BRONSON, J. I dissent.

BIRDZELL, J. I concur on the ground that the judgment constit
a cause of action in this state.

CHRISTIANSON, Ch. J. (concurring). I concur in an affirmanc
the judgment, with the modification thereof directed in the opi
prepared by Mr. Justice Grace. As stated in that opinion, the s
fications of error on this appeal relate to, and in reality present
the one question,—May a judgment rendered in the superior cou
California be sued upon in this state while an appeal from such j
ment is pending in the supreme court of California, where there
been no compliance with the California statutes providing for a
of proceedings on appeal upon the filing of a supersedeas bond?

There is no controversy as to the facts in this case. The defen
in his answer expressly admitted that judgment was rendered ag
him as alleged in the complaint, and that he had not paid the judgm
This admission, of course, relieved the plaintiff of the burden o
tablishing, and of the necessity of offering any evidence tendin
establish, these facts. 1 Enc. Ev. 398. Upon the trial it was stipu
as a fact that the defendant had not filed a supersedeas bond as

scribed by § 942, California Code of Civil Procedure. Hence, we ha a situation where an action is brought in this state upon a Californ judgment in all respects final and enforceable in that state, subj alone to the contingency that it may be reversed on appeal. It is general rule, supported by the great weight of authority, that "t pendency of an appeal does not prevent an action on a foreign juc ment, if the appeal does not operate as a supersedeas or stay of proce ings in the jurisdiction wherein it was rendered, or if there has not be a compliance with the requisite conditions to obtain a supersedeas 15 R. C. L. p. 942, § 419. See also 23 Cyc. 1504, 1563.

Appellant does not deny the existence or correctness of this gener rule, but contends that it is inapplicable to a California judgment. I read the California statutes and decisions, the appeal taken by t defendant from the judgment involved in this case did not operate as stay of proceedings on the judgment in California. I therefore agr with Mr. Justice Grace that, inasmuch as the defendant in this ca failed to comply with the California statutes requisite to obtain supersedeas, the plaintiff might bring suit in this state upon the Cal fornia judgment, even though an appeal has been taken therefrom t and is pending in, the supreme court of that state. The same concl sion was reached by the supreme court of Oregon in Spencer v. Barne 65 Or. 231, 132 Pac. 707, Ann. Cas. 1915A, 1287.

DONALD McLARTY, Non Compos Mentis, by Christine McLar Welzer, as Guardian ad Litem, Appellant, v. WILLIAM RA MOND, Respondent.

(172 N. W. 836.)

Damages — appointment of guardian for suit who is non compos mentis power of trial court to appoint.

In an action for damages apparently based upon fraudulent representatio made to secure the execution of certain notes and a mortgage for $1,000, a upon the wrongful connivance of the defendant thereby securing the incarcer tion of the plaintiff, who was *non compos mentis*, in the insane asylum, it

held **upon the record that the trial court was authorized to appoint a guardi** ***ad litem,*** **and that the complaint fails to state cause of action.**

Opinion filed April 29, 1919.

Action for damages.

Appeal from an order sustaining demurrer, in District Court, Wi liams County, *Fisk,* J.

Affirmed.

Brace & Stuart, for appellant.

"An insane person has a right to sue." 16 Am. & Eng. Enc. La 600.

"A guardian *ad litem* is not a party to the suit, but is appointed b the court to protect the property rights of the noncompetent." 15 A & Eng. Enc. Law, 2. See Comp. Laws 1913, § 7401; Mailen Mailen, 2 Johns. Ch. 238; Denney v. Denney, 8 Allen, 313; 1 Da Ch. Pr. 83; Story, Eq. Pr. § 66; Deil v. Smith, L. R. 9 Ch. 91; Mas Gen. Stat. 1860, chap. 109, § 18; Plympton v. Hall, 55 Minn. 22, L.R.A. 675, 56 N. W. 351; 10 Standard Proc. 710; 13 Standard Pro 598; Frieseke v. Frieske, 138 Mich. 458, 101 N. W. 632.

A misjoinder of causes of action is a misjoinder of causes belongi to different classes, such as contract and tort, etc. 6 Standard Pr 902; Coddington v. Canady, 157 Ind. 243, 61 N. W. 567; Kurtz Lyden Canyon Sanatorium Co. 37 Utah, 313, 108 Pac. 14; Boyd Mut. F. Asso. 116 Wis. 155, 61 L.R.A. 918, 90 N. W. 1086, N. W. 171; Kope v. Winterfield, 116 Wis. 44, 92 N. W. 43 Crosby v. Lehigh Valley R. Co. 128 Fed. 193, affirmed in 70 C. C. 199, 137 Fed. 765; Randal v. Johnson, 20 N. D. 493, 128 N. W. 6

Under the codes, as a rule it is no ground for demurrer that seve causes of action are not separately stated. N. D. Comp. Laws 19 § 7466; 6 Standard Proc. 904; Tishbein v. Paine, 52 Ind. App. 4 100 N. E. 766; First Nat. Bank v. Ingle, 37 Okla. 276, 132 Pac. 8 Danielson v. Garage Equipment Mfg. Co. 151 Wis. 492, 139 N. 443.

Craven & Converse, for respondent.

"When an infant is a party he must appear either by his gen

guardian or by a guardian appointed by the court in which the acti
is pending." Comp. Laws 1913, §§ 7399, 7401, 8885; Tiffany
Worthington, 96 Iowa, 560, 65 N. W. 817; Beall v. Smith, 43 L.
Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625, 22 Week. Rep. 12
Gustafison v. Ericksdotter (Kan.) 16 Pac. 91.

PER CURIAM. This is an action for damages. The cause of acti
dates back to 1909. The real party in interest is *non compos ment*
In the month of October, 1916, nearly a month prior to the institut
of this action, the trial court, upon the application of the plainti
appointed a guardian *ad litem*. The action was instituted in Nove
ber, 1916. A demurrer was interposed to the complaint upon fo
grounds; *viz.*

1. No legal capacity to sue.

2. Defect of parties plaintiff in that the incompetent person c
prosecute his action only by a general guardian.

3. Facts insufficient to constitute a cause of action; and,

4. Several causes of action improperly united.

The trial court in March, 1918, sustained the demurrer, and fro
its order so doing the plaintiff has appealed.

The record does not show the existence of any general guardian f
the incompetent. Consequently the court was authorized, under
7401, Comp. Laws 1913, to appoint a guardian *ad litem*.

The complaint, however, fails to state a cause of action. It wi
serve no useful purpose to extend this opinion by an involved consider
tion of the allegations of this complaint. It is hard indeed to discov
either a theory or a purpose from the viewpoint of the pleader. Th
gist of the action seems to be the false representations made by th
defendant to this incompetent by reason of which he was induced t
execute certain notes and a mortgage for $1,000 in order to be in
position to marry the sister-in-law of the defendant; and that the de
fendant, through wrongful connivance, secured the incarceration of th
plaintiff in the hospital for the insane. The complaint grounds an ac
tion neither in false imprisonment nor upon fraud and deceit; eve
the old common-law action on the case cannot be predicated upon allega
tions of this complaint. In fact, the complaint shows no deprivation o
property possessed by the incompetent. Possibly a cause of action ma

exist in favor of the incompetent. This court is not disposed to forc bar the plaintiff from maintaining his cause of action, if one he The order of the trial court is affirmed, with costs to the respond without prejudice to the plaintiff proceeding upon an application fore the trial court to amend his complaint either as to the party pl tiff or as to the cause of action, as he may deem proper.

ROBINSON, J. (dissenting). This case presents a short story simple narrative with a plot. The plaintiff is a credulous simple who lives alone and farms a quarter section of land. Defendant i shrewd banker who likes to get his hand on a thousand dollars. says to the simpleton: It is not well for a man to live alone on a fa I should think it would drive you crazy. For every Adam God made an Eve. Mortgage your good farm for $1,000, put the money my bank. Then I will say to my sister-in-law: Here is a good thri farmer with $1,000 in the bank; why don't you marry him? I induce her to wed with you and you will be happy ever afterwa The farm is mortgaged, is lost. The broker gets the thousand doll and to make sure of it he contrives to have the simpleton sent to insane asylum. The sister is the heroine. She makes search for poor lost brother and in time she finds him in the asylum, secures his lease and her appointment as guardian and commences this suit to cover $15,000 damages. The appeal is from an order sustainin demurrer to the complaint and dismissing the action.

The complaint contains forty-one folios or 4,000 words, so i long enough to be good. It avers in effect that in 1909, in Willi county, the plaintiff owned a quarter section of land (N.E. 14–1 98); that he was *non compos* or of weak and unsound mind; that fendant is a banker who manages and virtually owns the First S Bank of Wheelock, and that to secure $1,000 from the plaintif advised and persuaded him to mortgage his land for $1,000 and t posit the same in the bank, which he did. And in consideration th defendant agreed to induce his sister-in-law to marry the plaintiff; relying on such promises the plaintiff did mortgage his land for $1, which he received and deposited with defendant in his bank, an fendant still holds and retains the same; that to pay the mortgag plaintiff was forced to sell and did sell the land at half its value,

then to secure himself in the possession and use of the money defen ant wrongfully and surreptitiously caused the plaintiff to be sent the insane asylum at Jamestown, where he was imprisoned for two a one-half years, until perchance his sister and guardian herein discover his imprisonment and secured his release; that by said imprisonme and the loss of his land the plaintiff has sustained damages to t amount of $15,000.

The complaint further shows that the plaintiff had several relatior as defendant well knew; that he had a brother Daniel, in Williar county, a brother Nathan, at Colgan, North Dakota, and a broth Norman, at Williston, North Dakota, and a mother, brother, a sisters residing in Canada; that defendant caused the imprisonme of the plaintiff without giving notice to any of his relations, and th before the county court of Williams county he made a charge of i sanity against the plaintiff and caused his arrest, and procured wi nesses to testify against him, and procured false testimony to be giv and falsely suppressed the disclosure of certain material facts.

Defendant demurs on the ground: (1) That the plaintiff has n legal capacity to sue; (2) that the complaint does not state a cause action; (3) that several causes of action have been improperly unite Manifestly, according to the facts stated, defendant was guilty gross wrong, for which the law affords a remedy. It is said that h induced the simple-minded plaintiff to mortgage his land for $1,0C in order to deposit the money with defendant and in his bank; an when defendant got the money, then, for the purpose of retaining indefinitely, or forever, he caused the plaintiff on a charge of insanit to be sent to the asylum, at Jamestown, where he was imprisoned f two and one-half years, until his guardian herein secured his releas According to the facts stated, the money was obtained by gross frau and artifice, and has been retained by the imprisonment of the plaintif It is all linked together as one and the same transaction, just as if th defendant had first caused the plaintiff to be imprisoned and then b force or stealth taken the money out of his pocket. Defendant was i no way related to the plaintiff and had no motive or reason to interfer with him, unless to get the thousand dollars.

On the demurrer the action was dismissed, with costs. That seem too much like playing horse and trifling with the due administration o

justice. On making the order appointing a guardian *ad litem,* learned judge must have known what he was doing, and no man sho suffer by the fault of the court. The order was made and the s commenced for the benefit of the plaintiff, and not for the benefit of defendant.

By statute county courts may appoint guardians of the person a property of an insane person, but the statute does not take from cou of common law and equity jurisdiction the inherent right to appo guardians and trustees and to administer justice without denial or lay, and without the leave or license of inferior courts.

However, while the long complaint shadows forth a good cause action, it is in many respects defective. It is too vague and indefin as well as too long. The complaint should state in a concise manner essential facts which constitute a cause of action. The facts sho be so carefully stated as to render a demurrer frivolous. The or sustaining the demurrer and dismissing the action should be revers with directions to amend the complaint, and with costs to abide event of the suit.

THE CITY OF MINOT, a Municipal Corporation, Appellant, ANNIE C. OLSON, Respondent.

(173 N. W. 458.)

Eminent domain — damages — payment into court.

1. In an action by a city to condemn for public use an alley as a right of where a judgment has been rendered providing that the damages assessed be paid by special assessments to be levied as provided by law, and where suant thereto there is paid into court, for the damages awarded to the de ant, a city warrant, it is *held* that such payment is improper under the p sions of § 14 of art. 1 of the Constitution, requiring money to be paid to, c to court for, the owner.

Eminent domain — payment of damages.

2. In such proceedings for a public right of way, § 3737, Compiled 1913, does not permit the payment of damages to property taken or used, city warrant or otherwise than as prescribed by the provisions of § 14 of of the Constitution, even though therein provision is made that the city, v

three months after the entry of judgment, may levy a special assessment
the payment thereof.

Eminent domain — payment of damages.

3. In such action, where judgment was rendered on June 6, 1916, and the
after pursuant to § 3737, Compiled Laws 1913, the city, within three mont
levied a special assessment to pay for the damages awarded, and issued
paid into court city warrants against such special assessment as payment
the defendants, and where, thereafter, on August 13, 1917, pursuant to mot
made, the court dismissed and vacated the judgment so rendered, no payment
money having been made to the defendant, it is *held* that the trial court
not err in so doing.

Opinion filed April 29, 1919.

Appeal from order of District Court, Ward County, *Leighton,*
dismissing a judgment rendered for condemnation of an alley.

Affirmed.

G. S. Wooledge, for appellant.

Fisk & Murphy, for respondent.

BRONSON, J. This is an action of condemnation to open up a
alley through a certain block in the city of Minot. On June 6, 191
judgment of condemnation was entered for the alley involved and a
award made for the separate value of the property taken from some si
teen defendants. The respondent herein, as one of such defendants, wa
awarded damages in the sum of $1,100. The judgments provided tha
each of them be paid by special assessments levied against the abuttin
property as provided by law. On August 9, 1917, pursuant to a mo
tion and affidavit therefor, the trial court issued an order to sho
cause why the proceedings theretofore had should not be set aside
upon grounds stating that thirty days had elapsed since the final judg
ment was entered, and the city had wholly failed to pay the sum o
money so assessed, either to the defendant or by depositing the sam
in court for the defendant, and that the same could not be made o
execution. To such motion, the city responded by showing that
city warrant for $1,100 on July 6, 1916, was filed with the clerk of th
district court, and notice of the same given to the respondent, and tha
all of the defendants excepting the respondent had accepted city war

rants, and, further, that prior to August 9, 1917, the respondent l not made any objection whatsoever to payment by such warrant. P suant to this order to show cause the trial court on August 12, 19 vacated and set aside the judgment, so far as the same affected the spondent herein, upon the grounds recited in such order to show ca

From the order of the trial court so made, the city of Minot pr cutes this appeal. The only question for the consideration of this co is the authority of the trial court to vacate such judgment pursu to its order made. The questions of law presented are as follows:

1. The validity of the judgment as rendered.

2. The construction to be placed upon § 3737, Compiled Laws 19 in connection with § 14 of art. 1 of the Constitution.

3. The construction of said § 3737 in connection with §§ 8226 8227, Compiled Laws 1913.

Section 14 of article 1 of the Constitution provides:

"Private property shall not be taken or damaged for public without just compensation having been first made to, or paid into co for the owner, and no right of way shall be appropriated to the use any corporation, other than municipal, until full compensation there be first made in money or ascertained and paid into court for the ow irrespective of any benefit from any improvement proposed by s corporation, which compensation shall be ascertained by a jury, un a jury be waived."

Section 3737, Compiled Laws 1913 (Sess. Laws 1905, chap. § 174), provides that where judgment is rendered in condemna proceedings for damages to property used by the city it shall no vacated or set aside provided the city within three months after entry shall levy special assessments for its payment in whole o part, and shall, at the time of the next annual tax levy, levy a ger tax for the payment of such part of the same as is not to be pai special assessment, and provided, further, that upon the failure of city council to make such assessment and levy as herein stated, judgment may then be vacated.

Section 3711, Compiled Laws 1913, provides for the issuance of warrants in anticipation of the levy and collection of special assessr and that such warrants may be used in making payments on cont

for improvements, or may be sold for cash at not less than the par va thereof.

Section 8226, Compiled Laws 1913, provides that plaintiff m within thirty days after the final judgment pay the sum of money sessed. Section 8227, Compiled Laws 1913, further provides that p ment may be made to the defendant, or may be deposited in court, a that, if the money be not so paid or deposited, the defendant may h execution as in civil actions. Sections 8226 and 8227 are a part of ch ter 36 of the Code of Civil Procedure, setting forth the general statut provisions applicable to the exercise of the right of eminent doma and, if the money cannot be made on execution, the court upon a sho ing to that effect must set aside and annul the entire proceedings.

The appellant contends that the city, in its procedure so condemni the property involved, acted pursuant to chapter 44 of the Politi Code of 1913, relating to cities, and including therein said §§ 37 and 3737; that, under said § 3737, the court was not authorized vacate such judgment rendered, for the reason that the city compli therewith by levying the necessary special assessment within thr months, and that a city warrant was deposited in court for her, which she has made no objection; that it ought to have been paid cash. That, furthermore, §§ 8226 and 8227 do not apply to citi exercising that right, since specific provisions, as hereinbefore quote are applicable thereto. The appellant further contends that the jud ment rendered does not take or attempt to take the property of the d fendant contrary to § 14 of article 1 of the constitutional provisio hereinbefore quoted, for the reason that the city, at the time the moti for the vacation of the judgment was made, had not taken the pro erty involved; that the alley then had not been actually laid out; th the trial court could have modified the judgment if it felt that th final judgment, on which the time for appeal had expired, did not bi the defendant to receive something other than actual money, and th the city could have paid the defendant the money before it did ta her property for public use. The appellant requests this court, the event that it holds the defendant not bound to receive this speci assessment warrant under the final judgment as rendered, to order th the judgment be modified as to her by providing that her damages paid in money within a certain specified time.

In Martin v. Tyler, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392, it specifically held in construing § 14 of art. 1 of the Constitution, t private property cannot be taken for public use for right of way with just compensation in money being first made to, or paid into court the owner, even though it is sought to be taken by a municipal cor ration; and, further, that payment by a county warrant drawn by dr age commissioners upon a drainage fund was not such payment as Constitution required.

This case was decided in 1894, long before the new enactment of provisions of the Political Code relied upon by the appellant here It must be taken for granted that when the legislature enacted provisions, cited by the appellant with relation to eminent doma that it was its intention to conform to the constitutional provisi mentioned, and to the construction placed upon the same by this co long prior thereto.

It is unnecessary for this court to determine whether said § 37 of the Political Code, relating to cities, is inconsistent with contravenes the provisions of §§ 8226 and 8227, or whether § 37 is alone applicable in the exercise of eminent domain proceedings cities, for the reason that we are clearly of the opinion that the city not complied with the provisions of § 3737 and the other cognate p visions in the Political Code relating to cities when construed with constitutional requirement. It is first noticed that the purported ju ment states "that said judgment and each of them be paid by spe assessments levied against the abutting property as provided by la There is no provision in the said Political Code, relating to cities, thorizing judgments to be rendered in any such form. The questio not whether under § 3737 a judgment could be rendered, to be final effective, which provided for the payment of the amount or dam as required by the Constitution within a reasonable time, such as t months after the entry of such judgment. The fact is that this j ment provided for a prospective payment by special assessments, t levied against the abutting property. It is clear, under the cons tional provision, and the construction thereof heretofore given by court, that it was not proper to require the defendant either to rec a city warrant in payment, or to wait, or be compelled to wait, u

such time in the future as the special assessments might be collect in cash.

Under § 3711, Compiled Laws 1913, ample authority was granted the city to issue and sell for cash, warrants, in anticipation of the c lection of such special assessments. Payment could have been ma in money of any judgment rendered and special assessment had, pu suant to § 3737, Compiled Laws 1913. The fact that the city d make and levy a special assessment within the time required by § 373 and did issue city warrants therefor as the law permitted, did not the by grant to them any authority, under § 3737 or other provisions the Political Code relating to cities, to obviate the mandatory provisio of the Constitution,—that payment under eminent domain proceedin must be made in money, either into court, or to the owner. No attem was made to so do, in fact, and the judgment does not so require.

It therefore clearly appears that the contentions of the appellant ca not be sustained, and that the trial court was clearly right in vacati and setting aside the judgment. Furthermore, the whole intention the statutory provisions concerning eminent domain in the Politic Code relating to cities discloses a provision and desire for speedy tria both in the trial court, and in the appellate court, and for speedy settl ment and determination of the rights and demands of the parties und such proceedings. This action was instituted in the month of Augus 1915; judgment was entered on June 6, 1916. The order vacatin the judgment is dated August 13, 1917. Yet, during all this time n attempt in the record is shown to make payment in money to the d fendant as required by the constitutional mandate. During the tim this case has been pending in this court proceedings could have bee instituted, and a determination had, upon new proceedings in thi action to take this property involved under eminent domain, and t have had the matter adjusted and settled. No hardship, therefore, i imposed upon the city in sustaining the order of the trial court. It i therefore ordered that the order of the trial court be and the same i hereby affirmed, with costs to the respondent.

ROBINSON, J. (dissenting in part). On January 6, 1916, in condemnation proceeding for the opening of a public alley in the cit of Minot, the district court of Ward county gave judgment condemnin

certain land of Annie Olson and awarding her, as damages, $1,1
On August 3, 1917, the court made an order vacating the judgment
the ground that it had not been paid. Now it appears that accord
to custom on July 6, 1916, a city or special assessment warrant
$1,100, in favor of Annie Olson, was filed with the clerk of the dist
court and notice given to her, and before moving to vacate the judgm
she did not object to the warrant or demand payment in money.

The notice to vacate the judgment was made under the statute p
viding that the plaintiff must, within thirty days after final judgm
pay the money assessed, except where school or public lands on wh
no contract is outstanding is taken for public use. And if the mone
not so paid or deposited, defendant may have execution as in a c
action, and if the money cannot be made on execution the court r
annul the entire proceeding. Comp. Laws. §§ 8226, 8227. M
festly those sections of the statute do not relate to condemnation proc
ings by a city. However, it is clear that when land is taken by a
for public purposes, payment cannot be made in a city warrant, un
by consent or acquiescence of the owner of the land. The counsel
not cite any statute fixing the time within which a city must pay
lose the benefit of its condemnation proceeding, and it seems to s
extent the time must be left to the reasonable discretion of the co
Doubtless, until payment the court might have deferred making an
der for the entry of judgment on the verdict, or, by order or judgm
the court might have directed payment to be made within some rea
able fixed time.

In the conduct of a legal proceeding the rules of common cour
must prevail. The legal procedure must not be made a travesty
justice. When the good lady had a written notice that there was
with the clerk of the court a city warrant for $1,100, payable to
if she did not care to accept it, according to the usual custom in
cases, it was for her to serve a written notice refusing to accep
warrant and demanding payment in cash or legal tender within
reasonable time. It was not for her to remain silent for over a
and then, on a notice of two days, move to vacate the judgment.
was it for the court to grant the motion without giving the city
sonable time within which to make payment.

The order of this court should be that the city shall pay the judg

in lawful money within thirty days after the filing of the remitti and, on such payment being made, that the order appealed from reversed, with costs; also, that the case be at once remanded.

TRAILL COUNTY, NORTH DAKOTA, Respondent, v. STA OF NORTH DAKOTA, Appellant.

(172 N. W. 782.)

Judgment — necessity of pleadings to sustain a judgment.

There must be some pleadings to sustain a judgment.

Opinion filed April 29, 1919.

Appeal from the District Court of Traill County, Honorable *A. Cole,* Judge.

Reversed and remanded.

William Langer, Attorney General, and *George K. Foster,* Assist Attorney General, for appellant.

"A judgment not supported by the pleadings is fatally defective one not sustained by the verdict or findings. 1 Black, Judgm. 2d § 183; 31 Cyc. 45 D; Hilliard v. Loeb, 31 S. D. 333, 140 N. W. 703.

The plaintiff has failed to prove facts necessary to prove its ca Comp. Laws 1913, § 2576; 30 Cyc. 1108, 1157, note 39; 117 Ma 447.

The party asserting residence must prove it. 16 Cyc. 931, 9 1 Am. Rul. Cas. 237. See also 117 Mass. 447; 4 Enc. Ev. p. 8 note 4, citing cases.

I. A. Acker, State's Attorney, for respondent.

Robinson, J. In this case it appears that under Compiled La § 2576, an application was made to the state auditor to determine legal residence of James Smith, a person committed to the ins asylum. The decision of the auditor was that at the time of his co mitment James Smith was a legal resident of Traill county. Fr that decision Traill county appeals to the district court. Comp. La

§ 2577. The court held that Smith was not a resident of Traill county and that Traill county had paid for his maintenance at the asylum and in the home of the feeble-minded, $1,472. The court gave judgment that Traill county do have and recover from the state the sum of $1,472, with costs. The judgment was given without any pleadings and without any jurisdiction, and of course it must be reversed.

The appeal was from a finding or decision of the state auditor in regard to the residence of the insane person when committed to the asylum, and of course the appeal presented no other question to the district court.

From evidence submitted it appears that in 1892, at Caledonia, in Traill county, Smith was taken into custody and sent to the asylum, and his legal residence was then unknown and it is still unknown. The record contains no evidence sufficient to sustain any finding concerning the residence of the insane person, and for aught that appears he may have been a mere float, and not a resident of the state.

To recover a judgment against the state for the money paid or expended by Traill county, it must commence an action for the same on a complaint stating facts sufficient to constitute a cause of action for the recovery of money; and of course the action, if not barred by statute, must be tried by a jury, and upon the trial it would be proper to submit necessary evidence to sustain any material allegation concerning the residence of the insane person. On the hearing in the district court there was evidence of payments made by Traill county amounting to the sum of the judgment, but there were no pleadings to sustain the judgment.

It is therefore ordered that the judgment of the trial court, in so far as it finds that Smith was not a resident of Traill county, be affirmed, but that the judgment against the state for $1,472 be in all things reversed. Neither party to recover costs on this appeal.

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

A. SLIMMER and L. J. Thomas, Respondents, v. HARRY H. MARTIN, Administrator of the Estate of William H. States, Deceased; Julia A. States, Widow of the Said Deceased; Mollie A. Fouch, Lewis E. States, Arthur J. States, Frank R. States, Etta G. Sears, Elmer E. States, and Harry W. States, a Minor, and G. W. States, Guardian of the Said Harry W. States, Appellants.

(172 N. W. 829.)

Specific performance — remedy should be sought promptly — when specific performance not granted.

The remedy of specific performance must be promptly sought, and where there is an unexplained delay of approximately five years in bringing the action, and a further delay of approximately four years before the entry of judgment, the land in the meantime being in the possession of third parties, specific performance will not be decreed.

Opinion filed April 29, 1919.

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

Geo. P. Homnes and *Brace & Stuart*, for appellants.

In case a contract for the purchase of land is breached by the vendee, the vendor has various remedies. Richard v. Marshall (Iowa) 103 N. W. 774; Waters v. Pearson (Iowa) 144 N. W. 1026; Miller v. McConnell (Iowa) 157 N. W. 943; Curr Co. v. Nygren, 114 Minn. 268, 130 N. W. 1112, Ann. Cas. 1912C, 538; 22 Enc. Pl. & Pr. 702.

A vendor's lien exists only when the vendor has conveyed title to the vendee. Pom. Eq. Jur. 3d ed. §§ 1260–1262.

This rule is recognized by the courts of our own state. Roby v. Bismarck Nat. Bank, 4 N. D. 156. See also Devlin, Real Estate, 3d ed. §§ 1249–1250a; Halvorsen v. Halvorsen, 120 Wis. 59, 97 N. W. 494; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210; Raymond v. San Gabriel Val. Land & Water Co. 4 C. C. A. 89, 53 Fed. 888; Greenfield v. Carlson, 30 Ark. 547; N. D. Comp. Laws 1913, §§ 7152, 7608; Warvelle, Vendors, 2d ed. § 937; Prichard v. Mulhall (Iowa) 103 N. W. 774.

When the vendor has done all that his contract calls for and the vendee refuses to perform his part, the vendor can recover only the difference between the contract price and the market value at the time of the breach. Note to Gerrard v. Dollar, 67 Am. Dec. 271, citing Old Colony R. R. Corp. v. Evans, 6 Gray, 25; Scudder v. Wadingham, 7 Mo. App. 27; Louis v. Lee, 15 Ind. 500; Meason v. Kaine, 63 Pa. 335; Porter v. Trodis, 40 Ind. 556; Robinson v. Heard, 15 Me. 296; 29 Am. & Eng. Enc. Law, 720.

Palda & Aaker and *Greenleaf, Wooledge, & Lesk,* for respondents.

A contract lien may be foreclosed in an action for specific performance, even in cases where the legal title has not passed from the vendor to vendee. Loveridge v. Shurtz (Mich.) 70 N. W. 132; Roby v. Bismarck Nat. Bank, 4 N. D. 156, 59 N. W. 719; Brace v. Doble (S. D.) 52 N. W. 586; Freeman v. Pauson (Minn.) 119 N. W. 651. See also Abbott v. Moldestad (Minn.) 77 N. W. 227; Sparks v. Hess, 15 Cal. 186; 36 Cyc. 778, 792, and cases cited; 39 Cyc. 1794, 1849, and cases cited; Edmison v. Zaborowski, 68 N. W. 288; Gates v. Parmly, 66 N. W. 257; Loveridge v. Shurtz, 70 N. W. 132; Clark v. Hall, 7 Paige, 385; Corpus v. Teedt, 69 Ill. 205; Peake v. Young, 18 S. E. 237; Peck v. Zborwski, 82 N. W. 387; Strauss v. Beudheim, 66 N. Y. Supp. 247; Andrews v. Sullivan, 7 Ill. 327; Robinson v. Appleton, 124 Ill. 276, 15 N. E. 761; Goddin v. Vaughn, 14 Gratt. 102; Adams v. Ash, 46 Hun, 105; Peake v. Young, 40 S. C. 41; Brace v. Doble, 3 S. D. 110, 52 N. W. 586; Martinson v. Regan, 18 N. D. 467; Comp. Laws 1913, §§ 7192–7201; Shelton v. Jones (Wash.) 30 Pac. 1061; see note to Davis v. Isenstein, 45 L.R.A.(N.S.) 52.

Birdzell, J. This is an appeal from a judgment in a vendor's action for specific performance. The specification is for a trial *de novo.* The appellants, however, insisted upon a jury trial in the court below, and upon this appeal they also rely upon the ruling of the trial court denying it as an error vitiating the judgment.

The action was commenced by the service of a summons on December 8, 1913, and the complaint was filed in the office of the clerk of the district court of Divide county, January 23, 1914. The trial took place on September 18, 1916. Findings and conclusions, order for

judgment, and judgment, were filed on December 7, 1917. The record on appeal to this court was filed on April 30, 1918.

In the complaint, relief is prayed for as follows:

"(1) That the amount agreed by the defendant to be paid for said land and the whole thereof, with interest according to the terms of the said contract, and the amount of the taxes paid on said premises by the plaintiffs, be ascertained by the court, or under its direction, and that the plaintiff have judgment against the defendant for the amount so ascertained, together with their costs and disbursements herein;"

"(2) That by the decree and judgment of this court herein, the premises hereinbefore and in said contract described be sold to satisfy the amount of such judgment, together with the costs and expenses of such sale;"

"(3) That the defendant be foreclosed of all right, title, interest, and estate in and to said premises, and the whole thereof, except the right of redemption thereof from such sale within such time as may be by the decree of the court fixed, for that purpose;"

"(4) That if the proceeds of such sale are insufficient to satisfy the judgment herein, together with the expenses of such sale, that the plaintiff have execution against the defendant for any deficiency remaining after applying thereto the proceeds of such sale;"

"(5) That the plaintiffs have such other and further relief as to the court may seem just and equitable."

The first contention of the appellant is that the action should have been considered an action at law, and that the defendant was consequently entitled to a jury trial. It is clear from a reading of the complaint that it purported to state a cause of action cognizable in equity. The contract, however, was set forth in full in the complaint and made a part thereof; so that if, under all the allegations, the complaint states a cause of action triable to a jury, it should have been so tried. It provided for the payment of the purchase price ($11,000) by the giving of a promissory note bearing 8 per cent interest per annum from March 1, 1909, payable as thereinafter stated. The terms of payment were expressed as follows: "$1,000 on the principal and all accrued interest on November 1, 1909, and $1,000 and accrued interest on the first day of November of each and every year thereafter, until entire purchase price and accrued interest has been paid." The contract

also embraced other obligations of the purchaser, such as the obligation to break the land, deliver the crops, pay taxes, and to secure the annual payments by mortgage on the crops, though the ownership of the same is reserved in the vendor. There is no acceleration clause under which the whole amount of deferred instalments might be declared to be due on the failure of the purchaser to fully perform with respect to a single instalment, or in case of other default. It is provided, however, that in case the purchaser shall fail to perform punctually "all and each of the stipulations of this contract, . . . then the party of the first part shall have the right to declare this contract null and void, and on such declaration all right and interest thereby created . . . shall utterly cease and all payments made or improvements placed upon said premises shall remain in and belong to the party of the first part as rent for the said premises." It is further provided that upon cancelation the party of the first part shall cancel and surrender the purchase-price note.

It is apparent that, at the time the action was brought, the time had not arrived for the delivery of the deed; and that but five of the eleven annual instalments ($1,000 each) of the purchase price were due. From this it follows that the plaintiff could have secured a money judgment for the instalments due by bringing an action at law for the unpaid instalments. Shelly v. Mikkelson, 5 N. D. 22–27, 63 N. W. 210. But, as held in the case cited, such an action is essentially an equitable proceeding for specific performance. See also to this effect Beecher v. Conradt, 13 N. Y. 1008, 64 Am. Dec. 535, where it was held that independent promises to pay instalments of the purchase price become dependent upon the tender of the deed when the time has arrived for the transfer to be made. See also 39 Cyc. p. 1900. In other jurisdictions, however, it is held that an action for the purchase price, under instalment contracts, may be maintained independently of any equitable considerations governing the remedy of specific performance. See Gray v. Meek, 199 Ill. 136, 64 N. E. 1020; 39 Cyc. supra; 36 Cyc. 565. We are convinced that both the better reason and the weight of authority support the proposition that, since an action by the vendor to recover the price is not essentially an action to recover damages as compensation, it should be controlled by equitable considerations. 29 Am. & Eng. Enc. Law, 720.

Since the action must be regarded as primarily one in equity to obtain specific performance, it presents a somewhat novel feature. It attempts to secure specific performance of a contract before the time has arrived for the delivery of the deed by the vendor or the full payment of the purchase price by the vendee. The query arises whether, in the proper exercise of equity jurisdiction, a court can decree the specific performance of a contract which is broken in reality as to some of its provisions, and which is broken only in anticipation as to the remainder. Does the doctrine, in short, of anticipatory breach of contract, as announced in the leading case of Hochster v. De la Tour, 2 El. & Bl. 678, 118 Eng. Reprint, 922, 22 L. J. Q. B. N. S. 455, 17 Jur. 972, 1 Week. Rep. 469, 6 Eng. Rul. Cas. 576, extend to the remedy by way of specific performance? Since the case of Stanford v. McGill, 6 N. D. 436, 38 L.R.A. 760, 72 N. W. 938, was overruled (Hart-Parr Co. v. Finley, 31 N. D. 130, L.R.A.1915E, 851, 153 N. W. 137, Ann. Cas. 1917E, 706), it has been the law of this jurisdiction that, upon the repudiation of a contract in advance of the time for performance, the opposite party may treat the contract as broken for the purpose of maintaining an action to recover damages for its breach. The doctrine of Hochster v. De la Tour, supra, is thus the law of this jurisdiction applicable to all contracts except, probably, negotiable instruments. See Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780. In applying the remedy of specific performance, however, before the time for performance has arrived, there are inherent practical difficulties that are not present in the same degree where it is sought merely to recover damages. Damages can well be estimated in advance on the supposition that the contract will not be performed, but to enforce specific performance before the time has arrived for performance under the contract necessarily involves the compelling of one to do that which he has not contracted to do.

In the case of Miller v. Jones, 68 W. Va. 526, 36 L.R.A.(N.S.) 408, 71 S. E. 248, this question was considered and it was there said: "The contract in the present case being of that general class of contracts which equity will specifically enforce, we see no reason why plaintiff may not maintain his suit, notwithstanding the time has not arrived for complete performance of the contract." It was held that the suit, though brought by the vendee for specific performance prior to the time for

the delivery of the deed, was not prematurely brought. The court further held, however, that its decree could go no further than to require performance *according to the agreement.* So, in reality, the suit merely determines what the rights of the parties are under the agreement, and does not compel performance in advance of the time stipulated. For additional authorities supporting the remedy of specific performance, see Bear v. Fletcher, 252 Ill. 206, 96 N. E. 997; Payne v. Melton, 67 S. C. 233, 45 S. E. 154; McRae v. Smart, 120 Tenn. 413, 114 S. W. 729; Bogard v. Barhan, 56 Or. 269, 108 Pac. 214; Contra Friedman v. McAdory, 85 Ala. 61, 4 So. 835; see also note in 36 L.R.A.(N.S.) 408.

It is obvious that in the case at bar the court could not have entered a personal judgment against the defendant, at the time the action was brought, for the entire amount of the purchase price. It could only have decreed that the contract was binding; that it was one which the plaintiffs were entitled to have specifically enforced; that the defendant should make payments from time to time as they matured under the contract; and that, in the event of his failure to do so, the vendors might have a special execution directing the sale of defendant's interest in the land, subject to redemption.

Having sought specific performance, the plaintiffs, on account of the provisions of the contract in question governing cancelation, are precluded from obtaining a personal judgment covering instalments falling due subsequent to the bringing of the action. It is expressly provided in the contract that upon cancelation the vendor will cancel and surrender the note for the purchase price; and, though no note was given in the instant case, this provision, of course, would operate to cancel the obligation to pay future instalments of the purchase price in the event of a cancelation for any cause or in any manner whatsoever. If, as a result of the action for specific performance, the purchaser should fail to pay the judgment for the amount of the purchase price, due up to the bringing of the action, and his equity were sold to satisfy the judgment, and there should be no subsequent redemption, it is clear that it would be impossible for him to obtain title to the land by performing his contract to the extent of making the payments subsequently falling due. The contract would have been canceled by operation of law through the exhaustion of the remedy chosen by the

vendors themselves. The vendors, then, in bringing the action, must be held to have consented to a cancelation of the contract, in the event that the remedy sought should result in foreclosing the purchaser's right to ultimately obtain the title. Hence, it would be inequitable to allow a personal judgment against the purchaser to stand for any amount that was not due at the time the action was brought. The judgment in this action is therefore erroneous to the extent that it embraces the instalments payable after action was brought and before the date of trial, which, as indicated in the statement of facts, occurred some eight years after the contract was made. So, taking the view of this case which is most favorable to the respondent, we would be compelled to modify the judgment so as to direct the sale for only the amount due up to the time of the bringing of the action, and to further limit it so that the subsequent instalments could not be made the basis of a personal judgment in the event of the failure of the purchaser to redeem from a special execution sale.

The questions discussed above were fully aruged or suggested in briefs of counsel and upon oral argument. A determination of them has seemed to the writer and to Mr. Chief Justice Christianson to be necessary in order to determine the character of the action and the principles that should control in arriving at a decision. But inasmuch as the plaintiff's remedy is, in the opinion of the court, wholly precluded by acquiescence and laches, our associates deem such discussion unnecessary. We who agree to the principles heretofore stated are not disposed to question the judgment of our associates in this respect; but our views are stated for what bearing they may be thought to have upon the case in hand.

The court is agreed that the plaintiff's remedy is barred. As previously stated herein, the contract between these parties was made in April, 1908, and possession was to be given on March 1, 1909. The note stipulated for in the contract was never given, and as early as January, 1909, the plaintiffs, in a letter to one Scofield, who was interested in the deal going through, manifested considerable concern over this fact, and anticipated that the defendant, who had previously made some objection to the title, did not care to go through with the deal. In the letter referred to the plaintiff said: " . . . We presume that States may try to back out on this deal, and are sending you these

papers believing that you had better have Palda get States to come to Minot on some pretext or other and get him to sign the note, and accept a copy of the contract covering these lands. Palda stands ace high with States, and we think he can handle him better than anyone else, and as you seem to consider this a good sale on this land it will never do to let it fall through, and in the event that Palda cannot get States to come to Minot, it might be well to have him go to Crosby, North Dakota, where States lives and bluff the thing through. He would no doubt come across better if he could be gotten to Minot, as his family are liable to make a kick, if Palda has to go to his home to get his signature." The record discloses that the defendant early repudiated his obligation under the contract, and that he persisted in a course of nonperformance. Yet, this action was not begun until December 8, 1913, or about five years after the defendant's attitude was known. And in the record, though the defendant pleaded the acquiescence of the plaintiffs in his abandonment of the contract, no explanation whatever is found for the delay. We are of the opinion that the laches shown on the face of the record not only amounts to proof of the acquiescence pleaded, but it puts the plaintiffs in a position where they are not entitled to invoke the equity powers of the court.

While the remedy by way of specific performance is equally open to both the vendor and the purchaser under a contract for the sale of real property, it is not to be resorted to in cases where hardship or inequitable consequences are apt to follow. In the case at bar, the possession of the land during the entire period of delay, and in fact to the present time,—eleven years after the contract was made,—has remained in an uncertain state,—a banker testified that up to the time the action was tried he had collected from different occupants $1,685, which was on deposit in his own name in the bank, subject to the call of the successful litigant. It is manifest that, owing to this delay and the long period of uncertainty as to the result, it will be impossible for a court of equity to put either party in the position he or they would have occupied had the contract been faithfully performed or had its performance been promptly compelled according to its spirit. This inability is apparently due, primarily, to the delay of the plaintiffs in promptly pursuing their remedy; hence, they are in no position to complain.

Where a party desires to avail himself of the equitable remedy of specific performance, he should proceed as promptly as the circumstances permit. Even a short delay may result in a situation making the pursuit of the remedy inequitable; and especially where, as here, the purchaser has not gone into possession and has enjoyed no valuable rights under the contract. For authorities, see Scott v. Desire, 175 Ill. App. 215; McDermid v. McGregor, 21 Minn. 111; Eastman v. Plumer, 46 N. H. 464; Colby v. Gadsden, 34 Beav. 418, 55 Eng. Reprint, 696, 17 L. T. N. S. 97, 15 Week. Rep. 1185; Fry, Spec. Perf. 5th ed. §§ 1100–1102; Pom. Spec. Perf. Contr. §§ 412, 425; 36 Cyc. 724.

For the foregoing reasons, the judgment appealed from is reversed, and the cause dismissed, with costs,

BRONSON, J. I concur in result.

GRACE, J. I concur in the result only.

ROBINSON, J. (concurring). This is a suit against the heirs and legal representatives of William States for the specific performance of an alleged contract to sell and convey 420 acres of land in town 162 of range 92. The plaintiffs aver that in April, 1908, they made with States a written contract to convey to him the land, and he agreed to pay for the same $11,000, with interest at 8 per cent, in eleven equal annual payments according to eleven promissory notes. In December, 1917, the district court gave judgment in favor of the plaintiffs for the nine payments that had become due, to wit, $9,000, with interest and taxes, amounting to nearly $17,000, and it was adjudged that the land be sold to satisfy the same, with costs and expense, subject to the payment of $2,000 and interest to become due, and subject to redemption within six months, and that an execution issue for any deficiency.

The appeal is taken by the administrator and the heirs of States. Now it appears that the deceased never took possession of the land, never paid a dollar on it, never gave either of the eleven promissory notes for payment, and never accepted the title. He at once repudiated

the contract, and the plaintiffs have always remained in possession and control of the land and have received the rents and profits, which they offered to apply on the judgment. Under such facts it seems nothing less than downright folly to bring an action for specific performance. Indeed, where a party has merely contracted to sell land, and the purchaser has never accepted the title or the land, and has never taken possession and has repudiated the contract, the seller has no right to an action for specific performance. His remedy is by an action for damages, and not by a forced and expensive sale of his own land. His measure of damages is the excess, if any, of the purchase price over the value of the property. Comp. Laws, § 7152. The presumption is that in any honest contract for the sale of land the agreed price does represent the fair value of the land; and if, for any reason, the purchaser refuses to accept the title and possession, that is no reason for a suit in equity, a judgment, and forced sale of the land. There is no reason for charging the party who breaches an agreement to purchase land with the cost of a suit, an expensive sale, and the difference between the original contract price and the figure at which the vendor may choose to bid in his own land. Such is not the measure of damages provided by the statute. It is high time for distinguished lawyers to learn better than to rush into a court of equity on every little dog-eared case which in no way contains any principle of equity. It is not good practice, either in Minot or elsewhere. The judgment should be reversed and the action dismissed, with costs.

FARMERS SECURITY BANK of PARK RIVER, NORTH DAKOTA, a Corporation, Respondent, v. C. R. VERRY and Hattie L. Verry, His Wife, Appellants.

(172 N. W. 867.)

Deeds — delivery — delay in recording.

In this case it appears that during four years defendant C. R. Verry was cashier of the bank. By neglect of duty, and by wilfully permitting several accounts to be largely overdrawn, and by discounting and receiving many worthless notes, he became indebted to the bank in the sum of about $9,000.

To secure the same he and his wife made to the bank four deeds of real property. At his request the deeds were not put on record for five days, and in the meantime Verry did not keep good faith with the bank. He made to an insurance company a mortgage for $9,000, which was first recorded, and the bank lost the security given by three of the deeds. On the fourth deed the bank realized $2,700.26, and gave the cashier proper credit for the same, but his wife unjustly claims the money on the ground that Verry was not authorized to deliver the deeds, except to secure some insurance notes.

Opinion filed April 29, 1919.

Appeal from the District Court of Grand Forks County; Honorable *Chas. M. Cooley,* Judge.

Modified and affirmed.

W. S. Lauder, for appellants.

When there exists doubt as to the delivery of a deed, the true situation may always be shown by parol. Burke v. Dulaney, 38 L. ed. 698, and cases cited; 17 Cyc. 642, and cases cited in note 46; Branson v. Oregonian R. Co. (Ore.) 2 Pac. 86; Davies v. Jones, 16 C. B. 625; Hallis v. Littel, 11 C. B. N. S. 369; Wilson v. Powers, 131 Mass. 539; Pawling v. United States, 4 Cranch, 219; 2 Taylor, Ev. 8th. ed. § 1135.

The officials of the bank were chargeable with notice of Mr. Verry's authority concerning the deed. Merchants' Nat. Bank v. Ohio Co. (W. Va.) 50 S. E. 880. See also the following authorities: Dowden v. Cryder (N. J.) 26 Atl. 941; Tiedeman, Com. Paper, § 92; North River Bank v. Aymer, 3 Hill, 262; Stainer v. Tysen, 3 Hill, 279; Voltz v. Blackmar, 64 N. Y. 440; Stainback v. Reed, 62 Am. Dec. 648.

See also the case of Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. 742. The opinion in this case is by Judge Sanborn and is an instructive case upon the point here under consideration.

See also: Rohrburg v. Express Co. (W. Va.) 50 S. E. 398; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728. On principle, the following authorities are in point: Northern Trust Co. v. First Nat. Bank, 25 N. D. 74, s. c. 33 N. D. 1.

E. Smith-Petersen and *McIntyre & Burtness,* for respondent.

"A delivery may be presumed from the grantee's possession of the instrument, in the absence of proof to the contrary." Brittain v. Work

(Neb. 14 N. W. 421; Parker v. Parker (Iowa) 8 N. W. 806; Hancock v. Dodd (Tenn.) 36 S. W. 742; American v. Frank (Iowa) 17 N. W. 464; N. D. Comp. Laws 1913, § 5497; Sargent v. Cooley, 12 N. D. 1; Ueland v. More Bros. (N. D.) 133 N. W. 543.

"There is no allegation of insolvency of either the plaintiff or principal debtor, or any other fact or circumstance to bring the demand within the principles of equity jurisprudence. N. D. Rev. Codes 1913, § 7449; Roberts v. Donavan (Cal.) 9 Pac. 180; Clark v. Sullivan, 2 N. D. 105.

Mrs. Verry gave the deed for her husband's benefit to secure his debt or liability to the bank, and cannot set up any secret understanding to defeat the deed. Ueland v. More, 133 N. W. 543; People's State Bank v. Francis, 8 N. D. 369.

So far as the homestead is concerned she did not occupy a more favorable position. People's State Bank v. Francis, 8 N. D. 369, 79 N. W. 853; Omlie v. O'Toole, 112 N. W. 677; Carroll County v. Ruggles, 69 Iowa, 275; Taylor Co. v. King (Iowa) 34 N. W. 775; Blume v. Bowman, 24 N. C. (2 Ired. L.) 338; Page v. Krekey, 21 L.R.A. 409, and note; Bank v. Boddicker, 45 L.R.A. 321, and note; Hendry v. Cartwright, 8 L.R.A.(N.S.) 1056, 89 Pac. 309.

Robinson, J. For several years the defendant was the cashier of the bank. The complaint charges, and it is a fact, that in his capacity as cashier he did wilfully permit numerous accounts to be overdrawn in large sums, and that he discounted and received many worthless promissory notes, some of which were given for his own use and benefit. While the findings of the trial court are mainly and justly in favor of the defendant, still several findings are against him, and so he appeals to this court.

The trial court found that the total amount of losses and damages sustained by the plaintiff was the sum of $8,506.52, on which the defendant was given credit for the proceeds of a quarter section of land, amounting to $2,700,26, and for services, $366,25; and he was charged with the net balance of $5,353.36, for which judgment was entered, with costs, amounting to $746.52.

The costs are clearly excessive and unreasonable, and a large part

of the cost was made in trying to prove groundless charges against the defendant Verry, who was to a great extent the prevailing party. He successfully defended against the great bulk of the claims charged against him. Hence, the costs item must be divided in two parts and only one part allowed as costs.

Aside from the question of costs, three matters were argued and submitted: (1) The first relates to the delivery of four deeds, marked exhibits 4, 5, 6, and 7, made by the defendants to T. Johnson, as grantee. (2) The second relates to the claim of defendant Mrs. Verry to recover from the bank $2,700.26, the price of a quarter section which she conveyed to the bank, and which it sold and gave credit on the account against her husband. (3) The third is in regard to the delivery of certificates to the bank for fifteen shares of stock.

Verry claims that at the time when he resigned as cashier of the bank the four deeds were given by himself and wife to secure insurance notes amounting to $10,000, and no more; that the conditions of the delivery were to be shown by a written agreement, which the bank refused to make and sign after obtaining actual possession of the deeds and the stock certificates. The assignment and delivery of the stock certificates stand in the same category as that of the deeds. It is claimed that the deeds were duly made and the certificates were duly assigned and left by C. R. Verry in the bank on the bank counters, or in the actual possession of the bank; that the evidence is not sufficient to disprove a delivery of the same and the equities are all in favor of a delivery to secure the sums justly due by Verry to the bank. It is fair to presume that Verry was disposed to close his dealings with the bank by giving security to pay the sums justly due, though he properly refused to sign an agreement pledging the deeds and securities for more than the sums due.

The four deeds, exhibits 4, 5, 6, and 7, were made at the same time and in the same manner. Each deed bears date, September 20, 1913, and is made by C. R. Verry and Hattie Verry, his wife, to T. Johnson. The express consideration is $1. Each deed is witnessed by the same parties and acknowledged before the same notary public on September 22, 1913, and recorded September 27, 1913. Though the deeds are thus made and signed by "C. R. Verry and Hattie L. Verry, his wife," as if he were the owner of the land, still it is claimed that

T. Johnson and the bank are chargeable with notice that the wife owned the land described in one deed, and that she did not consent to her husband delivering that deed only as security for certain insurance notes. However, it is not fair to assume that any person is chargeable with notice of all the little confidential talks between a husband and wife. Manifestly the deeds were given into the hands of the husband for the purpose of using and delivering the same to secure some debts. The deed in question was made and acknowledged at the same time as the three other deeds, without any reservation or limitation. Hence, it is fair to assume that the matter of delivery was entirely intrusted to the husband. Such was his ostensible authority. An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be the agent who is not really employed by him. Comp. Laws. § 6324. The deed was so executed as to indicate that the husband owned the land. There is no claim that the bankers did anything to deceive or mislead Mrs. Verry. Indeed they had no knowledge of any dealings with her. The proof is positive that Verry did deliver the four deeds. "He brought them into the bank and put them down on the counter and said, 'Here are the deeds.' " At request of Verry the deeds were not put on record for five days, and in the meantime Verry did not keep good faith with the bank. He gave a mortgage for nearly $9,000, which was first put on record and wholly defeated the security given by three of the deeds. Exhibit 58 is a letter dated April 5, 1914, addressed to Thomas Johnson and the bank. It certifies that he has agreed to sell the S.W.¼ 9-156-54 and to make Houska a deed of the same. It concludes thus:

The title to said land has been conveyed to you in trust. I demand that you deed the same to Mike Houska upon payment to you of the purchase price agreed upon, from which is to be deducted the existing liens and encumbrances.—

C. R. Verry.

The signature is manifestly genuine. The conveyance was made, and, after deducting encumbrances, Verry was given credit for the balance of $2,700.26, which is the sum now claimed by his good wife. Furthermore the court does not give credit to the testimony of Verry and his wife.

There is no occasion for any waste of words. Except on the question of costs, the judgment of the trial court is clearly and unquestionably right, and it is affirmed. And in regard to the costs of the appeal, it is hard to say which party is most to blame for the long and expensive appeal record, and hence the judgment is that neither party recover any costs of the appeal. The judgment is accordingly modified so as to award plaintiff costs amounting to $373.26, and affirmed, without costs on appeal.

GRACE and BRONSON, JJ., did not participate, Honorable W. L. NUESSLE, Judge of Sixth Judicial District, sitting in their stead.

JOHN A. McGREGOR, as Administrator of the Estate of Christ Hanson, Deceased, Appellant, v. GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent.

(4 A.L.R. 1635, 172 N. W. 841.)

In an action by an administrator, brought under the Federal Employers' Liability Act to recover damages occasioned by the death of the plaintiff's intestate through alleged negligence of the defendant railway company, where the cause of action arose and the action was begun subsequent to the assumption of Federal control and before the passage of the Rail Control Act of March 21, 1918, it is *held:*

Railroads — Federal Employers' Liability Act — when cause of action arises.

1. Under the Act of Congress of August 29, 1916, authorizing the assumption, in time of war, of control by the President of systems of transportation, and under the proclamation of the President issued in pursuance thereof, prima facie a cause of action for the alleged negligence arose and became vested in the plaintiff prior to the passage of the Rail Control Act.

Effect of Federal control.

2. General order No. 50, promulgated by the Director General of Railroads, which requires that suits upon causes of action arising subsequent to December 31, 1917, shall be brought against the Director General of Railroads, and not otherwise, and which authorizes the substitution of the Director General for the carrier company as party defendant and the dismissal of the action as to the company, is not warranted by the Rail Control Act of March 21, 1918, in so far as it purports to be applicable to causes of action already vested.

Effect of Federal control.

3. Section 10 of the Rail Control Act is construed and *held* to authorize the bringing of actions against the carrier corporations during the period of Federal control.

Effect of Federal control.

4. Under the Rail Control Act, the Director General is charged with administering the transportation systems owned by the various carrier corporations, but he is not authorized to appear and defend suits brought against them.

Effect of Federal control.

5. The carrier corporations, during the period of Federal control, remains legal entities, capable of suing and being sued in the courts, and are champions of their own legal rights.

Effect of Federal control.

6. The liability or nonliability of a carrier corporation for acts of alleged negligence occurring during the period of Federal control, is not an administrative question to be decided by the Director General, but is a judicial question to be determined by the courts.

Effect of Federal control.

7. The question as to whether or not a carrier corporation may be liable for the negligence of an employee during the period of Federal control is not decided.

Opinion filed April 30, 1919.

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

Order reversed.

E. R. Sinkler and *M. O. Eide,* for appellant.

"Interpleader or intervention will not serve to dismiss the original defendant." Comp. Laws, § 7413.

Order No. 50 by McAdoo is absolutely void. The power to determine what shall be the law cannot be conferred. State v. Young, 29 Minn. 474; State v. R. Co. 38 Minn. 281; Re Wilson, 32 Minn. 145; United States v. United Verde Copper Co. 196 U. S. 297; Thorton v. Territory, 17 Pac. 896; United States v. Grimaud, 220 U. S. 506.

Murphy & Toner and *Bradford & Nash,* for respondent.

"Congress had the power to delegate the rights to the President or his representatives to issue order No. 50 (taking over the railroad systems)." United States v. Grimaud, 220 U. S. 506; Shallenberger v. Pennsylvania, 171 U. S. 1.

"McAdoo, as representative of the President, must aid in enforcing the act of Congress taking over the railroads." Ex parte Young, 209 U. S. 123; Greene v. Louisville & Interurban R. Co. 244 U. S. 506; United States v. Lee, 106 U. S. 196; Tindal v. Wesley, 167 U. S. 205.

BIRDZELL, J. This action is brought by an administrator to recover damages occasioned by the alleged negligence of the defendant in causing the death of one Christ Hanson, an employee. The Federal Employers' Liability Act (chap. 149, 35 Stat. at L. 65, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208) and amendments are relied upon. The injury resulting in the death of the plaintiff's intestate is alleged to have been inflicted on January 22, 1918. In December, 1918, the district court of Ward county, upon motion of the defendant's attorneys, entered an order substituting Wm. G. McAdoo, Director General of Railroads of the United States, as defendant in the place and stead of the Great Northern Railway Company, and dismissed the action as to the latter. This appeal is from the order of substitution and dismissal.

Accompanying the notice of motion was an affidavit by one of the defendant's attorneys stating in substance that the railway company was under Federal control and was in every way subject to the jurisdiction, management, and possession of the government of the United States, acting through the Director General of Railroads, which control commenced on the 1st day of January, 1918, prior to the accrual of the alleged cause of action; and that on or about November 1, 1918, Wm. G. McAdoo, as Director General of Railroads, promulgated general order No. 50, ordering that all actions subsequently brought based upon certain claims, including claims for death, should be "brought against Wm. G. McAdoo, Director General of Railroads, and not otherwise;" and further that, as to actions pending upon causes arising subsequent to December 31, 1917, based upon the operation of any railroad, the pleadings "may on application be amended by substituting the Director General of Railroads for the carrier company as party defendant, and dismissing the company therefrom." The order of substitution purports to have been made in conformity with the requirements of general order No. 50, and the only question

presented upon this appeal is the legal sufficiency of the order to support the action of the district court.

The President assumed control of the railroads, acting under the authority of an Act of Congress of August 29, 1916, as follows: "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." [39 Stat. at L. 645, chap. 418, Comp. Stat. § 1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095.]

The cause of action in question arose after the government had assumed control, and the summons was served on the railway company on March 22, 1918. On March 21, 1918, the so-called "Rail Control Act" was approved, and the authority for the order relied upon to support the substitution is contained in § 10 thereof. That portion of § 10 which is germane to the present inquiry is: "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 carriers; 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 transferred 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." [40 Stat.

at L. 456, chap. 25, Comp. Stat. § 3115¾j, Fed. Stat. Anno. Supp. 1918, p. 762.]

The preamble to general order No. 50, after referring to the portion of the statute above quoted, recites: "Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control, should be brought directly against said Director General of Railroads, and not against said corporations:

"It is therefore ordered," etc. (as hereinabove indicated).

Other provisions of the Federal Control Act make the operating revenues of the carriers the property of the government, and authorize contracts to be entered into between the government and the companies covering the details of compensation as well as matters relating to additions, extensions, betterments, equipment, etc. The measure of control assumed under the original Act of 1916 and recognized by the later Act of March 21, 1918, is so complete as to suggest that claims for damages might be more properly litigated as claims against the railroad administration than against the carrier corporations. Whether or not Congress has authorized this procedure, however, must be determined by the various statutory expressions concerning Federal control. If we felt at liberty to go beyond the acts of Congress, and to determine the rights of individuals and the public arising out of their relations with the carriers, it might be possible to justify such an order as the one in question as being an exercise of a war power inherent in the Executive as commander in chief of the armies. But Congress has spoken upon this subject, and we are not inclined to go beyond the legislative authority to seek justification for the order in question. It is peculiarly appropriate here to confine our investigation to the acts of Congress, not only for the reason that Congress has dealt so fully with the subject, but for the further reason that a possible liability of the government is involved, and before there could be such a liability Congress must be found to have assented.

At the time of the injury upon which this action is predicated,

control had been assumed by the President under an act which did not purport to limit in any degree the rights of the public in their relations with the carriers, except to the extent necessary to permit the full use of the transportation facilities to serve the military needs of the government. The statute was very brief and apparently was designed to authorize control for military purposes and related emergencies. Under the President's proclamation of December 26, 1917, it was expressly provided that "suits may be brought by and against said carriers and judgments rendered as hitherto, until and except so far as said Director may, by general or special orders, otherwise determine."

Such was the status of Federal control at the time the alleged cause of action arose, and it was the same at the time of the passage of the Federal Control Act in March, 1918.

It may be true, as suggested by District Judge Evans, in the case of Muir v. Louisville & N. R. Co. 247 Fed. 888–895, that this proclamation of the President has not the force and effect of law, but nevertheless it reflects the measure of control that had been assumed prior to the time of the injury alleged as the basis for the action at bar. There can be little doubt that the defendant railroad company was prima facie liable to respond in damages in causes similar to that alleged at the time the cause of action arose.

Our inquiry, then, resolves to this: Assuming that a right of action had vested in the plaintiff prior to the Act of March 21, 1918, and prior to the issuance of the order in question, does general order No. 50 operate to deprive the plaintiff of the right to maintain his cause of action; and, if so, is the order justified as an exercise of war powers under the Act of March 21, 1918?

It can scarcely be doubted that the order is intended to relieve the carrier corporations from responsibility. The preamble to the order shows that it is prompted by the notion that carriers should not be held responsible for causes arising during Federal control, and the order purports to authorize both the dismissal of the action against the carrier and the substitution of the Director General. In our opinion it cannot be successfully contended that a judgment against the substituted defendant would be binding upon the carrier corporation. The only theory upon which it could be so held is that the corporations

themselves, rather than the transportation facilities owned by them, are under Federal control, and that the Director General acts as their agent. There is clearly no room for such a construction of any act of Congress bearing upon this question. The legislation contemplates that the carrier corporations shall be permitted to continue to transact their business as formerly, except as modified by the Federal control of their transportation facilities. They may sue and be sued as formerly, and judgments obtained give rise to the same remedies for enforcement, except that their transportation facilities are not subject to levy or seizure.

In the case of United States R. Administration v. Burch, 254 Fed. 140, it was held that the railroad administration could not enjoin a sheriff from selling real property belonging to a railroad company for the satisfaction of a judgment. The property in question was held not to be a part of the system of transportation, and it was said to be a judicial question whether the control of such property could be assumed by the Director General, the court holding that it could not. In Dooley v. Pennsylvania R. Co. 250 Fed. 142, it was held, however, that traffic balances which go to make up the working or liquid capital of a railroad company are not subject to garnishment during Federal control, because "the tying up of such a fund would clearly be detrimental to the successful operation of a railroad system. . . ."

We are fully convinced that, notwithstanding Federal control of the transportation facilities, the carrier corporations are still capable of representing their own interests in litigation, which may result in judgments being obtained against them. And, since they are not under the jurisdiction of the Director General in this matter, we can see no reason why the carrier corporations should be bound by any judgment rendered in a suit in which they are denied the right to appear and defend.

It is possible that as a result of the government control of the transportation facilities the carriers are so far denied the right to direct and manage their own affairs in connection with transportation that they cannot be held liable for the negligence of an employee. If such be the case, however,—and upon this question we express no opinion,—this would merely constitute a defense to an action brought against

the carrier, and such an order as the one in question would not be needed to protect the legal rights of the corporations. Whether or not the carrier corporations are responsible for the acts of various employees and agents is a judicial question to be decided in the ordinary course of judicial proceedings, looking toward reparation in actions predicated upon alleged violations of rights, and it is not an administrative question to be decided out of hand by the Director General. It is clear to us that the carrier corporations continue as legal entities, capable of defending any suits brought against them, and that the Director General has not been authorized to assume control of their affairs to the extent of becoming the champion of their legal rights in the courts. It is therefore for them to determine upon what grounds they will contest a liability sought to be fastened upon them.

We are also satisfied that a judgment rendered in a suit in which the only defendant is the Director General would not bind either the Federal government or the Director General personally. It is clear from the order that the Director General purports to act for the government alone, and from this it follows, of course, that he is substituted as a defendant in a representative capacity. That the judgment would not bind him, therefore, is elementary. Before the judgment could bind the government it must appear that Congress has consented to the maintenance of such suits against the government. It has not so consented; but, to the contrary, it has said that suits may be brought against the carriers. This negatives an intention that they may be maintained against the government. It does not follow, of course, that the railroad administration might not voluntarily pay such judgments, if they may be termed such, as proper claims arising during Federal control.

It is true that Judge Munger held, in Rutherford v. Union P. R. Co. 254 Fed. 880, that Congress had expressly authorized suits against the Director General; but the reasoning of his opinion does not impress us as being at all conclusive. It seems to be based on the hypothesis that the term "carriers," as used in that portion of the act authorizing suits to be brought, refers to the Director General. In our judgment there can be no question whatever that the term "carriers" as so used means the corporations. The term is used in this sense throughout the act. Section 5 affords a good illustration of

such use. There it is provided that "no carrier shall without the approval of the President declare or pay any dividend in excess of its regular rate of dividends," etc., with a proviso that "such carriers as have paid no regular dividends . . . may . . . pay dividends at such rate as the President may determine." This and other provisions so clearly contemplate the continued management of the corporations by their own officers and managers, and so clearly indicate the meaning of the term "carriers" as used in expressing the authority to bring suits, as to make discussion of the question seem superfluous.

In an opinion of the supreme court of New York, just published, in the case of Schumacher v. Pennsylvania R. Co. 106 Misc. 564, 175 N. Y. Supp. 84, it is held that § 10 of the Rail Control Act is unconstitutional for the reason that it attempts to make the railway companies liable for injuries occasioned by the negligence of government employees, thus taking its property without due process of law. It was not even suggested in the case that § 10 was capable of being construed as authorizing suits against the government. So construed, it would not of course be unconstitutional, and were it susceptible of such a construction, it was the clear duty of the court to adopt it, rather than to hold the law invalid as being in violation of the Constitution. So, on the question of statutory construction, this case is a direct authority in support of the conclusion reached in this opinion.

In the case just referred to, the alleged cause of action arose at a time (May, 1918) when it would be affected by the same considerations that govern liability in this case. But as we are not called upon on this appeal to deal with the question of liability, since it cannot arise on the motion, our reference to the case is not to be considered as an expression of opinion upon this matter. For the benefit of appellant's counsel, however, who is charged with the serious responsibility of protecting the rights of his client, we call attention to the following statement in the opinion at page 577 of 106 Misc.: "The questions here presented are not whether the plaintiff has an adequate remedy for the death of her husband, but whether her judgment should be one against the Pennsylvania Railroad Company or against the Director General of Railroads. Her action was begun before order No. 50 was promulgated. Still, she might have asked for the substitution of the Director General, as provided in the order. We are not pre-

pared to say that, even at this date, after the trial and a verdict, she might not amend by substituting the Director General. Certainly, if that official should consent to such an order, the plaintiff ought not to raise serious objection." This court cannot declare the course proper for appellant's counsel to pursue; it can only determine the legal foundation for the compulsory dismissal of plaintiff's action, and the substitution without his consent of a defendant against whom he is unwilling to pursue whatever remedy he has.

It follows from the above propositions, that to sustain the order of substitution would be in effect to deny the plaintiff the right to obtain a judgment that will be binding upon anyone, and thus altogether to deprive him of the right to maintain a suit upon his alleged cause of action.

But both the President in his original proclamation, and Congress in the Act of March 21, 1918, clearly contemplated that the liability of the carriers should continue. We have previously referred to the President's proclamation and the particular portion of the congressional act which provides that carriers shall be subject to all laws and liabilities 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." It is not contended that any other act of Congress or that any other provisions of the Act of March 21, 1918, qualified the liability of carriers, and we are cited to no order of the President which purports to limit their liability. Since the liability continues, it is competent for a suitor to resort to the ordinary legal remedies to establish it, and he cannot be denied this right summarily (Muir v. Louisville & N. R. Co. 247 Fed. 897; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1–19, 38 L. ed. 55–64, 14 Sup. Ct. Rep. 240); though, of course, it would be competent to make reasonable regulations governing the procedure. A regulation which altogether deprives a suitor of obtaining a judicial determination of his right however, is more than a procedural regulation. Other orders of the Director General prescribing procedural regulations, merely, have been held valid, such as the order fixing the venue of actions. See Wainwright v. Pennsylvania R. Co. 253 Fed. 459; Rhodes v. Tatum, —

Tex. Civ. App. —, 206 S. W. 114; but see Friesen v. Chicago, R. I. & P. R. Co. 254 Fed. 875.

If it be argued that the order in question amounts to a limitation of the liability by direct authority of the President within the exception quoted above, the conclusive answer is that the liability, if any, in the instant case, arose before the order was promulgated, and the order could not be made retroactive in its effect upon the liability as distinguished from its effect upon procedure merely. Inasmuch as the order would relieve the carriers from an alleged legal liability previously incurred, we are of the opinion that it is in direct conflict with the second sentence of § 10, which provides that ". . . 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."

Reasoning in harmony with the above has recently been employed by the court of appeals of Alabama in a criminal case (Vaughan v. State, — Ala. App. —, 81 So. 417), in which a judgment of conviction was dependent upon the sufficiency of an indictment which, in turn, according to the view of the court, depended upon the invalidity of general order No. 50. The conviction was affirmed.

There are some minor questions which are so elementary that it would be unnecessary to refer to them were it not for the fact that they are made the basis of considerable discussion in the dissenting opinion of Mr. Justice Bronson. They relate to procedure. It is strongly intimated that the record does not show that the plaintiff objected to the entry of the order. Suffice it to say that the order is one which necessarily "affects the judgment," and it is one which appears "upon the record transmitted from the district court." It is therefore deemed excepted to, and it becomes the duty of this court, upon appeal, to review it. Comp. Laws 1913, § 7842.

It is suggested that the plaintiff did not claim that the Director General should be interpleaded. The order, which it is contended is law, does not provide for interpleading the Director General. It provides for substitution and dismissal.

It is also suggested that the plaintiff, by amendment of the com-

plaint or by affidavit, might have attempted to show that there was a legal responsibility claimed against the railway company. The complaint needed no amendment in this respect. If it did not state a cause of action against the defendant railway company, it was of course subject to demurrer, and the suggestion that a complaint may be aided in its allegations by an affidavit which is not part of it is so novel as to amount to an invention in pleading. It is not at all surprising, therefore, that counsel would not attempt it.

Since the foregoing opinion was written, a pamphlet has been received containing the statements of Mr. Walker D. Hines, Director General of Railroads, before the Interstate Commerce Commission of the United States Senate, concerning the extension of tenure of government control of railroads. At page 21, Mr. Hines refers specifically to general order No. 50, as follows: "At this point I want to refer to general order No. 50. That refers to suits brought against the Director General. There, again, we had a situation which was developing confusion. Of course, general order No. 50 is designed to deal with certain classes of causes of action that arise against the government while the government is in control of the railroads, causes of action for which the government is liable and for which the corporation is not liable. Claims were beginning to be made in various parts of the country that the corporation itself was not liable for a cause of action arising against the government while it was in control, and plaintiffs were being embarrassed because they were not certain where they were going to come out if they sued the corporation. It seemed a reasonable rule, and really in the interest of plaintiffs,—and it did not have any relation to anything else or cause any disturbing factors,—to provide that where those causes of action arose against the government, in effect that suits should be brought against the Director General. It still left the plaintiffs free to sue, just as they could sue before, and to make service of process on the local railroad agents, just as they could make it before. It did not, as we see it, impair the rights of the plaintiffs at all, but it cleared up the situation by making it perfectly clear that they would have a procedure that would be free from attack. Of course, that does not apply to suits brought against the corporation for causes of action arising prior to Federal control. Those would be brought as heretofore; but as to suits arising under

Federal control, where it was perfectly clear that the corporation was in no way liable, it was believed that it was in the interest of the plaintiffs themselves to give them a clear-cut procedure; and general order No. 50, so far as I understand it, does not embarrass their opportunity to sue in any locality. Of course, that is affected by general order No. 18, which I have already explained."

The validity of the order, in so far as it is compulsory upon the plaintiffs, does not depend upon the propositions advanced by the Director General. Even assuming the correctness of the two propositions,— (1) that the government is liable; and (2) that the corporation is not liable,— the order cannot be supported, for it does not appear that the Director General has been vested with any authority to control the actions of plaintiffs, who seek to establish the liability of carriers, nor with the right to intercede on behalf of the carrier corporation. The right to intervene, however, to protect the interests of the government, is not here involved and is not considered. A plaintiff who is desirous of testing merely the liability of a carrier corporation cannot be made to test unwillingly the liability of the government.

The nonliability of the carriers is, as elsewhere indicated in the opinion, a judicial, not an administrative, question, and can only be decided by a court when the defense is properly raised. As illustrative of the character of the difficulties involved in the final determination of this question, we call attention to the fact that prior to August 1, 1918, the Director General exercised possession and control exclusively through the officers, directors, and agents of the railway corporations, thus recognizing their agency to act for the corporations under his directions; while, since August 1st, all administration of transportation has been effected through officers and agents directly appointed by the Director General. These are not recognized as agents of the corporations. The legal effect of these different methods under the acts of Congress is clearly for courts to determine as the questions properly arise, unless Congress has prescribed a different mode. It appears to us that it has not done so.

For the foregoing reasons, we hold that the order in question is void as involving an unwarranted deprivation of the plaintiff's alleged cause of action, and as being contrary to the governing acts of Congress

passed to meet the war emergencies. It follows that the order appealed from must be reversed. It is so ordered.

ROBINSON, J. (concurring). I fully concur in the syllabus and in the result of the decision as written by Mr. Justice Birdzell. The Director General was not made a dictator. He had no legislative power or authority to establish a special code of civil procedure. His orders concerning the court procedure in civil actions is manifestly dictatorial and wholly void. Indeed, in this land of liberty and constitutional law, it is amazing that any person of ordinary intelligence should ever think of making or regarding such orders.

BRONSON, J. (dissenting). In order to give full consideration to the determination made by the majority opinion of this court it is deemed necessary and proper to restate the facts of the record herein.

This action was instituted in the name of Vallie Hanson, as administratrix, by service of process on March 2, 1918, upon the agent of the Great Northern Railway Company, and, on March 4, 1918, upon Nels Nelson and Edward Hall, additional defendants named in the action. The complaint alleges that the deceased, Christ Hanson, while employed as a carpenter by the Great Northern Railway Company, and while engaged in interstate commerce, was run over by a locomotive of the railway company on June 22, 1918, occasioning injuries which resulted in his death. That then the defendants Nels Nelson and Edward Hall were each, respectively, a locomotive engineer and a fireman in the employ of such railway company; that at such time, the railway company was a common carrier engaged in interstate commerce, and that this action was brought in the state court under the Federal Employers' Liability Act.

On October 9, 1918, notice of motion was served on the attorneys for the railway, returnable October 24, 1918, to dismiss the action as against said Nelson and said Hall, and to substitute McGregor as administrator in place of said Vallie Hanson. Pursuant to such motion the court did dismiss the action as against said Nelson and said Hall without prejudice, and substituted said McGregor in place of said Hanson, as administrator. On November 27, 1918, an amended complaint was verified, the same being filed in the trial court on

December 20, 1918, setting forth a cause of action upon the grounds hereinbefore stated against the railway company alone. On November 29, 1918, the attorneys for the railway company served a notice of motion, returnable December 10, 1918, to substitute the Director General as the party defendant in such action and to dismiss the said railway company as a party defendant. This motion was supported by an affidavit setting forth that the railway company was under government control and has been since January 1, 1918, that its property and its business was not now subject to the jurisdiction, management, or possession of such railway company, but that the same was under the exclusive management and control of the United States government; that the cause of action stated in the complaint arose during the period of Federal control and operation and grew out of the possession, use, control, and operation of such railway by the Director General. The affidavit further quotes the provisions of general order No. 50 issued by the Director General. To this motion, so made, no counter affidavit, nor objection of any kind, was made by the plaintiff. On December 10, 1918, the trial court ordered the Director General substituted as the party defendant instead of the railway company, and dismissed the railway company as a defendant therein.

On December 19, 1918, the plaintiff appealed to this court from the order so made. For the purpose of consideration of the principles of law applicable, the following acts of Congress, proclamations of the President, and orders of the Director General are pertinent:

The Act of Congress of August 29, 1916, granting authority to the President in time of war to assume Federal control of railroad transportation systems.

The Act of Congress of March 21, 1918, further providing for Federal control of railway transportation systems.

The proclamation of the President dated December 26, 1917, assuming Federal control of railway transportation systems.

The proclamation of the President of April 11, 1918, with reference to such Federal control.

General order No. 18 and 18–A, dated respectively April 9, 1918, and April 18, 1918, issued by the Director General, providing that suits against carriers, while under Federal control, must be brought in the county or district where the plaintiff resides at the time of the

accrual of the cause of action or in the county or district where the cause of action arose.

General order No. 26, dated May 23, 1918, providing for a stay of the trial of the actions against carriers under Federal control under certain circumstances.

General order No. 50, of the Director General, dated October 28, 1918, providing for substitution of the Director General instead of the carrier, and dismissing the company as the defendant in causes of action arising out of the operation of the railway under Federal control.

This court will take and has taken judicial notice of these acts, proclamations, and orders. The appeal, therefore, is before this court upon such record.

The majority opinion denying the right of the Director General to be substituted as the party defendant is based broadly upon the propositions that plaintiff's cause of action had vested prior to the issuance of general order No. 50 and hence could not be affected by such order, and further that, under the Rail Control Act (Act March 21, 1918), the Director General was not authorized to appear and defend suits against carrier corporations, under Federal control upon causes of action which arose through, or on account of, Federal control or operation.

The majority opinion also holds, as an incidental proposition, that such carrier corporations, while their transportation systems are under Federal control, are still capable of suing and being sued concerning matters involved or occurring during the Federal operation of such transportation system, and that the question of their liability is a judicial question.

The nature and extent of the Federal authority and control exercised in war time for war purposes over the railway transportation systems is the sole question involved.

In the recent rate cause (State ex rel. Langer v. Northern P. R. Co. — N. D. —, 172 N. W. 324) decided by this court, the writer, in a dissenting opinion, discussed at some length the war powers of Congress and nature and extent of the war powers conferred by it upon the President, under the Acts of August 29, 1916, and March 21, 1918.

Reference, therefore, is herewith made to that case without restating the same in this opinion.

It is deemed proper, however, to state broadly the general considerations or principles of law that obtain, in my opinion, in interpreting or construing the war powers of the President or of the Director General, in the Federal operation of railways.

In the Federal management and operation of the railway transportations by the President, pursuant to the acts of Congress, one of two legal conceptions must obtain.

Either, it was the intent and purpose of Congress and our government, in the exercise of these war powers, to make the transportation systems involved a Federal instrumentality, in fact, operated by and under governmental authority; or, it was the intent and purpose to use the railroads in the war emergency as private instrumentalities, for the purposes needed, leaving the railroad corporations, owning the same, responsible either in contract or in tort upon causes of action arising on such transportation systems, during the period of, and while under the operation of, Federal control.

The reasoning of the majority opinion in this case, as well as in the rate case (State ex rel. Langer v. Northern P. R. Co.) adopts, in effect, the second conception. By a narrow construction the majority opinion first find, in effect, that Congress has not authorized the Director General to relieve the railway corporation of a liability for a cause of action arising during and on account of Federal control. Then it finds that Congress, under the Act of August 29, 1916, legislated, and the President pursuant thereto, by his proclamation, declared that a cause of action would exist and vest in a plaintiff against the railway company, for acts of alleged negligence that might arise during the period of, and on account of, Federal control and operation. In effect the majority of the court treat the railway corporations as still in control and responsible for the operation of the railway transportation systems, even though managed and absolutely controlled, in fact, by the Federal government. They assert and hold that such corporations may sue and be sued as formerly, and that judgments obtained give rise to the same remedies for enforcement except that their transportation systems are not subject to levy or seizure. Then, by way of possible concession, the majority opinion further finds that it

is barely possible that the railway company is not liable for alleged causes of action that may arise as the result of the government control, but that this is a matter of defense for the railway company. And, so, the suitor is placed between the rocks of Scylla and the shoals of Charybdis, with the court denying the right to maintain an action against the Director General, and the railway companies asserting that they are not liable for acts over which they had no control, and which they did not commit. Thus, by narrow construction are the railway transportation systems treated as private agencies.

Readily, perhaps, through such grounds of narrow construction, and from such viewpoint, may the conclusion be reached that the Director General possessed no authority to issue general order No. 50, and that a cause of action did vest in the plaintiff in the month of January, 1918, against the railway corporation, irrevocable and with no right of substitution, for alleged acts of negligence occasioned by and under the Federal control and operation of the transportation system formerly operated and controlled by the corporation.

If, on the other hand, the Federal control and operation of the transportation systems taken be regarded as Federal instrumentalities operated for and by the government; if, further, the acts of Congress and the powers conferred thereby upon the President be construed in accordance with the elemental rules that what is implied in a statute is as much a part of it as what is expressed, and that when a power is conferred by statutes everything necessary to carry out the power and make it effectual and complete will be implied (Dooley v. Pennsylvania R. Co. 250 Fed. 142; Wilson County v. Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488), and if, further, the surrounding circumstances and exigencies then existing, with an approaching and pending great crisis in this nation's existence, in a time of war, be considered in understanding the intent and purpose of Congress and the objects sought to be accomplished, little difficulty is experienced in determining the nature and extent of the Federal power and the Federal control over the transportation systems.

The assumption of Federal control over railway transportation systems, theretofore operated by private corporations as individual units, with no general Federal law machinery then applicable to actual operation, was necessarily a large undertaking.

If, upon the assumption of Federal control, radical changes were then made in the form of the methods and dealings of such transportation systems, then existing in their relations with the public, the Federal administration might have been seriously embarrassed, as well as the co-operation of our people hindered and impaired, in the prosecution of the war, then threatening and almost pending.

A mere review of the acts of Congress, of the President, and of the Director General, serve to show that the Federal government tried to assume Federal control with as little disturbance as possible to the then customary formal relations of the common carriers to the public.

Thus, when the Federal control was first assumed, the actual form of the private management of such carriers, then existing, was continued; the same formal methods of securing redress for private suits was followed. Later, however, and progressively as the acts, proclamations, and orders show, Federal control in form as well as in fact was assumed. It soon became necessary to restrict the right of levying execution against the properties of the transportation systems. It became necessary to limit the places where causes of action might be maintained. Also, it became proper to provide for delay or postponement of trials of action upon causes of action arising from the Federal operation of railways. It also became necessary to prescribe additional revenue through increased rates for the maintenance of such transportation systems, and the increased expenses and pay to railway employees. It became necessary, further, to direct substitution of the Director General in place of the transportation company as defendant. And finally, under general order No. 50–A, it has further been provided that no bond or security should be required of the Director General in prosecuting an appeal upon an action maintained against him. From the Act of Congress of August 29, 1916, down to the last order of the Director General, promulgated just a few months ago, there is discerned in the acts, proclamations, and orders of the Federal authority a progressive assumption, in form as well as in fact, of direct Federal control, and operation of the transportation systems. There is disclosed, without question, an intent and purpose to consider and to treat such transportation systems as a Federal instrumentality. There really is no question that the President and the Director General have so done. There is no question that they deemed the control a govern-

mental control, a governmental operation in fact, and a government liability to exist therefor. In his report for 1918 the Director General stated, "It having been found that suits were being brought, and judgments and decrees rendered against carrier corporations on matter based on causes of action arising during Federal control, for which the carrier corporations were not responsible, general order No. 50 was issued on October 28, 1918, providing," etc.

Very recently the new Director General, Mr. Hines, before the Interstate Commerce Commission of the United States Senate, explained the reasons for the issuance of said order No. 50. In part he said: "At this point I want to refer to general order No. 50. That refers to suits brought against the Director General. There, again, we had a situation which was developing confusion. Of course, general order No. 50 is designed to deal with certain classes of causes of action that arise against the government while the government is in control of the railroads,—causes of action for which the government is liable and for which the corporation is not liable. Claims were beginning to be made in various parts of the country that the corporation itself was not liable for a cause of action arising against the government while it was in control, and plaintiffs were being embarrassed because they were not certain where they were going to come out if they sued the corporation. It seemed a reasonable rule, and really in the interest of plaintiffs,—and it did not have any relation to anything else or cause any disturbing factors,—to provide that where these causes of action arose against the government, in effect that suits should be brought against the Director General."

It ought to plainly appear that the intent and purpose of our government has consistently displayed a course of action granting and intending to grant such authority as was needed and such as the occasion demanded for the operation and control of the transportation systems as a Federal instrumentality, in fact. The majority opinion fundamentally fails to recognize that, in war times, peculiar war powers necesarily exist to enable the sovereign power to carry on and devote its supreme powers to protect its sovereignty and its people in a successful prosecution of a great war, and that necessarily in the exercise of such powers civil rights in many and numberless instances become subordinate. If, in fact, the transportation systems were operated

and controlled as a Federal instrumentality, pursuant to a power so conferred by Congress on the President, there ought to be no question that Congress had authority to authorize the President and the Director General to provide, by an order, when a cause of action could be instituted against it, founded upon a claim, in contract or in tort, occurring during the period, and on account of Federal control. If the transportation systems are federally operated as a Federal instrumentality, liabilities that arise therefrom are Federal liabilities; and causes of action, if any, that arise, are causes of action upon these Federal liabilities. The majority opinion, in attempting by narrow construction to reason out an intent of Congress providing for a suit against a carrier corporation, for acts of Federal control, are forced into a position which inferentially recognizes the right to hold responsible a railway corporation for a cause of action concerning which it had nothing to do, and for which it is not legally responsible, and it thereby presents the other situation, which permits such carrier corporation to come in the court and show as a defense that it was not so legally responsible for the cause of action alleged, on account of the roads being under Federal control.

Accordingly the cause of action which they are seeking so strongly to protect and preserve for the plaintiff is merely a sham and a fiction, unless the railway company be deemed merely a nominal defendant for the government. Concerning the nature of these war powers exercised by the President, and the extent of the same, there are now several decisions interpreting these orders issued by the Director General, or involving the exercise of Federal powers over railroads. Thus, in Muir v. Louisville & N. R. Co. 247 Fed. 888, the cause of action arose on December 20, 1917, prior to the assumption of Federal control; the right of removal to the Federal courts upon the ground that the suit arose under the Constitution or laws of the United States was denied when suit was instituted on January 9, 1918, because a cause of action had theretofore vested. In Moore v. Atchison, T. & S. F. R. Co. 106 Misc. 58, 174 N. Y. Supp. 60, where a cause of action arose for damages to property in interstate commerce prior to the assumption of Federal control, the court denied the application of general order No. 18 on the grounds that the President had no power to make an order which would destroy or extinguish a right of action

already existing against a railroad company. In Friesen v. Chicago, R. I. & P. R. Co. 254 Fed. 875, the acts of negligence complained of arose on May 21, 1916, and the court held that the action could be maintained regardless of general order No. 18 and 18a, upon a cause of action not arising out of the railway company's duties as a common carrier. Judge Munger, in this case, in construing § 10 of the Act of March 21, 1918, which provides "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," stated: "It will be noted that by the terms of § 10, the carriers are not made subject to all Federal and state laws, but are subject only to all laws and liabilities 'as common carriers.' In many relations to the public, carriers are governed, not by the rules applicable to common carriers, but by rules relating to them merely as corporations, as contracting parties, or as owing duties apart from the carriage of goods or passengers. The use of the words 'common carriers' is thus distinguished from the word 'carriers,' which is used in the first sentence of this section and in many places in the same section, and in other sections of the act. The probable effect of the discrimination in the use of these words was pointed out in the debate in the Senate (56 Cong. Rec. 3576, 3580). If Congress had desired to leave to the President the entire control and management of the railways of the United States by executive orders, the former act of Congress did not require amendment; or, if Congress desired to continue the grant notwithstanding the careful restrictions in the second act, it could have employed the words 'carrier' or 'railway companies,' instead of the words 'common carriers,' and omitted the words 'except so far as may be inconsistent with the provisions of this act.' The plain meaning of the words used in this section is that the laws then existing governing the relationship of the railways as common carriers were to remain in effect except when they were inconsistent with the terms of that act of Congress or of any other act applicable to Federal control or with any order of the President. Orders of the President relating to the carriers' duties and liabilities, other than as common carriers, were not authorized by this portion of § 10. The authorization

of the bringing of an action at law as then provided by law, against the railway company, upon a cause of action not arising against it as a common carrier, was therefore not subject to an order of the President limiting the districts in which such an action could be commenced, because of anything contained in this section of the act of Congress."

In United States R. Administration v. Burch, 254 Fed. 140, where an execution was levied upon railroad property not used or essential to the performance of the duties of the railway company, or of the Federal government as a common carrier, it was held that the Federal government was not in possession of such property, and that therefore the exemption from execution, under the Act of Congress of March 21, 1918, did not apply. In Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114, a cause of action arose on January 23, 1917, when the plaintiff was injured while crossing the tracks, in the switch yards, of the defendant railway companies. The action was commenced in August, 1918. The defendant railway companies filed pleas in abatement, alleging Federal control and supporting their motions by general orders No. 18 and 18a and 26. It was held that these orders were authorized by the congressional acts, and that they applied to the instant case, the plaintiff's right to sue not being infringed. In Rutherford v. Union P. R. Co. 254 Fed. 880, an action for damages was brought against the railway company sustained by a passenger after December 31, 1917. The suit was instituted on October 26, 1918. The railroad company presented a motion to substitute the Director General as the defendant pursuant to general order No. 50. The plaintiff claimed that under the terms of § 10 of the Act of March 21, 1918, which provides "actions at law, or suits in equity may be brought against such carriers and judgment rendered as now provided by law," entitled him to maintain such action, and that order No. 50 violated this provision. With this decision, the majority opinion necessarily must, and does disagree. Judge Munger, in part, stated:

"From and after the taking possession of the railroads by the President, the corporations or persons who had previously controlled them ceased their functions and obligations as carriers. While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employees. who retained their positions and conducted the details of operation, were the

acts of the Director General. The part of § 10 of this Act of March 21, 1918, on which the plaintiff relies, did not provide that actions at law might be brought by and against the railway corporations, but did provide that they might be brought against 'such carriers,' and this referred to the 'carriers while under Federal control' mentioned in the first part of the section. It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been devested of authority over those acts. Moreover, the language which immediately follows that portion of the statute relied on by plaintiff demonstrates that the 'carrier' who is subject to suit is the agent of the President, who is operating the railroads. The language is: '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.'

"The corporations or persons who had lost control and possession of the railroads would have no occasion to assert the defense that they were instrumentalities or agents of the government as to acts which occurred after their control had terminated.

"Under these acts of Congress and the proclamation of the President the Director General is a carrier. He conducts the business of receiving and transporting goods and passengers for hire. A receiver of a railway company is a carrier as to the goods and passengers transported (United States v. Nixon, 235 U. S. 231, 234, 59 L. ed. 207, 208, 35 Sup. Ct. Rep. 49; United States v. Ramsey, 42 L.R.A.(N.S.) 1031, 116 C. C. A. 568, 197 Fed. 146), and the office of the Director General is analogous to that of a receiver of the railway companies.

"By the acts of Congress, the President was given authority to exercise the control of the railroads by such agencies as he should determine. He may appoint one or many persons, or one or many partnerships or corporations to carry out his will and to perform the business of carriage of goods and passengers over the several railroads. The purpose of Congress in the giving the right to bring suits against the carriers was to give the right of suit by or against any of such agencies as should be engaged in the actual control of the operations of the railroad after the President assumed control. The order of the Director General, therefore, does not conflict with the language

of this statute, but is pursuant to and in execution of it, and was authorized by the power conferred on him."

In Cocker v. New York, O. & W. R. Co. 253 Fed. 676, the cause of action arose on August 9, 1916; the action was commenced against the railway company in the Federal court in New York contrary to the provisions of general orders No. 18 and No. 18a. The plaintiff's ward was injured at Scranton, Pennsylvania. Motion was made in June, 1918, to stay the trial under general order No. 26. The court assumed that the Director General had the power to make these general orders, and that they had the force and effect of law, and granted the motion. In Wainwright v. Pennsylvania R. Co. 253 Fed. 459, the plaintiffs brought an action under the Federal Employers' Liability Act for the death of her husband on December 26, 1917, while engaged as an employee of the railway company, through its alleged negligence. The action was instituted May 6, 1918, in the Federal court of Missouri. The deceased resided and the cause of action arose in Pittsburgh. The defendant entered a plea of abatement setting up general orders Nos. 18a and 26. It was held that Congress had authority to authorize the general orders in question to apply to the Federal courts; that the right to maintain an action in any particular court is subject to the legislative will; that it is only when one is deprived of all rights to maintain an action for redress of his wrongs that the statute would be obnoxious to the 5th Amendment of the statute. The court cites for illustration the Carmack Amendment, authorizing an action against the receiving carrier regardless of the fact that the loss or damage sued for was covered by the damage of a connecting common carrier. Also the Act of February 24, 1905, chap. 778, vesting exclusive jurisdiction of actions on bonds of contractors for the construction of public works in the courts of the district in which said contract was to be performed and executed. It was further held that the act of Congress was not void because vesting administrative officers with legislative discretion or power, citing Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, L.R.A.1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856.

The court construes § 10 of the Act of March 21, 1918, with reference to the general orders in question, and as to whether Congress granted power so to make, as follows: "Counsel for plaintiff contend

that it does not, relying upon that part of § 10 of the act which reads: 'Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law.'

"In the opinion of the court all this quotation means is that any person having a cause of action shall not, by reason of this act or any regulation made thereunder, be deprived of the right to maintain it in a proper court, if, under the state, Federal, or common law, he is entitled to a legal remedy. It does not mean, as claimed, that, having a cause of action against the carrier, he has the right to institute it in any forum in which he could have brought it before the passage of this act."

In Dooley v. Pennsylvania R. Co. 250 Fed. 142, decided May 10, 1918, garnishment process was served on certain railway companies on January 29, 1918. The disclosure showed that the garnishees had certain traffic balance in their hands belonging to the defendant railway company. The defendant company and the garnishees had been taken under Federal control prior to the garnishment. Motion to quash was made under provision of the proclamation of the President dated December 26, 1917, providing as follows: "Except with the prior written assent of said Director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments entered as hitherto until and except so far as said Director, may by general or special order, otherwise determine."

It was held that the President under the Act of August 29, 1916, authorizing Federal control, was fully authorized and warranted to prohibit levies by attachment or execution upon properties used by transportation systems in the conduct of their business of common carriers while under Federal control. The court said concerning the rule of construction: "It is elementary that what is implied in a statute is as much a part of it as what is expressed. Wilson County v. Third Nat. Bank, 103 U. S. 770–778, 26 L. ed. 488–491; Little Rock v. United States, 43 C. C. A. 261, 103 Fed. 420. It is also elementary that, when a power is conferred by statute, everything necessary to carry out the power and make it effectual and complete will be implied. 26 Am. & Eng. Enc. Law, 2d ed. 614, and cases cited. This is the

same principle that is well established in the law of agency. Mechem, Agency, 2d ed. 789."

In Schumacher v. Pennsylvania R. Co. 106 Misc. 564, 175 N. Y. Supp. 84, the plaintiff brought the action for the death of her husband, killed while working as a yard master near Buffalo in the month of May, 1918. The railway company alleged in its answer that its transportation system had been taken over by the Federal government, and that it was not legally responsible for the accident. The trial court overruled the objection, and a verdict resulted for the plaintiff. Upon motion for a new trial it was held that § 10 of the Act of March 21, 1918, authorizing actions and judgments against carriers for damages sustained by employees, while the railroad is being operated by Federal authorities, was unconstitutional because it subjected to liability and seizure the property of the railway company for injuries to its former employee, while its property is under Federal control. It is also held that the act was also unconstitutional because taking private property for public use without just compensation, and because it deprived the railroad of the equal protection of the law in subjecting its property to liability and seizure for injuries to a former employee while its property was under Federal control. The court in construing § 10 of the Act of March 21, 1918, stated as follows:

"Section 10 expressly authorizes 'judgments rendered as now provided by law.' If this language means anything, it means a judgment having all the essential features of ordinary judgments obtained in the usual way, and negatives the claim that such a judgment is merely a method of ascertaining the liability of the government. A judgment of a court of competent jurisdiction is something more than a mere declaration of liability. It necessarily carries with it the right of satisfaction, the right to resort to the usual and ordinary proceedings provided for its collection. It directs and decrees that the successful party 'recover' of the defeated party a sum stated and have execution therefor. Judgments not only establish a liability, but give the right to collect.

"The Federal government, in the control and operation of the railroad properties taken over, is in no sense the agent or representative of the railroad companies to whom the systems belong. By the 12th section of the act the moneys and other property derived from the

operation of the carriers during Federal control are 'declared to be the property of the United States.' If a profit is realized from such operation, the profit belongs to the United States. By § 8 the President is given power to exercise the powers granted him with relation to Federal control 'through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith.' In other words, the Federal government, in the operation of the systems taken over, acts as the principal, and not as the agent, of the owners of the transportation systems, becoming a lessee of the railroad on terms agreed upon between it and the companies. Where no agreement as to rentals is reached, and where no such formal leases are entered into, the government is to pay such a rental as may be thereafter determined reasonable and just by and in the methods prescribed. In short, the relation between the government and the carrier is nothing more or less than that of lessor and lessee; the lessee operating the road for itself and on its own account. The employees engaged in operating the various systems are for the time being at least the government's servants and agents, subject to its directions, paid by the government, and subject to dismissal by it. This relation of the government and the carrier between themselves and to their employees and to the general public has been fully and repeatedly recognized by a series of orders issued by the Director General of Railroads under Federal control. We need but instance what is known as general order No. 8, by which the Director General directs that all acts of Congress to promote the safety of employees and travelers must be complied with, and then proceeds in this language: 'Now that the railroads are in the possession and control of the government, it would be futile to impose fines for violations of said laws and orders upon the government; therefore it will become the duty of the Director General in the enforcement of said laws and orders, to impose punishments for wilful and inexcusable violations thereof upon the person or persons responsible therefor, such punishment to be determined by the facts in each case. . . .'

"The questions here presented are not whether the plaintiff has an adequate remedy for the death of her husband, but whether her judgment should be one against the Pennsylvania Railroad Company or against the Director General of Railroads. Her action was begun

before order No. 50 was promulgated. Still she might have asked for the substitution of the Director General, as provided in the order. We are not prepared to say that, even at this date, after the trial and a verdict, she might not amend by substituting the Director General. Certainly, if that official should consent to such an order, the plaintiff ought not to raise serious objection."

With this case, again necessarily, the majority opinion herein must disagree.

In the case of Vaughan v. State, — Ala. App. —, 81 So. 417, decided March 18, 1919, an appeal was taken from a verdict rendered by the jury, upon an indictment charging the defendant with concealing or receiving certain tobacco, the property of the railway company. Upon appeal it was contended in the bill of exceptions that there was a fatal variance between the averment and the proof, because the railway system, at the time, was under Federal control. The court held that the identity of the carrier was not destroyed, nor was it rendered wholly impotent in respect to its functions in the conduct of business. That it was sufficient to lay the ownership of the goods in question in the railway corporation in an indictment for the larceny thereof. The court discusses general order No. 50, and questions whether the making of the same is within the scope of the Director General's authority. The court said that, assuming that such order was within his authority, it was sustainable on no other theory than that the transportation companies themselves are under Federal control. Also the court stated that the apparent theory of general order No. 50 is that, while the carriers are operating under Federal control, they are mere agents of the government, and, if liabilities for their torts and the torts of the employees exist, it is against the government, and not the carrier. The court further said: "There is no proof in this case that the railroad administration, in the exercise of Federal control, has excluded the transportation companies from the exercise of their functions in the operation of their respective systems, and we cannot assume that it has done so, contrary to the manifest purpose and spirit of the authority conferred by the act of Congress and the proclamations of the President. The foregoing considerations lead us to hold that the Louisville & Nashville Railroad Company is under Federal control and is exercising its functions and operating its system as an agency of the government, and

as such was bailee of the property alleged to have been stolen, and the ownership thereof was properly laid. This disposes of all questions presented by the record, and, finding no error therein, the judgment will be affirmed.

The court further states: "If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employees of the Federal government. Such an act would be an arbitrary exercise of legislative power, contrary to the established principles of private rights and distributive justice, and tantamount to a denial of due process of law."

This case is cited and relied upon by the majority opinion.

In Commercial Club v. Chicago, M. & St. P. R. Co. 41 S. D. 314, P.U.R.1919C, 52, 170 N. W. 149, decided December 31, 1918, where the question involved was the right of the Board of Railroad Commissioners to compel the railway company to construct and maintain a connecting track. Upon appeal, the court directed the Commissioners to withhold action during such time as the government retained control of the railroads, unless the consent of the government be secured. The court said: "As a war emergency act, the United States government has assumed control and management of most of the railroads of the country, including those involved in this case as well as the material and labor necessary for the construction and extension thereof. So long as this condition exists, the order of the Board of Railroad Commissioners cannot be enforced without the consent of the government, and, so long as this condition exists, an attempt by this court to enforce such order would be futile."

We now come to a consideration of the main proposition, upon which the majority opinion rests, that a cause of action had vested in the plaintiff, prior to the issuance of this order involved herein. Pray, what cause of action did the plaintiff possess against the railway corporation in the month of January, 1918? The accident occurred through alleged negligence of operatives employed by the Federal government, and on account of alleged negligence occurring during Federal control. At that time the railway corporation had then no control or domination over the management or the operation of its transporta-

tion line. It then had no control over its employees. The mere fact that Congress or the President, prior thereto, had permitted an action to be brought against such railway corporation does not mean that Congress legislated that the corporation should be liable for acts over which it had no control. If so, there is no reason why the cause of action should not now proceed to trial against the defendant railway company; why judgment may not be rendered and execution enforced out of the private property of such railway company not used for transportation purposes.

It is apparent that such reasoning is not sound. The unsoundness thereof is practically admitted by the majority opinion when it further asserts that possibly the defendant railway company may not be liable for such acts, but that the right to sue such defendant company thereby should not be denied. Ordinarily, if a cause of action is vested the same is termed a property right, and the plaintiff is entitled to pursue it, and to recover and enforce a judgment against the party against whom such cause of action is vested. Clearly, in the majority opinion, the so-termed vesting of the cause of action has not been considered.

If the majority opinion mean by the term "cause of action" a claim which may be enforced, subject-matter for which an action may be brought, the subject-matter of the controversy, the ground or reason for the action, or the ground upon which an action may be maintained, as sometimes defined in the abstract, or as the facts which give rise to an action, or the existence of those facts which give a party the right to judicial interference in his behalf, as often defined in reference to pleadings (1 C. J. 936), Congress or the Director General have not attempted to deny plaintiff his cause of action. The question whether Congress could so deny the plaintiff his cause of action, being in effect against the sovereign power and its consent therefor being necessary, is not before us, because Congress and the Director General have specifically permitted such cause of action to be maintained.

If the majority opinion mean by the term "cause of action" the right to maintain the same against the railway company, whether it be liable or not, whether there is any liability under the terms of the Federal Liability Act or not, simply because the plaintiff has the right to sue whom he pleases, then the answer is that such alleged cause of

action never did vest in the plaintiff. For, under any fundamental consideration, there first had to be a right in the plaintiff and a breach of duty or a wrong in relation thereto by the defendant (1 C. J. 938). No breach of duty is predicated in the majority opinion on the part of the defendant railway company. On the contrary, the opinion entertains doubt whether there is any liability. It asserts that Congress has legislated a cause of action; that the state court will not deny the plaintiff the right to maintain it against such company.

Thus do we proceed around the circle.

The only cause of action possessed in any event by the plaintiff in the month of January, 1918, upon the face of the complaint, was a cause of action against a common carrier engaged in interstate commerce under the Federal Employers' Liability Act. Under the terms of this act, which could be maintained only pursuant to congressional authority, a cause of action exists only when the defendant is a common carrier by railroad, then engaged in interstate commerce, and while the employee is so engaged. Note in 47 L.R.A.(N.S.) 74; Taylor v. Southern R. Co. 178 Fed. 380. Under its authority to regulate interstate commerce, Congress legislated concerning the liability of such common carriers, and upon the passage of such act it superseded all state legislation or authority of the state concerning such subject-matter. Note in 47 L.R.A.(N.S.) 47; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

In the case of Mondou v. New York, N. H. & H. R. Co. supra, it was contended that this act was not in accord with the policy of the state respecting the liability of employers to employees for injuries received by the latter while in the service of the former. In other words, that the act interfered with the local laws of the state as well as the local jurisdiction of the courts. In that case the court said: "The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for

all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state."

Then again, under the very terms of the Employers' Liability Act, the state court is given a concurrent jurisdiction with that of the Federal courts upon the cause of action created thereunder. Fed. Stat. Anno. Supp. 1916, p. 761; Mondou v. New York, N. H. & H. R. Co. supra; note in 47 L.R.A.(N.S.) 72. Although matters related to procedure and practice are generally governed by state laws, yet the state courts may not so proceed as to work a change in the terms of the Federal statutes or in the enactments of Congress with relation thereto. Fed. Stat. Anno. Supp. 1916, p. 768. Accordingly the plaintiff's cause of action exists only pursuant to congressional authority. The Federal government upon assuming Federal control did not become an agent or representative of the railway company. Schumacher v. Pennsylvania R. Co. 106 Misc. 564, 175 N. Y. Supp. 84. The majority opinion of this court concede that the Director General does not act as the agent of the railway company. Therefore the conclusion inevitably follows that the acts of the government in the Federal control exercised, in fact, are government acts, are the acts of Federal instrumentalities, are government acts as common carriers; in place of the corporations formerly acting and operating as common carriers. Consequently, on the face of the complaint, no cause of action exists as against the defendant railway company as such. The common carrier engaged in interstate commerce in the month of January, 1918, was a Federal instrumentality; the government control then operative. A control that reached not only to the employment and pay of the employees, but reached also into every action of the transportation systems in its operations.

It therefore ought to appear that the duties and obligations of common carriers were assumed by the Federal government in law as they were and have been assumed in fact. No other logical conclusion can be drawn from the acts of Congress and the acts of the President and the Director General thereunder, unless it must be assumed that the former carrier corporations are to be held responsible for acts and obligations not of their making and over which they had no control.

It therefore follows that in the month of January, 1918, the plain-

tiff possessed no cause of action, on the face of his complaint, against the defendant railway company, excepting such right as Congress and the President has theretofore prescribed for bringing an action to determine the liability of the Federal control. In other words, the only reason why the defendant railway company could be sued nominally as a defendant, prior to general order No. 50, was through the express consent of Congress providing for such a method of bringing a cause of action that arose during the period and on account of Federal control, to trial and determination. If the alleged cause of action had existed in ordinary times against such company, prior to Federal control, there would have been no question of the right of the court to substitute the receiver of such corporation as a party defendant in place of such company, or if another corporation had succeeded to all of its rights and liabilities, to substitute such corporation as the party defendant.

The power of Congress to provide for a change of the party defendant ought to appear clear. Its authority to confer this power upon the President likewise ought to appear clear. That it did grant this power to the President can be drawn from the express and implied provisions of the Act of March 21, 1918. In the act it granted to him all necessary powers to make effective a Federal control and operation of railroads. Section 9 of the act in part states: "The President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred." [40 Stat. at L. 456, chap. 25, Comp. Stat. § 3115¾i, Fed. Stat. Anno. Supp. 1918, p. 762.]

It gave him power to appoint a Director General (§ 8).

This was not an improper delegation of power. (Rhodes v. Tatum, — Tex. Civ. App. —, 206 S. W. 114; Cocker v. New York, O. & W. R. Co. 253 Fed. 676; Wainwright v. Pennsylvania R. Co. 253 Fed. 459; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, L.R.A. 1918C, 361, 38 Sup. Ct. Rep. 159, Ann. Cas. 1918B, 856, L.R.A. 1918E, 1015).

To these express powers should be applied, under elemental rules of construction, the implied powers (Dooley v. Pennsylvania R. Co. 250 Fed. 142, and Wilson v. Third Nat. Bank, 103 U. S. 770, 26 L. ed. 488, supra). The orders, therefore, of the Director General, when made, had the force and effect of law, the same as if made by Congress.

Viewing, therefore, the Federal control and operations of the transportation systems as a Federal instrumentality, it is apparent that Congress had the power to provide how and in what manner actions might be maintained concerning alleged breaches of contract or of legal duties arising or occurring during and on account of the Federal administration and operation of such transportation systems. No attempt has been made either by Congress or the Director General to change the cause of action. The Federal authority has simply provided against what representative of the Federal government the cause of action shall proceed. The majority opinion, in part, concedes that general orders 18 and 26 might be sustained because procedural. Clearly if these orders are valid, so likewise is general order No. 50. If the action were one against a state official as such, concerning his official duties, there would be no difficulty in appreciating the right of the court to substitute his successor, as the party defendant, upon his death, resignation, or lapse of office.

Furthermore, it is to be recognized that, regardless of whether Congress or the President possessed the authority to take over the Federal control of the common carriers, and operate and manage the same, the fact is that they did, and that they have operated and managed the same without any participation, control, or supervision by the corporations in the performance of the common-carrier duties theretofore performed by them. In consequence there is no cause of action alleged under the Federal Employers' Liability Act as against the defendant railway company.

But the majority opinion further contends that the trial court substituted the Director General as a party defendant without the consent of the plaintiff, and that the plaintiff had the right to have the court determine, as a judicial question, the liability or nonliability of the defendant railway company, and that the liability or nonliability of the defendant company is a judicial question, and not an administrative question to be determined by the Director General. True it may be that it is for the court to determine who is liable upon the alleged cause of action, in accordance with the law applicable thereto. On the other hand it is not the function of the courts to judicially legislate a defendant upon an alleged cause of action. Congress possessed the authority to legislate concerning the acts of negligence or breaches of duty or

obligation that might occur during the period of control. It did legislate. The majority opinion draws its conclusions from this legislation, and the powers exercised under it. The judicial question arises upon the interpretation of the nature and extent of this legislation and the powers so exercised.

Under fundamental rules of procedure, the trial court possesses the power to make the substitution as it did in this case and to dismiss the railway company as a party defendant. The trial court might have interpleaded the Director General upon principles of intervention. No objection, as heretofore stated, was made by the plaintiff to the action taken by the trial court. No claim was made by the plaintiff that the Director General ought to have been interpleaded and the railway company remain a party defendant. No attempt was made on the part of the plaintiff by amendment of the complaint, by affidavit, or showing of any kind, that there was a legal responsibility claimed against the railway company in the face of the undisputed motion and affidavit papers submitted by the defendant railway company. On the face of the record, therefore, in connection with the matters of which this court takes judicial notice, there existed before the court no cause of action alleged against the railway company. Under elemental rules, "no person is liable to be sued for any injuries for which he is not the cause," and "no person can be sued who has not infringed upon the right in respect of which the action is brought." Dicey, Parties to Actions, Rules 7 & 96; 30 Cyc. 102.

No objection having been made by the plaintiff, the trial court therefore did not err in substituting the Director General as the party defendant.

Again, the determination of this court turns upon the opinion of Justice Robinson, who concurs only in the result of the opinion as written by Justice Birdzell, and who, in the fashion of an *"ipse dixit,"* determines that the Director General was not made a dictator.

BRONSON, J. (addendum). Since the foregoing dissenting opinion was prepared, the majority opinion of this court, written by Justice Birdzell, has been changed somewhat. In this amended majority opinion the case of Schumacher v. Pennsylvania R. Co. 106 Misc.

564, 175 N. Y. Supp. 84, is quoted as direct authority for the conclusion reached in such majority opinion.

In a prior part of such majority opinion it is stated and held that Congress has said that suits may be brought against the carriers pursuant to § 10 of the Rail Control Act (as stated in the syllabus). Then the opinion quotes said New York case, holding such section to be unconstitutional and the statement of that court that plaintiff might have asked for the substitution of Director General, the action having been instituted prior to the promulgation of general order No. 50.

It is difficult indeed to understand the reasoning by which the majority opinion assumes that these holdings of that court are authority for the conclusion adopted by the majority in this case. The New York case directly states and holds that the plaintiff has no cause of action against the railway company upon acts or liabilities occurring during and on account of Federal control, and so necessarily it would hold in this case. It suggests to the plaintiff that he might have asked for substitution of the Director General, and if that officer should consent the plaintiff ought not to raise serious question. The court, in that case, suggests the very thing that was done in this case, with the consent of the railway company and the Director General, by the order of the court and without the objection of the plaintiff.

The majority opinion, therefore, is simply forced into the position of holding to a technical course of procedure, namely, that a party cannot be substituted in place of a party defendant, by order of court, unless the plaintiff so requests or consents thereto on the face of the record, even though such plaintiff has no cause of action on the face of the complaint against the defendant named, even though the Director General is the proper defendant, and even though, further, the plaintiff should have requested and asked for a substitution of such Director General. Through two courts already this action has dragged. Now, perchance, the action will proceed to demurrer or some other form of special motion and again proceed to this court for another construction, while the party plaintiff still awaits his ultimate remedy. The majority opinion practically concedes, by its suggestion to the appellant that a substitution ought to be had, the validity of general order No. 50. If it were a statutory rule of this state, such opinion would have

no difficulty in sustaining the substitution. Clearly it has this force and effect in this action brought under the Federal Employers' Liability Act. In our opinion, clearly, the order should be affirmed.

ALICE E. MARTIN, Appellant, v. ANNIE KENEFIC O'BRIEN, Respondent.

(173 N. W. 809.)

Action to quiet title — adverse possession — what constitutes.

This is an action to quiet title to a quarter section of land in Ramsey county. As the proof shows the title stands of record in the name of the defendant, but the plaintiff is the owner of the land, and she and her deceased husband have been in actual and adverse and continuous possession for over twenty years and have paid all taxes. Hence, the title of plaintiff is quieted and confirmed.

Opinion filed November 30, 1918. Petition for rehearing filed May 9, 1919.

Appeal from a judgment of the District Court of Ramsey County, Honorable *C. W. Cooley,* Special Judge.

Plaintiff appeals.

Reversed and remanded.

J. C. Adamson and *H. S. Blood,* for appellant.

Where the plaintiff in ejectment has been in possession of the land for nearly thirty years, the fact that the land was embraced in a deed to the defendant is not sufficient to defeat the plaintiff's title. Jones v. Graham, 80 Ga. 591; LaFrambois v. Jackson, 8 Cow. 589, 18 Am. Dec. 473; Draper v. Shoot, 25 Mo. 197, 69 Am. Dec. 462.

To constitute an adverse possession there need not be a fence, building, or other improvement made; it is sufficient if visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute. Ewing v. Burnet, 11 Pet. 53; Wallace v. Maxwell, 51 Am. Dec. 380; 1 Am. & Eng. Enc. L. p. 888.

The testimony of respondent that she had executed no deed to anyone, on account of her being a party to the action her evidence is incompetent, and the court cannot consider such testimony in an action of

this nature. Regan v. Jones, 14 N. D. 691, 105 N. W. 613; Dowdy v. Watson, 115 Ga. 42, 41 S. E. 266; Webb v. Simmons, 3 Ga. App. 639, 60 S. E. 334; Georgia Chemical Works v. Cartledge, 77 Ga. 547, 4 Am. St. Rep. 96; Jarvis v. Andrews, 80 Ark. 277, 96 S. W. 1064; Steinwand v. Brown (N. D.) 166 N. W. 129; Nash v. Land Co. 15 N. D. 566, 108 N. W. 792.

In making up the time required by statute to acquire title to land by adverse possession, the wife is entitled to tack her possession to that of her deceased husband. Georgia Chemical Works v. Cartledge, 77 Ga. 547, 4 Am. St. Rep. 96; Jarvis v. Andrews, 80 Ark. 277, 96 S. W. 1064; Stein v. Brown (N. D.) 166 N. W. 129; Nash v. Land Co. 15 N. D. 566, 108 N. W. 792.

W. M. Anderson, for respondent.

In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under an insubordination to the legal title, unless it appears that such premises have been held and possessed adversely, to such legal title for twenty years before the commencement of such action. Comp. Laws 1913, §§ 7365, 7370, relating to landlord and tenant.

Where possession is originally taken under the true owner, a clear, positive, and continued disclaimer and disavowal of title, and an assertion or an adverse right brought home to the true owner, are indispensable before any foundation can be laid for the operation of the Statute of Limitation. If this were not so the greatest injustice might be done. Without such knowledge the owner has a right to rely upon the fiduciary relation under which the possession was originally taken and held. 1 Cyc. 1022.

The possession of one who recognizes or admits title in another, either by declaration or conduct, is not adverse to the title of such other, until such occupant has changed the character of his possession, either express declaration or the exercise of actual ownership inconsistent with a subordinate character. 1 Cyc. 1033.

The mere fact that claimant has had possession of the land for the

statutory period will not suffice to satisfy the rule requiring the disseisor's possession to be hostile. 1 Cyc. 1026 and cases cited.

ROBINSON, J. The plaintiff is the widow and the legal successor of Daniel E. Martin. She brings this action to quiet her title to the southwest quarter of section 1—Twp. 155—Range 63. To a person who has lived in this state from early territorial times, and who knows how the titles were then acquired, the case presents not the least shadow of doubt. It is true the record title is in the defendant, but that is a matter which she just recently discovered.

In May, 1884, in the United States Land Office in Grand Forks, entry was made of the land and a receiver's receipt showing payment of $200 was issued to Elizabeth Kenefic. Then she made to her brother Daniel E. Martin a warranty deed of the land. As a question was raised concerning the validity of the entry, Martin through Frank Wilder quitclaimed the land back to the United States. Then he caused his sister, the defendant, to file on the land, and in December, 1889, in consideration of $200, the receiver of the United States Land Office issued the usual duplicate receipt for this land to Annie Kenefic. She at once mortgaged the land for $1,200, and in the course of a year the mortgage was paid by Daniel Martin. Doubtless at the time of mortgaging the land Annie Kenefic made to Daniel Martin a deed of the land in the same manner as her sister had done. But he wisely held the deed from record so as not to furnish evidence that the entry had been made for him. Manifestly the two sisters filed on this land and made entry of the same for Dan Martin, their brother. Neither of the sisters ever cultivated the land, made any improvements on it, or paid out a dollar for the making of final proof and entry. That was all done by Dan Martin. He caused the land to be mortgaged; he mortgaged it several times and paid the mortgages. From 1884 until the time of his death, in 1909, his possession of the land was continuous. During all of that time as owner in fee he was in the actual, open, adverse, and undisputed possession of the land, and he paid all taxes against it. And since then, the plaintiff, his legal successor, has continued in the open, adverse, and undisputed possession of the land and has paid all taxes against the same.

Just before this action was commenced, the plaintiff obtained an abstract of title and discovered that the title of record stood in the name of Annie Kenefic and applied to her for a quitclaim. In that way defendant discovered that the title was in her name and she concluded to hold it. The facts speak louder than words, and show beyond question that the plaintiff owns the land and the defendant has no title or interest in it. Hence, the judgment must be reversed and a judgment entered to the effect that the plaintiff is the owner in fee of the land and that her title be quieted and confirmed.

Reversed and remanded.

BIRDZELL, J. (concurring specially). I concur in the reversal of the judgment in this case for the reason that, as I view the evidence, it establishes quite conclusively that the claim asserted by the defendant Annie Kenefic O'Brien is barred by the Statute of Limitations.

It is an established rule in this jurisdiction that § 7381, Compiled Laws 1913, which is a part of the Statute of Limitations, is more than a statute of repose (Steinwand v. Brown, 38 N. D. 602–611, 166 N. W. 129), and we see no distinction in this respect between the ten-year statute (§ 7381, supra), and the twenty-year statute (Comp. Laws 1913, § 7362).

Section 7392 provides that no action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question within twenty years before the commencement of such action. See authorities cited in the note in 46 L.R.A.(N.S.) 506.

If the possession of Daniel Martin and of Alice E. Martin had been adverse for the period of twenty years, the plaintiff in this action is, under the rule stated, entitled to have her title quieted as against the claim of the defendant, which can no longer be successfully vindicated by reason of the Statute of Limitations.

In my opinion the evidence does show that the possession of Daniel Martin was adverse. The evidence upon which this conclusion of fact is based is that which describes the relation between Daniel Martin and his sister at the time the first proof was made, at which time a warranty deed was given by the sister making the proof; the

transactions with respect to the various mortgages which show that the land from the beginning was used by Martin as security as though it were his own; the fact that for many years Martin and his sister, the defendant, Annie Kenefic O'Brien, lived in the same neighborhood; that Martin farmed the land all of the time; that there is no evidence that any rental was ever paid to the defendant or that any claim was ever asserted by her,—that, though Daniel Martin died in October, 1909, and the possession of the plaintiff and appellant continued from that date until the commencement of this action on the 29th day of October, 1917, there is no evidence that any rental was ever paid by the plaintiff to the defendant or that any claim of any sort was ever made by the defendant during this period as owner of the property in question.

The evidence, embracing the relationship assumed by the parties themselves to the land in question, is much more convincing to my mind than the testimony of the brother, which tends to show that Daniel Martin in his lifetime continued to recognize the right of his sister to the land.

The circumstance of the land being assessed in the name of the defendant is, in my judgment, not of any greater importance than the character of the record title itself; for it is universally known that the assessment is in the name of the record owner as a matter of course, and that in reality real property taxes are assessed *in rem* rather than *in personam*. There is no evidence that Annie Kenefic O'Brien has ever paid any taxes on the property in question; on the contrary it appears that the taxes have uniformly been paid by the plaintiff since the death of Daniel Martin and by him prior to his death.

Upon this record I am convinced that Daniel Martin in his lifetime was in adverse possession of the land, and that after his death his widow continued in adverse possession; such adverse possession was continued for a sufficient period of time to bar the claim of the defendant under § 7362, Compiled Laws of 1913.

I am authorized to say that Chief Justice Bruce and my associates, Justices Christianson and Robinson, concur in the foregoing views.

GRACE, J. (dissenting). The action is one to quiet title to the S.W.¼ of section 1, township 155 north, of range 63 west of the 5th

principal meridian in Ramsey county, North Dakota. The plaintiff, in substance, alleges in her complaint that she is the widow of one Daniel E. Martin, who died testate in Ramsey county, North Dakota, on October 9, 1908; then follows allegations showing that the will was duly admitted to probate in said county and the entry of the final decree of distribution; that certain lands described in the final decree among which was the land in question in this action. The complaint alleges that Daniel E. Martin during his lifetime was in possession of the land involved in this action from about the 26th day of December, 1889, continuously to the time of his death, October 9, 1909, and that the plaintiff continued in possession since the death of Daniel E. Martin, husband, and is now in possession thereof, and has paid the taxes thereon since 1909, and that Daniel E. Martin paid the taxes on the premises for the years 1890 to 1908 inclusive. Complaint alleges the actual, exclusive, and continuous occupation of said premises adverse to the defendant in the manner and for the period above described. Complaint further alleges that from 1890 to 1908, inclusive, Daniel E. Martin took the rents and profits of the said land and since 1909 the plaintiff has taken them.

The defendant, in her answer, in substance alleges that she filed on the land in question and made final proof on such land and received the final receiver's receipt No. 14,325 issued her on the 24th day of December, 1889, which was filed and recorded in the office of register of deeds of said county, and further alleges all the times thereafter she has been owner and in possession of said premises and is now such owner and in possession.

Paragraph 3 of defendant's answer reads thus: "That at the time of making her final proof to said land only about 10 acres thereof was broken and fit for cultivation, and that she arranged with the person mentioned in the complaint as Daniel E. Martin, who was her brother, to put the land into crop the following year, and in accordance with said arrangement he went into possession as her tenant and agent and continued in possession of said premises as such up till his death in 1909, with her permission and knowledge, and from year to year as he saw fit and was able to do so broke said land and paid the taxes, taking his pay in the crops raised on said premises. That not all of said land was suitable for cropping purposes, and with the consent of

the defendant he was permitted to and did erect a pasture fence on said premises, and has pastured that portion for about sixteen years. That plaintiff's possession is that of a trespasser."

Paragraph 4 reads thus: "That defendant's maiden name was Annie Kenefic, and a short time after having proved up this land she was married to Thomas O'Brien, who is a farmer residing in said community at a distance of about 4 or 5 miles from the land in question, and that during said period the said Daniel E. Martin has at no time made any claim to her that he had any interest in said land beyond that of a tenant who was in possession of said land as such and has paid the taxes on said land as such, and has paid the taxes on said land, which were assessed in her name till 1905, when he surreptitiously had it assessed in his name without the knowledge or consent of the defendant."

The answer then sets up an independent cause of action against the plaintiff by way of counterclaim for rents for the value of the use of said premises since the year 1910, alleging the annual amount due for such use of land to be $320, and demanded an accounting for the rents. To the answer the plaintiff replied, denying practically all the allegations of the answer, and pleads the Statute of Limitations as to the right to recover rents claimed by defendant. The facts in the case, stated concisely, are as follows:

On or about the 24th day of December, 1889, Annie Kenefic made final proof of the land in question and received a receiver's receipt No. 14,325, which was duly filed for record, and a patent was afterwards issued to her by the government for the land. It appears that, before the time Annie Kenefic filed upon and made final proof upon such land, it had been previously filed upon by Elizabeth Kenefic, sister of the defendant, who made final commutation proof and paid the government $200 at that time, and afterwards mortgaged the same to one Whithed for $275. She sold the land to Daniel E. Martin, her brother, the husband of the plaintiff, for $1,000. On the day that Martin bought the land, he and his wife, the plaintiff in this action, executed a mortgage upon the land to Elias B. Reid for $1,000. Martin paid the $275 mortgage. It seems thereafter the entry of Elizabeth Kenefic was canceled and the land reverted to the government, and the same was afterwards filed upon by Annie Kenefic and proved up

at the time aforesaid. After Annie Kenefic made final proof she gave a mortgage on the land for $1,200 to Elias B. Reid, $200 of which was to pay the commutation proof money and the $1,000 was probably given in lieu of the $1,000 mortgage and note that Daniel E. Martin and wife had given on the land to Elias B. Reid in 1884. Martin afterwards paid the $1,200 mortgage, and afterwards mortgaged the land, together with the N.E.¼ section, to the Vermont Loan & Trust Company. It is not shown by the evidence that defendant had any knowledge of this mortgage. It is claimed on behalf of plaintiff that Martin farmed the land before and during the time Elizabeth Kenefic was proving it up and at the time he bought it from Elizabeth Kenefic, and also while Annie Kenefic was proving it up. It is claimed Martin farmed and pastured it ever since until 1909, since when his widow has farmed it; and the claim is that during all the years from 1889 down to the time this action was instituted, defendant never made any claim to be the owner of the land or any claim for rents or profits or for the possession.

The defendant claims that Daniel E. Martin, her brother, was in possession of the land as her tenant and agent, and continued in possession of said premises as such until his death in 1909. When the land was transferred from Elizabeth Kenefic to Daniel E. Martin, he retained title for only about seven days, when he transferred it to Wilder.

The main question in this case is: Was Martin, prior to his death, and the appellant since his death, holding the premises adversely to the defendant? and, second: Is the defendant estopped from claiming the land and the possession thereof or the rents or profits by reason of her alleged laches and silence during said time? Upon full examination of the record, we are thoroughly convinced that the questions above should be each answered in the negative. It is clear to us that no right claimed by the plaintiff can be reinforced by reason of any possession Daniel E. Martin had of such land during the time Elizabeth Kenefic claimed any right to said land by reason of her entry of the land or her final proof of entry thereafter made. It appears from the record that her proof must have become invalid and her entry canceled and the land turned back to the government and thrown open to public entry. If this were true, and we think it is, any

rights or claims of Daniel E. Martin by reason of entry of said land by Elizabeth Kenefic became of no force or effect as soon as the land was turned back to the United States government. The deed which she gave Martin to the land did not even operate to give him color of title, when, after the delivery of the deed, the land was returned to the government and became thereafter public land subject to homestead entry. The entry of Elizabeth Kenefic having been canceled and the land thrown open again as government land for entry under the Public Land Laws, whoever filed upon the land would do so free and clear of any alleged right or prior possession of any person which may have existed prior to the time the land in question was relinquished to the United States government. The land must have been relinquished to the government, or it could not have been again filed upon by Annie Kenefic. The alleged possession of Daniel E. Martin while the entry and filing of Elizabeth Kenefic was in force and effect cannot be tacked on to his possession, if any, under the filing and entry of Annie Kenefic. The rights and possession, if any, which he had under the Elizabeth Kenefic entry, were entirely disposed of when the land was relinquished or turned back to the government and again became public land subject to entry, and which was filed on as such by Annie Kenefic. Her entry on the land was free and clear from every claim of Martin or anyone else except that of the United States, she being of course bound to comply with the requirements of the Homestead Laws as to residence, etc. We need, therefore, only consider what has taken place since Annie Kenefic filed upon said land.

We are of the opinion that the claim of the defendant, that Daniel E. Martin, her brother, was in possession of the land as her tenant and agent, is strongly supported by the testimony of E. B. Kenefic, who is a brother of Elizabeth Kenefic, Maggie Kenefic, Daniel E. Martin, and the defendant. Martin at some time seems to have changed his name from Kenefic to Martin.

The following questions were asked of E. B. Kenefic:

O. Do you know what arrangement, if any, Dan Martin had with Annie Kenefic with reference to farming this land? If so, what were they?

A. Yes, I know. Dan was hard up that fall and about to lose his

home place. I think it was Frank Wilder, of Grand Forks, that had the mortgage on it. He told Annie, in my presence, that if she let him use her quarter for additional security for to tide him over, which she did, that he would break up her quarter section and crop it until he paid her a sum equal to the amount he was using it for, $1,000 I believe. I think they made a loan of $1,400 on it, but Dan was to get $1,000. I can't remember the man's name that loaned it. If I heard it I could recall.

Q. Subsequent to that time, did you hear Dan Martin make any statement about what arrangements he had with Annie Kenefic with reference to this land?

A. Twelve years ago last fall, at the time of the fair at either Fargo or Grand Forks, Dan was going to the fair and I was going to St. Thomas, North Dakota, with my family. I met Dan at the station house at Grand Forks and inquired how the crops were up there; he told me that the hail had touched Annie's quarter twice that year, but he got a good crop on the home place and the quarter he bought from Jake Trout; he said: "Ed, if Annie gave me that quarter it would not pay for the seed that I've lost on it; it was the most unlucky quarter in the state of North Dakota."

Q. Did Dan Martin at any time or times speak to you about this quarter? If so, state when and where.

A. Yes, when I was at Kent, Minnesota, in talking over his crops and business, he always referred to that quarter as "Annie's quarter."

We think the testimony of E. B. Kenefic clearly shows an arrangement between the defendant and Daniel E. Martin whereby he was to break up the quarter section of land in question and crop it until he had paid her $1,000, besides paying the $1,000 which was borrowed on the land for his use and benefit. It does appear that the defendant did make the loan of $1,200, that she got no benefit of it excepting the $200 which was paid to the government, and the $1,000 was in lieu of the $1,000 note that Daniel E. Martin and his wife had given on the same land to Elias B. Reid. Martin afterwards paid this mortgage, which, as we view it, it was his duty to do. He never has had any legal title to the land since the defendant filed upon and made final proof of the same, and has had no legal right or authority to give any

mortgages on it signed by himself and his wife. It was his further duty to pay the defendant for the use of the land in the amount agreed upon as testified to by E. B. Kenefic. If such agreement were made, and the testimony of E. B. Kenefic shows it was, the relation between the defendant and Martin was that of landlord and tenant. If such were the relations, Martin could not hold or claim the land adversely to the defendant. If the arrangement were made, as testified to by E. B. Kenefic, the defendant took possession of the land in question by the consent of the defendant, and under an arrangement and agreement to farm the same.

Under § 7370, Compiled Laws 1913, where the relation of landlord and tenant has existed, the possession of the tenant is presumed to be the possession of the landlord until the expiration of twenty years from the termination of the tenancy; or when there has been no written lease until the expiration of twenty years from the time the last payment of rent. The twenty-year period that the possession of the tenant is presumed to be the possession of the landlord may be computed from the time when the arrangement to farm the land for the defendant by Daniel E. Martin was made, which was in the fall of 1889.

As to the time when the arrangement was made between Daniel E. Martin and the defendant as to the farming of the land, the following questions asked of E. B. Kenefic, and his answers thereto, are in point:

Q. Have you in mind the land proved up by Annie Kenefic in the year 1889 in Ramsey county, North Dakota, and do you remember the time that said Annie Kenefic proved up on said land?

A. Yes, I was there.

Q. Do you know what arrangements, if any, Dan Martin had with Annie Kenefic with reference to farming this land? If so, what were they?

A. Yes, I know. Dan was hard up that fall and about to lose his home place, etc. [The balance of the answer we have heretofore quoted.]

The fall referred to was evidently the fall of 1889, which was the time the arrangement was made with defendant by Daniel E. Martin to farm the land. There is no showing of the termination of tenancy or the last payment of rent nor the payment of any rent, but counting

twenty years from the time the relation of landlord and tenant was initiated before plaintiff or those under whom she claims could commence to claim adversely to defendant, it would be 1909 before a claim adverse to the defendant could be initiated. Until that time, the possession of Daniel E. Martin would at all times under said arrangement be presumed to be the possession of the defendant, or, in other words, that of his landlord. In other words, in order to prevail in this action, Martin or those claiming under him would have to hold the land adversely to the defendant for twenty years commencing approximately with the fall of 1909 in order to ripen the title of said land in them by adverse possession.

It is not sufficient to show that Daniel E. Martin entered into possession of such land, but it must also appear that such entry was made under claim of title.

Section 7365, Compiled Laws 1913, provides that "in every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action."

The legal title was in the defendant. Considering in connection with this section, § 7370, which declares the possession of the tenant to be that of the landlord where such tenancy is shown to have existed, and the further fact that there is no showing that the alleged possession of Daniel E. Martin or those claiming under him was by claim of title, it cannot be said that he or those holding under him were holding or claiming adversely to the defendant.

Under § 7366, Compiled Laws 1913, in order to constitute entry of possession upon a written instrument, judgment, or decree or otherwise, and to constitute such entry adversely to the legal title, such entry or continued possession must be under claim of title.

The warranty deed from Elizabeth Kenefic to Daniel E. Martin executed and delivered in 1884 was not sufficient upon which to base claim of title. After the execution and delivery of such deed the land reverted to the government and again became government land

ubject to homestead entry. When the land went back to the government and was relinquished to it by deed or otherwise, all alleged rights of every description and kind, including that of possession and title or color of title, were devested from those who claimed them, and the title of such land was in the government, free and clear of all such claims or right, and the government could again offer the land for homestead entry, free and clear of all such rights and claims, and Annie Kenefic, who made subsequent entry of the land, would take the land from the government, free and clear of any prior claims or rights of any person and of everyone excepting those of the United States government. It is clear that the deed from Elizabeth Kenefic to Daniel E. Martin, in view of these facts, was not sufficient to support a claim of title, neither does such possession as he had before the land was turned back to the government avail anything to him or those claiming under him. All such rights, if any, were entirely eliminated by the return of the land to the United States government. None of the testimony offered by the plaintiff is effective to show any claim of title at the time Martin entered possession, nor does it have any particular tendency to prove the elements necessary to establish title to the land by adverse possession. The evidence to prove title by adverse possession should be clear and conclusive as to every element of it, and cannot be established by inference or implication.

As we view the matter, there is no showing that the possession by Daniel E. Martin was adverse to the defendant's title, and the plaintiff has wholly failed to prove, by clear and convincing testimony, title to such land by adverse possession. Since the entry of the final decree in the estate of her husband, the plaintiff has held such land under color of title and adverse to defendant's title, but such period of time falls far short of the twenty-year period required by law. This being true, the defendant is entitled to recover for the use and occupation since the entry of the decree in 1912, and such recovery is not barred by the Statute of Limitations. We think the plaintiff should be credited with the taxes paid by her, with interest from the date of payment.

The judgment of the District Court should be affirmed.

PER CURIAM. Defendant has petitioned for a rehearing. We have considered the petition, and in connection therewith have once more

read the record, with the result that we are satisfied that the facts as stated in the opinion prepared by Mr. Justice Birdzell are fully sustained by the evidence in the case. Not only is there evidence to the effect that Daniel E. Martin from 1884 up to the time of his death in 1909 was in uninterrupted possession of the land, treating it as his own, paying all taxes thereon, mortgaging it as his property, and speaking of it as "mine;" but it is undisputed that during all of this time the defendant never exercised one act of ownership over the land, neither collected nor demanded any rent, nor paid any taxes. It is also undisputed that this same condition continued after Martin's death. The plaintiff as executrix listed the land in the probate proceedings; she paid the taxes, and continued to occupy and treat it as property belonging to the estate. It is unquestioned that she did this in the belief that the property was in fact part of her deceased husband's estate. The defendant residing a short distance away never even suggested that the land belonged to her. The testimony of E. B. Kenefic was by deposition. Hence, the trial judge was in no better position to determine the credit to be given to this testimony than are the members of this court. We see no reason for receding from our former opinion. We are of the belief that it is warranted by the evidence, and is in accord with right and justice.

FOSTER & CONNOLLY, a Copartnership Consisting of W. R. Foster and P. L. Connolly Doing Business under the Foregoing Firm Name and Style, with Principal Place of Business at Minot, North Dakota, Respondent, v. M. E. DWIRE, Appellant.

(172 N. W. 782.)

Default judgment — application to open — affidavit of merits — sufficiency of — affidavits — exhibits.

Defendant made application and served motion to open a default judgment. She made an affidavit of merits sufficient in form and substance, which was supported by other affidavits and exhibits. The trial court denied the motion.

Held **under the circumstances existing in this case such denial by the trial court was an abuse of its discretion.**

Opinion filed April 15, 1919. Rehearing denied May 9, 1919.

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

George H. Stillman (*John A. Van Wagenen,* of counsel), for appellant.

Lack of order for judgment is fatal to a judgment. Crane v. Bank, 26 N. D. 268, 144 N. W. 96; Comp. Laws 1913, §§ 7667–7677.

Upon the hearing of a motion to open a default judgment the allegations of the affidavit of merits and of the answer tendered may not be controverted, nor the issues on the merits presented therein be controverted by counter affidavits, nor determined by the court, the sole issue for determination being the sufficiency of the excuse for the default presented by the moving party. Reference is had to the verified answer only to the extent of determining whether the same presents a substantial and meritorious defense. Racine-Sattket Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

In a case where the facts are such as to lead the court to hesitate before it refuses to open the judgment, it is better, as a general rule, that the doubt should be resolved in favor of the application. Grady v. Donahoo, 108 Cal. 211, 41 Pac. 41.

Fisk & Murphy, for respondent.

Grace, J. Appeal from the district court of Ward county, K. E. Leighton, Judge.

This is an appeal from an order of the district court of Ward county denying plaintiffs' motion to vacate a judgment entered in the above-entitled cause in plaintiffs' favor, April 3, 1918, by default for $2,128 and $83 costs. The defendant served upon the plaintiff proper notice of motion in which notice was given that on September 11th at 10 o'clock A. M. the appellant would apply to K. E. Leighton, Judge, for an order vacating and setting aside the judgment in question. The motion was heard and the application to vacate the judgment was denied.

The grounds stated and relied upon for a vacation of the judgment are, in substance, as follows:

Such complaint was not verified and judgment was entered without an assessment of damages as contemplated by statute; that plaintiff had no capacity to sue; that judgment was wrongfully and fraudulently entered in this respect; that immediately following service of summons and complaint upon defendant, she called upon plaintiff and took up with them the matter of the action and the installation of certain plumbing and heating appliances which were installed in her building by the plaintiff, and the improper manner in which the same had been done; that on February 5, 1918, the plaintiff promised and agreed to dismiss the action and informed the defendant that she need pay no further attention thereto; that she relied upon such promise and statement and made no appearance or defense to the action, and did not know that any further proceedings had been taken until June 15th, when, upon ordering and obtaining an abstract of title to certain property, she learned that judgment had been entered against her; that between February 5, 1918, and the time she learned of the entry of judgment, she paid plaintiff large sums of money and fully paid and discharged all of her indebtedness to plaintiff; that between February 5, 1918, and the date of the motion, the position of plaintiff with reference to the property had not been changed to their prejudice; that defendant had a good and substantial defense to the cause of action.

To support these contentions, the appellant served her affidavit of merits which substantially sets forth the foregoing matters claimed by her to be true. In support of her application were the affidavits of Gertrude Dwire, G. H. Bugenhagen, and exhibit D, a certificate under the official hand and seal of T. N. Henderson, clerk of court of Ward county. The appellant also tendered an answer which stated a good defense. She brought herself squarely within the letter and spirit of the law both statutory and as defined and determined by the decisions of this court with reference to the opening and vacating of a default judgment. It is well settled in this state that, on an application for the vacation of a default judgment, the affidavit of merits cannot be controverted with reference to the merits of the proposed defense; in so far as the affidavit of merits sets forth the facts which

are to constitute the defense, it cannot be controverted by counter affidavits. Counter affidavits are limited to the alleged facts in the affidavit of merits which seek to excuse the default. If the affidavit of merits shows that judgment was entered against the one applying for vacation of the judgment through a mistake, inadvertence, surprise, or excusable neglect, the opposing affidavits are limited in their scope to controverting such alleged facts. Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 17, 84 N. W. 581, and authorities therein cited; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 227, 130 N. W. 228.

Assuming that plaintiff's affidavit and those made in support thereof were such in substance as would, to some extent, controvert defendant's affidavit in this respect, we are clear on a full consideration of all the facts of the affidavit of merits offered in support of the motion and the amended and substituted notice of motion and the facts set forth in the proposed answer, which was duly verified, there was an abuse of discretion by the court in refusing to vacate the judgment. The action in which the judgment was entered was one to foreclose a mechanics' lien. The complaint alleged the lien was duly filed in the office of register of deeds of Ward county. The proposed answer, and the amended and substituted notice of motion, state that no such mechanics' lien was ever filed or claimed against defendant's premises. This is further shown to be true by the certificate of T. N. Henderson, clerk of the district court of Ward county, which certificate is exhibit D. Such official, under his land and official seal, certifies that no mechanics' lien in favor of Foster & Connolly and against M. E. Dwire was ever docketed or indexed in his office against lots 13 and 14, block 10 of the original town site of Minot since the first Monday of January, 1917. This certificate is dated the 21st day of September, 1918. This period of time includes the first Monday of January, 1917, which was prior to the service of the summons, to the 21st day of September, 1918, which was the time the motion to set aside and vacate the default judgment was finally heard. Notwithstanding this, the court in its findings of fact states that the mechanics' lien in question was duly filed for record in the office of the clerk of the district court on the 21st day of January, 1918, and ordered and directed that the premises described in the complaint be sold. The court made further orders commonly made in the foreclosure of mechanics' liens.

If there were no mechanics' lien in fact, and the action being one to foreclose a mechanics' lien, the court had no jurisdiction to enter judgment of foreclosure sale of the premises. A statutory mechanics' lien must exist before it can be foreclosed. The court ordered the premises sold and the amount received on such sale applied to the discharge of the amount claimed to be due on the lien and a deficiency judgment for the balance. Considering all these facts and circumstances, and the strength and positiveness of defendant's affidavit and the other affidavits in support thereof, and the certificate of the clerk of court, and the further fact that the answer states a good defense if proved, we are certain the court abused its discretion in refusing to vacate the judgment. We are of the opinion the judgment should have been vacated and the defendant allowed to defend the action and have her day in court. It is so ordered. A motion was made to dismiss this appeal, which is denied.

The order appealed from is reversed. The defendant is entitled to her costs on appeal.

BIRDZELL, J., and CHRISTIANSON, Ch. J. (dissenting). We are constrained to disagree with the majority in finding that there has been an abuse of discretion in the refusal to open the default judgment. In opposition to the moving affidavits, the plaintiffs presented affidavits of both partners and of the architect employed by the defendant. The affidavit of the architect shows in detail and by itemized statement the settlement arrived at, under which the defendant was to pay to the plaintiffs $2,068.73. The affidavits of the plaintiffs squarely contradict that of the defendant concerning the dismissal of the action, and state that it was the understanding that, if the amount agreed upon was paid within thirty days, the action would be dismissed without costs to the defendant. According to all of the affidavits the defendant knew as early as June that the judgment had been entered, but yet she shows no reason for the delay from June to September, in moving to vacate the judgment; although she claimed to have a defense. Nor does she contradict the plaintiffs' statement that, after knowledge of the judgment, she made part payment thereon. Under these facts, it seems to us that there cannot be said to have been an abuse of discretion in denying the defendant's motion. While

the discretion in such cases is one that should be exercised in such a way as to give defendants their day in court, it seems to us that in the instant case the circumstances do not show an abuse of discretion. The order is well supported by facts which negative circumstances entitling the defendant to be relieved.

HELMER HELLEBUST and Alfred Hellebust, Respondents, v. EDWIN BONDE, T. S. Stuart, and H. J. Hartvig, Copartners, Doing Business under the Firm Name and Style of Divide County Development Association, Appellants.

(172 N. W. 812.)

In an action brought to recover money paid under an alleged agreement whereby the defendants were to pay over the money to the United States and to the county to enable the plaintiffs to perfect a filing and entry under the United States Homestead Laws, it is *held:*

Misrepresentation of law — action for — deceit — promise no intention to perform.

1. While a misrepresentation of law may not support an action for deceit under § 5944, Compiled Laws of 1913, a promise by the defendants to pay to the government and to a county money which is not required to be paid may be considered "a promise made without any intention of performing," within § 5944.

Money paid — not applied — when recoverable.

2. Where money is alleged to have been paid to the defendants to be applied on behalf of the plaintiffs, and it cannot be so applied, it may be recovered back.

Contract — inducement — misapprehension of law — rescission — when.

3. Where a contract is induced under a misapprehension of law by one party, of which the other is aware, the contract may be rescinded under § 5855, Compiled Laws of 1913. Orth v. Procise, 38 N. D. 580.

Opinion filed May 13, 1919.

Appeal from Divide County, *K. E. Leighton,* J.

Affirmed.

Brace & Stuart, for appellants.

A false representation as to the law, in the absence or concealment of fact, does not amount to fraud if there is no relation of trust or confidence between the parties. 14 Am. & Eng. Enc. Law, 54, and notes; Platt v. Scott, 6 Blackf. 389, 39 Am. Dec. 436; Gormely v. Gymnastic Asso. 55 Wis. 350, 13 N. W. 242; see also Hubbard v. McLean, 115 Wis. 9, 99 N. W. 465; Hinckley v. Sack Oil Co. 132 Iowa, 396; Schnider v. Schnider, 96 N. W. 159; 6 Enc. Ev. 71; 14 Am. & Eng. Enc. Law, 54, General rule and illustrations, pp. 55, 56, and footnotes; and Doctrine in Equity, p. 57; Parker v. Thomas, 81 Am. Dec. 385; Clemm v. Newcastle & D. R. Co. 9 Ind. 488; Wood v. Roeder, 45 Neb. 311, 46 Am. Rep. 357, 70 N. W. 21; Platt v. Scott, 6 Blackf. 389, 39 Am. Dec. 436; Prince v. Overholser, 44 N. W. 775.

When the representation affirms something not allowed by or contrary to law, the presumption is conclusive that the party knows the law and consequently does not rely upon the false representations. 6 Enc. Ev. 71; 14 Am. & Eng. Enc. Law, 54, General rule and illustrations, pp. 55, 56 and footnotes; and Doctrine in Equity, p. 57; Parker v. Thomas, 81 Am. Dec. 385; Clemm v. Newcastle & D. R. Co. 9 Ind. 488; Wood v. Roeder, 45 Neb. 311, 46 Am. Rep. 357, 70 N. W. 21; Platt v. Scott, 6 Blackf. 389, 39 Am. Dec. 436; Prince v. Overholser, 44 N. W. 775; Gormely v. Gymnastic Asso. 13 N. W. 242; Thompson v. Phœnix Ins. Co. 75 Me. 35, 46 Am. Rep. 357.

A misrepresentation in order to support an action for damages must be a misrepresentation going to the quality, value, situation, or other matter or thing affecting the value of the consideration for which the injured party claims to recover damages. Winston v. Young, 47 Minn. 80, 53 N. W. 1015; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360; Bigelow, Torts 17; Grinell, Deceit, 4, 45, 50 and cases cited; Parker v. Wheeler, 149 Ill. App. 579; Burn v. San Gabriel River Block Co. 136 Pac. 544; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172.

It must be shown by affirmative proof that without the alleged false representations the injured party would not have entered into the contract. 10 Standard Procedure, 52 et seq., 8 Enc. Pl. & Pr. 872; Hodges v. Coleman, 76 Ala. 103; Judson v. Pickett, 78 Ala. 338; Sprague v. Taylor, 58 Conn. 542; Burns v. Wilson, 22 Minn. 210.

In order to afford grounds for action, any misrepresentations made must be of such a nature as to be an inducement to the contract. 8 Enc. Pl. & Pr. 872; Judson v. Pickett, 78 Ala. 338; Sprague v. Taylor, 58 Conn. 542; Burns v. Wilson, 22 Minn. 210; Gelpeke v. Blake, 19 Iowa, 263; Cortwright v. Stickler, 37 Iowa, 382; Knoll v. Horton, 50 Iowa, 687; 14 Am. & Eng. Enc. Law, 59 and 60; Sutherland, Damages, 549; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360.

The measure of damages for misrepresentations is the difference in the value between what was received or parted with and what would have been received or parted with had the representations been true. Beare v. Wright, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057, and cases cited; Fargo Gaslight & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 173; 8 Enc. Pl. & Pr. 908; Holton v. Noble, 83 Cal. 7; Bartlett v. Blaine, 83 Ill. 25; Danforth v. Cushing, 77 Me. 183; Fuller v. Hudson, 25 Me. 243; Brown v. Blunt, 72 Me. 415; Shinnabarger v. Shelton, 41 Mo. App. 147; 14 Am. & Eng. Enc. Law, 140; Carpenter Paper Co. v. News Pub. Co. 63 Neb. 59.

George P. Homnes, for respondents.

The presumption that everyone knows the law is not applicable where a relation of confidence existed between the parties. Topolewske v. Plankington Packing Co. 126 N. W. 561; Brent v. State, 43 Ala. 297.

The rule requiring investigation by the person to whom made does not apply if any relation of trust or confidence exists between the parties. 20 Cyc. pp. 34, 35; 12 R. C. L. 232–234, § 5.

BIRDZELL, J. This is an appeal from an order of the district court of Divide county, overruling a demurrer to the complaint. The action is one for the recovery of damages alleged to have been occasioned by the making of certain false representations which induced the plaintiffs to part with the sum of $500. The complaint alleges the making of the following agreement:

This agreement entered into this 14th day of April, A. D. 1915, between Divide County Development Association by Edwin Bonde,

President, of Crosby, North Dakota, party of the first part, and Helmer Hellebust and Alfred Hellebust, parties of the second part:

Witnesseth: that party of the first part agrees to secure filing receipt to the southwest quarter of section nine, township one hundred sixty-three, north of range one hundred two west of the fifth principal meridian, situated in Divide county, North Dakota, for Alfred Hellebust, and filing receipt for the east one half of the northeast quarter and the northwest quarter of the northeast quarter, and the northeast quarter of the northeast quarter, of section twenty-eight of township one hundred sixty-three, north of range one hundred two west of the fifth principal meridian, situated in Divide county, North Dakota, for Helmer Hellebust, and parties of the second part agree to deposit in the Citizens National Bank, Crosby, North Dakota, this day to the credit of Divide County Development Association, five hundred thirty dollars in cash and one note for seventy dollars due on demand in favor of Divide County Development Association or Edwin Bonde, its President, upon furnishing proof to said bank that filing receipt has been issued to said second parties.

In witness whereof the parties have hereunto set their hands and seals the day and year above written.

Divide County Development Association,
By Edwin Bonde, Its President,
First Party,

Witness
Jos. H. Pass
A. Nordstog

Helmer Hellebust
Alfred Hellebust
Second Party.

It is alleged that at the time the foregoing agreement was negotiated one Bonde, a defendant and president of the defendant partnership, represented to the plaintiffs that, in order to secure a filing and entry upon the lands mentioned in the agreement, it was necessary to pay to the government and to Divide county the sum of $500; that the defendants were in the business of dealing in lands and locating homesteads, and were familiar with the Homestead Laws of the United

States; that the plaintiffs were ignorant of the Homestead Laws and unfamiliar with the requirements for procuring homestead entries, and that the plaintiffs relied upon the representations with respect to the necessity of paying $500 and were deceived, defrauded, and cheated thereby. It was also alleged that the plaintiffs represented to the defendants that for a consideration of $100 the defendants would procure filings and entries for the plaintiffs upon the lands named in the agreement, and that the $100 commission entered into the total consideration named in the contract.

The principal contention of the appellant is that the alleged misrepresentations are misrepresentations of law, and not of fact. Being misrepresentations of law, it is claimed that they will not support an action for damages. The argument is the familiar one, that both parties are presumed to know the law, or at least *ignorantia legis neminem excusat,* and that consequently no one is capable of being legally deceived or damaged by the misrepresentation of a matter of law. Without denying the force of the argument, when applied in determining the rights of the parties dealing with each other at arm's length, we are satisfied that it cannot be properly applied under the facts alleged in this complaint.

This court has held in Orth v. Procise, 38 N. D. 580, 165 N. W. 557, that in a proper case one may be relieved of the consequences of a contract entered into through mistake or misapprehension of law, where the other party, at the time of contracting, was aware of the mistake, and by representations furthered the misapprehension. Comp. Laws 1913, § 5858. This conclusion is not only required by the section of the Code referred to, but it is well supported by authorities where there is no controlling statute. 20 Cyc. 19; 12 R. C. L. 296.

It is true that our Code, in laying down the elements of an action to recover damages for deceit (Comp. Laws 1913, §§ 5943, 5944) bases the action upon misrepresentation or suppression of facts or upon a promise made without any intention of performing it; and thus, by excluding misrepresentations of law, impliedly, at least, enacts the rule that such misrepresentations do not give rise to an action for deceit. But, since forms of action are entirely abolished by § 7355, Compiled Laws of 1913, we are not seriously concerned with the question as to whether or not the complaint comprises all of the allegations neces-

sary to state a cause of action for deceit. It is sufficient, as against demurrer, if it states a cause of action at all.

We are not to be understood as holding, however, that the complaint is necessarily deficient as a statement of a cause of action in deceit, but only that, in so far as the action may be thought to be predicated upon a misrepresentation of law, it cannot be regarded as an action for deceit under § 5944, Compiled Laws of 1913. The complaint contains allegations of fact from which a promise by the defendants may be implied to pay over the $500 to the government of the United States and to Divide county, which promise, it is reasonable to be inferred from the allegations, there was no intention to perform; and under ¶ 4 of § 5944, Compiled Laws of 1913, an action for deceit may be grounded upon "a promise made without any intention of performing."

But, even aside from the action of deceit, the complaint alleges a payment of $500 to the defendants for a specific purpose, which purpose has wholly failed because, under the law, it could not be carried out. In no view of the case can it be considered upon demurrer that the money was paid for the benefit of the defendants, nor that it was being voluntarily parted with by the plaintiffs. On the contrary, it was to be used for the benefit of the plaintiffs. The only relief claimed is the repayment of this sum of money so parted with. Hence, the complaint states a cause of action for money had and received.

Viewed from a little different angle, there are two contracts alleged, —one for the payment of $100 to compensate the defendants for their services in connection with the filing and entry on behalf the plaintiffs, and another under which the defendants assumed to pay over to Divide county and the government for the plaintiffs the sum of $500. Under the allegations of the complaint, the latter agreement was induced by a mistake of law within § 5855, Compiled Laws of 1913, and this action may well be regarded as an action to rescind as to this agreement and recover back the consideration so paid by the plaintiffs.

It will be noted that the written agreement above set forth is in the form of a memorandum, and there is no legal obstacle that would prevent the plaintiffs from showing the true consideration for the money

payments stipulated therein. See Erickson v. Wiper, 33 N. D. 206, 157 N. W. 592.

Our views as to the sufficiency of the complaint stated above render it unnecessary to consider seriatim the other propositions advanced by the appellant. For the foregoing reasons, the order appealed from is affirmed.

W. L. BRANTHOVER, Respondent, v. MONARCH ELEVATOR COMPANY, Appellant.

(173 N. W. 455.)

Thresher's lien — conflicting evidence — verdict — estoppel.

This action is based on a lien for threshing grain. The jury found a verdict in favor of the plaintiff for $237.50. On the trial there was really but one issue, and upon this issue the evidence was conflicting, and the jury found for the plaintiff. When there is a real conflict of testimony, as there is in this case, the jury must be left to do the guessing and it is not for the court to guess that the jury guessed wrong.

Opinion filed May 23, 1919.

Appeal from the County Court of Ransom County, Honorable *F. S. Thomas,* Judge.

Affirmed.

Kvello & Adams, for appellant.

Where one who owns or has an interest in personal property, with full knowledge of his rights suffers another to deal with it as his own by selling or mortgaging or otherwise disposing of it, he is estopped from later asserting his own issue. 16 Cyc. 762, 764, and cases cited.

Where one of two innocent parties must suffer by the act of a third person, he who has enabled the third person to occasion the loss must estop it. Comp. Laws, § 7077; Mohall State Bank v. Duluth Elevator Co. 35 N. D. 619, 161 N. W. 287.

C. S. Ego and *M. O. Thompson,* for respondent.

Mere silence will not work an estoppel. In order to work an estoppel the silence must be under such circumstances that there are both a specific opportunity and a real or apparent duty to speak. 16

Cyc. 759; 10 R. C. L. § 21 and cases cited; Washington Bridge Co. v. Stewart, 11 L. ed. 658; Tally v. Ganahl (Cal.) 90 Pac. 1049; Phelan v. San Francisco, 20 Cal. 39; Garrown v. Toxey (Ala.) 66 So. 443; Arizona-Parral Min. Co. v. Forbes (Ariz.) 146 Pac. 504; Morgan Eng. Co. v. Cahe (Ark.) 185 S. W. 57; Belskis v. Deering Coal Co. (Ill.) 92 N. E. 575; Alerding v. Allison (Ind.) 83 N. E. 1006; Sawyer v. Hawthorne (Iowa) 158 N. W. 506; Wade v. Empire Co. (Kan.) 158 Pac. 28; Folley v. Detroit R. Co. (Mich.) 159 N. W. 506; Ikenberry v. New York L. Ins. Co. (Minn.) 159 N. W. 955; Fergusson v. Missouri P. R. Co. (Mo.) 186 S. W. 1134; Ins. Co. v. Cochran (Okla.) 159 Pac. 247; Gaherton v. Fitzpatrick, 91 S. W. 355; St. Louis v. Gibson (Ark.) 168 S. E. 1129; James v. Lyons (Cal.) 81 Pac. 275; Kuhn v. Delaware R. Co. 36 N. Y. Supp. 339.

ROBINSON, J. This action is based on a lien for threshing grain. The jury found a verdict in favor of plaintiff for $237.50, and defendant appeals. On the motion for a new trial the court very properly said: There is no error of law entitling the defendant to a new trial.

On the trial there was really but one issue: Did the conduct of the plaintiff estop him from asserting his lien upon the grain or from recovering the value of his special property in the grain threshed by the plaintiff and purchased by the defendant? Upon this issue the evidence was conflicting, and the jury found for the plaintiff.

Furthermore, it now appears to this court that there has been two jury trials and in each of them the jury found for the plaintiff. The first verdict was set aside for errors of law. 33 N. D. 454, 156 N. W. 927. Now, for the second time, defendant appeals and asks the court to grant a new trial regardless of the fact that twenty-four jurors and a judge have concurred in the verdict,—and the two trials and the appeals have probably cost twice as much as the judgment. There is no sense in that kind of litigation. A person who goes to law must realize that he takes a chance on the peril of dies. When there is a real conflict of testimony—as there is in this case—the jury must be left to do the guessing, and it is not for the court to guess that the jury guessed wrong. Were it otherwise, we might as well do away with jury trials.

Under the statute when a person runs a threshing machine and threshes grain for another, he has a lien upon the grain threshed for the value of his services, upon filing a proper notice in the office of the register of deeds within thirty days after the threshing. The grain in question, 1,000 bushels of wheat, was threshed, it was sold to the defendant and the lien was filed in September, 1914. There is no defense only that plaintiff assented to the sale of the wheat, and on that point the die was cast against defendant.

In a way it is a hardship that an elevator company should have to pay twice for the same grain, yet it is a risk that is always taken when a party purchases property of any kind from an irresponsible person without making proper inquiry.

The purchase was made in the threshing season; it was made without any inquiry concerning the threshing lien. The loss must be charged to gross negligence.

Affirmed.

COUNTY OF STARK, Respondent, v. ADAM MISCHEL et al., Appellants.

(6 A.L.R. 174, 173 N. W. 817.)

Attorney and client — good faith — conflicting interests.

1. It is the duty of an attorney to exercise the highest good faith in the interests of his client, whether in public or in private office, and, for private reward to himself, he cannot abandon the cause of his client as a public officer without reasonable cause and undertake an employment as a private attorney upon litigation pending which he has instituted and established in a court of law as a valid and just cause, where such action is antagonistic to the interests of his client and his duty as an attorney.

NOTE.—On power of public body to employ attorney on contingent fee, see note in L.R.A.1917D, 263.

On what contracts of attorneys are void as against public policy, see note in 13 Am. St. Rep. 299, where it is held that an agreement that an attorney is to receive, as compensation for his services, a portion of the subject-matter of the litigation, is not champertous.

On attorney's compensation contingent on a fixed sum or a percentage, see note in 15 L. ed. 504.

Contracts — attorney and client — contingent fees.

2. A contract between attorney and client, which provides that the attorney shall save the client harmless from all expenses that may be incurred in proposed litigation out of which the attorney is entitled to a contingent fee of the amount received, if successful, is champertous in its nature and void as against public policy.

State's attorney — duty of — payment for special services to county — when unauthorized.

3. Where a state's attorney, in the performance of his duty, instituted an action upon a claim in favor of the county, which thereafter the state court adjudicated to be a valid and just claim in favor of such county, by its judgment entered, and prior thereto the board of county commissioners enacted a resolution providing that such state's attorney should handle such claim upon a contingent fee of 50 per cent, and should have the county harmless from all costs involved therein, and thereafter, subsequent to the entry of such judgment in the state court, such state's attorney resigned and entered into a contract with the board of county commissioners in accordance with the terms of the said resolution, and the board of county commissioners thereupon appointed as state's attorney the former assistant state's attorney, who had assisted in, and was familiar with such litigation, and where thereafter such former state's attorney acted for the county pursuant to such contract and secured the payment of such judgment by a recognition and settlement of such judgment in certain actions pending in the Federal court concerning such claim, and received, pursuant to such settlement, the fee stipulated, it is *held*, in an action to recover from such former state's attorney and the former county commissioners and their sureties the amount so paid as an unauthorized and illegal payment, that the same was void for reasons of public policy, and that the trial court did not err in so finding.

Opinion filed May 31, 1919.

Action to recover an unauthorized and illegal payment made upon a contract with an attorney. From a judgment rendered in the District Court of Stark County, in favor of the plaintiff, the defendants appeal.

Affirmed.

Engerud, Divet, Holt, & Frame and *John F. Sullivan,* for appellants.

When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed

and the jurisdiction involved is exhausted. Gage v. Trust Co. 86 Fed. 894; Freeman v. Howe, 65 U. S. 450; Herdritti v. Oil Cloth Co. 112 U. S. 294.

A civil officer has the right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. Comp. Laws § 683, subdiv. 3, § 684, subdiv. 5; United States v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; People v. Carter, 6 Cal. 26; State v. Hauss, 43 Ind. 105; Leech v. State, 78 Ind. 570; Gates v. Clark, 3 Nev. 566; Gilbert v. Luce, 11 Barb. 91; Connor v. Mayor, 2 Sandf. 371, 5 N. Y. 295; State v. Nayor, 4 Neb. 260; State v. Litts, 49 Ala. 402.

L. A. Simpson, W. F. Burnett, and *Thomas H. Pugh,* and *J. P. Cain,* State's Attorney, for respondent.

The county board is vested with and possesses, and can exercise only, such powers as are by statute conferred upon it, or as may be necessarily or reasonably implied from the powers thus expressly conferred. 15 C. J. 457; Morse v. Grant County (Mont.) 119 Pac. 286; State Bd. of Control v. Buckstegge (Ariz.) 158 Pac. 839; Wadsworth v. Board of Supers. (N. Y.) 112 N. E. 163; Pierson v. Minnehaha County (S. D.) 134 N. W. 212.

A contract made by the board of county commissioners for the county with attorneys at law for their services as such, and which services the county attorney is bound to perform, is ultra vires and void. Storey v. Murphy, 9 N. D. 115; Pierson v. Minnehaha County (S. D.) 134 N. W. 212; Wilson v. Otoe County (Neb.) 98 N. W. 1050; Platte County v. Gerard (Neb.) 11 N. W. 298; Brome v. Cumming (Neb.) 47 N. W. 1050; State v. Stockwell, 23 N. D. 70, 134 N. W. 767.

Bronson, J. This is an action at law to recover county funds from the former county commissioners and the former state's attorney of Stark county, and their sureties, alleged to have been unlawfully converted to the use of such former state's attorney. The action was tried to the court without a jury, and, from a judgment rendered in favor of the plaintiff for $4,794.74 and interest, the defendants have appealed.

There is practically no dispute in the record concerning the facts. The record therefore presents for consideration only questions of law.

The necessary facts to be stated in accordance with the principles of law applied by this court are as follows:

One J. S. White was formerly county auditor of Stark county, for four successive terms, up to December 15, 1909, when it was discovered that, during several terms of his office, he had forged and secured payment of county warrants which aggregated, in payments out of county funds, over $30,000; he was removed from office, subsequently convicted, and sentenced to the state penitentiary.

Later, the county of Stark instituted an action against the respective county treasurers and their sureties, during the said county auditor's terms, to recover amounts that had been paid out of county funds by such county treasurers upon such forged warrants. As a result of this action, judgments were rendered and collected in favor of the county to the amount of over $33,000. The defendant Murtha became state's attorney of Stark county, through election, in January, 1911. After becoming such state's attorney, he assisted in collecting and settling up such judgments.

Later, some of the surety companies, upon the bonds of the county treasurers in question, instituted suit in equity in the Federal court to recover from the surety, upon the official bond of the convicted county auditor, for the amount that they had been compelled to pay as sureties, upon principles of subrogation; this was in the fall or latter part of the year of 1911. In one of the actions so instituted in the Federal court, the Dakota National Bank of Dickinson was made a defendant to recover from it amounts that had been paid the bank upon such spurious warrants, upon the ground that such bank had not acquired the same in good faith. Thereupon, such bank and another bank in the city of Dickinson, and the city of Dickinson, filed a cross bill and complaint in intervention in the month of March, 1912, setting up spurious warrants paid by them and held by them, which had been acquired in good faith, and asserting the right of recovery thereupon from the defendant surety on the convicted auditor's bond, upon equities superior to the claim of the plaintiff surety company.

In the month of July, 1912, the defendant Murtha, as state's at-

torney for Stark county, instituted an action in the district court of that county against the convicted county auditor and his surety to recover an additional claim due the county by reason of his defalcations, including interest and expenses incurred, not theretofore paid upon the prior actions instituted, and maintained by the county against the county treasurers and their sureties. When this new action in the state court became known to the parties to the action in the Federal court, action was then taken in such Federal court, whereby the county of Stark was brought in as a party claimant to the money sought to be recovered. In the action in the state court, the surety company answered. The action subsequently came to trial on the 4th day of January, 1913, before the court without a jury.

In the meantime, the defendant Murtha had been re-elected as state's attorney; he continued to handle this action; on February 1, 1913, the trial court made findings in favor of the county and ordered judgment against the convicted auditor and his surety for $9,203.13 and costs. In this action the defendant Murtha, however, testified that these findings, though dated February 1, 1913, were not signed by the trial court until February 17, 1913.

Pursuant to such findings, judgment was rendered in favor of the county on February 19, 1913. Later, it appears that the Federal court served an order to show cause upon said Murtha, as attorney for the county, why execution should not be enjoined in the state court, and Murtha testified that the Federal judge did not so issue an injunction because he agreed not to take out an execution. On February 18, 1913, the defendants the county commissioners of Stark county passed the following resolution: "Resolved that T. F. Murtha, an attorney at law of Dickinson, N. D., be retained to attend to the defense of this county in the three cases now pending in the United States district court for the district of North Dakota, and he is to save this county harmless from all expense on account of said litigation, and is to receive for said services and such disbursements a sum equal to one half of the sum recovered, actually paid into the county treasury of this county from the Northern Trust Company on the bonds of former auditor J. S. White. If there is no recovery on said bonds, said

attorney is to receive no compensation, either for services or disbursements."

At that time the defendant Murtha was state's attorney.

Later, on August 8, 1913, in the evening at a meeting of such county commissioners, the defendant Murtha, being present before such commissioners, tendered his resignation as state's attorney, and the same was accepted and ordered filed. Thereupon, such commissioners at such meeting appointed as state's attorney J. P. Cain, who was then the assistant state's attorney, to fill the unexpired term. Then, at such meeting the following agreement was drawn and signed:

It is agreed that T. F. Murtha, an attorney at law of Dickinson, N. D., be retained to attend to the defense of this county in the three cases now pending in the United States court at Fargo, N. D., and he is to save the county harmless from all expenses on account of said litigation, and is to receive for said services and such disbursements a sum equal to one half of the sum recovered, actually paid into the treasury of said county from the Northern Trust Company on the bonds of former auditor, J. S. White. If there is no recovery on said bonds, said attorney is to receive no compensation either for services or disbursements.

Dated this 8th day of August, 1913.

Board of Commissioners,
D. Hughes, Chm.
F. A. Roquette.
A. F. Mischel.
T. F. Murtha.

On September 4, 1913, the cases mentioned in the Federal court came up for hearing. Then the parties recognized through a settlement then made the priority and validity of the claim of Stark county, as evidenced by the judgment rendered in the state court, and thereupon made arrangement to pay the same in full. The defendant Murtha there represented the county of Stark pursuant to the agreement made. Pursuant thereto, on September 8, 1913, the check of the Northern Trust Company, the surety of the convicted county auditor, was issued payable to the county treasurer of Stark county for $9,589.43. On the

same day a county warrant was issued pursuant to a voucher filed therefor to the defendant Murtha for one half of such amount, namely, $4,794.71, upon which the county treasurer on September 11, 1913, issued his check in payment therefor.

Accordingly, on December 26, 1913, this action was instituted to recover such amount as an illegal and unauthorized payment. The defendant demurred to the complaint, and this court passed upon such demurrer in Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931; holding the complaint to state a cause of action against such former officials and their sureties. Subsequently, on December 27, 1916, upon issues framed, the action came to trial in the district court.

On November 8, 1917, in this action the trial court made its findings, holding among other things as follows:

On February 18, 1913, and for more than two years preceding such time, Stark county had a valid claim and cause of action for $9,239.13 against said convicted auditor and his surety; that prior to said February 18, 1913, the district court had made its order for judgment in favor of said Stark county upon such claim and cause of action.

That on February 18, 1913, judgment was about to be entered for the amount of such claim, which the former county commissioners and the former state's attorney, the defendants herein, then knew; that on such date the defendant county commissioners unlawfully engaged and agreed to pay said defendant Murtha, pursuant to the terms of the resolution adopted on said date; that it was then the duty of said defendant Murtha, as state's attorney, to perform such services without receiving any additional compensation, which the defendants then knew. That, on the evening of August 8, 1913, the defendant Murtha submitted his resignation as state's attorney to the said board of county commissioners; that the same was then accepted and said J. P. Cain appointed as state's attorney. That said Cain had theretofore been assistant state's attorney, and had assisted in the case involved and was familiar with all the facts in connection with the same. That he qualified as state's attorney on August 9, 1913; that the resolution dated August 8, 1913 (hereinbefore set forth), was not recorded in the minutes of the proceedings of the board of county commissioners, was not published in any of the official newspapers of the county as a part of such proceedings, was not in the records or

files of the commissioners' proceedings or in the office of the county auditor, and was produced at the time of the trial by the defendants; that the existence of such exhibit was unknown to the attorneys for the plaintiff or to anyone else excepting only the said county commissioners, or defendant Murtha and the county auditor. The trial court, in its conclusions, determined the attempted employment to be unlawful, void, and against public policy. That it was violative of the official duties of the defendants as public officers; that, furthermore, it was the official duty of the defendant Murtha, and his successor, J. P. Cain, to perform the work and services of collecting such judgment. Pursuant to such findings, on November 12, 1917, judgment was rendered against the appellants herein.

The appellants specify error of the trial court in excluding offered testimony, rejecting their proposed findings, and in making erroneous findings. In view of the principles of the law, applicable in the determination of this appeal, the trial court committed no error in rejecting the offered testimony of the defendant Murtha concerning advice of former Attorney General Miller to the board of county commissioners upon its right of recovery upon the subject-matter involved in the action of Stark county against the convicted auditor and his surety.

The principal contention of the appellant is based upon the proposition that the county of Stark did not have a valid cause of action against the convicted auditor and his surety upon the judgment for which it recovered judgment for $9,239.13. That when the state's attorney resigned, the claim of the county was very shadowy and doubtful; that the county commissioners were unwilling to spend further county moneys in an attempt to recover the amount claimed. That the state's attorney had a perfect right to resign and a perfect right to make a contract as a private attorney with the county commissioners concerning this doubtful litigation, and that the former county commissioners, within their lawful powers legally made this contract with the former state's attorney, and that therefore the claim paid, after the successful termination of the litigation, to such former state's attorney, was a valid, legal, and binding obligation upon the county.

We are wholly satisfied upon this record that the trial court has erred neither in its findings of fact, nor in its conclusion of law.

The appellants' counsel are in no position to assert or even contend that the claim of the county was of doubtful or questionable validity. By so doing they impugn the good faith and ability of their client, the defendant Murtha, in performing his duties as state's attorney.

As an attorney, he in fact instituted this action in the state court in behalf of the county. It was his duty as an attorney to exercise his best judgment in determining the merits of the claim before action. It is to be presumed that he did. He does not testify to the contrary. It is likewise presumed that the county commissioners permitted him to institute this action, and acted in accordance with the advice that he gave concerning the institution of such action.

Kinkead, in his work on Professional Ethics, p. 342, states that "lawyers first pass judgment upon the merits of a case or defense; and it is believed that the courts and the public have a right to demand that in arriving at that judgment they shall exercise great care and diligence in ascertaining the facts and the law applicable to the facts, and act only in the line of their best judgment so formed."

Necessarily therefore, as state's attorney, the defendant Murtha first passed judgment upon the merits of the claim of the county; necessarily, if it be conceded that he acted in the interests of his client, the county, he believed that the county had a valid and just claim. Otherwise he would not have brought the action. Fundamental rules therefore, of common honesty as well as of legal ethics, prevent the appellants from now trying to assert that that which they believed in exercising their best judgment was a valid claim, and which the state court determined to be a valid and just claim was of doubtful validity. In addition, there is the further fact that the parties in the Federal court did not dispute the validity of the claim of the county, but in fact recognized and paid the same. The appellants, in part, concede that, if the judgment were valid, the payment would be illegal because the collection of the judgment would be a part of the defendant Murtha's official duties as state's attorney, and that he could not legally be paid anything except his regular salary for duties he might be required to perform as state's attorney. We have no hesitancy in arriving at the conclusion that the trial court properly determined that there was a valid subsisting claim in favor of the county, existing at the time the resolution of February 18, 1913, was adopted, at

least, so far as the parties herein are concerned. For this reason alone the judgment of the trial court might properly be affirmed.

There is, however, another principle of law which directly applies to the record facts in this case, upon which the contract made by the defendant former official was illegal and against public policy. Upon the record herein the plain duty of the defendant Murtha to his client, whether it be viewed as that of state's attorney or in the relation of attorney and client, is plain. No other reason is shown in the record for the resignation of the defendant Murtha except for the purpose of receiving this appointment as a private attorney. No other inference can be drawn as a cause of such resignation other than the possible reward which would accrue to him while acting as an attorney for such county in a capacity other than his theretofore official position. Above all things it is the prime duty of an attorney whether, as such in public office or as a private attorney, to exercise the highest good faith in the interests of his client. It was the duty of the defendant Murtha as state's attorney to prosecute and use his best endeavors to collect this claim. It is not shown in the record that he would not have been equally successful if he had remained state's attorney and continued in that capacity to represent his client in the litigation already adjudicated in the state court. In effect, his resignation and the acceptance thereof were antagonistic to the best interests of his client. It gave to him the opportunity, against the highest interests of his client, to receive a reward and a compensation that otherwise he would not have received as state's attorney in the performance of his official duty.

It was one of his particular duties as a lawyer and, acting in that capacity in a public office, with this important litigation pending, to not abandon his client without just cause therefor, and to not seek thereby to reap a reward and a compensation by means of knowledge and information gained while acting in such public office. Among the fundamental rules of ethics is the principle that an attorney who undertakes to conduct an action impliedly stipulates to carry it to its termination, and he is not at liberty to abandon it without reasonable cause. Weeks, Attys. § 255; 6 C. J. 673; see Nickells v. Nickells, 5 N. D. 125, 33 L.R.A. 515, 57 Am. St. Rep. 540, 64 N. W. 73.

This court would indeed be derelict in its duty in the administration of justice if it sought for a moment to uphold the right of an officer

of this court, an attorney at law, to recover upon a contract of this sort so made which disregards the prime duties of an attorney to his client, and which thereby would serve to reflect upon the just and proper administration of justice. We have no hesitancy in determining such contract to be illegal and void upon grounds of public policy, whether the matter be viewed in connection with the duties of the defendant Murtha as a public officer or as a private attorney. Furthermore, the resolution of February 8, 1913, and the contract of August 8, 1913, both of them, contained a provision violative of another fundamental rule of legal ethics, long recognized in the history of the bar, and in law, concerning the relations of attorney and client.

Under the doctrine of champerty, long has been recognized the impropriety of an attorney speculating in lawsuits, and becoming a gambler in litigation, at his own cost. The provision in such resolution and contract which required the defendant Murtha to save harmless the county of Stark against all costs, and which thereby imposed the burden of carrying on the litigation and paying the costs and expenses thereof at his own peril, was champertous in its nature for reasons of public policy long and well established; it served to vitiate and render void such contract. 11 C. J. 241; 6 R. C. L. 276; see Woods v. Walsh, 7 N. D. 376, 75 N. W. 767; see Rohan v. Johnson, 33 N. D. 179, L.R.A.1916E, 64, 156 N. W. 936, Ann. Cas. 1918A, 794. See No. 10 Canon of Ethics, Am. Bar Assoc.

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

BIRDZELL, J. (concurring specially). I concur in the affirmance of the judgment for the reasons assigned in the opinion of the court as prepared by Mr. Justice Bronson, except wherein it is held that champerty *necessarily vitiates and renders void* a contract for the employment of an attorney. By thus qualifying my concurrence in the main opinion, I do not wish to be understood as either contenancing or discountenancing so-called champertous agreements.

This agreement being void for the other reasons assigned, I deem it unnecessary to consider whether or not its champertous character would of itself vitiate it. This might depend upon the circumstances, and while I am not willing to say that the circumstances in the instant

case might not justify holding the contract void on that ground, I am not prepared to hold that under all circumstances such agreements are void. It is unnecessary to so hold. The question is primarily one of public policy and as such it has been somewhat discussed in the prior decisions of this court. See Woods v. Walsh, 7 N. D. 376, 75 N. W. 767; Rohan v. Johnson, 33 N. D. 179, L.R.A.1916E, 64, 156 N. W. 936, Ann. Cas. 1918A, 794; Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908. In these cases it has been shown that the reasons which formerly existed for holding contracts involving champerty and maintenance void no longer obtain, at least in equal degree. I would not be disposed to differentiate between legal and illegal agreements on the basis that they are differentiated in some jurisdictions, where distinctions are recognized between agreements which provide that the attorney is to have for his services a portion of the proceeds and agreements that he is to have an amount equivalent to a certain percentage of the proceeds and a lien upon the proceeds for payment. See Blaisdell v. Ahern, 144 Mass. 393–395, 59 Am. Rep. 99, 11 N. E. 681.

Such distinctions are based upon no real differences of situation or of actual tendency, and the same is true as to maintenance. In my view, one contributes quite as much to the maintenance of an action, that might not otherwise be brought, by agreeing to pursue it for a contingent fee, as he does by agreeing to contribute something in the way of costs. The ultimate effect is, generally, when the attorney stipulates for a contingent fee, that a suit is brought that would not otherwise have been brought, because of the inability of the client to pay a stipulated fee. Without such arrangements there would often be a failure of justice. There is yet a legitimate scope for the contingent fee. Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. supra. I mention these matters here merely to indicate that, in my judgment, there is no occasion either to define illegal champerty and maintenance upon the basis of the presence or absence of stipulations insuring against costs and actually sharing in the proceeds of the litigation, or to characterize all such agreements as void because they result in giving those who are not otherwise interested an incentive to pursue litigation. As said above, there are other arrangements that have the same effect.

There is another reason why I wish to qualify my concurrence. In the opinion of the court it is said that "common honesty as well as legal ethics prevent the appellants from now trying to assert that that which they believed in exercising their best judgment was a valid claim, and which the state court determined to be a valid and just claim, was of doubtful validity." I can see no occasion for characterizing the action of the appellants in presenting the doubtful features of the county's claim as being dishonest. I can see no question of honesty involved in arguing to this court or any other court that the claim which the county had and which it agreed to share with the attorney was of doubtful validity. Nor can I see the force of the suggestion that an attorney, in bringing an action, is subsequently precluded from asserting what he actually believes to be the case; namely, that the claim upon which the action was founded was of somewhat uncertain legal validity. He might have honestly so believed at the time the action was instituted and he might have honestly so advised his client. The client would have had a perfect right to bring the action even though the claim were somewhat doubtful. I can see nothing in these circumstances to prevent the attorney from subsequently asserting his belief in the doubtful character of the claim, so long as it is not done to his client's detriment. And it is inconceivable to me that his assertions to this effect can be regarded as dishonest.

As a matter of fact this court knows judicially that approximately two thirds of the claim was, at the time the action was brought, so gravely doubtful in character, it being based upon interest, that this court, in Dickinson v. White, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754 (which was pending for decision at the time the action was brought by the county), upon petition for rehearing, receded from views previously expressed, and held that interest, as against sureties on official bonds, could be recovered only from the date of the notice to the sureties of the breach or from the date of the demand. This was held in a companion case to that brought by Murtha on behalf of the county, having arisen out of the same defalcation. It was pending when that case was brought and was undecided at the time the judgment was rendered in the county's action and at the time of the settlement in the Federal court.

I agree, however, with the proposition asserted in the opinion of the

court that the same ethical considerations which render the contract for employment invalid also operate to prevent the contention of the appellants, based upon the doubtful character of the county's claim, from having any weight in support of the claim for fees. The contract for fees being void for the reasons assigned, is not legally revived or reinstated by the good fortune of the county in having its doubtful claim fully satisfied.

CHRISTIANSON, Ch. J. (concurring in part and dissenting in part). I concur in the conclusion reached by the majority members in this case, but am not prepared to concur in all that is said in the majority opinion. That opinion holds in effect that a contract between an attorney and client whereby the former agrees, in consideration of having a part of the money or thing recovered, to pay the costs and expense of the litigation, is champertous and void. This is directly contrary to the ruling of this court in Woods v. Walsh, 7 N. D. 376, 75 N. W. 767. That decision was rendered in 1898. The court therein pointed out that the legislature had defined champerty, and in so doing had singled out certain agreements which were champertous at common law and declared them to be misdemeanors; but that the legislature had not declared a contingent fee contract between attorney and client to be champertous even though the attorney agreed to pay the costs and expenses of the litigation. No subsequent legislature has seen fit to declare such contracts to be void. The law upon the subject remains as it was. See §§ 9412–9418, Comp. Laws 1913. The declaration of the public policy of the state is primarily a matter for the lawmaking body. It is for the legislature to determine what is best for the public good, and to provide for it by legislative enactments. The province of the courts is to expound the law as it is, and to enforce the public policy as therein expressed. 6 R. C. L. 109.

Nor do I concur in what is said with respect to appellants being estopped from asserting that the claim of Stark county against the surety company was one of doubtful validity. As a matter of fact this court knows not only that the claim was of doubtful validity, but that under the ruling of this court in Dickinson v. White, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754, more than two thirds thereof was without any validity whatsoever. If the litigation between

the county and the surety company and the different claimants had not been determined or adjusted before that decision was handed down, there can be no question but that the county would have received not to exceed one third of the amount of money which it did. Are suits never brought except where the right of recovery is certain and undebatable? The question requires no answer. An examination of the decisions of this court, and of other courts of last resort, will disclose that in many of the cases the members of the court disagreed upon the question of liability. The very fact that a lawsuit is brought by one able and reputable attorney and defended by another equally able and reputable indicates that there is a difference of opinion and some doubt as to liability. While it is true the major portion of the claim upon which Stark county recovered did not constitute a valid claim against the surety company and the adverse claimants this could not affect the validity of the arrangement between the county commissioners and Murtha, although it does have some bearing upon the actual good faith of the parties thereto. But if that arrangement was void as a matter of law from its inception, it was not validated by the fact that the adverse parties permitted Stark county to receive more than was legally coming to it.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Respondent, v. J. C. DUNCAN, as Treasurer of the County of Towner, State of North Dakota, and the County of Towner, a Municipal Corporation, Appellants.

(176 N. W. 992.)

Taxation — levy — amount limited by.

1. Section 1 of chapter 254, Session Laws of 1915, which provides for limiting taxes levied at a certain rate in mills during the years 1915 and 1916, is construed and held to limit the taxes that may be extended by the county auditor for school purposes, under § 1224, Compiled Laws of 1913.

County auditor — duty.

2. A county auditor is an officer "whose duty it may be under existing laws to levy taxes at a certain rate in mills," within § 1 of chapter 254 of the Session Laws of 1915.

Taxation.

3. Chapter 254 of the Session Laws of 1915 has no application to the extension of taxes previously levied for the discharge of pre-existing indebtedness.

State Constitution — legislative power over municipal corporation — contracting debts — limit of debt.

4. Section 183 of the Constitution, which limits the authority of the various political subdivisions to incur debts in excess of 5 per cent upon the assessed valuation of the taxable property therein, is self-executing as a limitation upon the power to incur debts.

State Constitution — debt limit — self-executing.

5. Section 183 of the Constitution, when so construed as to harmonize with § 130, which confers upon the legislature power to provide for the organization of municipal corporations and restrict "their powers as to levying taxes and assessments, borrowing money and contracting debts," is not so far self-executing as to confer upon political subdivisions the power or the right to contract indebtedness up to 5 per cent of the assessed valuation without legislative authority.

Constitutional provisions — cities — municipal corporations.

6. The proviso contained in § 183 of the Constitution, to the effect that incorporated cities may become indebted in additional amounts for the purpose of furnishing water supply or constructing sewers, does not render municipal corporations immune from additional restrictions concerning municipal indebtedness that may be imposed by legislation.

Constitutional provisions — legislative act.

7. The requirements of § 61 of the Constitution, to the effect that no bill shall embrace more than one subject which shall be expressed in its title, are not violated where the title fairly indicates the general scope of a bill designed to accomplish a single object.

Legislative act, title of.

8. Where a legislative bill considered in the light of facts generally known is designed to accomplish one general object, and this is fairly indicated in the title, the title is not multifarious within the inhibition of § 61, although it indicates that several subjects related to the general object are embodied in the bill.

Opinion filed June 3, 1919.

Appeal from the District Court of Towner County, *Buttz*, J.

Affirmed.

William Langer, Attorney General, and *George K. Foster*, Assistant Attorney General, for appellants.

It is not necessary to grant a hearing on a performance on a ministerial function such as levying taxes against property which had been duly authorized. Hagar v. Reclamation Dist. 111 U. S. 708, 28 L. ed. 572; Amery v. Keokuk, 72 Iowa, 704, 30 N. W. 780; Gillette v. Denver, 21 Fed. 824; Lower Kings etc. Dist. v. Philips, 108 Cal. 314, 39 Pac. 630, 41 Pac. 335; Hodge v. Muscatine Co. 196 U. S. 280, 49 L. ed. 481.

If an act embraces two or more subjects, and two or more of the same are expressed in the title, the whole act is void. 1 Lewis's Sutherland Stat. Constr. 2d ed. §§ 103, 144.

When a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligations of contracts. 6 R. C. L. title Constitutional Law, § 338, note 7; Van Hoffman v. Quincy, 4 Wall. 535, 18 L. ed. 403; Buttz v. Muscatine, 8 Wall. 575, 19 L. ed. 490; Wolff v. New Orleans, 103 U. S. 358, 26 L. ed. 395; Louisiana v. New Orleans, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; Louisiana v. Police Jury of St. Martina, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648; Goodale v. Fennell, 27 Ohio St. 426, 22 Am. Rep. 321.

Flynn & Traynor and *Murphy & Toner*, for respondents.

A constitutional provision must be liberally construed, and if all parts of a statute have a natural connection and reasonably relate directly or indirectly to one general and legitimate subject of legislation, the act is not open to objection no matter how multifarious the provisions and details. Re Kol, 10 N. D. 493; 24 Am. & Eng. Enc. Law, 574, 575, 1 Sutherland, Stat. Constr. pp. 198, 287; 35 Cyc. 1022, 1044; Paine v. Dickey, 8 N. D. 581; State v. Haas, 2 N. D. 202; State v. Soodmansee, 1 N. D. 246; State v. Home Society, 10 N. D. 493; State v. Poole, 18 N. D. 101; School Dist. v. King, 20 N. D. 614; State v. Nomland, 3 N. D. 427; Eaton v. Guarantee Co. 11 N. D.

79; Geer v. County, 97 Fed. 435; Henderson v. State, 137 Ind. 552, 24 L.R.A. 469; Marioneaux v. Cutler, 91 Pac. 355; State v. Sloan, 66 Ark. 575, 53 S. W. 47.

BIRDZELL, J. This is an appeal from an order entered in the district court of Towner county, overruling a demurrer to a complaint. The action is one to recover certain taxes alleged to have been paid by the plaintiff under protest. The facts alleged in the complaint may be briefly stated as follows: In the year 1915 the county auditor of Towner county levied a mill tax for school purposes upon the property of the plaintiff, acting under the authority expressed in § 1224, Compiled Laws of 1913.

The tax is $114.69 in excess of the amount which the auditor would be authorized to levy under chapter 254 of the Session Laws of 1915, if the provisions of this chapter were applicable, and if the authority contained in § 1224, Compiled Laws of 1913, is restricted by the later enactment. The tax was paid under protest.

It is not disputed that the complainant states a good cause of action provided the plaintiff's theory as to the meaning and applicability of the statutes involved is correct, and provided chapter 254 of the Session Laws of 1915 is constitutional. The controlling statutory provisions are as follows:

Section 1224, Compiled Laws of 1913: "The county auditor of each county shall at the time of making the annual assessment and levy of taxes levy a tax of $1 on each elector in the county for the support of public schools, and a further tax of 2 mills on the dollar on taxable property in the county, to be collected at the same time and in the same manner as other taxes are collected, which shall be apportioned by the county superintendent of schools among the school districts of the county."

Chapter 254 of the Session Laws of 1915, in so far as applicable, reads: "Section 1: The board of county commissioners of any county, or any county officer, any township board, or any township officer, any village board, or any village officer, any city council or city commission, park board, or board of education of any city, or any officer thereof, or the officers of any school district, or any other taxing district, or any officer thereof, that is authorized, or whose duty it may be, under

the laws of the state, to fix or make any levy on the assessed valuation of property for the purposes of taxation, shall not during the years 1915 and 1916 levy any amount for purposes of taxation that will exceed by more than 5 per cent for the year 1915, and 10 per cent for the year 1916, the amount that such board or officer was authorized to levy on the assessed valuation of 1914. Any of the aforesaid officers, whose duty it may be under existing laws to levy taxes at a certain rate in mills, or fraction thereof, shall not levy during the years 1915 and 1916 at any rate that will produce revenue in excess of 105 per cent and 110 per cent, respectively, of that which would be produced by the levy of the prescribed rate upon the assessed valuation of 1914; . . ."

Section 2 provides that the salaries of officials which are determined by the amount of the assessed valuation of the property within any political subdivision shall not be increased during the years 1915 and 1916 beyond the amount authorized on the basis of the assessed valuation for the year 1914. Section 3 likewise continues substantially the existing assessed valuation basis as to all matters of official right, duty, or authority, where their exercise or obligatory character is dependent upon assessed valuation of property. Section 4 likewise continues the existing assessed valuation as a basis for the debt limits of political subdivisions up to July 1, 1917, allowing, however, for 10 per cent increase annually, where warranted by a higher assessed valuation; and § 5 repeals "all acts or parts of acts in conflict. . . ."

While the respondent contends that § 1224 of the Compiled Laws of 1913 provides an unconstitutional method of levying taxes for the support of the schools, it is not necessary to consider the merits of the contention, for the reason that, in this action, it only seeks to recover the amount of such taxes in excess of that authorized by chapter 254 of the Session Laws of 1915. Having reached the conclusion, for reasons which will later be assigned, that the respondent is entitled to recover the excess sued for without regard to the alleged unconstitutionality of § 1224, it is neither necessary nor proper to determine the constitutional question presented by the respondent. In suing for the excess only, the plaintiff, in the complaint as framed, tacitly admits the authority to levy a proper amount in the manner provided for in § 1224. With the question of the constitutionality of § 1224 thus elim-

inated, there are but two questions presented for decision. The first involves the interpretation of § 1 of chapter 254 of the Session Laws of 1915; and the second, the constitutionality of the chapter.

It is argued that the county auditor is not, within the language of § 1, an "officer . . . that is authorized, or whose duty it may be, under the laws of the state, to fix or make any levy on the assessed valuation of property for purposes of any taxation," and whose authority is so limited that the amount levied may not exceed by more than 5 per cent for the year 1915 the levy of the year before. And to this argument is added the further contention (which, if sound, would preclude the plaintiff's recovery) that the county auditor, not being an officer authorized to fix or levy taxes within the above-quoted language, is not restricted by the immediately following sentence, which provides as follows: " . . . Any of the aforesaid officers, whose duty it may be under existing laws to levy taxes at a certain rate in mills, or fraction thereof, shall not levy during the years 1915 and 1916 at any rate that will produce revenue in excess of 105 per cent and 110 per cent respectively, of that which would be produced by the levy of the prescribed rate upon the assessed valuation of 1914."

Therefore, the contention runs, chapter 254 is wholly inapplicable to the duties of a county auditor in connection with the levy of the mill tax for school purposes under § 1224. From this it would follow that the county auditor must extend a levy of 2 mills upon all property assessed, regardless of any increase in the valuation.

It is perfectly obvious that the last sentence quoted above, which refers to officers whose duty it may be to levy taxes at a certain rate in mills, could not refer to any officer or set of officers in whom were vested any discretion in the matter of levying taxes. For the very requirement of the levy "at a certain rate in mills" excludes the idea of discretion on the part of the officer so charged with the duty. It is manifest that whatever discretion is involved in the levying of taxes at certain prescribed rates is one which was exercised in the past by the legislative body that fixed the rate and imposed the duty. So, to adopt the appellants' contention in this respect would be to deprive the sentence in question of all meaning, because it would be made inapplicable to every existing mill tax on the property assessed during 1915 and 1916 at the valuation determined in those years,—a result

which obviously the legislature was endeavoring to avoid. It is our opinion that the proper interpretation of the language in question is that any of the aforesaid county officers, etc., whose duty it may be to levy taxes at a certain rate in mills shall be restricted as provided in the act.

A literal interpretation should not be adopted where the effect is certain to defeat the obvious intention; but even if we were inclined to adopt a strict, literal interpretation, it is not at all certain that the appellants have properly sensed the literal meaning. It will be noticed that the antecedents of the expression "aforesaid officers" include any county officer whose duty it may be either to fix or make any levy. It may well be that the county auditor does not have authority to exercise discretion in the making of a tax levy, but it is nevertheless made his duty to fix levies where officers making the levies exceed the limitations prescribed by law. Section 2148, Compiled Laws of 1913, requires the levy of taxes in specific amounts rather than according to a rate per cent; and among other things it is provided that " . . . the rate per centum of all taxes, except the state taxes and such other taxes, the rate of which may be fixed by law, shall be calculated and fixed by the county auditor, according to the limitations hereinafter prescribed; provided, that if any county, city, town or school district shall return a greater amount than the prescribed rate will raise, then the county auditor shall only extend such amount of tax as the limited rate will produce."

Thus is the county auditor made an officer charged with the duty of *fixing* a levy when the same is excessive. Furthermore, unless the county auditor were referred to by the designation "any county officer," no reason is perceived why the legislature would have included this designation in the enumeration of officers to fix or make a levy, for they had already referred to the board of county commissioners, who have the sole power to exercise discretion in levying county taxes.

If the question were otherwise doubtful, all doubt should be dispelled by the fact that in § 1224, Compiled Laws of 1913, the legislature referred to the duty of the auditor to extend both the school poll and the 2-mill taxes as the levying of a tax, and in § 1 of chapter 254 the same terminology is employed with apparent reference to the same subject-matter.

For the foregoing reasons we entertain no doubt that the legislature intended to limit the authority of the county auditor to extend the taxes provided for in § 1224 to such an amount as would result in turning in to the county tuition fund revenues which would not in 1915 exceed 105 per cent of the like revenues of the year before.

This brings us to the question of the constitutionality of chapter 254 of the Session Laws of 1915. It is claimed that the act is unconstitutional for the following reasons:

(1) That it violates the rights of the people of incorporated cities to incur indebtedness in excess of 5 per cent of the assessed valuation of the property.

(2) That it violates the rights of the various municipal corporations enumerated in § 183 of the Constitution to levy taxes to pay the interest and principal on pre-existing indebtedness.

(3) That it impairs the obligation of contracts between bond creditors and the various municipalities by limiting the debt-paying ability.

(4) That it violates § 61 of the Constitution with reference to singleness of subject.

The first contention, and to some extent the second and third also, are founded upon a misapprehension of the true meaning and effect of § 183 of the Constitution. This section provides a self-executing limitation upon the power of political subdivisions to contract indebtedness above "5 per centum upon the assessed value of the taxable property therein," with a proviso added "that any incorporated city may become indebted in any amount not exceeding 4 per cent on such assessed value, without regard to the existing indebtedness of such city for the purpose of constructing or purchasing waterworks . . . , or for the purpose of constructing sewers, and for no other purpose whatever." In our opinion, this section does not operate as a limitation upon the authority of the legislature to further restrict the powers of political subdivisions. By § 130 of the Constitution express authority is conferred upon the legislature to restrict the powers of municipal corporations "as to levying taxes and assessments, borrowing money and contracting debts." Section 183 must be so construed as to harmonize with § 130, and when so construed it operates only as a limitation, and not as a grant of authority, to incur debts and levy taxes.

The guiding principle for the construction of a constitutional pro-

vision such as § 183 of our Constitution is aptly expressed by Gray on Limitations of Taxing Power, § 2155a, page 113, as follows:

"In so far, as the constitutional debt limits are prohibitory in character, that is, in so far as they forbid the incurrence of debt beyond a certain amount, they are of course self-executing; no legislation is needed to carry them into effect and they invalidate, by their own vigor, debts incurred in violation of their provisions. All the cases so treat them.

"Those provisions of debt limitations which are in a sense permissive, such as that a county may by a vote of the electors incur debts not exceeding 10 per cent, or the like, are not self-executing, but require legislative action to carry them into effect. These provisions confer no debt-contracting capacity; they merely limit the legislative power to confer such capacity. Illustrating: A constitutional provision which forbade any county to donate bonds or money to railroads in excess of 10 per cent of the assessed valuation, *provided* that such donations might 'by a two-thirds vote' be increased 5 per cent, does not of itself authorize the county to increase the debt 5 per cent over the 10 per cent limit by a two-thirds vote, without express legislative authority, and bonds issued in excess of 10 per cent, without express authority, are void."

Dillon on Municipal Corporations, 5th ed. § 191, has expressed the principle as follows: "The constitutional limitation *does not confer power to create indebtedness,* but acts as a limitation upon the power conferred by the charter of the municipality or by statute (Robertson v. Staunton, 104 Va. 73, 51 S. E. 178). . . . *And the legislature may impose additional restrictions or regulations upon the incurring of indebtedness.*"

In so far as the second and third propositions are hinged upon the limitation of the power to levy taxes for the purpose of paying interest and principal on pre-existing indebtedness, and a consequent impairment of the obligations of contracts, the position of the appellants is clearly without merit. Under no construction of the law could it operate to reduce the ability of municipal corporations to incur or pay indebtedness below that which existed at the time the law was enacted, nor does it restrict the power to levy taxes to discharge pre-existing indebtedness.

Section 184 of the Constitution makes it the duty of the political subdivisions incurring indebtedness to provide, either before or at the time of incurring the debt, for the collection of annual taxes sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for payment are declared to be irrepealable until the debt be paid. Chapter 254 must be held to have been adopted in the light of this constitutional provision, and we fail to discover any provision therein that can, by fair construction, be held to violate § 184 by limiting the power of political subdivisions to levy taxes to pay indebtedness previously incurred.

The proper and natural presumption is that the discharge of pre-existing indebtedness was provided for at the time the indebtedness was incurred, and that the taxes are spread from time to time under irrepealable laws or ordinances adopted at the same time. Obviously there was no attempt to repeal any laws of this character. Where a certain levy is provided for by an irrepealable law, the act of levying is completed. All that remains for the future is to spread the levy in the tax lists. Doubtless large amounts of taxes are collected annually to discharge indebtedness incurred years ago and under levies which were made at the time to operate in future. Chapter 254 is only a limitation upon levies and indebtedness to be made or incurred subsequent to its enactment, and it is wholly inapplicable to previous indebtedness.

Section 61 of the Constitution provides that: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

It is contended that chapter 254 violates this section. The title of the bill is "A Bill for an Act to Limit Tax Levies During the Years 1915 and 1916, to Restrict Debt Limits, and Regulate Salaries of Officers, and the Rights and Duties of Officers Now Dependent upon Assessed Valuation." The argument is that the law singles out three distinct subjects and treats them separately; thus limiting the power of local taxation, the power to incur indebtedness, and the salaries of officers. Unless the three matters dealt with are so closely related as to constitute but separate parts of a consistent plan which is readily dis-

cernible in the act itself, when read in the light of the contemporary administration of public finance, it is open to the objection urged.

It is a rule of construction applicable to such constitutional provisions that they should be liberally construed to uphold proper legislation where all parts are reasonably germane to a central object or purpose. 36 Cyc. 1017, 1018; Lewis's Sutherland, Stat. Constr. § 115. The term "subject" as used in § 61 of our Constitution is generally held to mean the matter to which the statute relates. 36 Cyc. 1022. So that if the statute, when construed as a whole, be found to have been framed with one central object to which the apparently separate and distinct subjects treated are so related that the accomplishment of the single object may be said to be in a degree dependent upon the legislative treatment of the related matters so joined, the provision in question is not violated. 1 Lewis's Sutherland on Statutory Construction, § 118.

With reference to the necessity for a fairly liberal interpretation of such a provision as § 61 and one which at the same time shall faithfully observe and seek to prevent the evils attaching to attempted omnibus legislation, Lewis's Sutherland on Statutory Construction, 2d ed. vol. 1, § 143, says: "Similar subjects may be grouped and treated as a class for general legislation, embracing all or a part. There is evident in the later constitutions a strong preference for such legislation, and against special, where general acts are appropriate and practicable. Generalizations to answer all cognate wants require preparation and reflection. A particular need first attracts the attention of the legislator, and when he proceeds to frame a measure with reference to it, how comprehensive he will make it depends on his leisure, his courage, his capacity and his public spirit. *There is a marked difference between an act treating of individual subjects as such, and embracing more than one, and an act which aims at a single purpose involving a plurality of subjects, and concerning all of them or several of them.* The former is generally multifarious; the latter valid as dealing with a unity. . . . But where the legislation concerns separate things without unity in any consideration or purpose, it is within the constitutional inhibition."

It is well settled that constitutional provisions of the character of § 61 are not intended to restrict the "scope or magnitude of the single

subject of the legislative act" (1 Lewis's Sutherland, Stat. Constr. 2d ed. § 117), and neither are they controlling as to the form or the mere method of expressing the subject. State ex rel. Winter v. Sayre, 118 Ala. 1, 24 So. 89. As was said by the supreme court of Minnesota, in the case of Johnson v. Harrison, 47 Minn. 575–578, 28 Am. St. Rep. 382, 50 N. W. 923: " . . . All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject."

A legislative bill may be sufficiently comprehensive to accomplish any legitimate legislative aim, and in the title the subject may express this aim in general terms or it may be constructed by linking together the various minor matters embraced within the single subject indicated in it.

The title in question contains a clear indication of legislation designed to affect, during the biennium of 1915–1916, tax levies, debt limits, and salaries of county officers,—all of which were dependent upon the amount of the assessed valuation; and, as the act is read, it is found to center about the apparent, single object of preserving substantially, with allowance for an approximate average of normal increase, the existing limitations and standards concerning all the matters dealt with for the period of two years. The legislature must be held to have been familiar with such facts as were generally known concerning the operation of the revenue system. It knew, therefore, that the state was annually levying taxes up to the full amount or in excess of its constitutional ability to levy under the existing assessed valuation, and that the legislative limitations upon the powers of political subdivisions, in respect to levying taxes and incurring indebtedness, had been made in the light of the then existing practice of valuing property for assessment at a low percentage of its true value. It knew, also, that the rate of any taxes that were required to be extended at a flat rate had been fixed in the light of the same practice, and that the salaries of county officers had been fixed, and even certain powers of political subdivisions conferred or withheld, according to the amount of assessed valuation. An instance of the latter sort was the power of counties to

levy taxes for the support of fairs. The legislature must have known, then, that all of these matters would be disturbed by any substantial increase in the assessed valuation of the property of the state above that which might be normally expected. They also knew that the state board of equalization was constantly confronted with a choice between increasing the percentage at which property in the state would be assessed so as to be able to legally raise sufficient revenues to be able to meet the needs of the state, thus inviting extravagance on the part of the political subdivisions whose powers would be suddenly and abnormally increased, or of incurring the risks incident to deficits and illegal state levies. In this situation it might well have been considered preferable to relieve the state board of equalization of such embarrassment by permitting a higher basis of assessed valuation to be adopted without disturbing existing financial and governmental arrangements dependent thereon, than to attempt to legislate anew concerning all such matters without the benefit of some experience under a higher assessed valuation basis. It is only by legislation of the character of the act in question that the legislative desire could be accomplished; unless each subject thus related to the general purpose were made the subject of a separate bill. But the constitutional provision in question does not require legislation by piecemeal. When the title of this bill is considered in the light of facts that were commonly known at the time, it is indicative of legislation designed to accomplish a single general object, and it is not, in our opinion, open to the objection that it embraces more than one subject.

Section 61 of the Constitution of North Dakota has been construed by this court in a number of cases, none of which, however, is directly in point upon the question presented in this case. In the last case in which the question was considered—State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924—a discussion of the meaning of § 61 and a review of the authorities on the subject, both in this state and elsewhere, will be found which will show that the conclusion above announced is well supported by the reasoning applied in the previous cases, and that the result is in harmony with the principles laid down. It is therefore unnecessary to refer more at length to the prior decisions and authorities.

The order appealed from is affirmed.

ROBINSON, J. (dissenting). This is an appeal from an order overruling a demurrer to the complaint. The complaint avers that in 1915 the county auditor levied a 2-mill tax of $114.69 against the property of the defendant, in excess of the amount authorized by law; that the levy was made without notice and contrary to chap. 254, Laws 1915; that the plaintiff paid the same under protest; wherefore, it demands judgment for $114.69 and interest.

The tax in question is levied by the statute, and not by the county auditor. The statute makes the levy and directs the county auditor of each county to levy or extend the tax upon all the taxable property in the county for the support of the common schools. Laws 1890, chap. 62, § 102, Comp. Laws, § 1224. The statute gives the county auditor no discretion. It merely commands him in each year to levy or extend against all property in the county a 2-mill tax for school purposes. Under this statute for thirty years the county auditors have extended a 2-mill tax against all taxable property in their county. If the plaintiff may recover the whole or a part of the 2-mill tax for years 1915 and 1916, so may every taxpayer in the state. The right to recover it is claimed under the Laws of 1915, chap. 254. Its title is: "An Act to Limit Tax Levies During Years 1915 and 1916, to Restrict Debt Limits, to Regulate Salaries of Officers and the Rights and Duties of Officers Now Dependent upon Assessed Valuation." Manifestly the title does embrace four subjects, entirely separate and distinct, contrary to § 61 of the Constitution. Hence the act is void.

Section 1 is that part of the act to limit tax levies during the years 1915 and 1916. It provides that no board of county commissioners or county officer whose duty it may be to fix or make any levy on assessed valuation of property shall, during the years 1915 and 1916, levy any assessment for purposes of taxation that will exceed more than 5 per cent or 10 per cent, the authorized levy on the valuation of 1914. Now, though it is not easy to guess the meaning of such a statute, the statute providing for several separate and distinct subjects, it does seem quite clear that the legislature never thought of interfering with the 2-mill school levy which had been in force during thirty years. But if such was the purpose of the legislature, still the complaint does not state facts sufficient to constitute a cause of action. It does not describe the property of the plaintiff or give the assessed

valuation in the years 1915 and 1916. It does not state the amount of the tax extended or levied in 1915, nor the sum of a 2-mill tax based on the assessment of 1914, with an addition of 5 per cent. It does not state facts from which it is possible for the court to determine that in 1915 the school levy was $114.69, or any sum in excess of 2 mills on the valuation of 1914, with an addition of 5 per cent. Hence the demurrer should be sustained.

GRACE, J. I concur in the result arrived at in the dissenting opinion of Justice Robinson.

JOHN G. HALLAND, Respondent, v. MARTIN E. JOHNSON, Appellant.

(174 N. W. 874.)

Contracts — realty — verbal contract to sell — sales under — void.

1. Where a real estate agent claiming to have verbal authority only from the owner, or one alleged to have authority to contract for the sale of land, enters into a written contract between the purchasers and himself as agent of his principal, purporting thereby to effect a sale of such land, such written contract is wholly void under the provisions of §§ 5963 and 6330 of the Compiled Laws of 1913.

Agency — verbal authority — Statute of Frauds.

2. Where a real estate agent has only verbal authority to find purchasers for certain land, and, as agent on behalf of his principal enters into a written

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NOTE.—The provision of the Statute of Frauds that contracts for the sale or purchase of land shall be in writing is undoubtedly intended to apply only to agreements which are intended to effect a change in the title to property, and has no application to contracts of employment by which one person is to act as the agent of another in negotiating a sale or purchase of real property, so as to defeat the right of such an agent, acting under parol authority, to recover the agreed compensation for his services, as will be seen by an examination of the notes in 44 L.R.A. 601 and 9 L.R.A.(N.S.) 933, on necessity that authority of agent to purchase or sell real property be in writing, to enable him to recover compensation for his services.

The question as to when a broker to sell real estate is entitled to commissions is discussed in a note in 15 L. ed. 884.

contract with the alleged purchasers, such contract is within the Statute of Frauds, and is void and cannot be ratified. The rule would be different if the contract were merely voidable, and not wholly void.

Agency — authority in writing — principal — when bound — ratification.

3. Where an agent has no authority to sign a written contract for the sale of land for the principal without first having been authorized in writing so to do, and he signs the contract without having first procured such written authority, ratification of such contract is of no force nor effect under § 6331, Comp. Laws 1913, unless such ratification is in writing, and not then unless the contract is one which is voidable, and not one wholly void.

Evidence — void contract — introduction of.

4. Where a contract in writing by a real estate agent on behalf of his principal was wholly void as a matter of law for lack of written authority of agent to execute such contract, such contract cannot be introduced in evidence for the purpose of showing that the agent had produced a purchaser able, ready, and willing to buy upon the terms stated in the void contract, those terms having been inserted by the agent without any authority from the principal authorizing such terms.

Opinion filed June 3, 1919.

Appeal from the judgment of the District Court of Cass County, and an order denying motion for a new trial, *C. M. Cooley,* Judge, sitting in place of *A. T. Cole,* Judge for the Third Judicial District.

Reversed.

M. A. Hildreth, for appellant.

It was reversible for the court to charge that the uncontradicted evidence showed a compliance on the part of the plaintiff with the contract and a failure to comply with same on the part of the defendant. O'Day v. Myers, 147 Wis. 549, 133 N. W. 605; Ballow v. Carter, 137 N. W. 603; Harris v. Leise, 135 N. W. 687; Powell v. King, 135 N. W. 719; Clark v. Lanam, 139 N. W. 770; Kane v. Sherman, 130 N. W. 222; Wilson v. Gibb (Iowa) 160 N. W. 324; Jepsen v. Marohn, 21 L.R.A. (N.S.) 939, 119 N. W. 988.

An agent, to be entitled to recover commissions on sale, or for the production of alleged purchaser, must show what authority had been given him by the principal and what terms he was authorized to make, and that he either made a sale on the very terms authorized or produced a purchaser ready, willing, and able to purchase upon the precise terms

of the authority so vested in him. Powell v. King, 135 N. W. 719; Clark v. Lanam, 139 N. W. 70; Kane v. Sherman, 130 N. W. 222; Wilson v. Gibb (Iowa) 160 N. W. 324; Jepsen v. Marohn, 21 L.R.A. (N.S.) 939, 119 N. W. 988.

A mere listing of lands with authority to sell and dispose of the same at a certain fixed price, in the absence of a special authority to enter into a written contract with the purchaser in the name of the principal, only authorizes the real estate broker to find and present to the principal such a purchaser, and does not authorize such agent to enter into a contract binding the defendant to convey the property. Halsey v. Monteiro, 92 Va. 581, 24 S. E. 258; Morris v. Ruddy, 20 N. J. Eq. 236; Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617; Melne v. Kleb, 44 N. J. Eq. 378, 14 Atl. 646; Coleman v. Garrigues, 18 Barb. 60; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; Glentworth v. Luther, 21 Barb. 145; Grant v. Ede, 85 Cal. 418, 20 Am. St. Rep. 237, 24 Pac. 890; Hedden v. Shepherd, 29 N. J. L. 334; Young v. Hughes, 32 N. J. Eq. 383; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Stewart v. Pickering, 73 Iowa, 652, 35 N. W. 690; Ballou v. Bergsvendsen, 9 N. D. 285, 83 N. W. 10; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453.

In cases of this nature the burden is on the plaintiff to prove that he has found and produced and brought to the landowner a purchaser who is ready, willing, and able to enter into a contract to purchase with the landowner on the prescribed terms, or in lieu of producing and presenting such purchaser he must show that he has obtained from such purchaser a valid and binding contract in favor of the landowner and a contract that might be enforced by the landowner's heirs in the case of a breach or default in the terms thereof. Fulton v. Cretian, 17 N. D. 335; Watters v. Dancey (S. D.) 122 N. W. 431; Jacobson v. Rotzien, 127 N. W. 420.

Engerud, Divet, Holt, & Frame, for respondent.

GRACE, J. Appeal from the judgment of the district court of Cass county, and an order denying motion for a new trial, C. M. Cooley, Judge, sitting in place of A. T. Cole, Judge for the third judicial district.

The action is one in which the plaintiff seeks to recover a commis-

sion of $1,725 against the defendant for the alleged procuring of a purchaser for section 7, township 137, range 50. The complaint is in the usual form. The answer is a general and specific denial to the allegations of the complaint. A statement of the facts will give the clearest understanding of the matters at issue:

The defendant owned only the N.E.¼ of the section, Edward E. Johnson the N.W.¼, Kate Bergquist the S.W.¼, and John Johnson, who was incompetent and was under guardianship, the S.E.¼. At the time the plaintiff claims to have listed this land, he knew that the land above described was then owned by the respective parties above named. He made inquiry from defendant; he knew about the title and the source of it, which was from the estate of defendant's father. He knew at that time also that John Johnson was under guardianship. The listing contract, if any, between plaintiff and Martin E. Johnson, was oral. Plaintiff claims the net price to have been $50 per acre. Defendant claims he told plaintiff that he would expect a commission of $2 per acre if he sold it at the list price, and if sold for more than that price, a 5 per cent commission. He claims that Martin E. Johnson gave him authority to sell all of section 7. The defendant, in substance, claims that he listed only his quarter, and that he did not undertake to furnish title to the remaining three quarters. The plaintiff claims that defendant authorized him to sell the whole section, and that the defendant represented that he had authority to act for the others. All of section 7 had been leased by Evan Johnson, the father, to one Fjelstad for the term of five years. The lease did not expire for approximately three years from the time of the alleged sale of section 7 by the plaintiff. The plaintiff, having no other authority than the alleged oral contract between himself and Martin E. Johnson, entered into a written agreement with one T. P. Borderud and Frederickson and Brakke. The agreement is as follows:

Fargo, N. Dak., Jan. 7, 1915.

This agreement entered into between John G. Halland, party of the first part, as agent for Martin Johnson, and T. P. Borderud, and Frederickson & Brakke, parties of the second part:

Witnesseth, that the said John G. Halland has this day received one thousand dollars ($1,000) from T. P. Borderud and Frederickson &

Brakke, parties of the second part, as a part cash payment of the sum of thirty-four thousand five hundred dollars ($34,500) which is the purchase price, and for which consideration the said party of the first part as agent for Martin Johnson agrees to furnish good and merchantable title to the following tract of land:

Section seven (7), township one hundred thirty-seven (137), range fifty (50) Normana township, Cass county, state of North Dakota.

The terms of this purchase are as follows:

The whole purchase price for the above-described section 7 shall be $34,500, one thousand dollars ($1,000) paid down on the date of this agreement, and $9,000 in cash to be paid on or before the 1st day of March, 1915. For the balance of the said purchase price, namely, $22,000, the parties of the second part agree to give notes drawing 6 per cent interest, due in five years from March 1, 1915, with the privilege of prepaying sums of $100 or multiples thereof on any interest paying date. Such notes to be secured by a first mortgage on the above-described land. Such notes and mortgage to be drawn as may be directed by the parties of the first part.

It is further stipulated that the whole of this parcel of land above described shall be transferred to the parties of the second part, or such parties as they may direct, free of all encumbrance excepting a mortgage of $2,500, bearing interest at the rate of 6 per cent annually, due in five years, on the northwest quarter section of the said section 7.

The parties of the second part agree to assume the mortgage on the northwest quarter section, drawing interest at the rate of 6 per cent annually, due in five years.

It is furthermore stipulated that the cash payment of $1,000, together with all subsequent payments made on or before the 1st of March, shall be deposited with the Scandinavian American Bank of Fargo, such moneys to be turned over by the said bank to the party of the first part, when abstract of title, good warranty deed, notes, and mortgages shall have been duly executed and examined by the respective parties in this agreement. Should the party of the first part fail to furnish such title within a reasonable period, then the cash payment made shall be returned to the parties of the second part.

It is further stipulated that sufficient time shall be given in which to secure abstracts and carry out such court proceedings as may be

necessary in order to give good title. If for such purpose more time should be necessary than up to the 1st of March, 1915, through no fault of the party of the first part, then the date of payment of the $9,000 shall be extended until such time.

The parties of the second part assume the rights and obligations of lease in force at this date.

[Signed] John G. Halland, Agent.
T. P. Borderud.
Frederickson & Brakke.
By P. B. Frederickson.

Witnesses:
Amy Hill.

It will be noted that in the first part of the agreement, John G. Halland entered into the agreement, styling himself the agent for Martin E. Johnson. He signs it as John G. Halland, agent. The price at which the sale was undertaken to be made was $56.24 an acre. It is also to be noted that there are no specific terms of sale of the land set forth in the alleged verbal original listing agreement; neither is there substantial proof that specific terms of sale of the land were stated in the alleged verbal listing agreement. The terms of the alleged sale of said land, as contained in the written agreement hereinafter referred to as exhibit 1, are not shown to correspond with any terms of the listing agreement, if there were any. The terms contained in exhibit 1 are evidently such terms as the plaintiff saw fit of his own volition to insert therein. Such terms were neither given, consented to, nor legally ratified by defendant.

The trial was had to a court and jury, and a verdict was returned in favor of the plaintiff for $2,006, damages and costs. The defendant specifies twelve errors based upon the insufficiency of the evidence to sustain the verdict, forty-four errors based upon the admission or exclusion of testimony, eight errors based upon the giving of certain instructions to the jury. All the errors assigned have been fully considered. It is impracticable to discuss each separately; they will be considered and discussed as a whole in connection with our analysis of several of the most vital errors. We will consider first, error 22, which relates to the admission in evidence of exhibit 1. After show-

ing the circumstances surrounding the execution of exhibit 1, which was drawn up in the plaintiff's office, defendant not being present, and signed by the alleged purchasers and the plaintiff, the latter claiming to act as agent for the defendant, it was offered in evidence by the plaintiff. To the introduction of the same, the defendant interposed the following objection:

"Objected to on the ground that it is incompetent, irrelevant, and immaterial, and on the further ground that it appears from the evidence in this lawsuit, that neither Halland nor Johnson, his principal, was able to make conveyance of one-quarter section of the land that was involved, for the reason that that land was owned by a party that was incompetent to convey, save and except through the probate court, and that there is no foundation laid in the authority on the part of the plaintiff or Johnson to convey the land in question, save and except one-quarter section thereof which is described as the N.E.¼, the title of which was in the defendant, Johnson, and upon the further ground that it appears from the face of the record that even under the terms of the contract, exhibit 1, there could be no conveyance to the lands that were in the hands of the probate court, and it does not appear that Mr. Halland had any authority to make the contract in question or that Johnson had any power or authority to ratify such contract. The contract being one for the conveyance of lands, that is within the Statute of Frauds, and it already appears from the evidence that the plaintiff had no power of attorney or written authority from the owners of the land in question to enter into any contract for the sale thereof, and that his assuming authority and power under the very terms of the contract was void and of no effect, and not binding in any manner, neither upon the defendant nor the so-called purchasers; that the pretended contract, exhibit 1, in no sense shows the procuring of a purchaser that could buy or pay, for the reason that it involved the sale of the entire section, one quarter of which was beyond the power of either Johnson or Halland to give title to, and that the contract is absolutely void as a purchase contract, and therefore the evidence is incompetent, irrelevant, and immaterial, and does not prove nor tend to prove the procuring of a purchaser."

The court overruled this objection and admitted in evidence exhibit 1. We are of the opinion and so hold that this was prejudicial, rever-

sible error. Exhibit 1 constitutes no evidence of the sale nor terms of sale, nor ability, readiness, nor willingness on the part of the prospective purchasers to purchase the land, for the reason that Halland was wholly without any authority to enter into the contract as the agent of Johnson, nor was exhibit 1 ever, as a matter of law, ratified. The agreement was neither binding upon the purchasers nor upon Johnson. It is not a legal, binding, nor effective sales contract. It was wholly void. The plaintiff contended it was introduced for the purpose only of showing that he had purchasers able, ready, and willing to purchase the land in question. Considered in this light it is a mere self-serving instrument, and, as evidence, a self-serving declaration. At the time the plaintiff formulated exhibit 1 and inserted therein the terms and conditions upon which the land was sold, he was doing that which only the owner of the land had the authority to do. Halland had authority only to bring purchasers able, ready, and willing to purchase upon terms fixed by Johnson. Assuming, though not conceding, Johnson had authority to contract for the sale of all the land, it is clear the plaintiff was placed in this dilemma, *viz.,* that if he did not prepare an instrument such as exhibit 1 in which definite terms were stated, he would not be in position to prove that he had brought to defendant purchasers who were able, ready, and willing to buy upon terms fixed by the defendant. Thus he usurped the position of the owner of property, arbitrarily fixed terms in the alleged agreement, procured them to be signed by the purchasers,—all of which was wholly unauthorized and wholly void at the time those things were done. Plaintiff claims that exhibit 1 was presented to defendant and approved by him. The Statutes of Fraud squarely cover these matters. Section 5963, Compiled Laws 1913, provides: "No agreement for the sale of real property, or of an interest therein, is valid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or his agent thereunto authorized in writing." Section 6330, Compiled Laws 1913, which makes § 5963 more specific as to the authority of the agent to enter into a contract on behalf of his principal where the contract is required by law to be in writing, reads thus: "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing *can only be given by an instrument in writing.*"

We think it is conceded by both parties that exhibit 1 had no force or effect as a sales contract. As such it had no validity; it was void. Ballou v. Bergvendsen, 9 N. D. 289, 83 N. W. 10, and cases cited therein; Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453; Lichty v. Daggett, 23 S. D. 380, 121 N. W. 868. Plaintiff, however, claims that defendant ratified exhibit 1, and thus it was proper to introduce it in evidence to prove the terms of sale and the ability, readiness, and willingness of the alleged purchasers to comply with such terms. There is no claim by plaintiff that there was any approval or ratification of exhibit 1 by Johnson except a verbal one. Testimony relative thereto shows that the alleged approval or ratification of exhibit 1 was entirely verbal. It was not ratified by any writing signed by Johnson. In that case, such verbal ratification under our statute would be a nullity and of no force or effect.

The sections above set forth and authority cited fully demonstrate that exhibit 1 is absolutely void as a sales contract. If it be conceded for the sake of argument that the plaintiff did verbally ratify exhibit 1, it must be held that such ratification or approval, if any, had no force or effect in this case. A contract for the sale of the land is, by law, required to be in writing. The same is true of the ratification of it. Section 6331, Compiled Laws 1913, reads thus: "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or, when an oral authorization would suffice by accepting or retaining the benefit of the act with notice thereof."

The contract was absolutely void and of no legal effect. Section 614, Bishop on Contracts, 2d ed., is as follows: "A void deed of land conveys nothing. A void sale of goods passes no title though they are delivered, not even operating as a gift. And persons other than the direct parties, equally with them, may impeach a void judgment. *There can be no confirmation of a void contract;* nor will it constitute an adequate consideration for a new one."

Sec. 694, vol. 2, Page on Contracts, is as follows: "Whether an oral ratification of an unauthorized signature is sufficient depends in part upon the statutory requirements for the original authority of the agent. Putting aside questions of estoppel and performance, *ratification requires the same degree of proof as original authority.* Hence if

the statute requires original authority to be proved by writing, an oral ratification by the principal of an unauthorized contract for the sale of land made by his agent is within the statute, even if the agent had written authority with the terms of which he did not comply."

Under our statute, Halland could not sign the contract unless he was authorized in writing by Johnson so to do. This being true, a ratification to be effective would also have to be in writing. There was no written ratification, hence all testimony relating to oral ratification was wholly incompetent and inadmissible, and should have been excluded. All such testimony in this case was without probative force. It should not have been received as evidence; it was reversible error to receive it.

With exhibit 1 excluded, there remains no competent evidence sufficient to support plaintiff's claim. In this state at the time the cause of action herein arose, it was not necessary that the agent's authority be in writing in order to authorize him to procure a purchaser for land. A verbal authorization for that purpose was sufficient. He has, however, no authority by reason of such an agency to make any written contract with reference to the sale of the property for which he is thus agent which will in any way bind the owner of the property. Before he can do so, he must be for that purpose duly authorized in writing. If he does make such contract without such written authority, it is wholly illegal and void, and an oral ratification of it, if any were made, would in no manner affect its illegality, and it would still remain wholly void for every purpose.

So far as the testimony shows, Johnson received no benefit from this transaction. It is not shown that any money was paid to and retained by him. It clearly appears that he never in writing ratified exhibit 1. Section 6331 was enacted, as we view it, for the purpose of meeting conditions similar to those existing in this case. The alleged ratification being of no force nor effect, exhibit 1 was not valid as a sales contract, nor was it admissible to prove the terms of the sale of the land; for, as we have seen, Johnson did not legally approve nor ratify the same, and therefore did not ratify its terms nor any part or portion of it, and it is of no binding force nor effect as to him for any purpose, and is wholly void. As evidence, exhibit 1 must be considered, so far as Johnson is concerned, as a mere self-serving instru-

ment and declaration of the plaintiff, and wholly incompetent and inadmissible for any purpose.

Borderud, one of the alleged purchasers, was sworn as a witness, and in effect testified that he and the parties associated with him were able to carry out the contract according to its terms. This testimony in no manner strengthens the plaintiff's case. There was no contract to carry out. The purchasers knew, or must be held to have known, that they were not bound upon the contract, and that it and the attempted ratification of it were, as a matter of law, absolutely void. There was no partial performance as the $1,000 claimed to have been paid on on the contract was not shown to have been received by the defendant nor by anyone authorized by him to receive the same. What we have said, we believe completely disposes of the real merits of the case.

In order to more fully clarify issues involved, it may be well to examine the relative positions of the plaintiff and defendant at the time of the alleged listing agreement with reference to the knowledge each possessed of the condition of the land as to ownership and title. Plaintiff was in no manner misled or deceived in this matter. He knew at the time of the alleged listing agreement that the defendant owned only one-quarter section of the land. He knew who owned each of the other quarters of section 7. He knew the condition of the title of this land. He inquired about it at the time of the alleged listing of it. He was not innocent of who the real owners were. It is not such a case as if the defendant had represented to him that he owned all this land when he did own but one quarter, and the plaintiff relied upon his statement that he owned all of the land, or had authority to sell all of the land, and the plaintiff had no knowledge to the contrary. The plaintiff made no further inquiry into defendant's authority to sell the land.

If he desired, he could easily have fully determined this matter by inquiry from the other owners, and, in any event, he must have known that there would be considerable difficulty in getting title to the one-quarter section of John Johnson, incompetent. In addition to this, the records of Cass county were constructive notice to him of condition of the title, and additional knowledge was brought home to him at the time he negotiated a loan upon the N.W.¼ for Edward E. Johnson. Plaintiff cannot close his eyes to all these matters and claim that he

was in any manner misled or deceived. He was not. He was a man, according to the testimony, accustomed to doing this kind of business. He was a real estate agent. It must be presumed that he had knowledge of the importance of the condition of the title of the property of which he was to undertake to negotiate a sale. He knew the necessity of being invested with proper authority by Johnson or by the owners of the land in order to effect a sale, and the further necessity of delivering to the purchaser the title.

It is clear that the defendant is under no liability for the alleged procuring of purchasers for the whole section nor for his individual quarter. *The whole transaction was void and that included his quarter.* Defendant signified his willingness to make sale of his own quarter section for $50 an acre. He prepared an unsigned deed which was offered in evidence. It does not appear that the plaintiff has acted upon such offer nor indicated any willingness to complete the sale as to such quarter. In such case, it must be considered the plaintiff declined to consider the offer of the defendant in this regard. Exhibit 1 being wholly void, the defendant was under no obligations to complete the sale of his own quarter, and it is held he is under no liability for not doing so. Upon an examination of the entire record, we are satisfied there is no evidence or at least insufficient evidence to sustain the verdict. There are many other errors assigned, some of which are of merit and would justify a reversal of the judgment. We feel it not necessary to enter into further consideration of them. They have all been considered. Some of them are quite closely related to those we have discussed. From what we have stated and the conclusions we have reached with reference to the law of this case, it is apparent that the plaintiff cannot recover. If our statement of what the law is in the case is correct, a new trial could avail the plaintiff nothing.

The judgment is reversed, the case is remanded to the District Court, with instructions to it to enter an order for dismissal. Defendant is entitled to recover his statutory costs upon this appeal.

BIRDZELL, J. I dissent.

CHRISTIANSON, Ch. J. (dissenting). I dissent. In order to pre-

sent my views it becomes necessary to make some reference to the record in the case. The plaintiff in his complaint alleges that he is a real estate broker; that in September, 1914, he was solicited by the defendant to obtain a purchaser for section 7, township 137, range 50, at a price of not less than $52 per acre; that it was agreed between the plaintiff and defendant that the plaintiff, on procuring such purchaser, should receive a commission of $2 per acre if the land was sold for $52 per acre, and if the tract sold for more than that price that then the plaintiff should receive a commission of 5 per cent of the total selling price,—in either event the commission to be payable as soon as the sale was made; that the terms on which sale might be made were as follows: A substantial payment on delivery of deeds, the remainder in five years, with interest at 6 per cent, said payments to be secured by a first mortgage on the premises conveyed; that in pursuance of said agreement the plaintiff undertook to find, and in January, 1915, did find, a purchaser willing, ready, and able to purchase said tract of land at $56.24 per acre, or $34,500 for the entire tract, upon the following terms: $1,000 cash paid as earnest money, and $9,000 more in cash on or before March 1, 1915, upon delivery of proper conveyances and abstract of title; the assumption by the purchaser of a first mortgage for $2,500 against one of the quarters; for the remainder of the purchase price, *viz.*, $22,000, the purchaser was to give his notes, bearing 6 per cent interest, due in five years, with privilege of paying the sum of $100 or any multiple on any interest-paying date,—such notes to be secured by mortgage on the premises sold; that the plaintiff informed defendant of the terms and conditions of such proposed sale, and that the defendant advised and directed the plaintiff that said purchasers and the terms of sale were satisfactory, and that defendant authorized plaintiff to sell the land on the said terms. The complaint further alleges that the plaintiff and the purchasers made the contract set forth in the majority opinion, and that the purchasers at all times were ready, willing, and able to purchase the lands upon the terms stated in such contract, and were prevented from so doing solely by the defendant's failure to perform. The answer is, in effect, a denial of the averments of the complaint.

The plaintiff testified positively that the defendant came to his

office in Fargo on September 22, 1914, and listed the land for sale; *i. e.*, employed plaintiff to obtain a purchaser therefor. One Axel Tangerud, a disinterested witness, testified that he met the defendant just as he came out of plaintiff's office, and that the defendant then told him (Tangerud) that he had listed the section of land for sale with the plaintiff. Miss Amy Hill, a public stenographer, who had a desk in plaintiff's office, testified that defendant frequently came to plaintiff's office in the fall of 1914 and the winter of 1914–1915, and that she heard them talking about the sale of the land at least five or six times. The testimony shows that plaintiff went to considerable trouble in obtaining a purchaser. After he had entered into negotiations with the purchasers involved in this litigation, defendant was informed of such negotiations. In fact the evidence shows that the defendant took the plaintiff and the purchasers out in his (defendant's) automobile to look at the land, and that upon this occasion he participated to some extent in the discussion of the price. The plaintiff testified that the defendant, pending the negotiations, told him to take any paper that Borderud would sign, as Borderud was "absolutely good;" that the plaintiff notified defendant by telephone the same evening that the terms of sale had been agreed upon, and that defendant expressed his satisfaction with the deal; that on the day following the defendant came to plaintiff's office and read the contract set forth in the majority opinion, and expressed his full approval of the terms of the proposed sale as therein contained. Judge Cole testified that (at a subsequent date) he was present and heard a conversation between the plaintiff and defendant, wherein the defendant expressed his intention to complete the sale to the purchasers procured by the plaintiff in accordance with the terms agreed upon between the plaintiff and such purchasers. Borderud, one of the purchasers, was called as a witness, and testified to his ability, willingness, and readiness to purchase upon the terms stated in the agreement. Clearly the testimony of these different witnesses was admissible, even though the position of the majority members as to the written contract is correct. This testimony was properly for the consideration of the jury, and supports the verdict returned.

Under the laws of this state, in force at the time involved in this litigation, the contract of employment of a real estate broker might

rest entirely in parol. Comp. Laws 1913, §§ 5886, 6330; Kepner v. Ford, 16 N. D. 50, 53, 111 N. W. 619. And where an oral authorization suffices, ratification of the acts of the agent may be by parol. Comp. Laws 1913, § 6331. The majority members concede this, but they say that a real estate broker has no authority to make a contract of sale, binding upon his principal, unless he is authorized in writing to do so. And upon this premise they base the conclusion that, inasmuch as the plaintiff attempted to make a contract of sale with the purchaser which he procured, he has no cause of action for the compensation which he had earned by finding the purchaser. The premise is right, but the conclusion is wrong. No one has contended that the plaintiff in this case had authority to make a binding contract of sale. Nor has anyone contended that the defendant has ratified the contract of sale so as to make it enforceable against him. Certainly plaintiff has advanced no such contention, nor did the trial court so rule. The plaintiff does not claim any authority to make a contract of sale, but he does claim, and the evidence shows, that he was authorized to procure a purchaser. He says that he procured such purchaser, and that the terms upon which the purchaser was willing to buy were embodied in a writing, and that such writing was submitted to the defendant and that he assented to the terms of sale stated therein. Plaintiff offered the writing in evidence, not for the purpose of showing a valid contract of sale, but solely for the purpose of showing the terms upon which the purchasers were willing to buy the property. He offered the evidence, with respect to the submission of the agreement to the defendant and his assent to the proposed terms, not for the purpose of showing the ratification by the defendant of a contract of sale so as to make it binding upon him, but solely for the purpose of showing that the defendant assented to the proposed terms of sale, and that therefore plaintiff did in fact perform the services for which he was employed, *viz.*, procured a purchaser able, willing, and ready to buy upon the terms stated, or upon terms assented to by the defendant. There is no room for misunderstanding upon this point. The trial court so indicated when he admitted the contract in evidence, and in his instructions to the jury he said: "You are instructed that exhibit 'I' is not an agreement for the purchase or sale of said tract of land that could be enforced against either of the parties thereto, and

such contract is material to this case only as written evidence of the terms and conditions upon which the said Borderud and Fredrikson & Brakke offered to purchase said tract."

That the contract was admissible in evidence for the purpose to which it was restricted in the institutions is the established law of this state. The precise question was considered and determined by this court in Kepner v. Ford, 16 N. D. 50, 111 N. W. 619. In that case this court said: "Appellant's second assignment of error is predicated upon the court's ruling in receiving in evidence plaintiff's exhibit C, which is a mere memorandum agreement between the plaintiff signing himself as agent for the defendant, and Maurice Deneen and W. H. Deneen, showing that the two last-named persons agreed to purchase the defendant's said property at the sum of $12,000 cash; the defendant to give warranty deed and furnish abstract showing no encumbrance. This is dated August 6, 1904. The ground of defendant's objection is that plaintiff had no authority to enter into such agreement, and hence that the same is not binding upon defendant. This objection is clearly untenable. Whether or not plaintiff could enter into a contract with the Deneens which would be binding upon the defendant is not material. Conceding that he could not, which no doubt is true (Brandrup v. Britten, 11 N. D. 376, 92 N. W. 453), still we think this exhibit was admissible as some evidence at least of the fact that the Deneens were willing to purchase the property, and also for the purpose of showing the terms upon which they were willing to purchase (McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Lawson v. Thompson, 10 Utah, 462, 37 Pac. 732). It was incumbent upon plaintiff to furnish proof of such facts. The Deneens afterwards testified to their willingness and ability to purchase the property upon the terms stated, and such fact was not disputed in any way by defendant, and hence such ruling, if error, was entirely harmless. There is nothing in the opinion in Brandrup v. Britten, supra, relied upon by appellant, holding contrary to the views above expressed." At the time of the trial of this action, the rule announced in Kepner v. Ford was the law of this state. Comp. Laws 1913, § 4328. And the plaintiff, his attorneys, and the trial court were justified in acting accordingly. The language quoted from Kepner v. Ford is directly applicable to the instant case. In this case, also, the purchaser testi-

fied to his ability and willingness to purchase the land upon the terms stated. In fact there was more reason for admitting the agreement in evidence in this case than there was in Kepner v. Ford, for in this case the evidence shows that the written agreement was submitted to the defendant and read by him; that it formed the basis of a conversation between plaintiff and defendant; and that defendant expressly assented to the terms of sale therein stated. The written agreement (as held in Kepner v. Ford) was in legal effect merely a memorandum of the terms upon which the purchasers were willing to buy the property. And in his instructions, the trial court expressly limited it to that purpose.

But the majority members say that the agreement was a self-serving declaration, and inadmissible even for the limited purpose for which the trial court admitted it. Of course if the agreement in this case was inadmissible for this reason, so was the agreement involved in Kepner v. Ford. It is indeed difficult to understand the reasoning of the majority members. If their theory is sound a real estate broker who carries on negotiations and arranges the terms of sale with a purchaser through correspondence would be precluded from establishing his cause of action. And if the theory is carried to its logical conclusion a real estate broker should also be held to be precluded from testifying to anything which he did or said in procuring a purchaser, or anything which the purchaser said to him; for of course such testimony, in so far as it would tend to establish the broker's right of recovery, would be in his own interest, and to that extent self-serving. So far as I can find, the majority opinion stands alone. It is contrary to the universal holdings of the courts, and directly in conflict with, and overrules, the decision of this court in Kepner v. Ford.

The questions in this case are: (1) Did the defendant employ the plaintiff as a real estate broker? and (2) Did the plaintiff perform his contract by obtaining a purchaser able, willing, and ready to buy on the terms expressed in the contract of employment, or on terms assented to and ratified by the defendant? If these questions are answered in the affirmative, plaintiff is entitled to recover. Paulson v. Reeds, 33 N. D. 141, 156 N. W. 131; McFarland v. Lillard, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; 23 Am. & Eng. Enc. Law, 900. In this case these questions were submitted to the jury. *They were*

the only questions submitted. The jury by the general verdict answered these questions in favor of the plaintiff. It is elementary that the findings of the jury are conclusive upon this court, if there is any substantial evidence tending to support them. It seems to me that, wholly aside from the written agreement, there was ample evidence to support the findings of the jury. But even though the evidence was insufficient, this would not justify this court in dismissing the action. The action should not be dismissed unless it clearly appears that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict can be remedied upon another trial. First State Bank v. Kelly, 30 N. D. 84, 98, 99, 152 N. W. 125, Ann. Cas. 1917D, 1044. It is undisputed that the written agreement was the result of oral negotiations. Even if the agreement is eliminated, the plaintiff would doubtless be able to show that the proposed purchasers were able, willing, and ready to buy the land upon the same terms as those stated in the agreement.

In my opinion the majority opinion in so far as it holds the written agreement to be inadmissible for the purpose for which it was admitted in this case is unsound. And in so far as it overturns the verdict and orders a dismissal of the action, it constitutes a flagrant invasion by this court of the functions which the Constitution of this state has expressly conferred upon the jury.

BIRDZELL, J. I concur in the foregoing dissenting opinion.

KASPER SCHANTZ, as Administrator of the Estate of Raphael Schantz, Deceased, Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

(173 N. W. 556.)

Damages — injury of section worker — interstate commerce — Employers' Liability Act.

1. An employee of an interstate railway carrier engaged in working as a section man upon the railroad of such carrier, who is injured returning from his work by attempting to board a moving freight train pursuant to directions

or orders of the section foreman so to do, is engaged in interstate commerce within the meaning of the Employers' Liability Act of Commerce, of April 22, 1908.

Damages — personal injuries — question of negligence — assumption of risk — jury.

2. In an action for personal injuries under the Federal Employers' Liability Act, where the deceased, a boy sixteen years of age, while employed as a section man upon the railway of the carrier, was injured by attempting to board a moving freight train upon his return from work, it is *held*, under the evidence, that the question of the negligence of the carrier in directing or ordering, through its section foreman, the deceased so to do, and of the contributory negligence of, and the assumption of the risk by, the deceased, were questions of fact for the jury.

Damages — personal injuries — Federal Employers' Liability Act governs.

3. In such action, the Federal Employers' Liability Act, applying under both the pleadings and the evidence, superseded state statutes.

Opinion filed April 25, 1919. Rehearing denied June 6, 1919.

Action for personal injuries, in District Court, Morton County, *Crawford*, J. From a judgment entered upon a verdict directed for the defendant, the plaintiff appeals.

Reversed and new trial granted.

Jacobsen & Murray, for appellant.

"A track repairer engaged in repairing a track over which both interstate and intrastate trains move is embraced within the provisions of the Federal Employers' Liability Act." Thornton, Fed. Employers' Liability Act, 3d ed. § 48, p. 76. Also see cases cited therein; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125; Moyse v. N. P. R. Co. (Mont.) 108 Pac. 1062; 8 Thomp. Neg. § 4557.

"An employee working at interstate commerce is protected by the Federal Employers' Liability Act while going to and from his work." Thornton, Fed. Employers' Liability Act, § 55, p. 88; North Carolina R. Co. v. Zachary, 232 U. S. 246, 58 L. ed. 591; Southern R. Co. v. Puckett, 37 Sup. Ct. Rep. 703; Erie R. Co. v. Winfield, 37 Sup. Ct. Rep. 556; U. S. Comp. Stat. §§ 8657–8665; Umsted v. Colgate Elev. Co. 18 N. D. 309.

"The fact that the deceased may have been guilty of contributory

negligence does not mean that he assumed the risk." Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 506, 58 L. ed. 1062, 1070; Chesapeake & O. R. Co. v. DeAtley, 36 Sup. Ct. Rep. 564; 8 Thomp. Neg. p. 673, § 4614 and cases cited; N. P. R. R. Co. v. Egland, 163 U. S. 93, 41 L. ed. 82; Swords v. McDonnell, 31 N. D. 494; Van Duzen Gas & Gasoline Engine Co. v. Schelies (Ohio) 55 N. E. 998; Wheeler v. C. & N. W. I. R. R. Co. 108 N. E. 330; Clinkscales v. Wis. Granite Co. (S. D.) 160 N. W. 843; Wuotilla v. Duluth Lumber Co. (Minn.) 33 N. W. 551.

"A master is liable for injuries to an inexperienced servant in consequence of his attempt to obey a negligent order of one having authority to give the order." 8 Thomp. Neg. p. 580, § 3815. Also §§ 3809, 4924, 5382; 7 Thomp. Neg. § 5382; 83 S. W. 289.

The above case involves an order given to a laborer to jump off a train. Tuckett v. Am. Steam & Hand Laundry (Utah) 84 Pac. 507; Cook v. St. P. M. & M. R. Co. 24 N. W. 311; Strong v. Iowa C. R. Co. (Iowa) 62 N. W. 799; Swift & Co. v. Creasey, 61 Pac. 314; Sweet v. C. & N. W. R. Co. (Wis.) 147 N. W. 1054; Flynn v. Modern Steel Structural Co. (Wis.) 134 N. W. 1044; Standard Cement Co. v. Minor (Ind.) 100 N. E. 767; Sexton v. Boston Elev. R. Co. 101 N. E. 1067; Marietta Glass Mfg. Co. v. Bennett, 106 N. E. 419; Rathjen v. C. B. & Q. R. Co. (Neb.) 124 N. W. 473; 8 Thomp. Neg. § 4630; Looney v. Garfield Coal Co. (Iowa) 147 N. W. 129; Breedlove v. Gates (Neb.) 137 N. W. 871; Rathjen v. C. B. & Q. R. R. Co. (Neb.) 124 N. W. 473, holds that the method of having section men catch on to moving trains in coming from their work is dangerous and renders the company liable. 147 N. W. 1054, 136 N. W. 511, 124 N. W. 473.

Watson, Young, & Conmy, for respondent.

"A master is not answerable for the acts of his servant committed outside his duty, although the particular injury could not have occurred without the facilities afforded by the relation of the servant to his master." Louisville, etc. R. Co. v. Palmer, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400; Harrell v. Cleveland, etc., R. Co. 27 Ind. App. 29, 60 N. E. 717, and many other cases cited; Louisville & N. R. Co. v. Gillen, 76 N. E. 1059; Hobbs v. Great Northern R. Co. 142 Pac. 23; Chattanooga S. R. Co. v. Myers, 37 S. E. 439; Green v.

Brainard R. Co. (Minn.) 88 N. W. 974; 3 Elliott, Railroads, p. 1303, and cases cited.

"It is the settled law in North Dakota and in the United States that a section foreman is not a vice principal." Ell v. N. P. R. R. Co. 1 N. D. 336, 48 N. W. 222; B. & O. R. Co. v. Bangle, 149 U. S. 368; see extensive notes in 51 L.R.A. 603, and 11 L.R.A.(N.S.) 1041; Vanordstrand v. N. P. R. Co. 151 Pac. 89; Reeve v. N. P. R. Co. L.R.A.1915C, p. 37, 144 Pac. 63; C. R. I. & P. R. Co. v. Koehler, 147 Ill. App. 147.

"Where there is an absolute safe and safer way to do the work open to the servant, he cannot recover if he chooses the dangerous way and is injured." Morris v. Duluth R. Co. 108 Fed. 747; Suttle v. Choctaw, O. & G. R. Co. 144 Fed. 668; Central of Georgia R. Co. v. Mosley (Ga.) 38 S. E. 350; 20 Am. & Eng. Enc. Law, p. 146; Bailey, Mast. Liab. p. 169; Iron Co. v. Brenan, 20 Ill. App. 555; Same v. Burk, 12 Ill. App. 369; Cook v. Mining Co. 12 Utah, 51, 41 Pac. 557; Iron Co. v. Carpita (Colo. App.) 40 Pac. 248; Richardson v. Coal Co. (Wash.) 32 Pac. 1012; Lewis v. Simpson (Wash.) 29 Pac. 207; Fritz v. Salt Lake & O. Gas & E. L. Co. (Utah) 56 Pac. 90; (Colo.) 71 Pac. 425; (Ga.) 36 S. E. 599; Penn. R. Co. v. O'Shaughessy (Ind.) 23 N. E. 675; Railroad Co. v. Jones, 95 U. S. 439, 440, 442, 443, 24 L. ed. 506; Railroad Co. v. Houston, 95 U. S. 697, 702, 24 L. ed. 542; Dawson v. Chicago, R. I. P. R. Co. 52 C. C. A. 286, 114 Fed. 870; Erie R. Co. v. Kane, 55 C. C. A. 141, 118 Fed. 235; Kresanowski v. Railroad Co. (C. C.) 18 Fed. 229; Gilbert v. Burlington R. Co. 128 Fed. 536; Crothy v. C. & G. W. R. Co. 141 Fed. 913; American Linseed Co. v. Heins, 141 Fed. 45.

Assuming a direct and positive order to catch the train, there can be no recovery, as the risk was open and obvious. Umsted v. Colgate Elev. Co. 22 N. D. 249; Louisville & N. R. Co. v. Williams, 194 S. W. 920; Travis v. Alabama G. S. R. Co. 73 So. 983; Mundhenke v. Oregon City Mfg. Co. 81 Pac. 977. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 222, 51 U. S. App. 81, 79 Fed. 902, in which a boy fifteen years of age, who had been at work in a room with a picking machine, was assigned to feed it, and permitted his hands to slip into the exposed cogs, which the Factory Act of New York required the master to cover; Buckley v. Mfg. Co. 113 N. Y. 540, 21 N. E. 717,

wherein a boy twelve years old slipped and threw his fingers into exposed cogs; Engine Works v. Randall, 100 Ind. 293, 50 Am. Rep. 798, in which a boy nineteen years of age permitted his hands to engage with meshing cogs; Berger v. Ry. Co. 39 Minn. 78, 38 N. W. 814, wherein a boy, in feeding rollers in a boiler making shop, permitted his hands to slip between them; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 517, 106 Fed. 647, in which a block on which a boy of seventeen years of age was standing slipped upon the greasy floor and caused him to throw his hand into a hasher; Glover v. Bolt Co. 153 Mo. 327, 55 S. W. 88, in which a boy engaged in pulling iron from a pile fell, and threw his fingers between closing shears; Sullivan v. Simplex Electrical Co. 178 Mass. 35, 39, 59 N. E. 645, in which the hands of a boy nineteen years of age, who was feeding rubbers between rollers, were caught and injured by them. Glenmont Lumber Co. v. Roy, 126 Fed. 530; Crothy v. C. & G. W. R. Co. 141 Fed. 913; St. Louis Cordage Co. v. Miller, 126 Fed. 495; Wilson v. A. T. & S. F. R. Co. 71 Pac. 282; Fitzgerald v. C. B. & Q. R. Co. 114 Ill. App. 118; Myers v. New York C. R. Co. 34 N. Y. Supp. 807; Baker v. Ry. Co. 64 S. E. 506; Lave Mfg. Co. v. Payne, 30 L.R.A.(N.S.) 436; McGrath v. Del. & L. Ry. Co. 100 Atl. 754; L. & N. Ry. Co. v. Dunn, 94 S. E. 661; Lindsey v. Hollerback Co. 92 S. W. 294; Texas R. Co. v. Ellison, 87 S. W. 213; Umsted v. Colgate Elev. Co. 22 N. D. 249; Hanel v. Obrigekewitsch, 39 N. D. 540, 3 A.L.R. 1029, 168 N. W. 45; Capan v. D. & L. Ry. Co. 102 Atl. 661.

"In this case the Federal court's interpretation of the common law doctrine of assumption of risk should govern." Southern R. Co. v. Gray, 241 U. S. 339; Manson v. G. N. R. Co. 31 N. D. 643; Cook v. N. P. 32 N. D. 340; Hein v. G. N. (N. D.) 159 N. W. 14; Jacobs v. Southern R. Co. 241 U. S. 229.

"The stumbling on the ties was as much responsible for the injury as the giving of the orders. This court has already held there can be no recovery when such a situation presents itself." Black v. Fair Association (N. D.) 164 N. W. 297; Manson v. G. N. Ry. Co. 31 N. D. 643, 155 N. W. 32; Cincinnati, N. O. & T. P. R. Co. v. Mealer, 50 Fed. 725; Scheffer v. Ry. Co. 105 U. S. 249; Chesapeake & O. Ry. Co. v. Ealker, 167 S. W. 131; Kellog v. Ry. Co. 94 U. S. 469; G. N. Ry. Co. v. Wiles, 240 U. S. 444; Scherer v. Schlaberg (N. D.)

122 N. W. 1000; Balding v. Andrews & Gage Elev. Co. 12 N. D. 267, 96 N. W. 305.

BRONSON, J. This appeal is taken from a judgment entered upon a direct verdict ordered at the close of plaintiff's case. Raphael Schantz, the deceased, a boy sixteen years of age, was seriously injured in the month of April, 1916, while attempting to board a moving freight train. Thereafter he died in a hospital on August 21, 1916. This action is brought by the administrator of the deceased under the Federal Employers' Liability Act to recover damages due to the alleged negligence of the railway company. On the day of the injury the deceased was in the employ of the company as a section hand with a crew working on the north branch of the defendant railway out of Mandan. He had been so working as a section hand for some six months. Prior to that time the boy had been raised and had worked upon a farm. On the day in question the crew, consisting of seven men, went out to work upon a gasolene speeder provided by the defendant under the direction and supervision of a section foreman, named Peter Barron. On that day they were repairing tracks and putting in new ties on such railway near Harmon, some 10 miles distant from Mandan. About 4:30 P. M. they were ready to go to Mandan and to start out on the speeder, but it was not working well and then the freight train came along. The crucial question in this case is whether the directions or orders of this section foreman, then twenty-one years of age, given at this time to this boy, the deceased, about boarding this freight train, under the circumstances, raised any issue of negligence imputable to the defendant. The section foreman was called by the plaintiff for cross-examination under the statute. It appeared that he was not then in the employ of the defendant, so the plaintiff called him as his witness.

He testified as follows concerning this matter: He had been acting as section foreman for about a month. "The boy said, 'We will have to catch the train or else we have to walk in.' I said: 'If you want to catch the train it will be safe to get on.' The Hartner boy came up and said: 'It is safe to get on.' I told Schantz to get on and told the rest of the crew to get on if it comes along."

On cross-examination he testified:

"Hartner came along and asked if the train is safe to catch. I,

said: 'All right, if you can catch it, you can get on.' Hartner said that the train is safe to catch. I said: 'All right, you can catch on when it comes along.' I got up and looked and it was running along pretty slow. I told Hartner to get on if it was safe. I told Hartner not to get on the train unless it stopped. I told him that first, and then he came along and said it is safe to get on. I said: 'All right, if it is safe to get on, you can get on.' Hartner is the one that came up to me and suggested catching on the train. When I told Hartner the first time not to get on that train unless it stopped. I don't know if all the boys heard it. Hartner said: 'It is safe to get on.' I said: 'All right, if it is safe, you get on, and then they went over on the other side.' I said: 'If you think it is safe to get on, go ahead and get on,' then they went over to the other side of the depot. I can stop a freight train if I want to. I had the right to stop them. I know they used to stop a freight train for the purpose of getting a ride into town. I used to do it. If I would have to stop them, if they had not come along slow, I would have stopped them and put the boys on. Nobody told me that I could stop a freight train. I know that myself. They always used to do that. In a deposition given on September 22, 1916, at Mandan before a justice of the peace, I testified: 'The speeder wasn't working very good and I told them to get on the train if it stops,' and that after I told them that the boys went right across. I told them that the first time, then Hartner came along and said: 'It is safe to get on,' and then I said: 'If it is safe, get on.' In my deposition I told them not to get on if it did not stop. I told them that the first time. When I told them that I thought the train might possibly stop at the switch and they could get on. It sometimes stopped there. The men did not go right over at that time. They went over after I told them to get on."

On redirect examination he testified positively that before the deceased started to go over to get on the train he told him: "If it is safe to get on he could get on. That the first time he said if it stops get on, but after Hartner came along and said it was safe to get on you don't have to stop it, I told the boys to get on."

On recross examination he again testified that he first told the boys not to get on the train unless it stopped, and that after Hartner came over and said it was safe to get on that he told him to catch on. That he talked with Hartner; not with Schantz. That Schantz was close to

him; then afterwards he testifies that Schantz and some others were about 200 feet away. Then the court remarked that the witness should have an interpreter and asked the witness if he understood the question, whereupon he said he understood a few of them but they were speaking them all too fast. The deposition of the witness so taken was not introduced.

Adam Hartner, aged nineteen years, who was working at the time in this crew, testified for the plaintiff in a deposition as follows:

"That the section foreman told us we had to walk in or get on the freight train if she slows up. That when he said that the freight train was about ½ mile away and then running about 13 miles per hour. That he told the fellows where to catch the train. That the reason he told us to go up by the switch was because the train slows up there and he told us it would. When the train came there it was running about 8 to 10 miles per hour."

On cross-examination this witness said that the boss first suggested catching the freight and that he said: "If she slows up, you catch her."

This testimony has been set forth considerably at length for the reason that it is deemed proper so to do in order to demonstrate the error of the trial court in directing a verdict for the defendant. In this record it clearly appears that there is testimony to the effect that this section foreman had authority, so claimed at least, to stop this train. That if it had not come along slow he would have stopped it and put the boys on. That this crew were told to get on this train, by this section foreman, whether the testimony of one witness be taken, if it slowed up, or the other, if it was safe. In either event there is testimony of an assurance or a direction to get on this freight train.

The testimony of the witness Hartner is not contradictory. There are contradictions in the testimony of the witness Barron, but they are capable of being harmonized when it is considered that such witness insists that he made two different statements. One at first to the effect that the crew should not get on unless the train stopped, and the subsequent statement made after Hartner reported to him that it was safe where he directed the crew to get on. It is not to be expected that these witnesses could repeat word for word verbatim everything that was said about this matter. These witnesses were subjected to

severe cross-examination attacking the veracity of their testimony and their motives and interest in connection with other alleged statements by them made. Both of these witnesses were practically boys. One of them had never been in court before. The court indicated that one of them should have had an interpreter. Surely it was the province of the jury, not the court, to weigh and determine as a matter of fact the truth or falsity of the same. It was not the function of the court to disregard all such testimony simply because there were inconsistencies in the testimony of one witness. State v. Brandner, 21 N. D. 310, 130 N. W. 941; Commercial Secur. Co. v. Jack, 29 N. D. 67, 150 N. W. 460; Holbert v. Weber, 36 N. D. 106, 161 N. W. 560; Jensen v. Clausen, 34 N. D. 637, 159 N. W. 30; Peterson v. Fargo-Moorehead Street R. Co. 37 N. D. 440, 164 N. W. 42; Werre v. Northwest Thresher Co. 27 S. D. 486, 131 N. W. 721.

The motion made for a directed verdict herein was in the nature of a demurrer to the evidence, and therefore all fair inferences from the evidence must be drawn in favor of the party against whom such verdict was directed; and where honest and intelligent men may fairly differ in their conclusions from the evidence upon any material fact in the case, it is error to withdraw the evidence from the consideration of the jury. John Miller Co. v. Klovstad, 14 N. D. 435, 440, 105 N. W. 164.

Taking the most favorable view of this evidence, was it negligence imputable to the defendant for the section foreman to direct or order the deceased to board this freight train while moving? The defendant contends that in any event the evidence only shows a permission so to do. That if the foreman did so order he was acting outside of the scope of his duties. In our opinion these contentions are without merit. Consideration must be given to the fact that the deceased was a mere boy, sixteen years old, and it was for the jury to place the construction upon the language or directions given this foreman. Furthermore there is no question that this boy was in the employ of the defendant while going to and from his work; that he was at work when this freight train came along, and under the directions of this foreman. Surely the jury might assume from all the circumstances that the boy was in the performance of his duty when he is directed by his foreman to catch a freight train in order to return from his

work, when it is then known that no other method of conveyance then existed, and certainly the jury might find this defendant negligent when the foreman, knowing that the speeder could not be used and that he had the right to stop the freight train if he wanted to, in order for his men to ride upon such train, deliberately assumed that it was safe for them to board this moving train.

It is one of the absolute duties of the master to exercise due care for the safety of his servants. Where it is necessary in the course of the conduct of the business of the master that orders be given to the servants concerning their conduct or the place where they are to work, or to go in pursuit of the master's business, the master has not only the right, but also the absolute power, to give such orders, and the servants have the right to assume that the master has exercised due care in so giving the same. Carlson v. Northwestern Teleph. Exch. Co. 63 Minn. 428, 65 N. W. 914; Anderson v. Great Northern R. Co. 95 Minn. 212, 103 N. W. 1021, 18 Am. Neg. Rep. 501.

In this case, the deceased was at work prior to the time the freight train came along. The foreman could have ordered him to continue to work there. He could have ordered him not to catch the freight train. He could have ordered him to wait until the speeder was repaired. None of these things did he order. There is evidence in the record which would be sufficient to uphold the finding of a jury that he did order the deceased to catch this freight train. This order, if it was given, was the act of the defendant.

This action was brought under the Federal Employers' Liability Act. The defendant stipulated in the record that at the time of this injury the railroad running through Harmon known as the North Branch road was hauling upon it interstate and intrastate commerce, and that the road was used for these purposes.

We are of the opinion that the deceased at the time he was injured was working for the defendant, engaged in the performance of interstate duties. Koofos v. G. N. Ry. Co. 41 N. D. 176, 170 N. W. 859, and cases cited. Hein v. Great Northern R. Co. 34 N. D. 440, 159 N. W. 14; Bombolis v. Minneapolis & St. L. R. Co. 128 Minn. 112, 150 N. W. 385.

The Federal Act applying, it superseded state statutes. Under such act the question of the contributory negligence of the deceased was for

the jury. Hein v. Great Northern R. Co. 34 N. D. 440, 159 N. W. 14; Bombolis v. Minneapolis & St. L. R. Co. 128 Minn. 112, 150 N. W. 385; notes in 47 L.R.A.(N.S.) 38, and L.R.A.1915C, 47.

The defendant further contends that the deceased in any event assumed the risk as a matter of law. The answer sets up no plea of assumption of risk. Nicholaus v. Chicago, R. I. & P. R. Co. 90 Iowa, 85, 57 N. W. 694; Kenyon v. Illinois, C. R. Co. 173 Iowa, 484, 155 N. W. 810.

In any event, under the record in this case we are of the opinion that the question of assumption of risk was fairly one for the consideration of the jury. Umsted v. Colgate Farmers Elevator Co. 18 N. D. 309, 122 N. W. 390; Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 859.

For the error of the trial court mentioned, the judgment is reversed and a new trial granted.

ROBINSON, J. I dissent.

CHRISTIANSON, Ch. J. (dissenting). I am unable to agree with the conclusion reached by my associates in this case. Only two witnesses testified to the matters relating to the accident,—Baron and Hartner. Baron was the section foreman. He testified: "We were figuring on starting out and saw the train coming along. The *boys* said, "We will have to catch the train or else walk in." He testified positively that when "the boys" (members of the crew) first came and asked about riding in on the freight train, he "told them not to get on if it did not stop;" that at the time this statement was made the members of the crew, including the deceased, "were all around." Baron at the time was at work trying to get the "speeder" to run. The members of the crew thereupon went down to some point near the switch or depot. A little later "the Hartner boy" came back to where Baron was working, and said, "The train is safe to catch,"—"it is safe to get on the train without stopping." Baron says that when Hartner made this remark he (Baron) looked up and observed that the train "was running along pretty slow," and that he thereupon replied to Hartner, "All right, if it is safe you can get on." At the time this talk took place Baron was some distance away from the track, where the de-

ceased and the other members of the crew were. After this talk, Hartner went back to where the rest of the men were, and "they went on the other side of the track," and lined up to catch the train.

The witness Hartner, on his direct-examination in answer to one question, said: "He (the foreman) told us we had to walk in or get on if she slowed up." In another answer he said: "He said, get on that train or walk in. *If you don't want to walk in get on that train if she slows up.*" Hartner was the only witness who purported to give a description of the accident. He said: "All I see is that he tried to catch it and *stumbled* over some ties and dragged on the end of the ties, and then he rolled down from the side of the bank."

While Baron stated that he had authority to stop freight trains and had done so, he did not claim that this was for the purpose of permitting the section crew to ride on such trains. On the contrary he testified positively that the crew at no time before had ridden in on a freight train. This testimony was not contradicted by anyone. Baron also testified that on other occasions the section crew had walked in, and that when they were required to do so they always received pay up to the time they got in.

It is undisputed that the suggestion that the crew ride in on the freight train came from the members of the section crew. When they attempted to get on the moving freight train, they knew that the foreman himself had no intention of doing so, but that he was at work fixing the "speeder." The members of the crew really asked the foreman for permission to get on the freight. According to the foreman's testimony he (the foreman) told them they might get on if the train stopped, but "not to get on if it did not stop;" and that later upon the solicitations of Hartner, and at his suggestions that it was safe to catch the train even if it did not stop, he (the foreman) said they could get on if it was safe to do so. And according to Hartner's version of the matter the strongest language used by the section foreman was: "Get on that train or walk in. *If you don't want to walk in get on that train if she slows up.*"

Of course it is conceded that plaintiff must establish the fact that there was an order, and that the deceased was injured in conforming to and obeying such order. Labatt, Mast. & S. §§ 1357, 1358. Can it be said that the section foreman gave any direct, specific, and per-

sonal order to the men, including the deceased, to get on the moving freight train? It seems to me that the evidence in this case does not warrant reasonable men in arriving at such conclusion.

C. W. SHERWIN, Respondent, v. AMERICAN LOAN & INVESTMENT COMPANY, a Corporation, James Grady, and H. C. Aamoth, Appellants.

(173 N. W. 758.)

Mortgages — absolute deed as security — consideration.

1. In an action to declare a deed and a contract for a deed, a mortgage, and not a conditional conveyance with the right of repurchase, where it appears that the plaintiff, having become financially embarrassed through the accruing of numerous liens upon his land, and indebted to the defendant by reason of its purchase of some of such liens, made an absolute deed of the land to the defendant, to secure relief, and as a part of the same transaction executed a promissory note for $25,000, representing indebtedness against such land, and received a contract for a deed upon such land, no money consideration passing between the parties, it is *held* that the trial court did not err in determining the transaction to be for purposes of security.

Mortgages — equity view — redemption — if given as security deed will operate as mortgage.

2. In such a transaction, equity presuming that all parties intended to act in good faith, and guarding zealously the right of redemption, will search all the surrounding circumstances in order to ascertain the real intention of the parties, and if it clearly appears by satisfactory evidence, that the transaction was intended for purposes of security, the instrument executed will be deemed a mortgage.

Mortgages — agreement between parties after giving mortgage — "once a mortgage always a mortgage" — right of redemption.

3. In such action, where the plaintiff subsequently executed a surrender of the contract for a deed and received an agreement in the nature of a lease upon the land, it is *held* that the maxim, "Once a mortgage, always a mortgage," obtains, and that the right of redemption is not terminated in the absence of a new and adequate consideration paid and bona fide accepted.

Mortgages — amount of mortgage — not ascertained — accounting — claiming deed for security as sale — when pleading and proof of tender is not necessary.

4. In such action where the amount of the legal indebtedness owing upon the transaction deemed a mortgage is unascertained, and the plaintiff has demanded an accounting to ascertain the same, and the defendant has maintained that the transaction was a sale, it is *held* unnecessary to both plead and prove a tender in order to maintain the action.

Deed as mortgage — accounting — judgment against officers of defendant corporation.

5. In such action, where the plaintiff seeks an accounting against all of the defendants, it is *held* that the trial court did not err in ordering judgment against the officers of the corporation.

Opinion filed June 12, 1919.

Action to determine a deed and a contract for a deed to be a mortgage.

From a judgment of the District Court of Barnes County, *Cole*, J., for the plaintiff, the defendants appeal.

Affirmed.

Winterer, Combs, & Ritchie, for appellants.

In such cases the courts have, with great uniformity, required the proof that should destroy the recitals of a solemn instrument to be clear, satisfactory, and specific. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454. See also Larson v. Dutiel (S. D.) 85 N. W. 1008 and cases there cited; McGuiny v. Lee, 10 N. D. 160, 86 N. W. 714.

Before the grantors can compel a reconveyance they must pay or tender to the grantee all of the indebtedness,—"he who seeks equity must do equity." Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 706, and cases cited; also 2 Current Law pp. 911, 912. Smith v. Jenson, 16 N. D. 408, 114 N. W. 306. See Comp. Laws, § 5819.

"If it appears that the deed was accepted in payment and satisfaction of an existing debt, the agreement for reconveyance on payment of a given sum cannot convert it into a mortgage." 27 Cyc. 1033 and cases cited under note 36. See also the North Dakota case of DeVore v. Woodworth, 1 N. D. 143, 45 N. W. 701. See also 27 Cyc. 1007, 1009, 1010.

"The proof must be clear, convincing, and satisfactory that it was the intention of the parties that the deed was given as a mortgage." Adams v. McIntyre, 22 N. D. 337, 133 N. W. 915; Jasper v. Hazen, 4 N. D. 1, 58 N. W. 455; Little v. Braun, 11 N. D. 419, 92 N. W. 800; Farester v. Van Andem, 12 N. D. 175, 96 N. W. 501. See Miller v. Smith, 20 N. D. 96, 126 N. W. 499.

W. J. Lorshbough and *Maddux & Lemke,* for respondent.

"It is well settled that if a deed, though absolute in its face, is given to secure a loan, it is a mortgage, and if it is a mortgage in its inception it will remain such throughout." See N. D. Comp. Laws 1913, §§ 6727, 6729; Higgins v. Farmers Bank, 163 N. W. 522; Niggler v. Maurin, 34 Minn. 122; Fahay v. State Bank (Neb.) 95 N. W. 505; First Nat. Bank v. Sargent (Neb.) 91 N. W. 595; Keeline v. Clark (Wis.) 106 N. W. 257.

To the same effect are People's Bank v. Maxson (Iowa) 150 N. W. 601; McRobert v. Bridget (Iowa) 149 N. W. 906.

In order that a deed and a separate instrument of defeasance should operate together and so constitute a mortgage, it is necessary that they should be executed contemporaneously, and as parts of the same transaction. But this objection is removed where both the deed and the defeasance are made in the performance of, and according to the terms of, one and the same prior agreement. In that case, they are properly regarded as parts of the same transaction, and the defeasance, though executed at a later time than the deed, will relate back to it and convert it into a mortgage. 27 Cyc. 1000, citing: Lovering v. Fogg, 18 Pick. 540; Reitenbaugh v. Ludwick, 31 Pa. 131; Peugh v. Davis, 96 U. S. 337, 24 L. ed. 775.

While the right of redemption may be surrendered, such must be the intention of the parties, and grounded upon a new and adequate consideration. He (plaintiff) could not retain the notes and at the same time claim that defendants had executed a release and had no further rights under the contract. It has been judicially determined that such transactions will be regarded with great jealousy by courts of equity, and will only be sustained if perfectly fair, and for an adequate consideration. Wells v. Geyer, 12 N. D. 316, 96 N. W. 289; Holien v. Slee (Minn.) 139 N. W. 493; Wilson v. McWilliams (S. D.) 91 N. W. 453; Smith v. Jensen, 16 N. D. 408, 114 N. W. 306.

BRONSON, J. This is an action to have a deed, absolute on its face together with the accompanying instruments, deemed and declared to be a mortgage. The defendants have appealed from the judgment of the district court of Barnes county adjudging the deed to be a mortgage, and providing for the foreclosure thereof and an accounting, and demand a trial *de novo*.

The substantial facts are as follows:

The plaintiff is a farmer. For over twenty years, in Barnes county, he owned and farmed a section of land which is the subject-matter of this action. The defendant investment company is a domestic corporation and Messrs. Grady & Aamoth are, respectively, the president and secretary thereof, and the principal stockholders. The business of the corporation is that of a holding company for real estate.

Prior to the year 1914 the plaintiff had become somewhat financially embarrassed. The land had become subject to many liens and encumbrances; some of these were in process of foreclosure, or threatened foreclosure. The plaintiff also had had some domestic difficulties, resulting in a judgment of $4,000 being awarded against him and in favor of his divorced wife. On December 3, 1913, the defendant corporation purchased from the divorced wife the judgment of $4,000, paying therefor $500. Theretofore it possessed no interest nor lien upon the lands involved. At this time the period of redemption was running upon a foreclosure against such land. There then began between the plaintiff and the defendant corporation and its officers some negotiations with respect to taking care of the indebtedness existing against the land. The plaintiff's testimony is to the effect that they negotiated concerning methods to be adopted to meet the pressing obligations and concerning arrangements to be made with the defendants to aid him in that regard. The defendants' testimony is to the effect that they negotiated concerning a prospective sale of the land to the corporation and the resale or release of the same to the plaintiff. On January 13, 1914, while these negotiations were pending, the defendant corporation purchased a mortgage of More Brothers on such land for about $3,400 at 5 per cent discount.

On January 19, 1914, the defendant corporation redeemed from the foreclosure upon such land of the Fried mortgage for about $3,000.

Finally on January 26, 1914, the plaintiff gave an absolute deed of

the land to the defendant corporation; on the same day he received a contract for a deed from such corporation for such land which provided for a consideration of $25,000 to be paid with interest at 7 per cent per annum, payable through one half of the crop annually, and one half of the net increase in the stock, grown, raised, or fed upon the premises, in an amount not less than $800 each year, at the same time the plaintiff gave a note for $25,000 evidencing the consideration expressed in such contract.

Concerning the judgment, the defendant corporation claims, and its officers testified, that there was nothing said about the satisfaction of such judgment when the deed was given.

At that time the defendant corporation figured that the amount of liens existing against the premises was between $19,000 and $20,000. The officers of the defendant corporation testified in this regard that they paid no money to the plaintiff, that the agreement was that the corporation should pay the mortgages, encumbrances that were against the land, prior to the mortgage foreclosure of the Anton Fried mortgage; that the consideration for such deed was the payment of these different mortgages against the land.

The plaintiff cropped the land in the year 1914, and the defendant company received from such crop as gross returns $1,520.56, and as net returns $1,171.41.

On May 20, 1915, pursuant to negotiations had between the parties and an apparent difficulty resulting from crop settlements, the plaintiff and his second wife signed on the back of the contract for a deed a surrender of the same in consideration of $1 and other valuable considerations therein expressed, and, on the same date, a lead pencil agreement was made by the defendant corporation to the plaintiff, agreeing to lease the land involved for the year 1915 for one third of the crop of grain, hay, and grass seed thereon to the plaintiff, and, further, to satisfy the judgment of $4,000. On August 23, 1915, an agreement in writing was made between and signed by the defendant corporation and the plaintiff, providing for a lease of the land involved during the season of 1915 and the retention of the premises until March 15, 1916, and the reception of one third of the crop, hay, etc., by the plaintiff as his share of the crop for such year. On July 20, 1915, there was executed a written satisfaction of such $4,000 judg-

ment which the defendant corporation claims it delivered, together with the note of $25,000 to the plaintiff at the time this lease was executed on August 23, 1915. The plaintiff denies that the same was so delivered, or received by him. Subsequently, ouster proceedings were instituted against the plaintiff under the unlawful detainer statute, and the plaintiff was ejected from the premises.

In November, 1915, this action was instituted. In May, 1916, an order of the trial court was made to take testimony of parties before the trial, and pursuant thereto in such month of May the evidence of the defendant Aamoth was taken before the clerk as a referee. At that time he testified that there had been paid out moneys by the defendant corporation, including the judgment mentioned, aggregating a total of $25,728.58.

Upon the trial of this action this same witness testified that the actual amount of moneys paid, including recording fees and abstracters' fees, upon liens and encumbrances upon such lands, including the judgment mentioned, aggregated the total of $22,116.55; that the total face value of such claims and liens so paid was $25,799.85.

There are many controverted questions of fact presented in the lengthy record in this case. The trial court has made full findings of fact, determining that the deed in question was in truth a matter of security for the corporation and in fact a mortgage, and that no consideration of any kind passed between the parties in the execution of such deed or the so-termed lease, subsequently made, and adjudging the right of foreclosure to the defendant and the right to an accounting to the plaintiff concerning the entire transaction.

The appellant contends that the plaintiff has wholly failed to establish the deed in question to be a mortgage by such clear, satisfactory, convincing, and specific proof as the well-settled principles of law applicable in this state require, citing Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; McGuin v. Lee, 10 N. D. 160, 86 N. W. 714, and other later cases.

Further, the appellants contend that, though the deed be deemed a mortgage, nevertheless the surrender of the contract for the deed and the execution of the so-termed lease were based upon a valid and adequate consideration, and operated to terminate any right of redemption possessed by the plaintiff. In the evidence there is a square con-

flict between the testimony of the officers of the defendant corporation and the plaintiff concerning the intentions of the parties in this transaction. It will serve no useful purpose to review at length this controverted testimony. It is sufficient to state that the testimony of the plaintiff is to the effect that the corporation agreed to pay off the indebtedness, including the judgment, if he would give to it a deed and take back a contract, and that such corporation would give to him a deed again when he had paid out to it such indebtedness. That he gave this note for $25,000 named in the contract as an arbitrary amount for the reason that the amount necessary to clear up the indebtedness was not then ascertained, and that such amount could be determined later as they paid such indebtedness.

In transactions of this kind, the essential thing, in equity, is to determine the real intention of the parties. In so doing, equity, presuming that all parties intended to act in good faith, will view all of the surrounding circumstances in order to determine this real legal intention of the parties.

It is true that this intention must be disclosed by clear, convincing, and satisfactory testimony in order to overcome the presumption accorded to a solemn deed absolute on its face.

In this case, however, there is a contemporaneous contract for a deed to the plaintiff. It is undisputed that it was executed on the same day that the deed was made. The defendants claim that this contract was executed in the afternoon and the deed in the morning. Plaintiff claims that they were both executed in the morning. This is deemed immaterial; clearly they were a part of the same transaction.

Accordingly the real question is whether it was the intention of the parties that the plaintiff should have the right to repurchase or the right to redeem.

In Smith v. Jensen, 16 N. D. 408, 114 N. W. 306, the distinction is drawn between the character of proof required when the transaction on its face is an unconditional conveyance, and the situation presented where the transaction was not so intended. That in the latter case, when a controversy exists as to whether the transaction was a mortgage or a conditional sale with the right to repurchase, the same will ordinarily be held to be a mere security transaction, and therefore a

mortgage, where the true character of such transaction is left in doubt by the evidence. Citing Rose v. Gandy, 137 Ala. 329, 34 So. 239.

It appears clearly in the record that the relation of the debtor and creditor existed between the parties prior to the execution of the deed and contract. The plaintiff was financially embarrassed. The defendant was solicitous concerning realizing on the $4,000 judgment which had been purchased for $500. At the time the deed was given, the defendants figured on $19,000 to $20,000 in encumbrances against the property. In fact, the amount of moneys paid by the defendants, in the aggregate up to the time of the trial, is about $2,500 less than the face of the note. At such time the defendants claim that nothing was said about the judgment. No money consideration passed between the parties. Clearly, if it had been the real intention of the parties that the transaction should be considered as a conveyance in fact, there was no reason, on either side, why the judgment of $4,000 should not have been satisfied, on the day the deed was executed. We are satisfied that the evidence fully warrants the conclusion of the trial court that the transaction was for purposes of security and not of sale.

Furthermore, the transaction being deemed a mortgage, the trial court was warranted in holding that the execution of the surrender of the contract and of the so-termed lease did not operate to terminate the right of redemption. Equity zealously guards the right of redemption. No new or adequate consideration is clearly shown in the evidence for the release of such right of redemption. Whatever the indebtedness is which exists between the parties, the consideration, which the defendant offered to show for the release of such right of redemption, formed a part of such indebtedness for which the mortgage existed. The plaintiff denies receipt of such consideration, or any part of it. The maxim, "Once a mortgage, always a mortgage," therefore could be well applied by the trial court with respect to the transaction involved. Wells v. Geyer, 12 N. D. 316, 96 N. W. 289; Clark v. Landon, 90 Mich. 83, 51 N. W. 357. See note in 131 Am. St. Rep. 926.

The appellant further complains that the plaintiff made no tender either by allegation or proof to pay the amount due. The appellant is not in a position so to do. What amount is due on such mortgage is disputed and unascertained, and an accounting has been asked.

The appellant claims that the transaction was a sale, upon such accounting, or upon foreclosure. Equity will protect the appellant. De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813. The appellant further complains that judgment was rendered by the trial court against the officers of the corporation as well as against the corporation. The trial court did not err in that regard. The plaintiff seeks an accounting, and this may well proceed against the corporation as well as the officers thereof.

The judgment of the trial court should be and hereby is affirmed, with costs to the respondent.

ROBINSON, J., disqualified, did not participate, Honorable J. M. HANLEY, Judge of the Twelfth Judicial District, sitting in his stead.

AMANDA WEGNER, Executrix of the Estate of Ernest Wegner, Deceased, Respondent, v. FIRST NATIONAL BANK OF CASSELTON, NORTH DAKOTA, Appellant.

(173 N. W. 814.)

Banks and banking — cashier's check — escrow.

1. Where a cashier's bank check, in payment of a deed to land, is sent to a bank, with instructions to withhold the delivery of the same from the payee until releases of outstanding liens upon the land are secured or shown, and the bank, in violation of such instructions, delivers the check to the payee, an action may be maintained against such bank, either in conversion, or for money had and received, for the actual loss sustained thereby.

National banks — powers.

2. A national bank, in receiving such check and accepting the terms of such instructions, is acting within its powers conferred, and performing a function incident to the business of banking.

National banks — guaranty — intra vires duty — obligation — liability.

3. Where, in such transaction, a national bank entered into a contract of guaranty by its acceptance of the check and the instructions, in addition to its duty and obligation *intra vires*, and where the complaint sufficiently alleges and establishes a cause of action against such bank for a breach of its duty or obligation *intra vires* in violating the express terms of such instructions, it

cannot avoid a liability for such breach of its duty or obligation on *intra vires*, by asserting and relying upon the *ultra vires* guaranty.

Opinion filed June 17, 1919.

'Action to recover for wrongful delivery of a cashier's bank check sent to the defendant bank with a letter of instructions.

From an order of District Court, Cass County, *Cole*, J., overruling a demurrer, defendant appeals.

Affirmed.

Lawrence & Murphy, for appellant.

An obligation on the part of a bank relating to the guaranty of performance of a contract with a third party in which the bank has no interest is *ultra vires*, and not binding upon the bank except for benefits actually received. International Harvester Co. v. Upham (N. D.) 166 N. W. 507; Cottondale Bank v. Oskham Nolte Co. 59 So. 566; Third Nat. Bank v. Savings Bank, 244 Mo. 554, 149 S. W. 495; Ayr v. Hughes, 87 S. C. 382, 69 S. E. 657; Norton v. Bank, 61 N. H. 589, 60 Am. Rep. 334; Grow v. Cocknel, 63 Ark. 418, 36 L.R.A. 89; Norton v. Bank, 60 Am. Rep. 334; Bank v. Bank, 97 Tex. 536, 80 S. W. 601; Taylor v. Bank, 174 N. Y. 181, 62 L.R.A. 783, 66 N. E. 726.

An attempt by a state to define the duties of a national bank or to control the conduct of their affairs is absolutely void whenever such attempted exercise of state authority conflicts with the laws of the United States relating to the purposes or efficiency of these agencies of the Federal government. Davis v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700; Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452. To the same effect see Larabee v. Dolley, 175 Fed. 365; Elizabethtown First Nat. Bank v. Com. 143 Ky. 816, 137 S. W. 518; Nat. Bank v. Pennsylvania Fuel Co. 215 Pa. 115, 64 Atl. 374; Green v. Bennett (Tex.; 1908) 110 S. W. 108; State v. Nat. Bank, 84 Vt. 167, 78 Atl. 944; First Nat. Bank v. Am. Nat. Bank, 173 Mo. 153, 72 S. W. 1059; Hansford v. National Bank, 10 Ga. App. 270. See also discussion by Justice Shiras in Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452.

National banks are not to be viewed as solely operated for private gain. Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452; M'Cullough v. Maryland, 4 Wheat. 425, 4 L. ed. 606; Osborn v. Bank of United

States, 9 Wheat. 738, 6 L. ed. 204; Merchants Bank v. Armstrong, 65 Fed. 936.

The Federal statutes constitute the measure of authority of national banks. They have no other powers than such as are expressly granted and such additional implied powers as are necessary to carry into effect the express powers granted by the National Banking Act. Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107; Sav. Bank v. Kennedy, 167 U. S. 362, 42 L. ed. 198; Seligman v. National Bank, 3 Hughes, 147, 647, Fed. Cas. No. 12,643; National Bank v. Kennedy, 42 L. ed. 198.

Although a national bank may guarantee negotiable paper on transferring or discounting it in the ordinary course of business, it cannot guarantee the papers of others solely for such other's benefit. People Bank v. National Bank, 101 U. S. 181, 25 L. ed. 907; Bowen v. Needles Bank, 87 Fed. 430, 94 Fed. 925; Smelter Supply Co. v. Bank, 173 Fed. 859; Tallapoosa Nat. Bank v. Monroe, 32 L.R.A.(N.S.) 550; Appleton v. Citizens Nat. Bank, 101 N. Y. Supp. 1027, 216 U. S. 196, 54 L. ed. 443; International Harvester Co. v. State Bank (N. D.) 166 N. W. 507; Fidelity Co. v. National Bank (Tex.) 106 S. W. 782; Commercial Bank v. Pirie, 82 Fed. 799; Seligman v. Charlotville Bank, 3 Hughes, 647, Fed. Cas. No. 12,642; Thelmanny v. Paper Co. 108 Iowa, 333, 79 N. W. 68; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123; Norton v. National Bank, 60 Am. Rep. 334; Bushnell v. National Bank, 74 N. Y. 290; Flannagan v. National Bank, 23 L.R.A. 836, 56 Fed. 959; Baily v. National Bank, 97 Ill. App. 66; Fidelity Company v. National Bank, 48 Tex. Civ. App. 301; Barron v. McKinnon, 179 Fed. 959; Commercial Nat. Bank v. First Nat. Bank, 104 Am. St. Rep. 879; First Nat. Bank v. American Nat. Bank, 173 Mo. 153, 72 S. W. 1059; First Nat. Bank v. Sixth Nat. Bank, 212 Pa. 238, 61 Atl. 889; Norton v. Bank, 61 N. H. 589; St. Joe Bank v. National Bank, 32 U. S. App. 52, 66 Fed. 691; Bank v. Smith, 40 U. S. App. 690, 77 Fed. 129; Judge Hook in National Bank v. Baird, 17 L.R.A. (N.S.) 526, 160 Fed. 642; McCormick v. Bank, 165 U. S. 538; 167 U. S. 364, 42 L. ed. 198; First Nat. Bank v. National Exch. Bank, 92 U. S. 128.

A contract of a corporation which is *ultra vires* in the proper sense, namely, outside the object of its organization and therefore beyond the

powers conferred upon it by the legislature, is not voidable, but wholly void, and of no legal effect. Transportation Co. v. Pullman Palace Car Co. 139 U. S. 24; Navigation Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. Rep. 379; Union P. R. Co. v. Chicago, R. I. & P. R. Co. 163 U. S. 564, 16 Sup. Ct. Rep. 1173; McCormick v. Bank, 165 U. S. 538, 17 Sup. Ct. Rep. 433; Bank v. Kennedy, 167 U. S. 362; California Nat. Bank v. Kennedy, 167 U. S. 365, 42 L. ed. 198.

In an *ultra vires* transaction a national bank is liable only to the extent of benefits actually received. Cherry v. City Nat. Bank, 144 Fed. 587; Armstrong v. Chemical Nat. Bank, 83 Fed. 456; Meyer & C. State Bank v. First Nat. Bank, 248 Fed. 679; American Bank v. National Wall Paper Co. 77 Fed. 85; Bank v. Pire, 82 Fed. 799; Towle v. Investment Co. 78 Fed. 688.

Lovell & Horner, for respondent.

When no time for the performance is expressed the law implies a reasonable time for performance after the obligation arises. Quimby v. Lyon, 63 Cal. 394; Pauly v. Sage, 15 Conn. 56; Field v. Brown, 45 N. E. 464; Warder v. Nolan, 57 N. E. 821.

The amended complaint of the plaintiff and respondent fairly states a cause of action, and is not demurrable. Thomas v. City Nat. Bank (Neb.) 58 N. W. 945; Second Nat. Bank v. Howe (Minn.) 42 N. W. 200; Tourtelot v. Whited, 9 N. D. 467; First Nat. Bank v. State Bank, 15 N. D. 594; First Nat. Bank v. Bakken, 17 N. D. 224; Grant County State Bank v. N. W. Land Co. 28 N. D. 479; First Nat. Bank v. Flath, 10 N. D. 281, 86 N. W. 867; First Nat. Bank v. Messner, 25 N. D. 263, 141 N. W. 999; Hindman v. First Nat. Bank (Ky.) 57 L.R.A. 108; Patterson v. First Nat. Bank (Neb.) 102 N. W. 765; Northern Nat. Bank v. Lewis (Wis.) 47 N. W. 834; Ditty v. Dominion Nat. Bank, 75 Fed. 769; Wilson v. Pauly, 72 Fed. 129; First Nat. Bank v. Burns (Ohio) 49 L.R.A.(N.S.) 764; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82.

Bronson, J. This is an appeal from an order overruling a demurrer to the complaint. The facts as they appear from the complaint are substantially as follows:

In October, 1914, the deceased Wegner, of whose estate the plaintiff is executrix, contracted to purchase from the Northern Trading

Company certain land in McHenry county, for $4,500, $2,000 being paid in cash, and the balance, $2,500, to be paid on March 1, 1915, when a warranty deed and an abstract of title was to be given, showing the land free and clear from all liens and encumbrances. Later, when an abstract of title was furnished, a trust deed for $100,000 appeared as a lien against the land and also a mortgage for $1,500. The attorneys for the deceased noted these liens and, in their opinion, required the same to be released and discharged. On March 13, 1915, the defendant, through its cashier, sent to the First National Bank of Everly, Iowa, a draft for $3,000 on the deceased and inclosed a warranty deed to the land, conveying the same free of encumbrances. The bank in Iowa, in a letter, was authorized to deliver the deed upon payment of $3,000 exchange and collection charges. In such letter the defendant further stated: "On receipt of this money we are instructed to place of record a satisfaction of prior encumbrances which we hold here and to furnish you with an abstract of title which will show free and clear of all encumbrances. This we undertake to do."

On March 25, 1915, the cashier of the defendant bank personally wrote the bank in Iowa, explaining about the mortgages outstanding as liens, and that they would see to it that the necessary releases were filed so that the deceased got a perfect title free of encumbrances. On April 6, 1915, the bank in Iowa replied to the letter of the defendant bank, dated March 13, 1915, inclosed a cashier's check for $2,500, and stated in such letter as follows: "In regard to this collection, will say that we are inclosing herewith cashier's check for $2,500 in payment of this deed, which you are to hold until the Northern Trading Company shall complete the abstract which we inclose herewith to the above-described land according to the opinion of Mr. Wegner's attorneys, Messrs. Buck & Kirkpatrick, which is attached to the abstract. We are sending this to you upon your guaranty that the abstract will show the above-described land free and clear of all encumbrances and the abstract returned to us. When this is done you may turn over the $2,500 to the Northern Trading Company."

On April 8, 1915, the defendant bank acknowledged receipt of said letter of April 6, 1915, and stated: "We note the terms under which this is sent, and the matter will have our careful attention."

The Northern Trading Company did not pay off the encumbrances

mentioned, and the same continued as valid liens against the land in question. The defendant bank delivered the cashier's check for $2,500 to the Northern Trading Company, without receiving or securing the releases required, in violation of the instructions contained in the letter received from the bank of Iowa.

The complaint, in the first cause of action, alleges, in addition to the facts stated, that the defendant bank fraudulently conspired with the Northern Trading Company to wrong and defraud the deceased by converting and delivering such cashier's check, and by converting and appropriating the proceeds. It further alleges that the reasonable market value of the land was $3,000; that the outstanding liens far exceed the value of the land, and that the plaintiff has been damaged in the sum of $3,000. For the second cause of action the complaint alleges that the defendant bank has had and received said sum of $2,500 to and for the use of the deceased. The defendant demurred to each cause of action upon the grounds that there was a defect of parties defendant in that the Northern Trading Company is a necessary party defendant; that several causes of action have been improperly united, and that facts have not been stated sufficient to constitute a cause of action. The trial court wholly overruled the demurrer.

In support of its demurrer, the defendant bank contends that the whole transaction, as pleaded, is *ultra vires* and in excess of the powers of the defendant as a national bank; that being *ultra vires,* and the bank having received no benefits, no implied obligation or liability existed; that there is not consideration shown, that there can be no recovery for fraud or a fraudulent conspiracy in an *ultra vires* transaction; that the plaintiff was guilty of laches in delivering the funds to the defendant bank and accepting the assurance of the cashier of performance, when it knew of the personal interest of the cashier in the transaction, and failed to bring the matter to the attention of the directors. That the complaint shows on its face no certain or definite method of ascertaining plaintiff's damages; that the Northern Trading Company is a necessary party defendant.

These contentions of the defendant bank are largely urged upon the ground that the theory of plaintiff's causes of action, shown from the allegations thereof, is based upon a contract of guaranty made by the defendant bank concerning this transaction, and upon fraud and

fraudulent conspiracy in connection therewith. In other words that the complaint, from its four corners, relies upon and predicates causes of action, alleging in their essence a guaranty undertaken by the defendant bank, clearly *ultra vires*. If, upon the facts alleged in the complaint and admitted by the demurrer, the engagement of the defendant should be so construed, the contention of the appellants concerning the *ultra vires* nature of the transaction would indeed be deserving of serious consideration.

Upon a fair construction, however, of the allegations of the complaint, we are satisfied that a cause of action is alleged in each of the causes of action stated upon a transaction clearly *intra vires*, which is good as against the demurrer interposed. The complaint has attached to it several exhibits. It sets forth the facts fully.

From the facts stated, it is clear that the defendant bank, upon the reception of the cashier's check of $2,500, made an engagement directly within its powers and incidental to its business. When the letter of instructions was sent to the defendant bank, together with the check, and the defendant bank received and accepted the same upon the terms imposed, it thereupon had imposed a duty to pay and a duty to collect within its banking functions. This duty and obligation so accepted by the defendant bank did not depend at all upon its guaranty or its undertaking of guaranty. The duty existed even though the alleged contract of the guaranty be in all respects disregarded. If the Iowa bank had delivered the cashier's check in question to the defendant bank, with instructions to turn the same over to the Northern Trading Company, and that it would rely upon the guaranty of the defendant bank, that the release of the liens in question would be secured, the contention of the appellant might apply and a question of *ultra vires* would then be presented. Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290, 293.

On the contrary, however, it is clear that the check and the letter of instructions were not sent and deposited in reliance wholly upon the guaranty made. They were sent, as they might have been sent, if no guaranty had been given, in the ordinary course of banking transactions.

This duty and obligation of the defendant bank, then so imposed and accepted, became analogous to the duty and right of a bank to

receive a special deposit or to act as agent in collections of items of moneys or securities. 7 C. J. 816. See Kennedy v. State Bank, 22 N. D. 69, 74, 132 N. W. 657. This particular duty and obligation was within its power as a national bank. It was incidental to the business of banking. See 7 C. J. 816, 817; U. S. Rev. Stat. § 5136, Comp. Stat. § 9661, 6 Fed. Stat. Anno. 2d ed. p. 654; Bushnell v. Chautauqua County Nat. Bank, 74 N. Y. 290; Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1058; American Nat. Bank v. Presnall, 58 Kan. 69, 48 Pac. 556; Kansas Nat. Bank v. Quinton, 57 Kan. 750, 48 Pac. 20.

The fact that the defendant bank, in addition to assuming a duty and obligation within its powers, also made a contract or guaranty *ultra vires,* does not permit it to avoid liability for a breach of its duty or obligation *intra vires,* by asserting an *ultra vires* agreement connected with the transaction, when the complaint alleges facts sufficient to constitute a cause of action against the bank for violation of its duty or obligation *intra vires.* 7 C. J. 835; First Nat. Bank v. Henry, 159 Ala. 367, 49 So. 97. The complaint being so construed, the contentions of the appellant concerning the principles of law applicable upon a transaction *ultra vires* do not apply.

The first cause of action sounds in tort, in the nature of a conversion. The second cause of action is for money had and received. Recovery may be had in either form of action. Kennedy v. State Bank, 22 N. D. 69, 74, 132 N. W. 657; 7 C. J. 613; 38 Cyc. 2025. See Pinkney v. Kanawha Valley Bank, 68 W. Va. 254, 32 L.R.A. (N.S.) 987, 69 S. E. 1012, Ann. Cas. 1912B, 115; Gregg v. Bank of Columbia, 72 S. C. 458, 110 Am. St. Rep. 633, 52 S. E. 195. Appellant has made no point in the brief or upon oral argument concerning the improper joinder of the two causes of action. It is therefore waived. Both causes of action as alleged show actual damages sustained. See Kennedy v. State Bank, supra. Upon the breach of its duty or obligation the defendant bank was liable for the actual loss sustained thereby. 7 C. J. 623. See A. G. Becker & Co. v. First Nat. Bank, 15 N. D. 279, 281, 107 N. W. 968; Comp. Laws 1913, § 6002.

Accordingly the trial court did not err in overruling the demurrer. The order of the trial court is affirmed, with costs to the respondent.

BUCHBINDER BROTHERS, a Corporation, Appellant, v. GEORGE E. VALKER, Doing Business as Valker's Minot Greenhouse, Respondent.

(173 N. W. 947.)

Purchase price — counterclaim — damages.

In an action brought to recover the purchase price of certain fixtures delivered to the defendant, where the defendant counterclaimed for damages attributable to the failure of the refrigerator to fulfil the purpose for which it was bought, the evidence is examined and *held* to support the judgment for the defendant on the counterclaim.

Opinion filed June 21, 1919.

Appeal from District Court of Ward County, *K. E. Leighton,* J. Affirmed.

Bosard & Twiford, for appellant.

Palda & Aaker (*E. T. Burke,* on oral argument), for respondent.

In case of breach of warranty of the fitness of personality the injured person is allowed a fair compensation for the loss incurred by an effort in good faith to use it for such (warranted) purpose. Comp. Laws 1913, § 7159.

It is not, however, a sufficient reason for disallowing damages claimed that a party can state their amount only approximately. It is enough if, from the approximate estimates of the witnesses, a satisfactory conclusion can be reached. The rule of recovery is compensation. 13 Cyc. 37, and cases cited.

BIRDZELL, J. This is an appeal by the plaintiff from a judgment rendered against it on a counterclaim. The judgment is for $150 and costs. The action was brought to recover a balance alleged to be due to the plaintiff on account of the purchase price of certain fixtures ordered by the defendant. The purchase price was $972, of which amount the defendant had paid $245, leaving a balance claimed to be due of $727. This balance, however, was further altered, under the testimony by debit and credit items involving railroad fare of the

plaintiff's expert and cancelation of the order as to small items; leaving a net balance under the testimony of $717, which the plaintiff claimed. The facts are: In September, 1915, the defendant opened negotiations with the plaintiff, looking toward obtaining a bid from it for certain fixtures to be placed in a retail florist's establishment which the defendant contemplated opening in the near future in Minot. The principal item was an ice box which was to be approximately 16 feet long, 5 feet deep, and 8 feet high. Early in the negotiations it appeared that the defendant was desirous of installing the fixtures at an early date, and that he fixed the date at October 25, 1915, for their delivery in Minot. The fixtures did not arrive until about the middle of November, and, after being set up and installed by the defendant, it appears that the ice box or refrigerator failed to perform the functions for which it had been purchased, the defendant notifying the plaintiff by letter dated November 29th. In this letter it was stated that, after being in place one week, the refrigerator had failed to reduce the temperature below 65 degrees. Attention was also called to some other omissions and defects not material to be considered, except to note that they make up a substantial item. In reply to this letter the plaintiff wrote stating that the refrigerator had been set up and inspected before being shipped, and that the fault lay with the defendant's carpenter in improperly setting it up in defendant's store. The plaintiff also proposed to send a man up from the factory to remedy the defects, the defendant paying his fare. Defendant's correspondence shows that he was very much concerned to have the refrigerator in working order to enable him to better handle the approaching Christmas and holiday trade, so, on receipt of plaintiff's letter, he wired asking that plaintiff's expert be sent at once. Plaintiff delayed sending the expert until about January 5th, following, and when he came he worked one day on the refrigerator. Then, under the presentation that the defects were remedied, he obtained the defendant's signature to a statement as follows:

January 6, 1916.

The signature below signifies the erection and completion of all refrigerator and store fixtures purchased from Buchbinder Bros. and that same are working in satisfactory condition.

(Signed) George E. Valker.

After obtaining the above admission, the expert returned to Chicago. It is undisputed that the testing of a refrigerator of this size to determine its efficiency would require some days, so the admission referred to is worthless. There is ample testimony to the effect that the plaintiff's expert did not succeed in putting the refrigerator in working condition, and that in fact he improved it but little. The defendant later abandoned the retail store in question, and at his own expense moved the refrigerator to another store and rebuilt it.

The only question for consideration in this case is whether or not there is sufficient evidence to support the verdict in defendant's favor upon his counterclaim for damages. The testimony on this subject goes to the extent of establishing that the refrigerator, in the condition it was when received, was practically worthless; that it was remedied but slightly by plaintiff's own expert, who came at defendant's expense; that it had not been finished according to specifications, and that to refinish it would cost something like $60; that the hardware was not according to specifications; that the defendant sustained substantial damage through the loss of flowers put in the refrigerator for hardening, which did not harden on account of the temperature being too high; and that the flowers placed in the worthless refrigerator wilted sooner than they would had they not been placed therein.

The testimony goes to show that the defendant lost a considerable quantity of flowers that were from time to time placed in the refrigerator, and the appellant contends that the verdict cannot be supported except upon the supposition that the jury has charged the plaintiff for the value of all these flowers, thus giving the defendant a recovery based upon his own unreasonable acts enhancing the damages. The argument is made that the defendant could not continue to use a refrigerator that had been demonstrated to be defective and by that method practically sell his output of cut flowers to the plaintiff. This contention is sound if the premise be granted. The premise, however, cannot be granted. It assumes that the refrigerator was worth practically the purchase price, and herein lies the error of the proposition. The refrigerator was bought for use. The special ability of the plaintiff was relied upon, and the testimony shows that, even after the plaintiff's expert had attempted to put it in proper working condition, it was still a failure as a refrigerator. Thus, when the plaintiff left

the job that it was presumably peculiarly qualified to perform, there was left upon the hands of the defendant some material of questionable value for any purpose; and the whole venture, which, to the knowledge of the plaintiff at the time he contracted, was dependent for success upon its prompt delivery of a refrigerator that would do the work it was designed to do, was frustrated for several months, leaving the defendant to pay rent for his building, clerk hire for his help, and to work to a disadvantage in attempting to supply a merchantable product to his customers. In those circumstances, and in the light of the failure of the plaintiff's own expert to remedy the situation, the jury might well have adopted the defendant's view and rendered its verdict on the theory that the so-called refrigerator was practically worthless. In fact, we are of the opinion that it would have been a reasonable view for the jury to take. If they did do so, the verdict is clearly reasonable and well supported.

In this view of the case, the fact that the defendant was later on able to reconstruct the refrigerator and use it to some advantage in another store becomes largely immaterial.

On the record as presented, the verdict is apparently just and the judgment is affirmed.

GRACE, J. I concur in the result.

ROBINSON, J. (dissenting). The plaintiff sues to recover a balance of $727 for goods sold and delivered. On a counterclaim for damages the jury gave the defendant a verdict for $150. Thus the result is to release him from the payment of $727. Hence the verdict is in fact $877, and the plaintiff appeals. The goods were a small refrigerator at $150, a large combination show case and refrigerator, $500, two wall cases, $250, and a counter, $72,—making in all $972. That was the price f. o. b. at Chicago. Defendant paid $245, leaving the balance $727.

The goods were manufactured by the plaintiff at Chicago and shipped to the defendant at Minot, except the small cooler, which was shipped to Williston. Defendant had been in the rosary business at the twin cities, and his purpose in buying the articles was to use them in doing a twin-city rosary business at Minot and at Williston. The

defense is that the goods were not delivered in time and that they were worthless for the purpose for which they were purchased; that the big cooler did not cool the flowers, and, in consequence, they were spoiled to his damage a thousand dollars. There was really no objection to any of the property, excepting the big cooler. The evidence shows that it was shipped in a knocked-down state, and it was not properly put up and did not sufficiently cool the flowers. In fact there was no floral business at Minot to warrant the purchase of such an immense plate-glass show case and cooler. It was much the same as Noah's ark after the flood, when it rested on the top of Mount Ararat; it was out of place. On October 12, 1915, the plaintiff wrote the defendant as follows: "We have your blueprint and letter and will make the refrigerator as follows: 12 feet wide, 5 feet deep, and 8 feet high over all. Front will have four display doors and one window panel in the center, base is covered with 6-inch verde antique marble 6 inches high, drawers in the base. The ice compartment is in the back of the refrigerator, with plate-glass mirrors in the front." Then it is shown that a large part of the front was of plate glass. Now it is well known that glass is a good conductor of heat and cold, and with a temperature of 75 or 80 degrees on one side of the glass, doubtless it was not easy to reduce the other side below 60 or 65 degrees. On the whole, the evidence shows that the combination show case and cooler was made and shipped in accordance with the special order of the florist.

The defendant was slow in making his cash payment, and it seems the plaintiff awaited the payment before commencing to make the cooler. On October 7, 1915, defendant wrote the plaintiff that he was mailing $245, which he did not mail until October 20th, though he expected the goods shipped to arrive November 1st.

The answer is not based on the proper rule of damages, which is given by statute thus: It is: (1) The excess, if any, of the value which the property would have had at the time and place of sale if it had been as warranted, above its actual value; (2) a fair compensation for the loss incurred by an effort in good faith to use the property for the purpose for which it was sold. Comp. Laws, §§ 7158, 7159. Under the statute the answer should have shown the facts thus: The value of the property, if made as per contract, at the time and place

of sale; (2) the real value of the property as put on the cars, f. o. b.; (3) the loss incurred by an effort in good faith to use the property. Of course the evidence should have been limited to the proof of such facts; but, on the contrary, against objections, defendant gave testimony to this effect: The big cooler is worthless, though it has been made over so that it works very good now. The biggest season for chrysanthemums commences the latter part of November and in December. At that time there was produced at the raising plant about 500 chrysanthemums a day. They were worth from $2 to $3 a dozen. I was raising large numbers of carnations and roses, and cut around 1,000 carnations a day and 200 roses. The carnations were worth 5 to 6 cents apiece, and the roses, 8, 10, and 12 cents.

Q. "How much did you lose on the flowers by the defect of the refrigerator?"

A. "Around $2,000."

All the testimony relates to the loss of flowers for want of a proper refrigerator. Day after day it seems defendant kept using the combination show case and refrigerator, and charged the loss to the plaintiff. He charged up the daily loss of flowers for which there was no market. There was no showing of any loss by an attempt in good faith to use the big cut-glass cooler. As a florist it was for defendant to know the right temperature to preserve the flowers and to ascertain the temperature by a thermometer. He had no excuse for attempting to use a cooler that did not cool to a proper temperature. But defendant had to quit the florist business, not for want of a cooler, but because the people of Minot needed bread and butter more than they needed flowers at $2 or $3 a dozen. Had it been possible for defendant to produce flowers and to market them at the prices stated, he would not have quit the business that would soon have made him a millionaire. Neither the answer nor the evidence submitted has any bearing on the correct rule and measure of damages, and the charge of the court does not in any way state the rule or measure of damages. The verdict has no support either in the pleadings or the evidence.

This case was poorly tried. The rule of damage was ignored as it is in the long-delayed majority opinion. The case demands a well-prepared motion for rehearing.

BRONSON, J. I concur in the dissent of Justice ROBINSON. In my opinion, the trial court has clearly erred in the reception of evidence affecting the question of damages, pursuant to the assignments of error.

O. J. BARNES COMPANY, a Corporation, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, and the Chicago, Milwaukee, & St. Paul Railway Company, a Corporation, Appellants.

(173 N. W. 943.)

Carriers — liability for loss by freezing through company's negligence.

Where a carrier receives perishable goods, namely, potatoes, for shipment at a season of the year when it is reasonable to anticipate freezing temperature; and where, following a delay in the shipment, the goods are damaged by being subjected to a freezing temperature, it is *held:*

1. The perishable nature of the goods is a fact to be taken into consideration by the jury in determining whether or not there was an unreasonable delay in the shipment.

2. Where goods are shipped under an option whereby the shipper assumes the risk of damage from heat and cold, the carrier is not relieved from liability where its delay in the shipment is the proximate cause of loss or damage by freezing.

3. A carrier is not exempted under the rule which excuses it from liability for damage occasioned by an act of God, where perishable goods are damaged by freezing following an unreasonable delay in their shipment at a season of the year when it was reasonable to anticipate freezing temperature.

Opinion filed June 21, 1919.

NOTE.—On duty of carrier to take precautions to prevent loss from delay, see note in 39 L.R.A.(N.S.) 645. The question of prior delay or deviation as affecting carrier's liability for loss of, or damage to, goods from act of God, is treated in a note in L.R.A.1916D, 988; and the question of duty of carrier where act of God has occurred or is threatened is treated in notes in 29 L.R.A.(N.S.) 671, and L.R.A.1916D, 981.

On carrier's liability for loss or deterioration of goods by delay, see note in 11 Am. St. Rep. 360.

Appeal from the District Court of Grand Forks County, *Cooley*, J. Affirmed.

Watson, Young, & Conmy, for appellants.

It is elementary law that all parts of the charge must be construed together. If, taken as a whole, the charge is substantially correct, the judgment must not be disturbed. 1 Hayne, New Trial, No. 131, p. 676.

"A new trial should never be granted in a civil action for errors in instructions, however egregious they may be, where the verdict was the only one warranted by the law applicable to the case." McGrath v. N. P. R. Co. (Minn.) 141 N. W. 166.

"Where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions, however erroneous." (79 U. S. 401.) C. Hebrard v. Jefferson Gold & S. Min. Co. 33 Cal. 290; Meguire v. Convine, 101 U. S. 108; West v. Camden, 135 U. S. 521; Butler v. Pitt R. Co. (Ind.) 46 N. E. 92; Mehurin v. Stone, 37 Ohio St. 54.

Among the state authorities there is a conflict as to whether or not a recovery will be allowed where goods are damaged by an act of God, after a negligent delay. Rodgers v. N. P. R. Co. 10 L.R.A.(N.S.) 658; C. & E. R. Co. v. Schaff Bros. (Ind.) 117 N. E. 869.

This shipment being interstate, the Federal rule must be followed.

Where property is destroyed by an act of God, but would not have been within the range of the destructive force except for the negligent delay of the carrier, it is established as the rule accepted and enforced in the Federal courts, that the act of God, not the negligent delay of the carrier, is the proximate cause of the loss, and that the negligent delay of the carrier is too remote as a contributing cause to entail liability upon him. Clark v. Barnwell, 12 How. 272, 13 L. ed. 985; Memphis R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Western Transp. Co. v. Downer, 11 Wall. 129, 20 L. ed. 160; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; Thomas v. Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663; New Orleans & N. E. R. Co. v. National

Rice Mill Co. 234 U. S. 80, 58 L. ed. 1223, 34 Sup. Ct. Rep. 726; Seaboard Air Line v. Mullin (Fla.) 70 So. 467.

A published tariff so long as it is in force is binding on the shipper and the carrier and has the force of a statute. And it must be strictly followed by the court until changed by the Interstate Commerce Commission. Soo R. Co. v. Campbell, 35 Sup. Ct. Rep. 33; Penn. Ry. Co. v. Int. Coal Co. 230 U. S. 184; Great Northern R. Co. v. O'Connor, 232 U. S. 508; St. L. I. M. R. v. Starbird, 243 U. S. 604; George W. Lardie & Son v. Manistee & N. E. R. Co. (Mich.) 158 N. W. 31.

And it is well settled in the United States courts, that where the loss occurs because of an exempted cause, such as heat and frost, the burden is on the shipper to show not only that there was delay, but that the delay was negligent. Carr v. Texas & P. R. Co. 194 U. S. 427; Northwestern Mill. Co. v. C. B. & Q. R. 160 N. W. 1028; New Orleans R. Co. v. Milling Co. 234 U. S. 80; The New Orleans, 26 Fed. 44; The Portuguese, 35 Fed. 670, 67 Fed. 794; Hurst v. St. Louis R. Co. 94 S. W. 794; Heil v. St. Louis R. Co. 16 Mo. App 363; Thyll v. N. Y. R. Co. 87 N. Y. 345.

McIntyre & Burtness, for respondent.

"Different classes of goods may reasonably require greater expedition, depending upon the questions as to whether they are perishable or liable to freeze or to be affected by changes in the weather. All such circumstances and incidents are to be taken into consideration in deciding upon the question whether the carrier has been guilty of an unreasonable delay, and each case must be determined by its own facts." Hutchinson, Carr. 3d ed. § 652; 10 C. J. 286; McGraw v. R. Co. (W. Va.) 41 Am. Rep. 696; Alabama R. Co. v. McKenzie, 45 L.R.A.(N.S.) 18, 77 S. E. 647; Woodward v. R. Co. 73 S. E. 290; Hewitt v. C. B. Q. (Iowa) 19 N. W. 790, 4 R. C. L. 738; Elliott v. R. Co. (S. D.) 161 N. W. 347.

"Where the bill of lading recited that the goods were received in apparent good condition, the burden of proof is on the carrier to show that they were not in good condition when received." 10 C. J. 371; 4 R. C. L. 913; Streubeling Co. v. Merc. Dis. Co. (Wis.) 126 N. W. 21; Central of Ga. R. Co. v. Dowen (Ga.) 65 S. E. 1091.

"If a carrier negligently and carelessly delays a shipment, and the

goods are overtaken in transit and damaged by an act of God, which would not have caused the damage had there been no delay, the carrier is liable even though the act of God could not reasonably have been anticipated." Alabama R. Co. v. Quarles (Ala.) 5 L.R.A.(N.S.) 867, 40 So. 120; Central of Ga. R. Co. v. Lumber Co. 54 So. 205, Ann. Cas. 1912D, 965 & note; Wald v. Pittsburg R. Co. (Ill.) 44 N. E. 888; Green Wheeler Shoe Co. v. Chicago, R. R. Co. (Iowa) 106 N. W. 498; Bibb Brown Corn Co. v. R. Co. (Minn.) 102 N. W. 709; Wabash R. R. v. Sharpe (Neb.) 107 N. W. 758; Read v. Spaulding, 30 N. Y. 630; Chicago R. Co. v. Miles (Ark.) 123 S. W. 775; Lamb v. Mitchell (Ga.) 84 S. E. 213; Sandy v. Lake St. R. R. Co. (Ill.) 85 N. E. 300.

BIRDZELL, J. This is an appeal from an order entered in the district court of Grand Forks county, granting a new trial. The action is one to recover damages alleged to have been occasioned by a delay in the shipment of a car load of potatoes from Grand Forks, North Dakota, to Vermillion, South Dakota, which delay is alleged to have subjected the potatoes to a low temperature, resulting in a considerable portion of them being frozen. It appears that the plaintiff placed a false bottom in the car and loaded it at Grand Forks on November 3, 1916. The car was a refrigerator car; the potatoes were contained in burlap sacks, and were so loaded as to leave an air space between the inside of the car and the potatoes. The route traveled was from Grand Forks to St. Paul, a distance of 320 miles, and from St. Paul to Vermillion, a distance of about 375 miles. The car arrived at its destination on the afternoon of November 17, 1916, or some fourteen days after it was loaded. The evidence showed that the temperature was lowest during the latter days of the transit. The shipment was made under what is termed option No. 1 of a tariff previously approved by the Interstate Commerce Commission and on file with it, and at the station of the Northern Pacific Railway Company at Grand Forks. Under this option the applicable tariff required the shipper to assume all responsibility for loss or damage due to cold or heat, not the direct result of the negligence of the carrier; and any warming of cars before loading was to be performed by the shipper at his own expense (the shipper was also required to provide

false flooring, stoves, fuel, etc.). The tariff directs carriers to refuse to accept shipments upon which may be noted directions to place the car in a roundhouse if the temperature goes below zero, or that the car must make schedule time.

The case was submitted to a jury and a verdict returned for the defendant. A special question was also submitted, in response to which the jury found that nine days was the ordinary and usual time necessary to move a shipment from Grand Forks, North Dakota, to Vermillion, South Dakota. The plaintiff later moved for a judgment *non obstante,* and, in the event of a denial of this motion, for a new trial. The former motion was denied and the latter granted.

In the order granting the new trial the trial court indicated that it was granted on the sole ground of an error committed in instructing the jury. The instruction deemed erroneous is as follows: "You are instructed that the fact that these goods are perishable goods, so-called, does not impose upon the defendants any greater duty to see that these goods were transported promptly, or any more promptly than other goods. It is the duty of the railway company to transport all goods in a reasonably prompt manner, and no exception is made in the case of perishable goods." An instruction submitted by the plaintiff, which stated the carriers' duties in different language, was refused. This instruction reads: "The jury is instructed that the law imposes upon a common carrier the duty of transporting goods from the place where received for shipment to their destination without unreasonable delay and as promptly as the ordinary course of traffic will permit, and that in determining what constitutes the transportation of the shipment in question within a reasonable time consideration should be given to the fact that the goods were of a perishable nature, and to the further fact that they were being transported during a season of the year when changing temperatures were to be anticipated." A comparison of the two instructions,—that is, the one given and the one refused, leads to the conclusion that the one refused contains the more correct statement of the law, in that the duty of the carrier to transport without unreasonable delay under the particular circumstances is recognized, and reference is made to some of the circumstances which properly bear upon the question of reasonableness. It is certainly proper, in determining the reasonableness of the time consumed in shipping

any commodity, to consider, among other circumstances, the nature of the goods and their liability to be affected by variations of temperature. 4 R. C. L. § 207; 10 C. J. 286; 2 Hutchinson, Carr. 3d ed. § 652. In the instruction given, however, the jury was practically told that the perishable character of the goods was not to be considered as a circumstance in determining the reasonable time. This error was not corrected or cured in the remaining portion of the instruction, and we are of the opinion that the trial court properly recognized its error in granting the new trial.

Counsel for the appellant argue, however, that, in shipping under option No. 1, it must be held that the shipper assumes all risk incident to heat and cold. If this contention be sound, the error, on account of which the new trial was given, would be error without prejudice. We do not agree with this construction of the option. Where the carrier negligently delays the shipment of a perishable commodity at a time of year when it is reasonable to anticipate that a delay will subject the commodity to a temperature that is apt to destroy it, and where such a result actually follows, the loss results from the negligent delay. In fact, the option itself implies that the shipper does not assume the risk of the carrier's negligence, for it does not attempt to excuse the carrier from liability for damage which is the direct result of the negligence. In our opinion, where the negligence is the proximate cause of the damage, the damage is, in the language of the option, the direct result of the negligence.

But counsel contend that the destruction of the property, being due to the elements, is a loss through what is commonly termed "an act of God," and that for losses so resulting no recovery may be had. But it is well settled that where loss due to changes in temperature occurs at a time when it is reasonable to anticipate such changes, the exemption is not applicable. 4 R. C. L. § 189. It is even held in some jurisdictions that the carrier is not exempted where, following a delay in their shipment, the goods are damaged by a so-called act of God which could not have been anticipated. See 4 R. C. L. § 194, and cases cited. We express no opinion as to the correctness of such a rule.

For the foregoing reasons, the order appealed from is affirmed.

THEA BYE, Respondent, v. JOHN ISAACSON, Appellant.

(6 A.L.R. 1067, 173 N. W. 754.)

Assault and battery — rape — damages.

In this case actual rape by extreme force and violence is in no way essential to the plaintiff's cause of action. The complaint does charge, the evidence does show, and the jury has found, that the defendant grabbed and assaulted the plaintiff, pulled her onto the bed, and with a strong hand overcame her feeble power of will and resistance; that he thrust his seed upon her, caused her to suffer the pains of childbirth and to bring into the world a fatherless child without any support for it. That is a cause of action. The judgment of $1,500 is righteous, just, and moderate, and it is affirmed.

Opinion filed June 27, 1919.

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

Affirmed.

Palmer, Craven, & Converse, for appellant.

"This court has repeatedly stated what the law requires to establish a criminal charge of rape. That the rule laid down by the trial court in its charge to the jury is sustained by respectable authority is shown by the following authority:" Dean v. Raplee, 75 Hun, 389, 145 N. Y. 319, 39 N. E. 952.

"The learned trial judge charged the jury that plaintiff, in order to maintain the action, must satisfy them, from all the proofs, that if defendant had criminal connection with her it was accomplished with the intent on his part to effect his purpose in defiance of all resistance, and that it took place without her consent, against her will, and that she resisted to the best of her ability, under all the circumstances." Koening v. Nott, 2 Hilt (N. Y.) 323, 8 Abb. Pr. 384; Lind v. Closs, 88 Cal. 6, 25 Pac. 972; Champagne v. Hamey, 189 Mo. 709, 88 S. W. 92; Dickey v. McDonnell, 41 Ill. 62; Besler v. Stephani, 71 Ill. 400; Linville v. Green, 125 Mo. App. 289, 102 S. W. 67; Breon v. Hinkle, 14 Or. 494, 13 Pac. 289.

McGee & Goss and *Ray O. Miller,* for respondent.

Resistance in rape.

The rule in this state is settled in State v. Bancroft, 23 N. D. 449, and State v. Owens, 26 N. D. 337.

ROBINSON, J. This is an appeal from a judgment on a verdict in favor of the plaintiff for $1,500. It is a civil action to recover actual damages against the defendant on the ground that by force and a strong arm he assaulted her, pulled her onto a bed, overcame her feeble powers of resistance, forced his seed upon her, causing her to endure the pains of childbirth and to have a bastard child with no means of supporting it. At the time of the assault the plaintiff was a domestic in the employ of defendant, and to some extent she was under his care and guardianship. He was bound to protect her from abuse and outrage. On July 7, 1915, he grabbed her while she was clearing the table after supper, pulled her into the bedroom, held her over the arms, saying he wanted to have intercourse with her. She said she would not allow it. He lifted her onto the bed.

Q. Why did you not get away from him?
A. I could not, he held me so tight and strong.

Then he lifted her clothes with his hands and shoved his hand between her limbs. He used a hand and foot to pry her legs apart. She tried all she could to get away from him, but he forced himself onto her, forced his way and accomplished his purpose. She tried to get away from him, to wriggle away from him, but he held her so fast she could not. She tried to get loose, but she could not.

Q. What did you do while he was doing it?
A. I tried to get away from him.

Such is the testimony which the jury found to be true. There was no fondling, no love-making, no kissing and caressing. He just grabbed her, pulled her onto the bed, held her arms, and quickly accomplished his purpose. It was no Julia and Don Juan affair. It was simply an act of brutal force. A very whore would not consent to such treatment.

In such a case there is no reason why the court should apply the old rules of criminal prosecutions for rape. The question of rape or no rape is in no way material to this case. So far as the complaint

charges a common-law rape it may well be considered as an exaggeration and as surplusage. Actual rape by force and violence is in no manner essential to the plaintiff's cause of action. The complaint does charge, and the evidence does show, and the jury has found that the defendant grabbed and assaulted the plaintiff, pulled her onto the bed, and with a strong hand overcame her feeble power of will and resistance; that he thrust his seed upon her, caused her to suffer the pains of childbirth and to bring into the world a fatherless child without any means of supporting it. Manifestly the plaintiff has suffered a great wrong, for which she has a legal and constitutional right to remedy by due process of law. To throw her out of court and to deny her any remedy because she did not resist with greater force, when all resistance in her power was obviously futile, that were a travesty on justice and a reproach to the courts. The verdict is manifestly righteous, just, and moderate. It is only for actual damages occasioned by a great wrong. Hence the judgment is affirmed.

GRACE, J. (specially concurring). An appeal from a judgment of the district court of Williams county and from an order overruling motion for verdict for defendant or for a new trial.

This action is one wherein the defendant seeks to recover from the plaintiff damages upon three causes of action,—two of which are for $5,000 each and one for $300. The plaintiff's two main causes of action are based upon the claim that defendant damaged her in that he caused her to be sick and in great distress of body and mind for a period of nine months caused by the defendant wilfully and unlawfully making a felonious assault upon the person of plaintiff against her will and without her consent, and by the use and means of great force and violence overcame her and her utmost resistance, and did unlawfully rape, ravish, criminally know, and have unlawful sexual intercourse with the plaintiff, whereby she became pregnant with child by the defendant. The $300 is claimed for medical care, attention, and medicines which plaintiff was required to purchase and use and for her loss of time during her sickness. The answer is a general denial.

The material facts are as follows: The plaintiff was thirty-seven years of age. She had been a married woman, but her husband had died a considerable period of time prior to the time of the alleged acts

of rape. She was the mother of two children prior to the time of the alleged acts of rape in question. She claims to have been first raped in June, 1915, the date being indefinite. The second time on July 7th of the same year and again on July 11th, and on the 15th. The causes of action are based upon the acts of rape, if any, which were alleged to have occurred on the 7th and 11th of July. This case was twice tried to a jury. The plaintiff in the last trial recovered a judgment for $1,500. In this appeal the appellant makes numerous assignments of errors of law. In addition thereto he assigns errors alleged to have occurred by the court giving certain instructions, and finally assigns as error the insufficiency of the evidence to sustain the verdict. We have with great care examined each error of law assigned. They consist principally in motions to strike out certain evidence offered by plaintiff or in overruling defendant's objections to certain evidence offered. We are very clear that the court committed no reversible error in this regard. If there was any error it was without prejudice. The court gave the following instruction, which is assigned as error: "The plaintiff insists that she did not voluntarily consent, but that she resisted to the full extent of her ability, and only yielded when her will was overpowered, and that after she finally submitted to her fate it was against her will and for fear of more serious consequences." Certainly there was no error in giving this instruction. It merely set forth what plaintiff claimed, that is, that she did not voluntarily consent, that she resisted to the full extent of her ability, etc. The next instruction, the giving of which is assigned as error, is as follows: "If you believe from the evidence that at the time of the alleged rape other people were at the same time in the same house who might easily have heard her had she made an outcry, and that she in fact made no outcry at the time the defendant was attempting to have connection with her, then you should consider such fact in connection with the question of whether she did everything within her power under the circumstances to prevent the defendant from accomplishing his purpose." There was no error in giving this instruction. It was as favorable to defendant as to plaintiff. Whether the plaintiff resisted the defendant to the extent of her ability was a question of fact under all the evidence for the jury. Whether or not there were other people in the house at the time the alleged rape was committed upon plaintiff, she

should have cried aloud for assistance unless she was prevented from doing so by reason of threats of great bodily harm accompanied by apparent power of execution. The next assignment of error is as follows: "Evidence has been admitted touching alleged attempts of the defendant to have sexual intercourse with the plaintiff at times other than the times and instances set forth in plaintiff's first and second causes of action,—evidence of such attempts has been received and may be considered by you for the bearing it may have and the light it might throw upon your minds, and what did occur, if anything, at the alleged instances on July 7th and July 11th of alleged rape set forth in plaintiff's first and second causes of action." We think this instruction was not prejudicial. The only effect of it was to show that attempts by the defendant to have sexual intercourse with the plaintiff at other times would lend color to the probability that he committed the actions of rape complained of, which are alleged to have occurred on July 7th and 11th. In this particular kind of a case we are of the opinion that such testimony is admissible for that purpose. This action is a civil, and not a criminal, action, and for the purpose for which such evidence might be introduced it certainly was not prejudicial to give the instruction with the limitation of its application as defined by the court in the instruction. There was no error in any of the other instructions assigned as error.

The appellant has assigned as a reason for setting aside the verdict and reversing the judgment that the evidence is insufficient to sustain the verdict. To determine this question necessitates a thorough examination of the evidence. Before doing so, however, it is necessary to determine what the character of the evidence must be, and what degree of proof is required in order to hold the defendant in damages arising from the alleged rape of the plaintiff. It is well settled that if the defendant were being tried on a criminal charge of rape, before the jury could convict, it would be necessary for it to find that the act was committed by force and against the will of the plaintiff, and that she resisted the commission of the act to the extent of her ability, and that her resistance was overcome by force or violence, unless she is prevented from resisting by threats of immediate and great bodily harm, accompanied by apparent power of execution, or unless prevented from resisting by the administration to her of an intoxicating, narcotic,

or anesthetic agent. If the charge were a criminal one, all such matters would have to be proved by the state of competent evidence, beyond a reasonable doubt. In a civil action for damages for rape, the same character of proof is required as in the criminal case, but in a different degree; in other words, by a preponderance of the evidence only. If the plaintiff in this case has proved by a clear preponderance of the evidence that the defendant by force and violence actually raped her, and that she resisted such act to the extent of her ability; that her resistance was overcome, or if, by reason of any threats, she was put in great fear of immediate bodily injury, the means of executing the threat being accompanied by apparent power of execution,—then she has a cause of action against the defendant and the verdict should be sustained; otherwise, she would have no cause of action, and there would not be sufficient evidence to sustain the verdict.

We will first examine the alleged rape of July 11th. The only testimony to sustain plaintiff's claim is her own. Her testimony with reference to the alleged rape of July 11th is substantially as follows: "On the 11th of July, early Sunday morning, I didn't know before he was right there by my side, taking hold of me and shoved me over into the corner near the entrance to the basement. He shoved me against the door—side of the door—and wanted intercourse. Took up my clothes and put his organ into mine at that time. While he was doing that I tried to get away from him. He did get his organ into mine at that time, not very long, a few minutes. I said to him he shouldn't do it. I didn't make any noise. I didn't dare to. I was afraid of him since the first time, afraid he would hurt me in some way." This was substantially all the testimony on behalf of the plaintiff as to this act. That it is insufficient to prove rape must be conceded. There is practically no showing of force nor violence used by the defendant, and her testimony shows absolutely no effort to resist him. There is no evidence in the record that he had ever made any threat that he would do her any great bodily harm. There is no evidence that she made any outcry or called for any help or made any noise of any kind or character to attract anyone's attention that might have been in the house,—and as we shall see, there is other testimony showing there were other people in the house at that time. Testimony that she tried to get away from him is of no value. It is a mere conclusion. It shows

no act of resistance. There was nothing in her testimony with reference to this act that in any material degree tends to prove the commission of rape.

In connection with the alleged rape of July 11th, it is also well to examine the testimony of other witnesses. The defendant testified that, from the evening of the 9th until the evening of July 11th, he was absent from his dwelling in Tioga, and at no time during that period did he return until the evening of the 11th; that on the evening of July 9th he went out to Halvor Davidson's, a brother-in-law, and from there he went to the place of another brother-in-law; that on the evening of the 9th they stayed at Davidson's, and on the night of the 10th they stayed at Herfindahl's. His wife was with him these two nights. He denies all of the plaintiff's testimony with regard to the alleged rape of July 11th. Herfindahl, who lived 7½ miles south of Tioga, testified that he was home on July 10th and he first saw John Isaacson on the morning of the 10th, in the forenoon, at his place; that Mrs. Isaacson was with him; that they stayed there all that day and that night until the next morning about 10 o'clock on the 11th; that they were not absent from his place any time in the meantime; that they came to his place from Halvor Davidson's; that they said they were going from his place to Olaus Herfindahl's. Olaus Herfindahl testified that he lived 6 miles south of Tioga on a farm; that he is a brother of Mrs. Isaacson; that he saw Mr. Isaacson on the 11th of July at his place, and on the night of the 9th he talked with him over the phone from his place to Davidson's about 10 o'clock in the evening, but that he did not see him until the forenoon of the 11th; that they stayed until evening; that they came to his place from Julius Herfindahl's place; that from his place they went to town. Mrs. John Isaacson, wife of defendant, testified that on the evening of the 9th they were at Mr. Davidson's and remained there all that night; that her husband was with her and slept with her at Davidson's place; that on the forenoon of the 10th they left Davidson's place and got to Julius Herfindahl's place, got there in the forenoon and stayed there until the next forenoon on the 11th; that her husband was there during all the time that she was there; that on the night of the 11th her husband slept with her; that on the 11th they visited Olaus Herfindahl until the evening of the 11th and got back home on the evening of the 11th;

that she was positive that her husband was not in Tioga at any time from the time she left Tioga on the 9th of July until the evening of July 11th. This testimony is entirely undisputed; its truthfulness is in no manner questioned nor contradicted. It would appear to prove conclusively that John Isaacson was not home from the evening of July 9th until the evening of July 11th. If this is true, and we believe the testimony shows it to be, it would have been impossible for him to have committed the act of July 11th, as claimed by the plaintiff. We are of the opinion that there is no evidence showing that Isaacson did commit the alleged rape of July 11th.

We will now consider the alleged rape of July 7th. Plaintiff testifies substantially as follows: "On the 7th of July, 1915, he grabbed me while I was clearing the table after supper. He was then in the dining room, held me over the arms. He pulled me into the bedroom,—from the dining room into the front room and then the bedroom." He said he wanted intercourse with her. She said it was not permissible "either for you or me." He said, "People do a great deal that they are not permitted to do; you will have to live the best you can." It was not probable there was any light after this. She said she would not allow it. He lifted her into the bed, one arm around the shoulders and the other under the hips. She couldn't get away from him, he held her so tight and strong. He lifted the clothes with his hands and shoved his hand up between her limbs. He used a hand and foot to pry her legs apart; that she tried all she could to get away from him, but he forced himself to her, forced his way to accomplish it; that he succeeded in having intercourse with her; that she did not consent. She testified that she tried to get away from him, wriggle away from him, but that he held her so fast she couldn't. As to the length of time that she was trying to get away from him before he had sexual intercourse with her, she testified she was not quite sure, but that it must have been about five minutes, because he was so strong, it didn't help any the way she struggled. She testified that he did not say anything during that time. She testified that she was scared and that he finally succeeded in having intercourse with her; that it was only a few minutes, not very long. She also testified that during the act of intercourse she tried to get loose but couldn't; that the alleged rape hap-

pened between 6 and 7 in the evening. The following question was asked her:

Q. Do you know where the rest of the Isaacson family was at that time?

A. The oldest daughter hurried up and ate her meal and went to town, and the other children left also right away after they had eaten, and Mrs. Isaacson and the baby were not at home for supper.

She testified that she stayed at the house after that; and, asked why she stayed there, she answered, she was afraid he might do her some harm; besides, she had to work somewhere, had to live. The evidence given by the plaintiff tends to show there was some force used by the defendant upon this occasion, but we believe, however, there is practically no evidence on the part of plaintiff to show any resistance to any force used by the defendant. There is no showing of any outcry, the making of any noise to attract anyone's attention to her relief, though her own testimony tends to show some of the children were in the house at that time. There is absolutely no showing that any threats were made against her or that any threat of violence of great bodily harm was made against her person unless she consented to have sexual intercourse with the defendant, nor anything of this nature which might relieve the plaintiff from crying aloud for help, in some manner showing actual resistance. There is no testimony by her showing any facts which would put her in fear.

Mrs. Isaacson testified she knew Thea Bye about three years; that she began to work for them on the 7th of April; that she, Mrs. Isaacson, left for Minneapolis April 20th for medical treatment and an operation and remained there until June 30th; that the first place she went on a visit after she got home was at Watford, which was on the Fourth of July; her husband and daughter accompanied her; that they returned from Watford City on the evening of July 6th. That on the next day, July 7th, she was at home all that day; that she was positive of that; that Mrs. Bye's testimony that she went away from home that afternoon and was not at home at the supper meal is not so; that Mrs. Evjen was present at the supper meal; that there was not anybody else there, just the family; that on the evening of the 7th she occupied her usual bedroom in the house; that it was the bedroom on

the first floor; that after July 7th, the next time she left her home was on the evening of July 9th, as before stated; that on the evening of July 7th the condition of her bed from supper time until the time she went to that bed to sleep was that it was made up and in good shape; that she saw no evidence of the bed being mussed up at that time until they went to bed the evening of the 7th.

Bertha Evjen testified that she had lived in Tioga fourteen years; that she knew the Isaacson family; that she was no relation to them; that she was over at the Isaacson place on the evening of July 7th, that she went there about supper time; that she was present when the family was eating supper a little after 6; that Mrs. Isaacson was home that evening for supper; that she had supper that evening with the family; that the oldest daughter was home and she also had supper with the rest of the family; that she, Bertha Evjen, stayed there until about 9.

Myrtle Fredrickson testified that she was the daughter of Mr. and Mrs. Isaacson; that she was twenty years old; that in 1915 she was home at her father's place and going to school that year; that on the 30th of June her mother returned from Minneapolis, and that all the other children that were going to school always came home for the noon meal. That she spent the Fourth of July at Watford City with her mother and father and brother; that they returned home on the 6th in the evening; that she was home on the 7th of July, and, so far as she could remember, was home on that day and was home for supper that evening; that after her mother came from Watford on the 6th of July the next time she left home for any visit was on the 9th of July; that on the evening of July 7th Mrs. F. Evjen was at their place for supper; the whole family was there; that she had a good memory; that Mrs. Evjen was present for supper the evening of July 7, 1915; that she, the witness, remained home that evening for supper; that she roomed, boarded, and lived at home during the month of July; that she never saw any familiarities between her father and Mrs. Bye.

If this were a criminal prosecution for rape there could not be the least doubt that there is no competent evidence by which a conviction could be sustained, for the reason that there is no competent proof that there was any resistance to the acts of alleged rape. This is an exceedingly important element in the crime of rape, and if it is wholly

absent there is no crime of rape. Resistance must be established as a fact by competent testimony, that is, the acts which constitute the resistance must be detailed and must show that resistance to the full extent of ability was made unless it was prevented by threats of great bodily harm as defined by the statute. The statement of conclusions is not evidence of resistance. As, for instance, such statements as are contained in plaintiff's testimony, that during the act of sexual intercourse she tried to get loose but couldn't, that he held her so tight and strong that she couldn't get away, that she tried all she could to get away from him but he forced himself to her, that she tried to wriggle away from him but that he held her so fast she couldn't, and all similar testimony, are the merest conclusions, and are not statements of fact. There is absolutely no testimony in the record showing any threat of bodily harm by the defendant against the plaintiff. She never at any of the times of alleged rape made a single outcry of any kind or character to attract the attention of anyone who might be in the house or any passer-by. With the element of resistance wholly lacking, there is no evidence of rape.

The plaintiff in two trials in the lower court and in the appeal to this court tried her case upon the theory that she was entitled to damages by reason of the alleged rape committed upon her. The question that presents itself for our consideration is, she having failed to establish a cause of action for rape for the reasons above stated, may she recover upon a cause of action upon which she did not rely in the trial court or in this court? The opinion as written by Justice Robinson, in effect, holds that she may. If she may recover upon other grounds than those upon which the action was maintained, what are those grounds? As I understand the theory, in the opinion of the court, it is upon the ground of assault. In such an assault there would no doubt exist as a basis for damages the injured feelings of the plaintiff and the mental suffering and anguish to which she was subjected by reason of the assault; that would probably be a sufficient basis to support the judgment in question. If all the consequences which followed from such assault, accompanied by sexual intercourse, resulting in the plaintiff's becoming pregnant and being delivered of a child, are to be considered in connection with the assault, and as a part or consequence of it, the judgment may be sustained upon that theory. Under the

theory laid down in the case of Ingvaldson v. Skrivseth, 7 N. D. 388, 75 N. W. 772, no recovery can be had by an unmarried female for her own seduction. Assuming that to be the law of this state, the judgment can be sustained only upon the theory that it is damages for an assault. I concur in the result arrived at in the opinion of Justice Robinson.

DWIGHT FARM & LAND COMPANY, a Foreign Corporation, Plaintiff and Respondent, v. A. H. JOHNSON, and All Other Persons Unknown, Claiming Any Estate or Interest in or Lien or Encumbrance upon the Property Described in the Complaint, Defendants, and Now, A. H. JOHNSON, Alone, Defendant and Appellant.

(173 N. W. 752.)

Contracts — sale of land — nonperformance.

A contract of sale does not live forever when there is no performance under it. After the lapse of twenty years without any performance of a contract for the purchase of land, the holder of the contract is in no position to assert any right or claim under it.

Opinion filed June 28, 1919.

Appeal from the District Court of Steele County, Honorable *A. T. Cole*, Judge.

Affirmed.

Chas. A. Lyche, for appellant.

Where it appears on the face of a contract for the sale of land that the prohibition of assignment is not the main purpose of the covenant, but the mere means to a securing for such purpose, a contract is assignable in equity, and the assignee has all the equitable rights of his assignor. Grigg v. Landis, 21 N. J. Eq. 495; Cheney v. Bilby, 20 C. C. A. 291, 36 U. S. App. 720, 74 Fed. 52; Wagner v. Cheney, 16 Neb. 202, 20 N. W. 222; Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14.

When it appears that the object for inserting a nonassignable clause

has been accomplished, and that the purchase money has been permitted to be paid or tendered to the vendor, and that nothing remains to be done but to execute a deed to the purchaser, the vendor cannot be heard to allege as an excuse for not making a conveyance that at a certain time the purchaser of the land assigned a contract of purchase without his consent. Poehler v. Reese, 78 Minn. 71, 80 N. W. 847; Auxier v. Taylor, 102 Iowa, 673, 72 N. W. 291; Coles v. Shephard, 16 Minn. 153; Case v. Wolcott, 33 Ind. 5; 39 Cyc. 1384, 1386 (B).

Whenever by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with his provisions, he may be relieved therefrom upon making full compensation to the other party, excepting in case of a grossly negligent, wilful, or fraudulent breach of duty. Comp. Laws 1913, § 7138; 39 Cyc. 1559, 1560 and cases cited.

A delay or default in payment on the part of the purchaser is excused, and a nonforfeiture can be had when the vendor's conduct is responsible for or leads the purchaser to refrain from making payment in accordance with the terms of the contract. 39 Cyc. 1561–1564, 1606, C, and cases there cited; Hudson v. Jones, 143 S. W. 197; Newberry v. Langan, 47 Can. S. C. 114; 17 B. C. 88; Dist. Cushing v. Knight, 46 Can. S. C. 555; Constr. Co. v. Vansickler, 51 Can. S. C. 274, 31 Ont. L. Rep. 531; 6 Ont. Week. N. 526; Boyd v. Richards, 29 Ont. L. Rep. 119, 4 Ont. Week. N. 1415; Nelson v. Geaskawyer (Minn.) 87 N. W. 1121; Plummer v. Kelley, 7 N. D. 88; Bennett v. Glaspell, 15 N. D. 239; Fargusson v. Talcott, 7 N. D. 183; Cughan v. Larson, 13 N. D. 373; Boyum v. Johnson, 8 N. D. 306; Russell v. Timmins, 13 N. D. 487; Kicks v. Bank, 12 N. D. 576.

Conduct on the part of the purchaser which is not inconsistent with the continuance of the contract in full force and effect does not amount to an abandonment. 39 Cyc. 1353, A, 2; Chapman v. Propp, 125 Minn. 447, 147 N. W. 442; Wheaton v. Collins, 84 Atl. 271; Comp. Laws, 1913, §§ 5471, 5529; Wright v. Jones, 23 N. D. 101; Zerfing v. Seeling (S. D.) 80 N. W. 140; Conklin v. Kruse, 36 L.R.A.(N.S.) 1124, and the extensive notes to this case; Doran v. Dazey, 5 N. D. 167.

P. O. Sathre, for respondent.

The property in question is in possession of third parties. It has been improved and increased materially in value. All this has taken

place with the full knowledge of the defendant, and he cannot at this time be heard to assert his right to the premises. Mahon v. Leech, 11 N. D. 181, 90 N. W. 807; Rogers v. Van Northwick, 58 N. W. 757; Melms v. Pabst Brewing Co. 66 N. W. 518; Willard v. Wood (U. S.) 41 L. ed. 540; Hagerman v. Bates (Colo.) 38 Pac. 1104; Mathews v. Burdick, 38 Fed. 896; Miles v. Vivian, 79 Fed. 853; Schlawig v. Purslow, 59 Fed. 853; Burgese v. St. Louis C. R. Co. (Mo.) 12 S. W. 1054; Stuart v. Holland, 179 Fed. 193; Berwick v. Dorris, 174 Fed. 506; Fowlers v. Alabama Iron Co. (Ala.) 51 So. 395; State v. Warner Valley Stock Co. (Or.) 106 Pac. 778. See also Ottow v. Friese, 20 N. D. 86.

Where one of the parties was, during the statutory time, as required under § 5471, Comp. Laws 1913, in actual and open adverse and undisputed possession of the land, the title thereto became vested in such party. Comp. Laws 1913, § 5471; Paiver v. Ketching, 10 N. D. 254; Woolfolk v. Albrecht, 22 N. D. 36; Streeter v. Fredrickson, 11 N. D. 300; Schneller v. Plankinton, 12 N. D. 561; Stiles v. Granger, 17 N. D. 502; Wright v. Jones, 23 N. D. 191.

Robinson, J. This is an appeal from a judgment quieting plaintiff's title to a quarter section of land in Steele county. Defendant appeared and by answer asserted a claim of title to the land as assignee of a cropping contract of sale made by the plaintiff to defendant's assignor. The contract was made twenty-two years ago, and there is no claim of the least performance under it. Neither the defendant nor his assignor have paid any taxes on the land, nor ever paid a dollar or anything on the contract or done anything toward performance.

In the opinion of the writer it requires some nerve to assert a claim under such a contract. But defendant claims that he is an innocent purchaser; that he took the contract without reading it or knowing that it provided against any assignment; and that he has at all times been ready and willing to comply with the contract, and that plaintiff has been at fault in not recognizing his rights as an assignee; also, that the plaintiff has done nothing to cancel the contract.

Such a plea is futile. It is obviously without any merit and contrary to the decision of this court in Nelson v. McCue, 37 N. D. 183, 163 N. W. 724. After a lapse of more than twenty years without any perform-

ance of the contract, the defendant is in no position to assert any rights or claim under it. The judgment is clearly right, and it is affirmed, with costs, and directions that the case be remanded forthwith.

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

W. E. HANSON, as State Bank Examiner of the State of Washington, for and in Behalf of the First International Bank, an Insolvent Corporation, of South Bend, Washington, Appellant, v. M. J. JOHNSON, Clara Johnson, and Forest City National Bank, a Corporation, Respondents.

(177 N. W. 452.)

Recording of instruments — notice — deposit of instrument for record — recording fees.

1. Where an instrument affecting real property is required by the Recording Acts to be recorded in the office of register of deeds in the county where the real property is situated in order to be notice to subsequent purchasers for value, and there is a further requirement by law that when such instrument is deposited with the register of deeds for record, he may require the payment of the recording fee in advance, *held* that the depositing of the instrument with the recording fee unpaid with the register of deeds for record and the same is not entered upon the reception book or spread at length upon the record, does not constitute the recording of the instrument so as to be constructive notice to subsequent purchasers for value until the required recording fee is paid. *Held*, further, if the instrument is deposited for record, and at that time the required recording fee is not paid, and the instrument is recorded by being entered in the reception book or spread at length upon the record, it will be constructive notice to subsequent purchasers for value even though the recording fee is not paid at the time of depositing the instrument for record.

Consideration — value — pre-existing debt — past-due indebtedness.

2. By the provisions of § 6910, Compiled Laws 1913, an antecedent or pre-existing debt constitutes value for an instrument payable on demand or at a

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NOTE.—On effect of failure to pay registration tax or fee, see note in 42 L.R.A. (N.S.) 146. For authorities discussing the question of protection under recording acts of mortgage given as security for pre-existing debt, see note in 33 L.R.A. (N.S.) 57.

future time. The rule is different if the antecedent or pre-existing indebtedness, which is the consideration of an instrument, is past due and there is no extension of time of payment to a time certain, and there is no surrender of security for the same debt, nor surrender of legal rights, nor any new instrument taken for the antecedent or pre-existing indebtedness payable on demand or at a future time.

Opinion filed November 22, 1918. Rehearing denied July 1, 1919.

Appeal from the District Court of Oliver County, North Dakota, Honorable *J. M. Hanley,* Judge.

Reversed.

B. W. Shaw and *Robert Dunn,* for appellant.

"The register of deeds may in all cases require the party for whom any services are to be rendered to pay the fees in advance." Comp. Laws 1913, § 2212, as amended.

A law established for a public reason cannot be contravened by a private agreement. Comp. Laws 1913, § 7247; Parrish v. Mahany, 73 N. W. 97.

Where an instrument comes into the hands of the register of deeds, and the fees for recording same were not paid in advance, such delivery to the register of deeds does not have the effect of depositing the instrument for record, and cannot be deemed recorded under § 5558, Comp. Laws 1913. Orr v. Sutton, 42 L.R.A.(N.S.) 146.

The instrument first executed and delivered in point of time is entitled to priority regardless of the recording acts, unless there are some other circumstances which placed the mortgagee in a worse position than he was before. McDonald & Co. v. Johns, 33 L.R.A.(N.S.) 57, and note.

Miller, Zuger, & Tillotson (*H. A. Brown,* of counsel), for respondents.

A mortgage to secure a pre-existing debt is not within the protection of a statute giving mortgages priority as against bona fide purchasers from the date they are filed for record, so as to entitle it to priority from the time of its record over an existing unrecorded mortgage. McDonald Co. v. Johns (Wash.) 114 Pac. 175; Hicks v. Nat. Surety Co. 50 Wash. 16, 96 Pac. 515; Peoples Sav. Bank v. Bates, 120 U. S. 556;

Pomeroy, Eq. Jur. 3d ed. 747–749; 27 Cyc. 1191; 24 Am. & Eng. Enc. Law, 2d ed. 139.

He must not only have had no notice, but he must have paid a consideration at the time of the transfer, either in money or other property, or by a surrender of existing debts or securities held for the debts and liabilities. Note in 33 L.R.A.(N.S.) 57; 24 Am. & Eng. Enc. Law, 2d ed. 139.

A conveyance or mortgage of property in satisfaction of an antecedent indebtedness, although good as between the parties, will not, according to the weight of authority, entitle the grantee to be considered a purchaser for value. 23 Am. & Eng. Enc. Law, p. 290; Bybee v. Hawkett, 12 Fed. 649; Wells v. Marrow, 38 Ala. 125; Johnson v. Graves, 27 Ark. 557; Withers v. Little, 55 Cal. 370; Clinski v. Sawadski, 8 Fla. 405, 27 L.R.A.(N.S.) 620, note.

The burden is upon the plaintiff to prove that he is a bona fide purchaser within the meaning of the recording statute. Conklin v. Kruse, 82 Kan. 358, 108 Pac. 856, 36 L.R.A.(N.S.) 1124. Also note to this case.

"An instrument deposited with the register of deeds, with the intention of having it recorded, is deemed recorded." Parrish v. Mahaney, 10 S. D. 276, 66 Am. St. Rep. 715, 73 N. W. 97; Parker v. Panhandle Nat. Bank, 11 Tex. Civ. App. 707; Marlet v. Hinman, 77 Wis. 136, 20 Am. St. Rep. 102, and cases cited in that opinion; Smith v. Waggoner, 50 Wis. 155, 6 N. W. 568; Citizens Bank v. Shaw, 14 S. D. 197, 84 N. W. 779; 2 Jones, Real Prop. No. 1472; Fisher v. Butcher, 19 Ohio, 405; Brookes's Appeal, 64 Pa. 127.

GRACE, J. Appeal from the district court of Oliver county, North Dakota, Honorable J. M. Hanley, Judge.

This action is brought upon a promissory note, dated November 26, 1912, for $3,100, with interest after date at the rate of 8 per cent per annum, and for the foreclosure of a real estate mortgage securing said note and bearing even date with said note, a lien against the N.½ of section 11, township 142, range 87, Oliver county, North Dakota. The note and mortgage were each executed and delivered by M. J. Johnson and Clara Johnson, who were then the owners of the land in question.

to the First International Bank of South Bend, Washington. Neither of the Johnsons interposed a defense.

The Forest City National Bank claims a lien on the same land by reason of a deed executed by the Johnsons to it on the 13th day of May, 1910, at which time the Forest City National Bank claimed the Johnsons were indebted to them for $5,472.40. The Forest City National Bank, in its answer, in substance alleged that though the deed in effect was absolute in form, it was intended and agreed to be security for said indebtedness and obligations of the said Johnsons to said bank. Defendant further in substance alleges that said deed was deposited on the 2d day of April, 1912, in the office of the register of deeds of Oliver county, and on the same day was duly presented to the county auditor for certification as to delinquent taxes, and that said county auditor officially certified and indorsed upon said deed that all delinquent taxes were paid and transfer of said premises was entered in his office; and that owing to the neglect and default of the register of deeds, such deed was not recorded at length in the office of said register of deeds on the day it was filed for record, but, on the 19th day of May, 1914, was recorded in the office of the register of deeds of Oliver county in book 10 of warranty deeds on page 280. The answer further alleged that the First International Bank of South Bend, Washington, prior to November 26, 1912, had actual notice or knowledge of the existence of said deed to the Forest City National Bank, in addition to the constructive notice imported by the records of Oliver county, and took the mortgage which plaintiff is seeking to foreclose with full knowledge of the Forest City National Bank's interest and rights in and lien upon the said premises, and subject to such lien of the Forest City National Bank. The note upon which plaintiff maintains this suit is set out in full in his complaint, and is a note payable on demand.

The Johnsons were the owners of the land in question on the 13th day of May, 1910, at the time said deed was executed and delivered to the Forest City National Bank.

It appears that the deed was taken from the Johnsons to the Forest City National Bank as security, and therefore, though a deed in form, it is in fact a mortgage, and will be considered as such in further reference to it, and the only consideration for it was the antecedent debts owing from the Johnsons to the Forest City National Bank. The de-

mand note for $3,100 and the mortgage securing the same also had no other consideration than the antecedent debts owing from the Johnsons to the First International Bank of South Bend, Washington.

The mortgage given to the First International Bank of South Bend, Washington, was duly and fully recorded on the 10th day of December, 1912, in the office of register of deeds of Oliver county, North Dakota. It thus appears that the mortgage to it was actually recorded more than a year and four months prior to the time of the recording of the mortgage in question to the Forest City National Bank.

Section 5594, Compiled Laws 1913, in part is as follows: "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.*"

Section 5595, Compiled Laws 1913, defines the term "conveyance" and the word "purchaser." The section reads as follows: "The term 'conveyance,' as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or encumbered, or by which the title to any real property may be affected, except wills and powers of attorney. The word 'purchaser' as used shall embrace every person to whom any estate or interest in real estate is conveyed for a valuable consideration, and also every assignee of a mortgage, lease or other conditional estate."

The deed from Johnson to the Forest City National Bank was dated May 13, 1910, and deposited for record with the register of deeds of Oliver county on the 2d day of April, 1912, and, on the last date, certified as to delinquent taxes to the county auditor of said county to the effect that all delinquent taxes were paid and transfer of the premises was entered in his office. The fees for the recording of the deed were not paid in advance at the time of depositing it for record, but were paid on the 19th day of May, 1914. The mortgage to the First International Bank of South Bend was fully recorded on the 10th day

of December, 1912. Which, then, of the two conveyances is a prior lien on the land in question?

The answer to this question presents two propositions the disposition of which is decisive of the case. First proposition is: Under a law which provides, in effect, that the fees for recording an instrument must be paid in advance, may an instrument, which is entitled to be recorded, be said to be of record when the same is delivered to and left with the register of deeds for record unaccompanied with the recording fee? The second proposition is: Is either of the mortgages based upon a valuable consideration so that the holder thereof is in the position of a purchaser for value?

Considering the first of the propositions, we are of the opinion that an instrument required to be recorded in the office of the register of deeds is recorded when it is deposited and left with the register of deeds for the purpose of record, and, when so deposited, is accompanied by the requisite fee for spreading the same at length upon the records. This view, we believe, is in harmony with the law relative to the recording of instruments such as those we are considering as expressed in §§ 5557, 5558, 3548, and 3509 of the Compiled Laws of 1913.

Under our law, § 3508, Compiled Laws 1913, the register of deeds receives a salary based upon the assessed valuation of the property assessable within the county. He no longer receives a recording fee individually and as part of his own compensation, but he receives it as a representative of the county, and as such he must keep a fee book which is provided for him by the county, and in it enter each item of fees for services rendered. He must, within three days after the close of each calendar month and at the end of his term of office, file with the county auditor a statement, under oath, showing the fees which he has received as such officer since the date of his last report, and also, within the three days, deposit with the county treasurer the total sum of such fees. He must also indorse the amount of the fees on the instrument recorded. He may in all cases require the party for whom any service is to be rendered, to pay the fee in advance for the rendition of such service or to give security for the same.

Section 5558, Compiled Laws 1913, is as follows: "An instrument is deemed to be recorded when, being duly acknowledged or proved and

certified, it is deposited in the register's office with the proper officer for record."

Construing the foregoing sections together in their application to an instrument deposited for record without the payment of the recording fee at the time of depositing for record, and where the instrument deposited for record has not in fact been recorded by being entered in the reception book or spread at length upon the record, it is held that such instrument is not recorded, and is no constructive notice to subsequent purchasers for value. If the instrument is deposited for record and at that time the required recording fee is not paid, and the instrument is recorded by being entered in the reception book or spread at length upon the record, it will be constructive notice to subsequent purchasers for value even though the recording fee is not paid at the time of depositing the instrument for record. In the case at bar, after the register of deeds received the mortgage to the Forest City National Bank on April 2, 1912, he sent a notice to the bank that it would be necessary to receive the fees before he could record the mortgage. The notice was sent on the regular printed form or statement. The fees were not paid until the 19th day of May, 1914, which is two years or more after the time the deed was received by him. It is clear, under these circumstances, that the mortgage to the Forest City National Bank, which, as we have seen, was in the form of a deed, was never in fact of record until the 19th day of May, 1914.

Considering the second proposition, we are of the opinion that the mortgage from Johnson to the First International Bank of South Bend, Washington, is based upon the valuable consideration, and the holder thereof is in the position of, and is entitled to, the rights and protection of a purchaser for value. It is true that the $3,100 is the aggregate of certain antecedent debts owing from Johnson to the First International Bank. Antecedent debts, however, under some circumstances, are a sufficient consideration to support a simple contract. This is true where the antecedent indebtedness is included in an instrument, such as a promissory note or a mortgage, payable on demand or at a future time. In this case, the antecedent indebtedness of Johnson to the First International Bank was placed in the form of a demand note which was secured by mortgage on the land in question, and this, as we view it, afforded a valuable consideration for such note and mortgage, and af-

fords the First International Bank all the rights of a purchaser for value.

Section 6910, Compiled Laws 1913, reads thus: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

The rule would be different if the antecedent or pre-existing indebtedness, which forms consideration of an instrument, were past due and there were no extension of the time of payment thereof, no surrender of security for the same debt, no instrument payable on demand or at a future time, the consideration of which is the antecedent indebtedness. In such case the instrument could not be said to be based upon a valuable consideration and would come within the rule laid down in the case of Horton v. Wright, B. & S. Co. 36 N. D. 622, 162 N. W. 939. As above pointed out, our statute makes antecedent or pre-existing indebtedness a valuable consideration for an instrument payable on demand or at a future time. The note and mortgage from Johnson to the First International Bank are instruments payable on demand and come within the terms of § 6910. The record does not clearly show in what manner the indebtedness of Johnson to the Forest City National Bank was to be paid, whether on demand or at some future time.

The following question was asked Mr. Isaacs:

Q. Can you now state what Mr. Johnson was owing to the Forest City National Bank from the 13th day of May, 1910, the amount, and in what form it was?

A. After refreshing my memory from the books, I find that he was owing at that time notes as follows: One for $250, one for $572.40, one for $2,000, one for $950, one for $700, and one for $1,000; total $5,472.40.

The total amount represented the face of the notes and did not include any interest, and it would appear from such testimony that the notes must have been due or past due.

R. W. Stephenson, who was vice president of the Forest City National Bank during 1912, 1913, and 1914, testified as follows:

Q. Mr. Stephenson, what can you say of your own knowledge as an officer of the bank as to whether or not M. J. Johnson was owing the Forest City National Bank during the time you were one of the officers thereof?

A. He was indebted to the bank during all of the time that I was one of the officers.

Q. And in about what amount as near as you can recollect?

A. That was about $5,500.

Q. While you were an officer of the bank did you take renewals of notes from Mr. Johnson?

A. Yes, sir. I did.

Q. I will ask you to examine the papers marked by the numbered exhibits, numbers 2, 3, 4, 5, 6, 7, and 8, and ask you to state what they are.

A. These are notes representing Mr. M. J. Johnson's indebtedness to the Forest City National Bank, February 24, 1915.

Q. Do you know, Mr. Stephenson, how the particular notes represented by these exhibits came to be taken?

A. Note marked exhibit 2 was taken in renewal of a similar note executed by M. J. Johnson owing to the bank, which note bore Emil Johnson's indorsement. Exhibits 3 to 8 inclusive were taken in renewal of M. J. Johnson's indebtedness to the bank, including accrued interest.

Q. What do you say, Mr. Stephenson, with reference to the indebtedness of Mr. M. J. Johnson to the Forest City National Bank on the 24th day of February, 1915, as being represented by exhibits numbered 2 to 8 inclusive? Did that represent all of his indebtedness or not, as you recollect?

A. It did.

Q. What do you say, Mr. Stephenson, as to the notes marked exhibits 2 to 8 inclusive? Were they or were they not taken in renewal of previous indebtedness by deed, exhibit 7?

A. They were.

In all this testimony, there is nothing to show but that all the indebtedness from Johnson to the Forest City National Bank was past due at the time of the delivery of the deed given to secure such indebt-

edness. There is testimony tending to show that renewals of such indebtedness were taken from time to time, and there are several of such notes in evidence; one note for $1,000 bearing the date, January 24, 1913, and four notes for $1,000 each bearing date February 24, 1915, and two other small notes of the same date, one for $248.95 and one for $321.28. From all of the testimony on behalf of the Forest City National Bank, it does not appear that any new note or notes payable on demand or at a future time were executed and delivered by Johnson to the Forest City National Bank at the time of the execution of the deed or mortgage to it, nor does it appear that such indebtedness was not then past due. All of such testimony rather tends to show that the deed or mortgage to the Forest City National Bank was taken to secure indebtedness to it, then past due. Johnson gave this bank a mortgage which, as we view it, had no other consideration than the past-due antecedent and pre-existing indebtedness from Johnson to this bank. They took no instrument representing such past due indebtedness payable on demand or at a future time, and it has not brought itself within the provisions of 6910. It would thus appear the Forest City National Bank is not a purchaser for value, and is not entitled to protection as a purchaser for value. The Forest City National Bank took the deed, which was in fact a mortgage, from Johnson to secure the indebtedness to it, and there is nothing to show an extension of time of payment, no new instrument payable on demand or at a future time, and it is not a purchaser for value, and its mortgage is subordinate to that of the First International Bank of South Bend, Washington. If it were conceded, however, that the Forest City National Bank was a purchaser for value, and that, at the time of the execution of the mortgage to it, the indebtedness from Johnson to it was not then due, or if new notes were taken from Johnson for the indebtedness due to it at the time it received the deed, this mortgage would nevertheless remain subordinate to that of the First International Bank, for the mortgage to the Forest City National Bank did not legally become of record until the 19th day of May, 1914, as we have above shown, while the mortgage to the First International Bank was fully recorded on the 10th day of December, 1912, and from that time became a valid and subsisting lien against the land in question and entitled the holder of such mortgage to all the rights and privileges of a purchaser

for value. The trial court found, and we think properly, that at the time the First International Bank received its mortgage from Johnson, it did not have actual notice or knowledge of the prior mortgage or deed in favor of the Forest City National Bank. The mortgage to the First International Bank of South Bend, Washington, while a contract entered into between Johnson and the bank in the state of Washington, is a contract affecting and relating to real property within this state; and, as we view it, should be construed in accordance with the laws of this state relative thereto.

It is held that that part of the trial court's 7th finding of fact, which finds to the effect that the register of deeds accepted the deed in question for record, intending to waive his right to have his fee paid in advance of recording the deed, is erroneous, and not justified by the evidence.

Judgment appealed from is reversed, and the case is remanded to the lower court for further proceedings in harmony with this opinion. Appellant is allowed statutory costs on appeal.

CHRISTIANSON and ROBINSON, JJ., concur in the result.

THOMAS PARSONS, Respondent, v. L. E. ROWELL et al., Doing Business under the Firm Name and Style of Spring Butte Threshing Company, Appellants.

(173 N. W. 761.)

Review on — appeal — record — facts.

1. In order for the supreme court to review a specified erroneous ruling of the trial court upon appeal, the record must present the facts upon which the trial court acted.

Appeal — order refusing to modify — what facts must be shown.

2. In an appeal from an order refusing to modify a judgment entered in excess of the amount of the verdict rendered, where the record does not present the facts upon which the trial court acted, it is *held* that there is nothing for this court to review.

Opinion filed June 21, 1919. Rehearing denied July 1, 1919.

The defendants appeal from an order of District Court, Hettinger County, *Crawford*, J., refusing to modify a judgment.

Affirmed.

Jacobson & Murray, for appellants.

The rule of law is well settled that the court can only enter judgment in conformity with the verdict, and has no power to order judgment for a larger amount. 23 Cyc. 801, ¶ 6; Alpers v. Schammel (Cal.) 17 Pac. 708; Haldane v. Arcadia (Iowa) 30 N. W. 802; Weatherford v. Hanger (Ariz.) 146 Pac. 759.

The trial court has power after the entry of its judgment to correct it so as to make it correspond with the verdict, and the court can correct of its own motion or upon application of the injured party. 23 Cyc. 873, ¶ 9, 876.

The fact that the court did not pass upon the application to modify the judgment for more than a year cannot affect defendants' rights, because they made their motion in due time. If the motion is denied the proper remedy is to appeal from the order denying. 28 Cyc. 881, ¶ II.

M. S. Odle & E. J. McIlraith, for respondent.

Defendants cannot change front and try the case in the supreme court on a different theory than that which they tried it on in the district court. It is presumed that the district court acted in conformity to the record of the case in judgment. Raad v. Grant, 169 N. W. 588, and authorities therein cited; 2 Enc. Pl. & Pr. 425–433.

Bronson, J. This is an appeal from an order refusing to modify a judgment. The only papers before this court, in addition to the pleadings, are: Notice of trial, verdict of the jury, order for judgment, the judgment and notice of entry thereof, statement of costs, objection thereto, motion to modify judgment and order denying the same, order granting extension of time in which to appeal, notice of appeal, undertaking, and specifications of error. No statement of the case has been settled. The entire judgment roll is not even presented. From the complaint it appears that the action was instituted to recover for the negligent destruction by fire of certain stacks of millet and oats. The answer denies negligence and alleges plaintiff's contributory negligence. It also alleges a tender made to and deposit for the plain-

tiff of $100, and of a threshing bill owing amounting to $40 in settlement, and of plaintiff's refusal to accept the same. It then alleges such tender as a counterclaim and demands judgment accordingly. In the order for judgment the court recites that the defendants, before trial, tendered the sum of $100, and also the satisfaction of such threshing bill of $40, and that the court instructed the jury to render verdict over and above such $140. The jury returned a verdict of $128.26 for the plaintiff. The court ordered judgment for the amount, plus the tender so made, and judgment was entered accordingly. The appellants later moved to modify the judgment to conform to the verdict; from the order overruling such motion the defendants have appealed. In an amended certificate, the trial judge states that the motion to modify the judgment was overruled upon the entire record in the case, including the evidence of deposit and offer of payment of threshing bill by the defendants, the instructions of the court to the jury wherein the court instructed the jury that their verdict should be for such an amount that they found for the plaintiff over and above the $100 deposit and the $40 thresh bill tendered. This court does not know what evidence was introduced, stipulations made, instructions given to the jury, what issues were submitted or withdrawn from the jury, or proceedings had in the trial court. It is well settled that he who urges error in the order of the trial court, must prepare and present a record of the facts upon which the trial court acted. State v. Scholfield, 13 N. D. 664, 102 N. W. 878; Schomberg v. Long, 15 N. D. 506, 108 N. W. 332; State v. Gerhart, 13 N. D. 663, 102 N. W. 880; Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314; Erickson v. Wiper, 33 N. D. 193, 225, 157 N. W. 592.

Even the instructions of the court, a part of the judgment roll, are not presented. Comp. Laws 1913, § 7689. It was the duty of the appellant to present a record which affirmatively showed error of the trial court in its order; every presumption must be accorded in favor of the judgment rendered. Raad v. Grant, — N. D. —, 169 N. W. 588. There is accordingly nothing before this court to review. The order of the trial court is affirmed, with costs to the respondent.

ROBINSON, J. (dissenting). This is an appeal from a judgment on a verdict, and it is for a sum largely in excess of the verdict. The

appeal is taken on the judgment roll. It presents no evidence, no statement of the case, no findings of fact, nor even the charge of the court to the jury. The complaint avers that in October, 1916, by reason of defendants' negligence in doing some threshing for the plaintiff, the threshing machine set on fire and burned up grain and straw to the damage of the plaintiff $826. The answer contains a general denial. It avers that the value of the grain destroyed did not exceed $126, and that before the commencement of the action, to avoid costs, the defendant tendered to the plaintiff in cash $100 and a release of $40 due on a thresh bill, and that plaintiff refused to accept the same; and that defendant deposited the money to the credit of the plaintiff. The order for judgment avers that defendant has withdrawn the deposit and release, and therefore judgment was given against the defendant for $140 in addition to the verdict, which reads thus: "We, the jury, find for the plaintiff and assess his damages at the sum of $128.26." The order for judgment was dated November 24, 1917. On May 8, 1919, and after the appeal was taken, the court made a certificate that he had instructed the jury that their verdict should be for such amount as they found for the plaintiff over and above the $100 deposit and the $40 thresh bill. Now if such an instruction was given, it was erroneous. The tender and deposit was not a payment; it was merely a tender of payment; it was an offer of compromise. Hence the verdict should have been for the actual damages, and the court had no right to hear evidence concerning the deposit and to add $140 to the amount of the verdict, though such an error might have been cause for a new trial. But of course justice should not be defeated by any sharp or smooth practice. Hence the judgment should be reversed, with leave to the court to grant a motion for a new trial, and with costs of the appeal to abide the event.

The judgment should be reversed.

GRACE, J. I concur in the result arrived at in the dissenting opinion of Justice J. E. ROBINSON.

MERCHANTS NATIONAL BANK OF FARGO, NORTH DAKOTA, Respondent, v. CITY OF DEVILS LAKE, Appellant.

(173 N. W. 748.)

Municipal corporations — public improvements — liability for warrants.

In an action upon warrants issued by the city of Devils Lake in payment of work done in grading streets, it is *held*, for reasons stated in the opinion, that the city is liable generally for the amount due on the warrants.

Opinion filed July 1, 1919.

From a judgment of the District Court of Ramsey County, *Buttz*, J., defendant appeals.

Affirmed.

Fred J. Traynor, City Attorney, and *Mack V. Traynor*, Assistant City Attorney, for appellant.

Wilson v. Aberdeen, 19 Wash. 89, 52 Pac. 524. In this case it is held that a city cannot be rendered liable generally upon warrants drawn against a special fund for the payment of a strect improvement even though the remedy of a street assessment proceeding is not longer available. The court says: "The obligation rested upon the warrant holders to compel the officers of the city to proceed with the collection of the assessments, and if they saw fit to allow their remedy to become lost through a failure to compel an enforcement of the assessment proceedings, they, and not the general taxpayers, must bear the consequences. They were bound to take notice of what was being done in the premises, or of any failure to proceed. If the property was exhausted, and proves to be inadequate, that loss cannot be imposed upon the general taxpayers." See also American Sav. Bank v. Spokane, 47 Pac. 1103; 49 Pac. 542.

28 Cyc. 1571: "Where municipal warrants are payable out of a particular fund, payment thereof is rightfully refused when there is no money belonging to such fund in the municipal treasury. And warrants issued by a city for public improvements, to be paid out of a special fund, cannot be collected against the city generally, although the remedy to collect from the special fund has been lost."

See also Affeld v. Detroit (Mich.) 71 N. W. 151; North Western Lumber Co. v. Aberdeen (Wash.) 60 Pac. 1115. And bearing incidentally on the same subject: Price v. Fargo, 24 N. D. 440; State v. Murphy, 20 N. D. 427.

Pollock & Pollock, for respondent.

The city council at the time this grading was done, warrants issued, and indebtedness incurred, had power "to lay out, establish, open, alter, widen, grade, pave or otherwise improve streets, alleys, avenues, . . . at the expense of the whole city." Sess. Laws 1887, subd. 7, art. 15, p. 190, chap. 73, Rev. Codes 1895 and 1899, subd. 7, § 2148; Sess. Laws 1897, chap. 102 p. 160; Sess. Laws 1899, chap. 40, p. 38; Sess. Laws 1899, chap. 42, p. 51.

Such city could borrow money on the credit of the corporation to meet the expenses of such improvements. It could issue bonds, if authorized so to do by the legal voters, and could issue other bonds to supply means to meet maturing bonds or for the consolidation or funding of the same. Sess. Laws 1887, subds. 5 and 6, art. 4, chap. 73; Rev. Codes 1895 and 1899, § 2148, as amended by Sess. Laws 1899, chap. 40 p. 38.

Such city was authorized to provide for the outlay and expenses of making such improvements by special assessments upon the adjoining property benefited or supposed to be benefited thereby. Sess. Laws 1887, art. 4, pp. 217–288, chap. 73; Rev. Codes 1895, §§ 2265–2314. As amended by Sess. Laws 1897, chap. 41, p. 47; Sess. Laws 1897, chap. 102, p. 160; Sess. Laws 1899, chap. 40, p. 38; Sess. Laws 1899, chap. 42, p. 51.

Christianson, Ch. J. Plaintiff brought this action to recover the amount due on certain warrants issued by the city of Devils Lake to one Thomas Young for grading certain streets. The warrants were thereafter purchased by and assigned to the plaintiff. The case was tried to the court without a jury, and resulted in a general judgment for the plaintiff, and defendant has appealed.

There is no controversy about the facts. It appears that some time prior to September, 1909, one Thomas Young graded some streets for the defendant city. The evidence does not show the terms of the agreement under which the work was performed. In payment of

such work the defendant city issued certain city warrants, drawn upon what is denominated the grading special assessment fund. There is also evidence tending to show that the city authorities levied certain special assessments against the lots abutting upon the streets graded, but the record of such proceedings is not in evidence. It also appears that, some years before as well as later, the city had caused other streets to be graded, and that in all four different grading projects had been undertaken. Some of the projects were in wholly different parts of the city and in no manner connected with one another. For these projects, also, special assessments were levied. It is conceded that the city authorities did not create improvement districts for the different projects, nor is it shown that the city authorities created the city into one improvement district. It is admitted that no attempt was made to segregate the moneys collected from the special assessments levied for the different projects, or to apply the moneys received from such assessments to the retirement of the warrants issued for the particular improvement for which the taxes were levied. The trial court found that some of the special assessments levied for the grading performed by Thomas Young were paid and collected, but the proceeds therefrom were placed in a general grading fund and commingled and mixed with other taxes and funds collected for other grading jobs and work done in other and various places in said defendant city, and no separate or specific fund or account was kept for the proceeds or taxes collected for this particular job or works, and other warrants issued for other grading jobs were from time to time paid from such general grading fund without keeping any record or account of receipts and disbursements with or for each or any particular job of grading. This finding is admitted to be correct. It is conceded that the warrants in question were presented for payment, and that they have not been paid in accordance with their terms. It also appears that the City Commission adopted a resolution in effect directing the city attorney to admit liability upon the warrants in suit, and permit judgment to be rendered in favor of the plaintiff, and that this position was receded from at the instance of certain taxpayers. It further appears that practically all of the lots benefited by the grading done by Young were bid in by the defendant city at the tax sale held in December, 1911; that since that

time said lots have been withdrawn from the tax lists, and no taxes or assessments of any kind extended against them, and that defendant had not perfected its tax title or made any effort to dispose of the lots.

The question of the general liability of a city for the payment of obligations payable from special assessments is one upon which there is much conflict in the authorities. See Hamilton, Special Assessments, §§ 671 *et seq.*; Dill. Mun. Corp. 5th ed. §§ 827 *et seq.*; Page & J. Taxn. by Assessment, §§ 1498–1526. We do not deem it necessary to enter into any extended discussion of the subject in this case. While certain general rules have been formulated, the determinations generally are controlled by the legislation, the contract, and the facts involved in each particular case.

Our statutes clearly contemplate that before the city authorities undertake any improvement to be paid for by special assessment, they must create an improvement district. Comp. Laws 1913, §§ 3698 *et seq.* The creation of such district has been held by this court to be a jurisdictional prerequisite. Kvello v. Lisbon, 38 N. D. 71, 164 N. W. 305. The city authorities have a wide discretion in determining the area of a proposed improvement district; but it is contemplated that they should exercise judgment and discretion in so doing. Comp. Laws 1913, §§ 3699, 3700. As already stated there is nothing to show that the city council of the defendant city ever created any improvement district whatever. It is undisputed that they did not deem the moneys received from assessments levied against property benefited by the grading done by Young applicable to the payment of warrants issued to him alone, but placed such moneys in a general grading fund, and applied them indiscriminately in payment of warrants drawn upon such fund. There is no showing that there was any provision in the agreement under which Young performed his work restricting the city's liability. The warrants contain no such restriction. Nor do the warrants pretend to be drawn against the funds of any specified improvement district as the statute provides that such warrants shall be drawn. Comp. Laws 1913, § 3711. The city council is given general authority over the streets of the city. Comp. Laws 1913, § 3599, subds. 7–12. The council may, when occasion warrants, create an improvement district for street grading,

and raise the necessary funds by special assessments against the property benefited. It is not necessary, however, in all instances, to pay for street grading by special assessments. The city council may also expend moneys raised by general taxation for that purpose. In our opinion the facts in this case warrant the conclusion drawn by the trial court, *viz.*, that the defendant city is liable generally upon the warrants in controversy.

Judgment affirmed.

GRACE, J. I concur in the result.

FARMERS STATE BANK OF DES LACS, NORTH DAKOTA, a Domestic Corporation, Appellant, v. UNION NATIONAL BANK OF MINOT, NORTH DAKOTA, a National Banking Corporation, Respondent.

(173 N. W. 789.)

Negotiable instruments — collection — special agreement governs.

1. The liability of a bank receiving commercial paper for collection depends upon the terms of the contract. Where there is no special agreement, the law implies the terms of the contract, but where the parties at the outset of the transaction make a special agreement, the rights and liabilities of the parties are governed by the terms fixed by the parties in such special agreement.

Banks and banking — liability of bank in collecting check.

2. Where defendant bank had been acting as plaintiff's correspondent for a long time, with the understanding that it should not be liable for the negligence of its subagents, and on receipt of the item in controversy the defendant, in accordance with its uniform prior practice, acknowledged receiving the check for collection, and incorporated in the body of the receipt a statement that "for collection of all items outside of the city" it would observe due diligence in endeavoring to select responsible agents, but would "not be liable in case of their failure or negligence," nor for employing a circuitous route, it was not liable for the failure to collect the check, due to negligence of a subagent.

Opinion filed July 1, 1919.

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

Plaintiff appeals from a judgment and from an order denying a motion for a new trial.

Affirmed.

McGee & Goss, for appellant.

Section 6956, C. L. "Where it is payable on demand, presentment must be made within a reasonable time after its issue." Pickett v. Baird Inv. Co. 22 N. D. 343, 2 N. & C. C. A. 722.

The principle of law, that a bank is liable for the negligence of correspondents selected by it, seems to have been originally established in the English case: Van Wert v. Wooley, 3 Barn. & C. 349.

The above rule has been adopted in the following cases: Downer v. Madison County Bank, 6 Hill, 646; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank v. Union Bank, 19 Barb. 391; McBride v. Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. Supp. 1040; Second Nat. Bank v. Bank of Alms, 99 Ark. 386, 138 S. W. 472; Reeves v. State Bank, 8 Ohio St. 468; American Exp. Co. v. Haire, 21 Ind. 4; Martin v. Hiberin, 127 La. 301, 53 So. 572; Simpson v. Waldby, 63 Mich. 439, 30 N. W. 199; Titus v. National Bank, 36 N. J. L. 558; Streiesguth v. National German American Bank (Minn.) 44 N. W. 497; Ft. Dearborne Nat. Bank v. Security Bank (Minn.) 91 N. W. 257; Harter v. Bank of Brunson, 92 S. C. 440, 74 S. E. 366; City Nat. Bank v. Cooper, 91 S. C. 91, 75 S. E. 696; California Nat. Bank v. Utah Nat. Bank, 190 Fed. 318; Exchange Nat. Bank v. Third Nat. Bank, 113 U. S. 278, 28 L. ed. 722; Commercial Nat. Bank v. Red River Valley Nat. Bank, 8 N. D. 362.

The contrary doctrine, in that a bank receiving a draft or bill of exchange in one state for collection in another state from a drawee residing there is liable for neglect of duty occurring in its collection whether arising from the default of its own officers, or from that of its correspondents in the other state, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York: Allen v. Bank, 22 Wend. 215; Bank v. Smith, 3 Hill, 560; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 659; Commercial Bank v. Union Bank, 11 N. Y. 203; Ayrault v. Bank, 47 N. Y. 570; Titus v. Bank,

6 Vroom, 598; Wingate v. Bank, 10 Pa. 104; Reeves v. State Bank, 6 Ohio St. 463; Tyson v. State Bank, 6 Blackf. 226.

It has been so held in the second circuit, in Kent v. Bank, 13 Blatchf. 237; and the same view is supported by Taber v. Perrot, 2 Gall. 565, and by the English cases of Van Wert v. Wooley, 3 Barn. & C. 439, and Mackery v. Banamys, 9 Clark & F. 818.

Greene & Stenersen, for respondent.

The principle that whosoever appoints an agent to do something which obviously and from its inherent nature can only be done by a substitute must be deemed to have accepted and authorized the employment of a substitute by the agent is clearly depended upon to support the Massachusetts rule. In the cases where that rule has been adopted and applied it is asserted or assumed that the collection, through the agency of a local bank, of an out-of-town check, bill of exchange, certificate of deposit, or promissory note, is, in each instance, a transaction in which the necessity for the bank to employ a correspondent or agent other than its own officers and immediate servants inheres in the very nature of the undertaking. Note to Brown v. People, 52 L.R.A.(N.S.) 608.

The general rule of law is that an agent is not responsible for the negligence or want of skill of a subagent employed by him, where such employment was necessary to the transaction of the business intrusted to him, and he has used reasonable diligence in his choice as to the skill and ability of the subagent. Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364, in which case the court said:

The doctrine of these cases is also embodied in the statutory law of this state. Rev. Codes, § 4348.

It therefore clearly appears that this court not only repudiates the New York doctrine, but expressly adopts what is called the Massachusetts rule, and cited the Code of our own state as an expression of the latter rule. Davis v. King (Conn.) 50 Am. St. Rep. 104; Givan v. Bank of Alexandria (Tenn.) 47 L.R.A. 270; Beddel v. Harbine Bank (Neb.) 86 N. W. 1060; Bank v. Sprague, 15 L.R.A. 498; Fanset v. Garden City Bank (S. D.) 123 N. W. 686; Guelick v. National State Bank (Iowa) 9 N. W. 328; Mechem, Agency, §§ 332, 1314; Brady, Bank Checks, §§ 203, 204; 5 Cyc. §§ 502–504.

CHRISTIANSON, Ch. J. The controversy before us involves the liability of the defendant upon a check which it received from the plaintiff for collection in the ordinary course of banking business. The material facts are not in dispute. It appears that on or about September 8, 1913, the Blaisdell-Bird Company received a check from C. R. Verry, for the sum of $324.35, drawn on the Farmers & Merchants Bank of Park River. On September 11, 1913, the Blaisdell-Bird Company delivered the check to the plaintiff bank for deposit, and its checking account in said bank was duly credited with the amount of the check. The plaintiff bank in due course forwarded the check to its correspondent, the defendant bank. It was received by the defendant on September 13, 1913. And the defendant promptly forwarded it in due course to its correspondent, First National Bank of Fargo. The First National Bank of Fargo sent it to the City National Bank of Duluth. The City National Bank of Duluth sent it to the Northwestern National Bank of Minneapolis. The evidence shows that the Farmers & Merchants Bank of Park River on September 18, 1913, received a remittance letter from the Northwestern National Bank of Minneapolis, which purported to accompany the check in controversy. The Farmers & Merchants Bank of Park River claimed, and the testimony of its cashier tended to show, that the check was not inclosed with the remittance letter, and that that bank has never received the check. The account of Verry became exhausted by checks presented against it on September 18, 1913; but the cashier of the Farmers & Merchants Bank of Park River testified that if the check in controversy had been inclosed with the remittance letter it would have been paid. The trial court found "that said check was never paid nor returned to the plaintiff or the defendant, and was lost while in the possession of either the Farmers & Merchants Bank of Park River, on which it was drawn, or while in the possession of the Northwestern National Bank of Minneapolis." That finding is in accord with the evidence.

The evidence shows, and the trial court found, that the defendant had been plaintiff's correspondent for many years prior to September 13,1913, and still remained such correspondent at the time of the trial. The undisputed evidence also shows that it was the uniform custom of the defendant bank to acknowledge the receipt of checks and other items, received by it for collection from the plaintiff and other correspondent

banks, by means of a written receipt, which contained the following provision: "All items (except checks on us) are credited subject to payment. For the collection of all items outside of the city we will observe due diligence in endeavoring to select responsible agents, but will not be liable in case of their failure or negligence, nor for the loss of items in the mail, nor for employing a circuitous route of collection, nor for sending direct to the bank upon which item is drawn." Upon receipt of the check in controversy the defendant bank, in accordance with its uniform custom and practice, acknowledged receipt thereof by means of a receipt containing the provision hereinabove set forth. The evidence clearly shows that the defendant bank in forwarding the check to the First National Bank of Fargo followed the usual custom, and did exactly what the plaintiff might reasonably have expected it to do. In fact the vice president of the plaintiff bank in his testimony expressly admitted that the defendant bank had not violated any custom or usage of banking in so forwarding the check.

The Blaisdell-Bird Company brought suit against the plaintiff and recovered judgment. The plaintiff thereupon brought this action. The case was tried to the court without a jury, and resulted in a judgment in defendant's favor for a dismissal of the action. Plaintiff has appealed from the judgment and from the order denying its motion for a new trial.

In this country there are two conflicting theories as to the liability of banks which undertake the collection of commercial paper at a distance. One has become known as the "New York rule," and the other as the "Massachusetts rule." Under the New York rule the first bank is responsible for the conduct of its correspondents and subagents as fully as though it had performed the entire service itself. Under the Massachusetts rule a bank which receives for collection out-of-town commercial paper is responsible only for its own negligence, and not for the negligence of its correspondents or subagents. Under this rule its duty is done when it exercises due care in the selection of a proper reputable subagent and duly transmits the paper to such subagent. An extended discussion of the two rules, and a review of the different authorities supporting each, is found in Morse on Banking, 5th ed., §§ 268–287, and also in a note appended to Brown v. People's Bank, 52 L.R.A.(N.S.) 608. In our opinion this case does

not necessarily depend upon the acceptance of either of the two conflicting rules, and the court is not required to express its approval of either rule. Both rules recognize that the extent of liability is measured by the terms of the contract. The real difference of opinion is with respect to what agreement the law implies where a bank takes out-of-town commercial paper for collection. Of course where there is an express agreement or understanding, the rights and liabilities of the parties are governed thereby. This is recognized by the different authorities under both rules. See Morse, Bkg. 5th ed. §§ 269 *et seq.*; McBride v. Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. Supp. 1041, 163 App. Div. 417, 148 N. Y. Supp. 654; First Nat. Bank v. City Nat. Bank, 106 Tex. 297, L.R.A. 1918E, 336, 166 S. W. 629, — Tex. Civ. App. —, 168 S. W. 415; Sagerton Hardware & Furniture Co. v. Gamer Co. — Tex. Civ. App. —, 166 S. W. 428; Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 28 L. ed. 722, 5 Sup. Ct. Rep. 141. See also authorities collated in note in 52 L.R.A.(N.S.) page 634. There is probably no stronger authority in favor of the so-called New York rule than Exchange Nat. Bank v. Third Nat. Bank, supra. Yet in that case it is said: "And, while the rule of law is thus general, the liability of the bank may be varied by consent, or the bank may refuse to undertake the collection. It may agree to receive the paper only for transmission to its correspondent, and thus make a different contract, and become responsible only for good faith and due discretion in the choice of an agent."

In this case the defendant was not to receive any compensation for making collection of the check in controversy. It was shown that there prevailed a general and well-understood custom among banks receiving collections upon outside points not to effect the collection themselves, but through the agency of other banks selected by them. The plaintiff was well aware of the fact that the defendant accepted such collections only upon the condition that it would "observe due diligence in endeavoring to select responsible agents," but would "not be liable in case of their failure or negligence," "nor for employing a circuitous route of collection." And the defendant gave specific notice that the check in controversy was accepted for collection upon such conditions. The defendant was clearly entitled to attach such conditions to its undertaking, and no good reason can be urged why

such conditions should be denied effect as to a party who must have understood them, and in effect expressed its assent to and acceptance thereof. In our opinion the evidence in this case shows a special agreement between the plaintiff and the defendant, and the rights of the plaintiff and the liabilities of the defendant are governed by the terms of such agreement. California Nat. Bank v. Utah Nat. Bank, 111 C. C. A. 218, 190 Fed. 318; First Nat. Bank v. City Nat. Bank, 106 Tex. 297, L.R.A. 1918E, 336, 166 S. W. 689; McBride v. Illinois Nat. Bank, 138 App. Div. 339, 121 N. Y. Supp. 1041; Youmans Jewelry Co. v. Blackshoar Bank, 141 Ga. 357, 80 S. E. 1005. As it has not been shown that defendant in any manner violated the terms of the agreement, it follows that plaintiff has not established a cause of action against the defendant.

The plaintiff also contends that the defendant is bound by the judgment which the Blaisdell-Bird Company recovered against the plaintiff. Little or no argument has been advanced in support of this contention, and, under the established facts, the contention is obviously without merit.

It follows from what has been said that the judgment and order appealed from must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

C. P. INGMUNDSON, Appellant, v. MIDLAND CONTINENTAL RAILROAD, a Corporation, Respondent.

(6 A.L.R. 714, 173 N. W. 752.)

Real property — use and enjoyment of land — pollution of air as nuisance — action for trespass.

1. An owner of land, as an incident to his property right, is entitled to use

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NOTE.—The universally accepted rule is to the effect that the operation of a lawfully constructed railroad in an ordinarily prudent and careful manner, without negligence or abuse, does not, by reason of the attendant noise, smoke, and vibration, constitute an actionable nuisance, as will be seen by an examination of the cases collated in a note in 6 A.L.R. 723, on operation of railroad as nuisance to property.

On liability of railroad for creating nuisance by noise, smoke, dirt, etc., see note in 32 L.R.A. (N.S.) 372.

and enjoy such land free from the pollution of air thereupon so as to amount to a nuisance, and for the violation of this right an action in the nature of trespass to realty can be maintained.

Pollution of air by gas, vapors, cinders, etc. — cause of action.

2. In an action, where the complaint alleges among other things that the defendant railway company caused large volumes of gas, noxious vapors, large quantities of thick black smoke, oil, and steam, and large quantities of cinders, to be cast upon the land of the plaintiff to his damage, it is *held* that the plaintiff states a cause of action.

Opinion filed July 1, 1919.

Appeal from judgment directed for defendant, in an action for damages, District Court, Stutsman County, Honorable *J. A. Coffey*, J.

Reversed and new trial ordered.

Knauf & Knauf, for appellant.

Where property is "damaged" by the laying and usage of railroad tracks adjacent to it, the railroad company must respond in such damages as are sustained when those damages are of substantial nature and affect the direct physical condition or value of the property to its injury. Gottschalk v. Railroad Co. 14 Neb. 550, 16 N. W. 475; Railroad Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762; Railroad Co. v. Rogers, 16 Neb. 117, 19 N. W. 603; Railway Co. v. Hazels, 25 Neb. 364, 42 N. W. 93.

That such an action may be maintained when no part of the plaintiff's property has been appropriated to the use of the company, but is injured by the permanent interference with his easement in the street upon which his real estate abuts, is no longer an open question. The doctrine is sustained by the decisions of this court. Railroad Co. v. Reinckle, 15 Neb. 279, 18 N. W. 69; Railroad Co. v. Fellers, 16 Neb. 169, 20 N. W. 127; Railroad Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762; Railroad Co. v. Janecek, 30 Neb. 276, 46 N. W. 478; Railroad Co. v. Weimer, 16 Neb. 272, 20 N. W. 349; Atchison & N. R. Co. v. Boener, 51 N. W. 842.

The city of New Orleans was divided into municipalities; held that one municipality could not open a street the center line of which was the dividing line between it and other municipality, under a statute formerly applicable to the whole city. Municipal No. 1 v. Young,

6 La. Ann. 362. And see People v. Lake County, 33 Cal. 487; Sparling v. Dwenger, 60 Ind. 72. State v. County Comrs. 23 Fla. 632; Harkness v. Waldo County, 26 Me. 583; Deering v. Comrs. 87 Me. 151, 32 Atl. Rep. 797; Cragie v. Mellen, 6 Mass. 7; Monterey v. County Comrs. 7 Cush. 394; People v. Highway Comrs. 15 Mich. 347; Wells v. McLaughlin, 17 Ohio, 97; Palo Alto Road View, 13 Pa. Co. Ct. 537; Kelly v. Danby, 46 Vt. 504.

In the following cases it was held that county commissioners could, under a proper petition, lay out a way wholly within a town or village. Harkness v. Waldo County Comrs. 26 Me. 353; Herman v. County Comrs. 39 Me. 583; Wells v. McLaughlin, 17 Ohio, 97; Kelly v. Danby, 46 Vt. 504. Under a petition for a way in two towns, a way cannot be laid out wholly in one of the towns. Hopkinton v. Winship, 35 N. H. 209; Newport's Petition, 39 N. H. 67; Monterey v. County Comrs. 7 Cush. 394; Griffin's Petition, 27 N. H. 343. And see Riddeford v. County Comrs. 78 Me. 105; Saunders v. Bluefield W. W. & Imp. Co. 58 Fed. 133; Crosby v. Hanover, 36 N. H. 404. This last case was an attempt to condemn a bridge across the Connecticut river, one end of which was Vermont. Farnum v. Blackstone Canal Co. 1 Sumn. 46; Holyoke Water Power Co. v. Connecticut River Co. 22 Blatchf. 131; United States v. Ames, 1 W. & M. 76; Salisbury Mills v. Forsaith, 57 N. H. 124, to the same effect Wooster v. Great Falls Mfg. Co. 39 Me. 246; Manville Co. v. Worcester, 138 Mass. 89; 30 Fed. 392.

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

"A nuisance consists in unlawfully doing an act or omitting to perform a duty." Code, § 7228.

"Neither does the mere allegation that plaintiff has suffered damage suffice, as such damage may have resulted from a use by defendants of their property and property rights, which use was perfectly reasonable." Hyde v. R. Co. (S. D.) 136 N. W. 92.

A nuisance susceptible of recurrence can be abated, and abatable nuisance cannot be a permanent nuisance. Rigney v. Chicago, 102 Ill. 64; Ballintime & Sons v. Co. (N. J.) L.R.A.1915A, 369; Ridley v. Co. (N. C.) 32 L.R.A. 708; Bischof v. Bank (Neb.) 5 L.R.A. (N.S.) 486; Cleveland R. Co. v. King (Ind.) 55 N. E. 875; Pond v. R. Co. (N. Y.) 19 N. E. 487; Byrne v. R. Co. (Minn.) 36 N. W.

339; 20 R. C. L. pp. 465–467; L.R.A.1916E, p. 1013, note 2 entitled, Presumption from Illegality.

In the following cases, it is held that smoke, trembling of the earth, noises, etc., due to the ordinary operation of a railway, are not injuries resulting in actionable damages, and that the facts as set forth in this complaint do not state a cause for action. Smith v. Co. (Wash.) 70 L.R.A. 1018; DeKay v. Co. (Wash.) 129 Pac. 574; Clute v. Co. (Wash.) 114 Pac. 513; Taylor v. Co. (Wash.) 148 Pac. 887 (a very strong case, commenting upon numerous other decisions. See correction of language used in Smith v. Co., at page 888 of the Reporter); Carroll v. Co. (Minn.) 41 N. W. 661; Stuhl v. Co. (Minn.) 161 N. W. 501; Mathias v. Co. (Minn.) 51 L.R.A.(N.S.) 1017; Bennett v. Co. (N. Y.) 74 N. E. 418; Herst v. Co. (N. Y.) 109 N. E. 490; Penn R. Co. v. Marchant (Pa.) 4 Am. St. Rep. 659; Penn Coal Co. v. Sanderson (Pa.) 57 Am. Rep. 445; Penn R. Co. v. Lippincott (Pa.) 2 Am. St. Rep. 618; Bell v. Co. (Pa.) 64 App. Div. 687; Austin v. Co. (Ga.) 47 L.R.A. 755; Randall v. R. Co. 65 Mo. 325; Proprietors v. Co. 10 Cush. 385; Prasbury v. Co. 103 Mass. 1; Vandaveer v. City (Mo.) 38 Am. St. Rep. 396; Smith v. Co. (Cal.) 79 Pac. 868; Eachus v. Co. (Cal.) 37 Pac. 750; Fairchild v. Co. (Cal.) 169 Pac. 388; Gilbert v. Co. (Colo.) 32 Pac. 814; Harrison v. Co. (Colo.) 131 Pac. 409; Beseman v. Co. 50 N. J. L. 235, 13 Atl. 164; Thomason v. R. (N. C.) 55 S. E. 205; Atchison Co. v. Armstrong (Kan.) 1 L.R.A.(N.S.) 113; Louisville Co. v. Lellyett (Tenn.) 1 L.R.A.(N.S.) 49 and note; Dolan v. Co. (Wis.) 95 N. W. 385. Note Judge Winslow's comments on Baptist Church Case; Fink v. Co. (Ind.) 105 N. E. 116; Grand Rapids etc. Co. v. Heisel, 38 Mich. 62; Louisville R. Co. v. Foster (Ky.) 50 L.R.A. 813; Morgan v. Co. (Iowa) 21 N. W. 96; Richards v. Co. 233 U. S. 546; Baltimore Co. v. Fifth Baptist Church, 108 U. S. 317; Roman Catholic Church v. Co. 207 Fed. 897; Dunsmore v. Co. (Iowa) 33 N. W. 456; Parrot v. Co. 10 Ohio St. 624; Harrison v. Co. (La.) 44 Am. Rep. 438.

Before smoke, noise, etc., may be taken into consideration, there must first appear an invasion of a right affecting the property which constitutes the substantive basis for damages, affecting the market value, and the damages must be original and peculiar to the plaintiff, and such as do not constitute an abatable or recurring nuisance. Choc-

taw Co. v. Drew (Okla.) 44 L.R.A.(N.S.) 38; Louisville Co. v. Lellyett (Tenn.) 1 L.R.A.(N.S.) 49 and note; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 329; Rainey v. Co. (Tex.) 13 Ann. Cas. 580 and note; Dolan v. Co. (Wis.) 95 N. W. 385; Stuhl v. Co. (Minn.) 161 N. W. 501.

BRONSON, J. This is an action for damages occasioned the defendant by reason of causing smoke, noxious vapors, cinders, etc., to be cast upon the property and home of the defendant through the operation of its railroad.

At the time of the trial the defendant objected to the introduction of any evidence, upon the ground that the complaint failed to state facts sufficient to constitute a cause of action. The objection was sustained. Thereupon the defendant moved for a directed verdict in favor of the defendant, and this motion was granted. Pursuant thereto, verdict was rendered and judgment entered thereafter in favor of the defendant for dismissal, with prejudice and costs. The plaintiff has appealed from the judgment rendered, and specifies as error the action of the trial court in sustaining the objection and granting the motion of the defendant. The sole question involved upon this appeal is whether the complaint states a cause of action.

The complaint alleges that the defendant as a common carrier operates its railroad through the city of Jamestown, on, over, upon, and adjacent to block 29 therein. The plaintiff is the owner of lot 8 in such block, upon which there is a house wherein he dwells with his family. Among other things the complaint alleges as follows with respect to the engines of the defendant: "That the said engines moving and passing on and over the premises herein described cause to, and permit to escape large volumes and quantities of gas and other noxious vapors and large quantities of thick, dense, black smoke, oil, and steam, large quantities of cinders, and to throw and scatter the same upon, in, and against said home and premises and lots, make great noises thereat, upon and about said premises and create great vibrations, movements and shaking of the ground in said lot, and of the house thereon, and of plaintiff's dishes, tables, beds, and furniture therein, and of the said premises and the whole thereof," etc.

This states a cause of action as against a general objection to the

complaint. The owner of land possesses the right to use and enjoy the same, free from the pollution of air thereupon so as to amount to a nuisance. This is a property right incident to his ownership of the land. For violation of this right an action in the nature of trespass to realty may be maintained. Vaughan v. Bridgham, 193 Mass. 392, 9 L.R.A.(N.S.) 695, 79 N. E. 739; Ponder v. Quitman Ginnery, 122 Ga. 29, 49 S. E. 746; Lamm v. Chicago, St. P. M. & O. R. Co. 45 Minn. 71, 10 L.R.A. 268, 47 N. W. 455. See 29 Cyc. 1152, 1154, 1155, 1184, 1187. It therefore follows that the judgment should be reversed, and a new trial ordered, with costs to the appellant. It is so ordered.

ROBINSON, J. (dissenting). This is an appeal from a judgment in favor of defendant on a directed verdict. When the case was called for trial defendant objected to any evidence under the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The complaint not only fails to state a cause of action, but also it shows that plaintiff has no cause of action. It avers that defendant is a railroad corporation, and as such it operates the railway running south from the Northern Pacific Railway depot in Jamestown; that upon its right of way of the width of 100 feet adjacent to block 29, in Jamestown, defendant keeps and maintains certain raised and graded railroad tracks; that plaintiff owns and resides on lot 8, in block 29; that before the construction of defendant's railway the lot was worth $5,600; that near to said lot and home the defendant has put up unsightly buildings and sheds which it keeps and maintains, and on said railway adjacent to said lot 8 defendant operates steam engines, freight and passenger cars, and that the engines permit the escape of large volumes of gas and noxious vapors and cinders, and scatter the same on said lot and home premises, and cause great vibrations of the ground; and that it has depreciated the value of said home in the sum of $2,600.

In reading such a complaint the court must take judicial notice of such facts as are commonly known to intelligent persons within the jurisdiction of the court. We must take judicial notice of the fact that defendant does operate a little railroad running south from James-

town, with small engines and light trains, and not with any such mogul engines and trains as pass over the main line of the Northern Pacific Railway. We take judicial notice of the fact that the passing trains of the Northern Pacific and of other railroads do cause a slight tremor of the earth and do emit some vapor and cinders, which often tend to lessen the value of adjacent property and cause a loss which is known as *damnum absque injuria,* but in the operation of its railroad the defendant is strictly within its legal rights.

In so far as the complaint asserts mere exaggerations which are known to be untrue it should be disregarded.

BIRDZELL, J., being disqualified, did not participate, Honorable W. L. NUESSLE, of the Sixth Judicial District, sitting in his stead.

B. G. JOHNSON, Appellant, v. FRED E. MERRICK, Respondent.

(173 N. W. 834.)

Appeal and error — judgment — dismissal.

This case presents an appeal from an order setting aside a verdict and judgment for $185 and dismissing the action. An examination of the record shows no reason for the order.

Opinion filed July 1, 1919.

Appeal from an order of the District Court of Ramsey County, Honorable *W. J. Kneeshaw,* Special Judge.

Reversed.

Siver Serumgard and *H. S. Blood,* for appellant.

Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. Bowers, Conversion, p. 1, § 1; Taylor v. Jones, 3 N. D. 235; Clendening v. Hawk, 8 N. D. 419.

Where a demand is useless or unavailing a demand is unnecessary, nor is a demand necessary when the defendant has voluntarily placed himself in a position where he cannot perform. Bowers, Conversion, §§

338, 339; Hahn v. Sleepy Eye Mill. Co. 112 N. W. 843; Myrick v. Bill, 17 N. W. 268; More v. Burger, 15 N. D. 345.

Flynn & Traynor, for respondent.

Where the decree and the written opinion of the court are at variance, the former will control. Goodnow v. Litchfield (Iowa) 9 N. W. 107; same case on rehearing, 13 N. W. 86; Nichols & S. Co. v. Trower (Okla.) 78 Pac. 575; Roders v. Hoenig (Wis.) 1 N. W. 17; 23 Cyc. 1145, 1166.

ROBINSON, J. This is an appeal from order setting aside a verdict and judgment for $185. The record contains a mass of needless stuff, and the writer gives no credit to either counsel for the way in which the trial was conducted.

The plaintiff avers that during the year 1914 he farmed a tract of land in town 155 of range 62, under a cropping contract with defendant. That he produced thereon: Wheat, 1,008 bushels; flax, 210 bushels; oats, 275 bushels; that he cut and put in stack 55 tons of hay; that by the terms of the contract the plaintiff was to furnish the seed grain and to do all the work and to have three fourths of the crop; that the value of the crop produced amounted to $2,109. That in October, 1914, the defendant wrongfully took, sold, and converted to his own use all of the crops. The answer admits the taking and conversion of the crops, and admits that he received from the grain taken and sold $1,142.97; and it appears that he sold the hay and received for it $184.50. The answer also avers that in April, 1915, in an action in the district court of Ramsey county, between the same parties, a judgment was entered that Merrick was entitled to the possession of the hay and grain produced on the premises in 1914, but an examination of the judgment roll does not sustain the plea of a former adjudication. It shows merely an injunctional suit to restrain Johnson from interfering with the possession of Kendall, as lessee of Merrick. The relief demanded was that the plaintiff be restrained from interfering with Merrick or his assignee and from taking the hay on the premises. The judgment was that by the terms of the lease Merrick was entitled to the possession of the real estate, the grain, and the hay. The judgment is manifestly erroneous, if not void, in attempting to dispossess Johnson by an injunctional procedure (which is not a legal or proper

means of acquiring the possession of either real or personal property). Yet, giving it full force and effect, it does not determine any issue in this case. Hence the question is, Was there any just cause for setting aside the verdict and judgment, and dismissing the case? The answer is an emphatic, "No." The testimony shows beyond contradiction that, in the absence of Johnson, Merrick went onto the farm in possession of Johnson, broke the grain locks, took the wheat and all the other crops and sold the same, and then immediately left for Oregon with the proceeds in his pocket and without notifying the plaintiff or making any attempt to settle with him. He completely disregarded the rights of Johnson. It is hard to conceive why the verdict and judgment was not for a much larger sum, but in the charge to the jury the court said: "The plaintiff in his complaint admits that he received the sum of $920.16, and this sum you are bound to allow as a credit against any sum that might be given the plaintiff under the alleged conversion." Now, if there was such an admission in the complaint, then the charge was right and the verdict was right, but an examination shows that there was not such an admission. The complaint contained a cause of action for work, labor, and materials, amounting to $163.50, and on the trial that cause of action was stricken out so as not to bar a future action, and still it was included in the admission. The complaint concludes thus: "That by reason of the facts stated, there is now due and owing to defendant $2,319.61, which is unpaid, except $920.16. While an examination of the answer and the record shows that the admission may have been a grave blunder, that question is not before the court. Manifestly the defendant had no reason for moving to set aside the verdict and judgment and to dismiss the action. Hence the order is reversed, with costs, and the verdict and judgment is reinstated.

BIRDZELL, J., concurs.

GRACE, J. I concur in the result.

CHRISTIANSON, Ch. J. (concurring specially). I concur in the conclusion reached in the opinion prepared by Mr. Justice Robinson. I agree that the judgment in the injunctional action is not *res judicata* in this case. The question involved in that case was the right of pos-

session of the grain and hay produced. The written contract contained a stipulation to the effect that the owner of the land (the defendant in this case) was vested with title to all grain and hay until a division was had between the parties. Under the construction placed upon such stipulations prior to the time of the trial of that action, the owner of the land could enforce such stipulations regardless of whether he had any claim against the tenant or not. The question of the amount of the indebtedness, if any, which the tenant owed to the landowner was not involved in that case, and in the memorandum filed by the trial court in that case, he expressly reserved to the tenant the right to maintain an action such as the one before us.

I also agree that there was an issue for the jury as to the amount, if any, due to the plaintiff. Therefore, judgment notwithstanding the verdict should not have been ordered, and the judgment rendered upon the verdict should be reinstated.

BRONSON, J., concurs.

STATE OF NORTH DAKOTA, Respondent, v. VALLEY CITY SPECIAL SCHOOL DISTRICT, a Public Corporation, Appellant.

(173 N. W. 750.)

Schools and school districts — § 142, Session Laws 1915, construed.

1. Section 142 of the Session Laws of 1915 provides that all students attending any model high school, graded or elementary school, which is operated and maintained or in any manner connected with the State University, any normal school, publicly maintained educational institution of higher learning, in which model high, graded, or elementary school, members of the faculty or of student body of such university, normal school, or institution of higher learning, teach, there shall be paid by the school district in which said pupils reside to said institution as tuition for such attendance certain amounts named in the law; *held* that such law is not unconstitutional.

NOTE.—Authorities discussing the question of use of common school funds for normal schools or teacher's training schools, are collated in a note in 20 L.R.A. (N.S.) 1033.

Schools and school districts — normal school part of free-school system.

2. It is further *held* that the normal school is part of the free public school system of North Dakota and is defined as such in § 148 of our Constitution.

Pleading — sufficiency of complaint.

3. *Held* that the complaint in the action stated a good cause of action, and was not demurrable.

Opinion filed July 1, 1919.

Appeal from an order overruling demurrer to complaint entered by District Court, Barnes County, North Dakota, Honorable *J. A. Coffey,* Judge.

Affirmed.

A. P. Paulson and *Theodore S. Lindland,* for appellant.

Inasmuch as a normal school is not a part of a public or common-school system, it is therefore beyond the power of the legislature to appropriate any part of the common-school fund for the establishment or maintenance of such a school. Collins v. Henderson, 11 Bush, 74; Gordon v. Cornes, 47 N. Y. 608; State Female Normal School v. Auditors, 79 Va. 233; School Dist. v. Bryan, 51 Wash. 498, 20 L.R.A. (N.S.) 1033, 99 Pac. 28; Dickenson v. Edmondson (Ark.) Ann. Cas. 1917C, 913–926.

Wm. Langer, Attorney General, *H. A. Bronson* and *Edw. B. Cox,* Assistant Attorneys General, for the respondent.

If the classification is not wholly unreasonable and arbitrary so that the statute is uniform in operation on all members of the class to which it is made applicable, no one has been denied the equal protection of the laws as guaranteed by the state Constitution. 6 R. C. L. 380; Consumers League v. Colorado, etc. R. Co. 52 Colo. 54, 125 Pac. 577, Ann. Cas. 1914A, 1158.

The classification will be upheld unless it is so manifestly inequitable and unjust that it will cause an imposition of burdens on one class to the exclusion of another without reasonable distinction. State v. McFarland, 60 Wash. 98, 140 Am. St. Rep. 909, 110 Pac. 792.

Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. When the classification in the law is called in question if

any state of facts reasonable can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 6 R. C. L. 384, 385, 386, and cases cited; Re McKennan (S. D.) Ann. Cas. 1913D, 750.

The following are recent cases decided by the supreme court of North Dakota, involving the question of classification: Strauss v. State, 36 N. D. 594, L.R.A.1917E, 909, 162 N. W. 908; Moody v. Hagen, 36 N. D. 471, affirmed in 245 U. S. 633, 62 L. ed. 522, 38 Sup. Ct. Rep. 133.

GRACE, J. This is an action brought by the state of North Dakota against what is termed the Valley City Special School District, to recover $2,794, with interest and the cost of this action.

The facts upon which the cause of action is based, as shown by the complaint, are as follows:

There is located at Valley City a state normal school, known as the Valley City Normal School; in connection therewith and as a part thereof is operated a model high, graded, and elementary school, wherein instruction is given to the pupils who attend by the faculty and student body of the State Normal School. The State Normal School is located in the special school district of Valley City. The pupils who attend the model school reside in the Valley City Special School District. Chapter 142 of the Session Laws of 1915 reads thus: "That all students attending any model high, graded or elementary school which is operated, maintained or in any manner connected with the State University, any normal school, publicly maintained educational institution of higher learning in this state in which model, high, graded or elementary school members of the faculty or student body of such university, normal school or institution of higher learning teach, there shall be paid by the school district in which said pupils reside to said institution as tuition for such attendance as follows: Not less than $2.50 per month of actual membership per pupil in such model high school and not less than $2 per month of actual membership per pupil in any such graded, or elementary school, provided, however, that such tuition is payable at the close of each term or semester."

It is by the terms of the above law that the state seeks to recover the amount mentioned in the complaint for the attendance of the

number of pupils for the time stated as set forth in the complaint. To this complaint a demurrer was interposed. It sets forth three grounds of demurrer, *viz.*, that there is a defect of party plaintiff, that there is a defect of party defendant, that the complaint in the three several causes of action therein set forth does not state facts sufficient to constitute a cause of action in any or all of them. The trial court made an order overruling the demurrer; this appeal is from that order.

We are of the opinion the demurrer was properly overruled. The appellant claims that the normal schools of the state are not part of the public school system. In this it is mistaken. Section 148 of the Constitution reads thus: "The legislative assembly shall provide, at its first session after the adoption of this Constitution, for a uniform system for free public schools throughout the state, beginning with the primary and extending through all grades up to and including the normal and collegiate course."

That the Normal School is part of the free public school system there is not the least doubt. It is denominated as such in § 148 of the Constitution. The normal school system exists for the very purpose of aiding the free public school system, and is a part of it. It undertakes to perfect the education of teachers in the particular science of teaching in the public schools. All the benefits that may arise from the instruction given in the Normal School accrue to the public schools. The normal schools being a part of the free public school system, the charging of the tuition for pupils which attend it from any school district either from the grades or the high school department to the district in which such pupils reside, is in no manner a diversion of any school funds for any other purpose or use than for the benefit of the public schools. On the other hand, it is an application of such funds directly to the use and benefit of part of such free public school to it, the Normal School. Such law is, therefore, not unconstitutional as being opposed to the provisions of §§ 154 and 152 of the Constitution, nor is the law opposed to any constitutional provision.

It is true Valley City Special School District has complied with the law with reference to maintaining its public schools both as to the grades and the high school. It has provided all the facilities for education to the same extent as the Model High School, which is located

in the same district. It may be conceded that the educational facilities provided by the special school district of Valley City and the Model High School, which is a part of the Normal School, are equivalent. It is certain from the allegations of the complaint that a large number of the pupils in the Valley City Special School District attend the Model High School. The necessary effect of this is to assist the Valley City Special School District in providing educational facilities as required by law for the children therein, and the logical result is and must be to in part relieve the Valley City Special School District from the burden and expense necessary to maintain its schools. It has probably been relieved from the necessity or will be relieved from the necessity of constructing additional public school buildings and furnishing additional equipment and teachers by reason of the location of the Model High School within the district, which will necessarily always be engaged in giving instruction in the grades and in its high school department to a very large number of pupils who reside in the Valley City Special School District, and this must necessarily result in relieving such school district of a considerable expense.

Certainly it was within the power of the legislature to impose on such district a reasonable charge for the instruction and educational facilities afforded such pupils by the Normal School through its Model High School. If the defendant has any remedy, it is one which cannot be procured from the courts, but it is one for the consideration of the legislature. It is certain the law is not unconstitutional. There is no doubt that the normal schools are instituted primarily for the purpose of perfecting the education of teachers who are to be instructors in the common schools; that part of the instruction given in the normal schools is theoretical and part practical. The theoretical instruction is provided by lectures or the study of certain works and books upon the science of pedagogy. Another part of the instruction is by actual demonstration of the work with a class of pupils of a given grade or of a given year of high school work. All of this, however, is for the benefit of the free public school system, and is a part of it. That the Normal School must have pupils by which to demonstrate the practical part of the work does not overcome the fact that the Valley City Special School District receives a special benefit there-

by, and is to a certain extent relieved from additional expense thereby, and for this the legislature has a right to say it shall pay.

We are satisfied that the complaint states a good cause of action. The order of the District Court overruling the demurrer is affirmed. We do not think the plaintiff is entitled to any statutory costs. The order appealed from is affirmed.

ROBINSON, J. (dissenting). This is an action to recover from the defendant $2,794 for the tuition of Valley City children at the Valley City Normal School. Defendant appeals from an order overruling a demurrer to the complaint. The complaint avers that the State Normal School at Valley City maintains a model high, grade, and elementary school, in which students of the State Normal School teach; that during the fall term of said school, commencing in 1915, the succeeding winter term and spring term, there were in attendance at said model high, grade, and elementary school a large specified number of students from Valley City Special School District, whose tuition at $2.50 a month amounted to $2,794, which is wholly unpaid.

The suit is brought under chap. 142, Laws 1915, entitled: "An Act Requiring the Payment of Tuition for Attendance at Any Model High or Graded or Elementary School Which Is Operated, Maintained, or in Any Manner Connected with the State University, Any Normal School or any Educational Institution of Higher Learning."

The act provides that the school district in which the pupil resides shall pay not less than $2 or $2.50 a month for the attendance and tuition of each pupil.

Under § 61 of the Constitution, the subject of every act must be expressed in its title, but the fair inference from the above title is that payment for tuition and attendance shall be made by the parent or guardian sending children to the model school. On reading the title no person would ever think that the purpose of the action was to require payment to be made by any school district or county or by the state. Hence the act is void and the demurrer should have been sustained.

BRONSON, J., being disqualified, did not participate, Honorable CHAS. M. COOLEY, of First Judicial District, sitting in his stead.

BELLE VAN VLEET, Appellant, v. EDWIN VAN VLEET, Respondent.

(174 N. W. 213.)

Divorce and separation — modifying judgment.

In an action for divorce brought by the wife, where the divorce is granted on the grounds of cruelty, it is *held:*

For reasons stated in the opinion, the judgment awarding a division of the property should be modified by effecting a division of the property in lieu of an annuity payable monthly; and, pending such division, an allowance of $55 per month is made for the support of the plaintiff and appellant.

Opinion filed July 1, 1919.

Appeal from District Court of Burleigh County, *W. L. Nuessle,* J.
Modified and affirmed.
Newton, Dullam, & Young, for appellant.
Sullivan & Sullivan, for respondent.

BIRDZELL, J. This is an appeal from the judgment entered in the district court of Burleigh county in a divorce action. The only portion of the judgment which is attacked in the appeal is that which adjudges it to be advisable that the plaintiff's share or portion of the property be paid to her in the form of an annuity, payable at the rate of $35 per month for the period of her life, and awarding the defendant the custody of a minor child, Allen Van Vleet, during vacation periods. The record shows that the parties to the action were married in October, 1890; that ten children were born of the marriage, seven of whom are living, three being minors at the time the action was begun. The defendant at various times treated the plaintiff with extreme cruelty, and in January, 1917, practically ordered her to leave the place. It appears that during their marriage there was acquired property consisting of five quarter sections of land and personal property valued in all at about $28,000, against which there were encumbrances of $16,000, making the net worth of all the property jointly accumulated approximately $12,000. The plaintiff is fifty years of

age and is perhaps not physically able to support herself. Neither should she be expected to do so. In dividing the property, the court took into consideration the fact that it was heavily encumbered and also, doubtless, was of the opinion that the interests of all parties would be best subserved by an arrangement that would keep the farm lands under the control of the defendant, thus better enabling him to provide the necessary support for the family. The amount apportioned to the plaintiff, and which is made a lien on the land, is more than the equivalent of a 7 per cent return on one half the net value of the property. Taking into consideration the ages of the respective parties, the remoteness of the probability that the plaintiff could make better provision for her support if an equitable portion of the encumbered property were turnel over to her absolutely, we are not prepared to say that the provision made by the trial court was wholly unreasonable under the existing circumstances; but nevertheless a majority of this court is of the opinion that, instead of providing for the plaintiff and appellant an annuity, payable monthly, she should, at an early date, be assigned a portion of the property in severalty as her separate property. While this court is reluctant to disturb the order and judgment of the district judge, who had the benefit of a more intimate contact with the parties and consequently was better able to appreciate their relative situation, we nevertheless feel that a woman who has passed the meridian of life, who has given birth to ten children and reared seven, and whose divorce from her husband is occasioned by his extreme cruelty toward her, has a right not merely to sufficient allowance for her support, so far as it is possible for the defendant to provide it, but a right to the enjoyment of a portion of the property which she has helped to accumulate. In view of the condition of the property, however, we do not feel justified in ordering a division to be made until the end of the present crop season. In the meantime, the allowance for support should be increased, and at the time of the division the value of this year's crop should be taken into consideration.

The order of this court is that on July 1st, and on the first of each succeeding month, until the further order of the district court, effecting a division of the property, respondent shall pay to appellant $55 per month for support instead of $35 per month as an instalment of an annuity; and that at any time subsequent to November 1, 1919,

upon motion of the appellant herein, the district court shall direct such a division of the property in question to be made as will result in giving to the appellant an amount of property equivalent in value to at least one half of the net worth of the property accumulated. The district court shall immediately direct the respondent herein to make such arrangements with respect to encumbrances as will enable the court, as far as possible, to later assign to the appellant unencumbered property so far as it may be found practicable so to do. It is the further order of the court that the respondent herein be enjoined from selling or disposing of any of his property until a division be made in accordance with this opinion, without first obtaining an order from the district court.

With reference to the custody of the minor child, Allen Van Vleet, during vacation periods, it does not seem to be seriously argued that his welfare is particularly prejudiced by the order; and, in the absence of a showing that such is the case, this court will not disturb an order which has so much apparent reason to support it.

The judgment appealed from is modified in the respects hereinbefore indicated, and, as so modified, is affirmed. The respondent to pay the costs of the appeal and $25 attorneys' fees.

CHRISTIANSON, Ch. J., did not participate.

W. L. RICHARDS and Robert L. Wilcox, Respondents, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

(173 N. W. 778.)

Damages — trial — findings of trial court presumed to be correct.

1. Where the trial court has made findings in a law case properly triable

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NOTE.—Authorities passing on the question of liability of carrier for injury to live stock by weather conditions are collated in a note in 34 L.R.A.(N.S.) 1013, where it is held that where weather to which stock is exposed because of negligent delay on the part of the carrier is not so unusual as not to be reasonably expected at that season, it will not be excused from liability on that ground, as such weather conditions are not the act of God in the legal sense of the term. Neither will the

to a jury, it is well settled that the supreme court, upon appeal, will presume that such findings are correct, especially where there is a sharp conflict in the parol evidence received, unless clearly opposed to the preponderance of the evidence.

Damages — loss occasioned by delay in transportation — liability of carrier.

2. In an action for damages sustained by negligent delay in the transportation of a train load of cattle by a carrier in an interstate shipment from Vineyard, Texas, to Dickinson, North Dakota, where the connecting carrier received the same at Oakes, North Dakota, for delivery at a station near Dickinson, and, by its negligent delay at Dickinson when the cattle were in a weakened, hungry, and almost dying condition, so delivered the train load at the destination that thereby through existing weather conditions within twenty-four hours, a loss of over 100 cattle was occasioned, it is *held* that the findings of the trial court determining that the defendant was negligent in the delay occasioned and that such negligence was the proximate cause of the loss sustained are justified upon the record.

Damages — connecting carrier subject to Carmack Amendment.

3. In such action, the connecting carrier transporting an interstate shipment subject to the Carmack Amendment is liable for its negligent delay occasioning loss through a rainstorm contributing thereto upon the unloading of the cattle at the destination, where it is shown in the record that the carrier, having knowledge of the condition of the cattle and the probable weather conditions, could reasonably have anticipated such loss as the probable result of its negligent delay.

Opinion filed July 3, 1919.

Action for damages against a carrier for loss of cattle. From a judgment of the District Court of Stark County, *Crawford*, J., in favor of the plaintiffs, the defendant has appealed.

Affirmed.

Watson, Young, & Conmy, Charles Donnelly, and *D. R. Frost,* for appellant.

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carrier be relieved from liability if, by proper care, the effects of the severe weather could have been avoided.

On duty of carrier where act of God has occurred or is threatened, see notes in 29 L.R.A.(N.S.) 671, and L.R.A.1916D, 981.

For prior delay or deviation as affecting carrier's liability for loss of or damage to goods from act of God, see note in L.R.A.1916D, 988.

On the general question of liability of carrier for loss of or injury to live stock, see comprehensive note in 130 Am. St. Rep. 432.

There must be some certainty to the proof of damage. Surmise and speculation will not do. Sutherland, Damages, 4th ed. § 53; 17 C. J. 755, 758, on damages; Evans v. Cumberland Teleph. & Teleg. Co. 135 Ky. 66, 121 S. W. 959. See also Western U. Teleg. Co. v. Totten (C. C. A. 8th C.) 141 Fed. 533; Hightower v. Henry (Miss.) 37 So. 745; Macon v. Dannenberg (Ga.) 39 S. E. 446.

Thomas H. Pugh and *T. F. Murtha,* for respondents.

Defendant contends that when tested by Federal decisions, there is a complete failure to prove defendant liable. M. K. & T. R. Co. v. Ward, 244 U. S. 383; Southern P. R. Co. v. Prescott, 240 U. S. 632.

"As the shipment was interstate, and the bill of lading was issued pursuant to the Federal act, the question whether the contract thus set forth had been discharged was necessarily a Federal question." Adams Exp. Co. v. Croninger, 226 U. S. 491, 506, 509, 510; M. K. & T. R. Co. v. Harriman, 227 U. S. 657, 672; Boston & M. R. Co. v. Hooker, 233 U. S. 97; M. K. & T. R. Co. v. Harris, 234 U. S. 412, 420; Charleston & C. R. Co. v. Varnville Furniture Co. 237 U. S. 597, 603; C. C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588; N. Y., P. & N. R. R. Co. v. Peninsula Exchange, 240 U. S. 34; Kansas Southern R. Co. v. Carl, 227 U. S. 639.

"The initial carrier under that provision of the Interstate Commerce Act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one state to a point in another state, upon the line of a succeeding and connecting carrier, came under liability not only for its own default, but also for loss or damage upon the line of a connecting carrier in the route." Atlantic Coast Line v. Riverside Mills, 219 U. S. 186; Chicago & A. R. Co. v. Kirby, 225 U. S. 155; Central Trust Co. v. Clark (C. C. A. 8th C.) 92 Fed. 293; Copenhaver, etc. Mill. Co. v. Kanawha, etc. R. Co. (W. Va.) 93 S. E. 940.

In the absence of proof *aliunde* of knowledge, by the defaulting party at the time the contract is made, of special circumstances which make other damages the natural and probable effect of a breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the

great multitude of such cases, and such damages only, may be recovered. Drug Co. v. Byrd, 92 Fed. 290; Railroad Co. v. Bucki, 16 C. C. A. 46, 30 U. S. App. 460, 68 Fed. 868; Hadley v. Baxendale, 9 Exch. 354; Primrose v. Telegraph Co. 154 U. S. 1, 29, 14 Sup. Ct. Rep. 1098; The Ceres, 19 C. C. A. 243, 72 Fed. 943; Boyd v. Brown, 17 Pick. 461; Ingledew v. Railroad, 7 Gray, 91; Railway Co. v. Mudford (Ark.) 3 S. W. 816; Kempner v. Cohn, 47 Ark. 527, 1 S. W. 869."

The facts in this case are not in dispute, and we think the court is able upon this record to say that the injury is the remote, and not the proximate, result of the defendant's acts, and therefore it would have been proper for the trial court to so direct the jury. Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; St. Louis Cattle Co. v. Ghilson (Tex. Civ. App.) 30 S. W. 270; S. S. Pass R. Co. v. Trich, 117 Pa. 390, 11 Atl. 628, and citations; Brandon v. Mfg. Co. 51 Tex. 121.

BRONSON, J. This is an action for damages sustained in the shipment of cattle through the alleged negligence of the defendant carrier. The action was tried to the court without a jury, and from a judgment entered, upon findings made in favor of the plaintiff, the defendant has appealed. The facts are as follows:

On June 6, 1914, the plaintiff shipped from Vineyard, Texas, consigned to Dickinson, North Dakota, a distance of 1,470 miles, 998 so-termed stocker or dogie cattle in twenty cars. The original contract of shipment was made with the Chicago, Rock Island, & Gulf Railway and constituted a solid train load. Prior to the departure of the cattle from Vineyard they were dipped in a standard arsenical solution to rid them of ticks and lice. This train load proceeded from Vineyard to Addington, Oklahoma, where the first stop was made, and the cattle there again dipped with the arsenical solution. Thence they proceeded to Herrington, Kansas. There the cattle were fed and rested for a half day. Then they proceeded to Omaha, where they were again unloaded and fed and rested for twelve to sixteen hours. Thence the train load was taken by the Northwestern Railroad from Omaha or Council Bluffs to Oakes, North Dakota. They arrived at Oakes on June 11, 1914, at 11:05 A. M. There they were unloaded and put into

pens, which the evidence discloses were quite muddy and filthy, and there they received, in accordance with some of the testimony, both insufficient food and water. There is testimony in the record that prior to the shipment the party in charge cut out of the herd some four or five of the cattle deemed not strong enough to make the journey. These cattle were mostly steers, some heifers among them, grass-raised in Texas, from one year to two years old, and weighed around 500 pounds. The testimony as to their condition ranges from statements that they were the poorest and weakest bunch of cattle ever seen shipped, to testimony that they were in good, fair condition for cattle of that class. At Addington one died. At Herrington, Kansas, there were seven cattle dead upon arrival. At Omaha seven cattle died in the stockyards. At Oakes, North Dakota, some sixteen cattle died or were dead upon their arrival. The train load was rebilled at Oakes over the defendant railway to Dickinson, North Dakota, and proceeded from Oakes at 4:10 P. M. on June 12, 1914. The train arrived at Dickinson June 13, 1914, at 7:20 A. M. The defendant railway company maintains an unloading station for cattle and some grass land for their use at a small station, where there is no agent, called Eland, some 4 miles from Dickinson. For several days prior to the arrival of the cattle at Dickinson the defendant knew that they were coming. On the day before their arrival at Dickinson, there is evidence in the record that one of the plaintiffs advised the defendant's representative that they desired the cattle to be unloaded at Eland; that they could not unload them at Dickinson by reason of no facilities there existing to take care of the cattle; that no objection was made to so doing and the plaintiffs expected such train load to be taken on to Eland. It appears, however, that when they arrived at Dickinson the plaintiffs were advised that they were billed to Dickinson; that no arrangement had been made to take the train load immediately out to Eland; that the same could not be pulled out by a switch engine because contrary to the rules of the company; that it would take some two hours to steam up engines; that it would be necessary to rebill the train load in order to have them shipped to Eland. At this time the cattle were in a weak and hungry condition. One of the plaintiffs testifies that he looked over the cars and saw two cattle down flat and two or three down with their heads up; that he advised the defendant for their

immediate removal as minutes meant money to him. At this time it was cloudy and looked like rain,—a cold, chilly morning. Finally after about three hours the train was taken to Eland, where the plaintiffs were prepared to take care of the cattle. There they proceeded at once to unload the cattle. It was necessary for them to haul out six or seven that were down, dying, or dead. Either 955 or 965 cattle were there unloaded. Immediately they were put out to grass upon the land of the defendant, adjacent. Then, as one of the plaintiffs testifies, it commenced to rain, and it rained hard that day and night. The government weather bureau man at the station about 1½ miles from there testified that the records showed that it began to rain about 1 P. M. and ended around 7 P. M., that the highest temperature that day was 65° and the lowest 49°, that the rainfall was 1.91 inches. Some of the cattle died that day. The next morning one of the plaintiffs counted 102 to 106 dead on the flat; many were drowned in the river adjacent.

This action was instituted to recover damages for the loss of 100 cattle by reason of the negligent delay occasioned at Dickinson and the failure to promptly deliver the train load at Eland. There is evidence in the record by cattle men of experience that, if the train load had been delivered at Eland some two and one half or three hours earlier, the cattle would have had an opportunity to fill up with grass and to recuperate so as to have avoided loss of the cattle for which damages are claimed.

The defendant assigned some twenty-five errors of law in the action of the trial court. These specifications concern principally the contention that the shipment in question must be governed by the Carmack Amendment and the Federal decisions applicable to interstate shipments; that no negligence of the defendant has been shown, and, even if shown, that it was not the proximate cause of the loss sustained, under the Federal decisions and other cases holding that losses sustained through act of God with concurrent acts of negligent delay give no right to recovery. That, furthermore, the delay in the Dickinson yards was not the proximate cause of the loss sustained, the real loss, in fact, being occasioned by the character of the cattle shipped, the condition in which they became during the shipment, and the man-

ner in which they were treated at the Oakes stockyard, which was not subject to or under the control of the defendant.

The record is somewhat long, and there are direct and sharp conflicts in the testimony.

Under the well-settled rule in this state, where the trial court has made findings of fact in a law case properly triable to the jury, this court will not try the case *de novo,* and it will be presumed that the findings are correct, especially where there is a sharp conflict in the parol evidence received, unless clearly the findings are opposed to the preponderance of the evidence. State Bank v. Maier, 34 N. D. 259, 158 N. W. 346, and cases cited therein; Stavens v. National Elevator Co. 36 N. D. 9, 161 N. W. 558.

The trial court has specifically found that the defendant carrier did not have adequate accommodations for the care and feeding of cattle at Dickinson; that it did maintain at Eland, 4 miles from Dickinson, a place for receiving and discharging of cattle and a quarter section of land for such use; that its custom theretofore for many years was to deliver large shipments of cattle at Eland which were usually billed to Dickinson, it being a well-known point, and Eland, a non-agency point; that, furthermore, the defendants knew of the condition of the cattle and the necessity of carrying them on to Eland without delay. That the defendant knew of the conditions existing at Oakes and the manner of treatment which had been accorded to the cattle so received at Oakes; that when the cattle arrived at Dickinson it was necessary that they be placed immediately upon grass in order to save them; that, furthermore, the defendant carrier knew of the impending storm and that the same might arrive in the course of three or four hours. The court further found that 100 head of cattle died directly through the unwarranted and negligent delay of the defendant of holding the cattle at Dickinson for three hours and upwards. The trial court accordingly ordered judgment for the sum of $22.50 for each of the cattle which perished, plus a proportionate amount of the cost of the freight, feed, and transportation. The appellant contends that the trial court improperly determined the new contract made at Oakes between the plaintiffs and the defendant to apply. We do not understand that the trial court so found excepting as a recitation of the facts concerning the things done. In any event we are satisfied upon the

record as pleaded and proved and as found by the trial court that a cause of action is shown for acts of negligence occurring on the defendant's line under the contract of interstate shipment as affected by the Carmack Amendment. 10 C. J. 543.

We are satisfied that there is evidence in the record to justify the findings of the trial court that the defendant negligently delayed the train load at Dickinson upon its arrival there, in view of the knowledge possessed by the defendant of the condition of the cattle and the necessity for their immediate removal as shown by the evidence. Our most serious consideration is addressed to the question of sustaining the damages allowed by the trial court for the 100 head of cattle that perished, and in finding support in the evidence that the defendant's negligence was the proximate cause of the loss as found. In other words, if it be conceded that the defendant carrier was negligent by reason of its delay, and that the cattle, through the resulting condition occasioned by the delay, were unable to withstand the storm which followed, may it not be considered that the defendant's negligence was the proximate cause of the loss?

The appellant contends that the storm was an independent intervening cause. That in applying the Carmack Amendment to the cause of action predicated that line of authorities must be followed which hold that the carrier is not liable for negligent delay in the transportation of property where the subsequent loss occasioned is through the act of God even though, but for such negligence, no loss would have occurred. In this case it is not necessary to pass upon that line of authorities. The principle is founded upon the doctrine that the carrier could not reasonably have anticipated or known that such casualty would occur as a natural result of the delay. 10 C. J. 127. In this case the trial court has specifically found that not only did the defendant know of the condition of the cattle, but it had knowledge of the condition of the weather and the probabilities of a storm. There is evidence in the record to justify such findings. Furthermore, the evidence does not disclose that this was an unprecedented storm or an act of nature that was of unusual occurrence. The prime question, therefore, is whether the acts of the defendant were the proximate cause of the loss. We are satisfied, upon the record and the findings as made, that there is no room for the application of the doctrine that

this was an act of God as an independent intervening factor where a rain storm occurred with a precipitation of 1.91 inches of rain and a drop in the temperature ranging 17 degrees, which the defendant could reasonably anticipate. There is evidence in the record to warrant the findings of the trial court that, if the cattle had been delivered as requested and as it then was its duty to do, the damages claimed would not have been sustained. The damages awarded are sufficiently large. We have entertained considerable doubt whether many of the cattle would not have died even though there had been a prompt delivery at Eland, owing to the weakened condition in which the cattle were at Oakes. However, the record shows that many cattle did die after arrival at Eland (how many the record does not clearly show) for which no claim is based against the defendant, and we therefore conclude that there is justification in the record for the amount of damages awarded.

It is therefore ordered that the judgment be in all things affirmed, with costs to the respondent.

ROBINSON, J. (dissenting in part). This is an appeal from a negligence judgment for $3,291. The case was tried by the court without a jury, and the judgment is based on findings of fact and conclusions of law.

As it appears, on June 6, 1914, at Vineyard, Texas, the plaintiffs shipped to themselves at Dickinson, North Dakota, some twenty carloads of scrub or dogie cattle,—steers and heifers one and two years old, average weight 300 pounds. The shipping was in twenty cars. On June 12, at Oakes, North Dakota, defendant receives on its cars for shipment to Dickinson all of the surviving animals. They were put on fourteen cars. The cars were shipped with a caretaker, the shippers agreeing to load and unload, feed and water, the stock while in transit, and to furnish for that purpose one or more attendants. The animals were promptly shipped to Dickinson, where they arrived at 7 A. M., June 13th. Then, by reason of some default, they were detained nearly three hours before shipment to the real destination at Eland, a prairie station 4 miles west from Dickinson. About 12 A. M. the poor dogie animals were unloaded, and soon after there set in a severe cold rain storm which continued for eight hours and until the rainfall was nearly 2 inches. The next morning the plaintiffs

counted 100 of the animals dead on the prairie. They claimed that the loss was due to the delay at Dickinson, by which the animals were exposed to the storm before they had time to fill up on the grass. The court found as a fact that on June 12th the plaintiffs gave due notice to the agent and the yardmaster at Dickinson that the cattle should be taken right to Eland, and that by neglect of defendant and its servants the train load of cattle remained on the track in Dickinson from 7 until 10 A. M.; that there was no reason for the delay other than the negligence of defendant, and that if the cattle had been unloaded at Eland two or three hours before the rain storm they could have filled up on the grass so as to withstand the storm, and that in consequence 100 head of the cattle died; that the cattle were worth $22.50 per head, plus $3.40 per head for freight, feed and expense; that the total value of the one hundred head was $2,590, for which judgment was rendered, with costs. In two respects the finding is clearly wrong: (1) The evidence does not show that the delay was the cause of the total loss; (2) the evidence does not show that the dead animals were worth $22.50, or any sum exceeding $5 or $10. Indeed there is no evidence of value only such as may be inferred from the cost price of the whole bunch and the description and condition of the animals, and it is quite preposterous to assume that the dead animals were of the same value as those that lived. All along the road from the point of shipment at Vineyard, Texas, the weakest and poorest of the animals were dying, while the strongest survived. The animals were yearlings or coming two years old steers and heifers, cattle picked up from the tick infested district of Texas. They were known as scrubs or dogies, and their average weight was three hundred pounds. Each animal was infected with a thousand or more ticks which burrowed into its little hide and sapped its life blood. The tick is the great curse of Texas. To rid the animals of ticks they were twice dipped over the head in a strong arsenical solution. One dipping was at Vineyard just as the animals were loaded onto the cars; and the other was at Addington, Oklahoma. At each dipping some of the weaker animals had to be hauled out of the dip or vat and the weaker animals were more or less affected by the poison permeating the hide where it was partly punctured by the ticks, and by the poisonous water which they imbibed when dipped. An expert veterinarian held a post mortem on

one of the animals and he testified: On opening the animals the appearance was of profound anemia (bloodlessness). In the stomach and intestines there was found lacerations of the mucous membrane. There was a lack of fat; there was no kidney fat whatever. The carcass was emaciated. In my opinion the cause of death was chronic arsenical poison. He says: In my judgment the death loss was due to a combination of circumstances. The cattle were too thin, weak, and emaciated before shipment, and the dipping would have more effect on the weaker animals; they would swallow more of the poison dip than the strong ones.

Then such of the cattle as did not get water at Oakes went about three days without water, and they could much better go that length of time without food.

At Oakes the number of cattle loaded was 955. Cattle were dying all along the route. At Oakes sixteen were counted dead and forty were put into a hospital car. The cattle were unloaded at the Northwestern stockyards. However, most of the animals did not get food or water or a place to rest without lying down in 4 or 5 inches of mud. The result of it all was that when the cattle were loaded on the Northern Pacific cars at Oakes they were not in shipping condition, and a large portion of them were in a starving and famished condition, which continued to grow worse and worse until they arrived at Dickinson and Eland. Then 100 of the animals were at the point of death. Their vitality was exhausted and within twenty-four hours they died. There is no sense or reason in claiming that the average value of the dying animals was the same as the surviving; on the contrary, they were practically worthless, and the chances are that most of them would have died even if they had been carried on to Eland without any delay at Dickinson. The 100 animals were at the point of death. They had not strength to stand up and graze, and it is shown that grass does not give any immediate relief to a famished animal. The food must have some time to digest before it can be assimilated and turned into nourishment. The plaintiffs must charge the loss mainly to their own negligence and want of care. They had an attendant in charge of the animals, but there is no showing that he was furnished with any money to buy feed or water, or that he was in any way efficient; and when the weaker animals arrived at Dickinson and at Eland the

plaintiffs did not offer them any nourishment or relief whatever. They were just turned out to live or die. Under such circumstances it is very doubtful if the plaintiffs are entitled to recover anything. The most they should be allowed is $500 damages for delay at Dickinson. The judgment should be accordingly reduced and modified.

JOHN F. BEYER, Respondent, v. NORTH AMERICAN COAL & MINING COMPANY, Herbert Williams, L. V. Williams, A. E. Wolpert, D. C. Wolpert, A. Maud Wolpert, J. L. Trevillyan, F. P. Nicoll, J. L. Ludwig, John E. Tappen, and Investors Syndicate, a Corporation, Defendants and Appellant.

(173 N. W. 782.)

Mortgages — redemption — fraudulent mortgages — rights of redemption.

The Investors Syndicate procured a fraudulent and void mortgage from the North American Coal & Mining Company. One Beyer was a stockholder in the latter company. He had paid several years' taxes on the corporate property. He maintained an action and recovered judgment for the taxes, and sold some of the corporate property under execution sale to satisfy the judgment. The Investors Syndicate attempted to redeem from such foreclosure, and paid to the sheriff the amount for which said property was sold on foreclosure sale, and received a sheriff's certificate and sheriff's deed. Beyer brought an action to recover for money expended in various suits theretofore brought against the corporation and in defending the interest of the stockholders and his own interest in the corporate property; in this action the Investors Syndicate appeared, answered, and claimed title to the property involved, under and by virtue of the alleged redemption. Beyer, in this suit, tendered into court the full amount which the Investors Syndicate had paid for the alleged redemption; *held* that the Investors Syndicate were not redemptioners. The basis of their redemption was the fraudulent and void mortgage; it afforded no right of redemption. The alleged redemption was a nullity and the Investors Syndicate acquired no right, title, or interest in the property attempted to be redeemed. Under such alleged redemption, it held it as trustee *ex maleficio* for the North American Coal & Mining Company.

Opinion filed July 7, 1919.

Appeal from the District Court of Stark County, North Dakota, *W. C. Crawford,* J.

Affirmed.

Bangs, Hamilton, & Bangs and *W. J. Mayer,* for appellant.

"If the property is not redeemed according to law, the purchaser or his assignee, or the redemptioner, as the case may be, is entitled to a sheriff's deed of the property." Comp. Laws 1913, §§ 7757, 7763.

Sannon at least became, as between himself and Williams, a redemptioner and entitled to all the rights of a redemptioner. It has been so held by several courts. N. D. Horse & Cattle Co. v. Serungard, 17 N. D. 446, 117 N. W. 453; McDonald v. Beatty, 10 N. D. 511, 83 N. W. 281; MacGregore v. Pierce, 17 S. D. 51, 95 N. W. 281; Roose v. Gove, 32 Colo. 533, 77 Pac. 246; Hare v. Hall, 41 Ark. 372; Smith v. Jackson, 153 Ill. 399, 39 N. E. 130; Harvey v. Krost, 116 Ind. 268, 19 N. E. 125; Carver v. Howard, 92 Ind. 173.

The question presented by plaintiff was settled in this state in 1901 by the opinion handed down in the case of McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281.

That such effect follows the retention of redemption money is well settled, and in cases where the persons redeeming did not possess the strict statutory right of redemption. See Carver v. Howard, 92 Ind. 173; Hare v. Hall, 41 Ark. 372; Re Eleventh Ave. 81 N. Y. 436; 3 Freeman, Executions, 3d ed. 317; McDonald v. Beatty, 10 N. D. 511, 83 N. W. 281.

Inadequacy of price does not destroy the validity of an execution sale. It is a circumstance in favor of those who have the right to redeem. Power v. Larabee, 32 N. D. 502, 57 N. W. 789.

M. A. Hildreth, for respondent.

The law allows nothing to be gained by fraud. Hennequin v. Naylor, 24 N. Y. 139; Nichols v. Michael, 23 N. Y. 265; Peter v. Wieting, 49 Barb. 315; Bigelow, Frauds, p. 493.

This court being a court of equity will not permit this property to go to the Investors Syndicate, but will treat it as the district judge did, a trustee *ex maleficio.* Ahrens v. Jones, 169 N. Y. 555.

To the same effect, see the case of Ziser v. Cohn, 207 N. Y. 407. At page 421 the learned judge says: "If relief is now refused the plaintiff against this fund he will be remediless, not through any fault

of his own, but by the fraudulent acts of those whom the appellants claim. Equity, therefore, in the exercise of its comprehensive jurisdiction over frauds, should mold its relief to meet the exigencies of the case, and fix a lien upon this fund in favor of the plaintiff." Citing decisions.

"Fraud is proven when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly without caring whether it be true or false." That doctrine is supported by Krause v. Bussacker, 105 Wis. 350; Rogers v. Rosenfeld, 158 Wis. 285; Elkford Oil & Gas Co. v. Jennings, 84 Fed. 839; Van Epps v. Van Epps, 9 Paige, 238.

It is settled by this court that the Investors Syndicate held the mortgage, which was the basis for this redemption, in fraud. Its redemption certificate was false. It perpetrated fraud upon the officers of the law in making the redemption that it did. Equity will relieve parties from such a situation, and will treat the Investors Syndicate as a trustee *ex maleficio*. Brown v. Lynch, 1 Paige, 147; Howland v. Scott, 2 Paige, 406; Freelove v. Cole, 41 Barb. 318; 2 Pomeroy, Eq. Jur. 628; 3 Pomeroy, Eq. Jur. § 1053, and cases cited in notes; Piper v. Hoard, 107 N. Y. 80; Third Nat. Bank v. Stillwater Gas Co. 36 Minn. 75, 30 N. W. 440; Farmers & Traders Bank v. Kimball Mill. Co. 47 N. W. 402; Sant v. Perronville Shingle Co. 146 N. W. 217.

A court of equity will deal with property of the character that we have here and administer justice between the parties regardless of forms of law. Murphy v. Teutsch (N. D.) 35 L.R.A.(N.S.) 1139, Opinion by Crawford, Judge. Hedlin v. Lee, 21 N. D. 500, Opinion by Fisk, Judge.

"The holder of the legal title to land will in equity be charged as trustee, where it was acquired by fraud and under such circumstances as render it inequitable for him to retain it." Norton v. Neder, Fed. Cas. No. 10,351; Mfg. Co. v. Bradley, 105 U. S. 175–180; Graffam v. Birgess, 117 U. S. 180–192; Williams v. United States, 138 U. S. 514–517; Camp v. Boyd, 229 U. S. 530.

GRACE, J. Appeal from the district court of Stark county, W. C. Crawford, Judge.

This appeal is from the judgment as amended. It appears that,

in addition to other relief granted to him by the judgment, there was entered a personal judgment against each of the defendants. The judgment was amended. As amended, it was practically the same as the judgment originally entered, with the exception there was no personal judgment entered against any of the defendants excepting the American Coal & Mining Company.

This case is another phase of the litigation which has been in progress for about twenty years between the same parties. Other cases heretofore litigated were: Beyer v. Investors' Syndicate Co. 31 N. D. 247, 153 N. W. 476; Investors' Syndicate v. Letts, 22 N. D. 452, 134 N. W. 317; Beyer v. North American Coal & Min. Co. 37 N. D. 319, 163 N. W. 1061.

On the 28th day of December, 1911, the Investors Syndicate commenced an action to foreclose what is termed the cumulative mortgage on the N.½ of section 21 and the S.E.¼ of section 16, T. 139, R. 94, Stark county, North Dakota. In that action it demanded judgment against the North American Coal & Mining Company for $3,000 and for a decree of foreclosure; in that action the North American Coal & Mining Company defaulted. John F. Beyer applied to the court for permission to intervene, which was granted. The Investors Syndicate answered the petition of intervention, and issues were duly joined in that case. Under the issues joined, the case was tried to the court, and the alleged mortgage for $3,000, dated the 20th day of March, 1899, which covered the land in question, was by the court declared to be fraudulent and void and against the interest of the stockholders of the North American Coal & Mining Company and against the interest of John F. Beyer as a stockholder in that corporation. In that case it was determined from the testimony therein that Williams, who was the promoter and president of the coal company, and Tappen, the secretary of the Investors Syndicate, were business associates before the organization of the coal company; that when the coal company was first organized, Tappen received stock therein for which he never paid and which was canceled from the books of the company; and that at one time Tappen was elected an officer of the coal company; that Williams took three fifths of the stock of the coal company for nothing excepting his services and did nothing to develop the coal mines; that he either borrowed or pretended to borrow $1,118.43 of the Investors

Syndicate, of which Tappen was secretary, and assigned some of his stock in the coal company as collateral; that at a meeting of the coal company thereafter, held at Williams' house, Beyer not being present nor invited thereto, a mortgage in that sum was authorized to be given by the coal company upon its entire assets. At the same meeting, Williams and his wife voted themselves back salaries, which had not theretofore been authorized by the company; that upon the execution of the mortgage, Williams took proceeds thereof from the Investors Company and a few hours later paid it back to the Investors Syndicate to pay his own personal note and to take down the stock which he had put up as collateral. The coal company got none of the money.

In the trial of that case in the district court, the following findings of fact were made: "I further find that the North American Coal & Mining Company and Herbert Williams and his said wife, L. V. Williams, and his said treasurer, F. P. Nicoll, have had full and complete knowledge of the fraudulent purposes for which said mortgage and note was made and executed on the said 20th day of March, 1899, and that the plaintiff herein, the Investors Syndicate, has at all times had full and complete knowledge that said note and mortgage was fraudulently made, executed, and delivered as the pretended act of said North American Coal & Mining Company, and was without any consideration whatsoever in the premises, and was not the act of the said North American Coal & Mining Company."

Another finding was to the effect that said mortgage, note, and coupon notes are fraudulent and void, and have been at all times fraudulent and void and without consideration whatsoever, and are not a lien upon the lands herein described. A decree was entered in the trial court in accordance with the findings of fact, and the conclusion of law was that the note and mortgage were null and void and taken and received by the Investors Syndicate with full knowledge that they were without consideration and were fraudulent and void as to stockholders of said company and as to the North American Coal & Mining Company. A judgment of dismissal of that action was entered by the trial court; costs were awarded in favor of John Beyer, and an appeal from that judgment was taken to this court on the 23d day of February, 1914, and the judgment of the district court of Stark county was affirmed. 31 N. D. 259, 153 N. W. 472. The court in that opinion

said: "Without setting forth more of the testimony which, as we have already said, is voluminous, we announce it as our opinion that the Investors Syndicate Company through its secretary Tappen and the officers of the coal company, principally Williams, entered into a fraudulent agreement to rob the coal company of its entire assets for the purpose of defeating the rights of the minority stockholders. We are further of the opinion that in so doing the officers of the coal company exceeded their authority in the issuance of the mortgage, and that the same was absolutely void, and was so known to the Investors Syndicate Company at the time they pretended to have purchased it."

On February 26, 1912, Beyer, who had paid taxes for several years upon the land in question, commenced an action against the North American Coal & Mining Company and Producers & Consumers Co-operative Company to have the question of the liens and taxes which he had paid on the property determined to be liens, and to recover judgment for the same. The Investors Syndicate became parties to that action, and, in addition to entering a general denial, claimed that it had an estate, interest, and lien on the N.W.¼ of section 16 and the land which we have heretofore described by virtue of what is known as the Dana mortgage and by virtue of the cumulative mortgage above referred to. In the trial of that action, the court found that Beyer was the owner of the judgment of record in an action in the United States court of North Dakota, against Letts, the Producers & Consumers Company, and the North American Coal & Mining Company, for the sum of $320, and that it was a lien in his favor against said lands for that sum. The trial court found that Beyer had paid certain taxes, and in all he was declared by the court to be entitled to a lien upon said land for the sum of $984.64, together with costs, in all amounting to $1,046.92. The judgment was entered on the 26th day of August, 1913, which was about the time when judgment was entered against the Investors Syndicate, dismissing its foreclosure action against the North American Coal & Mining Company. On the same day that judgment was entered in Beyer's favor, an execution was issued upon the judgment, and the three quarters of land first described were levied upon and sold at sheriff's sale to satisfy such judgment, and was bid in by Beyer, and a sheriff's certificate issued to him. That certificate was recorded with the register of deeds on the 12th day of November, 1913.

On the 23d day of October, 1914, shortly before the time for redemption expired, the Investors Syndicate endeavored to redeem from that execution sale. They based their right to redeem upon the cumulative mortgage. At the time of the alleged redemption, the appeal of the Investors Syndicate from the judgment dismissing the foreclosure action upon the cumulative mortgage from the North American Coal & Mining Company was pending in the supreme court of North Dakota; that appeal was determined July, 1915, following the redemption. At the time of the alleged redemption, the sheriff of Stark county executed and delivered to the Investors Syndicate a certificate of redemption in due form, which was filed for record in the register of deeds of Stark county on the 23d day of October, 1914, and on the 2d day of November, 1915, more than a year after the redemption, the sheriff of Stark county executed to the Investors Syndicate a sheriff's deed of said premises, which was filed in the office of the register of deeds on the 30th day of August, 1916. The sheriff remitted redemption money to the attorney for Beyer. Beyer received the redemption money and retained it until commencement of this action, when it was legally and duly tendered the defendants, and such tender has ever since been kept good. The amount tendered was $1,200. This action was brought by Beyer against the North American Coal & Mining Company to recover back the money which he had paid out in all the litigation we have mentioned. Beyer takes the position that it was necessary for him to have entered into all the litigation in order to protect the interest of the North American Coal & Mining Company and his own interest and investment therein as a minority stockholder. He recovered judgment for moneys paid out for that purpose in the sum of $5,978.97, and the judgment was decreed to be a prior lien upon the S.E.¼ of section 16 and N.½ of section 21, township and range above mentioned. It is further adjudged and decreed that the land be sold to satisfy the amount of that judgment. The judgment in this action decreed that the Investors Syndicate had no right, title, interest, claim, or demand of any kind or nature in and to said land above described under said redemption and sheriff's deed.

This brings us to the final question in this case: Was the redemption attempted to be made by the Investors Syndicate of any force, effect, or validity? If it were, then they have by that redemption,

and the issuing to them of the certificate of redemption and sheriff's deed, become the absolute owners of said land by reason thereof. If the redemption was not as a matter of law made, if the Investors Syndicate had no legal right to make a redemption, then their attempted redemption, and all the acts they did with reference thereto, are a mere nullity and are of no legal force nor effect.

Section 7753, Compiled Laws of 1913, declares who may redeem where property is sold subject to redemption. Under that section, redemption may be made: (1) By the judgment debtor or his successor in interest; (2) by a creditor having a lien by judgment, mortgage, or otherwise on the property sold or on some share or part thereof *subsequent* to that on which the property was sold. If the Investors Syndicate had any right to redeem, such right was based upon and arose from what is termed the cumulative mortgage. It will be remembered that the cumulative mortgage, prior to the time of the alleged redemption, had been declared fraudulent and void by the trial court of Stark county; that appeal had been taken from the judgment in that case to the supreme court, and it was during the pendency of that appeal that the alleged redemption was made. The theory of the defendants is that, notwithstanding such mortgage had been declared fraudulent and void by the trial court, it nevertheless remained a lien upon the land until the appeal from the judgment was finally disposed of in the supreme court; that it was, therefore, sufficient to support the redemption; that the mortgage pending the appeal still remained a lien upon the land sufficient to authorize the defendants to make such redemption. In other words, the defendants, in effect, claim that the mortgage was at all times not fraudulent until the trial court declared its invalidity on the grounds above mentioned, and that it still remained a lien until the final disposition of the case.

We are of the opinion, however, that this view is erroneous and unsound. The fact is, the mortgage never had any validity; it never became a lien against the land in question,—it never was of any legal force nor effect and the defendants at all times knew this,—it was a party to the fraudulent mortgage,—it knew when it took the mortgage it was fraudulent and void. Every stockholder of the Investors Syndicate knew or must be held to have known that it was fraudulent and void. It was in no way binding nor effective as a lien upon the

property, and in no way bound nor affected nor became an obligation of the North American Coal & Mining Company or any stockholder thereof. The decree of the trial court declaring the mortgage to be fraudulent, void, and invalid, did not give the Investors Syndicate any new knowledge. All the facts in that decree were known in substance by the Investors Syndicate at all times. The decree of the trial court simply declared the invalidity of the mortgage on the grounds stated, but the invalidity existed from the inception of the mortgage, and the defendants knew it. The mortgage being void from its inception for fraud and the defendants knowing it, its mortgage was not a lien upon the land; it therefore had no mortgage with which to make redemption; it was not a redemptioner because it possessed no valid mortgage under which it could make redemption. It had no authority to make redemption, and its attempt to do so was fruitless; it was not a redemptioner.

Much has been said about the affidavit of Tracy R. Bangs, the attorney for defendants. This affidavit, so far as showing any right in the defendants to redeem, is of no effect. The affidavit cannot make the fraudulent and void mortgage valid. The cumulative mortgage to the Investors Syndicate never was a mortgage upon the land in question. It was fraudulent and void from its inception, and the defendants knew it. It is worse than folly to contend that any right of redemption or property right may be acquired or based upon that mortgage. In order for one to be a redemptioner within the statute, he must be the holder of a valid, subsequent mortgage or lien to that from which redemption is made.

There is another reason why, as a matter of law, the defendants were not redemptioners. The alleged mortgage of the Investors Syndicate was dated March 20, 1899. The judgment upon which the land was sold was entered on the 26th day of August, 1913. If the mortgage were valid, it would be a prior, not a subsequent, lien upon the land to the judgment. The defendants, in order to be redemptioners within the statute, must have a lien by judgment, mortgage, or otherwise on the property sold or on some share or part thereof *subsequent to that on which the property was sold;* the defendants' alleged mortgage being a prior lien, and not a subsequent one, it was not a qualified redemptioner under the statute, and had no right to redeem, and for this additional reason its attempted redemption was a nullity.

The defendants, in effect, claim there is no evidence of any fraud in the acquisition by the Investors Syndicate in making the redemption and in acquiring sheriff's certificate and sheriff's deed to the property in question. In this the defendants are clearly mistaken. The very basis of the redemption, the cumulative mortgage, was fraudulent and void. The right to redeem is based upon that mortgage. The defendants at all times knew, or must be held to have known, that mortgage to be fraudulent and void. It was later declared to be fraudulent and void by the court. If the mortgage were fraudulent and void, every act subsequent to the mortgage with reference thereto, and every subsequent alleged right based thereon, carries with it the taint of such fraudulent mortgage, where the subsequent acts have been performed and alleged rights acquired by those who were a party to the fraudulent and void mortgage; it is impossible for the defendants to separate the alleged redemption from the fraudulent and void mortgage. This court has said in the case of the Investors' Syndicate v. North American Coal & Min. Co. 31 N. D. 280, 153 N. W. 472: "The Investors Syndicate Company, through its secretary Tappen and the officers of the coal company, principally Williams, entered into a fraudulent agreement to rob the coal company of its entire assets for the purpose of defeating the rights of the minority stockholders."

The court in that case had under consideration the very mortgage which is claimed by defendant to be the basis of its right to redeem. This alleged redemption has as its only basis the fraudulent agreement so strongly condemned by this court in that case. That the defendants acquired no legal right or interest in said land by their attempted redemption is too plain to require further comment. The trial court properly held that they were trustees *ex maleficio* for the benefit of the North American Coal & Mining Company.

The defendants cite as authority to sustain their position the case of the North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453. That was a decision of this court. In that case, Sannan was assignee of four mortgages, which were prior liens to the one which was foreclosed and from which redemption was made by him, the basis of his redemption being the prior liens. This court held in that case, though Sannan was not a statutory redemptioner, he having redeemed and

the holder of the certificate having made no objection and having received the money, that Sannan became as between himself and the certificate holder a redemptioner. That case is clearly distinguishable from the one at bar. In that case the mortgages, which were prior liens under which redemption was made, were valid and subsisting liens,—their legality was unquestioned. Those mortgages were not, as the one involved in this case, fraudulent and void. In that case the court was dealing with valid and subsisting good-faith mortgages. In this case we are dealing with a fraudulent and void mortgage. The principle in that case in the respect we have discussed has no application to a case such as this. This is a case of equity. The defendants are required to come before the court of conscience with clean hands. This they failed to do when they ask this court to grant them relief and to protect certain rights, the origin and source of which is a fraudulent and void instrument, *viz.*, the cumulative mortgage.

There is another reason why the judgment of the trial court should be sustained. It is found in the 17th finding of fact of the trial court, where it in substance said: I further find as a fact in this cause that at the time of making the so-called redemption of the sales made in behalf of John F. Beyer, as plaintiff, against the Investors Syndicate et al., as defendants, in which certificates of sale were issued to John F. Beyer for the land in question, the Investors Syndicate, defendant herein, had no right, title, interest, claim, or demand of any kind whatsoever upon the lands and premises sought to be redeemed; that the acceptance of the money paid to the sheriff of Stark county and subsequently paid to John F. Beyer was paid under a misapprehension and mistake.

We think the finding which we have set forth in substance is well sustained by the evidence. It is not necessary to set forth nor discuss the evidence; it is sufficient to say it sustained the finding of the trial court. If the redemption money was paid to Beyer and received by him while laboring under the misapprehension of fact and mistake, he waived none of his rights by so receiving it. He has returned the money and tendered it to the Investors Syndicate in open court. The trial court found that the $1,200 would cover the amount of money which the Investors Syndicate paid for the sheriff's deed.

The plaintiff recovered judgment for the costs and expenses he had

been to in all of the litigation. The result of his expending such money was the protection of the interest of the other stockholders as well as his own interest in the North American Coal & Mining Company. He has been awarded by the trial court judgment for all of the money so expended, in the sum we have above stated, and was awarded a lien of all the property of the North American Coal & Mining Company. In awarding such judgment and lien, the trial court acted legally and properly. Internal Improv. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157. The money which the defendant paid for the alleged redemption has been legally tendered to it. It is entitled to nothing else in this action.

The judgment of the trial court is in all things affirmed. The respondent is entitled to the statutory costs of appeal.

BIRDZELL, J. I concur on the ground that, assuming that the redemption was good, the property redeemed should, for the reasons assigned in the principal opinion, be held subject to the equities of the respondents.

CHRISTIANSON, Ch. J. (concurring specially, and in part dissenting). I concur in the result reached, but do not concur in the reasoning adopted, in the majority opinion. That opinion in effect holds that the redemption made by the Investors Syndicate was unavailing, and conferred no rights upon it, because it was not a proper redemptioner. With this I do not agree. It is well settled that "if a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom redemption is made, it will estop such person, after he has received the redemption money, from denying the validity of the redemption." 3 Freeman, Executions, 3d ed. § 317. "The holder of the sheriff's certificate and the person redeeming are the only persons concerned in the regularity of the redemption. The owner of the certificate may deal with it as he sees fit. He may sell or assign it, or he may retain it and insist that anyone who wishes to secure his right thereunder by redemption shall do so only by strictly complying with the statute, or 'he may waive his right to require exact and formal observance of the statutory mode, and his acceptance of the redemption money will be such a waiver.'" McDonald v. Beatty,

10 N. D. 511, 518, 88 N. W. 281. But in this case the trial court found that the plaintiff, Beyer, accepted the money through misapprehension and mistake. And in view of all the facts and circumstances in the case I believe that this is true, and that the court properly relieved against the mistake by permitting Beyer to return to the Investors Syndicate the amount of the redemption moneys with interest.

JOHN F. BEYER, Appellant, v. NORTH AMERICAN COAL COMPANY et al., Defendants, HERBERT WILLIAMS, L. V. Williams, A. E. Welport, D. C. Welport, A. Maud Welport, J. L. Trevillyan, E. P. Nicoll, J. L. Ludwig, John E. Tappen, and Investors Syndicate, a Corporation, Respondents.

(173 N. W. 787.)

Judgments — duty of district court clerk — power of court to amend.

The clerk of the district court acts in a ministerial capacity in entering judgments. He must enter such judgment as the court has ordered, and none other. And where the clerk enters a judgment different from that ordered, the court may order the judgment to be amended so as to conform to the order for judgment.

Opinion filed July 7, 1919.

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

Plaintiff appeals from an order amending the judgment.

Affirmed.

M. A. Hildreth, for appellant.

All the equities in this litigation are with Mr. Beyer. The stockholders referred to here have never attempted to assist in any manner in protecting the property. They are *in pari delicto* with the North American Coal & Mining Company officers, Tappen, and the Investors Syndicate. In other words they are wrongdoers. If they have not directly aided, they have remained silent in most of this litigation, occasionally dropping out of the litigation as it suited their taste. The deficiency judgment should stand in this cause.

See decision of this court in Beyer Case, 31 N. D. 247; see decision of this court in Beyer Case, 32 N. D. 543, same case 37 N. D. 320.

Bangs, Hamilton, & Bangs and *W. J. Mayer,* for defendants and respondents.

Compiled Laws 1913, § 7638. Judgment upon an issue of law or fact may be entered by the clerk by the order of the court or the judge thereof. Comp. Laws 1913, §§ 7667, 7677.

"Whatever limitations there may be upon the power of a court after final judgments to correct its judicial errors, there is certainly nothing in the way of its correcting its mere clerical mistakes or misprisions, so that the entry may conform to what the court intended it should be. Courts would be very inefficient agencies for the administration of justice, if they had not this power. In this case the court committed no judicial error, but, through the fault of plaintiff's attorney, was led into a clerical mistake, by which a judgment was rendered which the court never intended to pronounce."

"An amendment may be made for the purpose of making a judgment speak the truth." 15 Enc. Pl. & Pr. 225, 228.

The court may, after the expiration of the term, make the record show the judgment as actually rendered by the court. 15 Enc. Pl. & Pr. 220.

Independently of statute, there is not personal liability of stockholders to the creditors of their company. 26 Am. & Eng. Enc. Law, 1017.

CHRISTIANSON, Ch. J. The plaintiff is a minority stockholder in the defendant the North American Coal & Mining Company. He has conducted much litigation to protect his right as such, and to prevent the assets of the corporation from being dissipated. He brought the present action for the purpose of recovering the moneys expended by him in conducting such litigation and in preserving the assets of the company. The sufficiency of the complaint was challenged by a demurrer, and on a former appeal this court held that it stated a cause of action. 37 N. D. 319, 163 N. W. 1061. In the complaint the plaintiff demanded judgment that an accounting be had by the officers and agents of the defendant corporation, and that all parties owning

stock be brought in and made parties to the action; and that a lien be adjudged upon the lands and premises herein described in favor of the plaintiff and against the North American Coal & Mining Company and other defendants herein involved for the amount adjudged to be due to the plaintiff; that said property be impressed with the payment of said lien, and that the same be paid before any other liens. The case was tried to the court without a jury, and resulted in conclusions of law and order for judgment in favor of the plaintiff to the effect that plaintiff had expended certain sums for attorney's fees and disbursements, and in the payment of taxes, for the aggregate of which the court ordered personal judgment in favor of the plaintiff, and against the defendant North American Coal & Mining Company alone. The court further ordered that such judgment be a lien upon the property of the defendant the North American Coal & Mining Company, and that such property be sold to satisfy the same. Upon such findings and conclusions, the plaintiff caused to be entered a personal judgment not only against the North American Coal & Mining Company, but against all of the other named defendants. Subsequently the defendants moved that the judgment be amended by striking therefrom that portion which ordered personal judgment against said defendants other than the North American Coal & Mining Company. The motion was granted and plaintiff has appealed.

Clearly there was no error in amending the judgment so as to make it conform to the judgment actually ordered by the court. The clerk in entering a judgment acts in a ministerial capacity. He must enter such judgment as the court has ordered, and none other. A judgment entered by the clerk where no order for judgment has been made is void, and in fact no judgment at all. Dibble v. Hanson, 17 N. D. 21, 114 N. W. 371, 16 Ann. Cas. 1210.

The order appealed from is affirmed.

GRACE, J. I concur in the result.

STATE OF NORTH DAKOTA, Respondent, v. EMIL L. GUNDERSON, Appellant.

(173 N. W. 791.)

Information and indictment — appeal and error — shooting with intent to injure another.

1. Sections 9519 and 9549 of the Compiled Laws of 1913 are construed as previously construed in the case of State v. Cruikshank, 13 N. D. 337, and it is *held* that the felony of shooting or attempting to shoot another with intent to injure the person is not committed unless an attempt to carry out the intent is shown.

Information and indictment — verdict of jury.

2. Where the information charges the defendant with shooting another with intent to injure, and the jury, by its verdict, finds the defendant guilty of the crime of assault with a dangerous weapon as charged in the information, the verdict does not find the defendant guilty of an attempt to shoot, within § 9519, Compiled Laws of 1913.

Assault — sufficiency of verdict.

3. The verdict being sufficient to find the defendant guilty of the crime of assault, he may be sentenced accordingly.

Opinion filed July 8, 1919.

Appeal from the District Court of Pierce County, *Burr*, J.

Reversed.

E. R. Sinkler (*Engerud, Divet, Holt, & Frame,* of counsel), for appellant.

The sentence is unwarranted by the verdict. State v. Cruikshank, 13 N. D. 337; State v. Hunskor, 16 N. D. 420; Territory v. Conrad, 1 Dak. 363; Comp. Laws, § 9548.

In order to convict of any of these aggravated and felonious assaults, the verdict must find and declare the necessary evil intent. Omission from the verdict of a finding of the specific intent is equivalent to a finding of not guilty of the wicked intent; and hence is a verdict for simple assault only.

The words, "as charged in the information," are of no avail, and cannot help the verdict any. State v. Johnson, 3 N. D. 153; State v.

Marks, 3 N. D. 532; State v. Cruikshank, 13 N. D. 337; Sullivan v. State, 44 Wis. 595; People v. English, 30 Cal. 214; State v. Snider (Wash.) 73 Pac. 355; Territory v. Conrad, 1 Dak. 363.

BIRDZELL, J. This is an appeal from a judgment of conviction under which the defendant is sentenced to a term of one year in the penitentiary. The judgment was rendered on a verdict of the jury as follows: "We, the jury in the above-entitled cause, find the defendant, E. L. Gunderson, guilty of the crime of assault with a dangerous weapon as charged in the information." The information charges the defendant with committing the crime of assault and battery as follows: That the defendant did "unlawfully, wrongfully, wilfully, and without justification or excusable cause, shoot one John W. Caley with a firearm, commonly called a shotgun, which said arm was then and there loaded with powder and leaden shot, with intent then and there had in him, the said Gunderson, to injure and do hurt to the said John W. Caley."

The only assignment of error is that the sentence and judgment are erroneous and unwarranted by the verdict. Under the appellant's construction of the verdict, it finds the defendant guilty of only a simple assault. Sections 9518–9520, 9531–9533, and 9549, Compiled Laws of 1913, define various aggravated assaults. In each of the sections the specific intent with which the particular assault was committed is an ingredient of the offense, and where the assault is accompanied by the use of an instrumentality used for shooting, such as a firearm, there must be present the additional element of at least an *attempt to shoot.* This is also true of that part of § 9549, under which the information in question was clearly drawn, which relates to an assault with firearms. This section reads: "Every person who, with intent to do bodily harm and without justifiable or excusable cause, commits any assault or assault and battery upon the person of another, with any sharp or dangerous weapon, or who without such cause, shoots or attempts to shoot at another, with any kind of firearm or airgun or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the penitentiary not less than one and not exceed-

ing five years, or by imprisonment in a county jail not exceeding one year."

Under the decision of this court in the case of State v. Cruikshank, 13 N. D. 337, 100 N. W. 697, it was held that a verdict which found the defendant guilty "of the crime of assault with a dangerous weapon, with intent to do bodily harm to the complaining witness, . . . although without intent to kill him, as he stands charged in the information," was not sufficient upon which to pass a sentence for felony, where it appeared that the defendant had pointed a loaded revolver at the complaining witness for the purpose of frightening him into compliance with the defendant's demand for the settlement of a claim for wages. In that case it was pointed out that the verdict, though finding a specific intent to do bodily harm, did not find the defendant guilty of an attempt to shoot, which was an element of the felonies defined in §§ 7115 and 7145, Revised Codes of 1899, which are identical with §§ 9519 and 9549, Compiled Laws of 1913. The former section defines as a crime either shooting or attempting to shoot with intent to kill, and the latter is as above quoted. In the opinion it was said to be obvious that, "although shooting or attempting to shoot unlawfully at another is in all cases an assault, yet unlawfully assaulting with intent to shoot is not always an *attempt* to do the act intended. An attempt to shoot requires more than a mere assault. An attempt is a frustrated effort to execute some intended complete act. To constitute an attempt, there must be a present, actual, specific intent to do a complete act, and the actual doing of some overt act which is one of the series of minor acts directly involved in the performance of the ultimate act intended." It follows, said the court, further, "that an assault with a firearm or similar weapon, as such, with intent to kill, is not an offense, under § 7115, unless the assault is of such a nature as to constitute shooting or *attempting* to shoot," and this reasoning the court held to be as applicable to shooting or attempting to shoot, under § 9549, above quoted, as under § 9519, and it held that "neither § 7115 nor § 7145 [§§ 9519 and 9549, Comp. Laws 1913] makes a *mere assault* with a firearm, as such, a felony, even though the intent mentioned in the respective sections is established. The verdict . . . then," said the court, "is conclusive that the jury found only an assault,

but failed to find an attempt to shoot. The verdict is therefore nothing more, in effect, than a finding of simple assault."

That is precisely the situation in the instant case. The jury has found only an assault, but it has not found an attempt to shoot, and even though the verdict be construed as finding also an assault with a gun with intent to do bodily harm, it does not involve a finding of an *attempt* to execute the intent which the statute specifically makes an ingredient of the felony. It follows from this that the offense of which the jury has found the defendant guilty is the offense of assault, and it is elementary that the judgment and sentence must conform to the verdict.

Counsel for the respondent, however, urge that inasmuch as an assault is defined by § 9545, Compiled Laws of 1913, as "any wilful and unlawful attempt or offer with force or violence, to do a corporal hurt to another," it follows that the felony of shooting with intent to injure a person cannot be committed without committing the felony of assault with intent to injure another person with a firearm, as the offense is defined in the first part of § 9549, above. And from this it is said to follow that an information which charges the felony of shooting with intent to injure likewise charges the felony of assault with a dangerous weapon with intent to injure, and consequently that the verdict should be construed as a finding of guilt of a felonious assault though not embracing a sufficient finding of an attempt to shoot. But the court likewise dealt with this question in the case of State v. Cruikshank by applying the elementary rule of construction that a provision relating to a particular subject must govern with respect to that subject, as against provisions in other parts of the law which might otherwise be broad enough to include it. And the legislature having dealt specifically with the subject of assault or assault and battery with a firearm or similar weapon, used as such, it excluded such assaults from the more general assaults embraced within the fore part of § 9549. This construction of § 9549 is manifestly correct, for, if the section meant what the respondent contends it means, the second clause of the section is wholly superfluous; for it goes without saying that any firearm or other instrumentality capable of being shot is, as applied to a human being, a dangerous weapon. Consequently, charging an assault with such an instrument, so used as a firearm, charges assault with a dangerous weapon,

and it would be a felony under the first clause of the section. This would require us to strike from the statute the element of the attempt which the second clause makes an ingredient of the offense where it is charged that the instrumentality was employed to shoot.

It seems obvious to us that the information does not charge an assault with a firearm used as a sharp or dangerous weapon employed for other purposes than shooting, and that the verdict cannot be construed as a finding of the jury that the defendant committed an assault by so employing the firearm; for the jury has said by their verdict that the defendant was guilty of assault as charged, and the charge is assault and battery by shooting. For other authorities more or less in point on the question presented, see Territory v. Conrad, 1 Dak. 363, 46 N. W. 605; State v. Hunskor, 16 N. D. 420, 114 N. W. 996.

It follows from what has been said that the verdict in this case is insufficient to find the defendant guilty of a felony, and that the judgment must be reversed, with directions to sentence the defendant for the misdemeanor of assault with which the verdict finds him guilty. It is so ordered.

CHRISTIANSON, Ch. J., concurs.

GRACE, J. I concur in the result.

BRONSON, J. (concurring specially). I agree with the conclusion adopted by Justice Birdzell that the verdict as rendered does not justify the sentence imposed. I do this upon the sole ground that the verdict which attempts to describe the crime charged in the information fails to find a necessary ingredient of the offense, the evil intent. State v. Johnson, 3 N. D. 150, 54 N. W. 547. If the jury had returned a verdict of guilty as charged in the information no ambiguity would have resulted. The verdict as rendered leaves somewhat to conjecture the question of evil intent. It therefore can be sustained merely as a verdict for simple assault.

ROBINSON, J. (dissenting). In this case I think the reasoning of Mr. Justice Birdzell is too refined and technical, and too much after the mode of some old, former decisions. The appellant was tried and

convicted under the statute which makes it a crime for a person to shoot or attempt to shoot another with any kind of firearm or air gun, or other means whatever, with intent to injure any person. § 9549. The information charges that defendant did feloniously and without any cause or excuse shoot one John W. Caley with a firearm commonly called a shotgun, which said arm was then and there loaded with powder and leaden shot, with intent then and there to injure and do corporal hurt to the said Caley.

The verdict is: "We, the jury, find the defendant guilty of an assault with dangerous weapon as charged in the information." The fair meaning is that the defendant is guilty as charged in the information.

FARMERS BANK OF GARRISON, a Corporation, Appellant, v. GOTTLOB O. RAUGUST and Title Guaranty & Surety Company, a Corporation, Respondents.

(173 N. W. 793.)

Limitations of actions — actions against officer for negligence.

1. Where a clerk of court made an entry upon his record showing that a judgment against two certain persons was satisfied when in fact the satisfaction was partial and satisfied the judgment only as to one of the parties, and one of said parties thereafter executes a mortgage upon certain land which he owned, which mortgage was filed and recorded while the entry of the clerk as to the judgment remained as above stated, it is *held* that such mortgage is impaired at the time of its filing and recording; that an action against the clerk and his surety for the negligent entry and the damages alleged to have been sustained thereby, not having been commenced until more than six years after the time of the impairment of such mortgage, is barred by the Statute of Limitations.

Officers — recovery against.

2. It is further *held* that the owner of said mortgage, who afterwards became owner of the land by foreclosure of said mortgage and the issuing to him of a sheriff's deed, was not damaged, for the reason that the testimony shows the value of the land to have been about $3,600, which was more than the aggregate of all the liens against said lands which are established by competent testimony.

Opinion filed July 8, 1919.

Appeal from the District Court of McLean County, *W. L. Nuessle*, J.

Affirmed.

H. F. O'Hare and *Newton, Dullam, & Young*, for appellant.

"Where the cause of action is based on consequential as distinguished from direct damages, and involves an act or omission which might have proved harmless, the cause of action must be taken as accruing only upon the actual occurrence of the damage, so that the statute runs only from that time."

In support of this are cited:—19 Am. & Eng. Enc. Law, 200; Wabash County v. Pearson, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. 134; Hotard v. Texas, etc. R. Co. 36 La. Ann. 450; Ludlow v. Hudson R. Co. 6 Lans. 128; Sterrett v. Northport Min. etc. Co. 30 Wash. 176; Allen v. Stephens, 102 Ga. 596, 20 S. E. 443; Hempstead v. Cargill, 46 Minn. 118, 48 N. W. 558.

Where the sheriff had released attached property without authority from the plaintiffs in the attachment proceedings it was held that the cause of action against him did not accrue at the time of the unauthorized release but at the time judgment was rendered in the attachment suit. Lesem v. Neal, 53 Mo. 412; Steele v. Bryant, 47 Iowa, 116; Aachen & M. F. Ins. Co. v. Morton, 15 L.R.A.(N.S.) 157, 165, 84 C. C. A. 336.

H. C. Bradley and *J. A. Hyland*, for respondents.

"If the plaintiff ever suffered damages giving rise to a cause of action against defendants, such cause of action accrues immediately upon the taking of the mortgage on September 12, 1910."

In 25 Cyc. at page 1065, the rule is stated as follows: "The Statute of Limitations begins to run from the time when a complete cause of action accrues, that is, when a suit may be maintained. Latin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Bennett v. Herring, 1 Fla. 387; Shelbourne v. Robinson, 8 Ill. 597; Parks v. Satterthwaite, 123 Ind. 411, 32 N. E. 82; Raymond v. Simonson, 4 Blackf. 77; Dobyns v. Schoolfield, 10 B. Mon. 311; Banks v. Coyle, 2 A. K. Marsh. 564; Hardee v. Dunn, 13 La. Ann. 161; Brown v. Houdlette, 10 Me. 399; Young v. Mackall, 3 Md. Ch. 298; Ganser v. Ganser, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18; Johnson v. Pyles, 11 Smedes & M.

189; Gray v. Givens, 26 Mo. 291; Fenner v. Kime, 5 Neb. (Unof.) 548, 99 N. W. 483; Odlin v. Greenleaf, 3 N. H. 270; French v. Higgins, 66 N. J. L. 579, 50 Atl. 344; Larson v. Lambert, 12 N. J. L. 247; Eller v. Church, 121 N. C. 269, 28 S. E. 364; Hamilton v. Hamilton, 18 Pa. 20, 55 Am. Dec. 585; Hall v. Vandegrift, 3 Binn. 374; Jones v. Conoway, 4 Yeates, 109; Hoskins v. Lindsay, 1 Del. Co. 29; Smith v. Blythewood, Rice, 245, 33 Am. Dec. 111; Mayfield v. Seawell, Cooke, 437; Martin v. Martin, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439; Coburn v. Coledge [1897] 1 Q. B. 702, 66 L. J. Q. B. N. S. 462, 76 L. T. N. S. 608, 45 Week. Rep. 488. See 33 Century Dig. title Limitation of Actions, 217."

The rule is further considered on page 1066, vol. 25 Cyc.: "The accrual of the cause of action means the right to institute and maintain a suit; and whenever one person may sue another, a cause of action has accrued and the statute begins to run." Larson v. Lambert, 12 N. J. L. 27; Jett v. Hempstead, 25 Ark. 462; Everett v. O'Leary, 90 Minn. 154, 95 N. W. 901; Landis v. Saxton, 105 Mo. 486, 24 Am. St. Rep. 403, 16 S. W. 912; Larason v. Lambert, 12 N. J. L. 247. The Statute of Limitations begins to run against a cause as soon as plaintiff, being then under no disability, is at liberty to sue. Eller v. Church, 121 N. C. 269, 28 S. E. 364 (followed in Dunn v. Dunn, 137 N. C. 533, 50 S. E. 212); Smith v. Blythewood, Rice, 245, 33 Am. Dec. 111. See Buntin v. Chicago, etc. R. Co. 41 Fed. 747.

The right to commence an action exists the moment the cause of action accrues, and the cause of action cannot be said to have accrued until the right to bring an action exists. Weiser v. McDowell, 93 Iowa, 772, 61 N. W. 1094. And see Ware v. State, 74 Ind. 181; Miller v. Perris Irr. Dist. 85 Fed. 693; Angell, Lim. 42.

The running of the statute is not delayed until plaintiff can get sufficient evidence to maintain his action. 25 Cyc. 1065 and 1066, and cases cited. Comp. Laws 1913, § 7375; Robinson v. Russell, 24 Cal. 472; Van Pelt v. McGraw, 4 N. Y. 110; Yates v. Joice, 11 Johns. 136; Lane v. Hitchcock, 14 Johns. 213, and Gardner v. Heartt, 3 Denio, 234.

The supreme court of the state of Massachusetts in the case of McKay v. Coolidge, 218 Mass. 65, 105 N. E. 455, Ann. Cas. 1916A, 883, lays down the rule. See also s.c. 52 L.R.A.(N.S.) 701, and

note. The breach of duty of a public officer which directly affects the rights of a private individual gives rise at once to a right of action, even though the entire extent of the injury may not be discovered until later. Snedicor v. Davis, 17 Ala. 472; Shackleford v. Staton, 117 N. C. 73, 23 S. E. 101; Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264; Hall v. Tomlinson, 5 Vt. 228; Lambert v. McKenzie, 135 Cal. 100, 67 Pac. 6; Rosborough v. Albright, 4 Rich. L. 39; Owen v. Western Sav. Fund, 97 Pa. 47, 39 Am. Rep. 794; Daniel v. Gizzard, 117 N. C. 105, 4 L.R.A.(N.S.) 485, 23 S. E. 95; Kearns v. Schoonmaker, 4 Ohio, 331, 22 Am. Dec. 757; Utica Bank v. Childs, 6 Cow. 238; Bartlett v. Bullene, 23 Kan. 606; Jones v. Bain, 12 U. C. Q. B. 550; Lightner Min. Co. v. Lane, 161 Cal. 696, 120 Pac. 771, Ann. Cas. 1913C, 1093.

A recorder is not liable for more than nominal damages for a mistaken recording, unless plaintiff proves that he cannot collect the full amount from the party actually liable. State v. Davis, 117 Ind. 307; Strain v. Babb, 30 S. C. 341; Wacek v. Funk, 51 Minn. 282; Rising v. Dickinson, 18 N. D. 478.

GRACE, J. Appeal from the district court of McLean county, W. L. Nuessle, Judge.

The defendant Raugust was the duly qualified clerk of court of the county of McLean for the term of two years, his term beginning on the first Monday of January, 1907. He gave a bond which was duly signed by the Title Guaranty & Surety Company and surety in the sum of $10,000. The Citizens' State Bank of Garrison recovered judgment in the district court of McLean county against John D. Meyers and John McCutcheon in the sum of $224.15. The judgment was docketed in the office of the clerk of the district court of McLean county on the 4th day of May, 1907. In the month of September, 1908, that judgment was satisfied as to John McCutcheon. The defendant Raugust received the partial satisfaction, and made the following entry upon the record: "September 18, 1908, satisfied." The record thus showed the judgment satisfied as to both Meyers and McCutcheon. The entry thus erroneously made remained unchanged until January, 1911, when the following words were added thereto: "As to John McCutcheon." At the time said judgment was entered

and docketed and thereafter until the 12th day of September, 1910, Meyers was the owner in fee of the N. ½ of the N. W. ¼ of sec. 24 and the S. ½ of the S. E. ¼ of sec. 13, T. 148, R. 87. On the 12th day of September, 1910, John D. Meyers and Hulda J. Meyers executed and delivered to the plaintiff in this action the mortgage of $1,292. 30, which was filed for record and duly recorded in the office of register of deeds of McLean county on the 24th day of September, 1910.

At the time the plaintiff recorded said mortgage, the judgment, which appeared by the records of the clerk of court to be satisfied as to both Meyers and McCutcheon, was not in fact satisfied as to Meyers, and was a prior lien upon the land in question to that of the mortgage to this plaintiff. The mortgage was not paid and was foreclosed, and a sheriff's deed issued to the plaintiff, who has since been the owner of the premises. The Citizens State Bank of Garrison claimed a lien upon the premises by reason of said judgment, and in an action instituted against that bank by this plaintiff that judgment was decreed to be a prior lien to the mortgage, and this plaintiff paid to the Citizens State Bank the full amount of the judgment, interests, and costs, in all $378.36.

Proper issues having been duly formed, the case was tried to the court. It rendered its judgment for the dismissal of the action and granted the defendant costs. The trial court dismissed the action for the reason that the cause of action set forth in the complaint did not accrue within six years before commencement of this action and thus was barred by the Statute of Limitations of this state.

Whether the cause of action was actually barred by the Statute of Limitations is the principal question in this case. If the cause of action arose at the time of the impairment of plaintiff's mortgage at the time it was filed and recorded, then it is barred by the Statute of Limitations. If the cause of action arose at the time when plaintiff claims he actually suffered the damages in consequence of the negligent act of Raugust, the clerk of court, then the cause of action is not barred.

We are satisfied plaintiff's cause of action arose at the time of the impairment of its mortgage. At the time the mortgage was filed and recorded, it at that time had the right to determine priority beween

the mortgage and the judgment. The judgment had long theretofore been duly obtained and docketed. It was a valid and subsisting lien against the land in question at the time the mortgage was recorded. It was thus a prior lien to the mortgage. It is self-evident that the mortgage was impaired at the moment of its record. At that point of time the plaintiff could have commenced an action to determine the right of priority as between its mortgage and the judgment. It never did commence this action until more than six years after this mortgage became thus impaired. It is thus clear that the plaintiff's cause of action is barred by the Statute of Limitations. It is also established by the testimony that the land in question was worth about $3,600. It is thus of sufficient value to have fully paid all the liens which were against said land of which there is any competent evidence. It would thus appear that the plaintiff had suffered no damage.

It is unnecessary to enter further discussion of the matters involved in this case. We are quite confident the judgment of the trial court was right, and it should be affirmed. It is affirmed. The respondent is entitled to statutory costs on appeal.

CHRISTIANSON, Ch. J. (concurring specially). I concur in an affirmance of the judgment in this case for the reason that plaintiff has shown no damages under the rule announced in Rising v. Dickinson, 18 N. D. 478, 23 L.R.A.(N.S.) 127, 138 Am. St. Rep. 779, 121 N. W. 616, 20 Ann. Cas. 484.

I am also of the opinion that plaintiff's alleged cause of action is barred by the Statute of Limitations. I agree with my associates that so far as plaintiff is concerned its cause of action accrued at the time its mortgage became impaired; but I am not wholly satisfied that plaintiff had a six-year period thereafter in which to bring suit. Many of the authorities hold that the Statute of Limitations begins to run at the time of the wrongful act. See McKay v. Coolidge, 218 Mass. 65, 105 N. E. 455, Ann. Cas. 1916A, 883, and extended note to this decision as reported in 52 L.R.A.(N.S.) 701, 711. Other authorities hold that the Statute of Limitations begins to run at the time of the consequential injury. See note in 52 L.R.A.(N.S.) 701, 711.

Under either theory plaintiff's action is barred.

MARGARET SEXTON and Patrick Sexton, Appellants, v. S. S. SUTHERLAND and Frank Windmueller, Respondents.

(174 N. W. 214.)

Homestead — declaration of — right of action under.

1. Section 5610, Compiled Laws of 1913, bars a right of action founded upon the homestead right where no declaration of homestead is filed and where the property is not occupied as a homestead.

Homestead — action in defense of — when barred.

2. It is *held*, under the facts stated in the opinion, that the action of the plaintiff is barred under § 5610, Compiled Laws of 1913.

Opinion filed July 11, 1919.

Appeal from the District Court of Stark County, *W. C. Crawford*, J. Judgment affirmed.

Casey & Burgeson, for appellants.

The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. Swingle v. Swingle, 36 N. D. 611; Yusk v. Studt, 37 N. D. 221, 163 N. W. 1066; Rasmussen v. Stone, 30 N. D. 541; Severtson v. Peoples, 28 N. D. 382; Deiter v. Fraine, 20 N. D. 484.

A mortgage upon the homestead which has not been signed and acknowledged by the wife, is utterly void and of no effect. Justice v. Souder, 19 N. D. 618; Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544, and cases cited; Alt v. Banholzer, 40 N. W. 830.

An attempted conveyance by deed, mortgage or otherwise of his homestead, by a married man, without his wife's signature is void, although at the time she may have abandoned him and her home, and may be leading an adulterous life. Murphy v. Renner, 109 N. W. 593; 8 L.R.A.(N.S.) 565, see case note; Keyes v. Scanlan, 23 N. W. 570; Stanton v. Hitchcock, 31 N. W. 395; Sherrid v. Southwick, 5 N. W.

1027; Alt v. Banholzer, 40 N. W. 830; Sherrid v. Southwick (Mich.) 5 N. W. 1027.

One who gets possession of a homestead under proceedings in foreclosure of a void mortgage is not entitled to notice as a tenant at will, before being sued in ejectment. Sherrid v. Southwick (Mich.) 5 N. W. 1027.

To work an estoppel the mortgage itself must be a valid instrument. The covenants can have no greater validity than the deed itself. It would nullify the statute to hold that a deed which the law declares void should by reason of the covenant of the grantor operate effectually as a conveyance. Note to 95 Am. St. Rep. 922, citing Alt v. Banholzer, 12 Am. St. Rep. 681, 40 N. W. 830; 27 Cyc. 1723; Branham v. Mayor, and Common Council of San Jose, 24 Cal. 585; Justice v. Souder, 19 N. D. 613; Smythe v. Henry, 41 Fed. 705.

A sale under an action to foreclose a mortgage or "homestead premises" is void as against the wife of defendant when she is not made a party to such action. Watts v. Gallagher (Cal.) 31 Pac. 626; Chase v. Abbott, 20 Iowa, 154; McDonald v. Sanford, 88 Miss. 633, 117 Am. St. Rep. 758, 41 So. 369, 9 Ann. Cas. 1; Cook v. Klink, 8 Cal. 347; Kraemer v. Revalk, 8 Cal. 74; Van Reynegan v. Revalt, 8 Cal. 75; Sherrid v. Southwick, 5 N. W. 1027; Dorsey v. McFarland, 7 Cal. 342; Webb v. Winter, 65 Pac. 1028; Kellman v. Ludenecker, 28 S. W. 79.

C. H. Starke and *Thos. H. Pugh,* for respondents.

Where the husband has never occupied the land as a homestead, under the laws of this state, his wife could acquire no homestead rights therein. It never became their homestead by actual or constructive occupancy. Residence of some kind is a prerequisite to obtaining homestead rights in land. Brokken v. Baumann, 10 N. D. 453; Edmondson v. White, 8 N. D. 72.

There is no exception as to married women in the application of the principle of equitable estoppel, and that actual and positive fraud at the time of the act set up as constituting estoppel, is not essential to the application of the doctrine of estoppel, it being sufficient that the act relied on constitutes constructive fraud. 3 Pom. Eq. Jur. 3d ed. § 814; Enghelm v. Ekram, 18 N. D. 195; Galbraith v. Lunsford (Tenn.) 1 L.R.A. 522; Brokken v. Baamann, 10 N. D. 453;

Smith v. Spafford, 16 N. D. 208; Trousdale v. Beaton, 27 N. D. 441.

As to what constitutes actual possession, see Churchill v. Onderdonk, 59 N. Y. 134; Cutting v. Patterson (Minn.) 85 N. W. 172; Rosenfelt v. United States, 13 C. C. A. 450.

The statute places the homestead in the head of the family. Under the statute the duty is upon him to defend it. It is only in the event that the husband fails to claim the homestead that the wife may do so. Comp. Laws 1913, § 5605.

The wife cannot come in to defend except the husband fail to do so; and where the husband defends, the wife is bound by the judgment, though not a party. Heldenstein v. Carr, 3 Iowa, 287; (S. D.) 100 N. W. 755; 23 Cyc. 1245, 1253, note 70, and cases cited; Carmody v. Hanick, 85 Mo. App. 659; Wegman Piano Co. v. Irnine (Ga.) 32 S. E. 898; Willingham v. Slade (Ga.) 37 S. E. 737. See also note 10, 23 Cyc. 1363; Frazier v. Brasiere (Ky.) 36 S. W. 1038; 2 Black, Judgm. p. 556; Campbell v. Ayers, 18 Iowa, 252; Stitt v. Smith (Minn.) 13 L.R.A.(N.S.) 723; Lee v. Woods (Iowa) 25 N. W. 255.

The principle of subrogation is applied to aid those who have paid the debt of another under circumstances in which equity will imply a sufficient motive. 5 Pom. Eq. Jur. § 921; Baker v. Baker (S. D.) 49 N. W. 1064; Northwestern Mut. Sav. & L. Asso. v. White, 31 N. D. 348.

Birdzell, J. This is an appeal from a judgment in an action brought to determine adverse claims to a parcel of land described as lot 2, block 2, in the Hilliard & Manning's second addition to the city of Dickinson. The identical action has been once before this court upon an appeal from an order overruling a demurrer to the complaint. Sexton v. Sutherland, 37 N. D. 500, 164 N. W. 278. Other litigation involving the homestead right here in controversy, as between some of these parties and another mortgagee, has also been before this court. Mandan Mercantile Co. v. Sexton, 29 N. D. 602, 151 N. W. 780, Ann. Cas. 1917A, 67. In the latter case it was held under the facts presented that the property in question was the homestead of Patrick Sexton and Margaret Sexton, and the mortgage, not having been executed by Margaret Sexton, was decreed to be void. In the instant case the mortgage under which the respondent claims was dated about the same time as the Mandan Mercantile Company mortgage, and considerable

reliance seems to be placed upon the contention that, there being no difference in the homestead status of the property, the same result should be reached in this case. The respondent meets this contention by referring to evidence which, he contends, proves the facts to be otherwise than as established in the Mandan Mercantile Company Case. We need not, however, concern ourselves with the argument upon the question as to whether or not the property in question was the homestead of Patrick Sexton and Margaret Sexton at the time of the execution of the mortgage under which the respondent claims; for, if the position of the appellants should find the requisite support in the evidence, there are other findings, overwhelmingly supported by the evidence, which preclude the plaintiffs from obtaining the relief sought in this action.

It appears that while the litigation involving the Mandan Mercantile Company mortgage was pending, the mortgage under which Sutherland claims was foreclosed by action, Sutherland purchasing at the foreclosure sale. The foreclosure action was brought against Patrick Sutherland, Mrs. Sutherland not being made a party. The district court held the mortgage valid as against the claim of Patrick Sexton that the property was the homestead at the time of its execution. No appeal was taken from this judgment, and consequently it is a final adjudication as to Patrick Sexton. This action, then, must be regarded as involving the same homestead right; but it is asserted by Margaret Sexton. That the plaintiffs so regarded the action appears from the complaint, in which it is alleged that the property is the homestead of Margaret Sexton and her husband, and "that this action is for the purpose of freeing title to such lands and premises from all liens and encumbrances of whatever description claimed by the defendants, which liens and encumbrances have grown out of mortgages signed by her husband without being either signed or acknowledged by herself, the said Margaret Sexton." It is manifest that unless the plaintiffs' claim, that the property is their homestead, can be asserted, they have no claim as against this defendant, for the reason that the defendant has become the owner of the fee of Patrick Sexton by operation of a judgment which has become final. This brings us to the decisive question in the case.

Section 5610 of the Compiled Laws of 1913 provides as follows: ". . . no action, defense or counterclaim founded upon a right of homestead in property hereafter conveyed or encumbered, otherwise than as provided by the law in force at the time of the execution of such conveyance or encumbrance, and for which no declaration of homestead shall have been filed previous to the execution of such conveyance or encumbrance, shall be effectual or maintainable, unless such action is commenced or such defense or counterclaim interposed within two years after the execution of such conveyance or encumbrance; provided, nevertheless, that such limitation shall not apply if the homestead claimant was, at the time of the execution of such conveyance or encumbrance, in the actual possession of the property claimed and had not quit such possession previous to the commencement of such action, or the interposing of such defense or counterclaim."

The action in this case was begun by the service of a summons and complaint on September 16, 1915. The evidence shows the existence of the following facts: The mortgage through which the plaintiffs obtained their interest was dated and executed September 14, 1911. No declaration of homestead was ever filed by the plaintiffs or either of them. The plaintiffs never actually occupied the premises except from the fall of 1912 until the summer of 1913, since which time neither Patrick Sexton nor Margaret Sexton has lived on the premises. The plaintiff Margaret Sexton went to Elmira, New York, in 1913, and had not returned to North Dakota at the time of the trial of this action (September, 1917); her testimony being taken by deposition.

Patrick Sexton testified that in the summer of 1913 he advertised the premises for rent, and that they had been rented a good portion of the time since. He also testified that his wife had independent means sufficient to support her, and that it didn't seem hardly right for him to use the money that he had borrowed from other people to improve the property to the extent of making it worth $2,000, and then use the homestead right, which he could only assert through his wife, to avoid the indebtedness contracted for the purpose of making the improvements. Under the evidence it is clear that Patrick Sexton and Margaret Sexton had quit the actual possession of the property long previous to the commencement of this action. Thus the action is brought directly within the bar of the statute.

But appellants' counsel contend that possession through a tenant would be sufficient to prevent the Statute of Limitations above quoted from applying. The statute is not susceptible of such an interpretation. The term used in that portion of the statute which creates the exception to the two-year limitation is "actual possession." We are of the opinion that this means such a possession as will put one dealing with the occupant upon notice of his interest in the property. The homestead right is favored, and it may exist, as was held with respect to this particular property (Mandan Mercantile Co. v. Sexton, 29 N. D. 602, 151 N. W. 780), even where the claimant does not actually live on the premises, provided there is a constructive occupancy and even where no declaration has been filed. It depends largely upon intention. Where the law goes to such limits in favoring the right of homestead, it is reasonable to accord some protection to the rights of those dealing with the owner on the supposition that the property is not a homestead. This the statute does by requiring that as against such person the right shall be asserted within the prescribed period of time. Otherwise, transactions consummated in the utmost good faith and with no notice whatsoever, either actual or constructive, of the existence of a homestead right, would be subject to being avoided years after their completion, and upon the mere proof of the existence of an uncommunicated intention. When one deals with a person in *actual possession* of the property, he is bound to know the extent of his interest or right therein, but ownership alone is not sufficient to put a grantee or mortgagee upon notice that the owner regards the property as a homestead. If he actually does so regard it, however, and the element of occupancy is present, the right attaches and is protected. But, under the statute, it is the duty of the one claiming the homestead in these circumstances, as against a grantee or encumbrancer, to assert the right within two years after the execution of the conveyance or encumbrance.

It is true that there is an apparent inconsistency involved in the statement that contracts, conveyances, and encumbrances not executed in the manner provided by statute are utterly void and of no effect (Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Silander v. Gronna, 15 N. D. 552, 125 Am. St. Rep. 616, 108 N. W. 544), and a requirement that, as against such instruments, the homestead right shall be asserted within a prescribed

time; but the inconsistency inheres in the statute itself, for it is manifest that the statute was intended to apply in favor of those claiming through such instruments. The statute bars an action, defense, or counterclaim founded upon a right of homestead thereafter conveyed or encumbered *otherwise than as provided by the law in force at the time of the execution of such conveyance or encumbrance.*

This court held in the case of Justice v. Souder, 19 N. D. 613–619, 125 N. W. 1029, in construing identical language in a similar statute, that it was intended to apply so as to limit the time in which a mortgagor might question his conveyance or encumbrance of the homestead; and we can see no distinction between its application as against the mortgagor and against the spouse of the mortgagor, who had full knowledge of the mortgage and who, with such knowledge, voluntarily joined with her husband in quitting the possession of the property and thereafter neglected to assert her claim for the statutory period.

While the homestead law should be and is liberally construed to effectuate its beneficent objects, the principles of liberal construction cannot be so far extended as to deny effect to the plain language employed by the legislature in limiting the assertion of the homestead right in cases where the property is not, in fact, occupied as the homestead.

For the foregoing reasons our conclusion is that the action in question was barred by § 5610, Compiled Laws of 1913. Judgment affirmed.

GRACE, J. (dissenting). Section 208 of the Constitution of the state of North Dakota provides: "The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law."

In compliance with and pursuance of this constitutional mandate the legislature of North Dakota enacted § 5608 of the Compiled Laws of 1913 of North Dakota, which reads thus: "The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

This court has held in an unbroken line of decisions that a mortgage or conveyance of the homesteads executed and acknowledged by the husband only is void. Silander v. Gronna, 15 N. D. 552, 125 Am. St.

Rep. 616, 108 N. W. 544. In that case this court in the syllabus said: "A contract by a husband for the sale of the homestead of himself and wife is *void*, and an action against him for damages for its breach cannot be maintained." To the same effect is Gaar, S. & Co. v. Collin, 15 N. D. 622, 110 N. W. 81. In the syllabus of that case is the following language: "Section 5052, Rev. Codes 1905 [same as 5608, Comp. Laws 1913], which requires the signature of both husband and wife to all conveyances and encumbrances of the homestead, is a proper means for protecting and perpetuating the homestead, and is not open to the objection that, by legislative action alone, it impairs or defeats the husband's right of individual conveyance."

That language would seem to fairly and clearly state the meaning of the section under consideration to be much the same as § 208 of the Constitution. The language of the section is in harmony with the intent and purpose of that section of the Constitution. A long line of decisions of this court, possibly between fifteen and twenty, are largely to the same effect. See Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684; Bremseth v. Olson, 16 N. D. 242, 13 L.R.A.(N.S.) 170, 112 N. W. 1056, 14 Ann. Cas. 1155; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; Severtson v. Peoples, 28 N. D. 382, 148 N. W. 1054; Rasmussen v. Stone, 30 N. D. 451, 152 N. W. 809; Swingle v. Swingle, 36 N. D. 619 and many others.

If § 5610, Comp. Laws 1913, means what the majority opinion maintains, it is clearly opposed to and in conflict with § 208 of our Constitution, and is invalid and unconstitutional. Homestead laws should be liberally construed to effect their evident purpose, *viz.*, the protection of the home and family. Section 5610 is a law designed to benefit creditors, and as opposed to the Homestead Exemption Law should be strictly construed, and as thus construed, if it is found to be opposed to the plain meaning and intent of § 208 of our Constitution and if it operates to destroy the beneficent intent and purpose of the homestead, it should be declared invalid and unconstitutional.

Under the majority opinion, a mortgage upon a homestead given by the husband only while the husband and wife are in possession thereof is valid, and may be enforced as soon as possession is not maintained by those claiming the homestead. Such a construction nullifies § 5608,

Comp. Laws 1913, and is contrary to the plain terms, meaning, and intent of § 208 of our Constitution.

The greatness, welfare, safety, and healthful existence of the state or nation depend largely on salutary laws which protect the home, the source from which is obtained largely their future citizens. The greatness and prosperity of a state or nation is largely measured by the contentment, happiness, and security to be found in those homes. A law which throws protection about such home, and secures it to those who are raising the future citizens of the state, should have a very liberal construction to effect its purposes, and should, where there is possibly some conflict between it and another law designed to satisfy rapacious creditors, be preferred where it is the evident purpose of that other law to curtail the benefits of laws enacted to protect the homestead exemption as defined by law and as protected by the Constitution.

JOHN WINGEN, Appellant, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

(173 N. W. 832.)

Master and servant — scope of employment — negligence.

In this case plaintiff was employed by defendant as an ordinary carpenter on the division of its railroad between Portal and Harvey. On the night of September 16, the plaintiff and several other carpenters got on to a gas car to run from Flaxton to Portal, a distance of 8 or 9 miles, and when midway between the two places, they ran against a hand car wrongfully on the track and defendant was seriously injured.

Held, that there is no proof of wrong or neglect to sustain a verdict for damages.

Opinion filed November 16, 1919. Rehearing filed July 16, 1919.

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

Plaintiff appeals.

Affirmed.

E. R. Sinkler and *M. O. Eide*, for appellant.

It was the duty of the defendant to have the car under such control as to admit of its being stopped after he became able to discern objects on the track and before a collision with such objects should occur. La Pantney v. Shedden Co. 74 N. W. 713; Sliney v. Duluth & W. R. Co. 49 N. W. 187; 3 Labatt, Mast. & S. p. 3402, note; Texas Co. v. Beck, 133 S. W. 439; Horton v. Crosstown Str. R. Co. 121 N. Y. Supp. 749.

Negligence is imputed, as a matter of law, to an employee who allows a car under his management to travel at a rate of speed which is dangerous under the circumstances. 3 Labatt, Mast. & S. § 1254; English v. Chicago, M. & St. P. R. Co. 24 Fed. 908.

John E. Greene and *John L. Erdall* (*Alfred H. Bright*, of counsel), for respondent.

If the specifications do not conform to the statute and the rules of this court, it is held that the question will not be reviewed on appeal. Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276; Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63; Jackson v. Ellersen, 15 N. D. 533, 108 N. W. 241; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366; Feil v. N. W. German F. Ins. Co. 28 N. D. 357.

Negligence cannot be regarded as the proximate cause of an injury so long as it appears that some other thing contributed to produce the result. Moore v. Abbot, 32 Me. 53.

An injury that is not the natural consequence of the negligence, and would not have resulted from it but for the interposition of some new individual cause that could not have been anticipated, is not actionable, the negligence not being the proximate cause. Scale v. Gulf, C. & S. F. R. Co. 65 Tex. 277, 57 Am. Rep. 602; Missouri, K. & T. R. Co. v. Byrne, 40 C. C. A. 402, 100 Fed. 362; Washington v. Baltimore & O. R. Co. 17 W. Va. 196; Clark v. Wilmington & W. R. Co. 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 47; Louisville & N. R. Co. v. Quick, 125 Ala. 553, 28 So. 14, 16; Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 224.

An employer is liable for the act of an employee in charge of his vehicle only when it is committed under express or implied authority, and in the course of his employment. Thomp. Neg. art. 526, p. 489; Railroad Co. v. Dawkins (Tex.) 13 S. W. 982; Fleischner v. Durgin,

207 Mass. 435, 93 N. E. 801; Patterson v. Kates, 152 Fed. 481; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 17 Atl. 535; Steffen v. McNaughton, 142 Wis. 49; Cunningham v. Castle, 127 App. Div. 590; Slater v. Advance Thresher Co. 107 N. W. 133; Morier v. St. P. M. & M. R. Co. 31 Minn. 351, 17 N. W. 952; Smith, Mast. & S. 151; 2 Thomp. Neg. 855, 866; Shearm. & R. Neg. §§ 62, 63; Cooley, Tort, §§ 533 et seq.; Little Miami R. Co. v. Wetmore, 20 Ohio St. 110; Storey v. Ashton, L. R. 4 Q. B. 476; Mitchell v. Crassweller, 13 C. B. 236; McClenaghan v. Brock, 39 S. C. L. (5 Rich.) 17; Davis v. Houghtelin, 14 L.R.A. 737.

Robinson, J. This is an action for a personal injury based on the alleged negligence of defendant. As it appears plaintiff was a carpenter working for defendant at $75 a month on its division between Portal and Harvey. On a dark night of September 16, 1916, about 8 P. M., the plaintiff and six other carpenters were at Flaxton, where they got onto a gas car to go to their home or headquarters at Portal, a distance of 8 miles. When they had gone about 4 miles they ran against a gas car No. 2 standing on the track. The plaintiff was thrown off and seriously injured. At the time of the accident, plaintiff sat on the front seat with the driver, and held a lantern and occupied the position of a lookout.

There is no showing that the car was going at an unusual speed or that the plaintiff made any objection to the speed. A speed of 25 miles an hour would have made the distance from Flaxton to Portal in twenty minutes and from Flaxton to the place of the accident in ten minutes. No one knew the speed of the car at the time of the accident. It was a matter of conjecture,—a mere guess. But as the car had run only 4 miles and had only another 4 miles to run, the chances are that it was run at ordinary speed, and there is no evidence that anyone objected to the speed.

When the standing car was first observed by the plaintiff and the driver, it was at a distance of one or two rails—the distance of a second in the measure of time, and as it takes some time for the mind to think and to act, there was no time to stop the moving car so as to prevent the collision; and a sudden stop would have thrown the plaintiff directly in front of the car. Hence, there is no force in the ob-

jection that the car was not equipped with new brakes so that it might have been stopped or slowed up in the fraction of a second. Such a sudden stop or slow up would have been more dangerous than the collision.

Without the leave or license of the defendant, and contrary to its orders, the standing car had been wrongfully taken from Portal by the section foreman and others who were going to a lodge meeting at Flaxton. The car on the track was the real and proximate cause of the injury, but it was not there through any fault or negligence of the defendant. The defendant was not bound to stand with a club, and to keep watch and ward to prevent the wrongful taking of the gas hand car from Portal. Railroad companies must act through their servants, and assume that servants will not wrongfully take and misuse their property.

The plaintiff claims the benefit of the Employers' Liability Act: 35 U. S. Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; Laws 1915, chap. 207. These sections provide that every common carrier by steam railroad is liable in damages to any employee suffering injury while he is employed by such carrier in interstate commerce, if such injury results in whole or in part from the negligence of any officers, agents, or employees of such carrier; or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, or equipment; and also that an employee shall not be held to have assumed the risk of his employment in cases where the carrier violates a statute for the safety of employees and such violation contributes to the injury.

Aside from the employer's liability statute, it is provided:

Section 6108. An employer must in all cases indemnify his employee for losses sustained by the former's want of ordinary care.

Section 6107. An employee is not bound to indemnify his employer for losses suffered by him in consequence of the ordinary hazard of the business.

Section 5948. Every person is responsible for an injury occasioned to another by his want of ordinary care and skill in the management of his property or person except so far as he has wilfully or by want of ordinary care brought the accident upon himself.

The briefs of counsel do not discuss the question as to whether or

not at the time of the accident plaintiff was employed in the business of interstate commerce, and on the record it does not seem necessary for the court to decide that question. However, in the opinion of the writer, the ordinary carpenter work done by the plaintiff had no more of interstate commerce than the digging of potatoes for defendant on its right of way. Under either statute the question presented is one of ordinary care, and there is no proof to show a lack of ordinary care in any respect. Hence, there was no proof to sustain a verdict for damages.

Judgment affirmed.

GRACE, J. I dissent.

On Rehearing.

PER CURIAM. The plaintiff contends that the former decision erroneously held that the plaintiff was not engaged in interstate commerce. The contention is without foundation. It is true the writer of that decision expressed as his individual opinion that plaintiff was not engaged in interstate commerce, but the remaining members of the court did not do so. They deemed this to be immaterial, and expressed no opinion thereon. The Federal Employers' Liability Act and the state act are in all essentials the same. See 35 U. S. Stat. at L. 65, chap. 149, Comp. Stat. § 8657, 8 Fed. Stat. Anno. 2d ed. p. 1208; N. D. Laws, 1915, chap. 207. Under both laws, negligence is the basis of liability, and there can be no recovery under either act in the absence of negligence on the part of the railroad company or some of its employees. Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 502, 58 L. ed. 1062, 1068, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Manson v. Great Northern R. Co. 31 N. D. 643, 649, 155 N. W. 32; Vanevery v. Minneapolis, St. P. & S. Ste. M. R. Co. 41 N. D. 599, 171 N. W. 610; Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 859. A party, in order to be entitled to recover under either act, "must allege and prove (as in other actions based upon negligence): (1) The existence of some duty or obligation on the part of the defendant toward the plaintiff; (2) a failure to discharge that duty; and (3) in-

jury resulting from such failure." Koofos v. Great Northern R. Co. supra.

This is not a case where an employee of the company while engaged as such violates some rule by leaving a hand car or other obstruction upon the track. The undisputed facts are that the section foreman at Portal on the evening the accident happened took out the hand car for the purpose of *taking some companions*—not employees of the defendant—*to Flaxton to attend a lodge meeting.* It is undisputed that the proposed trip was in no manner connected with any business of the defendant. It is also undisputed that the taking and use of the car was in violation of the express rules and specific instructions of the company, and that the section foreman knew this to be so. It is further undisputed that the rule had been kept, and had never before been violated by the section foreman in question. Suppose the section foreman, instead of taking the hand car, had taken an automobile with an attachment so as to enable him to propel it along the railroad track, would anyone contend that the company would have been liable for any injury occasioned thereby? Yet the defendant railroad company had no more connection with the matter of the travel by hand car than if the section foreman and his companions had attempted to use an automobile, or than if they had walked along the track. The men were in no manner engaged in the service of the company, either directly or indirectly. The only connection the company had with the matter was that the parties were wrongfully using for their own private purposes a hand car belonging to the company.

On the other hand, there is no showing that the car in which plaintiff was traveling was being driven at an excessive rate of speed. In fact the evidence negatives rather than affirms excessive speed. Nor is there, in our opinion, any evidence from which reasonable men in the exercise of their judgment could find that the injury was occasioned by reason of defective appliances on the car on which plaintiff traveled. In our opinion the evidence in the case warrants only one conclusion,—that the proximate cause of the accident was the placing of the hand car on the track by the man or men who had wrongfully taken it from the defendant for the purpose of going to Flaxton to attend a lodge meeting at that place. Such man or men were not employees or representatives of the defendant, but were trespasssrs on

its railway. And such man or men—and not the defendant—were responsible for the injuries sustained by the plaintiff.

We adhere to the conclusion reached in the former decision,—that plaintiff has failed to establish that he was injured by reason of any negligent act on the part of the defendant or its employees.

BRONSON, J. I dissent. The evidence is sufficient to warrant a conclusion of fact that the plaintiff was subject to the terms of the Federal Employers' Liability Act. The complaint alleges a cause of action within the Federal statute. In any event, it is clear that the plaintiff at the time of his injury was then an employee of the defendant railway company, then engaged, either in interstate or intrastate commerce. It is unnecessary to make any extended discussion concerning the application of the Federal or the state Employers' Liability Act. The writer has fully discussed these matters in the dissenting opinion in Froelich v. Northern P. R. Co. post, 550, 173 N. W. 822. There is evidence in this case sufficient to form a question of fact for the jury concerning the negligence of the defendant in furnishing defective appliances which were the proximate cause of the injury sustained. The trial court improperly directed a verdict for the defendant. The judgment ought to be reversed and a new trial granted.

GRACE, J., concurs.

EQUITY CO-OPERATIVE PACKING COMPANY, a Corporation, and P. M. Casey, Respondents, v. THOMAS HALL, Secretary of State of the State of North Dakota, Appellant.

(173 N. W. 796.)

Corporations — amendment of articles of incorporation — compelling secretary of state to file articles as amended.

The plaintiff attempted to incorporate as a co-operative corporation under chapter 92 of the Session Laws of North Dakota for the year 1915. The

Incorporators informed their attorneys that they desired to be incorporated under said law, and instructed their attorneys to prepare articles of incorporation pursuant thereto. There were only seven signers of the articles of incorporation; they were unaware that it was required by said law to have twenty-five incorporators instead of seven. There was inadvertently omitted from the original articles of incorporation statements showing the co-operative character of the plaintiff. The incorporators of plaintiff believed it was properly incorporated pursuant to chapter 92. The legislature of 1917 passed an act known as chapter 97, whereby any co-operative corporation which had attempted to incorporate under any prior statute or which was theretofore organized and doing business under prior statutes could by taking the proper proceedings required by chapter 97 receive the benefit thereof and be bound thereby. The plaintiff did this and tendered to the secretary of state, Thomas Hall, certain amended articles of incorporation and a filing fee of $5 and recording fee of $6, which are the proper fees if plaintiff is a co-operative corporation. The secretary of state refused to receive and file such amended articles on the theory that the plaintiff was an ordinary corporation, and having increased its capital stock from $1,000,000 to $3,000,000, the defendant contends the filing fee would be $1,000 and recording fee $6. The trial court, W. L. Nuessle, issued a writ of mandamus directed to Thomas Hall, secretary of state, requiring him to file in his office the amended articles of incorporation. *Held* that the action of the trial court in overruling defendant's demurrer to application for mandamus and his action in granting the writ was in all things proper and lawful, and its action therein is affirmed.

Opinion filed June 13, 1919.

Appeal from District Court, Sixth Judicial District.

Affirmed.

W. H. Stutsman, for appellant.

The charter of a private corporation having capital stock, organized under a general law of the state, constitutes a "contract" between the state and the corporation, between the state and the shareholders in the corporation, and between the corporation and its shareholders, which cannot be violated by the state. Larabee v. Bolley, 175 Fed. 365, 179 Fed. 461, 36 L.R.A.(N.S.) 1065, 31 Sup. Ct. Rep. 189.

The charter of a private corporation is a contract within U. S. Const. art. 1, § 10, prohibiting laws impairing the obligation of contracts so far as it is a contract between the state and the corporation, and between the stockholders and the state. Avondale Land Co. v. Shook, 170 Ala. 379, 54 So. 268.

Where a corporation is organized under the general laws of the state, its articles of incorporation, or charter, constitute a "contract" between the state and the corporation, protected by the Federal Constitution from legislation impairing its obligation. Arkansas Stave Co. v. State, 94 Ark. 27, 27 L.R.A.(N.S.) 265, 140 Am. St. Rep. 103, 125 S. W. 1001. The charter of a private corporation is a contract between it and the state, which the state, unless it reserves the right to do so, cannot alter to the prejudice of the corporation without its consent. Louisville v. Freeland, 140 Ky. 400, 131 S. W. 195.

A stockholder cannot be deprived of his vested property rights under the reserved power to amend the statute on incorporation or by-laws. Bond v. Atlantic Terra Cotta Co. 122 N. Y. Supp. 425.

The power of the state to alter or repeal corporate charters is one of regulation and control, and it cannot extend to interference with property rights vested under a legitimate exercise of the power granted. State v. R. R. Com. (Wis.) 121 N. W. 919; Com. v. Essex Co. 13 Gray, 239; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Miller v. State, 13 Wall. 478, 21 L. ed. 98; Holyoke Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; Persall v. Great Northern R. Co. 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705.

The reserved power stops short of the power to devest property rights, and is embodied in the state Constitution for the purpose of enabling the state to retain control over corporations, and must be construed in connection with the other provisions of the Constitution, to the effect that private property shall not be taken for public use without compensation. State v. R. R. Commission, supra.

S. L. Nuchols, for respondent.

GRACE, J. This is an appeal from a certain order overruling a demurrer by defendant to an application for an alternative writ of mandamus and the granting of the writ, which required the defendant, Thomas Hall, as secretary of state, to file in his office certain amended articles of incorporation of the plaintiff upon the payment of a filing fee of $5 and the further sum of $6 for recording the same.

The Equity Co-operative Packing Company was organized on about the 4th of October, 1916, and its articles of incorporation were filed in

the office of the secretary of state, October 25, 1916. The purpose of the incorporation was to build and operate packing plants, slaughter-houses, stockyards, etc., and to buy, sell, and deal in cattle, hogs, sheep, poultry, etc. It was also the purpose of the corporation to carry on a business of wholesale and retail dealers in meat products, etc. Its principal place of business was at Fargo, North Dakota; the term of its existence was twenty years. The number of directors was fixed at seven. The articles of incorporation further named certain persons who were appointed to serve until the successors were elected and qualified, and they signed the articles of incorporation. The amount of capital stock was fixed at $1,000,000 divided into 40,000 shares of par value of $25 each.

At the time of the incorporation, a filing fee of $532 was paid. In January, 1919, the plaintiff decided to increase his capital stock from $1,000,000 to $3,000,000. It held a meeting of its stockholders January 17th; at that meeting 31,744 shares of stock, distributed among 5,994 stockholders, which constituted a majority of all the stockholders, voted to amend the articles of incorporation by increasing the capital stock from $1,000,000 to $3,000,000. On January 21, 1919, the plaintiff presented to the defendant, the secretary of state, a copy of the amendment and also the sum of $11, and requested the secretary of state to file and record such amendment, which the defendant refused to do on the ground that if the plaintiff was an ordinary, and not a co-operative corporation, the statutory filing fee for the amendment would be $1,000 and in addition thereto a recording fee of $6, in all $1,006, instead of the sum of $11 as claimed by plaintiff.

In the application for alternative writ of mandamus, the following allegations are set forth:

"That it was the intention and purpose of the original incorporators of the Equity Co-operative Packing Company, a corporation, and the persons who signed the articles of incorporation of said corporation, to organize a co-operative corporation pursuant to chapter 92 of the Session Laws of North Dakota for the year 1915; and the attorneys who were employed by said incorporators for the purpose of preparing the articles of incorporation of said corporation were informed that the incorporators desired and intended to organize a co-operative corporation pursuant to chapter 92 of the Session Laws of North Dakota

for the year 1915, and said attorneys were instructed to prepare articles of incorporation pursuant to chapter 92 of the Session Laws of North Dakota for the year 1915; that none of the original incorporators of said corporation or the persons who signed the articles of incorporation of said corporation are lawyers or versed in the law, and did not know that chapter 92 of the Session Laws of North Dakota for the year 1915 required the association together of not less than twenty-five persons to form a co-operative corporation pursuant to such statute, and were not informed by the attorneys who prepared the articles of incorporation for said corporation that at least twenty-five original incorporators were necessary under said statute to incorporate a corporation pursuant to said statute; and when said incorporators signed the articles of incorporation for said corporation, and filed said articles of incorporation in the office of the secretary of state for the state of North Dakota, they believed that they were incorporated pursuant to chapter 92 of the Session Laws of North Dakota for the year 1915 and intended to form a corporation pursuant to said statute; but because said incorporators were not informed as to the number of persons necessary to form a co-operative corporation pursuant to said statute, the articles of incorporation of said corporation were signed by only seven persons, and contains nothing indicating an intention to form a co-operative corporation; that the original by-laws adopted by the stockholders of said corporation provide for the distribution of profits of said corporation in part on the basis of and in proportion to the amount of property bought from or sold to members of said corporation and to other customers, and of labor performed and other services rendered to said corporation, as is shown by a copy of the original by-laws of said corporation hereto attached marked exhibit "A" and made a part of this affidavit and application; that all of the shares of the capital stock of said corporation which have been sold, have been sold upon the statements and representations of the officers and agents of said corporation that the same was a co-operative corporation; and all of the stockholders of said corporation believed the same to be a co-operative corporation which will pay patronage dividends to customers and patrons."

It also appears from the application that a special meeting of the stockholders of the corporation was had on the 29th day of October,

1918, for the purpose of voting upon accepting the benefits of chapter 97 of the Session Laws of North Dakota for the year 1917, and a majority of all the stockholders did vote to accept the benefits thereof, and to be bound by the provisions of said act pursuant to § 16 thereof; that on the 30th day of October, 1918, said corporation filed in the office of the secretary of state of the state of North Dakota a written declaration signed and sworn to by the president and secretary of said corporation, stating that at said special meeting of stockholders, said corporation had by majority vote of all the stockholders decided to accept the benefits of and be bound by the provisions of said chapter 97.

The claim of plaintiff and respondent is that, while the articles of incorporation were in form those of a general corporation, that it was in fact the purpose and intention of the incorporators to incorporate as a co-operative corporation under chapter 92 of the Laws of 1915, and that it clearly appears that such business is of a co-operative character as disclosed by an examination of its by-laws and other sources of information; that therefore the plaintiff is permitted under chapter 97 of the Session Laws of 1917 to cure the error, if any, in its incorporation, by taking the proceedings for that purpose required by said chapter, and that plaintiff has taken all such proceedings and has therefore cured such error.

The defendant demurred to the application. He thus admits all the material allegations therein. He thus admits it was the intention of the incorporators of the Equity Co-operative Packing Company to organize a co-operative corporation pursuant to chapter 92 of the Session Laws of 1915; that when the incorporators signed and filed the articles of incorporation they believed they were incorporating pursuant to said chapter; admits whatever is contained in the by-laws of the plaintiff as they were made a part of the affidavit and application for the writ; admits that the different meetings of the stockholders for the purpose of voting and accepting the benefits of chapter 97 of the Session Laws of 1917 were held, and that a majority of all the stockholders did vote to accept the benefits thereof; and all similar matters that are alleged are thus admitted; admits that the articles of incorporation were by mistake signed by seven instead of twenty-five signers as required by Session Laws of 1915.

We are of the opinion that chapter 62 of the Laws of 1909 have no

application to the facts in this case; that chapter 92 of the Session Laws of 1915 is not an amendment thereof, but is a separate and distinct law under which the plaintiffs could incorporate; in it there is no limitation of the amount of capital stock for which incorporation may be made. Under said chapter 92, such co-operative association or corporation may be incorporated for the co-operative transaction of *any lawful business* including the construction of canals, railways, irrigation ditches, bridges, and other works of internal improvement. There is thus no limitation as to the kind or character of business that may be engaged in; it is a much broader and different law to that of 1909. Chapter 92 repealed all acts or parts of acts in conflict with it. Section 4 of chapter 62 of the Laws of 1909, relative to the limitation of the amount of capital stock for which a co-operative corporation may be organized, is in conflict with it and was by it repealed. Under chapter 92 there was no limitation upon the amount of capital stock. Section 4 of chapter 62 of the Laws of 1909, which is the same as § 4606 of Compiled Laws of 1913, was re-enacted in chapter 95 of Compiled Laws of 1917, with the exception that there was no limitation placed upon the amount that might be designated as the capital stock thereof, under chapter 95 the amount of capital stock was required to be stated in the articles of incorporation.

After § 4606 was re-enacted, there being no limitation to the amount of capital stock for which a co-operative corporation might be organized, it became in this respect identical with § 92, in which there was no limitation as to the amount of capital stock. The only difference in this respect between the two sections is that in chapter 95 the amount of the capital stock must be stated. In chapter 92 there is nothing said about the capital stock, no limitation placed thereon, and it must follow that the capital stock thereunder could be any amount the incorporators saw fit to name. We do not believe there is any constitutional question presented in this case. There is no question presented in this case concerning the election of directors or managers of the corporation. The sole question presented is to determine whether or not the plaintiff is an ordinary or a co-operative corporation. From the allegations in the application and affidavit for a writ of mandamus, and from the demurrer thereto, which admits all such allegations, we think it stands conceded that the plaintiff is a co-operative corporation; that

it attempted to organize under chapter 92 of the Session Laws of 1915. This being true, it comes under and is entitled to all the benefits and privileges set forth in chapter 97 of the Session Laws of 1917, and especially to § 16 thereof; that, being a co-operative corporation, the filing fee of $5 and recording fee of $6 was the proper amount to tender the secretary of state, the defendant herein, for the purpose of having the amendment of its articles of incorporation filed and recorded.

We have considered all the points presented in this appeal, and we find no necessity of further discussion of them. The order of the District Court that the peremptory writ of mandamus issue is in all things affirmed.

ROBINSON, J. (dissenting). The purpose of this suit is to obtain a writ of mandamus commanding Thomas Hall, as secretary of state, to receive and file amended articles of incorporation, increasing the capital stock from $1,000,000 to $3,000,000. The writ of mandamus may be issued to a person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Comp. Laws, § 8457. The question is: Was it the plain duty of Thomas Hall to receive and file the amended articles without receiving the regular incorporation fee of $5 for every $10,000 increase of the capital stock, as provided by statute? Sections 4509, 4510.

In October, 1916, the plaintiff filed with the secretary of state articles of incorporation signed by seven persons as directors, *viz.*: M. P. Johnson, Tolley, N. D.; A. M. Baker, Fargo, N. D.; F. J. Lee, Valley City, N. D.; Anthony Walton, Minot, N. D.; P. H. Casey, Lisbon, N. D.; J. C. Bergh, Hendrum, Minn.; J. C. Leum, Mayville, N. D.

The articles are in effect: (1) The purpose of the corporation is to do a general packing-house business, with its principal office at Fargo; (2) the number of directors shall be seven; (3) the amount of its capital stock shall be $1,000,000. The stockholders shall be entitled to receive a cumulative dividend of 8 per cent.

In accordance with the statute the plaintiff paid the secretary of state the sum of $533. Manifestly the plaintiff was incorporated under the general laws, and under such laws it was not entitled to in-

crease its capital stock without paying a fee of $5 for each 10,000 of the increase. The application for the writ was based merely on the presentation made to Thomas Hall. This suit is based on a verified complaint, dated February 5, 1919, and on a copy of the by-laws of the company. The complaint avers that plaintiff is a co-operative packing company; that it was the purpose of the original incorporators to organize as a co-operative corporation under chap. 92, Laws 1915, and that by mistake of their counsel, who drafted the articles, they organized as they did under the general laws; that the by-laws provide for the distribution of profits in accordance with chapter 92; that in 1918, at a special meeting of the stockholders, a majority of all the stockholders voted to accept the benefits and to be bound by the provisions of chapter 97, Laws 1917. On October 30, 1918, it filed in the office of the secretary of state a written declaration, signed and sworn to by its president and secretary, stating that at such special meeting the stockholders, by a majority vote, agreed to accept the benefits and to be bound by the provisions of said chapter 97; that at a meeting of the stockholders in January, 1919, at which more than two thirds were present, they voted to amend the articles of incorporation by increasing the capital stock to $3,000,000, and the secretary of state was duly requested to file and record such amendment on payment of $11, but he demanded an additional sum of $1,000.

The complaint is in the nature of a bill in equity, appealing to the court to excuse the carelessness of the plaintiff and its counsel, by which they incorporated under the general laws, when their purpose was to incorporate under chap. 92, Laws 1915, but it does not appear that any such excuse was presented to the secretary of state, or that the statute made it his plain duty to act the part of a clairvoyant or a mindreader so as to determine what the plaintiff intended to do, and to correct its mistakes. Furthermore, it does appear from a copy of the by-laws (§ 28), submitted as a part of the complaint, that it is not the purpose of the plaintiff to distribute its earnings in accordance with chapter 92. By said § 28 it is provided that, after a sinking fund has been provided and all running expenses and dividends paid, a sum not to exceed 10 per cent of the remaining net profits shall be paid to the American Society of Equity for educational purposes, which shall be prorated among the several states, and the remainder of the net

profits shall be apportioned among the patrons as a patronage dividend. Now it is clear that does not accord with chapter 92, and it does not appeal to equity. It does not show an honest and good-faith purpose to deal fairly with the stockholders and to compete successfully against the great packers, who do not give away 10 per cent of their net earnings. Furthermore, there is no showing that the contemplated increase of stock is in accordance with the letter or the spirit of the Blue Sky Law (Laws 1915, chap. 91). Clearly the application should be denied.

CHRISTIANSON, Ch. J. (concurring specially). This is a mandamus proceeding wherein the relator asks that the secretary of state be compelled to file certain amended articles of incorporation. The controversy arises over the amount of filing fee to be paid. The relator claims that it is a co-operative corporation, and is entitled to have these articles filed upon the payment of the sum of $11. The respondent contends that the relator has not shown itself entitled to be classified as a co-operative corporation and therefore is required to pay the fee exacted from general corporations. The relator interposed a general demurrer to the application for the writ, and the question presented is whether plaintiff's application states facts sufficient to entitle it to the relief sought.

In 1909 the legislature of this state first provided for the incorporation and regulation of co-operative associations. See chap. 62, Laws 1909. In this act the amount of capital stock to be issued by such associations was limited to $50,000. The act also provided that no member should own shares of a greater par value than $1,000. In 1915 the legislature enacted an act to define co-operative associations and to authorize their incorporation. Laws 1915, chap. 92. This statute defined a co-operative company, corporation, or association, to be one "which authorizes the distribution of its earnings in part, or wholly, on the basis of, or in proportion to, the amount of property bought from or sold to members, or to members and other customers, or of labor performed, or other services rendered to the corporation." The act provided that "any number of persons not less than twenty-five may be associated and incorporated for the co-operative transaction of any lawful business." The act further provided that "any co-operative [company], corporation, or association, being under the definition

given in § 1 of this act is hereby authorized to file with the secretary of state a declaration signed by its president and secretary stating that it is a co-operative corporation or association as above defined, that at a meeting of the stockholders held in which all stockholders were represented all stockholders unanimously consented to come under the provisions of this act," and that upon the filing of such certificates the corporation shall be entitled to the same legal recognition as though its articles of incorporation had originally been filed under this act. In 1917 the legislature enacted a law amending the provision of chapter 62, Laws 1909, by removing the limit of $50,000 placed upon the amount of the capital stock to be issued by co-operative corporations. Laws 1917, chap. 95. It also enacted an act relating to the incorporation of co-operative associations, the fees to be paid therefor, and the powers and duties and obligations thereof. Laws 1917, chap. 97. This statute provided that a co-operative association may be formed by any number of persons not less than fifteen. This statute also contained the following provision, the construction and application of which forms the basis of this controversy, to wit: "All co-operative corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, under prior statutes, . . . shall have the benefit of all the provisions of this act, and be bound thereby on filing with the secretary of state a written declaration signed and sworn to by the president and secretary to the effect that said co-operative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions of this act. No association organized under this act shall be required to do or perform anything not specifically required herein, in order to become a corporation or to continue its business as such."

It will be noted that there is a marked distinction between chapter 92, Laws 1915, and chapter 97, Laws 1917, as regards the right of existing corporations, and the powers and duties of the secretary of state as to such corporations when they endeavor to claim the benefit of laws applicable to co-operative corporations. Under the provisions of chapter 92, Laws 1915, any general corporation might become a co-operative corporation upon the assent of all of its stockholders, by filing the proper certificate with the secretary of state. Under that

act the duties of the secretary of state were merely ministerial. If the certificate tendered to him was in proper form and accompanied by the proper fee, he must file it. But chapter 97, Laws 1917, does not enable general corporations to declare themselves to be co-operative corporations. Only those corporations which have been organized and are doing business under prior statutes as co-operative associations, or which "have attempted to so organize and do business," are entitled to claim or obtain the benefits thereof. Who is to determine, in the first instance, whether a corporation is one entitled to qualify under the act? No specific provision is made in the act for such determination by anyone, unless it be by the secretary of state. The certificate must be filed with him. And of course, when a corporation seeks to qualify under the act, he necessarily determines whether it has shown a prima facie right to do so. In this case the relator was permitted to qualify under the act.

The matter comes before us on a demurrer to the application for the writ. The articles of incorporation are not before us, except in so far as the contents thereof are averred in the application. I am by no means clear as to what the legislature meant by the language employed in the Act of 1917. And while I have considerable doubt upon the matter I am not prepared to say that the majority members are in error in holding that the facts alleged show that the incorporators of the relator "attempted" to organize a co-operative corporation.

Manifestly the questions involved are such that it is not at all strange that the secretary of state should have been in doubt as to the fee to exact from the relator. It is not denied that the secretary of state has acted in good faith in the matter. He has not questioned the propriety of the remedy employed by the relator, or placed any obstacles in the way of obtaining a speedy determination of the question involved. In his brief, relator's counsel expresses his appreciation of the courtesies shown by the adverse party during the course of the litigation, and the assistance given to the end that a speedy determination might be obtained of the questions involved. Under the circumstances it is only right no costs whatever should be awarded against the respondent. See State ex rel. Baker v. Hanna, 31 N. D. 570, 579, 154 N. W. 704.

SAMUEL ELLIS, Petitioner, and H. A. Merrifield, Administrator, Appellants, v. ELIZABETH A. ELLIS, Fred L. Ellis, Ernest J. Ellis, Frances A. Ellis, and John E. Ellis, Respondents.

(174 N. W. 76.)

Executors and administrators — §§ 8657 and 8663 construed — appointment of administrator other than party named in petitions of interested parties.

1. Under §§ 8657 and 8663, Compiled Laws of 1913, the county court, in exercising its probate jurisdiction, is vested with a discretion to determine whether or not the welfare of the estate of a deceased person manifestly requires the appointment, as administrator, of a disinterested third person, instead of petitioning parties who, by the former of the two sections, are given the right to control the appointment.

Executors and administrators — discretion of court where interested parties fail to agree.

2. It appearing that the surviving children of a deceased person who have the right to control the appointment of an administrator did not agree upon the appointment; that there was evident friction existing as to the management and disposition of the estate; and that the court had exercised the discretion vested in it by the appointment of a suitable third person,—it is *held*, for these and other reasons indicated in the opinion, that the discretion was not abused.

Opinion filed June 21, 1919. Rehearing denied July 18, 1919.

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

Reversed.

J. A. Dwyer and *W. S. Lauder*, for appellants.

"It is discretionary with the court who shall be appointed administrator, when the heirs cannot agree." Comp. Laws 1913, §§ 8657, 8663; Re Anderson (Neb.) 166 N. W. 261; Re Scott, 106 N. W. 1003; "The undertaking on appeal insufficient." Stewart v. Lynnes, 22 N. D. 149. See also the late case First State Bank v. Kellogg Commission Co. 41 N. D. 269, 170 N. W. 635.

Dan R. Jones and *Jos. G. Forbes*, for respondents.

This action was and is triable *de novo* both in the district court and in this court. Re Peterson, 22 N. D. 480.

"The court have no power to declare a person incompetent to act as administrator unless he is one of the classes declared to be incompetent by the Probate Code." Re McClellan (S. D.) 129 N. W. 1037; Re Banquier, 26 Pac. 178, 532; Holiday v. Holiday, 16 Or. 147, 19 Pac. 81; Li Po Tai Estate (Cal.) 41 Pac. 486; Re Owens (Utah) 85 Pac. 277; Re Myers (Cal.) 100 Pac. 712.

"The right of administration of a decedent's estate is a valuable right, and those on whom it has been conferred by statute should not be deprived of it except as the statute has provided." Williams v. Williams, 24 App. D. C. 214; Ky. Statutes 1903, § 3896; Buckner v. Buckner, 120 Ky. 596, 87 S. W. 776; Re Davis, 96 N. Y. Supp. 1106, 9 Dec. Dig. Executors and Administrators.

Parties interested in the estate should administer it. Re Davis, (Cal.) 39 Pac. 757; Re Carmody, 26 Pac. 373; Osborne v. United States Bank, 22 U. S. 738, 6 L. ed. 204; Abbott v. L. Hommedieu, 10 W. Va. 677; State v. Cummings, 36 Mo. 278.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Richland county, rendered in a proceeding appealed from the county court and involving the right of certain persons, hereinafter named, to the administration of an estate.

One John L. Ellis, a resident of Richland county, died on September 7, 1917, intestate. He left surviving six children, as follows: Ernest J. Ellis, forty-nine years of age, Fred L. Ellis, forty-two years of age, Elizabeth A. Ellis, forty years of age, Frances A. Ellis, thirty-eight years of age, and John E. Ellis, thirty-two years of age. The property belonging to the estate consisted of a section of land in Richland county and personal property worth about $2,000. Petitions for letters of administration were filed in the county court by Samuel and Elizabeth. Upon hearing the petitions the county judge decided that the best interests of the estate would be subserved by appointing a third person, and he thereupon appointed H. A. Merrifield, a banker and business man residing at Hankinson. From the decree appointing Merrifield, Elizabeth and Fred appealed to the district court. The district court, in determining the appeal, reversed the decree of the county court and directed the county judge to remove Merrifield as administrator and to appoint Elizabeth in his stead. It appears that

the county judge had previously denied the petition of Elizabeth on the ground and for the reason that he did not consider Elizabeth "a fit and competent person to administer the estate." Also that the petition of Samuel was denied for the reason that the court considered the relations existing between him and the other heirs to be such as to make his appointment not for the best interests of the estate. The court thereupon proceeded to exercise the authority assumed to be vested in it by § 8663, Compiled Laws of 1913, and appointed Merrifield. Samuel did not appeal from the judgment of the county court denying his petition, and the district court, accordingly, upon the appeal of Elizabeth and Fred, determined that letters should have issued upon the petition of Elizabeth. It is from this determination that Merrifield and Samuel appeal to this court. A supersedeas order was entered in the district court and the necessary bond given.

The appellants' contentions here center about two main questions which are argued in the brief. First, did the county court have any jurisdiction to appoint a third person administrator under the facts in this case? Second, if the county court was vested with discretion in the matter, in the exercise of which it could deny the petitions both of Samuel and Elizabeth, was the discretion so abused in appointing Merrifield as to warrant the reversal of the decree by the district court?

Section 8657, Compiled Laws of 1913, provides: "Administration of the estate of a person dying intestate *must* be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order: (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed. (2) The children . . . ." (The remainder of the section is not pertinent.) Section 8663 provides as follows: "Administration may be granted to an applicant or to one of several applicants according to the prescribed order of preference, without regarding any party having an equal or a better right, who fails to assert his claim; and when there are several applicants of the same class the appointment may be awarded according to their relative fitness. But *in every case, when the welfare of the estate manifestly so requires,* an heir may be joined with the surviving husband or wife, or two or more applicants of the same class may be united in the ad-

ministration, *or the court may in its discretion appoint some suitable and discreet person who is disinterested as between the parties.*" In the instant case there are two claimants for letters of administration belonging to the same class, and both could not be appointed unless joint administration were deemed by the court advisable, and, in view of the facts appearing in this record, joint administration was clearly not advisable. It was the duty of the county court, then, either to appoint one of the two petitioners, or if, in the judgment of the court, the appointment of a third person would best serve the interests of the estate, such appointment was proper provided it was authorized.

The respondents contend that the duty and authority of the county court was limited to a determination of the respective claims between the contesting petitioners; but we are of the opinion that § 8663 clearly gives to the court, in circumstances such as are presented in this appeal, a discretion to appoint "a person who is disinterested as between the parties." It will be seen that the section gives to the court power to appoint a third person who is disinterested *as between the parties.* The term "parties" here manifestly refers to those who are given preference in the appointment under § 8657. Express authority is therefore conferred to appoint a third person where, in the judgment of the court, the best interests of the estate will be thereby subserved.

The case then, upon this appeal, resolves to the question as to the propriety of the exercise of the discretion vested in the county court. In the district court it appeared that four of the six heirs named petitioned for the appointment of Elizabeth, and that the similar desire of Frances, an incompetent person, was manifested through attorneys employed by her brother and guardian, Ernest J. Ellis. The district court, however, found H. A. Merrifield to be a competent business man and a stranger to the estate, but that the welfare of the estate did not manifestly require the appointment of a disinterested person. Neither did the district court consider the claim of Samuel to appointment, for the reason that he had not appealed from the decree of the county court. From the record, it appears that the deceased was a man about seventy-six years of age, and that just prior to his death he was living alone and farming, possessing the usual equipment of live stock, machinery, etc. About two weeks prior to his death, Samuel took him to his home, where he was cared for by Samuel and

his wife, the funeral being held from Samuel's home. Elizabeth, at the time, was at College Place, Washington. She had knowledge of her father's illness. The deceased relied upon Samuel to take care of his live stock. The following letter, written by Elizabeth three days after her father's death, indicates her point of view regarding the disposition of some of the property:

College Place, Wash.,
September 10, 1917.

Dear Mary:—

I thought that you folks could get along without me and that it would be such an expense. If you folks will get father's trunks and open then take all his things over to your house and keep them their. I would like the towels and tablecloths and a pair of blankets. I would like the separator, cream separator, and you folks take the corn planter and let Fred take something else. I would like a bedstead and the rocking chair. I may be married soon. Will know for sure soon. Will let you know. How about the business? You folks could even get hay for your share. I could take a wagon too.

Did Father make a will? Hope that you folks are all well. Did father say anything about anything before he died? Did he suffer much? You folks look after the ducks, etc. Suppose you will be very busy. You could just keep my things at your house and see to the sending later when you had more time.

Write me soon.
Elizabeth.

At the time the petition was presented to the county court it was clearly the duty of the court to consider the probability of Elizabeth's anticipated marriage, as this would disqualify her to act as administratrix. Comp. Laws 1913, § 8682. Another letter of November 1, 1917, further reflects the attitude of Elizabeth towards the division of the estate. Her letter follows:

Hankinson, N. Dak.
Nov. 1, 1917.

Dear Brother Sam:—

I write this on request of *Ernest, John, Fred, and myself*. We all

want the court to divide all the land but the Ranke place, that will have to be sold, as there is such a large mortgage against it. The court will have to appoint an Adm. for that Ranke place. It will have to be sold and after paying judge and lawyers be divided among us all.

Now the *Tree Clame* is valued at $8,000, and Ernest and Frances will go in on that. Ernest can be her gardean or some of the rest of us, not you for Ernest would not consent to have you in with him. It will be a joint deed or can be separate.

The place where Oro Baker lives. John and Elizabeth, Joint Deed $8,000. Now Fred says he will take

Section 17—lot 2		48.18 A
—lot 1		40.69 A
		88.87
88.87 A x $50.00	$4,443.50	
He will pay you cash	443.50	
		40. A
You have section 17—lot 3		15.55 A
Strip		55.55
55.55 x $50.00	$2,777.50	
$4,000—$2,777.50	1,222.50	

Then you have over $400.00 personal property you have coming:

$1,222.50
443.50

$779.00
400.00 Personal property.

$379.00

That we will pay you cash from the bank, but you can't take that yourself. You got the personal property cheap and the boys say you can have all the corn on Ranke place and Ernest place raised this year.

Your sale was not lawful the judge told me so with his own mouth you are under arrest John and Ernest have signed papers. But we don't want any trouble. The judge said the land could be divided, if

all are willing and that will give us all more without any trouble. People you owe are going to come in against the estate to get their pay, this way will give you a chance to pay them and get that piece of land clear. You are coming into lots of trouble but that seems the best way out to us. Fred will rent his share to you on half next year. We are all planning to have free seed for just next year out of what Ora Baker raised. We have ordered him not to sell any or let be sold. Now I hope this will be all right with you and the business can be done Tuesday. That will stop a lot of expense. Have you hauled all father's share of grain on Harry's place?

Drop in at Fred's to see me if you wish, but no quarreling, or drop me a line.

Elizabeth.

This letter indicates a degree of feeling toward Samuel that would justify the court in observing caution in selecting one of the petitioning parties to represent the interests of an estate in which the interests of all should be equally protected.

Respondents contend that Samuel and Merrifield conspired to conduct a sale of the personal property soon after the death of the deceased, but it appears from a letter written by Elizabeth, in August, that she anticipated the necessity for the sale and disposition of the live stock. And it further appears that the burden of caring for the live stock fell primarily upon Samuel, and that at that particular time of the year the conserving of this property by one who had no immediate use for it was both expensive, burdensome, and inconvenient. Samuel was petitioning for letters of administration, and Merrifield's participation in the sale was only that of acting in the capacity of clerk. It will serve no useful purpose to review the evidence in detail. Suffice it to say that it presents a case where there is a disagreement among the heirs to an estate and a question of competency. On the whole record, we are satisfied that it cannot be said that the county court abused the discretion vested in it in appointing a disinterested third person, as to whose competency to act there can be no question. The judgment of the District Court, reversing that of the county court, is

therefore reversed, and the judgment of the County Court is in all things affirmed.

CHRISTIANSON, Ch. J., and BRONSON, J., concur.

ROBINSON, J. I dissent.

GRACE, J. I concur in the result.

A. C. JOHNSON, Respondent, v. AXEL WAGNER, Appellant.

(174 N. W. 73.)

Claim and delivery — sales — action for possession of personal property — question for jury.

In an action brought to obtain possession of personal property transferred to the plaintiff by a bill of sale, where the plaintiff had gained possession under claim and delivery proceedings, and the defendant counterclaimed, setting up a cause of action for damages for misrepresentation and fraud affecting the consideration that supported the bill of sale, and in addition to his claim for damages asked for specific performance of the contract as alleged in the counterclaim, it is *held:*

(1) The election to affirm the contract, to obtain specific performance, as far as possible, and to recover damages, amounts to an admission of the plaintiff's right to possession under the bill of sale.

(2) Where the pleadings present no issue of fact upon which the plaintiff's right of possession depends, error is not committed in instructing the jury to find that the plaintiff is entitled to possession.

(3) Where the plaintiff had possession of the property in question at the time of the trial, and where the pleadings admit the right of possession, under § 7635, Compiled Laws of 1913, it is unnecessary to submit to the jury the question of the value of the property.

(4) Sections 7449, 7453, 7605, and 7679, Compiled Laws of 1913, concerning counterclaims, are considered and held to authorize the entry of an appropriate judgment in a possessory action, while issues upon which the defendant's counterclaim for damages is based remain undetermined.

Opinion filed June 21, 1919. Rehearing denied July 18, 1919.

Appeal from District Court of Cass County, *A. T. Cole*, J.

Modified and affirmed.

Pollock & Pollock, for appellant.

"Fraud in the making and obtaining of the instrument upon which respondent founds his action in claim and delivery could have been shown as a defense under a general denial" (Vallency v. Hunt, 20 N. D. 579; note in 34 L.R.A.(N.S.) 473), and certainly could be proved under the allegations thereof in an affirmative defense and counterclaim as contained in appellant's answer. Taylor v. Rice, 1 N. D. 72; Plano Mfg. Co. v. Daleu, 6 N. D. 330; Lane v. O'Toole, 8 N. D. 210; Arnett v. Smith, 11 N. D. 55; Sobolisk v. Jacobson, 6 N. D. 175; Plano Mfg. Co. v. Person (S. D.) 81 N. W. 897; Herried v. C. M. & S. P. R. Co. (S. D.) 159 N. W. 1064; 34 Cyc. 1499; Nolan v. Jones (Iowa) 5 N. W. 572; Gevers v. Farmer (Iowa) 80 N. W. 535; Bliss v. Badger, 36 Vt. 338; Merrill v. Wedgewood (Neb.) 41 N. W. 149.

"No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." Herried v. C. M. & St. P. R. Co. (S. D.) 159 N. W. 1065; Fargo Gas & Coke Co. v. Fargo Gas & E. Co. 4 N. D. 219.

"The question which is decisive on this point is this: Did plaintiff rely and act upon the false statements to his damage? Whether he relied upon them is not a question of law, but a question of fact purely. The question is not, whether the false statements should have induced plaintiff to part with his property, but is this, Did they induce him to do so? This is always for the jury, where there is substantial evidence warranting the conclusion that the false statements were relied upon." Chilson v. Houston, 9 N. D. 498, 502; Massey v. Rae, 18 N. D. 409; Waters v. Rock, 18 N. D. 45; Neilson v. Edwards, 34 S. D. 399, 148 N. W. 844; Baskerville v. Culver, 33 S. D. 424, 146 N. W. 595; Smith & Co. v. Kimble, 31 S. D. 18, 139 N. W. 348, Ann. Cas. 1916A, 497; Clark v. N. P. R. Co. 36 N. D. 509, L.R.A. 1917E, 399.

The materiality of the false and fraudulent representations relied upon is a question for the jury. Guild v. Moore, 32 N. D. 473.

Value is a question of fact for the jury. Clendenning v. Hawk, 8 N. D. 419; Haverson v. Anderson, 3 N. D. 540; Loftus v. Agrant, 18 S. D. 55, 99 N. W. 90.

"Undoubtedly a special verdict is defective which fails to determine all the material and controverted facts put in issue by the pleadings." Hart v. West Side R. Co. (Wis.) 57 N. W. 81.

Under a demand for a special verdict, questions to the jury must cover all material issues and facts and the whole question at issue. Block v. Milwaukee Street R. Co. 89 Wis. 371, 27 L.R.A. 365, 61 N. W. 1101; Morrison v. Lee, 13 N. D. 599; Sonnesyn v. Akin, 14 N. D. 261; Lathrop v. Fargo-Moorhead St. R. Co. 23 N. D. 257; Shrunk v. St. Joseph (Wis.) 97 N. W. 948; Note, Office of Special Verdict, 24 L.R.A.(N.S.) 5.

We contend that there can be but one final judgment in an action. Comp. Laws 1913, § 7679; Wagner v. Northern L. Ins. Co. 70 Wash. 210, 126 Pac. 434, 44 L.R.A.(N.S.) 338, note, 23 Cyc. 772; Tootle v. Cook, 4 Col. App. 111, 35 Pac. 193; Bethel v. Bethel (Ky.) 99 Am. Dec. 655; Garvin v. Martin (Wis.) 93 N. W. 473 and cases cited.

Harry Lashkowitz (*Barnett & Richardson,* of counsel), for respondent.

"Where two causes of action are set out in the same petition, and a trial is had, and separate verdict and judgment on each, and one is found on appeal to be correct and the other erroneous, that which is right will be affirmed, and the other reversed." Totten v. Cooke, 2 Met. (Ky.) 280.

"A judgment by default, directing the sale of a tract of land in general terms, without describing it, is void to that extent, but this does not impair a money judgment rendered in the same action." Gear v. Hart, 31 Tex. 135; Shean v. Cunningham, 6 Bush (Ky.) 126; Webb v. Bulger, 4 Hill (N. Y.) 588; New York v. Saratoga Co. 88 Hun, 568.

"The plaintiff may take judgment for the amount admitted to be due by the defendant in his affidavit of defense, and proceed to trial for the balance." Coleman v. Nantz, 63 Pa. 178.

"A claim for damages for breach of warranty, interposed by answer to a petition to recover the price of goods, is, in effect, a counterclaim; and the court can render judgment of the undisputed portion of the price, and allow the action to proceed as to the sum in dispute." Moore v. Woodside, 26 Ohio St. 537; Plummer v. Park (Iowa) 87 N. W. 534; Winton Co. v. Blomberg, 147 Pac. 21.

"Two judgments may be allowed in one action where the defendant defends only as to a portion of plaintiff's demand." Mester Co. v. Pope, 155 Ill. App. 667.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of Cass county in an action brought to recover personal property. The judgment awarded to the plaintiff the immediate possession of the property and costs and disbursements amounting to $193.27, with interest on the same. The defendant and appellant, Wagner, was a farmer who had lived in the vicinity of Gardner, North Dakota, for a number of years. He was the owner of a quarter section of land and personal property used in connection with his farming operations. His land was heavily mortgaged and a sheriff's certificate of foreclosure sale was outstanding in the fall of 1916. The indebtedness against the land aggregated about $6,700. In October, 1916, Wagner negotiated with Johnson, the plaintiff and respondent, for the sale or trade of his equity in the land and his personal property, the land being valued by Wagner at $7,600 and his equity therein at approximately $900. A deal was made which was evidenced by four instruments, as follows: 1. An agreement binding Wagner to convey the quarter section to T. D. Johnson, a brother of the plaintiff, in consideration of $50 per acre, to be paid by T. D. Johnson by discharging the encumbrances and paying the plaintiff $100 down, $100 in five days, $100 in ten days, the transfer to be made within thirty days. 2. A bill of sale executed for the expressed consideration of $1, whereby Wagner transferred to A. C. Johnson title to the personal property sought to be recovered in this action. 3. An agreement between A. C. Johnson and Wagner, whereby, in consideration of the bill of sale, Johnson agreed to quitclaim to Wagner a tract of land in Otter Tail county, Minnesota, consisting of 81.69 acres. 4. A quitclaim deed of the same land, executed by A. C. Johnson and wife. The parties entered upon the performance of the agreement, Johnson making certain payments which were retained by Wagner, but, upon demand being made for the delivery to the plaintiff of the personal property, Wagner refused. Thereupon this action was begun and claim and delivery proceedings were had, by virtue of which the plaintiff obtained possession of the property. The complaint in the action simply de-

scribes the personal property, alleges the plaintiff's ownership and right of possession, and places the value at $1,800. For a counterclaim the defendant, however, alleges the negotiations between himself and the plaintiff leading up to the sale or trade, and claims damages on account of misrepresentations made relating to the value of the Minnesota land. The alleged misrepresentations refer specifically to the amount of encumbrance against the land, the date of its maturity, the rental value, and to an agreement by the defendant to resell the land for the plaintiff within thirty days at $30 per acre without commission. There are also allegations to the effect that by crowding and coercing him the plaintiff induced the defendant to execute the papers in connection with the deal without being enabled to procure the advice and assistance of one A. E. Ingebretson, upon whom the defendant relied for advice, and that as so executed they did not safeguard the rights of the defendant according to the previous agreement to pay the plaintiff for his equity in the land in cash as soon as the contract would be reduced to writing between the parties. But defendant alleges his willingness to carry out the transfers in accordance with the agreement as alleged in the counterclaim and his determination to affirm the contract and bargain and to claim damages for the plaintiff's misrepresentations and fraud in reference to the character and value of the Minnesota land. The damages so claimed amount to $1,390.70. In his prayer for relief, the defendant seeks judgment for specific performance of the contract as alleged by him and the damages occasioned by the deceit in the sum of $1,390.70.

Upon the trial, at the end of the defendant's case, the plaintiff's attorney made three motions, as follows: For a directed verdict for the relief prayed for, *i.e.*, the possession of the personal property; for the entry of an order denying specific performance of the contract; and for a directed verdict in favor of the plaintiff on the issue of damages presented by the counterclaim. At the close of the case, the motions were renewed. The first and second motions were then granted, and the third denied. The question of damages was submitted to the jury under special interrogatories, requiring a special verdict, and the record shows that the directed verdict on the issue of possession was delayed, at defendant's request, pending the determination by the jury of the questions submitted for the special verdict. The jury failed to

arrive at the special verdict and to dispose of the question of damages, and it was discharged.

Upon this appeal no question is raised concerning the denial by the court of specific performance as prayed for by the defendants, and it seems to be conceded that specific performance had become impossible. The specifications of error attack the ruling of the court in directing a verdict for the immediate possession and entering judgment on the verdict including a judgment for costs and disbursements. It is also claimed that it was error for the court to refuse to submit to the jury the question of the value of the personal property involved.

It is first contended that no valid claim to possession could be based upon the bill of sale, for the reason that it was vitiated by the same fraud that gives rise to the claim for damages. In view of the fact that the defendant has, by his counterclaim, affirmed the contract and elected to recover damages for the alleged fraud, this contention is clearly without merit. Whether the real contract be as expressed in the different papers executed by the parties, or whether it be as alleged by the defendant in his counterclaim, is immaterial so far as this question is concerned, for the defendant has seen fit to affirm it and claim damages. He cannot affirm the contract in part nor recover his damages piecemeal, and his affirmance makes the bill of sale effective to transfer title and right of possession.

The contention that the court erred in refusing to submit the question of the value of the personal property to the jury is likewise without merit; for, under the issues framed, the value of the personal property is immaterial. The only element of damage claimed by the defendant relates to the Minnesota land, and in his counterclaim he manifested his willingness for the plaintiff to have the personal property; provided, only, he would make good the difference between the worth of the Minnesota lands as represented, encumbrances considered, and its worth as it actually is. He would be entitled to these damages, if proved, regardless of the value of the personal property included in the bill of sale. It might be observed also in this connection that § 7635, Compiled Laws of 1913, which governs the determination of the issues in an action for the recovery of specific personal property, makes it wholly unnecessary for the jury to find the value of the prop-

erty where it is in possession of the plaintiff, who is found to be entitled to the possession. Subdivision 2.

The main contention of the appellant is that, inasmuch as § 7679, Compiled Laws of 1913, contemplates the entry of but one judgment between the same parties where a counterclaim is interposed, the court was without authority to direct a verdict in favor of the plaintiff for possession and to enter a judgment therein while other issues in the same action remained undetermined. We regard this contention as being sufficiently answered by the statutory provisions governing the counterclaim. It is permissible for the defendant to file a counterclaim under § 7449, Compiled Laws of 1913, when a claim exists in his favor against the plaintiff, as between whom and himself a *several* judgment might be had in the action; provided the counterclaim arises out of the transaction set forth in the complaint or is connected with the subject of the action. Also when the action is in contract and the claim of the defendant constitutes a cause of action arising on some other contract existing at the commencement of the action. Section 7453 provides that when the answer contains a statement of new matter, constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move "for such judgment as he is entitled to upon such statement." From these sections it clearly appears that a counterclaim is regarded as an independent cause of action in favor of the defendant and against the plaintiff, and that the issues presented by the statement of the cause of action in the defendant's answer are capable of being determined independently of the issues presented by the plaintiff's complaint and the defendant's answer thereto. If no issues of fact are tendered by the pleadings embracing the counterclaim, there is no apparent reason for requiring the facts pleaded to be submitted to the jury. As previously indicated herein, the only issues of fact presented by the pleadings as a whole are the issues concerning the defendant's claim for damages, and, the jury having disagreed, these remain for trial. Section 7679, Compiled Laws of 1913, relied upon by the appellant, simply provides for the entry of judgment in the ordinary case where the plaintiff may establish a money demand, as pleaded in his complaint, and the defendant may likewise establish a money demand pleaded in his counterclaim. It is apparent that the section has no

application where the judgment in favor of one party is, by other statutory provisions, required to be entered for the possession, and in favor of the other, if he establishes his counterclaim, for money. The unsoundness of appellant's contention, based upon § 7679, becomes apparent when the logical consequences of his position are contemplated. For example: If A should give to B a bill of sale of an automobile, B paying the full consideration, and A should then refuse to deliver possession to B on the ground that he held a promissory note against B, which he had purchased from a third party and which was unpaid, a possessory action, based upon the bill of sale, brought by B against A, could be defeated by the assertion of a counterclaim based upon the note. Yet the judgment in the possessory action is required to be for or against the plaintiff's right of possession (§ 7635), and the only judgment that could be entered on the counterclaim is a judgment for money. Manifestly, if the defendant's pleading admits the right of the plaintiff to possession, no issue remains for trial except those presented in the counterclaim and the reply.

Another statute indicating that independent issues of fact may be raised concerning the causes of action stated in the complaint and in the counterclaim is § 7605, in which it is stated that issues of fact arising upon material allegations in the complaint controverted by answer and upon new matter in the answer controverted by a reply.

In the view we take of the case, the respondent was entitled to a judgment on the pleadings awarding possession, and there was no occasion for a trial to determine his right thereto. It appears that the judgment for costs embodies an item of $21 for witness fees, of $14 for service of subpœnas upon witnesses, and $10 for trial, making a total of items clearly attributable to the trial of $45. These costs and the interest apportioned thereto may, therefore, properly abide the event of the trial upon the issues presented in the counterclaim for damages. The item, $10 for the trial, should be reduced to $5. As so modified, the judgment appealed from is affirmed. Respondent is entitled to costs upon the appeal.

BRONSON, J. I concur in the result.

GRACE, J., concurs.

MATT FROELICH, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

(173 N. W. 822.)

Personal injury — damages — master and servant — employers' liability act — interstate commerce.

This is a personal injury suit in which the plaintiff recovered a verdict and judgment for $5.000 for a sad accident by which he lost four fingers from the left hand. He was a night workman in the roundhouse at Mandan. He was employed as an engine box packer. On a May morning, while it was yet dark, he went into the car shop, turned on the lights, started the circular saw, as he claims for the purpose of making a tool box to use in his employment; but he had no right or authority to use the saw and in doing so he was a mere trespasser. The injury did not result in whole or in part from the negligence of any officer, agent, or employee of the defendant, or by reason of any defect or insufficiency in its machinery or equipment. Judgment reversed and action dismissed.

Opinion filed November 30, 1918. Rehearing filed July 22, 1919.

Appeal from the District Court of Morton County, Honorable *J. M. Hanley,* Judge.

Reversed and dismissed.

Watson, Young, & Conmy, for appellant.

Negligence is never presumed, but is an affirmative fact, and the burden of proving it is on the plaintiff in order to make out a case. Manson v. G. N. R. Co. 31 N. D. 647; Adams v. Paper Co. 143 N. W. 658; Patton v. Texas & P. R. Co. 179 U. S. 658; Pioneer Const. Co. v. Sandberg, 98 Ill. App. 36; Ryan v. McCully (Mo.) 27 S. W. 533; Goldstein v. People's R. Co. (Del.) 60 Atl. 975; Duntley v. Inman Poulson Co. 70 Pac. 529; C. & N. W. R. Co. v. O'Brien, 132 Fed. 593; Sandrew v. R. Co. 142 Fed. 320; Mexican C. R. Co. v. Townsend, 114 Fed. 737; Butler v. Frazee, 25 App. D. C. 392; N. P. R. Co. v. Dixon, 139 Fed. 737; Greeley v. Foster (Colo.) 75 Pac. 351; Sappenfield v. Park R. Co. (Cal.) 27 Pac. 590; Chicago Teleph. Co.

NOTE.—Constitutionality, application, and effect of the Federal Employers' Liability Act, see notes in 47 L.R.A.(N.S.) 38; 48 L.R.A.(N.S.) 987; and L.R.A. 1915C, 47.

v. Schulz, 121 Ill. App. 573; Brownsfield v. R. Co. (Iowa) 77 N. W. 1038; Dana & Co. v. Blackburn (Ky.) 90 S. W. 237; Lane v. Missouri P. R. Co. (Kan.) 69 Pac. 626; Vissinaw v. R. Co. (Ky.) 89 S. W. 502; So. Bolt Car Works v. Schaefer (Md.) 53 Atl. 665; Wormell v. Maine C. R. Co. (Me.) 10 Atl. 49; Robinson v. Wright & Co. (Mich.) 53 N. W. 938; St. Louis R. Co. v. Hill (Ark.) 94 S. W. 914; Huff v. Austin (Ohio) 21 N. E. 864; Neeley v. Cotton Seed Oil Co. (Okla.) 75 Pac. 537; Duntley v. Inman P. & Co. (Or.) 70 Pac. 529; Higgins v. Fanning (Pa.) 46 Atl. 102; Green v. Power Co. (S. C.) 55 S. E. 125; Ry. Co. v. Lindamood (Tenn.) 78 S. W. 99; Moose Line Co. v. Johnston (Va.) 48 S. E. 557; Mo. K. & T. R. Co. v. Crowder (Tex.) 55 S. W. 380; Katerman v. Dry Fork R. Co. (W. Va.) 37 S. E. 683.

"There is no negligence shown where it appears that the machinery was such as is in common and general use." Omaha Bottling Works v. Theiler (Neb.) 80 N. W. 821; Higgins v. Fanning (Pa.) 46 Atl. 102; Fritz v. Electric Co. (Utah) 56 Pac. 90; Poneybelisk v. Coal Co. (Wis.) 74 N. W. 117; Manley v. Mpls. Paint Co. (Minn.) 78 N. W. 1050; Weeds v. Ry. Co. (Neb.) 99 N. W. 827; Law v. Central Dist. Printing & Tel. Co. 140 Fed. 558; Wash. Asphalt Block & Tile Co. v. Mackey, 15 App. D. C. 410.

A master owes his servant the duty of providing his machinery with the same kind of appliances or appliances equally safe, as those in general use by man of ordinary prudence in the same kind of business. Boyle v. U. P. R. Co. 25 Utah, 420, 71 Pac. 988; Chrismer v. Bell Teleph. Co. (Mo.) 92 S. W. 378; Shadford v. Ann Arbor St. R. Co. (Mich.) 69 N. W. 661; Richards v. Rough (Mich.) 18 N. W. 785; Briggs v. C. & N. W. R. Co. 125 Fed. 745; Titus v. Bradford Co. 20 Atl. 517; Rogers v. L. & N. R. Co. 88 Fed. 462; N. P. R. Co. v. Blake, 63 Fed. 45; Roberts v. Mill Co. (Wash.) 70 Pac. 111; Kehler v. Schwank (Pa.) 22 Atl. 910; Brock v. Witherbee, 98 N. Y. 562; Corbett v. School (N. Y.) 68 N. E. 997; Tomkins v. Machine Co. (N. J.) 58 Atl. 393; Demers v. Marshall (Mass.) 59 N. E. 454; C. & G. R. Co. v. Armstrong, 62 Ill. App. 228; Wabash Screen Door Col. v. Black, 126 Fed. 721; Westinghouse Co. v. Heimlich, 127 Fed. 92; Chrismer v. Bell Teleph. Co. 6 L.R.A.(N.S.) 492; Manson v. G. N. R. Co. 31 N. D. 643; Balding v. Andrews & Gage Elev. Co.

12 N. D. 267, 96 N. W. 305; Meehan v. G. N. R. Co. 13 N. D. 432, 101 N. W. 183; Scherer v. Schlaberg (N. D.) 122 N. W. 1000.

Plaintiff must show a defect creating a dangerous situation, and also that defendant had knowledge of such defect and the danger created thereby. Tolland v. Paine Fur Co. (Mass.) 56 N. E. 608; Duntley v. Inman Poulson & Co. 70 Pac. 529; Marquard v. Ball Engine Co. 122 Fed. 374; Mast. & S. Dec. Dig. § 125; Patton v. Texas & P. R. Co. 179 U. S. 658, 660, 664.

Knowledge of the defect or some omission of duty in regard to it must be shown. Looney v. Met. R. Co. 200 U. S. 486; Sappenfield v. Park R. Co. (Cal.) 27 Pac. 590; Brownfield v. R. Co. (Iowa) 77 N. W. 1038; Black v. Fair Asso. (N. D.) 164 N. W. 297; Meehan v. G. N. R. Co. 13 N. D. 432, 101 N. W. 183; Manson v. G. N. R. Co. 31 N. D. 643; Chybouski v. Bucyrus Co. (Wis.) 106 N. W. 833.

Where evidence shows it is just as probable accident happened by causes other than negligence of defendant, there can be no recovery. Patton v. Texas & P. R. Co. 179 U. S. 658, 660, 664; Boston v. Buffrom (Me.) 54 Atl. 392; Chesapeake & O. R. Co. v. Heath (Va.) 48 S. E. 508; Strasburger v. Vogel (Md.) 63 Atl. 202; Cerrilles Coal R. Co. v. Deserant (N. M.) 49 Pac. 807.

"Where the plaintiff knew the danger incident to the use of a dangerous machine without the safety device, even though there were no rules forbidding the use of same, he took his own chances in using same." Egnor v. Lumber Co. 92 N. W. 245; Purkey v. Coal Co. 50 S. E. 753; Lamotte v. Boyce (Mich.) 63 N. W. 517; W. & R. R. Co. v. McDade, 135 U. S. 554; Seaboard Air Line v. Horton, 233 U. S. 492; Jacobs v. So. R. Co. 241 U. S. 229; Manson v. G. N. R. Co. 31 N. D. 643; Pingree v. Leyland, 135 Mass. 398.

There can be no recovery in this action, neither the plaintiff nor the defendant being engaged in interstate commerce at the time of the injury. I. C. R. Co. v. Kelly, 167 Ky. 745, 181 S. W. 375; C. N. O. & T. P. R. Co. v. Tucker, 168 Ky. 149, 181 S. W. 940; Chesapeake & O. R. Co. v. Shaw, 182 S. W. 657.

It is prejudicial error to permit the jury to pass upon the question as to whether the defendants were negligent in any particular as charged in the complaint. Strange v. Lumber Co. 116 Am. St. Rep. 92, 96 S. W. 152; Walrod v. Webster County, 47 L.R.A. 480,

81 N. W. 598; Illinois C. R. Co. v. King, 70 Am. St. Rep. 93, 55 N. E. 552.

Jacobsen & Murray, for respondent.

The master owes the servant certain nondelegable duties, among which are reasonably safe instrumentalities and a safe place to work and to proper instructions. 26 Cyc. 1097, 1104, 1185; United v. Colgate Elev. Co. 18 N. D. 320; Sword v. McDonnell, 31 N. D. 494.

If the evidence shows there is no liability under the Federal act, as soon as that fact appears the defendant may then file a petition for removal, if entitled to it, if there be a diversity of citizenship. Thornton, Fed. Employers' Liability Act, 3d ed. § 193, p. 731; Strother v. Union P. R. Co. 22 Fed. 731; Powers v. Chesapeake & O. R. Co. 169 U. S. 91, 42 L. ed. 673.

When the action is brought under the Federal statute, and allegations are used which are sufficient to bring the action on a state statute or at common law, and the proof under the Federal statute fails, the plaintiff may go to the jury on the state statute or common law as his proof may show. Corbett v. Boston & M. R. Co. (Mass.) 107 N. E. 60; Thornton, Fed. Employers' Liability Act, 3d ed. § 212, pp. 313, 314; S. R. Co. v. Ainsley, 8 Ga. App. 325, 68 S. E. 1086; Winfree v. N. P. R. Co. 227 U. S. 96, 33 S. C. 273, 57 L. ed. 518, 173 Fed. 65.

Robinson, J. This is a personal injury suit in which the plaintiff recovered a verdict and judgment for $5,000 for a sad accident by which he lost four fingers from the left hand. Defendant moved for a directed verdict, for judgment notwithstanding the verdict, or, in the alternative, for a new trial, and appeals from an order denying the same.

Since January, 1910, at Mandan, plaintiff was in the employ of defendant as a roundhouse workman for some two years. He was helping at boiler making; then for three years he was employed as an engine box packer—a night workman—in the roundhouse, and that was his business at the time of the injury. His business was to pack and oil engine boxes and to change brasses. The packing is replacing "dope" or old grease in the cylinders, drive boxes or journals, so there may be no friction. The packing keeps them lubricated and oiled.

As it appears from plaintiff's testimony, he thought that in his business it would be well to have a tool box to carry his tools and to sit on when working under an engine, and he concluded to make one himself. Accordingly, toward the approach of a May morning, plaintiff went from the roundhouse to the farthest corner of the car shop and there turned on the lights and started up the machine. He says: "I looked for a board and found it. When I put on the switch the machine started to run right away. It run like lightning; the saw was in gear and I took the board and put it in there—when I had it about half way through all at once it started and jerked and wabbled, and the first thing I noticed the board was gone through my hands and I looked at my hand and the four fingers were gone." He says the board he started to rip was 12 x 30 inches, and at the time of the accident it was ripped about half through.

Joseph Zuger, the roundhouse foreman, testified that he heard of the accident and went to the car shop early in the morning. He examined the board that plaintiff had been sawing; it was a piece of car roofing 5 or 6 inches wide and 7 or 8 feet long; it was laying in the saw and ripped about halfway through and spots of blood all over it. If that is true, the board was more suitable for kindling wood than for the making of a tool box.

The action is brought under the Federal Employers' Liability Act, which is, in effect, the same as chap. 207, Laws 1915. Under the act a common carrier by railroad, while engaged in interstate commerce, is liable in damages to any person suffering injury while he is employed by such carrier in such commerce. It is liable for such injury or death, resulting in whole or in part from the negligence of any of the officers, agent, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, or other equipment. And the negligence of the injured party is not a bar to any recovery, though it may reduce the amount.

However, in this case there are several objections to the right of plaintiff to recover anything:

(1) The making of a tool box was no part of interstate commerce, and it was entirely outside the line of plaintiff's employment. He was employed as an engine box packer, and not as a carpenter. His employment and his duties were in the roundhouse. He had no right

or authority to go into the car shop, turn on the lights, and attempt to use the saw. In doing that he was a mere trespasser. Near the saw there was posted a conspicuous sign: "This saw is to be used by carmen only." And in addition the plaintiff was expressly warned against attempting to use the saw. It was outside of his employment. His place was in the roundhouse and he had no right to enter the car-shop.

(2) However, if the plaintiff had any leave or license to use the circular saw, there is no showing that it was in anyway defective. There is no proof of a defect in any of the machinery. For some twenty years the sawing apparatus has been in daily use by the numerous carpenters of the car shop without injury to any of them, and so the plaintiff might have used it without any risk or injury if he had not neglected to use the safety guard. When the guard is used it covers the saw and protects the operator from all danger. Without the use of the guard no one should ever attempt to use the buzz saw.

It is entirely clear that at the time of the injury the plaintiff was not employed to use the circular saw, and in using the saw he was a mere trespasser. His injury did not result in whole or in part from the negligence of defendant or any of its officers, agents, or employees, or by reason of any neglect or insufficiency in its cars, engines, appliances, machinery, or equipment. Hence the plaintiff has no cause of action. Judgment reversed and action dismissed.

CHRISTIANSON, Ch. J., and BRUCE, J., concur.

BIRDZELL, J. I concur in the result.

GRACE, J. I dissent.

On Rehearing.

PER CURIAM. A rehearing was ordered in this case. After full argument and reconsideration of all questions involved, we are satisfied that the result reached in the former opinion is right. Certain features of the case—tending to support the conclusions formerly reached—were even more clearly brought forth on the reargument, and we deem it

desirable to supplement the former opinion by a reference to those features of the case.

The plaintiff was a night box packer, employed in defendant's roundhouse at Mandan. The general roundhouse foreman was Joseph Zuber. He was in general charge both night and day, but during the night there was a subordinate or night foreman. The night foreman was named Vickers. Plaintiff testified that about a month before the accident he asked Vickers for a tool box. That about a week before the accident plaintiff asked Vickers about the matter, and that Vickers stated he couldn't get a tool box for him, and said to the plaintiff: "When you get time make it yourself." On the night the accident occurred Vickers was off duty, and one Cantwell was acting as night foreman. It is undisputed that the plaintiff said absolutely nothing to Cantwell about either wanting a tool box, or intending to make one, or wanting to use the saw for any purpose. The undisputed testimony shows that Cantwell had absolutely no knowledge that plaintiff intended to use the saw, and that the first knowledge he had that plaintiff would do so was after the accident had occurred. As stated in the former opinion there was posted near the saw a large sign reading, "This saw is to be used by carmen only." The evidence showed and the jury found (in answer to special interrogatories) that at the time of the injury there was an existing rule "to the effect that none but carmen should use the saw in question," but that this rule was not followed by employees or enforced by the defendant. The jury further found (in such special interrogatories) that the plaintiff in the exercise of reasonable care should have known of such rule; and that an ordinarily prudent man in the exercise of reasonable care and the use of his eyesight should have noticed and obeyed the sign which stood on the wall near the saw, if the rules had been enforced.

The roundhouse foreman, Zuber, testified: "There were instructions that no employee in my department was to go into the car shops without my permission." He also testified: "In 1915, about February, 1915, . . . one of the men in the car shops had sawed his finger, . . . and we have what is called a 'Careful Club' or bureau of information, and the idea of this is to educate all of our employees to be careful not to do anything that is liable to cause an injury or to injure anyone else. I, as well as the other foreman, was ordered by

our superior officers to call all of our employees into the office and go over all of the injuries or accidents that had happened that we knew of, especially in our own departments, and to call the men's attention to the various instructions that had been put out, and I called them all into my office on the 10th day of February, all the machinists and their helpers and box packers. Among other things, I told them about this man going down and using this saw, and he had no business to use it. I said, 'There is a man that took a chance and got hurt. The railroad company has spent thousands of dollars trying to teach you boys to stop doing those things.' *I instructed them that I did not want any man in my department to go near the saw, and that if I knew of any man going near that saw I would discharge him from the service.*" Zuber further testifies that the plaintiff, Froelich, was present at the time those instructions were given. Zuber's testimony to the effect that the instructions were given, and that the plaintiff was present, is corroborated by other witnesses, and is not contradicted by anyone. And while the plaintiff was recalled after this testimony was given, he did not in any manner deny that he was present at the time such instructions were given. And there is absolutely no evidence tending to show that the foreman, Zuber, had any knowledge or information that the plaintiff or any of the other employees were violating the instructions. Nor is there any evidence tending to show any violation of the order during the daytime. But it is contended that the order was disregarded at night; that the night foreman had knowledge of such violations, and that the jury was justified in finding that the order had been waived.

It is true plaintiff testified that he had used the saw. But he does not claim nor is there any evidence tending to show that he ever used it in the presence of anyone. Nor is there any evidence showing that the night foreman had any actual knowledge of plaintiff's violation of the order, and the positive testimony of both Vickers and Cantwell is to the effect that neither of them knew or had been informed of such violations. It is true, the evidence does show that upon two occasions Vickers sent the plaintiff to the carpenter shop for certain boards, but the uncontradicted testimony showed that it was customary for the carpenter to leave boards sawed into proper lengths for the various purposes for which boards would ordinarily be needed during the night-

time, and that if any extraordinary occasion occurred the carpenter could be called at any time during the night. In fact the plaintiff testified that on the night the accident occurred "there was quite a lot (of sawed boards) laying there besides the saw."

The only order which plaintiff claimed to have received with respect to making a tool box was about a week before, when, he claims, Vickers said: "When you get time make it yourself." Vickers denied this conversation, and testified that a tool box was not necessary, and that the tools might, and frequently were, carried in the dope pail. The undisputed testimony also showed that the carpenter—Larson—during the daytime would saw any boards that were requested for the use of the night men, and the plaintiff could have had Larson saw whatever boards that might have been needed for the tool box. Clearly there is no evidence from which reasonable men could find that defendant either knew or should have known that plaintiff or others violated the order relating to the use of the saw, so that it may be said that defendant acquiesced in such violation and waived the order. Nor is there any evidence from which reasonable men could find that the night foreman ordered plaintiff to use the saw in making a tool box. In our opinion the evidence upon this feature of the case warrants but one conclusion,—that the plaintiff was injured while, and as a result of, wilfully violating a reasonable and lawful order promulgated by the defendant for the safety of its employees. He disregarded the order, and sought to do that which he had been expressly forbidden. His own act, and not the act of the defendant, was the cause of his injuries. Great Northern R. Co. v. Wiles, 240 U. S. 444, 60 L. ed. 732, 36 Sup. Ct. Rep. 406. See also 18 R. C. L. 498; Labatt, Mast. & S. § 273.

Nor do we believe that there is any evidence to support a finding that the defendant was guilty of negligence with respect to the saw itself. The evidence shows that a guard was provided for the saw in the summer of 1915. Larson, the carpenter, had used the saw for something like eighteen years before that without any safety device. It is said Larson used the saw without using the guard.

His testimony is:

Q. You did not always use that guard?

A. Not in the beginning, because I forgot once in a while because I used the saw so much without it before it was put there, but lately I don't use it without using the guard.

The guard was right at hand, over the saw. In order to use the guard, all that was necessary to do was "just to pull it right down over the saw, and it is supposed to be right on the board when you are sawing." Larson testified that the guard was in good condition. Villaume, superintendent of a box factory where some thirty similar saws are in operation, testified that the guard was a good one, and that he did not know of a better one. The undisputed testimony is to the effect that plaintiff could not possibly have been injured if he had used the guard.

The plaintiff said he had never used any other buzz saw. All his knowledge of buzz saws was gained from the saw in question. The same is true of the only other witness who testified for the plaintiff on this point. Neither of them could, nor did they pretend to, testify that the saw was not installed in the usual manner. On the other hand the positive testimony on the part of defendant's witnesses was to the effect that both saw and guard were properly installed in the usual manner, and were both in the best of condition. The plaintiff gave as his reason for not using the guard that Larson had said it was "unhandy," and "not good." There is no contention that Larson was instructing the plaintiff in the use of the saw, and the undisputed testimony is to the effect that Larson never knew that plaintiff used it, and plaintiff admitted that he had never seen Larson operate the saw since he (plaintiff) became a night box packer. Of course most safety devices may be said to be unhandy, and most safety regulations may at times be irksome. It probably required more time and effort to use the guard than to operate the saw without it, just as it takes longer time to travel a given distance and obey speed regulations than by exceeding them.

Reference has been made to the fact that sometimes the belt would slip over on the neutral pulley, and that when it did the board would wabble. Plaintiff testified to this. And yet under his own testimony he could not possibly know this to be so, for he testified positively and without equivocation or contradiction that the belt slipped only

once while he was operating the saw, and that upon that occasion he had not yet put in a board, but had just started the saw. The testimony shows, without dispute, that the belt was in good condition, and the neutral pulley a usual thing. In fact according to the testimony the neutral pulley is a safety device. If the saw becomes overcrowded, the belt will slip off, and on to the neutral pulley, and the saw will stop. It is undisputed that after the belt slips off, it cannot possibly go back on and start the saw until or unless the lever is thrown over so as to put the belt back on the active pulley again. In this case the plaintiff testified positively and without contradiction that the saw continued to run after the accident had occurred, and until the plaintiff shut it off.

Before plaintiff can recover under either the Federal or the state Employers' Liability Acts, he must prove that his injuries were occasioned by the negligence of the defendant or its employees. In other words, he must prove: (1) The existence of some duty or obligation on the part of the defendant toward the plaintiff; (2) a failure to discharge that duty; and (3) injury resulting from such failure. Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 862; Vanevery v. Minneapolis, St. P. & S. S. M. R. Co. 41 N. D. 599, 171 N. W. 610; Wingen v. Minneapolis, St. P. & S. Ste. M. R. Co. ante, 517, 173 N. W. 832; Great Northern R. Co. v. Wiles, 240 U. S. 444, 60 L. ed. 732, 36 Sup. Ct. Rep. 406. In this case plaintiff was injured by his own acts, and not by reason of any act of the defendant. Plaintiff could not possibly have been injured if he had not intentionally and deliberately violated the orders of the defendant. Nor could he have been injured if he had used the guard with which the saw was equipped. Plaintiff was not injured while doing something in the line of his duty, but while doing something which the defendant had expressly and unequivocally said that he must not do.

We adhere to our former conclusion, the causal negligence in this case was the negligence of the plaintiff. The action is dismissed.

BRONSON, J. (upon rehearing). I dissent. This is an action for personal injuries. Upon trial in the district court of Morton county before a jury, a verdict was rendered for the plaintiff in the sum of $5,000. Judgment was entered accordingly. Thereafter, the defend-

ant made a motion for judgment *non obstante,* or, in the alternative, for a new trial. The trial court denied such motion. The defendant has appealed from the judgment and the order denying such motion. In a former opinion this court reversed the judgment and ordered dismissal of this action. There is evidence in the record to show the following facts:

The plaintiff was injured on May 20, 1916, while in the employ of the defendant as a night box packer. His duties consisted in packing the driving boxes of locomotives, changing brasses, and doing other incidental work upon and concerning locomotives under the direction of his foreman. The locomotives upon which he did work were those that hauled interstate passengers and freight, as well as local engines upon branch lines to the north and south. The defendant concedes in the record that the railway company at the time was engaged in interstate commerce. It does not concede, however, that the plaintiff, at the time of his injuries, was engaged in interstate commerce. At the time of the injury, the plaintiff was the only man employed as night box packer. There was another man working opposite him on the day shift. In his work as night box packer it was necessary for him to have tools and a tool box. He had worked for the company since 1910, first, as a helper to boiler makers, then as a machinist's helper, and later, since February 18, 1916, as such night box packer. At Mandan the defendant had a roundhouse as well as a car shop. The work of the plaintiff was largely performed in the roundhouse. In the car shop there was a saw, a sort of rip or buzz saw, used for the purpose of ripping or sawing boards. This saw was the same saw that had been used at that place by the defendant, as one witness testified, since 1896. The saw was a stationary saw inserted in a table, standing by itself in the room of the car shop. At the time of the accident there was a guard, home-made, for the saw, which had been constructed some seven or eight years previous. This saw was customarily used by the day engine carpenter, named Larson. He testified that, once in a while, he operated this saw without using the guard. He also testified that sometimes the belt would slip from the live pulley to the neutral pulley and stop the saw if the stick was crowded too hard against the saw; that if you did not throw over the belt with the lever far enough on the pulley it might work over on the loose or neutral

pulley. The plaintiff worked under the supervision of the night foreman. He was his boss. During the night, when the accident occurred, one Cantwell was such night foreman. This foreman testified that the plaintiff was under the instructions of the foreman, and was required to do what the foreman told him to do. That he operated the saw sometimes; that it was put in operation by a lever and belt connected with a power shaft in the ceiling above. That to operate the saw, the lever was pulled, and it threw the belt from a neutral or loose pulley upon a solid or live pulley; that sometimes the lever would move itself so as to shut off the power. That is, the belt would work over upon the loose pulley so that there would be a time when the belt would be half on the live and half on the neutral pulley. This would cause the saw to slow up. That it was necessary to watch the lever to keep the saw in gear. That the saw had to be fed by hand. That a board being fed to the saw would not be as steady while the saw was shifting or shutting off. That "the board would not handle quite as smooth." He further testified that there was no one in the car shop to do sawing at night. That if a packer needed any sawing done he would have to get it sawed the best way he knew how, and would have to use his best judgment in that regard; that a car shop man might be called when there was a five hours' job, but not for ten, twenty, or thirty minutes.

The plaintiff, before the night of this accident, had used this saw to some considerable extent for ripping or sawing boards in connection with his duties as night box packer. The foreman was over with him two nights before the accident, and the foreman used such saw. Sometimes the plaintiff used the saw twice in a night, possibly he used it four times a week. For a time the plaintiff had used an old tool box. He put in an order for a new tool box, but could not get one furnished to him. He testified that his foreman, one Vickers, told him to make one. This tool box could be necessarily used by him not only for carrying tools, but also as a seat when working under engines in the pit. On the night of the accident, the plaintiff started to make a tool box. For that purpose, he took a board, went over to this saw, and started to use it. He did not use the guard. He had been advised before by the day engine carpenter that he did not use the safety guard; that it was unhandy and no good; that furthermore he did not use it because it was too wabbly; that he acted upon Larson's advice.

That he operated the saw in a proper way; that he had seen one Larson operate the saw and he operated the same as he did; that when the board which he had was about half sawn through, the saw started to jerk and wabble; the first thing he noticed the board was gone through his hands; he looked at his hands and four fingers were gone.

The defendant introduced testimony showing that there was a sign posted in the car shop stating that such saw was to be used by carmen only; that the roundhouse foreman, one Zuber, called in the men for a conference in February, 1915, and gave instructions that no employee in the roundhouse should go into the car shop without his permission, and that he did not want any of his men to go near this saw, and that if they did he would discharge them. That the plaintiff was there at the time of this conference. He also testified that the box packers did not come under the class of carmen who were under his jurisdiction. The defendant also introduced testimony to show that the board which the plaintiff was sawing had a crack in it; that the plaintiff so admitted; that the saw was in good condition as well as the guard placed thereover; that the plaintiff violated the defendant's rules and instructions. The case was submitted to the jury upon sixteen special interrogatories in addition to a form of general verdict. The jury, in addition to returning a general verdict for the plaintiff, found upon these special interrogatories that the defendant was negligent in having defective machinery, and not more strictly enforcing rules in the operation of the saw; that the plaintiff did not know the condition of the saw and appreciate the dangers incident to its use; that as an ordinarily prudent man he would not have known the dangers of the saw and appreciated its risks; that there was at the time a rule to the effect that none but carmen should use the saw, but that the rule was not followed by the employees or enforced by the defendant; that the plaintiff in the exercise of reasonable care should have known of such a rule; that as an ordinarily prudent man he would have noticed the sign on the wall, if the rules had been enforced; that an ordinarily prudent man would not use the saw without using the guard if it had been satisfactory; that the plaintiff used the saw as an ordinarily prudent man; that the injury was not occasioned by accident; that the plaintiff suffered $5,000 in damages; that plaintiff was not guilty of contributory negligence and no deduction should be made from the

damages suffered; that the guard attached was defective because not firm; that there was not a safer way of using the saw; that the plaintiff knew or should have known, in the exercise of ordinary care, that the belt moved from the solid pulley on the neutral pulley, not by reason of plaintiff's action. These numerous questions, so submitted to the jury, demonstrate by the manner in which they were answered, that the jury exercised a high degree of intelligence, keenly appreciating the issues in this action.

Upon these numerous special interrogatories, the jury have passed upon every issue of fact, finding negligence on the part of the defendant and absence of contributory negligence and assumption of risk on the part of the plaintiff. Their findings are conclusive upon this court unless there is no evidence in the record to justify them as matter of law. The judge who presided at the trial, and who saw and heard the witnesses, denied the motion of the defendant for judgment *non obstante,* or for a new trial.

Accordingly, upon this record, so passed upon by the jury in such minute detail through their special findings, and upheld as a matter of law upon such findings by the trial judge, the verdict should and must be upheld if there is any evidence in the record to sustain such findings.

The questions of plaintiff's contributory negligence and assumption of risk were clearly for the jury. This saw was there for use in connection with the duties of the plaintiff as night box packer. It necessarily had to be used if he were to perform those duties in accordance with the orders given by the foreman; there was no night engine carpenter to work the saw when plaintiff was in the performance of his duties. The engine carpenter who worked days manifestly could not be called every time a board needed to be sawed that required a moment's time. The plaintiff was told to do his work and to get the sawing done as best he knew how. The fact that the defendant at a time considerably previous gave instructions not to use this saw except by car shop men, and that they had a sign there to that effect posted, has no bearing, as a matter of law, when there is evidence that the defendant specifically disregarded these instructions and assigned work to the plaintiff which required him, or directed him, either expressly or impliedly, to use this saw. An employee cannot hide behind a viola-

tion of an instruction to escape liability when such employer has itself violated such instructions and has permitted or directed its employee so to do.

The cause of action set up in the complaint is within the terms of the Federal Employers' Liability Act. The facts, as alleged in the complaint, are within the terms of the statute (Sess. Laws 1915, chap. 207), which is similar to, and substantially follows, the Federal Act, if at the time the plaintiff in fact was not engaged in interstate commerce.

It is a serious question upon the record, whether the plaintiff was an employee engaged in interstate commerce at the time the accident happened.

In Shanks v. Delaware, L. & W. R. Co. 239 U. S. 556, 558, 60 L. ed. 436, 438, L.R.A.1916C, 797, 36 Sup. Ct. Rep. 188, the test is stated as follows: "Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?" In that case, the railroad company engaged in both interstate and intrastate commerce, conducted an extensive machine shop for repairing parts of locomotives, wherein the plaintiff usually worked in repairing certain parts of such locomotives, but on the day he was injured he was performing solely the work of taking down and putting in a new location, an overhead shaft in the shop. It was held that he was not then employed in interstate commerce.

Likewise, in New York C. R. Co. v. White, 243 U. S. 188, 199, 61 L. ed. 667, 673, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943, this test was applied, and it was held that a night watchman charged with the duty of guarding tools and materials intended to be used in the construction of a new station and a new track upon a line of interstate railroad was not engaged in interstate commerce, because it bore no direct relation to interstate transportation and had to do solely with construction work. So, in Delaware, L. & W. R. Co. v. Yurkonis, 238 U. S. 444, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902, an employee mining coal in a colliery operated by the railway and intended to be used in its locomotives in interstate commerce was not engaged in interstate commerce. In Illinois C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L. ed. 1051, 1055, 34 Sup. Ct.

Rep. 646, Ann. Cas. 1914C, 163, 10 N. C. C. A. 153, the court stated the test to be, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" and held that a fireman on a switch engine who received a fatal injury while the switch engine was moving several cars, all loaded with intrastate freight, from one part of the city of New Orleans to another, was not engaged then in interstate commerce, even though his general work extended to and covered interstate commerce. Again in Illinois C. R. Co. v. Peery, 242 U. S. 292, 61 L. ed. 309, 37 Sup. Ct. Rep. 122, a freight conductor who was injured on a return trip between two points in Kentucky while the train was carrying intrastate freight alone was not engaged in interstate commerce although on the outward trip such train carried interstate freight. So, in Erie R. Co. v. Welsh, 242 U. S. 303, 61 L. ed. 319, 37 Sup. Ct. Rep. 116, a yard conductor who was injured while seeking, in the performance of his duties, further orders in making up trains, which orders, if they had been received by him, had he not been injured, would have required him to make up an interstate train, was not engaged in interstate commerce.

In Minneapolis & St. L. R. Co. v. Winters, 242 U. S. 353, 61 L. ed. 358, 37 Sup. Ct. Rep. 170, Ann. Cas. 1918B, 54, 13 N. C. C. A. 1127, an employee in the roundhouse of the railway company who was injured while making repairs upon an engine which prior to the injury on October 18th pulled interstate and intrastate freight, and likewise on October 21st subsequent to the injury pulled such freight, was not engaged in interstate commerce. It was further held that the evidence offered was not sufficient to bring the case within the terms of the Federal Act; that the next work of the engine so far as appeared from the evidence might be interstate or confined to Iowa, as it should happen. See 126 Minn. 260, 263, 148 N. W. 106. Likewise, in Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992, a switchman killed while switching coal of the railway company from a storage track to a coal shed was not engaged in interstate commerce although such coal had been hauled in interstate commerce, or might be used thereafter in locomotives engaged, or about to be engaged, in interstate or intrastate traffic.

On the other hand, in North Carolina R. Co. v. Zachary, 232 U.

S. 248, 260, 58 L. ed. 591, 596, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109, a fireman who had been inspecting, firing, and repairing his engine preparatory to a trip to be performed as a part of interstate commerce, and who, after temporarily leaving his engine, presumably to go to a boarding house, was injured within the railway yards, was held to be on duty and employed in interstate commerce.

So, in Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452, where the state court of Wisconsin rendered a large verdict for a hostler whose duties consisted in receiving and repairing engines for departure in both interstate and intrastate commerce, and who was injured while walking in the yards to a rest house, where he could await his next call to duty, it was held that such hostler was not then engaged in interstate commerce, and where the railway company, upon writ of error to the Supreme Court of the United States, contended that the hostler then was engaged in interstate commerce, it was held unnecessary to determine the question, for the reason that the court did not perceive that any difference was made, for the reason that if there was any error it did not do the railway company any harm. Further, held that there are conditions and similarities between the Wisconsin and the Federal statutes, but that the court did not perceive that there is any difference that made the railway company's position worse if tried on the hypothesis that the state law governed.

In Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, an iron worker in the employ of the railway company repairing its bridges was run down and injured by an intrastate passenger train through the negligence of the engineer while carrying a sack of bolts to be used in repairing a bridge used both in interstate and intrastate commerce. The court stated that under the Federal statute the carrier was charged with the duty of exercising appropriate care to prevent defects in its appliances, machinery, tracks, etc., used in interstate commerce; that, independently of the statute, the court was of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to interstate commerce as to be in practice and in legal contemplation a part of it. That

the true test always is, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" Concerning the contention made that interstate commerce by railroad can be separated into its several elements and the nature of such determined regardless of its relation to others, or to business as a whole, the court further said that a track or bridge may be used in both interstate and intrastate commerce, but that when it is so used it is none the less an instrumentality of the former, nor does its double use prevent the employment of those who are engaged in its repair, or in keeping it in suitable condition for use, from being in the employment of interstate commerce. It was accordingly held that the iron worker injured was engaged in interstate commerce.

In Louisville & N. R. Co. v. Parker, 242 U. S. 13, 61 L. ed. 119, 37 Sup. Ct. Rep. 4, a fireman who was killed upon a switch engine then engaged in transferring an empty car, not moving in interstate commerce, from one switch track to another for the purpose of being able to reach and move an interstate car, was engaged in interstate commerce. So, in Erie R. Co. v. Winfield, 244 U. S. 170, 61 L. ed. 1057, 37 Sup. Ct. Rep. 566, Ann. Cas. 1918B, 662, 14 N. C. C. A. 957, an engineer of a switch engine whose duties consisted in switching freight cars about in the yard, containing both interstate and intrastate freight, and who was killed after the completion of his day's work, and while leaving the yards, was held to be engaged in interstate commerce. It was held that his day's work consisted in an engagement in both interstate and intrastate commerce, and that, in leaving the yard at the close of his day's work, the deceased was discharging a duty of his employment. In Southern R. Co. v. Puckett, 244 U. S. 571, 61 L. ed. 1321, 37 Sup. Ct. Rep. 703, Ann. Cas. 1918B, 69, a car inspector of the railway company, who had theretofore been engaged in inspecting cars put in an interstate train, and who was injured while carrying some blocks on his shoulder to be used in jacking up a wrecked car to which he had gone, in obedience to instructions, on account of a wreck that had occurred in the yards, was engaged in interstate commerce. In this case the court quotes with approval the holding of other cases that preparatory movements in aid of interstate transportation are a part of such commerce, within the meaning of the Federal act.

In the case at bar it is practically conceded by the defendant, and established by the evidence, that the engine upon which the plaintiff performed his duties was indiscriminately used in intrastate and interstate commerce.

Upon the trial, among other things, the following proceedings were had covering this matter:

The Court: "This seems wholly unnecessary to prove that the Northern Pacific Railway Company is engaged in interstate commerce, and that as to the engines, even the switch engines are engaged in interstate commerce. That is certainly a fact, and it ought not to be necessary to spend any time proving that the Northern Pacific and those engines are in that business. It is an entirely different question as to whether or not the man was engaged in interstate commerce."

Plaintiff's counsel: "Does counsel for the defendant admit that the court's contention is substantially correct?"

Defendant's counsel: "As I understood, your statement is that the Northern Pacific is engaged in hauling interstate freight and interstate passengers, and that the engines here in the roundhouse at Mandan are used in hauling these trains, or at least some of them are used in hauling these trains."

The Court: "That would be taken as correct for the purposes of this case, as to being engaged in interstate commerce."

Defendant's counsel: "No question about it."

It is not to be denied in the record that the plaintiff's usual duties were in connection with interstate transportation, and that his work so closely related to such interstate transportation as to be practically a part of it. The prime question, however, is, whether the plaintiff in preparing the board for this tool box was at the time of his injury, in fact then engaged in interstate commerce, or in a work so closely related to it as to be a part of it. If he had been engaged at work upon the engine at the time, or while sitting beneath the engine was sawing a board for use in connection with the engine, or the repairing of it, or was nailing this board, which had been sawed, on the tool box which he had with him, while at work upon the engine, and then was injured, it would appear that the plaintiff could then be fairly said to be within the terms of the Federal act. Upon the evidence and the findings it is clear that the plaintiff was not sawing this board for

purposes of his own. He was fashioning an instrumentality in the course of his duty, and pursuant to the instructions given to him concerning an instrumentality necessary to be used in interstate commerce or in connection with it. If the saw had been a portable saw which the plaintiff might have had right beside him while he was performing his duties upon the engine, again it would appear that the plaintiff, while sawing the board in connection with his work upon the engine, would be within the terms of the Federal act. It might therefore well be held, within the decisions of the United States Supreme Court, although we do not so determine nor deem it necessary so to determine, that the plaintiff at the time was engaged in the line of his duty and in connection with interstate commerce; that his duties were preparatory to a movement in interstate commerce, if it be conceded that all of the engines upon which he worked were used in interstate commerce.

Well might the engine upon which plaintiff performed his duties be deemed an instrumentality of interstate commerce the same as the bridge was in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779, in view of the practical concession in the record that such engines were indiscriminately used in interstate commerce. Surely the principle does not deserve recognition that an employee engaged in interstate commerce steps without such employment whenever, during the course of such employment, he wipes off a wrench, cleans a shovel, sharpens a tool, or repairs or fashions an instrumentality necessary and incidental to the performance of his work.

The fact that the plaintiff was injured by causal negligence proceeding from the act of defendant's agents or officers, or through an instrumentality not then engaged in interstate commerce, does not deprive the plaintiff of his right of recovery as an employee engaged in interstate commerce. Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 149, 57 L. ed. 1125, 1127, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 51, 56 L. ed. 327, 346, 38 L.R.A.(N.S.) 44, 54, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Upon this record, we are of the opinion that it is immaterial whether the plaintiff be deemed at the time of his injury engaged in interstate or intrastate commerce. We are satisfied, upon the record, that if the

plaintiff's cause be considered not to fall within the terms of the Federal statute because not then engaged in interstate commerce, his cause of action as pleaded and proved, in any event, falls within the terms of the state statute (N. D. Laws 1915, chap. 207). This statute uses almost the same identical language as the Federal Employers' Liability Act, presumably copied directly from it, and changes only such language as is necessary for purposes of making it a law of the state.

The duties of the plaintiff as a night box packer involved acts as a part of, or to further and promote, either interstate or intrastate commerce. Necessarily, the same facts which would establish a liability of the defendant, for the injury sustained by the plaintiff, if then engaged in interstate commerce, would likewise establish a liability of the defendant under the state law cited, if the plaintiff was not then so engaged. If it be deemed that the plaintiff was not engaged in interstate commerce at the time of his injury, it is then fairly clear that his duties concerned and involved an engagement concerning commerce to which the regulative powers of the state applied.

But the defendant maintains that at the time plaintiff was injured the class of work which he was then performing may not be called railroad work proper, which is peculiarly hazardous in its nature, and that under the authority of Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, the fellow-servant rule and the ordinary common-law defenses were available to the defendant.

This contention must be denied. The plaintiff's duties fall within the class of rail work proper,—"the business of running trains, keeping the tracks in repair, and other similar work connected with the use and operation of railroads." Beleal v. Northern P. R. Co. 15 N. D. 325, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453. This is a business of a common carrier engaged in commerce, whether interstate or intrastate. Fairly upon this record it may be said that the plaintiff was performing these duties in the course of his employment. See Gunn v. Minneapolis, St. P. & S. Ste. M. R. Co. 34 N. D. 418, 158 N. W. 1004.

The allegations in the complaint set up facts bringing plaintiff's cause of action within the terms of the Federal Employers' Liability Act, although the complaint does not in terms speak of a violation of such act. Such allegations also constitute a cause of action under the

state law if the Federal act does not apply. The court instructed the jury upon the theory that the Federal act applied. At the close of the case the defendants moved for a directed verdict upon grounds, among others, that the evidence showed that the plaintiff was not engaged in interstate commerce, that the defendant was deprived of the benefit of trying it under state laws, in force and effect at the time of the accident.

Again, after judgment was entered the defendant moved for judgment *non obstante*. It is apparent that the question of whether or not a railway employee is engaged in interstate or intrastate commerce frequently involves questions of great legal nicety. Questions of fact are propounded which often are questions for the jury. The defendant here made no request to have the jury find upon this particular question. Upon the facts as shown in the record the plaintiff had a cause of action either under the Federal act or state act. If the Federal act applied, it superseded the state statute. Wabash R. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224. If the Federal act did not apply the jurisdiction of the state law then became supreme. Corbett v. Boston & M. R. Co. 219 Mass. 351, 107 N. E. 60, 9 N. C. C. A. 691. The Federal act would apply even though the cause of action had been based upon the state law. Hein v. Great Northern R. Co. 34 N. D. 440, 448, 159 N. W. 14. In the complaint at bar it required only an elimination of the allegation that the plaintiff was then engaged in interstate commerce to state completely a cause of action under the state law. In this state, where the cause of action under the state law is practically identical with the cause of action under the Federal act excepting as the same affects commerce, there are evident reasons why, in the judicious expedition of litigation and the saving of expenses both to the parties and to the state, one trial should be had wherein the facts could be ascertained and the conflicting issues of the application of the Federal or state act determined in one action, where by so doing the defendant is not deprived of full opportunity to defend under either act. As a matter of justice the defendant was not entitled to foreclose the plaintiff's right of action under the state law if by reason of the conflicting evidence it was determined that the facts did not give rise to the application of the

Federal act. Corbett v. Boston & M. R. Co. and Wabash R. Co. v. Hayes, supra.

In actions of this kind the method of determining the question of whether the employee was engaged in interstate commerce is a matter of state practice. North Carolina R. Co. v. Zachary, 232 U. S. 248, 257, 58 L. ed. 591, 595, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109. It is apparent upon this record that the defendant's position in accordance with its defense interposed is not made worse, no matter whether the Federal act or the state law be applied. Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 35 Sup. Ct. Rep. 620, 9 N. C. C. A. 452. In Kansas City Western R. Co. v. McAdow, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857, an action was brought in Missouri for injuries sustained by a motorman upon an electric car of the defendant; the original petition alleged negligence occurring in the operation of the car intrastate; an amendment was allowed alleging negligence of the defendant in violation of the Federal act. The court held that the amendment introduced no fact inconsistent with those first alleged, and it was unnecessary when the facts were stated to invoke the act of Congress in terms; that the law governing the situation is equally a law of the state whether derived from Congress or the state legislature, and must be noticed by the courts. The court further stated that the questions raised really are immaterial, since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them govern the case; that under such circumstances it is unnecessary to decide which law applies. It is therefore proper in this state to determine, as a matter of practice, that when facts are alleged in a complaint which predicate a cause of action either under the Federal or the state Employers' Liability Act, recovery may be had under either act as the facts warrant, where the position of the defendant, upon the record, is not made worse by so doing. Upon this record, therefore, a cause of action exists against the defendant regardless of whether the Federal act or the state act is made to apply if in fact its negligence has been sufficiently shown, as a matter of law, upon the evidence.

After a careful consideration of the evidence, we are of the opinion

that the question of defendant's negligence was fairly a question of fact for the jury.

The saw was an old saw. There it had been located for over twenty years. It had over it a home-made safety device which concededly was not always used by the man whose principal duty it was to operate the machine. The saw did not operate perfectly. The fact that it would slow up and that the belt would transfer from the live to the neutral pulley was known to the defendant by actual notice brought to its foreman, considerably prior to the time of this accident, when the foreman of the roundhouse gave his instructions to his men after a man had been hurt; the defendant then knew and realized its dangers. Under the evidence the effect of the saw slowing up and becoming dead or half dead while in the course of the operation of sawing is manifest. It became then a highly dangerous instrumentality.

The jury found that the safety device was defective, that the machinery was defective, and that the defendant was negligent in not more strictly enforcing its rules in the operation of the saw. Upon the whole record we are fairly satisfied that these questions of defendant's negligence were fairly for the consideration of the jury. It was the duty of the defendant, if he directed the plaintiff either expressly or impliedly to use this saw, to provide a saw reasonably safe in its condition and safety devices in connection therewith likewise reasonably safe. Under such circumstances the duty was likewise imposed upon the defendant, in the exercise of ordinary care, to give to the plaintiff instructions concerning the operation of such saw. See Harney v. Chicago, R. I. & P. R. Co. 139 Iowa, 359, 115 N. W. 886; Chilson v. Lansing Wagon Works, 128 Mich. 43, 87 N. W. 79; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Warehime v. Huseby, 38 N. D. 344, 165 N. W. 502; Cannon v. South Dakota C. R. Co. 29 S. D. 433, 137 N. W. 347; Latman v. Douglas & Co. 149 Iowa, 699, 127 N. W. 661. This court might well, upon the record, find for the defendant upon the question of fact, if this court were passing on the same as questions of fact. The jury, however, have determined these questions of fact; this court is bound by its determination. It therefore follows that the judgment of the trial court, sustained by the special findings of the jury, should in all things be affirmed.

MAY L. MORAN, Plaintiff and Appellant, and R. H. JOHNSON, W. F. Burnett, and F. H. Register, Interveners and Appellants, v. L. A. SIMPSON, T. D. Casey, et al., Defendants and Respondents.

(173 N. W. 769.)

Attorney and client — contract for attorneys' fees — public policy.

1. A certain written contract for attorneys' fees between the defendants, attorneys at law, and the plaintiff, examined and *held* to be against public policy.

Attorney and client — contract of employment — validity.

2. The contract for attorneys' fees prohibited the plaintiff from entering into any negotiations for the purpose of arriving at a compromise, adjustment, or settlement with certain parties with whom she was about to have litigation concerning certain property which was claimed by the plaintiff, and, adversely to her, claimed by those against whom the litigation was to be instituted, without her first having obtained thereto the written consent and approval of the defendants, her attorneys. *Held*, that such stipulation in the contract is against public policy, and is for that reason void. This being true, it made void the further provision in the contract which stipulated the amount of fees which defendants were to have received for services to be rendered by them to plaintiff under the terms of such contract.

Attorney and client — conveying property by client to attorney for fees — confidential relations.

3. Plaintiff, at the solicitation of defendants, having given a deed to the defendants for one half of certain real property and an assignment of certain property which defendants claimed they were entitled to in payment of certain attorneys' fees, said deed and assignment having been procured from the plaintiff without the defendants, at the time of the procuring of the same, having explained to the plaintiff the terms of the contract of employment, and without them telling her that she was not required by the terms of the contract to give such deed and assignment, and without having fully and fairly as her attorneys advised or explained to plaintiff her rights, powers, and privileges in such matter; it is *held* that, by reason of the confidential relation existing between defendants and plaintiff at the time of the execution of the deed and assignment and the failure of the defendants to properly advise, direct, and counsel plaintiff in all the matters above stated, the deed and assignment are wholly void.

Attorney and client — conflicting interest in property — confidential relations.

4. Where defendants were employed by plaintiff as her attorneys to procure for her and protect an interest in certain real and personal property also claimed by other parties against whom plaintiff was about to institute litigation, and which litigation was instituted, and wherein plaintiff's right to the property was being vigorously resisted and contested by various other claimants thereto, and the defendants during the time of such litigation by deed and assignment from plaintiff acquired an interest therein,—it is *held* that such interest so acquired by defendants was adverse and antagonistic to the interest of plaintiff, and a deed and assignment from plaintiff to defendants of such interest are *held* void as being procured in violation of a confidential relation then existing between defendants and plaintiff.

Work and labor — recovery on quantum meruit — invalid contract.

5. Where a written contract for attorneys' fees is void, services rendered by attorneys thereunder usually may be recovered in an action on *quantum meruit*.

Opinion filed June 2, 1919. Rehearing denied July 29, 1919.

On appeal from Stark County District Court, Honorable *Charles M. Cooley*, Judge.

Reversed.

J. P. Cain, W. F. Burnett, and *Engerud, Divet, Holt, & Frame*, for appellants.

Owing to the confidential and fiduciary relations between an attorney and his client and to the influence of the attorney over his client growing out of that relation, courts of law, and especially of equity, scrutinize most closely all transactions between an attorney and his client. 4 Cyc. 960; 2 R. C. L. §§ 42, 43; 6 C. J. p. 737, § 311; 1 Perry, Trusts; 2 Pom. Eq. Jur. § 960; Thornton, Attys. at Law, 744; Felton v. LeBreton (Cal.) 28 Pac. 490; Elmore v. Johnson (Ill.) 32 N. E. 443, 36 Am. St. Rep. 401, 21 L.R.A. 366; Willin v. Burdette (Ill.) 49 N. E. 1000; Shirk v. Neible (Ind.) 83 Am. St. Rep. 159, 59 N. E. 281; Thomas v. Turner (Va.) 12 S. E. 149; Dickinson v. Bradford (Ala.) 31 Am. Rep. 23.

When two parties stand toward each other in any relation which necessarily induces one to put confidence in the other and gives to the latter the influence which naturally grows out of such confidence, and a sale is made by the former to the latter, equity raises a presumption

against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in perfect good faith without pressure of influence on his part, and with complete knowledge of the situation and circumstances and entire freedom of action on the part of the seller. Dunn v. Dunn (N. J.) 7 Atl. 842; Condit v. Blackwell, 22 N. J. Eq. 481; Porter v. Woodruff, 36 N. J. Eq. 174; Farmer v. Farmer, 39 N. J. Eq. 211; Cleine v. Englehart (N. J.) 5 Atl. 718; Hill v. Hall (Mass.) 77 N. E. 831; Burnham v. Ilcselton (Me.) 20 Atl. 80; Pom. Eq. Jur. §§ 955–957; Adams, Eq. § 61, and notes; Story, Eq. Jur. § 310; Egan v. Burnright (S. D.) 149 N. W. 176; Woodcock v. Barrick (W Va.) 91 S. E. 396.

A contract between attorney and client which deprives the client absolutely of any control of her interest of the proceedings to protect or enforce them, and vests that power and control absolutely and irrevocably in her attorneys, is contrary to public policy and void. Greenleaf v. Ry. Co. 30 N. D. 112; Longue v. DeJain (La.) 56 So. 427, 38 L.R.A.(N.S.) 389; Scheinesohn v. Lemonek (Ohio) 95 N. E. 913; Bartlett v. Odd Fellows Sav. Bank (Cal.) 21 Pac. 743; Price v. Western Loan & Sav. Co. 19 Ann. Cas. 589, and note; Gibson v. Chicago R. Co. (Iowa) 98 N. W. 474; Schouweiler v. Allen, 17 N. D. 510; 4 Cyc. 954 and cases cited; Polsley v. Anderson, 7 W. Va. 202. 23 Am. Rep. 613.

In every contract where the attorney agrees to give his services based on a contingent fee, notwithstanding any expressed stipulation to the contrary, the client has the right to terminate the employment before the completion of the litigation only for the reasonable value of the attorney's services. Scheinesohn v. Lemonek (Ohio) 95 N. E. 913; Bartlett v. Odd Fellows Sav. Bank (Cal.) 21 Pac. 743; Price v. Western Loan & Sav. Co. 19 Ann. Cas. 589, and note; Gibson v. Chicago R. Co. (Iowa) 98 N. W. 474; Schouweiler v. Allen, 17 N. D. 510; 4 Cyc. 954 and cases cited; Polsley v. Anderson, 7 W. Va. 202, 23 Am. Rep. 613.

T. F. Murtha, L. A. Simpson, and *T. D. Casey,* for respondents.

Any person may before the trial intervene in an action or proceeding, who has an interest in the matter in litigation or in the success of either party, or an interest against both. Comp. Laws 1913, §§ 7413, 7789; Bray v. Booker, 6 N. D. 526, 72 N. W. 933; Horn v. Volcono

Water Co. 13 Cal. 62, 73 Am. Dec. 569; 6 C. J. 719, § 283; Greenleaf v. Ry. 30 N. D. 112.

The common-law rule in regard to contracts between attorney and client is abrogated in this state, and attorney and client may lawfully make contracts fixing the attorney's compensation. Comp. Laws 1913, § 7789; 6 C. J. 719, § 283.

Contingent fees are lawful in this state. Greenleaf v. Ry. 30 N. D 112.

A contingent fee of 50 per cent is not unconscionable. 6 C. J. 740, § 316, 741, note 10; Dreiband v. Candler (Mich.) 131 N. W. 129; Re Fitzsimons (N. Y.) 66 N. E. 554; Taylor v. Bemiss, 110 U. S. 42, 28 L. ed. 64.

The defendants were not the attorneys for plaintiff until the contract of May 9th was signed, and in making such contract the plaintiff dealt with the defendants at arm's length. 2 R. C. L. 1036, § 120; 6 C. J. 735, § 309; 1 Story, Eq. Jur. 13th ed. §§ 310–313; Elder v. Frazier (Iowa) 156 N. W. 182; Dockert v. McLellan (Wis.) 67 N. W. 733; Clifford v. Braun, 71 App. Div. 432, 75 N. Y. Supp. 856; 6 C. J. 688, § 212, notes 35 and 37.

The cancelation of an executed contract is an exertion of the most extraordinary power of the court of equity, which ought not to be exercised except in a clear case and on strong and convincing evidence. 9 C. J. 1254, § 195; Lovell v. McCanghey (S. D.) 66 N. W. 1085; McKillip v. Bank, 29 N. D. 541, 151 N W. 287; Schmidt v. Curtiss (Wash.) 130 Pac. 89.

Where parties employ an attorney, paying a certain amount as retainer only, and there is no fraud in the making of the contract, the attorney on being discharged and other attorneys substituted will not be required to return the retainer. Moyer v. Cantiney (Minn.) 42 N. W. 1060; See 5 Century Dig. Attorney & Client, p. 1786; Kersey v. Garton, 77 Mo. 645; 5 Ky. L. Rep. 2, 16 Cent. L. J. 472; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796.

Where an attorney is employed to defend a suit and is discharged without cause, the measure of his damages is the compensation named in the contract. Kersey v. Garton, 77 Mo. 645; 5 Ky. L. Rep. 2; 16 Cent. L. J. 472; Webb v. Trescony, 76 Cal. 621, 18 Pac. 796.

For other cases in point under circumstances somewhat similar to

the case at bar, transactions between the attorneys and client were upheld. Ah Foe v. Bennett (Or.) 58 Pac. 508; Donohoe v. Chicago Cricket Club (Ill.) 52 N. E. 351; Bartlett v. Odd Fellows Sav. Bank (Cal.) 21 Pac. 743; Bingham v. Salene (Or.) 14 Pac. 523; Lewis v. Helm (Colo.) 90 Pac. 97; Kidd v. Williams (Ala.) 56 L.R.A. 879; Meyers v. Luzerne Co. 124 Fed. 436; Hamilton v. Holmes (Or.) 87 Pac. 154; Ringen v. Ranes (Ill.) 104 N. E. 1023; Garceau v. Arcand (Minn.) 145 N. W. 809; Vanasse v. Reid (Mich.) 87 N. W. 192; Lindt v. Linder, 90 N. W. 596; Day v. Wright (Ill.) 84 N. E. 226; Mitchel v. Colby (Iowa) 63 N. W 769; Morrison v. Smith (Ill.) 23 N. E. 241; 2 R. C. L. p. 96, § 43, note 17.

Ordinarily, where the clients convey to the attorney an interest in the cause of action and the lawful effect of the contract is to confer a power coupled with an interest, the contract is not revocable at will. Larned v. Dubuque (Iowa) 53 N. W. 105; Gray v. Bemiss (Minn.) 151 N. W. 135; Re Haynes, 12 N. E 60; 38 L.R.A.(N.S.) 390; 2 C. J. 531; Bird v. Phillips, 87 N. W. 414; Marziou v. Pioche, 8 Cal. 536, 38 L.R.A.(N.S.) 390; Gulf, C. & S. F. R. Co v. Miller, 21 Tex. Civ. App. 609; 53 S. W. 709. See also People ex rel. Downer v. Norton, 16 Cal. 436.

GRACE J. Appeal from the district court of Stark county, Chas M. Cooley, Judge.

This action is one to set aside and cancel a deed to certain lands, and a certain assignment to certain lands, and personal property, and to reform a certain note and mortgage. The material facts in the case are as follows:

James H. Caldwell and Laura E. Caldwell, his wife, were murdered by their hired man in Stark county, North Dakota, on April 30, 1917. James H. Caldwell died testate, seised of certain real estate which consisted of approximately 4,100 acres of land in Stark county, 225 head of cattle, and, in addition to this, some horses, farm machinery, and furniture. The estate was appraised at $60,000; it was encumbered for approximately $10,000. The property was all in Mr. Caldwell's name. He had two children only,—a daughter, May L. Moran, the plaintiff, and a son, Jay Allen Caldwell, who, it is conceded, disappeared in October, 1907, and who has never since been heard from.

It does not appear from the record in this case whether Mr. or Mrs. Caldwell died first. It is a matter which is not material in this controversy, except it may have an indirect bearing upon one of the questions presented to which we will later refer. Mrs. Caldwell died intestate, leaving an adult son, Albert Mark Smith, who was her only heir, he being her son by a prior marriage to that with Mr. Caldwell. The will of Mr. Caldwell was dated the 4th day of April, 1916. In it he bequeathed to his wife for the term of her natural life the homestead, the northeast quarter (N.E.¼) of section 8, township 138, range 93, together with the income and profits therefrom. He further bequeathed her the sum of $15,000, which was to be realized from the sale of personal property or real estate. In addition to this, he bequeathed to her all the horses and machinery and furniture. He bequeathed to Deborah Lovewell, his sister of Chicago, Illinois, the sum of $1,000 and also a contingent interest in other property to which we will later refer; to his sister Julia H. Tennis, of Chicago, the sum of $1,000. All the residue of the estate, real, personal, and mixed, he devised and bequeathed to R. H. Johnson and W. F. Burnett, of Dickinson, North Dakota, and F. H. Register, of Bismarck, in trust for J. Allen Caldwell. The will further provided that if J. Allen Caldwell did not within twenty-five years appear to claim his interest, then the residue of the estate should be taken by Deborah Lovewell. He also appointed the same parties who were by the will designated trustees, or survivor, or survivors of them, as the executors of his will, and named them as such therein. The trustees were empowered to hold the property in question, manage and care for the same, to contract for the sale of and to sell and dispose of any and all of the real estate and personal property. A like power was conferred upon the trustees as upon executors.

May L. Moran, desiring to contest the will, first employed as her attorneys the firm of Casey & Burgeson, of Dickinson, North Dakota, and entered into a contract in writing with them, which she duly executed, and which was, on behalf of the firm of Casey & Burgeson, signed with the firm name by T. D. Casey. Mr. Burgeson refused, however, to have anything to do with the case, and is not a proper party to the action. This contract is exhibit "G," and is as follows:

Whereas, the estate of James H. Caldwell is about to be probated, and I, the undersigned, Mae Moran, daughter of said James H. Caldwell, wish to have my interests looked after and taken care of.

Therefore, Casey & Burgeson are hereby retained by me to look after my interests in said matter, and, providing a contest of the will of said James H. Caldwell is decided upon, then and in that case said Casey & Burgeson are to receive as fees for their services . . . amount, the same to be equal to . . . per cent of the value of the estate obtained by me through such contest. That unless such contest is decided upon by us, and other disposition is made, under the provisions of the will, then Casey & Burgeson are to receive such fee from me as will be reasonable and hereinafter decided upon.

That I am destitute and without funds and cannot provide funds for said contest or for any purpose, therefore this agreement is made with Casey & Burgeson.

Dated at Dickinson, N. D., this 4th day of May, 1917.

Mrs. Mae Moran.

Witness:

A. M. Fay.

We and each of us hereby accept the terms of the above arrangements.

Dated this 4th day of May, 1917.

Casey & Burgeson,
By T. D. Casey.

Subsequent to the execution of this contract and on May 9, 1917, the plaintiff entered into another contract with Leslie A. Simpson and Tobias D. Casey, being the same Mr. Casey who is a member of the firm of Casey & Burgeson. This contract is exhibit "A" and is as follows:

This agreement, made this 9th day of May, 1917, between May L. Moran of Dickinson, N. D., daughter and heir at law of James H. Caldwell, deceased, and legatee under the purported will of James H. Caldwell, deceased, party of the first part, and Tobias D. Casey and L. A. Simpson, attorneys, of Dickinson, N. D., parties of the second part, witnesseth:

The party of the first part desires to contest the will of James H.

Caldwell, deceased, and to institute legal or other proceedings to acquire for herself her rightful share of her father's estate, and she is without funds to carry on such contest; to that end she hereby retains and employs the parties of the second part as her attorney irrevocably to take charge of all matters in connection with the said estate for and in her behalf, and to conduct such proceedings in said court or such other court as the case may be removed to, to protect her interest in said estate.

The party of the first part agrees upon her part that she will not enter into or conduct any negotiations of any kind or character with the executors of said estate, the above-named petitioners, or with any other person, looking to a settlement, adjustment, or compromise of her interest connected with the said estate, save and except the parties of the second part, and that she will, in all things connected with any litigation growing out of it or any efforts at settlement or compromise, consult with and be guided exclusively by the advice of the parties of the second part, and will make no settlement of any kind or character in connection therewith without first having obtained the written consent and approval of the parties of the second part. And the party of the first part, in consideration of the employment and retainer aforesaid, hereby agrees to allow an expense account to the parties of the second part in a sum not to exceed $3,000, exclusive of the compensation and commissions to be paid to the parties of the second part as hereinafter stated.

In consideration of the parties of the second part accepting such employment and undertaking to protect and enforce the interests of the party of the first part in said estate, in addition to the expense account hereinbefore mentioned, the party of the first part agrees to pay to said second parties a sum equal to 50 per cent of the amount realized by the said May L. Moran from said estate whether the same be realized by adjustment, compromise, litigation, or in any other manner whatever.

In consideration of the things hereinbefore mentioned the parties of the second part accept such retainer, and agree and undertake to protect the rights of the party of the first part in and to said estate, and to do all things in their judgment whatsoever requisite and necessary, and to that end full power and authority by the party of the first part is given to the parties of the second part to adjust, settle, or com-

promise the interests of the party of the first part in said estate, but no final settlement shall be made and consummated by the parties of the second part without first submitting the offer, compromise, or adjustment to the party of the first part.

In witness whereof said parties have hereunto set their hands and seals the day and date first above written.

May L. Moran,
Tobias D. Casey,
L. A. Simpson.

On the 5th day of May, 1917, the executors presented the will for probate to the county court of Stark county, and also petitioned to be appointed as special administrators therein. The defendants Simpson and Casey, on the 18th day of June, 1917, as attorneys for plaintiff, filed a contest against the probate of the will, alleging incapacity of James H. Caldwell to make said will by reason of alcoholic insanity and upon other grounds. The hearing of the proof of will was to have occurred on the 21st day of June, 1917. The defendants Simpson and Casey, after their retainer, had done considerable work in preparation for the contest of the will and were to more or less expense, all of which facts appear more fully from the evidence.

Just prior to the date upon which the contest of the will was to have been heard, it seems to have been decided upon by plaintiff and her attorneys to purchase the interest of Deborah Lovewell in the estate which was bequeathed to her, as we have above stated. The executors named in the will and W. F. Burnett, their attorney, were consulted in this regard. The hearing of the proof of will was continued to the 15th day of October, 1917. On the 9th day of August, 1917, W. F. Burnett, one of the executors and trustees named in the will, was sent to Chicago by Simpson, Casey, and May L. Moran with the consent of the executors to determine whether said Deborah Lovewell's interest could be purchased for May L. Moran. On the 22d day of August, 1917, S. E. Thompson of Chicago, Deborah Lovewell's attorney, came to Dickinson, North Dakota, and the sale of Deborah Lovewell's interest was finally consummated. It was purchased by the plaintiff in this action for the sum of $7,500. The money to pay for the interest of Deborah Lovewell was furnished by the firm of Simpson & Casey.

It also appears that the defendants were making some effort to purchase the interest of the heir of Laura E. Caldwell, which is shown by the bequest in the will, that interviews were had with the executors and Pugh & Thress, attorneys for Albert Mark Smith, with a view to buying the interest for May L. Moran. This purchase was never consummated by the defendants, but was later made by May L. Moran and the executors for the sum of $12,500.

The defendants claim that in pursuance of the contract exhibit "A", and with the understanding and consent of May L. Moran, and during the negotiations for the purchase of the interests of Deborah Lovewell and Albert Mark Smith, that the plaintiff agreed with Simpson & Casey that if they would purchase the interest of Deborah Lovewell and pay for the same, she would immediately by deed and assignment convey them an undivided interest in all the property she would receive from her father's estate, whether the same be by suit, purchase, compromise, settlement, or any other manner, and whether the said interest be real, personal, or mixed property; and that she at that time agreed to give them a note and mortgage upon the real estate that she might obtain from the estate as security for the money advanced by defendants to purchase the interest of Deborah Lovewell and Albert Mark Smith in the estate.

On the 28th day of August, 1917, May L. Moran made, executed, and delivered a deed to one-half interest in all of her interest to the real estate belonging to the estate of her father, and on the same date made an assignment of one-half interest of all the property of the estate of every kind and description that she would then or thereafter obtain from her father's estate. The deed was acknowledged on the 4th and the assignment on the 5th day of September, 1917. The deed was recorded in the register of deed's office, Stark county, on September 24th, at 2:55 o'clock P. M. The mortgage for $12,500 was dated September 4, 1917, and recorded September 24, 1917, at 3:10 o'clock P. M.

It is claimed by the defendants that the deed of one-half interest in the land therein described, and the assignment which purports to transfer the one-half interest in the land and certain personal property, were executed and delivered to them in pursuance of the terms of the contract of May 9, 1917. It is conceded by the defendants that the mortgage for $12,000 should be reformed and reduced to $7,500, and

when so reformed should be a lien upon the land. It may also be conceded that the defendants have rendered a considerable amount of professional service to the plaintiff.

We think the foregoing covers all the material facts in the case, and we may now proceed to consider the relative rights of the parties to the litigation. The two contracts have been set forth herein for the reason there is considerable authority to show that after an attorney has once entered into a contract with his client, and is retained by the client and the compensation for his professional services is agreed upon, that thereafter such compensation cannot be changed by agreement between the attorney and the client, nor increased by the making of a subsequent contract with reference thereto. Whatever may be the rule in other states, we are satisfied that this rule does not apply in this state. We have a statute which treats of the right and power of an attorney in making a contract. It is § 7789, Compiled Laws 1918, which so far as material to this case, reads thus: "The amount of fees of attorneys, solicitors, and counsel in civil and criminal actions, must be left to the agreement, express or implied, of the parties." The language of this statute is plain and cannot be misunderstood. It confers upon the attorney the right to make a contract with his client upon such terms as he and the client may finally agree. The attorney and the client having a right to make the contract, it must follow they have a right to change the terms of the contract by mutual agreement or the right to entirely abrogate the first contract and make a new contract.

It is claimed by the appellant that the trial court erred in its findings of fact and conclusion of law predicated thereon, in determining therein that the executors had no interest in this action and were not properly interveners, and that their complaint should be dismissed. That the trial court is in error in this regard, there can be no doubt. The interveners were the executors of the will. As such, for the purpose of administration, the title of all the property vested in them. They were thus accountable as a matter of law for all property which came into their hands or under their control, and were answerable and could be held to account fully for the same to anyone who was entitled to receive any of such property. If the trust created by the terms of the will was invalid as being contrary to the laws of this state, the executors nevertheless would be vested with control and be in charge of the

property until such time as it was legally and properly distributed to those who were finally determined by the court to be entitled to it. The position of an executor or administrator is a trust of the highest character. They are held to strict accountability for all property, money, or effects that may come into their hands or under their control by virtue of such relation. See McFadden v. Jenkins, 40 N. D. 422, 169 N. W. 151. Truly, then, the executors had a very material interest in the result of this action. This being true, they were not only proper, but necessary, parties, and their complaint in intervention should not have been dismissed, and it was reversible error so to do.

Appellant has also assigned as error the conclusion of law by the trial court, which is as follows: "That the contract of May 9, 1917, as well as the assignment and deed described in the amended complaint, are valid and binding instruments, and are not null and void nor inequitable nor unconscionable, but the interest thus conveyed to defendants under said assignment and deed is, and equitably should be, impressed with a lien in favor of the said May L. Moran, as security for the payment by defendants to her of such sum, if any, as she may be required to pay on the note, exhibit 'C,' or any other sum or sums which have been or may be expended by her pursuant to the contract, exhibit 'A,' in excess of her proper one half thereof, and the judgment to be entered herein will decree such lien accordingly."

In connection with this assignment of error may be considered a further one, *viz.*, that it was error to dismiss the complaint of the plaintiff, and under these two assignments of error may be included the discussion, if any, relative to any other assignments of error. The appellant at the very conclusion of the brief uses the following language: "This, of course, leaves the retainer contract, exhibit 'A,' stand for what it is worth. Its validity, or Messrs. Simpson & Casey's rights under it against Mrs. Moran, are not the issue in this action." In this the appellants are entirely mistaken, for one of the main issues raised by the pleadings, and which is pleaded in the complaint and answer, is the validity of exhibit "A," and the validity of the deed and assignment. The defendants and respondents in their brief use the following language: "In conclusion we desire to direct the court's attention to counsel's emphatic statement at the commencement of their brief, and which statement is reiterated throughout such brief to the

fact that the validity of the contract of May 9th is not here in question. Such attitude of counsel is, in view of the testimony, commendable, but the statement by them on page 126 of their brief, that the assignment, exhibit 'B,' the deed, exhibit 'D,' the note for $12,000, exhibit 'C,' and the mortgage securing same, are the only instruments attacked by the complaint, and the only instruments against which relief is sought, is manifestly not true, as a glance over the complaint will clearly disclose. In paragraph 12 of the complaint they expressly challenge the validity of such contract, alleging that the same was and is unconscionable and exorbitant, and that said several instruments and assignments (which include the contract of May 9th) were and are unequitable and void and without consideration, except as therein stated and in fraud of her rights, etc."

In the defendants' answer, the following allegation is contained:

"That the plaintiff, May L. Moran, wished to contest the said will of said James H. Caldwell, but, being absolutely without means, she was unable to secure counsel to conduct a contest or any litigation that might be necessary, or to take any other steps to protect her rights in the estate, unless such counsel could be procured upon a contingent basis, as plaintiff, May L. Moran, informed these answering defendants when she solicited these defendants to appear for and to represent her in said estate.

"That on the 9th day of May, 1917, said May L. Moran, one of the above plaintiffs, entered into a written contract with the answering defendants, attorneys at law, residing at Dickinson, Stark county, North Dakota, to represent her in all litigation, settlement, or compromise, of every kind and description growing out of her claim to the property left by James H. Caldwell, at his death, and said attorneys were to receive for such services a contingent fee of fifty per cent (50 per cent) of all of the property of whatever kind obtained by said May L. Moran out of the estate of her father, James H. Caldwell, deceased, and, in addition thereto, an expense account not exceeding three thousand dollars ($3,000).

"That thereafter and in pursuance of such written employment, the answering defendants served upon W. F. Burnett, Esq., attorney for the executors and trustees named in the will, and upon said executors personally, a notice of retainer and appearance in said case,

which notice of retainer and appearance bore date May 10, 1917, and said answering defendants ever since said time have been and now are acting as the attorneys for said May L. Moran."

The issue, then, is the validity of the instruments above mentioned, and it clearly appears to be such from the pleadings. The contract of May 9th is an issue in the case. Its terms, validity, effect, was, on oral argument, thoroughly analyzed by the attorneys of both appellant and respondent. Defendants' claim of right to recovery in this action is based largely upon the terms of the contract. If that contract is invalid, the deed and assignment have no standing in this action, and are of no effect, and are void, and, should that contract be determined to be a valid one, the deed and assignment, for reasons which we shall state, might, nevertheless, be void. Assuming for the present that the contract of May 9th is valid, we are convinced the deed and assignment, so far as the contract is concerned, are void and should be canceled of record.

The 50 per cent clause in the contract means 50 per cent of the amount of money which May Moran should finally receive from the state, and not 50 per cent of the property, either real or personal, which might be recovered in her action against estate. Giving such words their usual and commonly understood signification, no other reasonable conclusion can be reached. Under the 50 per cent clause in the contract, the defendants had no right, and were not entitled, to a transfer to them of one half of the real and personal property. Such transfer was not in accordance with the terms of the contract, and, considering all the facts and circumstances under which it was executed and the confidential relations of the parties, it was voidable by the plaintiff at any time so far as the defendants were concerned.

If a transfer such as this from the plaintiff to her attorney, of property in litigation based upon the 50 per cent clause in the contract, could in any event be valid, it could only be where there is clear proof that the plaintiff prior to, and at the time of, the transfer, fully understood the nature and the meaning of the entire contract, exhibit "A," and upon further clear proof that the defendants in this action, her attorneys, had fully and fairly explained the whole of the contract and its legal meaning and effect to her. It would have to appear from competent and clear testimony that she made such transfer knowingly;

that it was one warranted or required under the terms of the contract; and that she at that time knew and understood that the defendants were entitled only to 50 per cent in money of whatever was recovered from the estate; and that she further knew that the defendants were not entitled under the contract as a matter of right to receive a deed to 50 per cent or one half of the land and assignment to one half the personal property. It was incumbent upon the defendants to explain fully and fairly to the plaintiff all these matters and terms of the contract, exhibit "A," before she executed the deed and the assignment. They could not draw up a contract providing for such transfer, and hand it to plaintiff or read it to her, and let her draw her own conclusions as to what its meaning was. They were bound in good faith to explain every term of the contract and the full meaning thereof to her. They were further bound to advise her of the legal consequences of the making of such transfer; that is, they were bound to inform her that under such transfer they would have a legal right in all the property equal to that of plaintiff; that they would have a legal right to object to a settlement about to be made or an equal right with plaintiff to make settlement with any other claimants to the estate, and this though it conflicted with plaintiff's wishes, desires, or interests therein; that under such transfer they would become tenants in common with her, etc.

The relation between defendants and the plaintiff was one of trust; it was a confidential relation. There is no proper showing in this record that the defendants so advised the plaintiff, nor that they fully and fairly explained to her the full legal effect of all the contracts executed by her, including exhibit "A," before procuring the transfers in question from her. They appear to have taken a negative position. They appear to have proceeded upon the theory that it was the plaintiff's duty to depend upon her own intelligence exclusively as to the meaning of the terms of all the contracts, and as to the defendants' rights thereunder, and their right, if any, with reference to the transfer of the property in question; and that she had no right to expect and that they were not bound to advise or direct her in arriving at the proper understanding with reference thereto; in other words, they assumed toward plaintiff a kind of *laissez faire,* or *caveat emptor* atti-

tude. Such is not the proper attitude in law nor otherwise for attorneys to assume toward their clients.

It is clear from what we have said in this regard that the transfer was voidable, not only for the failure of the defendants to properly advise the plaintiff of all her rights under the contract and in law with reference to the transfer, but that the transfer is also, under all the circumstances and the misapprehension of fact and law under which we think the record fairly shows it was executed, voidable as being in conflict with the expressed terms of the contract.

The contract of May 9th is not valid, but wholly void; it is one against public policy. It provides in substance that the plaintiff shall not enter into or conduct any negotiations of any kind or character with the executors of said estate, or with any other person looking to settlement, adjustment, or compromise of her interest connected with the estate, save and except the parties of the second part, and that she will, in all things connected with any litigation growing out of it or in any efforts at settlement or compromise, consult with and be guided only by the advice of the defendants, and that she will make no settlement of any kind or character in connection therewith without first having obtained the written consent and approval of the defendants. That such provision of the contract is void and absolutely against public policy, there is not the least doubt. This being true, it makes void that provision of the contract which provides for the payment to the defendants of the 50 per cent of the amount realized from the estate by the plaintiff. Snyder v. De Forest Wireless Teleg. Co. 14 L.R.A.(N.S.) 1101 and note therein cited (190 N. Y. 66, 123 Am. St. Rep. 533, 82 N. E. 742, 13 Ann. Cas. 441; Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 14 L.R.A.(N.S.) 1105, 94 Pac. 262. The contract being void in this respect, there is nothing to do but to hold the deed and assignment void, and it is so held.

There is another reason why the deed and assignment are void, and that is, the defendants as attorney for the plaintiff could acquire no interest in the subject-matter of the action which would be adverse or antagonistic to her interest at the time they received deed and assignment of one half of the land and an assignment of one-half interest in the personal property mentioned in the assignment. As soon as they received the deed and assignment, if the same were valid, they became

part owners of the property. There were others than plaintiff who claimed an interest in the estate with whom settlement had not been made. Plaintiff might want to make settlement with them for a different sum of money than what defendants would be willing to pay. If this were true, their interests would be adverse and antagonistic to plaintiff's. If the plaintiff desired to litigate with others who claimed an interest in the estate, and defendants wanted to settle with such other claimants, the interests of plaintiff and defendant in such circumstances would be adverse, antagonistic, and conflicting, and the same would be true if defendants desired to litigate with other claimants to the estate than plaintiff, and plaintiff desired to settle with them. If, after the defendants received a deed to one-half interest in the land and assignment to one half of the personal property, the plaintiff desired to litigate the other claimants and defendant desired to settle with them, or *vice versa,* in what position would defendants be to actually and in good faith as attorneys represent plaintiff's interest? It is not difficult to see in such circumstances, the defendants would be so placed that they could not in good faith represent the plaintiff and defendant and protect her interests. That this condition did, to some extent, arise in this case, is beyond dispute. The defendants thought the interests of Smith would be bought for approximately $4,000; the testimony shows they were trying to buy it for about this amount; the plaintiff, however, agreed to pay $12,500 for it. It is not difficult to see, under these circumstances, that the interest of plaintiff and defendants in the land and personal property would be adverse, antagonistic, and conflicting.

1 Perry on Trusts, § 202, in part reads as follows: "When an attorney deals directly with his client, either in purchasing from him or in selling to him, as well as in making contracts with him during the time of his employment as attorney, such dealing will be carefully scrutinized by the court to make sure that the consent of the client was freely given, and that no material matters of fact or of law were concealed from him."

The settlement of the estate produced much litigation. Under all these circumstances, we cannot come to any other conclusion than that the defendants placed themselves in an adverse, antagonistic, and conflicting position to plaintiff by taking the deed and assignment

from her; that it was against public policy for them so to do; that in the circumstances of this case they could not do so and still remain in position to protect and defend her interest in the litigation.

At the time of the execution and delivery of the contract, exhibit "A," there was executed and delivered by plaintiff to defendant a certain power of attorney. It conferred no additional powers upon the defendants other than they would have had by virtue of their office as attorneys at law, except it contained a provision which attempted to empower defendants to adjust, compromise, or settle all matters in controversy with the executors or administrators of the estate of James H. Caldwell. This power of attorney must be construed in connection with exhibit "A." We have seen that exhibit "A" is void as being against public policy, in that it prohibited plaintiff from negotiating a settlement with the executors or any other person; that she was prevented by it from adjusting or compromising with any of the other claimants to the estate, etc. This invalid provision in exhibit "A" cannot be made effective or legal by attempting to confer upon the defendants by a separate instrument executed contemporaneously therewith, a power which the plaintiff by law and justice has the first and exclusive right to use and control, and which was illegally withheld from her by the terms of exhibit "A." The power of attorney had no other office than to aid the defendants in carrying out and attempting to make effective the contract which was, as we have seen, against public policy and void. The power of attorney, in all the circumstances of this case, was of no force nor effect, and in no way aids or strengthens the position of defendant. We must therefore hold, and do hold for the foregoing reasons, that the deed and assignment were void.

During the defendants' employment, they advanced on behalf of plaintiff $7,500 with which to purchase the Lovewell interest. They, however, took a note and mortgage from the plaintiff for $12,000, they claiming that the balance over and above $7,500 was for the purpose of purchasing the Smith interest. The defendants have never made any settlement with Smith; settlement with him has been made by the plaintiff. It is apparent, therefore, that the $12,000 note and mortgage should be reduced to $7,500, and as so reduced be lien upon all the land in question. It is therefore held that the note and mortgage are reduced to $7,500; that the defendants are entitled to be repaid said

$7,500, with interest from the date of the note and mortgage at the rate specified in them, and that such mortgage is a lien upon all the land involved in this litigation.

The defendants contend that the execution of the deed and the assignment of the personal property to them was in payment of fees, and the fees having been paid cannot be recovered, and cite much authority which they claim sustains this contention. As we view this matter in this case, this position is untenable. The contract, exhibit "A," being void, there were no fees which would form a consideration for the transfer. The provision in the contract with reference to fees, for the reasons above stated, became invalid, and, as above stated, for many other reasons the transfer by the deed and assignment became and were invalid, void, and of no effect. There is no doubt that a contract for contingent fees is proper and legal. In this case, however, the contract, exhibit "A," for contingent fees, for the reasons above stated, is held to be absolutely void. The defendants in this case as attorneys of law, if entitled to recover anything, are entitled to recover only the reasonable value of their services rendered plaintiff, and of course that could not be recovered in this action.

We have examined thoroughly the specifications of error; and, while there are others than those we have particularly mentioned which would justify reversal of the judgment, we feel it is not necessary to give them particular consideration; they have been examined and considered in connection with what we have stated above.

The judgment appealed from is reversed. The contract, exhibit "A," is hereby as a matter of law declared to be void and of no effect. The deed and assignment are void and should be canceled of record. The $12,000 note and mortgage should be reduced to $7,500, and allowed to draw interest from date at the rate specified therein, and adjudged to be a lien upon all the land; defendants should be required to account to plaintiff for any and all personal property that has come into their hands, possession, or under their control by reason of the assignment or otherwise. It is so ordered. The case is remanded to the trial court for further proceedings not inconsistent with this decision of this court. The appellants are entitled to the statutory costs on appeal.

BRONSON and ROBINSON, JJ., concur.

ROBINSON, J. Fully do I concur in the opinion written by Mr. Justice Grace.

As it appears from the long and bunglesome record, in April, 1916, James Caldwell, of Stark county, made a will, giving to his daughter, May, a nominal sum, and to his wife, $15,000 in cash and a lot of other property, amounting to half his estate, and to the above-named trustees he left the rest of his estate to be held in trust and to accumulate for twenty-five years, awaiting the advent of a son, long lost and probably dead. If the son did not return and claim his share of the estate, then, after the lapse of twenty-five years, it was to go to a sister of deceased. About a year after the making of the will, and at the same moment, the testator and his wife were instantly killed. The deceased left an estate of $60,000. As he did not leave a surviving wife, the whole estate went to his issue. It went in equal shares to May Moran and the long lost son, if alive, and, if dead, then, by the terms of the will, the share of the son went to the sister of the deceased. Will or no will—son or no son—May Moran had title clear to one half of the estate. She retained defendants as her attorneys. They at once induced her to sign a contract of May 9, 1917, giving them 50 per cent of any sum realized from the estate, in addition to expense not exceeding $3,000. And thereby she contracted to make no settlement, adjustment, or contract regarding the estate, unless by consent of her attorneys. They induced her to sign a power of attorney, giving them entire and full control, with a right to compromise and settle all matters. Then on August 28, 1917, they induced her to make a deed conveying to them a half interest in all the land, 4,161 acres, and a half interest in all the other property of the estate. Then, on August 28th, they induced her to make an assignment transferring to them an undivided half interest in all the estate coming to her as heir at law, legatee, or by assignment or conveyance of other heirs or legatees, with directions to the trustees to deliver such property to them, and with directions to the county court to transfer and decree the same to them. Then, under date of September 4, 1917, the plaintiff made to her attorneys a mortgage of her interest in the estate, to secure the payment of a promissory note for $12,000, and interest at the rate

of 10 per cent, in one year. This note and mortgage was given to secure $7,500, which the attorneys paid in cash to the sister of the deceased for an assignment of all her interest in the estate to May Moran. It was also given to secure an additional sum which was not paid. Hence the mortgage secures only $7,500 and interest, and it should not have been taken for a greater sum.

Manifestly there was nothing in the case to warrant either the original agreement, the deed, or the assignment. While an attorney may bargain for a fair and reasonable fee, he may not in effect rob his client by contracting for an extortionate or exorbitant fee. When Jacob bargained with starving Esau to sell him his birthright for a meal of bread and pottage, he took an unconscionable and unfair advantage of another's necessity and distress, and that is just what was done in this case. Though Esau may have fully comprehended the nature of his simple bargain, that did not make it fair or conscionable; and though the plaintiff may have fully comprehended the legal tenor and effect of the papers she signed, though she may have been given the most lucid explanations of the same, that does not make the papers either legal, fair, or conscionable. The whole transaction admits of no palliation or excuse. It bears the indelible stamp of unfairness and oppression. It has subjected the plaintiff to anxiety and ruinous expense far in excess of taxable costs. This expense and every dollar of it the defendants should pay.

An attorney is a minister of justice. He has no right to bind his own client, or any other person, with burdens that are grievous and heavy to be borne.

ADDENDA per ROBINSON, J.: Mr. Casey complains that the opinion is a grave personal reflection on his character as an attorney, but it should not be so construed; such is not the purpose of the opinion.

CHRISTIANSON, Ch. J., and BIRDZELL, J. (concurring in part and dissenting in part). We concur in the judgment of reversal but not in that portion of the judgment which declares the contract, exhibit "A," null and void. Inasmuch as the majority of the court has based the judgment upon reasons with which we are not in accord, and have made holdings upon certain legal propositions that are not in accord

with our views of the law, we deem it necessary to express both the reasons for our partial concurrence in the judgment and for our dissent in so far as we dissent from the holdings of the majority opinion.

Under the terms of the last will and testament of James H. Caldwell, the plaintiff, May L. Moran, was only allowed an unconditional bequest of $25. It was further provided that if the son, Jay Allen Caldwell, appeared and received the property bequeathed to him he was requested by the testator "to make such provision for his sister, May L. Moran, as he may deem meet and proper." And the trustees were authorized, after paying taxes and expenses of maintenance of the trust property, to use such portion of the net income therefrom as they may deem meet and proper and expedient for the care and support of the daughter, May L. Moran. But it was provided that if the daughter, May L. Moran, should object to the probate of the will or *in any way attempt to contest or aid in the contesting of the same or any of the provisions thereof, or the distribution of the estate thereunder, then and in that event the testator annulled the provisions made for her, excepting the bequest of the sum of* $25. The testator's wife, Laura E. Caldwell, was given a life estate in the homestead, and $15,000, to be derived from the sale of personal or real property. Two bequests of $1,000 each were made to two sisters of the testator. All the remainder of the property was devised to the son, Jay Allen Caldwell, and three trustees were appointed to hold such property in trust for him for the period of twenty-five years. If the son, Jay Allen Caldwell, did not appear and claim the property during that period, it went to the testator's sister, Deborah Lovewell, or the heirs of her body. Therefore when the plaintiff made her arrangements with her attorneys, the defendants in this case, this condition existed,—in order that the plaintiff might receive anything substantial out of her father's estate the will must be adjudged invalid or inoperative. If the will was adjudged valid these obstacles presented themselves: (1) If the trust arrangement was valid the property would be in the hands of the trustees for a period of twenty-five years; (2) at the end of that period the property would not go to the plaintiff, but to the testator's sister, Deborah Lovewell, or the heirs of her body; and (3) if plaintiff contested the will or objected to the probate thereof she was shorn of all rights thereunder, except the $25 bequest. Whether the will was ad-

judged valid or invalid, the question whether the testator or his wife died first was one that had to be faced, as the testator's wife had a son by a former marriage, who would take as her heir. Such was the condition which confronted the plaintiff and her attorneys, at the time the contingent-fee contract was made. Manifestly plaintiff's case was one which would entail a great deal of labor and expense, and the eventual outcome of which was problematical. It is not fair to assume or say that defendants exacted a 50 per cent contingent fee in a case where there was really no question as to the outcome.

The defendants, as plaintiff's attorneys, contested the will. While such contest was pending they negotiated with Deborah Lovewell, and procured from her an assignment to the plaintiff of all of Deborah Lovewell's rights and interest in the estate. The defendants paid to said Deborah Lovewell $7,500 for such assignment. Negotiations were also carried on with Albert Mark Smith (Laura E. Caldwell's son) with a view of obtaining an assignment of his interest in the estate. The $12,000 mortgage was taken by defendants in connection with these two settlements. The $12,000 mortgage is fully explained,—$7,500 was to be paid to Deborah Lovewell, and the defendants believed they could settle the Smith claim for $4,500, and the $12,000 mortgage would cover both claims, and was taken for that purpose. The defendants have never claimed under it more than the $7,500, which they actually paid to Deborah Lovewell. Even at this time the property is tied up in the hands of the trustees for a period of twenty-five years, unless the trust arrangement can be set aside, and if the son, Jay Allen Caldwell, appears within that time the property goes to him, and the contingent fee of the defendants will cease to exist.

On this appeal the validity of the contingent-fee contract was not disputed. In their brief appellants say: "We shall assume for the purposes of this case that the contract of May 9, 1917, was valid," while some reference is made in the complaint to the contract as being invalid. The case was not tried in the court below, nor was it presented in this court on the theory that the contingent-fee contract was void. But the appellants did contend that the arrangement made August 28, 1917, whereby the plaintiff, May L. Moran, deeded an undivided one-half interest in the lands, and assigned a one-half interest in the estate, was not in accordance with the terms of the contingent-fee contract,

but divergent therefrom and unauthorized under its terms. This contention is amply supported both by the law and the facts of the case, and we agree with the majority of the court in upholding the contention and setting aside the deed and assignment.

The majority, however, not only hold that the deed and assignment are void, but they hold as well that the contingent-fee contract, exhibit "A," is void, and in doing so they overrule the case of Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908, although the case is not referred to in the opinion. Both parties upon this appeal have recognized the rule laid down in the Greenleaf Case as being correct, and in our judgment there is no occasion for overruling that decision. The majority in fact recognizes that the relief sought by the appellants would have to be given regardless of whether the contract was void or not, for in the opinion it is said that there is another reason why the deed and assignment are void. Under the Greenleaf Case there can be no question but what that provision of the contract which attempts to deprive the client of control over the litigation is void, and it is so conceded by the appellants. The question of the effect of such a void stipulation in a contract providing for a contingent fee was exhaustively considered in the Greenleaf Case, and in our judgment the principles laid down as the deliberate judgment of this court are applicable to contracts of the character of exhibit "A" in this case. Especially should they be regarded as law for all purposes of this appeal where admittedly the same judgment would have to be entered if the Greenleaf Case were followed. We do not regard the free overruling of a precedent that has so much to support it as being consonant with good judicial policy.

Another matter in which we disagree with the majority is the holding as to the right of the executors to intervene in this action. It is held by the majority that the executors had an interest in this controversy that justified them in intervening in the action, and that they were not only proper, but necessary parties. It seems to us that this holding is incorrect. It will be noticed that under the terms of the will, as stated in this opinion, it was expressly provided that if the plaintiff in this action should object to the probate of the will or in any way contest the distribution of the estate thereunder, all provision made for her was annulled, excepting only the bequest of the

sum of $25. In the light of this provision of the will it became the manifest duty of the executors administering the estate to see that the testamentary intention of the deceased was carried out. And any attempt on their part to deal liberally with May L. Moran cannot be justified under the will. On the contrary it would amount to an attempt to defeat the very provisions of the will that it is their duty to uphold, if possible. It will be noted, further, that the prayer for relief in the complaint in intervention is the same as in the plaintiff's complaint. It is inconceivable to us that the executors of the will of James H. Caldwell should be concerned with any arrangements that may be made between an heir who is *sui juris* and an attorney looking toward obtaining a share in the estate. They have an interest of course in seeing that the estate is properly administered, but they do not stand in the position of guardians of persons of full age and legal capacity, especially of persons whose interests are in every way conflicting with the terms of the will that it is their duty, under the law and the will, to safeguard. The complaint in intervention should be dismissed. To entertain it is to encourage the executors to make common cause with an heir who is practically disinherited by the will, and likewise to encourage the heir to seek the favor of those who are not in a position to grant favors.

OTTO THRESS, Respondent, v. F. W. ZEMPLE, Appellant.

(9 A.L.R. 1, 174 N. W. 85.)

Appeal and error — new trial — §§ 7643 and 7844, C. L. 1913, construed.

1. Upon an appeal from an order granting a new trial where the entire record is before the court and the question involved is the sufficiency of the evidence to justify the verdict rendered, the supreme court, under §§ 7643 and 7844, Comp. Laws 1913, has authority to order a judgment in favor of the party entitled thereto pursuant to his motions made therefor, even though such party has not appealed from such order.

Appeal and error — directed verdict — order of trial court.

2. Upon such appeal (Thress v. Zemple, 40 N. D. 510) where it appears that this court held that as a matter of law, the respondent, upon the record, was

entitled to a directed verdict or to judgment *non obstante*, and in its mandate to the trial court, directed that the case be remanded for further proceedings in accordance with the opinion rendered, it is *held* that the trial court did not err in directing and causing to be entered a judgment *non obstante* in favor of the respondent.

Judgment — motion to vacate — duty of trial court under Moratorium Act.

3. Upon a motion made to vacate such judgment so rendered, upon the ground that at the time of the rendition thereof the appellant was in the active military service of the Federal government, and it so appearing upon the hearing of such motion, it was the express duty of the trial court pursuant to chap. 10 of the Special Session Laws, N. D. 1918 (the Moratorium Act), to vacate such judgment, and not to take any further proceedings in such action during the time our government is engaged in the present war and for an additional period of one year, except pursuant to the provisions of said Moratorium Act.

Opinion filed June 30, 1919. Petition for rehearing denied September 8, 1919.

Appeal from judgment entered in District Court, Stark County, *Crawford*, J., for the plaintiff, and from an order refusing to vacate the same.

Reversed.

Jacobsen & Murray, for appellant.

When the remittitur says, "Order affirmed and case remanded for further proceedings," it means that the order of the lower court granting new trial is upheld, and that the case must be retried in lower court. 4 C. J. 1113, § 3095; Schumacher v. G. N. R. Co. 23 N. D. 231; Comp. Laws 1913, §§ 7643, 7844; Cahn v. Tootle (Kan.) 48 Pac. 919; Ball v. Rankin (Okla.) 101 Pac. 1105.

The court cannot consider matters not properly before it. 4 C. J. 1112–1114; Cooper v. Disbrow (Iowa) 76 N. W. 1013; Bank of National City v. Johnston (Cal.) 60 Pac. 776; Mathes v. Imperial Acci. Asso. (Iowa) 81 N. W. 484; Pace v. Heinley (Iowa) 52 N. W. 124; McWhirter v. Crawford (Iowa) 73 N. W. 1021.

A decision is the law of the case as to the questions presented only. Where the supreme court on appeal did not discuss and determine a question, the question could be litigated and determined on a subsequent trial. Oakland v. Oakland Water Front Co. (Cal.) 124 Pac. 251; 4 C. J. 1148, 1212, §§ 3155, 3264.

Thos. H. Pugh & Otto Thress, for respondent.

The plaintiff could not appeal; it is only when there is a denial of a motion for new trial coupled with a motion for judgment that an appeal would lie to the moving party. Turner v. Crompton, 25 N. D. 134, 141 N. W. 209; Stratton v. Rosenquist, 37 N. D. 116, 163 N. W. 723.

BRONSON, J. This is an appeal from a judgment rendered October 7, 1918, and from the order refusing to vacate the same. The action, originally commenced in March, 1914, was tried in December, 1915, before a jury, and, pursuant thereto, judgment was rendered for the defendant in December, 1916. Thereafter, in June, 1917, upon a motion made for judgment *non obstante,* or, in the alternative, for a new trial, the trial court granted a new trial. Thereupon, the defendant appealed from such order, and in the month of September, 1918, this court in its opinion (40 N. D. 510, 169 N. W. 79) held that the trial court should have directed a verdict for the plaintiff, or allowed the motion for judgment notwithstanding the verdict.

In the latter part of such opinion it is stated: "Order affirmed and case remanded for proceedings in accordance with this decision."

After the remittitur was filed, the trial court, following this court's opinion and deeming that a new trial would not result otherwise than in plaintiff's favor, ordered judgment in favor of the plaintiff. Judgment was so entered in October, 1918. In November, 1918, the defendant made a motion to vacate such judgment upon the ground that he was entitled to a new trial under the mandate of this court, and upon the further ground that, the defendant being in the active military service of the United States at the time of the rendition of such judgment, the Moratorium Act (Sp. Laws 1918, chap. 10) applied. Accordingly, the defendant has again appealed to this court from the order refusing to vacate such judgment. The appellant contends that neither the mandate nor the remittitur directed the trial court to enter such judgment, and that such court had no jurisdiction to so do. That the effect of the trial court's action is to grant to the respondent a greater relief than he secured in the trial court upon a matter concerning which he did not appeal, and upon a subject-matter that was not before this court for consideration. These contentions involve the construction to be placed upon the former decision of this

court and the right of this court to direct, and the trial court to enter, a judgment *non obstante,* where an appeal has been taken only from an order granting a new trial.

It is clear that this court determined in its opinion upon the former appeal (40 N. D. 510, 169 N. W. 79) that the plaintiff, as a matter of law upon the record, was entitled to a directed verdict or to judgment *non obstante.* If any lack of clarity exists as to the meaning of such decision, it is found only in the last paragraph thereof, which states that the order is affirmed and the case remanded for proceedings in accordance with the decision. If such last paragraph had stated in words, "it is therefore ordered that judgment be entered in the trial court for the plaintiff in accordance with this decision," there would be no difficulty whatsoever in apprehending exactly what this court intended to do. There can be little question, upon the plain language of the opinion, that it did so intend.

Under § 7643, Comp. Laws 1913, this court is granted the specific power, upon an appeal from an order granting or denying a motion for a new trial in an action where a motion is made by either party at the close of the case to direct a verdict, to order and direct a judgment in favor of the party who was entitled to have such verdict directed in his favor. See Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 36, 156 N. W. 234; Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85. Such motion for a directed verdict was made in this case. Under § 7844, Comp. Laws 1913, this court, upon an appeal from a judgment or order, may reverse, affirm, or modify the judgment or order, and in all cases this court shall remit its judgment or decision to the court from which the appeal was taken, to be enforced accordingly.

The appellant, upon the former appeal, appealed from an order granting a new trial. He brought up for review before this court the entire record. He questioned the sufficiency of the evidence to warrant such order. He contended that no new trial should be granted. The trial court did grant a new trial upon the ground that evidence was insufficient to warrant the verdict rendered. This court necessarily considered the sufficiency of such evidence which the trial court considered in connection with the motion for the new trial, involving therein also the motions made for a directed verdict and for judgment

non obstante. This court upon such former appeal did determine that as a matter of law, upon the record, no new trial should be granted, and that the motion for a directed verdict or for judgment *non obstante,* in favor of the plaintiff, should have been granted by the trial court. The opinion of this court in the former case is not now in question. The appellant now contends for a new trial pursuant to that opinion.

Plainly his contention must be denied. The court possessed the power to so order judgment for the respondent even though he contended simply for a new trial. Comp. Laws 1913, § 7643. It did, in fact, exercise such power, apparently deeming it to be a useless legal ceremony to remand this case for a new trial when such action would be futile and would simply serve to prolong litigation.

The appellants further contend that under the Moratorium Act the trial court in any event should have vacated the judgment for the reason that at the time the defendant was engaged in the military service of the United States. Under chap. 10, N. D. Sp. Laws 1918 (the Moratorium Act), it is specifically provided, under § 1 thereof, that no further proceedings shall be taken in any action that was pending at the time the act took effect, in which any person who is in the active military service of the United States is a party, over the objection of such party, his attorney or any person interested in his behalf. Under § 3 thereof it is provided that any proceeding taken against any such person shall be vacated and declared void as a matter of course upon proper application to vacate the same. The respondent, in his brief, suggests to this court that if the trial court transgressed the terms of the act it was done unwittingly, and that proper safeguards have been ordered, in that the trial court has directed that no proceedings be had for the enforcement of the judgment until the further order of the court. In the record it appears that the defendant was inducted into the military service, in the month of February, 1918, and ever since that time, up to the 25th day of November, 1918, when the affidavit was made, has been in the active military service of the United States. The act is explicit and direct in its terms. It must be given effect in accordance with its express terms. In this action a judgment was likewise rendered against the garnishee. Apparently no showing was made to the trial court under the provisions of § 4 of the Moratorium Act, providing for the giving of a bond, and the taking of property when

the court should so order upon the grounds stated in said § 4. The trial court accordingly erred in not vacating the judgment pursuant to the terms of the Moratorium Act. It is therefore ordered that the order of the trial court be reversed and the judgment be vacated, and that no further proceedings be taken in such action during the time the United States is engaged in the present war, and for an additional period of one year, unless otherwise ordered by the trial court pursuant to the terms of such Moratorium Act. The appellant will recover the costs in this court of this appeal.

GRACE, J. I concur in the result.

ROBINSON, J., (dissenting). In this case a former appeal was heard and decided on July 10, 1918. A motion for rehearing was denied September 24, 1918 (40 N. D. 510, 169 N. W. 79). The court held thus: "On the record and undisputed evidence the case presents no question of fact to submit to a jury. The court should have directed a verdict in favor of the plaintiff or allowed the motion for judgment notwithstanding the verdict." That was a direction to the trial court to enter judgment in favor of the plaintiff. Hence, on filing the remittitur, judgment was entered in accordance with the decision of this court. On October 2, 1918, a notice of taxation of costs was duly served on defendant's attorney, which appears by his written admission. He appeared and filed written objections to the taxation of the cost of printing the brief. Then, on November 14, 1918, defendant's attorneys served notice of a motion to vacate the judgment on the ground that the court had not jurisdiction to enter the same without a new trial. Subsequently, defendant added in pencil another cause to wit, "that at the time of the entry of judgment herein defendant was in the United States Army," and on December 27, 1918, at the time of the hearing of the motion, there was filed an affidavit by Mr. Murray, "that in February, 1918, defendant was drafted into military service of the United States, and that at all times since then he has been, and still is, in the military service of the United States at Camp Lewis, in the state of Washington, as appears from a letter written by defendant dated November 18, 1918." The court made an order denying the motion to vacate the judgment and directing that execution from the

judgment be suspended for the period of one year after peace has been declared. Thus the court gave defendant the full benefit of the Moratorium Statute, though defendant did not ask for it in the original notice of motion, and though he did not claim the same at the time of the taxation of costs. Now the law does not require idle acts, and surely an order that the judgment be set aside and reinstated after the lapse of the year would have been an idle act, imposing costs on the defendant.

The statute provides that no action for the recovery of any indebtedness against any person in the military service of the United States shall be maintained during the time the United States is at war, and for an additional period of one year, and that during such time no further proceedings shall be taken in any action that is pending against the party, *over the objection of such party or his attorney,* nor shall any judgment against such person be enforced against him or his property during such period. In the opinion of the writer the act is void because it *impairs the obligations of contracts* and because the subject of the act is not expressed in its title. The title is: "An Act Regulating Civil Rights of Members of the Military and Naval Establishments of the United States Engaged in the Present War." Now the word "civil" is from "civis," a citizen, and civil rights mean the rights of citizens, and not an exemption from due process of law. But in this case there is no reason to pass on the constitutionality of the act. It does not debar anyone who is in the Army from voluntarily appearing in court and contesting his rights to property. In this case the defendant appeared and contested his claim to $700, which was garnisheed, and the real purpose of the appeal was to contest that right or claim. It was to give defendant a further opportunity to contest his right to the money. Now the statute does not provide that any court must take judicial notice of the fact that any person is in the active military service, or by reason of such service deny him the right to prosecute or defend an action. It does provide that no proceeding in an action shall be taken against him over his objection on the ground that he is in the active military service, but when this case was before the court no such objection was made. When defendant appeared and contested the taxation of costs, no such objection was made. When defendant gave notice of motion to set aside the judgment, no such objection was

made. It was not made until December 28, 1918, when the motion was submitted to the court and decided, and then the court made its order giving defendant the full benefit of the statute. Now to say that the judgment must be vacated, with directions to reinstate the same after the lapse of a year, that would be ridiculous and absurd,—and it would be an idle act. If the judgment as entered by the district court should be held void, then, for the same reasons, the judgment of this court on the former appeal should be held void.

Furthermore, the Moratorium Act is void because it conflicts with the provision that no state shall pass any law impairing the obligation of contracts. The decisions of the United States Supreme Court do establish this rule: "The obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tends to postpone or retard the enforcement of the contract the obligation of the latter is to that extent weakened." Louisiana v. New Orleans, 102 U. S. 206, 26 L. ed. 133; Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447; Edwards v. Kearzey, 96 U. S. 600, 24 L. ed. 796; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

"The obligation of a contract . . . is that duty of performing it. . . . And if the law is so changed that the means of legally enforcing this duty are materially impaired, the obligation of the contract no longer remains the same." Curran v. Arkansas, 15 How. 319, 14 L. ed. 712; Seibert v. Lewis (Seibert v. United States) 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; McCracken v. Hayward, 2 How. 612, 11 L. ed. 399; Gantly v. Ewing, 3 How. 707, 11 L. ed. 794; Butz v. Nuscatine, 8 Wall. 583, 19 L. ed. 493; Walker v. Whitehead, 16 Wall. 314, 21 L. ed. 357.

But Congress had power to pass all laws necessary for the protection of the soldiers, and it did pass a Moratorium Statute which provides that when a person in the military service has appeared in an action and his rights have been in no way prejudiced by reason of his military service, then there is not even a stay of the judgment against him. U. S. Comp. Stat. § 3078¼bb, Fed. Stat. Anno. Supp. 1918, p. 814.

Certainly there is no occasion for this court supplementing, adding to, or taking anything from the act of Congress. The judgment should be affirmed.

W. L. VANNETT, Plaintiff and Appellant, v. REILLY-HERZ AUTOMOBILE COMPANY, Defendant, SCANDINAVIAN-AMERICAN NATIONAL BANK (Third Party Claimant), Respondent.

(173 N. W. 466.)

Appeal and error — trial procedure.

1. Where a party adopts a certain mode of procedure and induces the trial court to try and determine certain questions, he will not be heard to say on appeal that the procedure was erroneous.

Warehousemen — attachment of warehousemen's receipt — title to goods covered by same.

2. The indorsement and delivery of a warehouseman's negotiable receipt by the original holder thereof passes the title to the goods covered by such receipt to the indorsee, and thereafter the original holder has no attachable interest in the goods.

Opinion filed May 5, 1919.

Appeal from Ward County, *Leighton*, J.

Plaintiff appeals.

Affirmed.

W. H. Sibbald, for appellant.

Section 3142, Comp. Laws 1913, provides: "The title of goods and

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NOTE.—The question of issuance and delivery by warehouseman of receipt for his own property as a constructive transfer of possession essential to a valid pledge is discussed in notes in 16 L.R.A.(N.S.) 227; 30 L.R.A.(N.S.) 552; and 52 L.R.A. (N.S.) 754, where it seems to be well settled that one who has deposited goods in a public warehouse may pledge them to another by the simple delivery to the pledgee of the warehouse receipt.

On receipts of warehousemen and their transfer and negotiability, see note in 84 Am. Dec. 752.

chattels stored with a public storage company or any public warehouse shall pass to a purchaser or pledgee by the indorsement or delivery to him of the storage company's or warehouseman's negotiable receipt therefor, signed by the party to whom such receipt was originally given, or by an indorsee of such receipt, subject to all liens and charges thereon for warehousing, advanced charges, and insurance."

"A warehouse receipt is a written acknowledgment by the warehouseman that he holds certain goods in storage for the person for whom the writing is issued." 49 Cyc. 407. Hale v. Milwaukee Dock Co. 29 Wis. 432, 9 Am. Rep. 603; Sinsheimer v. Whitely, 111 Cal. 389, 52 Am. St. Rep. 192, 43 Pac. 1109.

"Warehouse receipts should be construed in accordance with the rules applicable to the consideration of contracts in general, and established in accordance with commercial usage." 40 Cyc. 412; Drudge v. Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359, 49 N. E. 34.

"In the absence of an agreement to the contrary, the usage of a particular business, it is held, may be presumed to have entered into and formed a part of the contracts and understandings of persons engaged in such business and those who deal with them." Morningstar v. Cunningham, 110 Ind. 328, 59 Am. Rep. 211.

"Usage in a particular trade or business cannot control an express contract, but it is presumable, when a contract is ambiguous, that it was made with reference to a known usage or ordinary course of the particular business. In such case the known and ordinary course of the particular business may be proved, to raise a presumption that the transaction was in conformity therewith." Lyon v. Lenen, 106 Ind. 567.

"The indorser of a warehouse receipt after its transfer by him has no interest in the property represented by it which is subject to attachment." Adamson v. Frazier, 40 Or. 273, 66 Pac. 810.

"The warehouse receipts for the grain stored with plaintiff on account of Cameron & Company stood and represented the property, and their transfer was a valid transfer of the commodity itself, so that at the time of the attachment Cameron & Company did not own the wheat

covered by the receipts and had no attachable interest therein." Citing State v. Koshland, 25 Or. 178, 35 Pac. 32; Anderson v. Mills Co. 37 Or. 483, 60 Pac. 839.

"Instruments of this kind are *sui generis*. From long use in trade they have come to have, among commercial men, a well-understood meaning. And the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale." Millhiser Mfg. Co. v. Gallego Mills Co. 101 Va. 579, 44 S. E. 760; Hale v. Milwaukee Dock Co. 23 Wis. 276, 99 Am. Dec. 169.

"By the weight of authority, notice to the warehouseman of the transfer of the receipt is not necessary to give validity to the assignment, even where the receipt runs to the bailor personally, without the words 'order' or 'bearer.'" 40 Cyc. 416; Durr v. Hervey, 44 Ark. 301, 51 Am. Rep. 594.

Greenleaf, Wooledge, & Lesk, for Scandinavian-American Bank.

CHRISTIANSON, Ch. J. On May 11, 1917, the defendant automobile company delivered to the Hodgins Transfer & Storage Company, a public warehouse company, at Minot, North Dakota, three certain Elgin automobiles. And on that same day the storage company issued and delivered to the defendant three certain warehouse receipts acknowledging the receipt of said automobiles from the defendant for storage. On May 15, 1917, the defendant automobile company indorsed and delivered these warehouse receipts to the Scandinavian-American National Bank of Minneapolis, Minnesota,—said bank having paid the defendant automobile company the sum of $2,515.35 for a certain draft secured by these receipts. On June 12, 1917, the plaintiff commenced this action to recover of the defendant automobile company the sum of $250, and caused the said three automobiles then in storage with the Hodgins Transfer & Storage Company to be seized under a warrant of attachment. The Scandinavian-American National Bank thereupon caused to be made and served the affidavits of its assistant cashier and of one of its attorneys, setting forth its title and right of possession to said automobiles and the value thereof as provided by § 7550, Comp. Laws 1913. The plaintiff's attorney thereupon served upon the attorneys for the said Scandinavian-American National Bank a notice that

the plaintiff "elects to take issue with the third party claim filed by you in the above-entitled matter, and that the matter of the motion of said bank as third party claimant to certain property attached, for the dismissal of said attachment and other relief, will be brought on for hearing before the Honorable K. E. Leighton, Judge," at a time and place specified in said notice. The matter thereafter came on for hearing pursuant to plaintiff's notice of motion. The Scandinavian-American National Bank submitted the two affidavits already referred to, and the plaintiff submitted the depositions of the president and manager, and the bookkeeper of said storage company. These depositions are to the effect that the warehouse receipts were issued on the day that the automobiles were left with the storage company for storage, and that the company had never been notified of the change of ownership of the automobiles. The trial court made an order and judgment was entered thereon, sustaining the title of the Scandinavian-American National Bank to the automobiles, and plaintiff has appealed therefrom.

Appellant challenges the propriety of the procedure, and contends that the Scandinavian-American National Bank had no right to move to discharge the attachment. It is contended that under the statute the right to so move is conferred only upon the defendant or a "person who has acquired a lien upon or interest in the property after it was attached," and that inasmuch as the Scandinavian-American Bank concededly obtained its interest in the property long prior to the attachment thereof, it was required to assert its rights by an independent action for the possession or conversion of the property. It is unnecessary to determine the procedural question raised. Manifestly the appellant is in no position to predicate error upon the method of procedure adopted; for he formulated the procedure. The Scandinavian-American Bank merely acquiesced in the procedure proposed by the plaintiff. Why plaintiff should complain because the court determined the matter which he asked it to determine upon the motion which he noticed is incomprehensible. "He who consents to an act is not wronged by it." Comp. Laws 1913, § 7249. And "acquiescence in error takes away the right of objecting to it." Comp. Laws 1913, § 7250; 4 C. J. 717; Walton v. Olson, 40 N. D. 571, 170 N. W. 107.

Appellant next contends that the trial court erred in sustaining the claim of the bank. There is no dispute as to the facts. It is conceded

that the Hodgins Transfer & Storage Company was a public warehouse company operating under the provisions of §§ 3138 et seq., Compiled Laws 1913. It is undisputed that it received the automobiles from the defendant for storage, and that it issued to it certain warehouse receipts. The receipts acknowledged that the storage company had received from the defendant certain specified automobiles for storage. The receipts contained, among others, the following provisions: "Under no circumstances will any goods covered by this warehouse receipt be delivered unless *indorsed on back thereof* or surrendered entirely and non-negotiable receipt given." It is undisputed that the Scandinavian-American National Bank on May 15, 1917, actually paid to the defendant automobile company $2,515.35, and that at that same time and as part of the same transaction the defendant indorsed and delivered to the bank the three warehouse receipts issued by the storage company covering the three automobiles involved in this action.

Section 3142, Comp. Laws 1913, reads: "The title of goods and chattels stored with a public storage company or in a public warehouse shall pass to a purchaser or pledgee, by the indorsement and delivery to him of the storage company's or warehouseman's negotiable receipt therefor, signed by the party to whom such receipt was originally given, or by an indorsee of such receipt, subject to all liens and charges thereon for warehousing, advanced charges and insurance."

In view of this statute it is difficult to understand where there is any room for argument as to the rights of the Scandinavian-American National Bank. Under the plain terms of the statute the indorsement and delivery to it of the storage company's negotiable receipt passed title to the property and to such receipts to the bank. St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 23, 126 N. W. 1013, Ann. Cas. 1912B, 1337. See also State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 257, 16 L.R.A.(N.S.) 227, 115 N. W. 846.

Appellant contends, however, that the warehouse receipts involved in this action do not conform to the requirements of § 6886, Comp. Laws 1913, and hence are not negotiable. Section 6886, supra, reads as follows: "An instrument to be negotiable must conform to the following requirements:

"1. It must be in writing and signed by the maker or drawer.

"2. Must contain an unconditional promise or order to pay a sum certain in money.

"3. Must be payable on demand, or at a fixed or determinable future time.

"4. Must be payable to order or to bearer; and,

"5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty."

This section is part of the Negotiable Instruments Act. It defines the instruments which are covered by that act. By its very nature a warehouse receipt could not conform to the provisions of § 6886, supra. For instance, it manifestly could not "contain an unconditional promise to pay a certain sum in money." The function of a warehouse receipt is entirely different from that of a bill or note. Such receipt is not a contract for the payment of, nor is it evidence of an obligation to pay, money. It is the written acknowledgment by the warehouseman that he has received and holds the goods therein described for the person to whom it is issued. 40 Cyc. 407. The contract on the part of the warehouseman is for the performance of a certain duty with respect to the goods stored. The receipt is a symbol of ownership of the goods covered by it. And when the statute speaks of a "warehouseman's negotiable receipt," the word "negotiable" is not "used in the sense in which it is applied to bills of exchange and promissory notes, but only as indicating that in the passage of warehouse receipts through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. Such statutes serve to dispense with notice to the warehouseman, to give the transferee the right to bring suit on the receipt in his own name and to transfer to a bona fide purchaser title free from any equities of prior parties not apparent on the face of the instrument." 40 Cyc. 418. In a technical sense such receipt is not a negotiable instrument (2 Ames, Bills & Notes, 782), and the provisions of the Negotiable Instruments Act are not applicable thereto. 40 Cyc. 419.

The receipts involved in this case by their express terms provided that they might be negotiated by indorsement "on the back" thereof. It is undisputed that they were so negotiated to the Scandinavian-American National Bank for value. The warehouse receipts represented

the automobiles. The indorsement and delivery to the bank of such receipts passed the title of the automobiles to the bank (§ 3142, supra), and the defendant thereafter had no attachable interest therein. Adamson v. Frazier, 40 Or. 273, 66 Pac. 810, 67 Pac. 300.

It follows from what has been said that the order and judgment must be affirmed. It is so ordered.

GRACE, J. I concur in the result.

J. SEMPLE, Appellant, v. G. ROY RINGO, Respondent.

(172 N. W. 817.)

Physicians and surgeons — administering anesthetics — payment for same.

In surgery the proper administration of an anesthetic is an essential part of the operation, for which a surgeon is commonly paid a good round fee, which includes the minor fee of an assistant. When he employs an assistant, the presumption is that he agrees to pay him, unless the contrary appears from express words or conditions.

Opinion filed May 5, 1919.

Appeal from the County Court of Ward County, Honorable *William Murray,* Judge.

Reversed and new trial ordered.

A. M. Thompson (*Greene & Stenersen,* of counsel), for appellant.

Defendant admits that some time before the trial he received from plaintiff a statement of the account sued on in this case, and also received a letter from plaintiff's attorney concerning it. It nowhere appears that he ever made any objection to the charges or disclaimed liability for any part of it. We submit that, under the law, this constituted an account stated between the parties, and that defendant is estopped to deny liability.

Palda & Aaker, for respondent.

When a surgeon calls another into consultation, or for assistance in the treatment of any surgical case, the physician called in consulta-

tion or assistance is simply called by the attending doctor on behalf of the patient himself, and, under the law, the patient at all times, under these circumstances, is held responsible for all fees of the attending or consulting surgeon, and cannot look to the party calling him for his fees. 30 Cyc. p. 1597, and note; Guerard v. Jenkins, 1 Strobh. (S. C.) 171.

ROBINSON, J. This is an appeal from a judgment on a directed verdict for defendant. The parties are distinguished physicians and surgeons at Minot. The complaint avers that on several occasions in 1915 and 1916, at the special request of the defendant, plaintiff administered anesthetics to patients of defendant on whom he performed surgical operations; that his services were reasonably worth $25, which defendant promised to pay. It is admitted that at the request of the defendant the plaintiff performed such services and that the same was reasonably worth $25. The defense is that in requesting the service defendant acted merely as the agent of his patients and did not assume any personal obligation, and that in such cases it is customary for a doctor to administer anesthetics and to look for his pay to the patients, and not to the doctor calling him.

In this case the defendant keeps a hospital at Minot and does quite an extensive operating business. On the several occasions, without disclosing the names of his patients or anything concerning them, he requested and accepted the services of the plaintiff in what are known as minor and major surgical operations. In such a case the principal surgeon commonly gets a good liberal fee for doing everything necessary for a successful operation. In modern surgery the proper administration of an anesthetic is a very essential part of the operation. It may also be necessary to obtain from a druggist antiseptic gauze or cotton, and other small things. All such services and necessaries are properly chargeable to the surgeon when he orders them without giving the name of his patient as the person to whom the charge should be made.

In this case it appears that at the request of defendant the plaintiff went and administered anesthetics, not knowing anything of the patients, not even their names; and not looking to them for payment. It also appears from abundant evidence that the custom is for a surgeon to pay the small fee of an assistant physician whom he requests to ad-

minister an anesthetic. Clearly both the presumption of law and the weight of the testimony are in favor of the plaintiff. The case should have been submitted to the jury. Judgment reversed and a new trial ordered.

Reversed.

BRONSON and GRACE, JJ., concur in result.

CHRISTIANSON, Ch. J. (dissenting). I dissent. In order to present my views properly it is necessary to first consider the facts as shown by the record. The plaintiff claims that he performed certain services as a consulting physician and in administering anesthetics to defendant's patients. He testified: "The first case that I helped Dr. Ringo on was a case out at Glenburn where a man had accidentally shot his knee, and we were in the Elks Home at the time, and Dr. Ringo says, 'Would you care to come out for a drive with me to Glenburn; I am going out to see a case of gunshot wound of the knee,' and I said 'Yes,' I would go, and we went out and it was Doctor Lord's case and he had called Dr. Ringo to help. Well, then, when we got there Dr. Lord wanted to assist Dr. Ringo in the operation, and they had me give the anesthetic to the patient. Well, Dr. Ringo and Dr. Lord were operating and that was the first case. The next case Dr. Ringo telephoned to my office and asked me if I could go up and give an anesthetic and I went up and gave the anesthetic. It was a male patient between the ages of twenty and thirty. The next case was where he called me to give an anesthetic for a patient he was operating on for appendicitis. The next case was a case Dr. Ringo asked me if I would come over and see a case with him and I did. We went over and examined the case together." The plaintiff further testified that the reasonable value of his services in these cases was $25, and that the same had not been paid.

It is undisputed that the defendant at no time expressly promised to pay plaintiff for the services which he rendered. And the sole question presented on this appeal is whether, upon the facts stated, there was an implied promise on the part of the defendant to pay for such services.

The usual rules of agency apply to contracts for medical services to a third person, effected through another. 22 Am. & Eng. Enc. Law, 792. And "where a person requests a physician to perform services for

a patient, the law does not raise an implied promise to pay the reasonable value of the services so rendered, unless the relation of the person making the request to the patient is such as raises the legal obligation on his part to call in a physician and pay for his services." 22 Am. & Eng. Enc. Law, 790, 791; 21 R. C. L. 410, 412. The law does, however, raise an implied promise on the part of the patient who receives the benefit of such medical services to pay what they are reasonably worth. 30 Cyc. 1596, 1597; 21 R. C. L. 410, 411. And where the patient has engaged a physician to attend him, and such physician summons another physician for consultation or assistance, the physician so summoned may recover from the patient for the services performed. 22 Am. & Eng. Enc. Law, 792; 30 Cyc. 1597.

Let us apply these rules to this case. The plaintiff knew that defendant had been engaged as attending physician by certain patients. The defendant summoned the plaintiff to assist in treating such patients. The plaintiff met them. They received the benefit of his services. They were all persons of mature age, and in possession of their faculties. It seems to me that under these circumstances the law does not imply any promise on the part of the defendant to pay plaintiff for the services which he performed. As was well said by the supreme court of Wisconsin in considering a somewhat similar question: "We think we are justified in assuming that it is quite exceptional for the members of that [the medical] profession to undertake the treatment of their patients on special contracts by which they are to be paid a sum in gross, and by which they bind themselves personally with their patients to pay for any needed assistance in the proper treatment of the case." Garrey v. Stadler, 67 Wis. 512–516, 58 Am. Rep. 877, 30 N. W. 787. See also Guerard v. Jenkins, 32 S. C. L. (1 Strobh.) 171; Shelton v. Johnson, 40 Iowa, 84.

The majority opinion states: "It also appears from abundant evidence that the custom is for a surgeon to pay the small fee of an assistant physician whom he requests to administer an anesthetic." In my opinion this statement is not in accord with the facts. It is true the plaintiff attempted to show that there was such a custom, but he did not succeed in his attempt. The plaintiff, who had been practising in Minot for only a comparatively short time, testified as to his personal experience with some three or four other physicians in that city. Dr.

Knapp, who was called as a witness by the plaintiff, testified as to his individual practice. Dr. Nestos, who was also called as a witness for the plaintiff, testified that, so far as there was any custom, to his knowledge or in his experience, a doctor called to administer an anesthetic would not receive pay for his services until the attending physician had collected the fee therefor from the patient. Manifestly this evidence did not show a custom within the legal meaning of that term. In order to be binding a custom must be certain, uniform, and general. 12 Cyc. 1035–1038. If the custom was as testified to by Dr. Nestos, then plaintiff would in no event be entitled to recover, for it is undisputed that the defendant has not received 1 cent from any one of the patients whose treatment is involved in this litigation.

CLIFFORD HANSON, an Infant, by Charles Hanson, his Guardian *ad Litem*, Respondent, v. W. P. THELAN, Appellant.

(173 N. W. 457.)

Physicians and surgeons — duty to exercise ordinary care, diligence, and skill.

1. A physician owes to his patient the duty to exercise reasonable and ordinary care, diligence, and skill, such as are ordinarily possessed by physicians practising in similar localities in the same general line of practice.

Physicians and surgeons — action for breach of professional duty — question of patient following directions.

2. In an action against a physician for breach of his professional duty to his patient, the patient cannot recover if he has not conformed to all reasonable directions of his physician, or if his conduct has contributed to the injury upon which the action is based.

Physicians and surgeons — action for malpractice — question of surgeon's negligence one of fact for the jury.

3. In an action for malpractice against a physician for breach of his professional duty in treating a fractured limb, where the plaintiff contracted erysipelas as the alleged result of bandaging cloths or bandages and lacing a shoe too tightly upon the limb of the plaintiff, and of the failure to properly attend thereto, it is *held* under the evidence that the questions of defendant's

negligence, and of the plaintiff's contributory negligence, were fairly questions for the jury.

Opinion filed May 5, 1919.

Appeal from District Court, McClean County, *Nuessle*, J., from judgment for plaintiff and from order denying judgment *non obstante*, or for a new trial.

Affirmed.

Miller, Zuger, & Tillotson and *Newton, Dullam, & Young*, for appellant.

The burden is always on the patient to prove that the particular injury complained of resulted from want of care or skill on the part of the physician, and a bare possibility of such result is not sufficient. The burden of proof is not shifted by showing that an unsuccessful result has attended the treatment of the patient by the physician. 21 R. C. L. § 49, pp. 406, 407.

Physicians and surgeons are not insurers of a successful result of medical treatment or surgical operation, nor that patients shall not contract other disease while in their charge; and a scintilla of evidence showing that it was possible that plaintiff's leg became infected during the course of the treatment will not support a verdict. McKee v. Allen, 94 Ill. App. 147; Ewing v. Goode, 78 Fed. 442 (opinion by Taft, C. J.).

Even where the evidence is as consistent with the absence as with the existence of negligence, the case should not be left to the jury. Ewing v. Goode, supra; Pelkey v. Palmer (Mich.) 67 N. W. 561; 30 Cyc. 1588; Farrell v. Haze, 122 N. W. 197.

Unless the court can clearly see that the injury complained of was the result of some particular act or omission on the part of the defendant, not even nominal damages should be sustained. Ewing v. Goode, supra; Martin v. Courtney, 87 Minn. 197, 91 N. W. 487.

It has been held that a physician is not chargeable with negligence for failure to use his best skill and ability, if he uses the care and skill which are exercised by physicians of ordinary care and skill in similar communities. Doris v. Worford (Ky.) 9 L.R.A.(N.S.) 1090;

Whitesell v. Hill, 37 L.R.A. 83; Miller v. Toles (Mich.) L.R.A.1915C, 595, 150 N. W. 118; 5 Thomp. Neg. § 6713.

The plaintiff must show not only that the physician or surgeon was negligent or unskilful, but also that the injury resulted from such negligence or unskilfulness. There can be no recovery if no injury resulting from the act or omission, pointed out, of the physician, is shown. Craig v. Chambers, 17 Ohio St. 523; Ewing v. Goode, 78 Fed. 442; Hrubes v. Faber (Wis.) 157 N. W. 519.

The mere fact that plaintiff contracted erysipelas is not of itself evidence of malpractice. Wood v. Boucher, 49 Mich. 295; Piles v. Hughes, 10 Iowa, 579; Simmons v. Parker, 41 Ill. App. 284; Boucher v. Larochells (N. H.) 68 Atl. 670, 15 L.R.A.(N.S.) 416, and note; Hrubes v. Faber (Wis.) 157 N. W. 519.

The verdict of the jury to the effect that the failure of the defendant to exercise ordinary care and skill resulted in the infection of plaintiff's limb is a mere conjecture. Hrubes v. Faber (Wis.) 157 N. W. 519; Farrell v. Haze (Mich.) 122 N. W. 197; Neifert v. Hasley (Mich.) 112 N. W. 705.

The fact that other appliances are known to the profession and might have been used is no evidence of malpractice. See Miller v. Toles (Mich.) 150 N. W. 118, L.R.A.1915C, 595, and note; Cozine v. Moore (Iowa) 141 N. W. 424; Ewing v. Goode, 78 Fed. 442; Pettigrew v. Willard, 46 Kan. 78.

Fisk & Murphy and *McCulloch & McCulloch,* for respondent.

The trial court very properly refused to hold as a matter of law that plaintiff had failed to make out a case entitling him to go to the jury. Baute v. Haynes, 12 L.R.A.(N.S.) 752.

Bronson, J. This is an action for damages sustained through malpractice. The plaintiff is a minor who, at the time of his injury, in the month of March, 1916, was sixteen years old. In the trial court a verdict was returned in favor of the plaintiff for $300. From the judgment entered thereupon, 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 substantial facts are as follows:

The infant plaintiff on the 31st day of March, 1916, sustained a fracture to his right leg between the knee and the ankle. Both bones were

fractured. The boy was placed in a hospital under the care and in charge of the defendant, a physician and surgeon. There is some testimony in the record to the following effect: The doctor for about three days applied ice packs to reduce the swelling; then he set the bones and inclosed the leg and foot in a plaster cast. The boy complained of suffering pain, and in about a week the cast was cut open and the leg then tightly bound and bandaged with cloths. Then, after three weeks, these bandages were taken off and then a board was placed under the leg and foot, they were wrapped in bandages, and a weight and pulley attached, weighing some 10 pounds. The boy remained in this condition for some two weeks, and then these appliances were removed and a shoe laced on tightly, next to the bare foot, with some cotton batting inserted, and a weight and pulley attached to the same. Prior to attaching these last appliances there were sores or bruises on his foot. Some two weeks later the shoe was removed, after the boy had complained of suffering, and the foot was then black and blue. The physician, some three days thereafter, put some salve on these sores. Dr. Ramstad of Bismarck came to Wilton, examined the boy, and stated that erysipelas might be expected. The boy became quite ill. They removed him to the Bismarck Hospital at Bismarck, where erysipelas developed, and where he became very ill for many days. There he remained for seven weeks. The main question in the record is whether the erysipelas developed from the method of treatment accorded by the doctor, and whether the doctor was derelict in his duty in that regard. The appellant in his specifications contends that the evidence is insufficient to warrant the verdict for the reason that there is no direct evidence in the record that the condition of erysipelas was brought upon the plaintiff by any act or omission of the defendant; also he complains of rulings of the trial court upon the admission of evidence, and that, furthermore, the plaintiff by his own conduct in going out when the fracture was mending, contrary to the instructions of the physician, and otherwise disobeying instructions given by the physician, precludes any recovery.

Erysipelas is a type of infection. 3 Whart. & S. Med. Jur. § 227. The gist of the negligent acts, if any, of the physician particularly refers to the manner in which he applied the shoe to plaintiff's foot, and the attention that he gave thereto. The law is now well settled that the physician owes to his patient the duty to exercise reasonable and ordinary care, diligence, and skill such as are ordinarily possessed by physi-

cians practising in similar localities in the same general line of practice. Note in 37 L.R.A. 830; see 12 L.R.A.(N.S.) 752; 93 Am. St. Rep. 657; 48 Am. Dec. 481; and 30 Cyc. 1575. It is equally well settled that the patient must not have contributed to his injury in any degree; that he must conform to all reasonable directions of his physician, otherwise he cannot recover. 5 Thomp. Neg. § 6795, p. 1090. See notes in 37 L.R.A. 830; 17 L.R.A.(N.S.) 1242; and 30 Cyc. 1580. We have examined the record in this regard, and are satisfied upon the whole that this question of plaintiff's contributory conduct or failure to obey the instructions of the physician, disputed somewhat in the evidence, was fairly a question for the jury. With reference to the contention of the appellant that there is no direct or positive evidence to show that the resulting erysipelas was proximately caused by the acts of the defendant, we are satisfied from a consideration of the testimony of the laymen in connection with the expert testimony of two doctors for the plaintiff, that the trial court did not err in submitting the question of defendant's negligence to the jury. There is some evidence in the record to the effect that the manner in which this shoe was bound to the foot of the boy was not properly done; that, furthermore, it was not examined sufficiently regular or often by the doctor. The expert evidence in this regard is not strong, but nevertheless, upon the whole record, we are not disposed to determine, as a matter of law, that the treatment accorded was not negligent. We have also examined the rulings of the trial court with reference to the admission of evidence concerning which specifications of error are made, and we find no prejudicial error in the rulings of the trial court. The appellant asserts that defendant's good reputation as a physician is at stake, and that this court should not condemn the defendant as an incompetent or careless practitioner upon the record herein; it does not follow that this judgment so rendered, or its affirmance, does so condemn the defendant. Surely physicians and surgeons are liable to make mistakes and to err in the performance of their duty to the patient occasionally, just the same as any other profession or any other trade. For a physician or a surgeon to assert that he is infallible and never makes a mistake is to place his ability and learning above the usual and ordinary run of human experience. The judgment is affirmed with costs to the respondent.

GRACE, J. I concur in the result.

MONS IVERSON et al., Appellants, v. WILLIAMS SCHOOL DISTRICT et al., Respondents.

(172 N. W. 818.)

Schools and school districts — consolidation of schools — selection of sites — determination by voters.

Upon appeal from an order denying the plaintiffs' motion for an injunction *pendente lite* to restrain performance of certain contracts entered into between the defendant school district and certain contractors, looking toward the construction of a new school building, it is *held:*

1. Sections 1184, 1185, and 1190, Compiled Laws of 1913, and chapter 127 of the Session Laws of 1915, authorize the questions of consolidation of schools, the selection of sites, and the building of new buildings, to be determined exclusively by the voters in common school districts.

Schools and school districts — when injunction will issue.

2. A temporary injunction will not issue where it is not reasonably apparent that it will serve some useful purpose.

Schools and school districts — granting of injunction will be granted when defect complained of has been remedied by voters.

3. Where, subsequent to the bringing of an action for injunction to restrain the performance of a contract, it appears that action has been taken by the voters of a district remedying the defect complained of, and where no injury is alleged to have been caused prior to the removal of the alleged defect in the proceedings looking toward the construction of a school building, the reversal of an order denying a preliminary injunction would serve no useful purpose.

Schools and school districts — election for selection of site — result of holding two elections to decide the same question.

4. Where an election results in a failure to select a site by reason of the indefiniteness of the question submitted, and the question is again submitted, resulting in the selection of the site previously assumed to have been legally selected, the previous invalid selection is ratified.

Municipal corporations — ratification of contracts.

5. Municipal corporations may ratify contracts within their corporate powers which were originally made on their behalf.

Opinion filed May 9, 1919.

Appeal from District Court of Nelson County, *Cooley*, J.

Affirmed.

Bangs & Robbins, for appellants.

"The property of the (school) district is regarded as state property, subject to the action of the legislature or school boards, which are deemed state agencies when empowered by statute to act." School Dist. v. King, 20 N. D. 619, 127 N. W. 515.

"Such public institutions as counties or school districts are a part of the machinery of the state, invented by the state itself, and brought into existence by the authorities of the state for the purpose of executing and performing certain public duties in aid of the welfare of the state, and are invested with certain corporate powers by the state." McDonald v. Hanson, 37 N. D. 341, 164 N. W. 8; Skelly v. School Dist. 103 Cal. 652, 37 Pac. 645; Denman v. Webster, 139 Cal. 452, 73 Pac. 140; School Dist. v. Pasadena, 166 Cal. 7, 134 Pac. 985; School Dist. v. Zedikar, 4 Okla. 599, 47 Pac. 482; Okla. R. Co. v. School, 33 Okla. 755, 127 Pac. 1087; Atty. Gen. v. Lowrey, 131 Mich. 643, 92 N. W. 289.

Under this law there is no doubt but that the school board had no power to purchase a site or construct a building save such as had been theretofore authorized. F. & M. N. Bank v. School Dist. 6 Dak. 255, 42 N. W. 756; Capital Bank v. School Dist. 1 N. D. 479, 48 N. W. 363; Benjamin v. Hull, 17 Wend. 437; Petersburg School Dist. v. Peterson, 14 N. D. 344, 103 N. W. 756; Seibert v. Botts, 57 Mo. 430; Township Bd. v. Carolan, 81 Ill. App. 359; Ziesing v. Matthiessen, 79 Ill. App. 560; Greenwood v. Gmelich, 175 Ill. 526, 51 N. E. 565.

"And throughout the whole act, it will be seen that the board have complete and entire control of the establishment and maintenance of the schools, and are furnished with all means and powers necessary for this purpose. By the 9th section of the act, cited *ante*, the power to determine upon the erection of schoolhouses, and the purchase of sites therefor, and the amount of money to be raised for that purpose, is conferred upon the meeting of legal voters of the district mentioned in said section. There can be no doubt that the power conferred by this section is general, extending to all schoolhouses and sites erected or purchased under this section, and we think it is equally evident that it was

the intention of the act to confer this power exclusively upon the voters. Whatever, therefore, is an exercise of this power must be done by the meeting, and not by another body,—the action of the meeting then must be full and complete in itself; to render it so, we think it is necessary that it should be definite and certain as to the number of houses to be erected and sites to be purchased." And see the following authorities: 3 Abbott, Mun. Corp. §§ 1083 et seq.; School Dist. v. Stough, 4 Neb. 357; Gehling v. School Dist. 10 Neb. 239, 4 N. W. 1023; Mizena v. Auten, 45 Neb. 242, 63 N. W. 399; Wilbur v. Wooley, 44 Neb. 739, 62 N. W. 1095; School Dist. v. Randolph, 57 Neb. 546, 77 N. W. 1073; Zimmerman v. State, 60 Neb. 633, 83 N. W. 919; Stadtler v. School Dist. 61 Minn. 259, 63 N. W. 638; McCarty v. Cain, 27 Okla. 82, 110 Pac. 653.

By the provisions of § 1192, Comp. Laws 1913, the electors must determine whether or not a high school shall be provided for and must select the site therefor. Kretchmer v. School Bd. 34 N. D. 403, 158 N. W. 993; Gehling v. School Dist. 10 Neb. 239, 4 N. W. 1023; School Dist. v. Randolph, 57 Neb. 546, 77 N. W. 1073; School Dist. v. Staris, 1 Neb. (Unof.) 85, 95 N. W. 492; Ladd v. School Dist. 70 Neb. 438, 97 N. W. 594; Greenwood v. Gmelich, 175 Ill. 526, 51 N. E. 565; People v. Ry. Co. 270 Ill. 594, 110 N. E. 825; Seibert v. Botts, 57 Mo. 430; Marsh v. Dedham, 137 Mass. 235; Board of Education v. Moross, 151 Mich. 625, 114 N. W. 75.

J. H. Roberts, C. N. Frich, and *H. S. Blood,* for respondents.

In view of the allegations of this answer, it would be wrong for the court to order a temporary injunctional order restraining the defendants from acting until the issues framed by the complaint and this uncontroverted affirmative answer could be tried. 22 Cyc. 753, "In any event an injunction must be refused if the complainant's case is so doubtful that it does not appear reasonably probable that he has the right claim and that it is being violated, or if he does not make it appear reasonably probable that an irreparable injury is impending and will occur before the final hearing can be held."

22 Cyc. 948, reads, "If plaintiff had a right of action at the time of filing the bill, but has lost it by subsequent change of circumstances, the bill may be dismissed."

35 Cyc. 962, reads: "A subsequent ratification of an invalid school district contract is governed by the rules applicable to the ratification of the acts of agents generally."

All acts sought by appellants to be restrained having been done fully and completed, any injunctional order restraining defendants from doing such acts after they had been done would be wholly moot. The facts bring this case squarely within the rule laid down by this court in Thompson v. Vold, 38 N. D. 569.

BIRDZELL, J. This is an appeal from an order entered in the district court of Nelson county, denying an application for a restraining order. The order appealed from was entered in disposing of a motion heard on July 18, 1918. The notice of motion apprised the defendants that the plaintiffs would move for an order commanding them "to refrain and abstain from carrying out, fulfilling, and performing the contracts entered into by the said Williams School District and Wm. Comeau and Anton Evanstad, and the Colburn School Supply Company for the construction of a consolidated school building in said Williams School District, and to abstain and refrain from authorizing the payment of or paying any moneys to the said William Comeau and Anton Evanstad, and the Colburn School Supply Company, on said contracts or doing any act toward carrying out and performing said contract." The motion was supported by plaintiffs' verified complaint in the action and by the affidavit of one Mons Iverson. From these it appears that the facts relied upon to justify the issuance of the restraining order are as follows:

On February 1, 1918, at a special meeting of the school board it was decided to call a special election to vote upon the question of consolidating all the schools of the school district, to select a building site for a central school, and to provide a suitable building. The date fixed for the election was February 21, 1918. The election was duly noticed, and at the election a ballot was provided for use (omitting title) as follows:

For consolidation of all the schools of Williams School District, Nelson county, North Dakota.

No ..... ☐
Yes ..... ☐

For the selection of building site for Central School.

Yes ☐
No ☐

For the provision of a suitable school building.

Yes ☐
No ☐

At the election there were thirty affirmative votes on each proposition and ten negative. On April 1, 1918, another election was held upon the question of bonding the district in the sum of $8,000 for the purpose of building a consolidated school. At this election fifty-one votes were cast, thirty-two being in favor and nineteen against the proposition. Thereafter the school board proceeded to contract for the purchase of building plans from the Colburn School Supply Company, for the sum of $200, and entered into a contract with the defendants Comeau and Evanstad for the construction of the proposed building, exclusive of heating and ventilating plant, for the sum of $11,425. It is alleged that the defendants have commenced to carry out the construction contract, and that unless restrained they will issue warrants in discharge of their pretended obligations to the different contractors.

The contention of the illegality of the contracts is based directly upon the insufficiency of the ballot on the proposition of the selection of a site, and upon an alleged excess of indebtedness created by the contract. In the affidavit in support of the motion and in the complaint it was charged that it was proposed to erect a building upon a site in the southwest corner of the southwest quarter (S. W. $\frac{1}{4}$) of section 15, township 152, range 59. It was further alleged that the site was not, at the time, and never had been, owned by the district.

An affidavit was filed, signed by the members of the school board, stating that at the time the election was held, the school district was the owner in fee of this site, which was situated in the geographical center of the district. The affidavit also takes issue on the question of the amount of funds available and legally possible to devote to the construction of the building, claiming that the contracts are well within the limit.

After the order denying the injunction was made and before it was

filed in the office of the clerk of the district court, the defendants served an answer upon appellants' counsel, which was later filed and in which it was alleged that after the commencement of the action the school board called another election at which were submitted questions as follows:

"(1) To select a site comprising 2 acres of land, located in the southwest corner of the southwest quarter (S. W. ¼) of section 15, in township 152, N., range 59 W., in the said Williams School District, as a site for the said consolidated school; and

"(2) Authorizing the said board of school directors to provide a suitable school building for use as a consolidated school to be erected in the year 1918 on the said site at a cost not to exceed $12,000."

It was alleged that this election was held on July 20, 1918, that eighty votes were cast, of which forty-five were in favor of both propositions and thirty-five against. The defendants, in the answer, ask that the defect, if any, in the previous election of February 21, 1918, be adjudged remedied by the election of July 20, 1918.

The appellants ask that the correctness of the order of the trial court denying the injunction *pendente lite* be determined in this court upon the basis of the facts as they existed at the time the order was signed; that is, prior to the election in July, which, if valid, resulted in the selection of the site upon which it was proposed in the first place to erect the building. The brief is devoted almost wholly to a consideration of the question as to whether or not directors of common-school districts possess the power to select a site for school buildings. The statutory provisions, §§ 1184, 1185, and 1190, Compiled Laws 1913, amply support appellants' contention in this respect. The sections referred to leave no room for doubt that questions of the location of consolidated schools and the building of schoolhouses in common-school districts are to be decided by the voters of the district. Henderson v. Long Creek School Dist. 41 N. D. 640, 171 N. W. 825.

But before counsel's contention as to the lack of power in the directors to determine the location of the building can be considered as decisive upon this appeal, it must appear that the reversal of the order denying the temporary injunction will serve some useful purpose, and will not merely amount to the decision of a moot question. It is well settled

that an injunction will not be issued unless it will serve some useful purpose (22 Cyc. 781); and where it appears that, by reason of circumstances arising subsequent to the bringing of the action, the plaintiff will not be entitled to the permanent relief sought, a temporary injunction should not issue. 22 Cyc. 755, 781; 16 Am. & Eng. Enc. Law, 2d ed. 431. As is said in High on Injunctions, § 5: "The court will not, however, upon an application for an interlocutory injunction, shut its eyes to the question of the probability of plaintiff ultimately establishing his demand, nor will it by injunction disturb defendant in the exercise of a legal right without a probability that plaintiff may finally maintain his right as against that of the defendant. And where the question involved is merely of a pecuniary nature, plaintiff will not be allowed an interlocutory injunction unless he can satisfy the court that there is a probability that his bill will not be dismissed upon the hearing."

When counsel's argument is weighed in the light of the foregoing principles, it will be seen that it ignores the possible legal effect of the action of the directors and of the voters subsequent to the bringing of this action. If their action in selecting the original proposed site was sufficiently curative to make valid the contracts complained of, this court, in holding that the board had no original authority to select a site and reversing the order denying the preliminary injunction, would be merely deciding a moot question and directing the entry of an injunctional order by the district court that it would be its duty to dissolve summarily upon motion. The injury of which the plaintiffs complain is only that which would flow from the performance of an illegal contract, and if circumstances no longer exist which show a prima facie case of illegality no injunctional order should be made. It clearly appears that such an order is not necessary to determine or protect any rights of the plaintiffs as they existed prior to the July election; for, as indicated above, no injury is claimed to have been suffered prior to that date. The plaintiffs have no right to stop all proceedings looking toward the construction of the building; they have only the right to stop illegal proceedings, and if the effect of the July election was, prima facie, to legalize the future proceedings under the existing contracts, the order appealed from should be affirmed. This, then, is the real question for our determination.

We are of the opinion that, notwithstanding the irregularity in the making of the contract, resulting from the failure of the first election to constitute a valid selection of a building site, the action of the voters on July 20, as shown by the answer, amounted to a ratification of the selection. Also to a ratification of the previous steps taken by the board toward carrying out the instructions of the voters at the first election to provide a suitable school building. The power of school districts to contract for the construction of school buildings is not questioned. But before there can be a valid exercise of the power, it is essential that the voters shall have selected a site for the location of the building. We find nothing in the statute to prevent the voters of a school district from ratifying by their own subsequent action a previous invalid selection of a site. To the effect that this may be done, see Board of Education v. Carolan, 182 Ill. 119, 55 N. E. 58; Nichols v. School Dist. 39 Wash. 137, 81 Pac. 325; Leighton v. Ossipee School Dist. 66 N. H. 548, 31 Atl. 899.

It seems to us to be immaterial, under § 1190, Compiled Laws of 1913, as amended by chapter 127 of the Session Laws of 1915, whether the question of the selection of a site by the voters be submitted as a part of a compound question involving consolidation and building as well, or whether it be separately submitted. The requirements of the statute are properly met if the voters have been given a fair opportunity to determine the question in an election regularly held. In the case at bar it seems that ample opportunity has been afforded for an expression of preference for a site. The site having been legally determined, it remains to be seen whether the building contract is ratified.

Municipal corporations are liable upon contracts for a corporate purpose and within the scope of corporate powers to the same extent as individuals; and, similarly, they may ratify contracts made on their behalf which they possess authority to make. See State ex rel. Carthage v. Cowgill & H. Mill. Co. 156 Mo. 620, 57 S. W. 1008; Sullivan v. School Dist. 39 Kan. 347, 18 Pac. 287; L.R.A.1915A, 1028, note. The ratification, however, cannot be given a retroactive effect which would enable the corporation to escape compliance with essential preliminary requirements. Henderson v. Long Creek School Dist. supra; 19 R. C. L. § 360. In the instant case the only requirement lacking at the time

the contract was made was a vote of the electors resulting in the selection of a particular site, and the statute has since been amply satisfied in this respect.

For the foregoing reasons, the order appealed from is affirmed.

GRACE, J. I concur in the result.

CATHERINE DELANEY and Johanna Colbert, Respondents, v. STATE OF NORTH DAKOTA and John Steen, as Treasurer of the State of North Dakota, Appellants.

(174 N. W. 290.)

Actions against state — title to property of decedent — statute construed.

1. Section 8175, Compiled Laws of 1913, authorizes actions to be brought against the state, where title to property is involved.

Escheat — district court proper place for commencement of suit.

2. Section 5760, Compiled Laws of 1913, which provides that, if there is no one capable of succeeding to property upon the death of a decedent and the title fails from a defect of heirs, the property escheats to the state, and authorizes an action for the recovery of the same in the district court, gives an exclusive remedy to perfect an escheat.

Escheat — state does not acquire property by succession or as last heir.

3. When property escheats to the state through failure of title on account of the nonexistence of a person capable of succeeding to the estate of a decedent, the state does not take the property by succession or as the last heir of the decedent.

Escheat — county court has no jurisdiction to determine escheat.

4. The county court has no jurisdiction to determine escheats.

Escheat — county court has no jurisdiction to settle question that state is only heir.

5. A finding by a county court in a decree of distribution, that the state "is the only heir" of a deceased, accompanied by a direction to the administrator to turn over the property to the state treasurer, followed by compliance, does not constitute an authorized adjudication of an escheat sufficient to vest title in the state.

Escheat — right of claimants to property not under jurisdiction of county court.

6. Where, in the course of an action of escheat in the district court, it becomes necessary to determine whether or not claimants are entitled to succeed to the property, the determination of such question is not an exercise of probate jurisdiction within the meaning of § 111 of the Constitution, which vests exclusive probate jurisdiction in county courts.

Opinion filed May 9, 1919.

Appeal from the District Court of Benson County, *C. W. Buttz,* J. Affirmed.

William Langer, Attorney General, *H. A. Bronson,* Assistant Attorney General, and *George K. Foster,* Assistant Attorney General, for appellants.

"Property escheats when. All property, real and personal, within the limits of this state, which does not belong to any person or to the United States, belongs to the state. Whenever the title of any property fails for want of heirs or next of kin, it reverts to the state." Comp. Laws 1913, § 9.

"The heirs of a deceased person have no vested interest in the property of a deceased person." Strauss v. State, 36 N. D. 601, 162 N. W. 908.

At best the heirs of a deceased person have only permission on the part of the state, upon complying with certain conditions, within certain time, to receive certain portions of the property of the deceased. Ibid.

2. Upon the death of a person intestate with defect of heirs his estate *eo instanti,* vests in the state of North Dakota. N. D. Comp. Laws 1913, § 5760; State v. Reeder, 5 Neb. 205.

3. No proceedings are necessary to effect an escheat where the owner dies intestate without leaving any inheritable blood. 4 Kent, Com. 424; State v. Reeder, 5 Neb. 203; 1 Bland, Ch. 299; O'Hanlin v. Den, 20 N. J. L. 31; Den ex dem. Van Kleek v. O'Hanlon, 21 N. J. L. 582; McCaughal v. Ryan, 27 Barb. 376; Ettenheimer v. Hefferman, 66 Barb. 374; Doe ex dem. Blount v. Horniblea, 3 N. C. (2 Hayw.) 37; Hinkel v. Shadden, 2 Swan, 46; Puckett v. State, 1 Sneed, 355; State v. Goldberg, 113 Tenn. 298, 86 S. W. 717; Ellis v. State, 3 Tex. Civ. App.

170, 21 S. W. 66, 24 S. W. 660; Sands v. Lynham, 27 Gratt. 291, 21 Am. Rep. 348.

Sinness & Duffy and *John J. Dwyer,* for respondents.

The state cannot be the heir of anyone. It can only take when there are no heirs. It takes, not by way of succession, but by way of escheat. 10 R. C. L. 602 et seq.; 1 Ross, Prob. Law & Pr. p. 187; Comp. Laws 1913, §§ 9, 5760.

"All property, real and personal, within the limits of the state, which does not belong to any person or to the United States, belongs to the state. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the state." Comp. Laws 1913, §§ 9, 5760; Finn v. Walsh, 19 N. D. 61.

The establishment of an escheat certainly does not come under the head of probate or testamentary matters. The probate courts are successors to the jurisdiction of the ecclesiastical courts of England while the escheat proceeding is derived from the ancient proceeding of office found. 10 R. C. L. 609.

It is clear that distribution relates to the passing of title by inheritance, and not by escheat. 9 R. C. L. and definition of descent and distribution in Bouvier's Law Dictionary.

"In many states the method of enforcing an escheat and the court in which the action shall be brought are prescribed by statute, and it is obvious that the statutory requirements must be complied with in all respects to confer jurisdiction." 10 R. C. L. 611.

"The proceeding to enforce an escheat is in the nature of an inquest of office. The proceeding is now generally regulated by statute, and when so regulated the right must be established in the manner provided, and all the requirements of the statute substantially complied with." 16 Cyc. 553. See Wilbur v. Tobey, 16 Pick. 177.

To the same effect see note in 12 L.R.A. 529.

"Determining whether property has escheated to the state, and deciding the questions involved in such a proceeding, constitutes no part of the ordinary duties of the probate court." 1 Church, Prob. Law & Pr. p. 69; Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029; Re Miner, 143 Cal. 194, 76 Pac. 968; 1 Ross, Prob. Law & Pr. p. 187.

It is well settled in this state that where a county court assumes to determine matters beyond its jurisdiction, its decree is void and of no effect. Arnegaard v. Arnegaard, 7 N. D. 501; Gjerstadengen v. Van Dusen, 7 N. D. 612; Finn v. Walsh, 19 N. D. 61.

The supreme court of this state has repeatedly held that the courts have inherent power to vacate or amend their void or irregular judgments and decrees, and that such action may be taken at any time irrespective of the statutory limit of one year. Martinson v. Marzolf, 14 N. D. 309; Freeman v. Wood, 11 N. D. 1; Campbell v. Coulston, 19 N. D. 645. See also 15 R. C. L. 692; 23 Cyc. 905.

The right of the county courts to vacate or amend their decrees is expressly granted by statute. Comp. Laws 1913, §§ 8591–8598.

Heirs can maintain an action for possession of property without the necessity of a decree of a probate court establishing their heirship, particularly where there are no creditors of the decedent. Notes in 15 L.R.A. 493, 112 Am. St. Rep. 729, 4 Ann. Cas. 195, 20 Ann. Cas. 96, and 22 L.R.A.(N.S.) 457, 11 R. C. L. 27, 28.

BIRDZELL, J. This is an appeal from an order overruling a demurrer to the complaint. The action is brought by the plaintiffs against the state of North Dakota and John Steen, as treasurer, for the recovery of certain personal property alleged to have come into the possession of the defendant as a result of a decree of distribution entered in probate proceedings in the county court of Benson county. The facts alleged upon which the questions of law raised by the demurrer depend may be briefly stated as follows: One Michael Clifford died on or about the 9th day of October, 1913, in the city of Minneapolis, Minnesota, leaving certain personal property in Benson county, North Dakota, where he had formerly resided. In February, 1914, one F. E. Wood was appointed administrator of the estate in Benson county, and in February, 1915, he presented his final report and account, which was approved in April following. The administrator was discharged in May, 1915, and died the following December. In the final decree of distribution entered at the time of the discharge, it was decreed "that the said state of North Dakota is the only heir of said deceased, and as such is entitled to the whole said estate," the estate referred to consisting of the personal property sought to be recovered in this action. Pursuant to the decree, the

property was turned over to and receipted for by John Steen, as state treasurer of the state of North Dakota. In the petition for letters of administration the petitioner Wood recited and alleged upon information and belief that the deceased "left two sisters surviving him, and also children of said sisters; but that the names or residences were wholly unknown." It is alleged that no search was made to determine the names or whereabouts of the heirs at law of the deceased; that the plaintiffs had no knowledge of the death of Michael Clifford nor of the probate proceedings; that they are the sisters of the deceased and his next of kin and heirs at law, and, as such, entitled to the residue of his estate; and that, after the entry of the final decree, upon learning of the death of Michael Clifford, plaintiffs forthwith petitioned the county court for a reopening of the probate proceedings, in pursuance of which petition an order was made modifying the final decree of distribution by vacating that portion decreeing the residue of the estate to the state of North Dakota and substituting an order that the residue be turned over to the treasurer of the state of North Dakota as *custodian* to be held by him in trust until otherwise disposed of according to law. It is further alleged that this order was entered in June, 1917, that no appeal was taken from it, and that in September, 1917, the plaintiffs duly demanded the property and the defendant refused to deliver the same and still refuses to do so.

The brief of the appellant contains a lengthy statement of so-called procedural facts with reference to the handling of the estate, both in this state and in Minnesota, which are confessedly outside the record, and which for this reason merit no attention.

The legal questions involved are discussed in the brief under three heads: (1) The right of the plaintiffs to maintain this action against the state, or the state treasurer as trustee; (2) the jurisdiction of the county court to set aside and modify the final decree; and (3) the jurisdiction of the district court to determine who are the heirs at law of Michael Clifford, deceased.

Section 8 of the Compiled Laws 1913, provides that the original and ultimate right to all property within the limits of the state is in the state. Section 9 reads: "All property, real and personal, within the limits of this state, which does not belong to any person or to the United

States, belongs to the state. Whenever the title to any property fails for want of heirs or next of kin, it reverts to the state."

In § 5742 it is provided that property, either real or personal, passes to the heirs of an intestate decedent subject to the control of the county court and to the possession of the administrator for the purpose of administration. Section 5743 provides the order of succession. In these sections, as well as the sections immediately following, which treat of inheritances to and from illegitimate children and of the degrees of kindred in direct and collateral lines, ascending and descending, etc., the state is not regarded as taking by succession. In § 5760, however, it is provided that if there is no one capable of succeeding under the preceding sections and the title fails from a defect of heirs, the property of a decedent devolves and escheats to the state, and that an action for the recovery of the property or for its sale and conveyance may be brought by the state's attorney in the district court of the county or judicial subdivision in which the property is situated. The very language of this section excludes the idea that the state takes property in the line of succession, for the escheat is not declared to operate except where there is no one capable of succeeding and the title fails from a defect of heirs. If the state were regarded as an heir, it is manifest that the title would not fail. Under this section and § 9 of the Compiled Laws, an escheat is nothing more nor less than the reversion of property to the state which takes place when the title fails. These statutes are so inconsistent with the theory that the title of the last holder is continued in the state that the contention of the appellants on this point must fail.

Since, for purposes of succession to property, the state does not take as the last heir, it is necessary next to determine whether or not the plaintiffs may maintain this action against the state or against the state treasurer as trustee. It affirmatively appears on the face of the complaint that no action of escheat such as is provided for in § 5760, Compiled Laws of 1913, has ever been instituted by the state, and that the property came into its possession through the decree of the county court. The county court, being a court of limited jurisdiction, could not render a decree binding upon parties ostensibly affected thereby unless it was made in pursuance of a jurisdiction possessed by the court. It follows from this that, unless the county court had jurisdiction to direct the transfer of possession to the defendants, they are in the same position

as any other person would be upon obtaining possession of property through an administrator without legal warrant. They hold it subject to the superior claims, if any, of third parties. Claimants of property may sue the state when the title is involved, the same as though the state were an individual. Comp. Laws 1913, § 8175. So far as the state is concerned, or the officer purporting to act for it, the plaintiffs are precluded no further by the determination of the county court than they would be if the claim set up by them in this action had been set up by way of answer or petition in an action of escheat brought by the state.

This brings us to the crucial question in the case; namely, the jurisdiction of the county court. Section 8525 provides that the county court shall have jurisdiction, among other things, to take proof of and determine heirship, and to revoke such determination.

Section 8846 provides for the distribution of the estate upon final settlement, upon the petition of the executor or administrator "or of any heir, legatee, or devisee, . . . among the persons who are by law entitled thereto." Section 8859 requires that the decree of distribution shall name the persons and the proportions to which each shall be entitled, and provides that such persons may sue for and recover their respective shares. From these sections, as well as others to which it is not necessary to refer, it appears clear to us that probate proceedings in the county court are limited to an administration that will result in the payment of indebtedness and the ultimate distribution of the residue to the persons who are determined by the court to be the heirs, legatees, or devisees of decedents. We find no evidence in the statutes of an attempt to vest in the county court jurisdiction to determine escheats. 1 Church, New Prob. Law & Pr. p. 69. If there be no one to claim as heir, legatee, or devisee, and there be no evidence adduced to the county court from which it can determine who may succeed to the title of the decedent, the court exhausts its jurisdiction when it makes the negative finding to that effect, and the property is left legally in the possession of the administrator and rendered subject to such future proceedings as may be taken looking toward the final acquisition of the property by the state through the process of escheat.

We are also of the opinion, for reasons which will later appear, that § 5760 provides the exclusive procedure through which the state may acquire property by escheat. It follows from this that the county court

was without jurisdiction to thrust the property upon the state by the erroneous decree of distribution.

We are confident that upon a careful examination it will be found that the authorities support the foregoing conclusions. Before considering the cases in which courts have been called upon to construe and apply statutes similar to the controlling ones cited above, it may be profitable to refer to authorities in which the rules governing escheats generally are considered and applied. The escheats generally considered in American cases are those occasioned either by alienage or by defects of heirs. The escheats for felony, treason, and for breach of condition of feudal tenure, are practically unknown in American law. The procedure, however, having been borrowed from England, still partakes of the characteristics of the old English inquest of office. See note in 15 L.R.A.(N.S.) 379. The fact that the principles of feudal tenure do not obtain in this country has, in some instances, led to the confusing statement that the state takes as the last heir. This, in American law, has been regarded as a more appropriate expression than the alternative expression that the state takes the fee as the feudal lord. While it might be appropriate enough to thus distinguish differences in tenure, the statement can only serve to confuse if allowed to influence the procedure to establish escheats, where the statutes are not clear and explicit.

Chief Justice Shaw, in the case of Wilbur v. Tobey, 16 Pick. 177, dispels some of the confusion by drawing a clear line of distinction between instances of escheat through alienage and through failure of heirs. In that case it is pointed out that, at common law, an alien could not take by act of law, such as descent, and, therefore, upon the decease of an alien, who in his lifetime held property within the state, there would exist no one to take the property by descent. He could have no inheritable blood and consequently no legal heirs. The law, in these circumstances, would not allow the fee to remain in abeyance, but would vest it immediately in the commonwealth without inquest of office.

On the other hand, if a citizen should die intestate, as the property would descend to the kindred indefinitely, a presumption would arise, which would be good even against the commonwealth, that the decedent left heirs capable of taking, and this presumption would obtain until rebutted by proceedings instituted by the state. It was held that in such case an inquest of office was necessary in order that the state might be-

come seised of the property. Upon the presumption of heirship, see also People ex rel. Atty. Gen. v. Roach, 76 Cal. 294, 18 Pac. 407.

As against the holding of the Massachusetts court, through Chief Justice Shaw, above referred to, we have the expression of Chancellor Kent, in 4 Kent's Commentaries, page 424, to the effect that whenever an owner dies intestate without leaving inheritable blood or whenever the relations whom he leaves are aliens and there is a failure of competent heirs, the lands vest immediately in the state by operation of law, and that no inquest of office is necessary in such cases. When authorities of such distinction as the two referred to are found to be in apparent disagreement upon a matter of this sort, a lack of harmony in the decisions is to be expected. See note in 15 L.R.A.(N.S.) 379, and 10 R. C. L. 609–611. But in cases such as the one at bar, we are not in reality concerned with the question as to whether an action must be brought by the state in order to perfect its title, or whether the bringing of the action will only serve, in the event legal claimants do not appear, to vindicate a title previously acquired; for our statute (§ 5760) clearly contemplates that such an action shall be brought on behalf of the state to obtain the property.

Statutes analogous to ours have been construed in California and South Dakota. In both jurisdictions it has been held that the duties of the probate court were limited to the administration of the estate for the purpose of arriving at the residue of the property and its distribution among those known to be rightful distributees. See 1 Church, New Prob. Law & Pr. p. 69. Also that a separate action was necessary in order to invest the state with title to the escheated property. In the case of Re Miner, 143 Cal. 194, 76 Pac. 968, the following paragraphs of the syllabus indicate the pertinent holdings of the court:

"1. An order of the probate court reciting that the affairs of an estate had been finally settled and that there were no heirs or other claimants thereof, and ordering 'that the county treasurer of this city and county forthwith pay into the state treasury all moneys and effects in his hands belonging to such estate,' did not *ipso facto* operate to vest in the state the title to the fund ordered to be deposited in the state treasury, as upon a decree in an action brought to escheat the same.

"2. There is no limit to the time within which native born American citizens may come forward and claim property to which they have suc-

ceeded, so long as no judgment or decree in a proper proceeding to escheat has been entered.

"3. The state does not come in by way of succession on failure of heirs or next of kin to take an estate of a decedent, but in such event the property, whether real or personal, goes to the state by escheat."

We have carefully examined the statutes under consideration in the California case, and while they are somewhat more comprehensive and specific as to procedure than the similar statutes in this state, they are not substantially different. The basic provision governing escheats, as distinguished from the procedure to determine it, seems to be drawn from the same source as our statute. See § 530, Draft of Civil Code for State of New York 1862; also §§ 795, 796, Dak. Rev. Codes 1877; § 5760, N. D. Comp. Laws 1913, 2 Kerr's Cyc. Code of California, §§ 1405–1407.

In the two appeals in Re McClellan, 27 S. D. 109, 129 N. W. 1037, Ann. Cas. 1913C, 1029, and 31 S. D. 641, 141 N. W. 965, the supreme court of South Dakota adhered to the rules previously announced in California. A statute identical with § 5760 of the Compiled Laws of 1913, was construed in the latter of the two appeals as follows (31 S. D. 654): "We think it clear, under this statute, if it be a fact that there are no heirs when the owner dies, the title to his property instantly vests in the state, but that the state is not given the right to recover the property and reduce it into possession of the state or sell and convey it, except through an action of escheat. The title which vests in the state is not created or vested by the judgment in the action. But the judgment becomes evidence of the facts upon which the state's title rests, and renders effective the right to recover and reduce the property into possession of the state." See also Wallahan v. Ingersoll, 117 Ill. 124, 7 N. E. 519; Wunderle v. Wunderle, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195; State v. O'Day, 41 Or. 495, 69 Pac. 542.

By a party of reasoning the title could not vest in the state *ipso facto* upon the death of a decedent, if he in fact left heirs or persons capable of succeeding to the estate, as the subsequent fact of their nonappearance in the county court could not be anticipated. If it were intended to make the county court the final forum for determining the existence or nonexistence of the fact upon which the escheat depends, no good reason is perceived for making provision for the bringing of an action in

the district court, as is done in § 5760. The legislature would surely not provide for the bringing of an independent action to accomplish a result that could be reached by the simple entry of an order in probate proceedings, where the property is already in the custody of an administrator or executor. The fact that it has authorized such an action in every case is a strong indication that it was not intended that county courts should be permitted to adjudicate escheats. Furthermore, if the appellants' contentions are sound, the district court would be without power to determine the fact of the nonexistence of heirs, with the result that the determination in the district court would necessarily be predicated on facts that could not be established outside the county court. If the legislature intended these consequences, it surely would have directed that additional steps be taken in the probate proceedings instead of directing the bringing of a separate action.

It appears that the legislature of South Dakota recognized the desirability of providing a more definite procedure in relation to escheated property than is contained in our Code. In 1909, prior to the decisions above referred to, it enacted chapter 104 of the Session Laws for this purpose. But it does not appear that the decisions were controlled by that act.

The foregoing leads to the conclusion that the plaintiffs may, in this action, try their title as against the defendants, and that the attempted exercise of jurisdiction with regard to the escheat on the part of the county court, both in the original decree of distribution and in the subsequent modification of the same, being in excess of the jurisdiction of the court, does not affect the right of the plaintiffs in this action.

In the third proposition advanced by the appellants the jurisdiction of the district court to determine who are the heirs of Michael Clifford is attacked. The contention is made that the determination of heirship is necessarily an exercise of original jurisdiction in a probate matter, and, as such, it is vested exclusively in the county court by § 111 of the Constitution. Our views upon this question have been somewhat foreshadowed in the previous discussion, and to meet the issue squarely it need only be added that it is our opinion that, while exclusive original jurisdiction is conferred upon county courts to so administer estates as to bind creditors and those who take distributive shares in those proceedings through will or by succession, the full exercise of this jurisdiction

might still result in leaving undetermined, as between the state and legal heirs not appearing in county court, a question of title. The determination of this question in a court of general jurisdiction is no more an exercise of probate jurisdiction than would be the determination of a similar question between an administrator and some third party claimant whose claim is adverse to the estate. It is well settled that such questions can be properly determined only in courts of general jurisdiction. See Finn v. Walsh, 19 N. D. 61, 121 N. W. 766. In determining such a question it may become necessary to establish anew the facts in relation to heirship. The necessity for the ascertainment of these facts, however, does not characterize the proceeding as a probate proceeding; neither does it furnish an adequate reason for curtailing the jurisdiction of a court of general jurisdiction.

For the foregoing reasons the order appealed from is affirmed and the cause remanded for further proceedings not inconsistent with this opinion.

CORNELIUS JORDAN, Respondent, v. E. I. DONOVAN, Appellant.

(172 N. W. 838.)

Mortgages — contract for deed — construction of instrument.

1. A certain contract for deed, executed by defendant to plaintiff, covering a certain tract of land, is examined and under all the circumstances of the case it is *held* that such contract as a matter of law is in the nature of a mortgage, and it is *held* to be such.

Mortgages — contract for deed — redemption — allowance of attorney's fees.

2. Defendant foreclosed the contract and recovered judgment for the full amount owing thereunder. Plaintiff endeavored to redeem and tendered the full amount necessary to make redemption from such foreclosure. Defendant refused to receive the same unless plaintiff would pay an additional sum of $1,000 claimed to have been paid out by defendant as attorney's fees in defending Jordan's title to the land against certain actions seeking to contest his title thereto. *Held* that plaintiff had the right to redeem without paying or tendering to defendant the $1,000 alleged by the defendant to have been paid out by him for attorney's fees.

Lis pendens — foreclosure — claim for attorney's fees.

3. If plaintiff owed defendant any sum for money expended for alleged attorney's fees, it constituted a simple debt only, and could not be tacked on to the amount necessary to redeem from the foreclosure sale; neither did indebtedness from plaintiff to defendant, if any, on account of defendant paying out money for plaintiff for attorney's fees in defending the title, confer any right or authority upon the defendant to file a notice of *lis pendens* in an action brought by defendant to recover the amount alleged to have been paid out for attorney's fees on behalf of plaintiff.

Opinion filed May 9, 1919.

Appeal from the District Court of Cavalier County, Seventh Judicial District, Honorable *C. W. Buttz,* Judge of the Second Judicial District, acting for and at the written request of Honorable *W. J. Kneeshaw,* Judge of the Seventh Judicial District.

Affirmed.

Geo. M. Price, for appellant.

"A trustee is entitled to the payment out of the trust property of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures if they were productive of actual benefit to the estate." Comp. Laws 1913, § 6308.

"Upon an accounting against a trustee he is entitled to credit for attorney's fees and the court costs properly expended by him for the defense and preservation of the trust fund." 39 Cyc. 329, 339, 480.

"Money advanced by a mortgagee for expenses and counsel fees in setting aside tax titles to the mortgaged property may be recovered by him from the mortgagor in a suit to foreclose the mortgage." 27 Cyc. 1779, note.

G. Grimson, for respondent.

To allow for special circumstances, the statute gives the court power to extend the time. When that has not been done, however, then the court is limited by the statute to the time therein provided within which to settle the statement. See 4 C. J. 271; St. Croix Lumber Co. v. Pennington, 11 N. W. 497.

In the case of Wright v. Juhl (S. D.) 93 N. W. 648, the court held that jurisdiction could not even be granted after the time expired to

make a motion for a new trial by stipulation of counsel, and quotes a number of cases. Higgins v. Rued, 30 N. D. 551; Grove v. Morris, 31 N. D. 8.

The foreclosure of a mortgage for a part of the debt exhausts the lien. See 27 Cyc. 1790; 37 L.R.A. 737; Borden v. McNamara, 20 N. D. 225, and Derelius v. Davis (Minn.) 77 N. W. 214.

"The rule of *lis pendens* does not apply to an action for the recovery of a money judgment, nor in any other action which does not directly affect real property." See 25 Cyc. 1454; Wheeling v. Perry, 14 W. Va. 66; St. Joseph Mfg. Co. v. Dagett, 84 Ill. 556, recites: "A judgment for a sum of money which may be satisfied by the sale of the real estate, if not otherwise satisfied, is not *lis pendens* in regard to the title of the real estate of the defendant in the judgment." Cited in 33 Century Dig. 1394; Gales v. Christy, 4 La. Ann. 293; Carson v. Fears, 91 Ga. 482; Armstrong v. Carwile, 56 S. C. 463, 35 S. E. 196; Shearon v. Henderson, 1 Tex. 326; Kaufman v. Simis, 147 N. Y. S. 478; Knox v. Parker, 167 Ala. 647; Fiegley v. Fiegley, 14 Am. Dec. 375; Joslyn v. Schwend (Minn.) 93 N. W. 705; Painter v. Gunderson, 143 N. W. 911, the court held: "Where the mortgagor has suffered his right of redemption to elapse or become barred by fraud practised upon him, or ignorance of his rights or consequence of his acts or through unavoidable accident or justifiable mistake, he may maintain a bill in equity to redeem. Any of these grounds are sufficient to justify the intervention of equity for his relief." 27 Cyc. 1847; Newman v. Locke (Mich.) 36 N. W. 166.

Held: Where the plaintiff in a suit shows that he understood that the redemption was to be made for him by another and that he relied on that belief, and did not attempt to raise the money, he will be allowed to redeem and is entitled to an accounting. To the same effect, see Nolan v. Rankin (Minn.) 77 N. W. 191.

"Where the defendant is guilty of fraud, and the plaintiff does not choose to sue him for redemption but sues him in account, equity takes the part of the plaintiff and compels an accounting." Prondinski v. Garbut, 8 N. D. 191; Chaffee v. Conway, 103 N. W. 269; Agars v. Slifer, 89 Ind. 433; Benton v. Streene, 4 Ind. 66; Wilson v. Eggelson, 27 Mich. 259; Dwer v. Blake, 44 Ill. 135. See also Hedlin v. Lee, 21 N. D. 495.

It is well settled that if the statute directs that the notice be served upon the person in whose name the land is assessed and a notice to any other person is not a notice at all. Rector v. Maloney, 88 N. W. 575.

A tax title is purely technical as distinguished from a meritorious one, and depends for its validity upon strict compliance with all the provisions of the statute. Power v. Bodle, 3 N. D. 107; Power v. Larabee, 2 N. D. 141; O'Niel v. Tyler, 3 N. D. 47; Swenson v. Greenland, 4 N. D. 532; Crawford v. Lee, 10 N. D. 482; Dever v. Corwell, 10 N. D. 123.

GRACE, J. Appeal from the district court of Cavalier county, C. W. Buttz, of the second judicial district, acting for and at the written request of W. J. Kneeshaw, Judge of the second judicial district.

This action is one which involves the right of the plaintiff to redeem from the foreclosure of a certain mortgage against land claimed to be owned by the plaintiff.

The material facts are as follows:

In 1894, Jordan by contract purchased from Baker, Moran, and P. C. Donovan, the following land in the county of Cavalier and state of North Dakota: The southeast quarter of Sec. 17, T. 161, R. 58, for the sum of $450, $100 of which he paid. At this time the plaintiff owed the defendant $411 and to secure the payment thereof assigned to the defendant his purchase contract for the land. The vendors' title to the land sold to Jordan was received by them under and by virtue of a certain tax deed, which was issued to them by the auditor of Cavalier county, North Dakota. The balance of the original purchase price, $350, was paid to Baker, Moran, and P. C. Donovan by E. I. Donovan, to whom the plaintiff had assigned his contract. In February, 1900, it was found there was still due from Jordan to Donovan $750. For this Jordan gave his note at 12 per cent interest. On February 24, 1900, a contract for deed in writing was executed by Donovan to Jordan wherein Donovan agreed upon the payment of $750 in the manner and at the time specified in the contract to convey to Jordan by quitclaim deed the premises in question. This is the contract which Donovan foreclosed and which was determined by the district court to be a mortgage.

At the time E. I. Donovan paid Baker, Moran, and P. C. Donovan the balance owing on the contract between them and Jordan, he received

a quitclaim deed from each of them of their interest in the premises. The defendant secured four additional tax deeds to the premises, the last one having been procured in January, 1900. The title secured by the defendant by the quitclaim deeds and by the additional tax deeds was held by the defendant in trust for Jordan and as security for the amounts which defendant had paid to Baker, Moran, and P. C. Donovan, the amount which Jordan originally owed the defendant, and as security for the amount paid at the tax sales, which was the consideration of the four additional tax deeds.

E. I. Donovan foreclosed by action the contract of February, 1900, on the land above referred to. A judgment was rendered in that action and the contract held to be a mortgage. The total amount found to be due Donovan upon the certain $750 note which was given by Jordan to Donovan, and upon the contract, including the money paid as consideration for the various tax deeds to said land, the money paid Baker, Moran, and P. C. Donovan, etc., was $1,970.15; the court ordered the sale of the premises to satisfy such judgment and costs. The sale was had and the premises sold at sheriff's sale to E. I. Donovan on March 2, 1915, for $2,153.91, and sheriff's certificate of sale was issued to Donovan. No appeal was ever taken in that action.

There was a fifth tax deed to the premises procured by the Linden Investment Company, of which E. I. Donovan was president and owner of the majority of stock therein. A tax sale certificate had been issued to W. C. Foster, who on the 9th day of December, 1913, purchased at tax sale the land in question for $31.04. He thereafter paid subsequent taxes up to and including the year 1915. In December, 1916, Donovan procured the assignment of the certificate of tax sale held by Foster to the Linden Investment Company. Donovan, on behalf of the Linden Investment Company, presented the tax certificate and assignment to the county auditor for the purpose of procuring a tax deed of the land to the Linden Investment Company. The tax deed was issued to the Linden Investment Company on April 17, 1917.

At the time Donovan presented the tax sale certificate and the assignment thereof to the county auditor, the auditor issued notice of expiration of time for redemption to L. S. Champine and Cornelius Jordan, wherein he stated the time of the expiration of redemption to be March 30, 1918. That notice was served upon Cornelius Jordan, L.

S. Champine, and E. J. Donovan. E. J. Donovan never had any interest in the land. On the 16th day of January, 1917, the county auditor issued a new notice of expiration of the time of redemption to L. S. Champine, Cornelius Jordan, and E. J. Donovan, wherein it was stated the period of redemption expired April 16, 1917. The land at the time of these attempted notices was in the name of E. I. Donovan. He was not served with either of the notices. The first notice was never published; the last one was. The last notice was not personally served upon anyone, nor was it served by mail.

Prior to March 6, 1917, the premises were assessed in the name of L. S. Champine, and since that date in the name of E. I. Donovan. No legal notice of the time of the expiration of redemption was given.

The Linden Investment Company, by quitclaim deed, transferred all its right, title, and interest in the premises to Donovan. The Linden Investment Company had notice of the rights of plaintiff in and to the premises, and that Donovan's relation to Jordan with reference to the premises was one of trust. In securing the assignment of the tax certificate from Foster to the Linden Investment Company, and for the payment of subsequent taxes, there was paid out $179.73 by Donovan.

During the time for redemption from the sale of the land under the judgment in the foreclosure action, Donovan brought a suit against Jordan for the sum of $1,000, which he claimed to have expended in defending the title to Jordan's land against attacks made thereon by one Champine, who was endeavoring to set aside the tax deeds to said land above referred to. That action was brought in the name of George H. Monroe et al., but for the benefit of Champine.

It is not necessary to go to any great length in discussing that case, as it is sufficient to say that Monroe and Champine were defeated in that suit; that case is reported in 31 N. D. p. 228, 153 N. W. 461. It is claimed by Donovan that he paid out the $1,000 in defending that suit. The record in this case, however, shows that Donovan was defending a companion case of similar character involving land in which Jordan had no interest.

In his cross-examination Donovan testified as follows:

Q. Jordan had no interest in that other land at all? A. No. None whatever.

Q. And these attorneys that you have spoken of whom you hired defended that action also? A. Yes, sir.

Q. So you would have hired those attorneys to defend those cases irrespective of the Jordan case? A. I would.

By the Judge:

Q. You mean those actions that Jordan wasn't interested in? A. Yes, sir.

Q. The actions were tried practically together? A. At the same time.

Q. The action which you refer to here is the action of James Mac Dowell et al. vs. Yourself et al.? A. Yes.

Q. Now as a matter of fact, Donovan, you wanted the payment of this $1,000 as a condition precedent to your giving title to Jordan, didn't you? A. I didn't think it had anything to do with the redeeming of the land.

Q. But you didn't want to turn the title over to Jordan until you got the $1,000? A. No, sir, I didn't.

Q. And it was with that intention that you filed that *lis pendens*? A. It was with the intention of getting the money back that I had paid out.

Q. And you wanted that land until you did get the $1,000? A. That was the purpose of the *lis pendens* as I understood a *lis pendens*.

The actions were tried at the same time. It appears from Donovan's testimony that he was defending those actions to protect his own interest. Jordan also employed a different attorney than the one employed by Donovan to defend his interest. It is clearly shown by the testimony of Donovan that Jordan hired his own attorney in that litigation.

It is not necessary to decide in this case whether Jordan is indebted to Donovan for any part of the $1,000 claimed by Donovan to have been paid out by him in defending the title to Jordan's land. If Jordan is indebted to Donovan in any amount on that account, it would constitute a simple debt on the part of Jordan to Donovan. Such debt, if any, would in no sense be a lien upon Jordan's land and would give Donovan no interest in the land, nor would it confer upon him authority to file the *lis pendens* which was filed in the suit.

On the 1st day of March, 1916, the defendant, by Jordan or others

acting on his behalf, was offered the full amount due him at that time under terms of the foreclosure sale. He refused to receive and accept that amount and release the *lis pendens* unless he was paid the further sum of $1,000, the amount he claimed to have paid out for attorney's fees in certain actions above referred to.

In the year 1917 this action to redeem was commenced and later tried and determined. The trial court in its conclusions of law held that Donovan at all times since he first got legal title to the premises as security for Jordan's debt by virtue of the quitclaim deed from Baker, Moran, and P. C. Donovan, and since the execution of the contract between plaintiffs and defendant, has been in the position of mortgagee to the plaintiff, and held such premises in trust for the plaintiff.

The court further held that the title which Donovan received by virtue of the final judgment in the case of Monroe et al. vs. Donovan and Jordan was security for the contract foreclosed upon by the defendant, and that such title as Donovan received in that action inured to the benefit of Jordan upon his redemption of the premises from the foreclosure sale.

The court further held that the deed to the Bank of Mowbray, executed by Donovan to it, was only a mortgage on Donovan's interest in said property, and, in case of redemption by plaintiff in the manner provided in the judgment, the interest of Donovan and the Bank of Mowbray ceased.

That the contract which was entered into between Jordan and Donovan and which was foreclosed by Donovan was in the nature of a mortgage, there is not the least doubt; that all of the tax deeds which are above mentioned to the land which Donovan had procured were held by him as security for what Jordan owed him is equally clear; that all of the indebtedness which Jordan owed Donovan was included in the foreclosure judgment, with the exception of the amount which Donovan paid to the Linden Investment Company, is undisputed except that Donovan claimed in addition to the amount of the judgment and the amount paid to the Linden Investment Company, Jordan was otherwise indebted to him for certain money which he had paid out as attorney's fees on Jordan's account. The deed which Donovan gave to the Bank of Mowbray of the land in question was properly held to be a mortgage so far as this plaintiff is concerned.

The trial court decreed that Jordan had the right and was entitled to

redeem the premises from the foreclosure sale by paying to the sheriff of Cavalier county, North Dakota, for the defendants, E. I. Donovan and the Bank of Mowbray, which had been interpleaded, the sum of $2,153.91, with interest thereon as specified in the judgment, and in addition thereto $179.73 for the taxes on said land for the years 1912 to 1915, inclusive. It was provided in the judgment specifically what the plaintiff would be required to pay to the sheriff in order to effect such redemption, and that such payment should be made within ninety days from the final entry of the judgment.

Judgment in this case further provided that when Jordan, within the time specified in the judgment, paid the amount therein set forth, a certificate of redemption of said premises should issue to him, passing to him all the right, title, and interest of the defendants, Donovan and Bank of Mowbray, and further provided for the cancelation of the sheriff's deed of the premises which had been issued to Donovan, and the auditor's deed conveying the premises to the Linden Investment Company, and upon the payment of the amount specified in the judgment in the manner and time therein stated quieted the title in Jordan as against any claims of Donovan either by virtue of his tax title or his alleged title under the tax deeds or alleged title otherwise acquired to the premises, and also quieted the title as against any interest of the Bank of Mowbray.

Jordan fully complied with the judgment of the court in this case, and paid to the sheriff the full amount specified in the judgment, and, if the judgment is affirmed, he is entitled to the sheriff's certificate of redemption.

It is clear that the action of Donovan against Jordan to recover the $1,000 alleged to have been expended on Jordan's account in payment of attorney's fees is one for money only. The only recovery Donovan can possibly have, if any, in that action, is a judgment for whatever amount he may by competent testimony show himself entitled to recover. The maintenance of such action by Donovan against Jordan did not authorize the filing of the notice of *lis pendens* in connection therewith. It was not such a case as under the statute permits the filing of a *lis pendens,* as it involved no actual claim or interest in the land.

The respondent made a motion to strike the statement of the case on the ground that, within thirty days after the notice of entry of judg-

ment, there was no settlement of the case and no application made within the thirty days as provided by § 7765, Compiled Laws of 1913, for an extension of time to procure the transcript or for time within which to settle the statement of the case. The matter is of no importance in this case, a decision on the merits being in favor of respondent. It is not, therefore, a material point in issue in this case.

There is no specification of errors made or served with the notice of appeal and undertaking and none in the record on appeal. The appellant has simply appealed from the judgment and demanded a trial *de novo*. There is, therefore, no need of further discussion of any of the matters involved in the appeal, nor is it necessary for the court to make any further analysis of any of the points discussed in the briefs of the respective parties. From all we have said, it is manifest that the judgment should be affirmed. It is affirmed. The respondent is entitled to his costs upon appeal.

CHRISTIANSON, Ch. J. (concurring). The appellant, by specification settled as part of the statement of case, has demanded a trial anew in this court. I am of the opinion that the trial court did not abuse its discretion in permitting the statement to be settled after the thirty-day period prescribed by § 7765 had expired, and that respondent's motion to strike the statement should be denied. I am also of the opinion that under the facts in this case, which are fully stated in the opinion prepared by Mr. Justice Grace, the judgment appealed from should be affirmed.

INDEX

APPEAL AND ERROR.

HOMESTEAD.

1. Section 5610, Compiled Laws of 1913, bars a right of action founded upon the homestead right where no declaration of homestead is filed and where the property is not occupied as a homestead. Sexton v. Sutherland, 509.
2. It is held, under the facts stated in the opinion, that the action of the plaintiff is barred under Section 5610, Compiled Laws of 1913. Sexton v. Sutherland, 509.

INDICTMENT AND INFORMATION.

1. Where one is prosecuted for a crime and a criminal information is filed in which the acts constituting a crime are alleged, it is incumbent upon the state to prove, beyond a reasonable doubt, each and every material allegation of the information. State v. Lessleyoung, 96.
2. An information was filed against the defendant charging him with obtaining money and property under false pretenses. Evidence examined and held to show a failure of proof of material allegations contained in the information. State v. Lessleyoung, 96.
3. Sections 9519 and 9549 of the Compiled Laws of 1913 are construed as previously construed in the case of State v. Cruikshank, 13 N. D. 337, and it is held that the felony of shooting or attempting to shoot another with intent to injure the person is not committed unless an attempt to carry out the intent is shown. State v. Gunderson, 498.
4. Where the information charged the defendant with shooting another with intent to injure, and the jury, by its verdict, finds the defendant guilty of the crime of assault with a dangerous weapon as charged in the information, the verdict does not find the defendant guilty of an attempt to shoot, within § 9519, Compiled Laws of 1913. State v. Gunderson, 498.

INJUNCTION.

1. As a general rule the granting or refusal, the continuing or dissolving, of a temporary injunction lies within the sound judicial discretion of the trial court and its ruling will not be disturbed unless an abuse of such discretion is shown. Hurley v. Village of Fairmount, 198.
2. In an action to restrain the officers of a village from installing a waterworks system and a sewerage system, a temporary restraining order was isued ex parte at the commencement of the action. Upon the hearing as to the continuing or dissolving of such order it was conceded that no permission had either been sought or obtained from the War Industries Board to construct such systems, as required by the directions of said Board. The trial court thereupon terminated the hearing and continued the restraining order in force until the further order of the court. Held, that the trial court did not abuse its discretion in so doing. Hurley v. Village of Fairmount, 198.

MISCONDUCT OF COURT OFFICER. See TRIAL, 5.

MONEY PAID.

1. Where money is alleged to have been paid to the defendants to be applied on behalf of the plaintiffs, and it cannot be so applied, it may be recovered back. Hellebust v. Bonde, 324.

MORTGAGES.

1. In an action to declare a deed and a contract for a deed, a mortgage, and not a conditional conveyance with the right of repurchase, where it appears that the plaintiff, having become financially embarassed through the accruing of numerous liens upon his land, and indebted to the defendant by reason of its purchase of some of such liens, made an absolute deed of the land to the defendant, to secure relief and as a part of the same transaction executed a promissory note for $25,000, representing indebtedness against such land, and received a contract for a deed upon such land, no money consideration passing between the parties it is held that the trial court did not err in determining the transaction to be for purposes of security. Sherwin v. American Loan & Invest. Co. 389.
2. In such a transaction, equity presuming that all parties intended to act in good faith, and guarding zealously the right of redemption, will search all the surrounding circumstances in order to ascertain the real intention of the parties, and if it clearly appears by satisfactory evidence that the transaction was intended for purposes of security, the instrument executed will be deemed a mortgage. Sherwin v. American Loan & Invest. Co. 389.
3. In such action where the plaintiff subsequently executed a surrender of the contract for a deed and received an agreement in the nature of a lease upon the land, it is held that the maxim, "Once a mortgage, always a mortgage," obtains, and that the right of redemption is not terminated in the absence of a new and adequate consideration paid and bona fide accepted. Sherwin v. American Loan & Invest. Co. 389.
4. In such action where the amount of the legal indebtedness owing upon the transaction deemed a mortgage is unascertained and the plaintiff has demanded an accounting to ascertain the same, and the defendant has maintained that the transaction was a sale, it is held unnecessary to both plead and prove a tender in order to maintain the action. Sherwin v. American Loan & Invest. Co. 389.
5. By the provision of § 6910, Compiled Laws 1913, an antecedent or pre-existing debt constitutes value for an instrument payable on demand or at a future time. The rule is different if the antecedent or pre-existing indebtedness which is the consideration of the instrument, is past due and there is no extension of time of payment to a time certain, and there is no surrender of se-

MUNICIPAL CORPORATIONS.

SCHOOLS AND SCHOOL DISTRICTS.