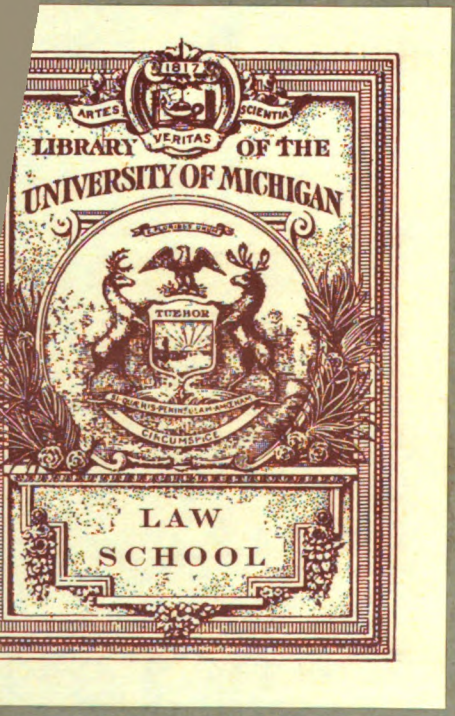

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

March 15, 1915, to June 7, 1915.

H. A. LIBBY
REPORTER

VOLUME 30

LAWYERS CO-OPERATIVE PUBLISHING COMPANY
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1915.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. CHARLES J. FISK, Chief Justice.
[1] HON. A. M. CHRISTIANSON, Judge.
HON. EDWARD T. BURKE, Judge.
HON. EVAN B. GOSS, Judge.
HON. ANDREW A. BRUCE, Judge.

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

[1] Elected a member of the Supreme Court at the 1914 general election, to succeed Hon. BURLEIGH F. SPALDING, former Chief Justice.

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
HON. CHARLES M. COOLEY.
District No. Two,
HON. CHARLES W. BUTTZ.
District No. Three,
HON. CHARLES A. POLLOCK.
District No. Four,
HON. FRANK P. ALLEN.
District No. Five,
HON. J. A. COFFEY.
District No. Six,
HON. W. L. NUESSLE.
District No. Seven,
HON. W. J. KNEESHAW.
District No. Eight,
HON. K. E. LEIGHTON.
District No. Nine,
HON. A. G. BURR.
District No. Ten,
HON. W. C. CRAWFORD.
District No. Eleven,
HON. FRANK FISK.
District No. Twelve,
HON. JAMES M. HANLEY.[1]

OFFICERS OF THE BAR ASSOCIATION.

HON. BENJAMIN W. SHAW, President, Mandan.
HON. ROBERT M. POLLOCK, Vice President, Fargo.
HON. OSCAR SILER, Secretary and Treasurer, Jamestown.

[1] Appointed to succeed Hon. S. L. NUCHOLS, resigned.

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

Note.—In North Star Lumber Co. v. Rosenquist, reported in Vol. 29, at p. 566, *Niles & Koffel* appeared as attorneys for appellant in the supreme court. [Reporter.]

Bovey-Shute Lumber Company v. Lind. See Vol. 29, p. 394. By an error in reporting this case, *Miller & Zuger* were named as "of counsel for appellant." They were "of counsel for respondent," and this note is made to correct such error. [Reporter.]

CASES REPORTED IN THIS VOLUME.

TABLE OF DAKOTA CASES CITED IN OPINIONS.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

HARRY PAST v. HENRY RENNIER and V. J. Wilmart (in Business under the Firm Name of Rennier & Wilmart), W. B. S. Trimble Company, a Corporation, and J. P. Duffey.

(151 N. W. 763.)

Plaintiff executed a first mortgage to one R. J. Trimble for $4,000 upon twelve and one-half lots. The defendants R. & W. obtained a judgment for $77.20, which became a second lien on the premises. R. & W. obtained an execution and levied upon five of said lots. At the execution sale the defendant Trimble & Company became the purchaser, and after the expiration of the year obtained sheriff's deed. This action is to set aside said sheriff's deed and for permission to redeem therefrom upon the grounds set forth in the complaint.

Mortgage — judgment — execution sale — sheriff's deed — action to set aside — evidence — bids — inadequacy of price.

1. Evidence examined, and shows that the five lots purchased by the Trimble Company were covered by the first mortgage of $4,000, accrued interest, taxes, and insurance, leaving an equity not exceeding $5,000 in the entire property. Conceding that the equity in those lots was from $1,000 to $2,000, such fact would not show an inadequacy of price which would throw suspicion upon the purchaser at the sale. Trimble & Company was not the original judg-

ment debtor, but bought the tracts as a speculation. There was no obligation upon it to bid a larger sum.

Sheriff's deed — action to set aside — service of execution — levy — actual notice of — evidence — sheriff's amended return.

2. The second ground upon which appellant seeks to set aside said sheriff's deed is that no service of execution of the levy was made upon plaintiff, Past. The evidence, however, shows that Past had actual notice of such levy. The sheriff's amended return was properly received in this case.

Interested parties — lien holders — conspiracy between.

3. The third attack upon the deed is upon the grounds that certain conduct of the Trimble Company was unfair, and that, in fact, a conspiracy existed between R. & W. and the Trimble Company to plunder Past's equities. Evidence examined, and *held*, insufficient to establish the conspiracy or fraud alleged.

Plaintiff — delay in bringing action — laches.

4. Plaintiff is guilty of laches in bringing his action.

First mortgage foreclosure — plaintiff made no redemption — title lost — judgment — affirmance.

5. Plaintiff made no redemption from a foreclosure of the first mortgage, and has therefore lost title to the lots irrespective of the outcome of this suit. This is an additional ground for the affirmance of judgment.

Opinion filed February 5, 1915. Rehearing denied March 15, 1915.

Appeal from the District Court of Stutsman County, *Coffey*, J. Affirmed.

S. E. Ellsworth, for appellant.

By foreclosure of mortgage, title passes from the mortgagor to the purchaser, but subject to the right of creditors of the mortgagor to enforce their liens upon it. The senior creditor, in the order and under the conditions prescribed by statute, by paying to the purchaser the purchase price, with interest, may redeem and become subrogated to his rights, and so on,—the last redemptioner becoming the owner in fee. The object of the statute is to have the property applied as far as it may or can be, in satisfaction of the debts of the mortgagor. Sprague v. Martin, 29 Minn. 226, 13 N. W. 34.

The purpose of redemption is to insure to the debtor and to his creditors the full value of the debtor's property. Lysinger v. Hayer, 87 Iowa, 335, 54 N. W. 145.

The sale was for an inadequate price. We recognize the rule that inadequacy of price is insufficient to warrant the setting aside of a judicial sale; but it is a circumstance which the courts will regard with great suspicion; and in cases where it appears, slight additional circumstances only are required to authorize the setting aside of the sale. Dewey v. Linscott, 20 Kan. 684; Pickett v. Pickett, 31 Kan. 727, 3 Pac. 549; Capital Bank v. Huntoon, 35 Kan. 577, 11 Pac. 369; Freeman, Executions, §§ 304, 308, 309; Jones v. Carr, 41 Kan. 329, 21 Pac. 258; Means v. Rosevear, 42 Kan. 377, 22 Pac. 319; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390; O'Donnell v. Lindsay, 7 Jones & S. 523; King v. Platt, 37 N. Y. 155; Griffith v. Hadley, 10 Bosw. 588; Dwight's Case, 15 Abb. Pr. 259; King v. Morris, 2 Abb. Pr. 296; Francis v. Church, Clarke, Ch. 475; Gardiner v. Schermerhorn, Clarke, Ch. 105; Hoppock v. Conklin, 4 Sandf. Ch. 582; May v. May, 11 Paige, 203; Brown v. Frost, 10 Paige, 245; Requa v. Rea, 2 Paige, 340; Williamson v. Dale, 3 Johns. Ch. 292; Lansing v. M'Pherson, 3 Johns. Ch. 427; Billington v. Forbes, 10 Paige, 487; Mulks v. Allen, 12 Wend. 253; Ontario Bank v. Lansing, 2 Wend. 261; Stacy v. Smith, 9 S. D. 137, 68 N. W. 198.

Where the return of sale by the sheriff is faulty, and fails to show that notice of sale for the time and in the manner required by law was given, the irregularity is not cured by the printer's accompanying affidavit showing the facts omitted from the return. Where the same is made at an entirely inadequate price, it is error to confirm it on such a defective return. Evans v. Bushnell, 59 Kan. 160, 52 Pac. 419; Jones v. Carr, 41 Kan. 329, 21 Pac. 258; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

Where there is gross inadequacy of price combined with fraud or mistake, or any other ground of equity relief in equity, it will incline the court strongly to afford relief. There was conspiracy in this case and a want of good faith and fair dealing. Kloepping v. Stellmacher, 21 N. J. Eq. 328; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390; Stacy v. Smith, 9 S. D. 137, 68 N. W. 198; Folsom v. Norton, 19 N. D. 722, 125 N. W. 310.

The rents and profits of property received by purchasers at a judicial sale where the price paid was grossly inadequate, and there were other circumstances of fraud or irregularity, should furnish a redemption fund to the extent to which they are received, and should be so applied if a redemption is made. Folsom v. Norton, 19 N. D. 722, 125 N. W. 310.

Rents received from the purchaser's own tenants are not included in the terms of the statute. This fact does not deprive the mortgagor of the right to have them allowed as credits if he redeems. Little v. Worner, 11 N. D. 382, 92 N. W. 456.

Under the circumstances of this case, the court has equitable jurisdiction, even if the time for redemption has expired. Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686; Blight v. Tobin, 7 T. B. Mon. 612; Day v. Graham, 6 Ill. 436; Morris v. Robey, 73 Ill. 462; Fergus v. Woodworth, 44 Ill. 374; Bullen v. Dawson, 139 Ill. 633, 29 N. E. 1038; Jenkins v. Merriweather, 109 Ill. 647; State Bank v. Noland, 13 Ark. 299; Schroeder v. Young, 161 U. S. 334, 40 L. ed. 721, 16 Sup. Ct. Rep. 512.

The owner is not required to pay the amount of the purchase when the purchaser has been in possession and committed waste. Harrison v. Wyse, 24 Conn. 1, 63 Am. Dec. 151; Anson v. Anson, 20 Iowa, 55, 89 Am. Dec. 514; Meigs v. McFarlan, 72 Mich. 194, 40 N. W. 246; Swegle v. Belle, 20 Or. 323, 25 Pac. 633.

If the mortgagee personally retains the property, he will be chargeable upon the accounting with the reasonable value of the use and occupation for the period. 27 Cyc. 431, and cases cited under note 34; Comstock v. Michael, 17 Neb. 288, 22 N. W. 549.

Whatever evidential force the sheriff's return was entitled to was lost by the amendment. While facts stated by a public officer in the course of his official duty are entitled to weight, yet those written down by him after a lapse of years, for the purpose of making evidence, are of no value. Evans v. Bushnell, 59 Kan. 160, 52 Pac. 419; Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75.

Carr & Kneeland and *Thorpe & Chase,* for respondents.

The sale made under the judgment and execution was legal, regular, and valid in all respects. Where defendant knows of the sale, and has a fair opportunity to redeem, he cannot have the sale set aside

because of inadequacy of price, as the redemption right affords him ample protection against a sacrifice of his property. Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789; Warren v. Stinson, 6 N. D. 293, 70 N. W. 279; First Nat. Bank v. Black Hills Fair Asso. 2 S. D. 145, 48 N. W. 852; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; Sigerson v. Sigerson, 71 Iowa, 476, 32 N. W. 462; Lehner v. Loomis, 83 Iowa, 416, 49 N. W. 1018.

The price for which the property sold, as compared with its real value, was little more than nominal, and there was no irregularity or defect in the sale. Mere inadequacy of price is not sufficient ground for attacking the sale. Peterson v. Little, 74 Iowa, 223, 37 N. W. 169; Sheppard v. Messenger, 107 Iowa, 717, 77 N. W. 515; Griffith v. Milwaukee Harvester Co. 92 Iowa, 634, 54 Am. St. Rep. 573, 61 N. W. 243; Brittin v. Handy, 20 Ark. 381, 73 Am. Dec. 497; Hardy v. Heard, 15 Ark. 184; Carden v. Lane, 48 Ark. 216, 3 Am. St. Rep. 228, 2 S. W. 709; Van Dyke v. Martin, 53 Ga. 221; Noyes v. True, 23 Ill. 503; McMullen v. Gable, 47 Ill. 67; Chouteau v. Nuckolls, 20 Mo. 442; Hart v. Bleight, 3 T. B. Mon. 273; Den ex dem. Flommerfelt v. Zellers, 7 N. J. L. 153; Murphy v. M'Cleary, 3 Yeates, 405; Union Bank v. Bertolet, 1 Woodw. Dec. 88; Agricultural, Mechanical & Blood-Stock Asso. v. Brewster, 51 Tex. 257; Clark v. Chapman, 98 Cal. 110, 32 Pac. 812, 33 Pac. 750; Doe ex dem. Weirick v. Ross, 2 Ind. 99; Kerr v. Haverstick, 94 Ind. 178; Cavender v. Smith, 1 Iowa, 306; Weber v. Weitling, 18 N. J. Eq. 441; Watt v. McGalliard, 67 Ill. 513; Johnson v. Dorsey, 7 Gill. 269.

The law does not require the sheriff to serve notice or copy of the execution upon the judgment debtor. He knew that there was a judgment lien upon his land, and the creditor is not required to notify him of a single step connected with the sale of his land under execution. Warren v. Stinson, 6 N. D. 293, 70 N. W. 279; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789; 17 Cyc. 1097, 1098, "Notice of Levy."

In the confirmation of a sale, our statute contemplates a mere *ex parte* proceeding before the court, based upon the officer's return of sale, and settles no question of fact. Warren v. Stinson, 6 N. D. 293, 70 N. W. 279; Hershy v. Latham, 42 Ark. 305.

There must be a period after which execution sale will not be dis-

turbed. The plaintiff has been guilty of such laches as to preclude him from a recovery. 2 Freeman, Executions, § 307a; Warren v. Stinson, supra; Baxter v. O'Leary, 10 S. D. 150, 66 Am. St. Rep. 702, 72 N. W. 91; Dickinson v. Johnson, 161 Iowa, 252, 142 N. W. 407.

The right of the owner of real estate to redeem same from sale under execution is purely statutory, and he must bring himself within its terms. Gosmunt v. Gloe, 55 Neb. 709, 76 N. W. 424; 17 Cyc. 1278, subdiv. h, 1324, title, Redemptions; Noyes v. True, 23 Ill. 503; 21 Century Dig.

There is a defect of parties defendant in this action, and a full determination of the rights of all the parties cannot be had. The owner of two of the parcels of property is not before the court. McDougald v. New Richmond Roller Mills Co. 125 Wis. 121, 103 N. W. 244.

The sheriff had the right to amend his return, and the court had the right to allow and receive such amended return. Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Malone v. Samuel, 3 A. K. Marsh. 350, 13 Am. Dec. 173; 17 Cyc. 1373–1375, 1385; O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; 18 Enc. Pl. & Pr. 950.

In any event this is a collateral attack, and the return is conclusive against it. 18 Enc. Pl. & Pr. 963, 985; 17 Cyc. 1366(b), 1382; Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553; Whittier v. Varney, 10 N. H. 291; Mills v. Howland, 2 N. D. 30, 49 N. W. 413; Ingram v. Belk, 2 Strobh. L. 207, 47 Am. Dec. 591; Humphry v. Beeson, 1 G. Greene, 199, 48 Am. Dec. 370; Drake v. Hale, 38 Mo. 346.

Where a sheriff states in his return that he "levied," it is sufficient, without stating the facts or acts done. Further title of a purchaser at execution sale does not depend upon the officer's return. Byer v. Etnyre, 2 Gill, 150, 41 Am. Dec. 410; Tullis v. Brawley, 3 Minn. 277, Gil. 191; Rohrer v. Turrill, 4 Minn. 407, Gil. 309; Folsom v. Carli. 5 Minn. 333, Gil. 264, 80 Am. Dec. 429; Hutchins v. Carver County, 16 Minn. 16, Gil. 1; 17 Cyc. 1370, (b), 1378, 1382; Millis v. Lombard, 32 Minn. 259, 20 N. W. 187; Marin v. Potter, 15 N. D. 284, 107 N. W. 970; Matchett v. Liebig, 20 S. D. 169, 105 N. W. 170; Burton v. Cooley, 22 S. D. 515, 118 N. W. 1028.

BURKE, J. The facts in this case were somewhat complicated and pretty largely in dispute. In stating the same, we give all the undisputed facts and some of the minor disputed ones, which are decided without setting forth the evidence or our reasoning therefor, but the major disputes will be treated later. On December 27, 1907, plaintiff, Past, was the owner of twelve and one-half lots situated in the city of Jamestown, and mostly improved property. Upon that date, he and his wife executed a mortgage upon said property to one R. J. Trimble securing the payment of $4,000. This loan was negotiated by the defendant W. B. S. Trimble Company, a corporation whose president was a brother of the mortgagee. This mortgage was later foreclosed, and plays a minor part in the controversy. February 8, 1908, the firm of Rennier & Wilmart obtained a judgment against Past for the sum of $77.20, which was duly docketed in the office of the clerk of the district court for said county on February 20, 1908, thus becoming a second lien upon all of said premises. Thereafter, Past and his wife gave a second mortgage upon all of said premises to the Farmers' & Merchants Bank of Jamestown to secure the sum of $1,400, which mortgage was later assigned to one Toay. This mortgage was a third lien upon the land, and was likewise foreclosed later, and also has a slight bearing on the issue. There are other judgment creditors (Toay with a $770 judgment) whom we do not believe it necessary to mention in particular, whose liens are inferior to the three mentioned.

The lien with which we are most concerned was the one represented by the judgment of Rennier & Wilmart. After obtaining two executions which were returned unsatisfied, a third and last execution was issued and passed in the hands of the sheriff, and levy and sale made of five of the lots covered by the Trimble Company mortgage. Those five lots are for convenience placed in three groups: one, lot 2, block 35, Jamestown, is known as the feed mill property; lots 13 and 14, block 23, Lloyd's Second Addition to Jamestown, will be hereinafter referred to as the Mell property; and lots one and two, block 25, Lloyd's Second Addition, will be mentioned as the Sappenfield property. Upon the sale of this property under such execution, each of said tracts was separately offered for sale, and no bids being received therefor the three tracts were offered together, whereupon the W. B. S. Trimble

Company made a bid of $119.25, which was the exact amount necessary to satisfy said judgment and costs. This sale took place on the 22d of June, 1909. No redemption was made from this sale, and on the 23d of June, 1910, the Trimble Company applied for and received a sheriff's deed to the three tracts aforesaid, and on the same day recorded it with the register of deeds of said county. They thus became the owner of all of the interest of said plaintiff in said tracts, subject only to the $4,000 mortgage aforesaid, unless plaintiff is able to establish his attack upon said sheriff's deed, which will be treated later. The case was tried in the court below which resulted in findings of fact and conclusions of law adverse to the plaintiff, and he has appealed to this court demanding a trial *de novo*. Plaintiff states his position in his brief as follows: "The grounds of attack by plaintiff upon the sheriff's deed issued to the defendants, W. B. S. Trimble Company, on June 23, 1910, are: (1) That the price for which the property was bid in by the Trimble Company at the sale was, in comparison with the actual value of the property, so grossly inadequate as to call for strict scrutiny of all proceedings leading up to, connected with, or following the sale; (2) that actual notice of the levy of the execution upon the property of the plaintiff, Past, was not given, and he did not know the property had been sold until a considerable time after the sheriff's deed had been issued to the Trimble Company, this failure of notice resulting from the omission of the sheriff of Stutsman county to comply with his statutory duty of serving the plaintiff, Past, an execution debtor, with a copy of the execution and a notice of levy upon the property, and to serve the tenants occupying the different parcels of property with notice of levy; (3) fraud and collusion betwen the judgment creditors, Rennier & Wil mart, and the Trimble Company, the purchasers at the sale, with the end and purpose not of realizing the amount due upon the judgment, but of obtaining title by sheriff's deed to plaintiff's property." We will consider those three attacks in the order mentioned.

(1) Appellant says: "While, under the great current of modern authority, inadequacy in price, however gross, in itself, is insufficient to warrant setting aside of a judicial sale, it is by universal holding a circumstance which courts will always regard with suspicion; and in cases where it appears, slight additional circumstances only are

required to authorize the setting aside of the sale." This seems a fair statement of the rule, and we will examine the facts in this case to determine whether or not there was such inadequacy of price that would throw suspicion upon the defendants' conduct. As already stated, the three tracts sold to Trimble Company were covered by a $4,000 mortgage which necessarily was superior to the title acquired by the purchaser. True, this mortgage was also secured by seven and one-half other lots, but it would require care to prevent the mortgagee from throwing an unjust proportion of said encumbrance against the lots in question. Under those circumstances, the purchaser might have the possibility thrust upon him of paying nearly the entire encumbrance of $4,000 from those three tracts. There is no satisfactory testimony as to the market value of these three tracts, but a circumstance occurred which gives us some idea thereof. Toay, the assignee of the second mortgage, made an attempt to buy the interest of J. R. Trimble and the Trimble Company in the entire property covering the twelve and one-half lots. At that time Mr. Trimble told him that their mortgage with interest, taxes and insurance, together with the amount they had invested in the execution sale title, amounted to $6,300, and that he would assign the entire amount to him for a bonus of $2,000, which would mean that he was willing to transfer what rights and interests they had in the entire tract, including the first mortgage, for $8,300, and that he believed Toay would buy at that figure, and Mr. Toay refused this offer, but offered them $1,000, which would make the entire property worth, in his judgment, something over $7,300. Referring to the offer of Trimble, Toay says: "I was not willing to pay that sum. There would be nothing left for me at that figure. At that time I told Mr. McElroy that he was too high. I am positive as to the date of this conversation. It was along in the latter part of the year, about the first part of November, 1910." Plaintiff himself testifies that the mill property was worth $2,500, the Mell property $1,500; and the Sappenfield property, $1,600, this of course, subject to the $4,000 mortgage. There is some other testimony, but none place the price so high as the plaintiff himself. For the purpose of this argument, we may assume that there was an equity in the three tracts sold upon execution after apportioning to them a fair share of the first mortgage, of, say, $1,000 to

$2,000, the value placed on it by Toay. However, taking into consideration the size of the first mortgage with interest, taxes, and insurance, and the obvious fact that it might be inequitably apportioned, we do not believe there is such gross inadequacy in the bid as tends to show irregularity in the sale. It seems to us that no person could safely make a bid of even the $119.80 for this equity unless he were prepared to take up the first mortgage, or was at least assured of friendly co-operation by its owner. This conclusion is re-enforced by the fact that two prior executions upon this judgment had been returned unsatisfied, it being evident that Rennier & Wilmart preferred to keep the lien of their judgment to a purchase of the equity.

Trimble Company were not the judgment creditors. They bought the tracts merely as a speculation, and we know of no rule of law which required them to pay any fancy prices for the tracts, nor can we see how any improper motives can be attributed to them for failing to bid more than the amount necessary to secure the tracts against competitive bidding. In this case, their bid of $119.80 was the highest and best bid, and obtained for them the property. Even if Rennier & Wilmart had bid in the property themselves, there would be no obligation upon their part to bid a larger sum (Warren v. Stinson, 6 N. D. 293, 70 N. W. 279), and certainly a stranger bidding for speculative purposes only was under no such obligation. Thus, under all the circumstances of this case, we do not see that it can be fairly said that the inadequacy of the price tended in any manner to destroy the good faith of the purchase.

(2) Taking up the second grounds advanced by appellant, to wit, that there was no service of the execution and notice of levy upon plaintiff or his tenants. In the trial below, plaintiff testified that he had received no copy of such papers, but this evidence was objected to as being a collateral attack on a return in another case. Defendant introduced in evidence the amended sheriff's return in the case of Rennier v. Past, wherein the sheriff in due form certified that he had served such papers upon defendant Harry Past, personally, on the 27th of May, 1909, and had likewise served notice upon the persons who were then occupying certain lots. This return was objected to by plaintiff for the reason that it was an amendment of the original return made three years after the proceedings. It appears that the

amended return had been made pursuant to an order of the district court in the former case after notice and upon hearing, and upon due proof by affidavit of the facts therein stated. It is evident that the amended return must be accepted as proper proof in the case at bar. If it is not a correct statement of what occurred, application to strike it from the files should have been made in the proper case, where the parties interested would have notice and an opportunity to litigate that question. It is obviously unfair to attack a return of one case when it is offered in evidence in another. There are many circumstances in the record corroborating the statement of the sheriff that Past was personally served. For instance, the return of the sheriff upon the second execution contains the following statement: "That, relying upon the promise of the defendant (Past) to pay the amount of this execution, I did not make a levy upon real property at once." This return was offered in evidence by the plaintiff himself. Plaintiff further testifies that after this sale his tenants refused to pay him any rent, and told him that they had been notified by the Trimble Company to pay him nothing further. Further, plaintiff testifies that thereupon he went to see an attorney about the matter at that time, and gives the conversation had with the attorney in detail. Upon a similar situation, this court in Warren v. Stinson, 6 N. D. 293, 70 N. W. 279, says: "Under ordinary circumstances, he should not be heard to plead that he was ignorant of the fact of sale, knowing that there is a judgment lien against his land, and that the creditor is under no legal obligation to notify him of a single step connected with the sale of his land under the judgment. He must be on the alert to ascertain whether his land has been, or is about to be, sold. Certainly it is not a harsh rule which exacts of him such diligence, such measure of business prudence, in looking after his own interests, as is involved in the not difficult task of discovering within a year of the day of sale that his property has been sold under the judgment which he knows is a lien against it."

But, furthermore, the statutes §§ 7720, 7547, and 7549, Comp. Laws 1913, which govern, make no provision for the service of the notice upon the judgment debtor, while § 7549 positively provides that "the failure of the sheriff to serve such warrant or notice shall not invalidate the levy, but the sheriff shall be liable to the person

whose property is attached for any damages which he may sustain by reason of such failure." The sheriff's amended return shows that this section was complied with in all respects; but even if there had been a failure to give the notice, under the clear reading of this section, it would not invalidate the levy. It seems plain to us that Past actually knew of the sale, but, having mortgaged the place himself for practically its entire value, he did not care to redeem from the $119 sale, unless able to save the place from the Toay mortgage and judgment, amounting to something over $2,500, and the first mortgage held by Trimble, which at the time of the sale amounted to about $6,300, a total of $8,800. He, undoubtedly, relied upon Toay to redeem from the small execution sale. Toay, the only person who could be expected to redeem, is not a party to this suit and asks for no relief. From Toay's testimony it appears that he intended to redeem, but through some oversight neglected it.

(3) We come now to the last and most serious question in this case. Appellant insists that the conduct of the Trimble Company in the entire transaction was unfair, and that in fact a conspiracy existed between it and Rennier & Wilmart to plunder Past's equities. There is no direct evidence upon this point, appellant relying upon several enumerated circumstances to establish the truth of this accusation. There is nothing prior to the execution sale in any way bearing out this conspiracy. Trimble Company were agents for R. J. Trimble and were the most natural purchasers at the sale. They were solicited by Rennier & Wilmart because they wanted their money on their judgment. Trimble & Company on their part may have seen some profit in the purchase. Shortly after the purchase aforesaid, the secretary of the company wrote notices which were sent by the deputy sheriff to each house demanding that the tenants pay the rent to the company under the sheriff's certificate. Mell paid $40, with the understanding, however, that it was to be held by the company until the matter was finally settled. Sappenfield paid $15 rent and then made a contract to purchase the property from the Trimble Company. This was all the money that was received during the year of redemption, and there is no evidence that they could have forced collection of any more. Nor were they under the same obligation to make such collection as would be the original judgment creditors. On June 23, 1910,

they obtained and recorded their sheriff's deed, and everything that is hereinafter mentioned in any way establishing bad faith occurred when they considered themselves the owners thereunder.

Earlier in this opinion, it was mentioned that the first mortgage of $4,000 was foreclosed. Trimble Company took care of this foreclosure and upon the day of sale apportioned the mortgage among the several tracts with the intention of bidding upon each tract separately. For one tract covered by the mortgage, but not by the execution sale, $2,100 was bid; for another, $2,200; for the Mell property, $225; for the Sappenfield property, $300. For the feed mill, the balance due upon their mortgage, somewhere between $400 and $500. As the sale proceeded, each of the different tracts was bid in in the name of R. J. Trimble until there remained only the feed mill, upon which the defendant Duffey unexpectedly bid $1,200. This produced a surplus of $774.43. However, it is stipulated that no disposition should be made of this surplus in this lawsuit. Duffey, to prevent redemption, thereupon purchased of the Trimble Company their interest in the feed mill property for $161, thus becoming the absolute owner of the record title of such property. Appellant points to those circumstances as evidence of conspiracy to devest Past of all his property without any attempt to make the same pay his debts. We do not believe the conduct of Trimble Company in this matter unusual. Unquestionably, they proportioned the mortgage with the light end upon the property which they had acquired at execution sale, and the heavy end upon the remaining property, which might possibly be redeemed. This does not prove that a conspiracy existed some fourteen months prior with Rennier & Wilmart. Another circumstance pointed out by appellant arose later. It will be remembered that Toay was the assignee of the second mortgage and that he desired to redeem the property covered by the execution sale, and to that end paid to the sheriff certain sums and obtained from the sheriff a certificate of redemption. This, however, was after Past's title had been extinguished by the issuance of the sheriff's deed. Therefore, Toay was not a redemptioner in law as to those particular tracts and the sheriff's acts were entirely unauthorized. Toay also attempted to buy the R. J. Trimble mortgage as hereinbefore mentioned, and at that time Trimble Company demanded a bonus of $2,000, but as this was long

after the issuance of the sheriff's deed we cannot say that the circumstance relates back to and proves fraud in the initial purchase of the tract. Still another circumstance relates wholly to the feed mill property. It will be remembered that the sheriff's deed on execution sale was obtained and filed June 23, 1910, thus shutting out any interest that Past had in this property. The sale under the first mortgage occurred August 20, 1910. Shortly before the expiration of the time for redemption from such mortgage sale, plaintiff demanded of Duffey that he account to him for the value of the use and occupation of the premises during the year that he had been in possession, and at the same time presented and filed with the sheriff a notice of redemption of said premises and offered to pay to Duffey the balance which might be determined to be due to him upon such redemption after deducting for the use and occupation of the property during the year. This was after June 23, 1910, when Past had ceased to be a redemptioner, and, moreover, no money was presented to Duffey, who ignored the demand and shortly thereafter obtained a sheriff's deed upon the mortgage foreclosure also. This circumstance would not, of course, establish a conspiracy upon the part of the Trimble Company, who knew nothing about it. It cannot be claimed that Duffey was in the conspiracy himself, and we do not believe it sufficient to set aside the sheriff's deed upon execution sale so far as he is concerned. There are other incidents relied upon by appellant along the same lines, which space forbids us to enumerate, but we are satisfied that none of them establish the conspiracy or fraud which must be proven before the deed can be set aside and redemption allowed at the late date attempted in this action. In Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789, it is said: "Where defendant knows of the sale and has a fair opportunity to redeem, he cannot have the sale set aside because of inadequacy of price, as the redemption right affords him ample protection against a sacrifice of his property." In the case of Warren v. Stinson, 6 N. D. 293, 70 N. W. 279, is found a discussion relative to the necessity of the service of the notice and of levy upon the judgment debtor. See also 17 Cyc. 1097. Upon the question of the right of the sheriff to amend the defective return, see 17 Cyc. 1373 and cases cited. Also 18 Enc. Pl. & Pr. 963. Also upon its face effect, see Marin v. Potter, 15 N. D. 284, 107 N. W. 970.

(4) As an additional reason for the affirmance, respondent points to the lack of diligence and laches of the plaintiff. Past must have known of the execution sale almost immediately after it occurred because he testifies that after such sale he was unable to collect rent from his tenants. This was in June, 1909. Sheriff's deed was issued June 23, 1910, and it was not until August, 1911, that this action was brought. See Higbee v. Daeley, 15 N. D. 339, 109 N. W. 318. This argument is sound.

(5) Still another reason advanced by respondent for an affirmance is that no redemption was made by plaintiff from the first mortgage sale, and that he is thereby excluded from any interest in the premises, even though he should succeed in setting aside the sheriff's deed upon the execution sale. This in itself would be enough to defeat plaintiff's action, but is unnecessary on account of the prior holdings. Upon the whole record we are unable to find any reason for setting aside the sheriff's deed given pursuant to the execution sale, or for allowing plaintiff to redeem at this time. The judgment of the trial court is in all things affirmed.

JOHN DAMMANN, Sr., v. SCHIBSBY IMPLEMENT COMPANY, a Corporation.

(151 N. W. 985.)

Evidence — conversion — findings — property — right of possession.

1. Evidence examined and found to support the finding that plaintiff was entitled to the immediate possession of the grain in question at the time of the alleged conversion.

Grain — warehouse receipt for — indorsement and delivery of — passes title to grain — trial court — findings of.

2. Following St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, *held*, that the indorsement and delivery of a warehouse receipt for grain pass title to the grain, and that the findings of the trial court that the defendant had converted the flax in controversy is amply supported by the evidence.

Opinion filed January 29, 1915. Rehearing denied March 13, 1915.

Appeal from the District Court of Bottineau County, *Burr*, J. Affirmed.

Blaisdell, Murphy, & Blaisdell and *Morton & Mohr,* for appellant.

If the owner expressly or impliedly assents to the taking, use, or disposition of his property, he cannot recover for the conversion thereof. 38 Cyc. 2009, and cases cited.

And this is true even where the person authorized to dispose of property exceeds his authority. 38 Cyc. 2110, and cases cited.

The holder of a general storage ticket is never chargeable with constructive possession of any specific grain. Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95; Best v. Barrett, 8 N. D. 49, 77 N. W. 1117; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338.

The decision of our supreme court in St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337, rests upon a statutory provision. Rev. Codes 1905, § 2266.

The above section is a part of article 47 of the Political Code. This act expressly excepts from its provisions grain in bulk. Sections 2241 and 2261 of article 46 of the Political Code control in all matters pertaining to warehouses or grain in bulk. This distinction between these two statutes has been recognized by this court. State ex rel. Hart-Parr Co. v. Robb-Lawrence Co. 17 N. D. 259, 16 L.R.A.(N.S.) 227, 115 N. W. 846.

Weeks & Moum, for respondent.

The legal title to the grain was in the respondent. Ownership carries with it the right of possession. Rev. Codes 1905, § 4702.

A conversion by defendant, or by a third person prior to the conversion alleged, is no defense. 38 Cyc. 2061.

Section 2266, Revised Codes 1905, expressly provides that the title of goods and chattels stored with a public warehouseman passes by indorsement and delivery of the receipt. St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337.

BURKE, J. Some time prior to the year 1910, plaintiff sold a quarter section of land to one Tarvestad and his wife upon what is known as the half-crop contract plan. Under the terms of said contract the Tarvestads agreed to pay the sum of $4,500 principally by delivering one half of all the grain sown or grown upon said land, each and every year thereafter until the purchase price was fully paid, and it was further agreed that the Tarvestads "may deliver all the grain sown,

the same to be applied upon the balance due thereon. . . . It is further agreed and understood that until the delivery of one half of said grain as aforesaid during each and every year of this contract, the legal title to the ownership and the possession of all of said grain raised during each and every year shall be and remain in the first parties. . . ." Under this contract, the Tarvestads entered into the possession of said land, and during the year 1910 raised thereon 179 bushels of flax and 25 bushels of wheat. The flax was delivered by Mrs. Tarvestad to the elevator at Hurd on November 7th of that year. She tried to sell the same, but owing to a notice given to the elevator by defendant was unable to do so, the elevator agent, however, delivering a storage ticket for the grain in the name of Mr. Tarvestad. The defendant Schibsby claims to have taken a chattel mortgage given by the Tarvestads upon this crop for the year 1910, and it was on account of his claim that the elevator company refused to pay cash to Mrs. Tarvestad for the flax. Upon the day of the delivery, Mrs. Tarvestad went to Lansford, as she says, to deliver the storage tickets to the plaintiff, Dammann, but meeting the defendant first was persuaded to deliver said storage tickets to him after indorsing her husband's name thereon. Plaintiff brings this action in conversion. The case was tried to a jury and evidence was offered by plaintiff's son, who seems to have acted as plaintiff's agent, and by Mrs. Tarvestad. Defendant offered the evidence of Alec Schibsby, who testified to the transaction whereby he obtained the storage tickets. After such testimony, both parties rested and each side made a motion that the court direct a verdict in his favor, and thereupon the court withdrew the case from the jury and made findings of fact and conclusions of law to the effect that the plaintiff was entitled to a judgment against the defendant for the value of one half of the flax. The defendant has appealed, specifying as errors certain rulings of the trial court, which may be grouped under two headings as stated by him in his brief: "Defendant asserts that plaintiff should not prevail for the following reasons: First, because the proof shows that plaintiff was not in possession, nor had he a legal right to the immediate possession, of the grain in question at the time of the alleged conversion, and had consented to the disposal of the flax prior to that time. Second, because the proof shows that defendant was a mere general storage ticket holder, and was neither in actual

or constructive possession of the flax alleged to have been converted." In considering these two propositions, we must remember that the finding of the trial court has the force of a finding by a jury, and will not be disturbed if supported by any substantial credible testimony.

(1) Upon the first proposition, we think the briefest reference to the evidence will show that plaintiff was entitled to the immediate possession of the grain in question on the 7th day of November, 1910. His son testifies, after the introduction of the contract of sale aforesaid: "Tarvestad was in to see us and he told us that they would thresh there in a few days, and that they would then turn in all of the crop threshed during the year 1910 on this quarter." Mrs. Tarvestad testifies: "I had instructions from my husband when the grain was threshed to haul it to the elevator and turn either the money or the storage tickets over to Dammann. I hauled the crop to the elevator at Hurd, Farmers' Elevator. I tried to sell it, but it was held back; the Farmers' Elevator held it back and said it did not belong to me. The elevator said Schibsby had a mortgage on it,—that he had advised the elevator not to sell it, or buy it from me. . . . I got storage tickets from the elevator. I can't say whether they were in my name or Mr. Tarvestad's." The foregoing evidence, taken in connection with the extracts of the contract which we have given, shows that plaintiff was entitled to the immediate possession of the flax upon the day in question.

(2) Under this heading appellant insists that the plaintiff is pursuing either the wrong party or the wrong property; that he should have sued the elevator company which actually received the grain, and that storage tickets are not a subject of conversion. Upon this question he argues that a general storage ticket holder is never chargeable with constructive possession of any grain, and cites us to Best v. Muir, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95; Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338. However, after the two decisions mentioned, in St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337, decided in 1910, this court held that an indorsement and delivery of the warehouse receipt for grain passed the title to the grain, the particular words being as follows: "Under the terms of storage tickets, Spenst had the right to demand possession of such wheat, and the elevator company would be compelled

to turn the same over to him, if in its possession and the same could be done, and, if the same was not in its possession, and the identical wheat could not be delivered, it was compelled to deliver to Spenst an equal number of bushels of wheat of like grade. These matters are elementary and no authorities need be cited in support of them. It is also beyond controversy that the assignment and delivery of storage tickets unconditionally pass the title to the property and to the storage tickets to the person to whom they are delivered. This is a statutory provision in our state. Rev. Codes 1905, § 2266 [3142, Comp. Laws 1913]. It is therefore beyond dispute that the defendants became the absolute owners of the storage tickets and of the wheat represented thereby. . . . We think that the defendants were in the constructive possession of the wheat after the storage tickets were turned over to them, and this is sufficient to sustain a sale with implied warranty of title that it is free from encumbrance." The above reasoning applies to the case at bar and supports the finding of the trial court that the defendant, for all the purposes of this litigation, received the flax and converted the same to his own use, and it follows that the plaintiff is entitled to judgment for the one half of the same. Appellant asks us, in effect, to overrule the last quoted case (St. Anthony & D. Elevator Co. v. Dawson), because, as he alleges, § 3142, Comp. Laws 1913, does not apply to elevator and other grain storage companies.

We, however, consider the case sound in principle regardless of the statute, and will follow its ruling. The judgment is affirmed.

On Petition for Rehearing.

Appellant has filed a petition for rehearing in which he strenuously contends that this court should follow Plano Mfg. Co. v. Jones, 8 N. D. 315, 79 N. W. 338, rather than St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337. We must decline to do so but will set forth our reasons, which in the interests of brevity we had omitted from the original opinion.

From the very earliest time there had been a dispute as to whether a person who delivered grain to a public warehouseman and took therefor a storage receipt had parted with his title to the grain. This dispute arose naturally from the difficulty of identifying the grain so

stored. Some authorities held such a transaction to be a sale because, as they say, the identical grain cannot be returned. Other authorities held the deposit to be merely a bailment and the fact that the identical grain cannot be returned is immaterial in view of the fact that a like amount of the same kind and grade answers every requirement of the return.

Those courts which held that the depositor had parted with his grain, of necessity held that no action could be maintained for its conversion. This for the very good reason that a man who has no wheat cannot maintain an action against somebody else for converting it. It might be said in passing that those decisions were made in the absence of statute upon the subject. In North Dakota by § 8, chap. 126, Sess. Laws 1891 it was provided: "Whenever any grain shall be delivered to any person, association, firm, corporation or trust, doing a grain, warehouse or grain elevator business in this state, and the receipts issued therefor, providing for the delivery of a like amount and grade to the holder thereof in return, *such delivery shall be a bailment, and not a sale of the grain so delivered.*" After the enactment of this statute the question was not an open one in North Dakota. Notwithstanding this fact, in 1899 the case of Plano Mfg. Co. v. Jones, supra, was decided upon the theory that such delivery was a sale. We have examined the briefs filed in that case and find that said statute was not called to the attention of the court at that time and was, undoubtedly, entirely overlooked. When the case of St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337, was decided, the correct rule was adopted; although that case did not in so many words overrule Plano Mfg. Co. v. Jones, it did so by necessary implication.

As authority for our position, we refer to a note in 94 Am. St. Rep. 220, from which we quote: "By far the most important transactions coming under the head of bailment are those which have to do with the deposit of grain in warehouses. It needs no authority to support the statement that when wheat is delivered at a warehouse to be stored, and the identical wheat is to be returned, the transaction is a bailment. The difficulty arises when it is mingled with other wheat. In this connection, there are two lines of decisions, one holding it a mere bailment and the other a contract of sale. . . . [Case cited and digested.]

This the court held to be a contract of bailment, and it has been so held by numerous other authorities. [Cases cited.] In such cases, the relation existing between the depositors is that of tenants in common of the mass, each being entitled to so much thereof as his share bears to the whole amount; and the fact that the identity of the mass is continually shifting, by being added to and taken from, does not alter it. [Cases cited.] The reasons for this rule were thus well stated in Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430: 'The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass, should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such

a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale.' [Cases cited and digested.] The other view holding that where grain has been mingled with that of others, whether with the depositor's consent or by custom, and an equal amount of like grain is to be returned, it is a sale, is also supported by eminent authority. [Cases cited.]"

It might further be said that any one interested can obtain possession of an ordinary storage receipt issued under § 3112, Comp. Laws 1913, and will see that such storage receipt does not obligate the warehouseman to purchase the grain nor to pay any sum therefor. True, warehousemen will usually purchase such grain, but the storage ticket does not obligate them to do so. As the St. Anthony & D. Elevator Co. v. Dawson Case is sound in principle, we follow it. The petition for rehearing is denied.

NORTH DAKOTA LUMBER COMPANY v. JOHN K. JAMES et al.

(151 N. W. 430.)

Default judgment — vacating by consent of parties — order for — not appealable.

No appeal will lie from an order entered by consent; and where it appears that an order vacating a default judgment and granting the defendant leave to answer was entered pursuant to the agreement and with the consent of the plaintiff, such order is not appealable, and plaintiff's appeal therefrom will be dismissed.

Opinion filed March 16, 1915.

From an order of the District Court of Benson County, *Burr,* Special Judge, plaintiff appeals.

Dismissed.

R. A. Stuart, of Minnewaukan, North Dakota, for plaintiff and appellant.

Cowan & Adamson, of Devils Lake, North Dakota, for defendants and respondents.

PER CURIAM. This is an appeal from an order setting aside a default judgment. Respondents have moved to dismiss the appeal on the ground that plaintiff consented to its rendition, and therefore cannot be permitted to appeal therefrom. The order appealed from recites, among other things, that at the time of the hearing plaintiff's counsel agreed in open court that the judgment be set aside, and that defendants' application for a vacation of the judgment and leave to answer be granted. The record discloses that the application to vacate the default judgment was made in proper form and accompanied by affidavits and an answer. And the showing made was doubtless sufficient to have justified the trial court in vacating the default. Apparently this must also have been the idea of plaintiff's counsel as the district judge, in his order vacating the default, states that the plaintiff's counsel expressly consented to the entry of an order granting defendants' application. No application was made in trial court to strike the recitals in question from the order; on the contrary the question of whether or not such agreement was actually made was afterwards fully submitted to the trial court with the result as above indicated. Plaintiff, therefore, has appealed from an order which expressly recites that it was entered pursuant to plaintiff's consent. The law is too well settled to require the citation of any authority that a party cannot complain of an order entered through his procurement or with his consent. The defendants' motion for a dismissal of this appeal is therefore granted.

AUSTIN JOHANNA v. A. L. LARSON and Thomas Lennon.

(150 N. W. 535.)

Appeal — failure to have record sent up — motion to dismiss — practice.

Unless appellant causes the record on appeal to be filed with the clerk of this court within thirty days from the date of filing this opinion, and pays to respondent's counsel the sum of $25; also serves his brief on appeal on or before May 1st next, and enters into a stipulation with respondent's counsel

consenting that the cause may be placed upon the short cause calendar of this court, such appeal will be dismissed.

Opinion filed March 19, 1915.

Appeal from District Court, Willams County, *F. E. Fisk,* J.

Motion to dismiss for failure to diligently prosecute the appeal.

Motion granted conditionally.

T. M. Cooney and *Burdick & Murphy,* Milliston, North Dakota, for the motion.

Wm. G. Owens, Williston, North Dakota, *contra.*

FISK, Ch. J. On respondent's application an order was issued requiring appellant to show cause why the appeal herein should not be dismissed for lack of prosecution. In support of such order one of respondent's counsel made and served an affidavit setting forth that the appeal was taken to this court from the judgment of the district court on or about December 4, 1913, by the defendant Larson by the service of a notice of appeal and undertaking on plaintiff's attorney, one A. J. Bessie. That aside from the service on respondent's attorney of a transcript of the evidence, no other steps have been taken to perfect the appeal by settling a statement of the case and causing the record to be certified to this court.

On the return day of such order to show cause appellant's attorney appeared in opposition to the motion and filed an affidavit wherein, among other things, he states that on February 28, 1914, a stipulation was entered into between counsel for the respective parties as follows: "It is hereby stipulated by and between the above-named plaintiff and respondent, Austin Johanna, by and through his attorney, Aaron J. Bessie, and A. L. Larson, one of the above-named defendants and the appellant herein, that the hereto attached instruments, consisting of the summons and complaint, answer, together with notice of trial, note of issue, order for judgment, judgment and transcript of testimony, together with exhibits, constitute the judgment roll in the above and foregoing entitled action, and that the hereto attached transcript is a true and correct transcript of all the evidence adduced at the trial of said action, and it is hereby further stipulated and agreed that the same may be presented to the judge of the district court, as hereto at-

tached, and by him certified and ordered as the settled case in the foregoing entitled action on appeal, and that the same shall be certified as the records and files and proceedings had in the trial of the said action on appeal to the supreme court of the state of North Dakota. It is hereby further stipulated and agreed by and between the above-named plaintiff and respondent and the above-named defendant and appellant, that notice and hearing on application for settlement of the case and certification of the same, and the time of service of the same, is hereby in all things waived, and that the same may be certified as the settled case in said action to the supreme court."

In such affidavit it is also set forth that after such stipulation was made plaintiff's attorney, A. J. Bessie, removed from this state and established his residence in Montana, where he later died "before taking up the matter in question in accordance with the stipulation had herein in reference thereto." It is also stated in such affidavit: "That prior to the death of the said A. J. Bessie there was a distinct understanding between the counsel for both parties that the said matter should be taken up at any time at the convenience of counsel and the judge of the district court; that this affiant entered into such stipulation at the express request of the said A. J. Bessie, respondent's attorney, who was at that time preparing to enter upon the practice of law in Montana, and for that reason stated to affiant that he desired that all matters pertaining to the appeal to the supreme court be indefinitely postponed so that the matter could be reached and definitely settled at such time as the said Bessie could give it the attention it required; that by reason of the sudden and unexpected demise of the said Bessie, the stipulations entered into could not be carried out, and that at no time has there been a notice served upon affiant or his client of the substitution of T. M. Cooney, or any attorney for respondent . . .; that affiant has . . . been unable to ascertain that any substitution of attorneys has been made."

Affiant further avers his willingness to immediately take all necessary steps to perfect the record on such appeal, and that the delay in doing so is attributable to the facts aforesaid. That his client has incurred the expense necessary to procuring the transcript and copies of the record to be used on the appeal. He also states that respondent removed from this state, and that his place of residence or place where

service of any notice could have been made upon him is and was unknown to affiant.

In rebuttal to such showing, respondent's counsel produced a letter of date May 1, 1914, addressed to appellant's counsel advising him that Mr. Bessie had turned said case over to Burdick & Murphy for attention. This letter purports to be signed by Usher L. Burdick and John J. Murphy. Also a reply thereto of date May 4, 1914, addressed to Burdick & Murphy and signed by appellant's counsel, reading as follows: "Referring to your letter of May 1st, which was received, I beg to advise you that the case of Austin Johanna v. Lennon and Larson is ready for the supreme court. As Mr. Bessie and I stipulated, the case could be settled by the judge without further notice."

The above is substantially all the showing on such motion. After duly considering the same, we fail to see how appellant has successfully excused the long delay in causing the statement of case to be settled and the record certified to this court. In view of the written stipulation waiving notice and hearing of application for settlement of the statement of case and the certification thereof, and containing an express consent that the same was correct and might be settled and certified, we fail to see why any delay was occasioned by the other fact stated, but in any event there appears to have been no need of the long delay which has elapsed since May 4th, the date of the letter written by appellant's attorney. The alleged oral understanding claimed to have been had between counsel seems to be squarely in conflict with the prior written stipulation, and the letter of appellant's counsel aforesaid also seems to negative the fact that any such oral stipulation was entered into, for no mention thereof is therein made. However, we are convinced of the good faith of counsel for appellant, and do not question the fact that he labored under the mistaken belief that some such oral understanding was had with Mr. Bessie. We are also satisfied that appellant took the appeal in good faith, for he has incurred the expense of procuring the transcript and copies to be used on such appeal. Furthermore, it does not appear that counsel for respondent have, at any time prior to applying for this order, taken any steps to expedite such appeal, but on the contrary have by their silence impliedly acquiesced in the long delay. They are therefore not in as favorable a position to urge their motion at this time as they otherwise might have been.

We have concluded, in view of the facts before us, to grant respondent's motion for a dismissal only upon the following conditions: The appeal will be dismissed unless appellant shall within thirty days from the date of filing this opinion cause the record on appeal to be certified to the clerk of this court, and pay to respondent's counsel as terms the sum of $25; also serve his brief on respondent's counsel on or before May 1st next, and enter into a stipulation with respondent's counsel consenting that the cause may be placed upon the short cause calendar of this court.

It is so ordered.

DELLA F. VAN WOERT v. NEW YORK LIFE INSURANCE COMPANY.

(151 N. W. 29.)

Default judgment — amended complaint and answer — affidavit of merits on motion — setting aside judgment.

1. A default judgment rendered in a case at issue upon the amended complaint and the answer to the original complaint may be set aside without an affidavit of merits.

Amended complaints — demurrer — statute — application — order of court — agreement.

2. Section 7445, Comp. Laws, applies only to complaints amended after a demurrer thereto has been sustained, and has no application to an amendment made in the action by order of the court, or by agreement of the parties.

Answer to original complaint — stands as answer — unless new answer made.

3. An answer interposed to the original complaint will stand as an answer to the complaint as thereafter amended, unless defendant elects to answer anew.

Opinion filed January 25, 1915.

From an order of the District Court of Renville County, vacating a default judgment, *Leighton,* J., plaintiff appeals.

Affirmed.

Grace & Bryans, for appellant.

The policy of insurance in this case cannot be forfeited by reason of

the lapse of payment of premiums. It is conceded that the insurance company had in its hands a reserve amount of money due the plaintiff, more than sufficient to cancel the unpaid premium, and such reserve should have been applied to the payment of the premium when due, rather than that a forfeiture should have been declared. Haas v. Mutual L. Ins. Co. 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58; 25 Cyc. 843, 870.

Mere oral agreements by counsel are not sufficiently explicit to authorize the vacation of a default judgment. 23 Cyc. 920; Rule 28 at xxxiii of 29 N. D.; Rule 20 of the rules of the eighth judicial District.

No notice of application for or entry of judgment was necessary in this case. Rev. Codes 1905, § 6856, Comp. Laws 1913, § 7445; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

No sufficient affidavit of merits was served with the motion to set aside the judgment and permit defense. Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

H. S. Blood, for respondent.

The amended complaint does not contain facts sufficient to state a cause of action. The policy of insurance is made a part of such complaint; one of its provisions is: "That *after three years,* the assured may *elect* as to *which of the benefits* provided by the policy shall be *claimed.*" This policy had *not* run *three years,* and hence the clause was not operative, and assured was in default in the payment of premiums. Knapp v. Homeopathic Mut. L. Ins. Co. 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; 25 Cyc. 850.

The acceptance of premium or assessment does not waive default unless such acceptance is *unconditional.* The policy contains a provision that, "the insured must be in *good health* when he pays a defaulted premium, and its acceptance is only upon the condition that insured is in good health." 25 Cyc. 871; Haas v. Mutual L. Ins. Co. 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58.

Where a complaint is amended, while the defendant has a right to amend his answer, he may stand upon his original answer. 1 Enc. Pl. & Pr. 628; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

Judgment cannot be taken as by default, on an amended complaint, where an answer to the original complaint was made and served. 23 Cyc. 920, and cases there cited; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Slimmer v. State Bank, 122 Minn. 187, 142 N. W. 144; McLaughlin v. Breckenridge, 122 Minn. 156, 141 N. W. 1134, 142 N. W. 134.

CHRISTIANSON, J. This is an appeal from an order of the district court of Renville county, vacating a default judgment against the defendant. This action was commenced by service of summons and complaint upon the defendant on February 27, 1913. The action is based upon an insurance policy issued by the defendant in the sum of $2,000. The defendant appeared in the action by its attorneys, Noble, Blood, & Adamson, and served an answer on March 22, 1913. The answer was verified by the secretary of the defendant. On April 4, 1913, the plaintiff served an amended complaint. A copy of the insurance policy involved was attached to and made a part of both the original and amended complaints. No substantial change was made in the plaintiff's complaint by the amendment, the cause of action as set forth in both complaints being based upon the same insurance policy. Thereafter, on May 6, 1913, the plaintiff's attorney made affidavit of default on the theory that defendant was in default for failure to answer the amended complaint, and obtained a default judgment against the defendant. It appears that the first knowledge of the entry of such judgment received by defendant's attorneys was on May 9, 1913, when they received a letter from the plaintiff's attorneys to the effect that the default judgment had been entered, whereupon the defendant's attorneys made application for a vacation of the judgment, and submitted in support of said motion all the files and pleadings in the case and the affidavit of H. S. Blood, one of the attorneys for the plaintiff. The affidavit of H. S. Blood is, in part, as follows: "That on the 4th day of April, 1913, the plaintiff herein served an amended complaint . . .; that said amended complaint was served personally upon the deponent by R. H. Grace of the firm of Grace & Bryans, attorneys for the plaintiff, and at the time of the said service it was stipulated and agreed between the deponent and the said R. H. Grace, that in case the deponent considered the answer to the original complaint a sufficient answer to

the amended complaint, then in that case he need not answer, and the answer to the original complaint should stand and be the answer to the amended complaint, and that if he deemed an answer to the amended complaint different from the answer to the original complaint necessary, then in that case he would serve an answer to the amended complaint, otherwise not." In the affidavit of Mr. Grace, the attorney for the plaintiff, submitted in opposition to said motion, the following statement is contained: "That he was in Minot on the 4th day of April, 1913, and presented an amended complaint in the above-entitled action to H. S. Blood, one of the attorneys for the defendant, who then admitted service thereof in writing indorsed on said amended complaint. That at the time of the admission of service of the amended complaint in said action, and while in the office of H. S. Blood at Minot, N. D., the affiant and the said H. S. Blood discussed to some extent the said above case and the contents of the amended complaint; that there were statements made either by H. S. Blood or this affiant or both, that the old answer or original answer might be sufficient to stand as the answer to the amended complaint, and in that case stipulation might be had permitting the original answer to stand as the answer to the amended complaint. . . ." After hearing the matter, the trial court made an order vacating the judgment, and directing that the answer to the original complaint be permitted to stand as the answer to the amended complaint. This appeal is from such order.

The principal contention of appellant is that the order is erroneous for the reason that no affidavit of merits was tendered in support of the application.

This contention cannot be sustained. In this case, an answer verified by one of the principal officers of the defendant, containing a full and explicit defense to the matters set forth not only in the original, but in the amended complaint, constituted part of the moving papers, and the application to set aside this judgment was not based upon the mistake, inadvertence, or excusable neglect of the defendant. And as we view the matter, the defendant was not in default, but the judgment was clearly improperly rendered, and the entry of the judgment under the facts existing in this case was not only grossly irregular, but a refusal to vacate the judgment would constitute a denial to the defendant of its substantial rights. In cases of that kind an affidavit of merit

is not required. "Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits. So, the rule does not apply where it was grossly irregular for the default to have been entered; or where the defendant complains of irregularity amounting to denial of his substantial rights; or where the judgment is alleged to have been procured by fraud." Black, Judgm. 2d ed. § 347; Foster v. Vehmeyer, 133 Cal. 459, 65 Pac. 974; Quan Quock Fong v. Lyons, 20 Cal. App. 668, 130 Pac. 33; Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501; Hertzberg v. Elvidge, 79 Misc. 109, 140 N. Y. Supp. 670.

It is insisted by appellant that defendant was in default by failing to answer the amended complaint within thirty days. It is apparent that appellant is under the impression that §. 7445 of the Comp. Laws of 1913 makes it obligatory upon a defendant in every instance to answer an amended complaint. In this he is in error. This section applies only to cases wherein complaints are amended after demurrers to the same have been sustained, and has no application to complaints that are amended, pursuant to an order of the court upon an application for leave to amend, or by agreement of the parties. This is also the construction placed upon a similar section by the supreme court of South Dakota in the case of J. I: Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82.

It clearly appears from the affidavits, not only of the defendant's attorney, but that of plaintiff's attorney as well, that the defendant intended to stand on its answer to the original complaint unless it served a new one, and the subsequent events clearly show that defendant's counsel elected to stand on the answer already served. This he had a perfect right to do. The cause still remained at issue upon the issues framed by the amended complaint and the answer to the original complaint. In the case of Martinson v. Marzolf, 14 N. D. 301, 308, 103 N. W. 937, this court, in considering the same question, says: "The defendants were not in default by failing to serve a new answer after the complaint was amended. The amendment was merely formal, and did not make any substantial change in the allegations of the facts which plaintiff claimed entitled him to relief. Those facts had already

been put in issue by the answer, and it was not necessary to repeat the denials of those facts, or renew the allegations of defensive matter by serving a new answer."

The supreme court of Wisconsin in the case of Yates v. French, 25 Wis. 661, 664, in considering the same proposition in a very exhaustive opinion, among other things, says: "A new plea was not, in all cases, required, nor in any case, except as the defendant found it necessary or proper by reason of new matter introduced by the amendment, which he wished to controvert or put in issue by his plea. He might, in any case, refuse to plead anew, and in that event his plea already filed was considered as a plea to the amended declaration. His neglect or refusal to plead anew within the time prescribed was an election on his part to have it so considered. On the other hand, his election to plead *de novo,* which was manifested by the filing and service of a new plea, was an abandonment of the former plea." We are entirely satisfied that the defendant was not in default by failing to serve a new answer to the amended complaint, but that the case still remained at issue upon the issues as framed by the amended complaint and the answer to the original complaint. And in this we are sustained by the overwhelming weight of authority. Ibid.; Crosby v. Bastedo, 57 Neb. 15, 77 N. W. 364; Pease v. Bartlett, 97 Ill. App. 492; Knips v. Stefan, 50 Wis. 286, 6 N. W. 877; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Byers v. Carll, 7 Tex. Civ. App. 423, 27 S. W. 190; Smith v. Halliday, — Ark. —, 13 S. W. 1093; Peacock v. Gleesen, 117 Iowa, 291, 90 N. W. 610; Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; Gettings v. Buchanan, 17 Mont. 581, 44 Pac. 77; Brossard v. Morgan, 7 Idaho, 215, 61 Pac. 1031.

It will be observed that the order of the trial court, after ordering a vacation of the judgment, provides that the answer to the original complaint stand as the answer to the amended complaint. The order, therefore, merely corrected the error committed by the improper entry of the judgment, and placed the parties in the same position they were in before the judgment was entered. The plaintiff is in no position to complain. The order appealed from is clearly correct, and must be affirmed.

A. C. HARRIS v. ED. HESSIN.

(151 N. W. 4.)

Judgment — vacation of — order denying — recitals in order — statement of case — evidentiary matters.

1. An order denying vacation of judgment should recite all the files and matters extrinsic thereto upon which it is based, and thus amount to a certificate of the basis for it, so that settlement of a statement of the case concerning evidentiary matters a part of its basis is certified and settled by the order appealed from, following § 7325, Rev. Codes 1905, § 7944, Comp. Laws 1913.

Clerk's certificate — on appeal — files.

2. To such an order the clerk, under § 7206, Rev. Codes 1905, § 7822, Comp. Laws 1913, attaches the files and certifies to the record under rule 24 of this court and transmits the same as the appeal record.

Minutes of court — must be settled on appeal — certificate — attached and sent up without notice to appellant — stricken from record.

3. Where minutes of the court on trial are not settled by the order appealed from to be a part of the basis therefor, and are subsequently written up, certified, and attached to the appeal record without notice to appellant and opportunity to challenge the same, and contain matter bearing on the merits, such certificate will be stricken from the appeal record on motion seasonably made as not properly a part thereof, without a settlement on notice as a part of a statement of the case concerning the matters so attempted to be certified *ex parte*.

Motion to strike — matters may be inserted upon notice — statement of case — appeal — records sent up.

4. Motion to strike and remand granted, with instructions to embody the disputed matter of fact in a statement of the case after notice. Such statement will contain all evidence or affidavits offered touching the issue involved, also the trial judge's certificate stating the facts as it finds them to be, all of which, certified by the clerk, will be returned as the completed record on appeal.

5. Twenty-five dollar terms conditionally allowed appellant on motion and remand.

Opinion filed February 13, 1915.

From the County Court of Increased Jurisdiction of Ward County, *William Murray*, J.

Palda, Aaker, & Greene and *I. M. Oseth,* of Minot, for plaintiff and respondent.

Campbell & Jongewaard, of Rugby, for defendant and appellant.

Goss, J. Matters of practice only are decided. The merits of the appeal for decision later will involve the propriety of an order denying motion to vacate a judgment taken by default. Anticipating that the proceedings had will have an important bearing on the merits on trial, under a review on appeal of the discretion of the trial court, both parties are much interested in having the record on appeal reflect their version of events transpiring on the hearing prior to the making of the order appealed from. Counsel for the appellant procured the record to be filed in this court. It omitted any minutes of court on trial. Soon afterwards, on motion of respondent that the record "be remanded to the county court for the purpose of amendment thereof by annexing thereto a properly identified transcript of the minutes of said court relating to and covering proceedings had in the above-entitled action," and after notice, remand was ordered, December 10th, 1914. On January 11th, 1915, the purported corrected record was returned, containing therein a purported copy of minutes of the trial court reciting a continuance to a date specified. Appellant claims the continuance was to a later date. If the minutes are correct he was in default when judgment by default, sought to be vacated, was taken. If incorrect, he was not in default. This recertification and amendment of the record was had without notice to appellants other than notice of the order of remand of this court. On January 22d, on application of appellant upon supporting affidavits, an order to show cause was issued "why said record should not be further remanded to the county court for the purpose of amendment thereof by striking out said papers and said record." This order was issued upon the motion therefor "to strike from the records and files transmitted all papers and records and copies thereof not transmitted to this court by said clerk originally and prior to the order of this court remanding said record, . . . for the reason that said papers constitute no part of the judgment roll as defined by the statute of this state, and are not a part of or portion of the original papers used by either party on the application for the order appealed from herein; that no statement of the case or bill of ex-

ceptions was settled or allowed in said cause, and that said papers constitute no part or portion of such bill or statement, . . . and that said papers were inserted in said record upon the remand thereof wholly without notice to the appellant or his attorney, and without opportunity on their part to oppose said amendment." Accompanying said motion are affidavits tending to impeach the matters recited in said minutes. On the return day in the order to show cause counter affidavits were filed by respondent.

The question is raised of whether the minutes of the court reciting proceedings had on trial, and challenged by the affidavits presented in support of this application, and which minutes evidently were made after the order appealed from was signed, constitute a part of the proper record on appeal. Section 7822, Comp. Laws 1913, § 7206, Rev. Codes 1905, provides that the clerk, if the appeal is from an order, shall "transmit the order appealed from and the original papers used by each party on the application for such order." This record is compiled by the clerk under said statute and rule 24 of this court. 145 N. W. x. In the words of the statute, "no further certificate or attestation shall be necessary." § 7822. However, the effect of the provisions of § 7325, Rev. Codes 1905, § 7944, Comp. Laws 1913, must not be overlooked, as thereunder it was the duty of the court to have the orders appealed from refusing to vacate the judgment "briefly describe the affidavits, documents, papers, and evidence upon which the order is made." Thus, the very order appealed from, under the theory of the law governing its making, becomes also in effect a certificate settling the case, instruments, record, and evidence upon which it, the order itself, is based. That statute contemplates that, if the order be based upon anything other than documents, the same shall be referred to or identified by the order itself, thus obviating the necessity of settling a statement of the case as to matter the basis for such order. The order is such a certificate settling the statement of the case as to it. All then that is necessary is that the clerk attach to said order the documents, records, evidence, and matter referred to therein as the basis therefor to complete the record for transmission on appeal. With this in mind we are confronted with the fact that the trial court omitted in its order to certify concerning its minutes, and not only that, but it made said record of minutes in part at least subsequently. Thus, the

record, as compiled by the clerk and transmitted on appeal to this court, properly failed to contain the minute record, evidently not then in existence.

Respondent then asked a remand, which remand was accompanied by the request of the presiding judge and a recitation of the substance of the proposed amendment. The remand was granted. Respondent's purpose therefore was to amend the statement of facts upon which the order was made, which should have been theretofore settled by recitals in the order. Manifestly the matter sought to be incorporated in the record, relating to facts considered by the court in the making of the order appealed from, should be placed in the appeal record to enable this court to pass upon the identical and complete facts that were before the trial court when the order appealed from was made. But it is also apparent that, where the order itself is to be amended accordingly, or the record amended by any ancillary and subsequent order, it must concern facts which are not yet of record and which must be brought upon the appeal record in proper manner and form. Where such facts are not settled by the order appealed from, there is no good reason why they should not be settled by a subsequent order reciting and establishing such as material facts as having taken place at the trial. But this is a matter which manifestly the clerk cannot certify under the provisions of § 7822 until it is established by order or certificate of the court itself. Such act by the court necessitates what is in fact the settling of the statement of the case as to such occurrences, or in other words the certifying to either evidence of the fact or the fact itself. The theory of the law is that no statement of the case or certification to testimony of a fact shall be made by a court without notice to the litigants concerned. Otherwise they would be afforded no protection against an erroneous record being made to their prejudice, whereby perhaps the results of a long trial might be overturned by inadvertence or otherwise. The policy of the law is to safeguard the rights of all parties where possible at every step. The inevitable conclusion is that, when this record was remanded on respondent's application, it was that the clerk should not affix an *ex parte* recitation of purported facts certified by the trial judge to the record, but instead that, if respondent desired to amend such record by bringing into the record matters not a part, strictly speaking, of the record on appeal, it should be done only

on notice to the adverse party. Hildreth v. Grandin, 38 C. C. A. 516, 97 Fed. 870, from North Dakota district; Travelers' Protective Asso. v. Gilbert, 41 C. C. A. 180, 101 Fed. 46 (C. C. A. 8th C.) The appellant could then controvert by affidavit or record evidence the matter thus proposed as an amendment, and thereupon the trial court could by order certify to the affidavits, certificate, and evidence thus offered and taken, including therein its own certificate or minute record bearing on the matter in dispute and finding the facts on such issue. Such statement of the case then settled may be attached to the order appealed from as a part of the basis therefor, and transmitted on appeal, together with the other records on appeal attested by the clerk. So compiled it may be referred to or reviewed on appeal. The clerk's certificate, however, should also be amended to include and attest the statement of the case amending the basis for the order.

It is therefore ordered that the amendatory matter inserted in the judgment roll on this appeal, without notice and on the former remand, be stricken therefrom, and the record again remanded, that respondent may, if he desires, proceed to settle a statement of the case concerning the issue of fact upon which the remand was first had, but only after notice to appellant of the time and place of said settlement, and that all evidence or affidavits bearing thereon offered by either party, or both, and the certificate as to the facts on said issue by the trial court, shall be received, and the whole certified as the statement of the case on said matter. Thereafter such statement shall be attached to and accompany the order appealed from with other original papers used by each party on the application for such order. The certified record as remanded shall be returned to this court within thirty days by the clerk of the trial court, unless otherwise ordered for cause shown; that the moving party, appellant, shall recover motion costs hereon in the sum of $25, to be paid before the return of the record to this court. However, if the terms in like amount imposed on appellant on the first remand have not been paid (an affidavit presented on this application so states), no terms on that first remand nor on this application need be paid, the same being considered as offset.

No petition for rehearing on this order will be entertained.

It is so ordered.

CHRISTIANSON, J., disqualified, did not participate herein.

ESTHER WHITNEY v. CARL RITZ.

(151 N. W. 762.)

Defendant was the owner of a stallion which escaped and injured the plaintiff.

Evidence — sufficiency of — verdict — to sustain.

1. Evidence examined, and *held* sufficient to sustain the verdict of the jury in favor of the plaintiff.

Instructions.

2. Instructions examined and found to be without error.

Opinion filed February 26, 1915.

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

Affirmed.

Oliver Leverson (*Newton, Dullam, & Young*, of counsel), for appellant.

Liability is always contingent upon proof of negligence, in an action for damages against the owner of a domestic animal. 1 Thomp. Neg. §§ 841, 845; Fletcher v. Rylands, L. R. 1 Exch. 279, L. R. 3 H. L. 330, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Brown v. Kendall, 6 Cush. 292; 2 Greenl. Ev. §§ 85, 92; Wakeman v. Robinson, 1 Bing. 213, 8 J. B. Moore, 63, 2 Chitty, 639; Davis v. Saunders, 2 Chitty, 639, 1 Eng. Rul. Cas. 203; Comyns's Dig. Battery, a, Day's ed. and notes; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145; James v. Campbell, 5 Car. & P. 372; Alderson v. Waistell, 1 Car. & K. 358.

The keeper of a stallion is bound to know the propensities of stallions in general, and to use such degree of care as the nature of the animal may require to avoid injuries; but he is under no obligation to guard against injuries which he has no reason to expect. Hammond v. Melton, 42 Ill. App. 186, 1 Am. Neg. Cas. 274; Meredith v. Reed, 26 Ind. 334, 1 Am. Neg. Cas. 283; Maloney v. Bishop, — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230; Earle v. Van Alstine, 8 Barb. 630; Moynahan v. Wheeler, 117 N. Y. 285, 22 N. E. 702, 1 Am. Neg. Cas. 26; Vrooman v. Lawyer, 13 Johns. 339;

Weide v. Thiel, 9 Ill. App. 223; DeGray v. Murray, 69 N. J. L. 458, 55 Atl. 237, 14 Am. Neg. Rep. 396; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879, 7 Am. Neg. Rep. 493.

The escape of the horse does not in itself show negligence. If the horse becomes unmanageable without fault of the defendant, he cannot be held liable. Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Groom v. Kavanagh, 97 Mo. App. 362, 71 S. W. 362; Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958, 78 Pac. 923; Metropolitan Casualty Ins. Co. v. Clark, 145 Wis. 181, 37 L.R.A.(N.S.)717, 129 N. W. 1065, 3 N. C. C. A. 532; Hammack v. White, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676, 10 Week. Rep. 230; Manzoni v. Douglas, L. R. 6 Q. B. Div. 145, 50 L. J. Q. B. N. S. 289, 29 Week. Rep. 425, 45 J. P. 391; Kimble v. Stackpole, 60 Wash. 36, 35 L.R.A.(N.S.) 148, 110 Pac. 677; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310, 1 Am. Neg. Rep. 481; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145; Bizzell v. Booker, 16 Ark. 326; 2 Thomp. Neg. § 1234; Coller v. Knox, 222 Pa. 362, 23 L.R.A.(N.S.) 171, 71 Atl. 539; 1 Thomp. Neg. § 1297; Button v. Frink, 51 Conn. 342, 50 Am. Rep. 24; Van Houten v. Fleischmann, 48 N. Y. S. R. 763, 20 N. Y. Supp. 643; Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

Ordinary care is all that was required of the defendant, and ordinary care does not require that all possible means for avoiding accidents might be employed. Missouri & K. Teleph. Co. v. Vandervort, 71 Kan. 101, 79 Pac. 1068, 6 Ann. Cas. 30; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Robinson v. Charles Wright & Co. 94 Mich. 283, 53 N. W. 938; Hinchman v. Pere Marquette R. Co. 136 Mich. 341, 65 L.R.A. 553, 99 N. W. 277; Snider v. Philadelphia Co. 54 W. Va. 149, 63 L.R.A. 896, 102 Am. St. Rep. 941, 46 S. E. 366, 1 Ann. Cas. 225; Manzoni v. Douglas, L. R. 6 Q. B. Div. 145, 50 L. J. Q. B. N. S. 289, 29 Week Rep. 425, 45 J. P. 391; Vincent v. Stine hour, 7 Vt. 62, 29 Am. Dec. 145; Unger v. 42nd Street & G. Street Ferry R. Co. 51 N. Y. 497; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958, 78 Pac. 923; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310, 1 Am. Neg. Rep. 481, Groom v. Kavanagh, 97 Mo. App. 362, 71 S. W. 362; Hammack

stored. Some authorities held such a transaction to be a sale because, as they say, the identical grain cannot be returned. Other authorities held the deposit to be merely a bailment and the fact that the identical grain cannot be returned is immaterial in view of the fact that a like amount of the same kind and grade answers every requirement of the return.

Those courts which held that the depositor had parted with his grain, of necessity held that no action could be maintained for its conversion. This for the very good reason that a man who has no wheat cannot maintain an action against somebody else for converting it. It might be said in passing that those decisions were made in the absence of statute upon the subject. In North Dakota by § 8, chap. 126, Sess. Laws 1891 it was provided: "Whenever any grain shall be delivered to any person, association, firm, corporation or trust, doing a grain, warehouse or grain elevator business in this state, and the receipts issued therefor, providing for the delivery of a like amount and grade to the holder thereof in return, *such delivery shall be a bailment, and not a sale of the grain so delivered.*" After the enactment of this statute the question was not an open one in North Dakota. Notwithstanding this fact, in 1899 the case of Plano Mfg. Co. v. Jones, supra, was decided upon the theory that such delivery was a sale. We have examined the briefs filed in that case and find that said statute was not called to the attention of the court at that time and was, undoubtedly, entirely overlooked. When the case of St. Anthony & D. Elevator Co. v. Dawson, 20 N. D. 18, 126 N. W. 1013, Ann. Cas. 1912B, 1337, was decided, the correct rule was adopted; although that case did not in so many words overrule Plano Mfg. Co. v. Jones, it did so by necessary implication.

As authority for our position, we refer to a note in 94 Am. St. Rep. 220, from which we quote: "By far the most important transactions coming under the head of bailment are those which have to do with the deposit of grain in warehouses. It needs no authority to support the statement that when wheat is delivered at a warehouse to be stored, and the identical wheat is to be returned, the transaction is a bailment. The difficulty arises when it is mingled with other wheat. In this connection, there are two lines of decisions, one holding it a mere bailment and the other a contract of sale. . . . [Case cited and digested.]

This the court held to be a contract of bailment, and it has been so held by numerous other authorities. [Cases cited.] In such cases, the relation existing between the depositors is that of tenants in common of the mass, each being entitled to so much thereof as his share bears to the whole amount; and the fact that the identity of the mass is continually shifting, by being added to and taken from, does not alter it. [Cases cited.] The reasons for this rule were thus well stated in Rice v. Nixon, 97 Ind. 97, 49 Am. Rep. 430: 'The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in intrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass, should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such

a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale.' [Cases cited and digested.] The other view holding that where grain has been mingled with that of others, whether with the depositor's consent or by custom, and an equal amount of like grain is to be returned, it is a sale, is also supported by eminent authority. [Cases cited.]"

It might further be said that any one interested can obtain possession of an ordinary storage receipt issued under § 3112, Comp. Laws 1913, and will see that such storage receipt does not obligate the warehouseman to purchase the grain nor to pay any sum therefor. True, warehousemen will usually purchase such grain, but the storage ticket does not obligate them to do so. As the St. Anthony & D. Elevator Co. v. Dawson Case is sound in principle, we follow it. The petition for rehearing is denied.

NORTH DAKOTA LUMBER COMPANY v. JOHN K. JAMES et al.

(151 N. W. 430.)

Default judgment — vacating by consent of parties — order for — not appealable.

No appeal will lie from an order entered by consent; and where it appears that an order vacating a default judgment and granting the defendant leave to answer was entered pursuant to the agreement and with the consent of the plaintiff, such order is not appealable, and plaintiff's appeal therefrom will be dismissed.

Opinion filed March 16, 1915.

From an order of the District Court of Benson County, *Burr,* Special Judge, plaintiff appeals.

Dismissed.

R. A. Stuart, of Minnewaukan, North Dakota, for plaintiff and appellant.

Cowan & Adamson, of Devils Lake, North Dakota, for defendants and respondents.

PER CURIAM. This is an appeal from an order setting aside a default judgment. Respondents have moved to dismiss the appeal on the ground that plaintiff consented to its rendition, and therefore cannot be permitted to appeal therefrom. The order appealed from recites, among other things, that at the time of the hearing plaintiff's counsel agreed in open court that the judgment be set aside, and that defendants' application for a vacation of the judgment and leave to answer be granted. The record discloses that the application to vacate the default judgment was made in proper form and accompanied by affidavits and an answer. And the showing made was doubtless sufficient to have justified the trial court in vacating the default. Apparently this must also have been the idea of plaintiff's counsel as the district judge, in his order vacating the default, states that the plaintiff's counsel expressly consented to the entry of an order granting defendants' application. No application was made in trial court to strike the recitals in question from the order; on the contrary the question of whether or not such agreement was actually made was afterwards fully submitted to the trial court with the result as above indicated. Plaintiff, therefore, has appealed from an order which expressly recites that it was entered pursuant to plaintiff's consent. The law is too well settled to require the citation of any authority that a party cannot complain of an order entered through his procurement or with his consent. The defendants' motion for a dismissal of this appeal is therefore granted.

AUSTIN JOHANNA v. A. L. LARSON and Thomas Lennon.

(150 N. W. 535.)

Appeal — failure to have record sent up — motion to dismiss — practice.

Unless appellant causes the record on appeal to be filed with the clerk of this court within thirty days from the date of filing this opinion, and pays to respondent's counsel the sum of $25; also serves his brief on appeal on or before May 1st next, and enters into a stipulation with respondent's counsel

consenting that the cause may be placed upon the short cause calendar of this court, such appeal will be dismissed.

Opinion filed March 19, 1915.

Appeal from District Court, Willams County, *F. E. Fisk,* J.

Motion to dismiss for failure to diligently prosecute the appeal.

Motion granted conditionally.

T. M. Cooney and *Burdick & Murphy,* Milliston, North Dakota, for the motion.

Wm. G. Owens, Williston, North Dakota, *contra.*

FISK, Ch. J. On respondent's application an order was issued requiring appellant to show cause why the appeal herein should not be dismissed for lack of prosecution. In support of such order one of respondent's counsel made and served an affidavit setting forth that the appeal was taken to this court from the judgment of the district court on or about December 4, 1913, by the defendant Larson by the service of a notice of appeal and undertaking on plaintiff's attorney, one A. J. Bessie. That aside from the service on respondent's attorney of a transcript of the evidence, no other steps have been taken to perfect the appeal by settling a statement of the case and causing the record to be certified to this court.

On the return day of such order to show cause appellant's attorney appeared in opposition to the motion and filed an affidavit wherein, among other things, he states that on February 28, 1914, a stipulation was entered into between counsel for the respective parties as follows: "It is hereby stipulated by and between the above-named plaintiff and respondent, Austin Johanna, by and through his attorney, Aaron J. Bessie, and A. L. Larson, one of the above-named defendants and the appellant herein, that the hereto attached instruments, consisting of the summons and complaint, answer, together with notice of trial, note of issue, order for judgment, judgment and transcript of testimony, together with exhibits, constitute the judgment roll in the above and foregoing entitled action, and that the hereto attached transcript is a true and correct transcript of all the evidence adduced at the trial of said action, and it is hereby further stipulated and agreed that the same may be presented to the judge of the district court, as hereto at-

tached, and by him certified and ordered as the settled case in the foregoing entitled action on appeal, and that the same shall be certified as the records and files and proceedings had in the trial of the said action on appeal to the supreme court of the state of North Dakota. It is hereby further stipulated and agreed by and between the above-named plaintiff and respondent and the above-named defendant and appellant, that notice and hearing on application for settlement of the case and certification of the same, and the time of service of the same, is hereby in all things waived, and that the same may be certified as the settled case in said action to the supreme court."

In such affidavit it is also set forth that after such stipulation was made plaintiff's attorney, A. J. Bessie, removed from this state and established his residence in Montana, where he later died "before taking up the matter in question in accordance with the stipulation had herein in reference thereto." It is also stated in such affidavit: "That prior to the death of the said A. J. Bessie there was a distinct understanding between the counsel for both parties that the said matter should be taken up at any time at the convenience of counsel and the judge of the district court; that this affiant entered into such stipulation at the express request of the said A. J. Bessie, respondent's attorney, who was at that time preparing to enter upon the practice of law in Montana, and for that reason stated to affiant that he desired that all matters pertaining to the appeal to the supreme court be indefinitely postponed so that the matter could be reached and definitely settled at such time as the said Bessie could give it the attention it required; that by reason of the sudden and unexpected demise of the said Bessie, the stipulations entered into could not be carried out, and that at no time has there been a notice served upon affiant or his client of the substitution of T. M. Cooney, or any attorney for respondent . . .; that affiant has . . . been unable to ascertain that any substitution of attorneys has been made."

Affiant further avers his willingness to immediately take all necessary steps to perfect the record on such appeal, and that the delay in doing so is attributable to the facts aforesaid. That his client has incurred the expense necessary to procuring the transcript and copies of the record to be used on the appeal. He also states that respondent removed from this state, and that his place of residence or place where

service of any notice could have been made upon him is and was unknown to affiant.

In rebuttal to such showing, respondent's counsel produced a letter of date May 1, 1914, addressed to appellant's counsel advising him that Mr. Bessie had turned said case over to Burdick & Murphy for attention. This letter purports to be signed by Usher L. Burdick and John J. Murphy. Also a reply thereto of date May 4, 1914, addressed to Burdick & Murphy and signed by appellant's counsel, reading as follows: "Referring to your letter of May 1st, which was received, I beg to advise you that the case of Austin Johanna v. Lennon and Larson is ready for the supreme court. As Mr. Bessie and I stipulated, the case could be settled by the judge without further notice."

The above is substantially all the showing on such motion. After duly considering the same, we fail to see how appellant has successfully excused the long delay in causing the statement of case to be settled and the record certified to this court. In view of the written stipulation waiving notice and hearing of application for settlement of the statement of case and the certification thereof, and containing an express consent that the same was correct and might be settled and certified, we fail to see why any delay was occasioned by the other fact stated, but in any event there appears to have been no need of the long delay which has elapsed since May 4th, the date of the letter written by appellant's attorney. The alleged oral understanding claimed to have been had between counsel seems to be squarely in conflict with the prior written stipulation, and the letter of appellant's counsel aforesaid also seems to negative the fact that any such oral stipulation was entered into, for no mention thereof is therein made. However, we are convinced of the good faith of counsel for appellant, and do not question the fact that he labored under the mistaken belief that some such oral understanding was had with Mr. Bessie. We are also satisfied that appellant took the appeal in good faith, for he has incurred the expense of procuring the transcript and copies to be used on such appeal. Furthermore, it does not appear that counsel for respondent have, at any time prior to applying for this order, taken any steps to expedite such appeal, but on the contrary have by their silence impliedly acquiesced in the long delay. They are therefore not in as favorable a position to urge their motion at this time as they otherwise might have been.

We have concluded, in view of the facts before us, to grant respondent's motion for a dismissal only upon the following conditions: The appeal will be dismissed unless appellant shall within thirty days from the date of filing this opinion cause the record on appeal to be certified to the clerk of this court, and pay to respondent's counsel as terms the sum of $25; also serve his brief on respondent's counsel on or before May 1st next, and enter into a stipulation with respondent's counsel consenting that the cause may be placed upon the short cause calendar of this court.

It is so ordered.

DELLA F. VAN WOERT v. NEW YORK LIFE INSURANCE COMPANY.

(151 N. W. 29.)

Default judgment — amended complaint and answer — affidavit of merits on motion — setting aside judgment.

1. A default judgment rendered in a case at issue upon the amended complaint and the answer to the original complaint may be set aside without an affidavit of merits.

Amended complaints — demurrer — statute — application — order of court — agreement.

2. Section 7445, Comp. Laws, applies only to complaints amended after a demurrer thereto has been sustained, and has no application to an amendment made in the action by order of the court, or by agreement of the parties.

Answer to original complaint — stands as answer — unless new answer made.

3. An answer interposed to the original complaint will stand as an answer to the complaint as thereafter amended, unless defendant elects to answer anew.

Opinion filed January 25, 1915.

From an order of the District Court of Renville County, vacating a default judgment, *Leighton,* J., plaintiff appeals.

Affirmed.

Grace & Bryans, for appellant.

The policy of insurance in this case cannot be forfeited by reason of

the lapse of payment of premiums. It is conceded that the insurance company had in its hands a reserve amount of money due the plaintiff, more than sufficient to cancel the unpaid premium, and such reserve should have been applied to the payment of the premium when due, rather than that a forfeiture should have been declared. Haas v. Mutual L. Ins. Co. 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58; 25 Cyc. 843, 870.

Mere oral agreements by counsel are not sufficiently explicit to authorize the vacation of a default judgment. 23 Cyc. 920; Rule 28 at xxxiii of 29 N. D.; Rule 20 of the rules of the eighth judicial District.

No notice of application for or entry of judgment was necessary in this case. Rev. Codes 1905, § 6856, Comp. Laws 1913, § 7445; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501.

No sufficient affidavit of merits was served with the motion to set aside the judgment and permit defense. Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

H. S. Blood, for respondent.

The amended complaint does not contain facts sufficient to state a cause of action. The policy of insurance is made a part of such complaint; one of its provisions is: "That *after three years,* the assured may *elect* as to *which of the benefits* provided by the policy shall be *claimed.*" This policy had *not* run *three years,* and hence the clause was not operative, and assured was in default in the payment of premiums. Knapp v. Homeopathic Mut. L. Ins. Co. 117 U. S. 411, 29 L. ed. 960, 6 Sup. Ct. Rep. 807; 25 Cyc. 850.

The acceptance of premium or assessment does not waive default unless such acceptance is *unconditional.* The policy contains a provision that, "the insured must be in *good health* when he pays a defaulted premium, and its acceptance is only upon the condition that insured is in good health." 25 Cyc. 871; Haas v. Mutual L. Ins. Co. 84 Neb. 682, 26 L.R.A.(N.S.) 747, 121 N. W. 996, 19 Ann. Cas. 58.

Where a complaint is amended, while the defendant has a right to amend his answer, he may stand upon his original answer. 1 Enc. Pl. & Pr. 628; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937.

Judgment cannot be taken as by default, on an amended complaint, where an answer to the original complaint was made and served. 23 Cyc. 920, and cases there cited; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Slimmer v. State Bank, 122 Minn. 187, 142 N. W. 144; McLaughlin v. Breckenridge, 122 Minn. 156, 141 N. W. 1134, 142 N. W. 134.

CHRISTIANSON, J. This is an appeal from an order of the district court of Renville county, vacating a default judgment against the defendant. This action was commenced by service of summons and complaint upon the defendant on February 27, 1913. The action is based upon an insurance policy issued by the defendant in the sum of $2,000. The defendant appeared in the action by its attorneys, Noble, Blood, & Adamson, and served an answer on March 22, 1913. The answer was verified by the secretary of the defendant. On April 4, 1913, the plaintiff served an amended complaint. A copy of the insurance policy involved was attached to and made a part of both the original and amended complaints. No substantial change was made in the plaintiff's complaint by the amendment, the cause of action as set forth in both complaints being based upon the same insurance policy. Thereafter, on May 6, 1913, the plaintiff's attorney made affidavit of default on the theory that defendant was in default for failure to answer the amended complaint, and obtained a default judgment against the defendant. It appears that the first knowledge of the entry of such judgment received by defendant's attorneys was on May 9, 1913, when they received a letter from the plaintiff's attorneys to the effect that the default judgment had been entered, whereupon the defendant's attorneys made application for a vacation of the judgment, and submitted in support of said motion all the files and pleadings in the case and the affidavit of H. S. Blood, one of the attorneys for the plaintiff. The affidavit of H. S. Blood is, in part, as follows: "That on the 4th day of April, 1913, the plaintiff herein served an amended complaint . . .; that said amended complaint was served personally upon the deponent by R. H. Grace of the firm of Grace & Bryans, attorneys for the plaintiff, and at the time of the said service it was stipulated and agreed between the deponent and the said R. H. Grace, that in case the deponent considered the answer to the original complaint a sufficient answer to

the amended complaint, then in that case he need not answer, and the answer to the original complaint should stand and be the answer to the amended complaint, and that if he deemed an answer to the amended complaint different from the answer to the original complaint necessary, then in that case he would serve an answer to the amended complaint, otherwise not." In the affidavit of Mr. Grace, the attorney for the plaintiff, submitted in opposition to said motion, the following statement is contained: "That he was in Minot on the 4th day of April, 1913, and presented an amended complaint in the above-entitled action to H. S. Blood, one of the attorneys for the defendant, who then admitted service thereof in writing indorsed on said amended complaint. That at the time of the admission of service of the amended complaint in said action, and while in the office of H. S. Blood at Minot, N. D., the affiant and the said H. S. Blood discussed to some extent the said above case and the contents of the amended complaint; that there were statements made either by H. S. Blood or this affiant or both, that the old answer or original answer might be sufficient to stand as the answer to the amended complaint, and in that case stipulation might be had permitting the original answer to stand as the answer to the amended complaint. . . ." After hearing the matter, the trial court made an order vacating the judgment, and directing that the answer to the original complaint be permitted to stand as the answer to the amended complaint. This appeal is from such order.

The principal contention of appellant is that the order is erroneous for the reason that no affidavit of merits was tendered in support of the application.

This contention cannot be sustained. In this case, an answer verified by one of the principal officers of the defendant, containing a full and explicit defense to the matters set forth not only in the original, but in the amended complaint, constituted part of the moving papers, and the application to set aside this judgment was not based upon the mistake, inadvertence, or excusable neglect of the defendant. And as we view the matter, the defendant was not in default, but the judgment was clearly improperly rendered, and the entry of the judgment under the facts existing in this case was not only grossly irregular, but a refusal to vacate the judgment would constitute a denial to the defendant of its substantial rights. In cases of that kind an affidavit of merit

is not required. "Thus a judgment by default, entered before the court has acquired jurisdiction in the case, may be set aside without an affidavit of merits. So, the rule does not apply where it was grossly irregular for the default to have been entered; or where the defendant complains of irregularity amounting to denial of his substantial rights; or where the judgment is alleged to have been procured by fraud." Black, Judgm. 2d ed. § 347; Foster v. Vehmeyer, 133 Cal. 459, 65 Pac. 974; Quan Quock Fong v. Lyons, 20 Cal. App. 668, 130 Pac. 33; Toy v. Haskell, 128 Cal. 558, 79 Am. St. Rep. 70, 61 Pac. 89; Naderhoff v. George Benz & Sons, 25 N. D. 165, 47 L.R.A.(N.S.) 853, 141 N. W. 501; Hertzberg v. Elvidge, 79 Misc. 109, 140 N. Y. Supp. 670.

It is insisted by appellant that defendant was in default by failing to answer the amended complaint within thirty days. It is apparent that appellant is under the impression that § 7445 of the Comp. Laws of 1913 makes it obligatory upon a defendant in every instance to answer an amended complaint. In this he is in error. This section applies only to cases wherein complaints are amended after demurrers to the same have been sustained, and has no application to complaints that are amended, pursuant to an order of the court upon an application for leave to amend, or by agreement of the parties. This is also the construction placed upon a similar section by the supreme court of South Dakota in the case of J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82.

It clearly appears from the affidavits, not only of the defendant's attorney, but that of plaintiff's attorney as well, that the defendant intended to stand on its answer to the original complaint unless it served a new one, and the subsequent events clearly show that defendant's counsel elected to stand on the answer already served. This he had a perfect right to do. The cause still remained at issue upon the issues framed by the amended complaint and the answer to the original complaint. In the case of Martinson v. Marzolf, 14 N. D. 301, 308, 103 N. W. 937, this court, in considering the same question, says: "The defendants were not in default by failing to serve a new answer after the complaint was amended. The amendment was merely formal, and did not make any substantial change in the allegations of the facts which plaintiff claimed entitled him to relief. Those facts had already

been put in issue by the answer, and it was not necessary to repeat the denials of those facts, or renew the allegations of defensive matter by serving a new answer."

The supreme court of Wisconsin in the case of Yates v. French, 25 Wis. 661, 664, in considering the same proposition in a very exhaustive opinion, among other things, says: "A new plea was not, in all cases, required, nor in any case, except as the defendant found it necessary or proper by reason of new matter introduced by the amendment, which he wished to controvert or put in issue by his plea. He might, in any case, refuse to plead anew, and in that event his plea already filed was considered as a plea to the amended declaration. His neglect or refusal to plead anew within the time prescribed was an election on his part to have it so considered. On the other hand, his election to plead *de novo,* which was manifested by the filing and service of a new plea, was an abandonment of the former plea." We are entirely satisfied that the defendant was not in default by failing to serve a new answer to the amended complaint, but that the case still remained at issue upon the issues as framed by the amended complaint and the answer to the original complaint. And in this we are sustained by the overwhelming weight of authority. Ibid.; Crosby v. Bastedo, 57 Neb. 15, 77 N. W. 364; Pease v. Bartlett, 97 Ill. App. 492; Knips v. Stefan, 50 Wis. 286, 6 N. W. 877; Kelly v. Bliss, 54 Wis. 187, 11 N. W. 488; Byers v. Carll, 7 Tex. Civ. App. 423, 27 S. W. 190; Smith v. Halliday, — Ark. —, 13 S. W. 1093; Peacock v. Gleesen, 117 Iowa, 291, 90 N. W. 610; Schmidt v. Mitchell, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. 929; Gettings v. Buchanan, 17 Mont. 581, 44 Pac. 77; Brossard v. Morgan, 7 Idaho, 215, 61 Pac. 1031.

It will be observed that the order of the trial court, after ordering a vacation of the judgment, provides that the answer to the original complaint stand as the answer to the amended complaint. The order, therefore, merely corrected the error committed by the improper entry of the judgment, and placed the parties in the same position they were in before the judgment was entered. The plaintiff is in no position to complain. The order appealed from is clearly correct, and must be affirmed.

A. C. HARRIS v. ED. HESSIN.

(151 N. W. 4.)

Judgment — vacation of — order denying — recitals in order — statement of case — evidentiary matters.

1. An order denying vacation of judgment should recite all the files and matters extrinsic thereto upon which it is based, and thus amount to a certificate of the basis for it, so that settlement of a statement of the case concerning evidentiary matters a part of its basis is certified and settled by the order appealed from, following § 7325, Rev. Codes 1905, § 7944, Comp. Laws 1913.

Clerk's certificate — on appeal — files.

2. To such an order the clerk, under § 7206, Rev. Codes 1905, § 7822, Comp. Laws 1913, attaches the files and certifies to the record under rule 24 of this court and transmits the same as the appeal record.

Minutes of court — must be settled on appeal — certificate — attached and sent up without notice to appellant — stricken from record.

3. Where minutes of the court on trial are not settled by the order appealed from to be a part of the basis therefor, and are subsequently written up, certified, and attached to the appeal record without notice to appellant and opportunity to challenge the same, and contain matter bearing on the merits, such certificate will be stricken from the appeal record on motion seasonably made as not properly a part thereof, without a settlement on notice as a part of a statement of the case concerning the matters so attempted to be certified *ex parte*.

Motion to strike — matters may be inserted upon notice — statement of case — appeal — records sent up.

4. Motion to strike and remand granted, with instructions to embody the disputed matter of fact in a statement of the case after notice. Such statement will contain all evidence or affidavits offered touching the issue involved, also the trial judge's certificate stating the facts as it finds them to be, all of which, certified by the clerk, will be returned as the completed record on appeal.

5. Twenty-five dollar terms conditionally allowed appellant on motion and remand.

Opinion filed February 13, 1915.

From the County Court of Increased Jurisdiction of Ward County, *William Murray*, J.

Palda, Aaker, & Greene and *I. M. Oseth,* of Minot, for plaintiff and respondent.

Campbell & Jongewaard, of Rugby, for defendant and appellant.

Goss, J. Matters of practice only are decided. The merits of the appeal for decision later will involve the propriety of an order denying motion to vacate a judgment taken by default. Anticipating that the proceedings had will have an important bearing on the merits on trial, under a review on appeal of the discretion of the trial court, both parties are much interested in having the record on appeal reflect their version of events transpiring on the hearing prior to the making of the order appealed from. Counsel for the appellant procured the record to be filed in this court. It omitted any minutes of court on trial. Soon afterwards, on motion of respondent that the record "be remanded to the county court for the purpose of amendment thereof by annexing thereto a properly identified transcript of the minutes of said court relating to and covering proceedings had in the above-entitled action," and after notice, remand was ordered, December 10th, 1914. On January 11th, 1915, the purported corrected record was returned, containing therein a purported copy of minutes of the trial court reciting a continuance to a date specified. Appellant claims the continuance was to a later date. If the minutes are correct he was in default when judgment by default, sought to be vacated, was taken. If incorrect, he was not in default. This recertification and amendment of the record was had without notice to appellants other than notice of the order of remand of this court. On January 22d, on application of appellant upon supporting affidavits, an order to show cause was issued "why said record should not be further remanded to the county court for the purpose of amendment thereof by striking out said papers and said record." This order was issued upon the motion therefor "to strike from the records and files transmitted all papers and records and copies thereof not transmitted to this court by said clerk originally and prior to the order of this court remanding said record, . . . for the reason that said papers constitute no part of the judgment roll as defined by the statute of this state, and are not a part of or portion of the original papers used by either party on the application for the order appealed from herein; that no statement of the case or bill of ex-

ceptions was settled or allowed in said cause, and that said papers constitute no part or portion of such bill or statement, . . . and that said papers were inserted in said record upon the remand thereof wholly without notice to the appellant or his attorney, and without opportunity on their part to oppose said amendment." Accompanying said motion are affidavits tending to impeach the matters recited in said minutes. On the return day in the order to show cause counter affidavits were filed by respondent.

The question is raised of whether the minutes of the court reciting proceedings had on trial, and challenged by the affidavits presented in support of this application, and which minutes evidently were made after the order appealed from was signed, constitute a part of the proper record on appeal. Section 7822, Comp. Laws 1913, § 7206, Rev. Codes 1905, provides that the clerk, if the appeal is from an order, shall "transmit the order appealed from and the original papers used by each party on the application for such order." This record is compiled by the clerk under said statute and rule 24 of this court. 145 N. W. x. In the words of the statute, "no further certificate or attestation shall be necessary." § 7822. However, the effect of the provisions of § 7325, Rev. Codes 1905, § 7944, Comp. Laws 1913, must not be overlooked, as thereunder it was the duty of the court to have the orders appealed from refusing to vacate the judgment "briefly describe the affidavits, documents, papers, and evidence upon which the order is made." Thus, the very order appealed from, under the theory of the law governing its making, becomes also in effect a certificate settling the case, instruments, record, and evidence upon which it, the order itself, is based. That statute contemplates that, if the order be based upon anything other than documents, the same shall be referred to or identified by the order itself, thus obviating the necessity of settling a statement of the case as to matter the basis for such order. The order is such a certificate settling the statement of the case as to it. All then that is necessary is that the clerk attach to said order the documents, records, evidence, and matter referred to therein as the basis therefor to complete the record for transmission on appeal. With this in mind we are confronted with the fact that the trial court omitted in its order to certify concerning its minutes, and not only that, but it made said record of minutes in part at least subsequently. Thus, the

record, as compiled by the clerk and transmitted on appeal to this court, properly failed to contain the minute record, evidently not then in existence.

Respondent then asked a remand, which remand was accompanied by the request of the presiding judge and a recitation of the substance of the proposed amendment. The remand was granted. Respondent's purpose therefore was to amend the statement of facts upon which the order was made, which should have been theretofore settled by recitals in the order. Manifestly the matter sought to be incorporated in the record, relating to facts considered by the court in the making of the order appealed from, should be placed in the appeal record to enable this court to pass upon the identical and complete facts that were before the trial court when the order appealed from was made. But it is also apparent that, where the order itself is to be amended accordingly, or the record amended by any ancillary and subsequent order, it must concern facts which are not yet of record and which must be brought upon the appeal record in proper manner and form. Where such facts are not settled by the order appealed from, there is no good reason why they should not be settled by a subsequent order reciting and establishing such as material facts as having taken place at the trial. But this is a matter which manifestly the clerk cannot certify under the provisions of § 7822 until it is established by order or certificate of the court itself. Such act by the court necessitates what is in fact the settling of the statement of the case as to such occurrences, or in other words the certifying to either evidence of the fact or the fact itself. The theory of the law is that no statement of the case or certification to testimony of a fact shall be made by a court without notice to the litigants concerned. Otherwise they would be afforded no protection against an erroneous record being made to their prejudice, whereby perhaps the results of a long trial might be overturned by inadvertence or otherwise. The policy of the law is to safeguard the rights of all parties where possible at every step. The inevitable conclusion is that, when this record was remanded on respondent's application, it was that the clerk should not affix an *ex parte* recitation of purported facts certified by the trial judge to the record, but instead that, if respondent desired to amend such record by bringing into the record matters not a part, strictly speaking, of the record on appeal, it should be done only

on notice to the adverse party. Hildreth v. Grandin, 38 C. C. A. 516, 97 Fed. 870, from North Dakota district; Travelers' Protective Asso. v. Gilbert, 41 C. C. A. 180, 101 Fed. 46 (C. C. A. 8th C.) The appellant could then controvert by affidavit or record evidence the matter thus proposed as an amendment, and thereupon the trial court could by order certify to the affidavits, certificate, and evidence thus offered and taken, including therein its own certificate or minute record bearing on the matter in dispute and finding the facts on such issue. Such statement of the case then settled may be attached to the order appealed from as a part of the basis therefor, and transmitted on appeal, together with the other records on appeal attested by the clerk. So compiled it may be referred to or reviewed on appeal. The clerk's certificate, however, should also be amended to include and attest the statement of the case amending the basis for the order.

It is therefore ordered that the amendatory matter inserted in the judgment roll on this appeal, without notice and on the former remand, be stricken therefrom, and the record again remanded, that respondent may, if he desires, proceed to settle a statement of the case concerning the issue of fact upon which the remand was first had, but only after notice to appellant of the time and place of said settlement, and that all evidence or affidavits bearing thereon offered by either party, or both, and the certificate as to the facts on said issue by the trial court, shall be received, and the whole certified as the statement of the case on said matter. Thereafter such statement shall be attached to and accompany the order appealed from with other original papers used by each party on the application for such order. The certified record as remanded shall be returned to this court within thirty days by the clerk of the trial court, unless otherwise ordered for cause shown; that the moving party, appellant, shall recover motion costs hereon in the sum of $25, to be paid before the return of the record to this court. However, if the terms in like amount imposed on appellant on the first remand have not been paid (an affidavit presented on this application so states), no terms on that first remand nor on this application need be paid, the same being considered as offset.

No petition for rehearing on this order will be entertained.

It is so ordered.

CHRISTIANSON, J., disqualified, did not participate herein.

ESTHER WHITNEY v. CARL RITZ.

(151 N. W. 762.)

Defendant was the owner of a stallion which escaped and injured the plaintiff.

Evidence — sufficiency of — verdict — to sustain.

1. Evidence examined, and *held* sufficient to sustain the verdict of the jury in favor of the plaintiff.

Instructions.

2. Instructions examined and found to be without error.

Opinion filed February 26, 1915.

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

Affirmed.

Oliver Leverson (*Newton, Dullam, & Young*, of counsel), for appellant.

Liability is always contingent upon proof of negligence, in an action for damages against the owner of a domestic animal. 1 Thomp. Neg. §§ 841, 845; Fletcher v. Rylands, L. R. 1 Exch. 279, L. R. 3 H. L. 330, 6 Mor. Min. Rep. 129, 1 Eng. Rul. Cas. 235; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Brown v. Kendall, 6 Cush. 292; 2 Greenl. Ev. §§ 85, 92; Wakeman v. Robinson, 1 Bing. 213, 8 J. B. Moore, 63, 2 Chitty, 639; Davis v. Saunders, 2 Chitty, 639, 1 Eng. Rul. Cas. 203; Comyns's Dig. Battery, a, Day's ed. and notes; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145; James v. Campbell, 5 Car. & P. 372; Alderson v. Waistell, 1 Car. & K. 358.

The keeper of a stallion is bound to know the propensities of stallions in general, and to use such degree of care as the nature of the animal may require to avoid injuries; but he is under no obligation to guard against injuries which he has no reason to expect. Hammond v. Melton, 42 Ill. App. 186, 1 Am. Neg. Cas. 274; Meredith v. Reed, 26 Ind. 334, 1 Am. Neg. Cas. 283; Maloney v. Bishop, — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230; Earle v. Van Alstine, 8 Barb. 630; Moynahan v. Wheeler, 117 N. Y. 285, 22 N. E. 702, 1 Am. Neg. Cas. 26; Vrooman v. Lawyer, 13 Johns. 339;

Weide v. Thiel, 9 Ill. App. 223; DeGray v. Murray, 69 N. J. L. 458, 55 Atl. 237, 14 Am. Neg. Rep. 396; Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879, 7 Am. Neg. Rep. 493.

The escape of the horse does not in itself show negligence. If the horse becomes unmanageable without fault of the defendant, he cannot be held liable. Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Groom v. Kavanagh, 97 Mo. App. 362, 71 S. W. 362; Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958, 78 Pac. 923; Metropolitan Casualty Ins. Co. v. Clark, 145 Wis. 181, 37 L.R.A.(N.S.)717, 129 N. W. 1065, 3 N. C. C. A. 532; Hammack v. White, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676, 10 Week. Rep. 230; Manzoni v. Douglas, L. R. 6 Q. B. Div. 145, 50 L. J. Q. B. N. S. 289, 29 Week. Rep. 425, 45 J. P. 391; Kimble v. Stackpole, 60 Wash. 36, 35 L.R.A.(N.S.) 148, 110 Pac. 677; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310, 1 Am. Neg. Rep. 481; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145; Bizzell v. Booker, 16 Ark. 326; 2 Thomp. Neg. § 1234; Coller v. Knox, 222 Pa. 362, 23 L.R.A.(N.S.) 171, 71 Atl. 539; 1 Thomp. Neg. § 1297; Button v. Frink, 51 Conn. 342, 50 Am. Rep. 24; Van Houten v. Fleischmann, 48 N. Y. S. R. 763, 20 N. Y. Supp. 643; Rowe v. Such, 134 Cal. 573, 66 Pac. 862, 67 Pac. 760.

Ordinary care is all that was required of the defendant, and ordinary care does not require that all possible means for avoiding accidents might be employed. Missouri & K. Teleph. Co. v. Vandervort, 71 Kan. 101, 79 Pac. 1068, 6 Ann. Cas. 30; Cleghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Robinson v. Charles Wright & Co. 94 Mich. 283, 53 N. W. 938; Hinchman v. Pere Marquette R. Co. 136 Mich. 341, 65 L.R.A. 553, 99 N. W. 277; Snider v. Philadelphia Co. 54 W. Va. 149, 63 L.R.A. 896, 102 Am. St. Rep. 941, 46 S. E. 366, 1 Ann. Cas. 225; Manzoni v. Douglas, L. R. 6 Q. B. Div. 145, 50 L. J. Q. B. N. S. 289, 29 Week Rep. 425, 45 J. P. 391; Vincent v. Stine hour, 7 Vt. 62, 29 Am. Dec. 145; Unger v. 42nd Street & G. Street Ferry R. Co. 51 N. Y. 497; Trow v. Thomas, 70 Vt. 580, 41 Atl. 652; Lynch v. Kineth, 36 Wash. 368, 104 Am. St. Rep. 958, 78 Pac. 923; Cadwell v. Arnheim, 152 N. Y. 182, 46 N. E. 310, 1 Am. Neg. Rep. 481, Groom v. Kavanagh, 97 Mo. App. 362, 71 S. W. 362; Hammack

v. White, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676, 10 Week. Rep. 230.

The accident could not have been anticipated. Could defendant, in the exercise of ordinary care, have foreseen that the accident would happen and the injuries resultant therefrom? The defendant's negligence must have been the proximate cause of the injury to hold him liable. 1 Thomp. Neg. § 50; Allegheny v. Zimmerman, 95 Pa. 295, 40 Am. Rep. 649; Maloney v. Bishop, — Iowa, —, 2 L.R.A.(N.S.) 1188, 105 N. W. 407, 19 Am. Neg. Rep. 230; Earle v. Van Alstine, 8 Barb. 630; Reed v. Southern Exp. Co. 95 Ga. 108, 51 Am. St. Rep. 62, 22 S. E. 133; Meredith v. Reed, 26 Ind. 334, 1 Am. Neg. Cas. 283; Briscoe v. Alfrey, 61 Ark. 196, 30 L.R.A. 607, 54 Am. St. Rep. 203, 32 S. W. 505.

There was nothing to suggest to defendant the possibility of such an accident or injury. Plaintiff's loss is therefore *damnum absque injuria.* Metropolitan Casualty Ins. Co. v. Clark, 145 Wis. 181, 37 L.R.A.(N.S.) 717, 129 N. W. 1065, 3 N. C. C. A. 532; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237; Tooker v. Fowler & S. Co. 147 App. Div. 64, 132 N. Y. Supp. 213.

The stallion was not running at large. It escaped from defendant's restraint and against his will. Rev. Codes 1905, § 9408, Comp. Laws 1913, § 10195; Fallon v. O'Brien, 12 R. I. 518, 34 Am. Rep. 713, 1 Am. Neg. Cas. 344; Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, 1 Am. Neg. Cas. 341; Montgomery v. Breed, 34 Wis. 649; Coles v. Burns, 21 Hun, 246; Dresnall v. Raley, — Tex. Civ. App. —, 27 S. W. 200; Howrigan v. Bakersfield, 79 Vt. 249, 64 Atl. 1130, 9 Ann. Cas. 282.

W. L. Smith, for respondent.

Neither the trial judge nor this court determines questions of fact. The negligence in this case, as claimed, was a question of fact for the jury. The facts were in dispute. Mares v. Northern P. R. Co. 3 Dak. 336, 21 N. W. 5; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Welch v. Fargo & M. Street R. Co. 24 N. D. 463, 140 N. W. 680, and cases cited; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718.

Inferences of fact are to be deduced by the jury; and where there is

evidence from which the existence of facts sufficient to support the verdict might have been inferred, the verdict will not be disturbed. Illinois C. R. Co. v. Abernathey, 106 Tenn. 722, 62 S. W. 3; Muri v. White, 8 N. D. 59, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Nicoud v. Wagner, 106 Wis. 67, 81 N. W. 999.

BURKE, J. Defendant was the owner of a stallion which escaped from him in July, 1910, and inflicted injuries upon the plaintiff. Trial was had to a jury, which returned a verdict for plaintiff. Appellant makes nine assignments of error, but the first eight are so closely allied that they will be treated as one.

(1) At the close of the testimony of the plaintiff and again at the close of the entire case, defendant requested the court to direct a verdict in his favor upon the ground that there was an entire lack of evidence tending to show negligence upon the part of the defendant. This motion was followed by a motion for judgment notwithstanding the verdict, or for a new trial, based upon the same ground. Defendant purchased the stallion in June, 1910, from one Schmidt, who was a witness and testified as to the gentle disposition of the animal. Defendant testified to the same effect, but, of course, in order to be entitled to a directed verdict, the evidence must not be in dispute, and if there is any substantial conflict therein it is a question of fact for the jury. Defendant had just moved onto the place that summer, and had not time to fence his barnyard. His well was about 25 feet from the barn. Upon the morning in question, he led the stallion out to water and afterwards allowed him to exercise in a circle about him and later to roll in the dirt. He had no bridle upon the animal,—merely a halter, and while rolling, one of the front feet of the stallion passed over the halter strap, and when the animal regained his feet he gave a jump and dragged defendant for some time. The evidence is in conflict as to whether defendant let go of the halter strap before or after the nose strap of the halter broke. Defendant testifies as follows: "I took him out and watered him. After he got through, he laid down and rolled and he rolled over and by rolling over he got his front leg in this strap and when he got up he made a jump and then I could not hold him any longer. He ran,—he was feeling kind of good and ran around and he got started

on me, and I held on just as long as I could until my hands were all skinned and then I had to let loose."

Burt Whitney testified as follows: "I saw him take him out of the barn and lead him out to water and let the horse drink, and he led him away from the well and drove him around in a circle, and then the horse laid down to roll and in getting up he started off and Mr. Ritz tried to hold him, but the halter broke and then he could not hold him because there was only one strap around his neck and then he dragged Mr. Ritz, because he could not hold him."

As to the knowledge that defendant had of the disposition of the stallion there was a sharp conflict, defendant claiming that he believed the animal to be gentle, whereas other witnesses give testimony inconsistent with this belief. Young Whitney testified that he saw the stallion at Mr. Ritz's place in June, 1910, and saw Mr. Ritz handling him, and that at that time the horse acted severe and kicked at the witness and also struck at Mr. Ritz with his front feet. The same witness also testified that in June, 1910, Mr. Ritz had told him that the horse was a bad horse, and that he had to look out for him as he was liable to get hurt, but that, of course, a man could handle him with a bridle. We will not try to set out more of the testimony, but that quoted is sufficient, we think, to necessitate the submission to the jury of the question of the defendant's negligence, under all of the circumstances, in allowing the animal to escape.

(2) Appellant complains of the instructions of the court, and has singled out therefrom the following line: "You should take into consideration the lack of a fence about the barnyard." The entire paragraph of the instructions containing the above quoted sentence reads as follows: "There are some questions in this case which the jury must decide, and the jury will be the sole judge as to those questions. The first of these questions is, Was the defendant, at the time the stallion escaped, using that degree of care and precaution to prevent the escape of the stallion which a person of ordinary caution and prudence would have used under like circumstances? In deciding this question, you should take into consideration all the evidence of the case, as to the size and age of the stallion and the manner in which he had been used and handled, his disposition, character, and propensities, the kind and character of halter which was used, the lack of fence about the barnyard,

the purpose for which the stallion was brought out of the barn, the probable consequences of his escape, and any and all other facts and circumstances in evidence which in your opinion will aid you in determining whether the defendant used due care and precaution to prevent the escape of the stallion." This is a correct and impartial statement of the law applicable to the fact before the trial court. The question of negligence was one of fact for the jury. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359. The evidence is sufficient to support the verdict and there is no error in the instructions.

Judgment affirmed.

E. O. ELLISON v. CITY OF LA MOURE, a Municipal Corporation, and Henry Hodem, as Treasure of La Moure County.

(151 N. W. 988.)

Legislature — general powers — local improvements — assessed against property benefited — powers — delegation — municipalities.

1. The legislature, in exercise of its general powers, may direct, subject to constitutional restrictions, that the cost of local improvements be assessed upon property benefited, and this power may be delegated to municipalities.

Municipalities — delegation to — powers — legislature — property benefited — assessment — determination of — amount.

2. The legislature may also confer upon such municipalities the power to levy the special assessments upon property benefited to pay the cost of such improvements, and may leave to municipal officers the determination of what property is benefited, and hence liable to assessment, and the amount of such benefits.

Sewer — construction — police power — exercise of — legislative will.

3. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will.

Territorial district — to be taxed for local improvement — legislative discretion.

4. The determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion.

Legislature — powers — city council — sewers — sewer districts — necessity for.

5. In this state the legislature has conferred upon the city council the power to establish a system of sewerage, create sewer districts, and determine the necessity for the construction of sewers.

Special assessment commission — tribunal to determine benefits — sewer districts — city council — power to review.

6. The legislature has created the special assessment commission a tribunal to determine the benefits, if any, accruing to the various parcels of land within the sewer district, and reserved in the city council the power to review the action of the special assessment commission in the assessment of such benefits.

Assessment commission — appointment — statutory authority — acts — quasi judicial.

7. A special assessment commission appointed under statutory authority, and acting regularly in the discharge of its statutory duties, is exercising functions quasi judicial in character, when it assesses the benefits to lands in the sewer district.

Acts of special assessment commission — city council — power to review — quasi judicial.

8. A city council, in reviewing the action of the special assessment commission in assessing such benefits, is also exercising functions quasi judicial in their character.

Special assessment commission — city council — statutory requirements — compliance with — action final — fraud — equitable interference.

9. When the special assessment commission and city council have in all things proceeded in accordance with the statutory requirements, their action is final, after the assessment has been confirmed and approved by the city council, unless assailed for fraud or other ground for equitable interference.

Equitable action — time of bringing — when barred.

10. Such equitable action must be brought within six months after such assessment is approved by the city council, otherwise it is barred under the provisions of § 3715, Compiled Laws.

Opinion filed March 4, 1915. Rehearing denied March 27, 1915.

From a judgment of the District Court of La Moure County, *Coffey*, J. Plaintiff appeals.

Affirmed.

S. E. Ellsworth, for appellant.

The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assess-

ment. This principle cannot be departed from without taking private property for public use. Hanscom v. Omaha, 11 Neb. 37, 7 N. W. 739; Gilmore v. Hentig, 33 Kan. 156, 5 Pac. 788.

A lot owner whose property is not benefited by a sewer cannot be compelled to aid in its construction where he seasonably objects, and it is apparent that the attempt to assess benefits arises out of fraud or demonstrable mistake of fact. State ex rel. McKune v. District Ct. 90 Minn. 540, 97 N. W. 425; Taylor v. Palmer, 31 Cal. 254; Denver v. Kennedy, 33 Colo. 80, 80 Pac. 122, 467; Re Market Street, 49 Cal. 546; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187; Tide-water Co. v. Coster, 18 N. J. Eq. 528, 90 Am. Dec. 634.

Where a sewer is constructed in part across private property, so that it is inaccessible to the owner of a lot assessed for benefits without commission of a trespass upon such property, such assessment must have been made through fraud or demonstrable mistake of fact, and cannot be sustained. Hanscom v. Omaha, supra; State ex rel McKune v. District Ct. 90 Minn. 540, 97 N. W. 425; Sperry v. Flygare, 80 Minn. 325, 49 L.R.A. 757, 81 Am. St. Rep. 261, 83 N. W. 177.

The findings of the special assessment commission, and of the city council, are not final and conclusive where there is fraud or clear mistake of facts. Auditor General v. O'Neill, 143 Mich. 343, 106 N. W. 895; French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; 2 Dill. Mun. Corp. 4th ed. § 752; People ex rel. Griffin v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Iowa Pipe & Tile Co. v. Callanan, 125 Iowa, 358, 67 L.R.A. 408, 106 Am. St. Rep. 311, 101 N. W. 141, 3 Ann. Cas. 7; Mobile County v. Kimball, 102 U. S. 691, 703, 704, 26 L. ed. 238, 241, 242; Illinois C. R. Co. v. Decatur, 147 U. S. 190, 202, 37 L. ed. 132, 136, 13 Sup. Ct. Rep. 293; Bauman v. Ross, 167 U. S. 548, 589, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Williams v. Eggleston, 170 U. S. 304, 311, 42 L. ed. 1047, 1050, 18 Sup. Ct. Rep. 617; Norwood v. Baker, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The collection of a void tax may be enjoined without the tender of any sum alleged to be due. Power v. Larabee, 2 N. D. 141, 49 N. W. 724.

The statute of limitation does not apply to a proceeding brought to

enjoin the collection of a void tax. Ibid.; McKone v. Fargo, 24 N. D. 53, 138 N. W. 967; 28 Cyc. 1188; McCoy v. Anderson, 47 Mich. 505, 11 N. W. 290; New Haven v. Fair Haven & W. R. Co. 38 Conn. 422, 9 Am. Rep. 399; Williams v. Saginaw, 51 Mich. 120, 16 N. W. 260; Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600; Brennan v. Buffalo, 8 Misc. 178, 29 N. Y. Supp. 750.

W. J. Hughes, for respondent.

Action to set aside or to restrain the collection of special assessments must be commenced within six months after such special assessment is approved. Rev. Codes 1905, § 2790, Comp. Laws 1913, § 3715.

The assessment must be wholly void, and not merely voidable, to relieve plaintiff from the bar of the statute. McKone v. Fargo, 24 N. D. 53, 138 N. W. 697.

Plaintiff must show no benefit whatever or he has no cause of action. Ibid.

A party loses no right by a statute which compels him to sue promptly in such a case or be regarded as having abandoned his claim. Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; Minneapolis & St. L. R. Co. v. Lindquist, 119 Iowa, 144, 93 N. W. 103.

Special benefits are not to be determined with reference merely to the particular use to which the owner is devoting his property. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249.

There is no method provided for fixing benefits other than through the special assessment commission. This is a tribunal clothed with authority to pass upon the question of benefits, and where the statutory requirements are fully and fairly met, its decision is final. Ibid.; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 848.

CHRISTIANSON, J. This is an action to set aside a special assessment for the construction of a sewer in the city of La Moure, and to enjoin the defendants from enforcing the collection thereof. The defendants prevailed in the district court, and plaintiff appeals and asks for a trial *de novo.* The material facts are not in dispute. No attack is made upon the regularity of the proceedings of the special assessment commission or the city council, but, on the contrary, it is conceded that these proceedings were had in accordance with the provisions of the statutes relative thereto. The special assessment commission assessed

the amount of the benefit resulting to plaintiff's property at $920.52, and levied a special assessment against such property in the sum of $751.52. It is admitted that the plaintiff appeared before the special assessment commission at a meeting held under the provision of § 3726, Compiled Laws, and objected to the assessment; that such objections were overruled by the commission, and that thereafter, on or about March 18, 1911, the commission returned to and filed the assessment list in the office of the city auditor of said city of La Moure. The plaintiff appealed from the action of the commission, and thereafter, at a hearing before the city council held on April 26, 1911, under the provisions of § 3728 of the Compiled Laws, the plaintiff appeared and presented his protest against the assessment, but the city council, after such hearing, approved and confirmed the findings of the special assessment commission, including the assessment against plaintiff's property. Plaintiff took no further proceedings in the matter until he commenced this action on March 13, 1912,—almost eleven months after the assessment had been so confirmed and approved by the city council. There are no allegations in complaint that the special assessment commission or the city council were in any manner guilty of fraud, and plaintiff's counsel expressly admits that no such contention is made, but asserts that the assessment was so grossly excessive as to be fraudulent as a matter of law.

The property involved consists of a 40-acre tract of land situated within the city limits of the city of La Moure. It appears that a large portion, if not the whole, of this tract, was at one time platted, but the plat was subsequently vacated. This tract lies directly south of Fourth street in the city of La Moure. The sewer in question is laid in Fourth street along the entire north side of the property involved herein. Directly across the street from the tract involved are various lots and blocks, some improved and some unimproved. It is not contended that the amount assessed against plaintiff's property is greater or disproportionate to that assessed against the property abutting on the sewer on the other side of the street. The only buildings on the tract involved are the buildings of the plaintiff. It is conceded by counsel for the respective parties that at some prior date a special assessment was levied against the plaintiff's property for a very much greater sum than the one involved in this action, and that upon a hearing before the city council, it sustained plaintiff's protest and refused to approve the assessment as

then made by the special assessment commission, and at the request of the plaintiff and his counsel the entire assessment was referred back to the special assessment commission, and that the assessment involved herein was then subsequently made.

Plaintiff called as one of his witnesses a member of the special assessment commission, who testified that before the assessment in question was levied the commission carefully examined the various tracts of land and assessed the benefits accruing to each tract from the construction of the sewer.

It is well established that the legislature, in exercise of its general powers, may direct, subject of course to Constitutional restrictions, that the cost of local improvements be assessed upon property benefited, and may delegate this power to municipalities. It may also confer upon such municipalities the power to levy special assessments upon property benefited to pay the cost of such improvement, and may leave to the municipal officers the determination of what property is benefited, and hence liable to assessment. 28 Cyc. 1102 and 1103. The law may provide for hearing before the body which levies the assessment, and after such hearing may make the decision of that body conclusive. Although in imposing such assessments the municipal authorities may be acting somewhat in a judicial character, yet, the foundation of the right to assess exists in the taxing power, and it is not necessary that in imposing an assessment there must be a hearing before a court provided by the law in order to give validity to such assessment. Hibben v. Smith, 191 U. S. 310, 321, 48 L. ed. 195, 199, 24 Sup. Ct. Rep. 88. See also Chadwick v. Kelly, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175.

Section 3697 of the Compiled Laws authorizes the city council to establish a system of sewerage, and § 3698 grants the power to create sewer districts. In this case it is conceded that such system of sewerage was established and such sewer district created. It is also conceded that the property involved herein is all situated within the sewer district so created by the city council.

There is no claim in this case that the city authorities did not have jurisdiction to establish the sewer and do all things necessary for its construction. In Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750, it is said: "A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the

police power is exercised solely at the legislative will. So, also, the determination of a territorial district to be taxed for a local improvement is within the province of legislative discretion. Willard v. Presbury, 14 Wall. 676, 20 L. ed. 719; Spencer v. Merchant, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921."

The only question sought to be raised in this action is that the property was not benefited or that the assessment is excessive. The attack is made solely upon the correctness of the judgment exercised by the commission in making the assessment, and the council in approving the same, and not on account of any irregularity in the proceedings.

The law relative to the construction of drains, while not identical in its provisions, is analogous in principle, and in considering this question in the case of drains, this court in the case of Alstad v. Sim, 15 N. D. 629, 638, 109 N. W. 66, said: "It is claimed that assessments were made against land not benefited by the drain. The action of the commissioners is not subject to review on the question as to what lands are benefited. On that question the action of the board is conclusive, except when acting fraudulently. Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; State ex rel. Dorgan v. Fisk, 15 N. D. 219, 107 N. W. 191." See also Paulsen v. Portland, 149 U. S. 30, 41, 37 L. ed. 637, 641, 13 Sup. Ct. Rep. 750; Fallbrook Irri. Dist. v. Bradley, 164 U. S. 112, 174, 41 L. ed. 369, 394, 17 Sup. Ct. Rep. 56; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; French v. Barber Asphalt Paving Co. 181 U. S. 324, 338, 45 L. ed. 879, 887, 21 Sup. Ct. Rep. 625. "The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final." Hibben v. Smith, supra.

The legislature in this state vested the city council with power to determine the necessity of the improvements. Section 3704, Compiled Laws. And also vested in the special assessment commission the power to determine the amount of the benefits to various properties and the assessments to be levied. Comp. Laws, § 3726. And granted to the various parties the right of appeal from the action of the commission to the city council. Comp. Laws, § 3727. And granted to the city council the right to review the findings and correct mistakes or errors of judgment, if any, of the commission in levying and apportioning the assessment. Comp. Laws, § 3728. See also Robertson Lumber Co. v.

Grand Forks, 27 N. D. 556, 568, 47 N. W. 249. The special assessment commission is, in the first instance, vested with the power and authority to fix and determine, not only the benefits, but the amount of the assessment each property should be required to pay; and the power is reserved to the city council to review and correct the errors of judgment of the commission.

The special assessment commission is expressly created a tribunal to assess the benefits resulting to the different tracts of land. And the amount of such benefit, if any, is a question of fact to be determined by such commission, subject to review by the city council in the manner provided by the statute. These boards, in assessing such benefits, are acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power they are exercising functions judicial in their nature. The statute provides for no appeal from the action of the city council upon such assessment, nor for a review by any other body, court or tribunal.

And where the special assessment commission and the city council have in all things proceeded in accordance with the statutory requirements, their action and decision as to what property is benefited, and the amount of benefits resulting to the different tracts from the construction of the improvements, are final, and cannot be assailed in a court, except for fraud or other grounds justifying equitable interference. State ex rel. Dorgan v. Fisk, 15 N. D. 219, 226, 107 N. W. 191; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Rogers v. St. Paul, 22 Minn. 494; Carpenter v. St. Paul, 23 Minn. 232; State ex rel. Cunningham v. Board of Public Works, 27 Minn. 442, 8 N. W. 161; State ex rel. Cunningham v. District Ct. 29 Minn. 65, 11 N. W. 133.

Of course, in cases wherein the city authorities fail to comply with the statute in their proceedings, or concededly made an arbitrary assessment without regard to the benefits derived, the action of the city authorities is subject to review by the courts. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249; McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808.

In this state it is expressly provided that any action or proceeding to prevent or restrain the collection of any special assessment, or any part thereof, must be commenced within six months after the special assessment is approved. Comp. Laws, § 3175. This is a valid statutory

enactment. McKone v. Fargo, 24 N. D. 53, 138 N. W. 967. If any ground for equitable inference existed, plaintiff was required to institute his action within six months after the assessment was approved, otherwise the action is barred. In this case plaintiff invoked the jurisdiction of both the commission and the city council, and had actual notice of the time when the assessment was approved, and having failed to bring his action within the time provided by law, he cannot now be permitted to attack the assessment. We are satisfied that if plaintiff ever had any standing in a court, that his right of action became barred at the expiration of six months after the assessment was approved. The judgment of the trial court was correct, and is affirmed.

On Petition for Rehearing.

Appellant has filed a petition for rehearing wherein he apparently seeks to raise a Federal question. The petition, however, is not definite as to the nature of the Federal question raised, but suggests that appellant has been denied some right guaranteed to him by the 14th Amendment to the Constitution of the United States. There is no intimation as to whether it is contended that the plaintiff has been deprived of any privilege or immunity to which he is entitled as a citizen of the United States, or whether it is claimed that he has been deprived of property without due process of law, or been denied the equal protection of the laws of this state.

It has never been contended on this appeal, nor is it asserted in the petition for rehearing, that any of the statutes under which the proceedings were had are unconstitutional. On the contrary, their constitutionality is assumed. It is also conceded that the assessments in question were regularly levied by the officials of the defendant city after such proceedings had been had, as are required by the laws of this state. The appellant submitted his cause to the jurisdiction of the local tribunals,—the tribunals created by law for the purpose of determining the benefits to his property; and appellant, with full notice of all the proceedings so had, failed to institute his action within the six-month period provided by law for attacking a special assessment.

The Federal question now sought to be presented was not alleged in the complaint as one of the grounds for avoiding the assessment, nor

was it presented on the appeal to this court. The issues presented to the trial court and to this court were in effect that the city officers had failed to properly discharge their duties, as prescribed by the laws of this state. The question presented involved only the construction and application of the laws of this state. And now two years after the entry of the judgment in the court below, this Federal question is presented for the first time by the petition for rehearing. It seems obvious that this question should not be considered at this time. It comes too late when presented for the first time on a petition for rehearing. No court has ruled more emphatically on this proposition than the Supreme Court of the United States. Cockran Oil & Development Co. v. Arnaudet, 199 U. S. 182, 50 L. ed. 143, 26 Sup. Ct. Rep. 41; Fullerton v. Texas, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221. See also Brown v. Massachusetts, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; Boll v. Nebraska, 176 U. S. 83, 91, 44 L. ed. 382, 385, 20 Sup. Ct. Rep. 287; Simmerman v. Nebraska, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333. It is therefore unnecessary for this court to consider such question at this time.

The petition for a rehearing is denied.

DAVID LLOYD v. CITY OF LA MOURE, a Municipal Corporation, and Henry Hodem, as Treasurer of La Moure County.

(151 N. W. 991.)

This case is governed by the decision rendered in Ellison v. La Moure, ante, 43.

Opinion filed March 4, 1915. Rehearing denied.

From a judgment of the District Court of La Moure County, *Coffey*, J. Plaintiff appeals.

Affirmed.

Davis & Warren, of La Moure, North Dakota and *S. E. Ellsworth* of Jamestown, North Dakota, for appellant.

W. J. Hughes, of La Moure, North Dakota, for respondents.

CHRISTIANSON, J. This case was argued and submitted at the same time as Ellison v. La Moure, ante, 43, 151 N. W. 988. The purpose of this appeal is to obtain a trial *de novo* of this action. The defendants prevailed in the district court and plaintiff appeals from the judgment. The action is brought to set aside a special assessment for the construction of a sewer in the city of La Moure and to enjoin the defendants from enforcing the collection thereof. No attack is made upon the regularity of the proceedings of the special assessment commission of the city council, but it is conceded that these proceedings were had in strict accordance with the provisions of the statutes relative thereto. The special assessment commission assessed the amount of benefit resulting to plaintiff's property and levied a special assessment against the property, the amount of the special assessment being $127.63. The sewer construction in question is the same as that referred to in Ellison v. La Moure, supra. The plaintiff in this action also appeared before the special assessment commission and objected to the assessment, and appealed to the city council from the action of the commission and appeared before the city council at the meeting held on April 26, 1911, and presented his protest and objections against the assessment. After such hearing, the findings of the commission, including the assessment against the plaintiff's property, were approved and confirmed by the city council. No further proceedings were taken by the plaintiff until on March 18, 1912, when he commenced this action. It is not contended that the special assessment commission or the city council acted in a fraudulent manner. The allegations in the complaint are almost identical with the allegations in the complaint in the case of Ellison v. La Moure, supra. The property involved in this action is all platted and is all located within the sewer district, as established by the city council.

It will be observed that this case, so far as the principal and controlling facts are concerned, is identical with the case of Ellison v. La Moure, and exactly the same in principle. On the authority of that case, therefore, the judgment of the District Court is affirmed.

On Petition for Rehearing.

A joint petition for rehearing was presented in this case and the case of Ellison v. La Moure, ante, 43, 151 N. W. 988, and the reasons ad-

vanced for the denial of the petition in that case are applicable here. Rehearing denied.

ALBERTINA KRAUSE v. HERMAN KRAUSE and John R. Jones.

(151 N. W. 991.)

Express contract — meeting of minds — proof must be satisfactory — necessary elements must be established — implied contract — state of dealings.

1. To prove an express contract, one claiming thereunder must produce satisfactory evidence showing a meeting of the minds of the contracting parties as to the essential elements of such alleged agreement. If an implied contract is claimed, such a state of dealings must be shown that the law would imply such agreement. *Held:* The proofs in this case fall far short of what the plainest rules of evidence require.

Relatives — transactions between — fiduciary relations — wrong or fraud — presumptions — evidence.

2. While transactions between relatives or persons sustaining fiduciary relations will be closely scrutinized to see that no wrong is done, yet fraud, generally, is never presumed. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to cheat, hinder, delay, or defraud others. *Held* that under the evidence in this case no fraud was shown.

Mortgage — record owner of land — legal title — open possession — equitable rights — notice of — trust relation.

3. J., who takes a mortgage upon land from H., the record owner of the legal title to land, which at all times was in the open, notorious, adverse, and exclusive possession of A., the owner of the equitable title, is charged with notice of all the rights of said equitable owner as well as of the relation of trustee sustained by H. *Held,* J. having made no inquiry in this case, his mortgage is not a lien, since H. gave said mortgage in violation of his trust relation.

Trustee of land — right to sell same — liability — grantee — ratification — agency.

4. H., being a trustee of land, had no right to sell the same, and in his deed attempt to fix the liability for the payment of his own debt to secure which he had given a mortgage in violation of his trust, upon the grantee in such deed; especially is this true when dealing with the agent of the equitable owner of said land, who knew nothing about the unlawful mortgage, and

who refused to ratify the act of her agent in taking such deed; said agent claiming no personal interest in said land.

Owner of legal title — trustee — equitable owner — land sold by trustee — recovery.

5. The owner of the legal title to land who holds the same as trustee can be compelled to redeem the same to the equitable owner.

Equity — offer to do — deed — may demand — trust relation — must satisfy.

6. Plaintiff, having at all times offered to do equity, can now demand a deed to be given her by her trustee, when she complies with all the demands against her growing out of such trust relations.

Equities — adjustment of — district court — evidence — mortgage satisfied.

7. The lower court required to take evidence and adjust equities, when a deed from H., the trustee, must be given and the mortgage improperly given to J. by H., the trustee, shall be deemed satisfied.

Opinion filed March 8, 1915.

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

Action to have a trust relation with reference to real property declared and to require a reconveyance of such property to plaintiff, and to have a decree by which a mortgage shall be adjudged not a lien.

Reversed.

Statement by POLLOCK, District Judge.

This appeal brings up the entire record of the court below. It was tried under the so-called "Newman act," and a new trial in this court is asked. The record covers 311 pages. The facts are many. Having read the entire record and made a grouping of the facts, it is found that but few are in dispute. The mortgages, judgments, liens, deeds, contracts, and other written documents speak for themselves. Disputes which have arisen are more concerning inferences and conclusions to be drawn from conceded or proved facts, rather than with reference to the facts themselves. Certain evidence was offered to which timely and proper objections were interposed. For example, evidence with reference to judgments given long after the transaction in question occurred, and which could have no bearing upon the case, has not been considered. The material facts are as follows: For the purpose of convenience reference hereafter will be made to Herman Krause, the defendant, as

Herman; John R. Jones, as Jones; Albertina Krause's husband, as John. On October 16, 1899, one Kinney entered into a contract with the plaintiff and her husband whereby he agreed to sell for $1,800, to them, the southwest quarter of 32—130—49. Possession was delivered to plaintiff and John April, 1, 1900. January 1, 1901, plaintiff and her husband Kinney all accrued interest and $30.65 on principal. Subsequently Kinney transferred the land to one Hankinson. A new contract was thereupon made between Hankinson, plaintiff and her husband. It was practically a continuation of the Kinney contract. This contract was not introduced in evidence, and cannot be found. Subsequently, and after a part of the purchase price had been paid to Hankinson, plaintiff and her husband assigned the contract to the defendant Herman, a brother of plaintiff's husband. Prior to the time this assignment was made, certain judgments had been taken against plaintiff and her husband, in the following order:

One dated October 11, 1899, in favor of August Brummund for $103.70; one dated December 3, 1899, in favor of August Bublits for $46.70; one dated May 4, 1901, in favor of W. E. Purcell for $832.-35; and one dated August 28, 1901, in favor of Otto Latzke for $543.-70. The one to Brummund was thereafter paid. Execution was issued on the Latzke judgment August 30, 1901 and returned wholly satisfied November 26, 1901. The land was sold under the Purcell judgment, but sold to Otto Latzke a subsequent judgment creditor. At the time these judgments were taken and indeed at all times mentioned in the complaint, the plaintiff and her husband were in the open, adverse, and exclusive possession of the land, holding and using the same as their own, and appropriating to their own use all the crops raised thereon. In about the year 1902 Herman went to live at the home of the plaintiff and her husband, and continued to make his home with them until the year 1905, when he left. During most of the time that Herman was residing with plaintiff, his son, a boy ten or twelve years of age, resided there also. Sometime after Herman went to live at the home of plaintiff, plaintiff and her husband assigned to him the so-called Hankinson contract. There is a dispute as to the exact date of this assignment. During all this time Herman was himself the owner of a quarter section of land near Hankinson. After the contract was made with Hankinson, certain of the proceeds of the crops raised on the land were ap-

plied in payment of the purchase price, so that in December, 1905, there were due on the contract $1,218. In the month of December, 1905, plaintiff and Herman applied to one Louis Fligelman, agent of T. Brokken, for a loan of $1,500 to be secured by mortgage on the land in question and another quarter concededly owned by Herman. The proceeds of this loan were to be used in paying the balance due on the Hankinson contract. The loan was made; the amount due Hankinson paid; the deed of the land was executed to Herman; $1,218 were paid Hankinson; a part of the loan was used by John in the payment of his debts, and the balance of $112.15 were turned over to plaintiff, who used the same as her own funds. Some confusion seems to arise in argument whether the land was sold on the Latzke or the Purcell judgment, but the fact remains that Latze became the owner of the land under a sheriff's deed, and the judgments of Purcell and Latzke were satisfied. The evidence shows that the judgments in favor of Latzke and Purcell had been duly docketed, executions were issued, and the land sold thereunder prior to the assignment of the Hankinson contract. A settlement was thereafter made with Latzke, who deeded the land to Herman by a deed dated March 6, 1906. An evident estrangement grew up between the brothers, and Herman left John's home. Herman then put a second mortgage upon the land for $300, out of which he paid Latzke $100, appropriating the balance to his own use. On December 18, 1905, Herman mortgaged the land to defendant Jones for $125. This mortgage was paid out of the proceeds of the $300 loan above mentioned. Plaintiff and her husband resided on a homestead adjoining the quarter in question, and used it, together with their homestead, as one farm. With the exception of one year, plaintiff has paid the taxes on the land. For that one year Herman paid them. Herman never paid any interest on either the $1,500 or the $300 mortgage. It was paid each year by the plaintiff. The $300 mortgage was foreclosed and redeemed by the plaintiff at a cost of more than $500. January 7, 1907, while plaintiff and her husband were in possession of the land, she claiming it as her own, farming it in the usual way and appropriating to her own use the crops grown thereon, Herman, without plaintiff's knowledge or consent, mortgaged the land to defendant Jones to secure the payment of $2,361.84, made up largely of antecedent debts owing by Herman to Jones. Nothing has been paid on that mortgage, neither principal nor interest. Jones

never paid any of the taxes levied against the land, nor any interest on prior mortgages. In the fall of 1907 negotiations were had between plaintiff and Herman, through one Grawe, for a reconveyance of the land to the plaintiff; Grawe through such conveyance to have paid to him a debt of Herman's of about $100. At the time of these negotiations, plaintiff had no knowledge of the existence of the mortgage from Herman to Jones, securing the payment of $2,361.84; and as soon as she became aware of the same and that the deed to Grawe had been made subject thereto, she refused to accept the deed. Grawe has never filed this deed for record, never asserted any rights thereon, and testified on the trial that he did not now and never had claimed anything himself under the deed. The relations between plaintiff and her husband and Latzke were unfriendly. Defendant alleges as one defense that he purchased the plaintiff's interest in the land outright, taking the same for an amount claimed to be due him for wages. At the time the assignment was made to him, he insists there was due him between $500 and $1,000. There is no evidence, however, of any definite contract with reference to wages, the amount or character of the same, or the relations existing between the parties with reference thereto, except that a further claim was made by defendant that they farmed the land in common, while it is asserted upon the part of the plaintiff that Herman was simply living with them, could come and go as he pleased; was in no sense a hired man, and that the brothers were practically living in a state of mutual accommodation, each helping the other upon farms which they owned respectively. Defendant, as a second defense, insists that the assignment to Herman was also made in fraud of creditors and especially the creditor Latzke; among other things, calls attention to the fact that on January 5, 1902, plaintiff's husband filed a voluntary petition in bankruptcy, was adjudged a bankrupt, and discharged as such December 3, 1903. The judgment of Latzke was scheduled in that proceeding. Defendant claims that the assignment of the Hankinson contract was in March, 1902, but was dated back so as to appear to have been made before the Latzke judgment. The evidence as to dating back is very unsatisfactory, and was brought out from Herman by direct questions of his counsel. The fact is denied, and the testimony will hardly warrant the court in finding, that such assignment was dated back. Otto Latzke having bought the land, together with the homestead

under the Purcell judgment, action was brought against him by John to quiet his, John's title, as against the record of the sheriff's deed, so far as the homestead quarter was concerned; that the judgment of Purcell was not a lien upon his homestead; and such title was so quieted in John.

W. S. Lauder and *Purcell, Divet, & Perkins,* for appellant.

It is an elementary principle of law that a conveyance will be deemed fraudulent as to creditors only when it in some way operates to hinder, delay, or defraud such creditors.

Fraud consists of some unlawful conduct that operates prejudicially upon the rights of others. Bump, Fraud. Conv. p. 19; Bates v. Callender, 3 Dak. 259, 16 N. W. 506; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; Kvello v. Taylor, 5 N. D. 76, 63 N. W. 889; Dalrymple v. Security Improv. Co. 11 N. D. 65, 88 N. W. 1033; Kettleschlager v. Ferrick, 12 S. D. 455, 76 Am. St. Rep. 623, 81 N. W. 889; Commercial State Bank v. Kendall, 20 S. D. 314, 129 Am. St. Rep. 936, 106 N. W. 53.

Plaintiff's interest in the property was assigned to Herman, to be held by him *merely in trust, and not as his own.* The assignment, therefore would not and could not in law be fraudulent. Bump, Fraud. Conv. p. 453; Wait, Fraud. Conv. p. 404; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; Over v. Carolus, 171 Ill. 552, 49 N. E. 514; Halloran v. Halloran, 137 Ill. 100, 27 N. E. 82; Dyer v. Homer, 22 Pick. 253; Clemens v. Clemens, 28 Wis. 637, 9 Am. Rep. 520; Harvey v. Varney, 98 Mass. 118; Fairbanks v. Plackington, 9 Pick. 96; Drinkwater v. Drinkwater, 4 Mass. 354; Oriental Bank v. Haskins, 3 Met. 332, 37 Am. Dec. 140; Crowninshield v. Kittridge, 7 Met. 520; Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713; Andrews v. Marshall, 43 Me. 272; Moore v. Meek, 20 Ind. 484; Springer v. Drosch, 32 Ind. 486, 2 Am. Rep. 356; Hoeser v. Kraeka, 29 Tex. 450; Davis v. Ranson, 26 Ill. 105; Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670; Jones v. Rahilly, 16 Minn. 320, Gil. 283; Gowan v. Gowan, 30 Mo. 472; Smith v. 49 & 56 Quartz Min. Co. 14 Cal. 242; Brooks v. Martin, 2 Wall. 70, 17 L. ed. 732; Taylor v. Weld, 5 Mass. 109; Dale v. Harrison, 4 Bibb, 65; Clapp v. Tirrell, 20 Pick. 249; Gillespie v. Gillespie, 2 Bibb, 89;

Sherk v. Endress, 3 Watts & S. 255; Thompson v. Moore, 36 Me. 47; Burgett v. Burgett, 1 Ohio, 469, 13 Am. Dec. 634; Chapin v. Peace, 10 Conn. 69, 25 Am. Dec. 56; Randall v. Phillips, 3 Mason, 378, Fed. Cas. No. 11,555; Byrd v. Curlin, 1 Humph. 466; Crawford v. Osmun, 70 Mich. 561, 38 N. W. 573; Irwin v. Longsworth, 20 Ohio, 581; Ballard v. Jones, 6 Humph. 455; Still v. Buzzell, 60 Vt. 478, 12 Atl. 209.

Open, notorious and adverse possession of real property is notice to the world of every right or interest owned or held by the person in possession—legal or equitable—or whether such right is an interest in the land itself, or a mere right of possession or to rents and profits. Hedlin v. Lee, 2 N. D. 495, 131 N. W. 390; O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; 48 Century Dig. p. 775, § 540.

Dan R. Jones and *Wolfe & Schneller,* for respondents.

The original transfer of title to the land involved, to Herman Krause, was in fraud of the creditors of the plaintiff and her husband, John Krause. They transferred the land to Herman Krause with the expectation and the hope that he could and would settle certain claims against them for a less or reduced amount. This, in itself, was a fraud. Rev. Codes 1905, § 6637, Comp. Laws 1913, § 7220.

Latze's claim, the one they were trying to get settled at a reduced amount, was in *judgment,* and that judgment was *conclusive* of the amount of the debt and of its validity. Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Soly v. Aasen, 10 N. D. 108, 86 N. W. 108; Greer v. Wright, 52 Am. Dec. 111 and note, 6 Gratt. 154; Minnesota Thresher Mfg. Co. v. Schaack, 10 S. D. 511, 74 N. W. 445; Ferguson v. Kumler, 11 Minn. 104, Gil. 62; Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384; Burgess v. Simonson, 45 N. Y. 225; Goodnow v. Smith, 97 Mass. 69; Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 490.

It is immaterial that a grantee in a voluntary deed knew nothing of the fraud on the part of a grantor. Peek v. Peek, 77 Cal. 106, 1 L.R.A. 185, 11 Am. St. Rep. 244, 19 Pac. 227; Lee v. Figg, 37 Cal. 328, 99 Am. Dec. 271.

A conveyance with intent to defraud creditors is void though there may have been full and valuable consideration paid therefor. Swinford v. Rogers, 23 Cal. 233; Ridell v. Shirley, 5 Cal. 488; Salemonson v.

Thompson, 13 N. D. 182, 101 N. W. 320; Salisbury v. Burr, 114 Cal. 451, 46 Pac. 270; Lockren v. Rustan, 9 N. D. 43, 81 N. W. 60.

A conveyance, though void as to creditors, vests the legal title in the grantee, and a judgment against such grantee is a lien upon the land so conveyed. Faber v. Wagner, 10 N. D. 287, 86 N. W. 963; Kerr's Code (Cal.) § 3439, note 2; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043, 1 Ann. Cas. 626; Jones v. Jones, 20 S. D. 632, 108 N. W. 23; Sickman v. Lapsley, 15 Am. Dec. 599, note; Carll v. Emery, 1 L. R. A. 618, note; Bigby v. Warnock, 115 Ga. 385, 57 L.R.A. 754, 41 S. E. 622; Gilliland v. Fenn, 9 L.R.A. 415, note; Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670; McMinn v. Whelan, 27 Cal. 300; Robinson v. Blood, 64 Kan. 290, 67 Pac. 842; Durand v. Higgins, 67 Kan. 110, 72 Pac. 567; Poppe v. Poppe, 114 Mich. 649, 68 Am. St. Rep. 503, 72 N. W. 612; Massi v. Lavine, 139 Mich. 140, 102 N. W. 665; Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007; Flannery v. Coleman, 112 Ga. 648, 37 S. E. 878.

In such a case the title passes absolutely to the grantee or vendee, or to an innocent purchaser from such vendee. Robb v. Robb, — Tex. Civ. App. —, 41 S. W. 92; Shields v. Ord, — Tex. Civ. App. —, 51 S. W. 298; 9 Decen. Dig. Fraud. Conv. p. 1661, § 172; Brady v. Huber, 197 Ill. 291, 90 Am. St. Rep. 161, 64 N. E. 264; Edgell v. Smith, 50 W. Va. 349, 40 S. E. 402.

Where performance was impossible at the time of the suit, and plaintiff knew or was informed at that time of such impossibility, the court, on denying the equitable relief, will not retain the case for the purpose of awarding damages, but will leave him to his legal remedy. 36 Cyc. 747, and note 91; Knudtson v. Robinson, 18 N. D. 12, 118 N. W. 1051.

A grantee accepting a conveyance of land by a deed describing certain mortgages thereon, and expressly declaring that the conveyance was made subject thereto, is estopped thereby to question the validity of the mortgage. American Waterworks Co. v. Farmers Loan & T. Co. 20 C. C. A. 133, 36 U. S. App. 563, 73 Fed. 956; Freeman v. Auld, 44 N. Y. 50; De Wolf v. Johnson, 10 Wheat. 367, 6 L. ed. 343; Calkins v. Copley, 29 Minn. 471, 13 N. W. 904; Jones, Mortg. §§ 744, 1491, and cases cited; 35 Century Dig. title, Mortgages, col. 1310, § 773; 14 Decen. Dig. title Mortgages, p. 272, § 278.

A principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency. Rev. Codes 1905, Sec. 5788, Comp. Laws 1913, § 6356; Anderson v. First Nat. Bank, 4 N. D. 182, 59 N. W. 1029; Mechem Agency, §§ 314, 315, 484; National Bank v. Merchants' Nat. Bank, 91 U. S. 92, 23 L. ed. 208; 16 Decen. Dig. § 145 (2) p. 1093, notes a, e,–i, and r; 40 Century Dig. Principal & Agent, 159, note e; Firestone v. Firestone, 49 Ala. 128.

POLLOCK, District Judge (after stating the facts as above). A vast difference exists between a *fact* and an *inference*. That John and wife may have deeded the land to Herman is a fact; the inference to be drawn from the act must be determined by the surrounding circumstances, coupled with the act. This is a trite statement, but one to be kept in mind in discussing the evidence in this case. The innumerable facts disclosed by the record are at first somewhat confusing, but if read accurately present very few conflicts. When discussing inferences, however, counsel became involved in hopeless contradictions. Two or three questions settled at the outset will, we think, tend to clarify the atmosphere. They refer to the character of the transactions between plaintiff, her husband, and Herman; the nature of the mortgage to Jones, and plaintiff's knowledge with reference to such transactions and mortgage.

(1) Did Herman take this land as security or payment for a debt? To substantiate this view of the case it would be incumbent upon defendant to show that there was a contract, either express or implied, entered into between the parties, before such a condition could follow. The testimony of Herman upon that point, if considering his claim that a debt was owing by implication for services performed, falls far short of what the plainest rules of evidence require of parties to support the existence of a contract, denied as it is in this case. No evidence appears as to the meeting of the minds of the parties upon the question of time of service; amounts paid or to be paid; efforts at settlement; demand for payment; in fact nothing beyond a guess or statement on Herman's part that there were owing him $500 to $1,000; while the evidence does show much to contradict the idea of there having been established a relationship of the parties, other than what frequently is found to exist between relatives, situated as Herman was at the time, being unmarried, and having the care of a boy upon his hands, and having land of his own

to cultivate. The fact that he had land elsewhere, and that there seemed to be a particularly friendly relation existing between the brothers at the time, negatives in a large degree Herman's claim that he had a contract for service, either express or implied. Indeed we are of the opinion that this contention is hardly the serious one made by the defendant. It would be wholly inconsistent with the other theory upon which he places so much reliance, and which is involved in the next proposition to which we will give our attention. If there is any unsatisfied obligation existing between Herman and his brother, that can be adjusted between them at a proper time and place. It is clear from the entire record in this case that the transfer of the property to Herman was not made in payment of or given as security for any such alleged obligation.

(2) Did the plaintiff and her husband assign the Hankinson contract to Herman with intent to hinder, delay or defraud their creditors? It perhaps will be conceded, as claimed by appellant, that "fraud consists of unlawful conduct that operates prejudicially upon the rights of others. To defraud is to withhold from another that which is justly due him, or to deprive him of a right by deception or artifice. A fraud upon the creditors consists in the intention to prevent them from recovering their just debts, by an act which withdraws the property of the debtor from their reach. There can be no actual fraud without a dishonest intent; but fraud does not consist in mere intent, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially on the rights of others, and is so intended." Bump, Fraud. Conv. p. 19.

Doubtless the general rule will also be conceded that fraud is never presumed, but must be affirmatively proved. On the contrary the presumption, if any, is in favor of innocence, and the burden falls on him who asserts fraud, to establish it by proving every material element constituting such fraud by a preponderance of the evidence. 20 Cyc. 108. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to disturb, cheat, hinder, delay, or defraud others; where a transaction called in question is equally capable of two constructions—one that is fair and honest and one that is dishonest—then the law is that the fair and honest construction must prevail and the transaction called in question must be presumed to be fair and honest. Schroeder v. Walsh, 120 Ill. 411, 11 N. E. 70; Hill

v. Reifsnider, 46 Md. 555; Tompkins v. Nichols, 53 Ala. 197. It is, however, true that when persons are in a fiduciary relation with each other, or are relatives, the law requires their acts to be scrutinized very closely to see that no wrong has been done.

There seems to be a dispute in the evidence as to when plaintiff made assignment of the Hankinson contract to Herman, whether before or after the sheriff's deed to Latzke, which was given January 16, 1903, but there is no controversy that it was made after the sale on the judgment, January 13, 1902, which ripened into that deed. The sheriff's deed purports to convey all title and interest of "John Krause and Albertina Krause had on the 18th day of October, A. D. 1901, or at any time thereafter, or now has, in said land." While under the rule in the case of Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976, the lien of the judgment would not attach to the equitable interest of plaintiff, yet, after the levy and sale, it would, and Latzke's rights at that time became fixed. Neither does it matter in this case whether Herman took his paramount legal title under the deed from Hankinson or the sheriff, his relation to the land as we conclude equitably considered must be determined by his agreements with plaintiff and her husband. Facing the question then, what evidence is there of fraud? It would seem that there is a vast distinction between *paying* and *preventing the payment* of what is owing another. It appears from the evidence that plaintiff, her husband, and Herman went to the office of one Gene Schuler, who acted as the scrivener, and while there, had a conversation with reference to the matter of this transaction.

Plaintiff gives her version of the conversation as follows:

Q. Just state what was said and why you made this assignment,—all about it?

A. I told Gene Schuler that I gave the contract to Herman Krause to settle with Otto Latzke, and make a deal with him about the trouble we had together so I could settle with him, and after he had settled for us he shall give me that back, and Schuler drawed the paper and we signed it, and then he asked him if he wanted to pay so we get an alright settlement between me and Krause and him, and if it is so that I gave John that land back again, and he says "I will."

Q. And what did Herman say to you?

A. He says, "I will."

Upon redirect examination Mrs. Krause testified:

I am Krause, John Krause my husband, and Herman was there, and I tell after we have this fixed up so he would make settlement with him, and he shall give that piece of land back to me, and he says he will.

Q. Who bought this land first?

A. I do.

Q. This is the contract, exhibit "C," is it not? (Exhibit "C" is the Kinney contract.)

A. Yes, that is it.

Q. Your name appears first in this?

A. My name.

Q. Did you make the bargain for the land?

A. Yes, I make the bargain.

John Krause testified upon redirect examination:

I talked it over with him (Herman) in Schuler's office.

Q. Who was the land to go back to?

A. To Mrs. Krause.

Q. That is your wife?

A. That is my wife.

While speaking in broken English, this statement is fully corroborated by the conceded testimony of the scrivener, Gene Schuler. All this is, however, denied by Herman. Under this evidence and that of plaintiff's financial condition, respondent insists there is proof positive that the parties were engaged in a scheme to defraud Latzke. Respondent evidently *infers* fraud. Is he justified in so doing? We think not. The most that can be claimed is that the parties were trying to compound their debt,—a debt which they felt was too large,—but concededly fixed by reason of the judgment and sale of the property to Latzke. So far as they knew, Latzke owned the property. They wanted to get it back. By reason of their ignorance, they went about the matter in a somewhat blundering fashion. However, they put no restrictions on Herman as to the amount he should pay, and they showed their good faith by putting into his hands the assignment which made possible the accomplishment of their purpose. It was the attempt of unlettered per-

sons to pay a claim, which, though onerous, yet must be borne, if they would free their land from a fixed encumbrance. Herman knew this. His every dealing with the land thereafter, with Latzke, Jones, Grawe, or anyone else, must, so far as he is concerned, be charged with such knowledge. He was a trustee. Good morals, safety in business, faith in human nature, all of which underlie and make possible honorable dealings between man and man, conspire to demand the highest good faith upon Herman's part. He was not dealing with his own. The property belonged to another. Without consent he was powerless to convey or encumber it.

It is difficult to conceive how it would be possible to defraud Latzke, when, by reason of his sheriff's certificate, he had the very weapon in his hands, for his own protection. There is no evidence that Herman was requested to or did in any way misrepresent to Latzke the true situation of affairs, and his dealings with him were in perfect harmony with the thought of perfecting an honorable settlement and paying the debt then owing. How could Latzke be inveigled into losing any of his rights, assisted, as he was, by astute counsel ever ready to protect his interests? It seems hard for us to imagine how a person with no more ability than is possessed by Herman, as shown by his testimony in this record, could lead astray or fraudulently impose upon the credulity of a man who held a sheriff's certificate to a piece of land, by which he could demand every cent coming to him. We might stop at this point, and conclude, as we must, that the assignment was not given for the purpose of hindering or in any manner delaying the creditor Latzke or anyone else in securing their just and legal obligations. If, however, we add to those acts the methods by which the parties themselves apparently construed their contract relations, we are bound to conclude that a trust relation, and that only was imposed upon Herman in the making of the Hankinson assignment and deed and taking the Latzke deed. The continuous possession and use of the land by the plaintiff and her husband; the uninterrupted enjoyment of the same; the making of contracts relative thereto by the plaintiff; the borrowing of money, and especially from Fligelman; the paying of a portion of the same to Hankinson; the payment of a portion of John's obligations; the receipt of a part of the overplus by plaintiff and its nonretention by Herman; the redemption from foreclosure sale of the $300 mortgage by plaintiff; the

payment of a large amount of interest on mortgage loans; the payment of taxes by plaintiff; the utter absence of any acts upon Herman's part indicating ownership,—all combine to show that the parties, in dealing with each other and the land, proceeded upon the theory that plaintiff was in fact the owner of the same. There being, therefore, no fraud practised upon Latzke or anyone else, and there having existed only a trust relation between plaintiff and Herman, it would now be contrary to the plainest principles of equity to permit Herman to take advantage of his fiduciary relation, and burden the land with an additional encumbrance which would practically exhaust all interest which plaintiff has in the land, unless the rights of innocent parties became fixed by reason of the record title concededly being in Herman.

(3) Is the Jones mortgage a lien upon this land? The evidence is uncontradicted that plaintiff has been in open, notorious, adverse, hostile, and exclusive possession of the land in question since the same was purchased from Mr. Kinney in 1899. No one else has ever been in possession of it or any part thereof. Mr. Jones in his testimony concedes that he did not go and examine the land, and stood purely and simply upon his faith in Herman and the record title. It is elementary that one dealing with property, either as a purchaser or mortgagee, which property is in the possession of a third person, deals with it at his peril. An open, notorious, and adverse possession of real property is notice to the world of every right or interest owned or held by the person in possession, whether such right be legal or equitable. O'Toole v. Omlie, 8 N. D. 444, 79 N. W. 849; Hedlin v. Lee, 21 N. D. 495, 131 N. W. 390; 48 Century Dig. 765. In taking the mortgage Mr. Jones was thereby charged with the notice of plaintiff's possession and every right she had to the land. Had he inquired of the plaintiff as to the character of her possession, knowledge would have immediately come to him that Herman did not own the land. He has, therefore, secured a mortgage upon land not owned by Herman, the mortgagor, and as such it would not constitute a lien upon the land.

(4) It is contended, however, that plaintiff is bound to pay Jones's mortgage by reason of the deed from Herman to Grawe. It is claimed upon the part of the defendant Jones that the plaintiff constituted Grawe as her agent to secure the title from Herman, and authorized him to agree to pay the Jones mortgage, and therefore she cannot now be heard,

in view of the evidence relative to that transaction, to be relieved from the contract alleged to have been entered into by her agent, Grawe. The relation of the parties to this transaction should be constantly kept in mind. Up to the point of time when this alleged contract was made, the parties are in the situation, equitably, of the plaintiff being the owner of the land with no mortgage to Jones thereon. An analysis of the facts show that all parties, with the possible exception of Grawe, had, or by reason of the possession of the plaintiff were presumed to have, full knowledge of the trust relation existing between Herman and plaintiff; so that while there was as a matter of record a mortgage running to Jones, yet, as a matter of substance and of fact, the mortgage did not exist as a lien or binding obligation of any sort upon the land in question or upon the plaintiff. It further appears from the undisputed evidence that at the time that plaintiff talked with Grawe, either through Forbes or by herself, over the 'phone, that she had no knowledge of the Jones mortgage, so that when Grawe, her agent, attempted to take the title from Herman, there was not in equity any such mortgage, and there was no knowledge upon the part of the plaintiff of the existence of the written paper and the record thereof in the form of a mortgage. She was not under any obligation to go and examine the record. She had a right to assume that Herman had been faithful to his trust. Herman knew, or is chargeable with knowledge, of these facts. Jones was not a party to the transaction in any form. There is some dispute in the evidence as to what authority was given to Grawe. The talk was over the 'phone, upon the one part by the plaintiff, who knew not of the existence of the Jones mortgage, and upon the other part by one who was simply intent upon collecting his own small obligation of a little over $100. Mr. Forbes, who probably did some of the talking, and was at least present when the talk took place, gives no evidence with reference to what was said. His silence upon this question is corroborative of the plaintiff's contention that she did not authorize the payment of any mortgage to Jones. It is difficult for us to conclude that she gave any authority whatever to Grawe to agree to pay a mortgage she did not know was in existence, which she did not owe, and which, when discovered, she at once insisted she could not and would not pay. She, it is true, used the expression, "Back out," in referring to her acceptance of the deed, but it is clear from the reading of the entire record that

what she meant to say, and what the import of her words and conduct clearly implied, was that she had not authorized the acceptance of the Jones mortgage, and would not affirm any unauthorized act of Grawe agreeing to receive the land subject to that encumbrance. Herman is in no position to claim any wrong done him, because he is charged with the notice of his relation to the land. His attempted participation in a fraud upon the plaintiff by seeking to burden the land with a debt of his own in which she was not interested, or for which she was not responsible in any manner whatsoever, could not bind her. This being true, the plaintiff is not responsible by reason of the unauthorized acceptance by Grawe of a deed from Herman. The testimony of Grawe is very clear; that his situation is not altered by reason of receiving the deed from Herman. The giving of a receipt is only prima facie evidence of a payment. If, as a matter of fact, Herman did not pay his debt to Grawe, and he could not by the transaction referred to, then he still owes Grawe the amount of his debt, whatever that may be, and Grawe is in the attitude of having received a piece of paper which does not create any obligation upon him because of the fact that the party with whom he contracted with reference to the obligation could not, in the very nature of things, bind Grawe or his assigns to pay something which did not in fact exist, that is to say, if there was any obligation whatever running from Grawe to Herman or to Jones, it was to pay a lien which was upon this land in suit; and we hold that there was no such lien, and hence, if there was any obligation, it was to pay something that did not exist, which in itself would create no liability whatsoever.

(5) It is urged that Herman cannot be compelled to give a deed to something which he does not own and the legal title of which is not in him. There should be no confusion with reference to this matter. We hold that the deed from Herman to Grawe did not pass any title to him whatsoever, and that, therefore, the legal title to the land still remains in Herman, and he should be compelled to quitclaim all interest he may have in the land to plaintiff, upon her adjusting the equities hereinafter referred to. We hold that the trust relation was settled in Schuler's office, and by the agreement of John, Herman, and plaintiff the legal title was to be returned to plaintiff alone. We are of the opinion that the deed to Grawe was only nominal in its character, and the passing of the title from Herman to Grawe and Grawe to the plaintiff was simply as a

matter of convenience, not as a fraud upon anyone, and plaintiff's refusing to accept the same would leave the matter in the same situation as though Herman had offered to deed directly to plaintiff and she had refused to accept it with the Jones mortgage feature therein. If Grawe had been a party to this action, we would have entered a decree which would adjust any apparent rights which Grawe might have had in said land. That, however, can be undoubtedly corrected by securing a quitclaim deed from Grawe, because under his testimony, as shown in this record, he claims no interest whatsoever in the land, and upon his testimony, together with the surrounding circumstances, it seems clear that his relation to the controversy is fixed and determined as against any possible personal interest in the land, or liability which might have been incurred by reason of taking said deed in its present form.

(6) This being an equitable proceeding, before the defendant Herman can be required to execute a deed to the plaintiff, she must of course do equity. This she has, at all times, in her pleadings and in the trial of this action, expressed a perfect willingness to do; and the decree to be entered in this case must be conditioned that Herman be reimbursed for any and all moneys he has himself paid out on account of his trust, and that he be relieved from further liability on the two mortgages,—the $1,500 mortgage and the $300 mortgage,—except as to those portions thereof retained by him. The land conceded to be Herman's must be released from the lien of the $1,500 mortgage. This was the mortgage given to Brokken and which included some of Herman's land as well as the quarter section here in suit.

(7) It is therefore ordered that the decision of the lower court be, and the same is, in all things reversed and the district court is required to enter a judgment to that effect. Further, that court shall require the parties to appear before him, make an account of all the moneys Herman has himself received and paid out on account of the transactions involved in the trust relation, if any, as well as the mortgages above referred to, and plaintiff must present proper releases to Herman's land from the $1,500 mortgage. When this is done Herman is required immediately and within three days to give a quitclaim deed to plaintiff, conveying all of his interest in the land in question. It being distinctly understood that this accounting referred to has reference only to the moneys involved in the trust relation, and does not refer to any alleged

debts owing to Herman by reason of the working upon or in connection with the premises here in suit or elsewhere; or growing out of any supposed contract relations with reference to farming the land with John or plaintiff; it being held that plaintiff, or she and her husband together (except as John's interest was affected by the trust agreement), were the owners of this land during all the times, and were entitled to all of the proceeds of the crops grown thereon. It is further directed that if defendant Herman fails to give the quitclaim deed as required herein immediately upon the entering of the decree in the lower court, or within three days thereafter, that this decree shall stand in the place of such deed, and its record in the office of the register of deeds shall operate to make a transfer from the said Herman to the plaintiff herein, as fully as though he did in fact execute and deliver the deed thus required of him to be made and delivered.

It is further decreed that the so-called Jones mortgage of $2,361.84 is not a lien upon the premises in question, and that by this judgment the said land is freed from all possible rights said Jones or anyone claiming under him may have under said mortgage, and this judgment shall operate as full satisfaction thereof. Plaintiff to have costs in both courts.

Goss, J., did not sit, nor did he take part in this decision, Honorable Chas. A. Pollock, Judge District Court Third Judicial District, sitting in his stead.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. FRED L. ALGER.

(152 N. W. 121.)

Threshing engine — written order for purchase — delivery — trial de novo.

Defendant gave written order for a 20 H. P. International, Type C, tractor engine. Delivery was made by plaintiff in March, 1910. Defendant used engine until October, same year, when he claimed it was not the engine ordered, because it would not show 20-horse power on drawbar. Upon trial *de novo*, this court holds with plaintiff.

Opinion filed March 16, 1915.

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

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

The meaning of a contract is not evident when, if looking at the subject-matter, it is so unreasonable as to appear unlikely that the parties so intended. To enable one to read the contract in the light of the subject-matter and the effects and consequences, evidence of facts and circumstances, not mere conversations, leading up to and concurrent with the making of the contract, is often necessary. Oral testimony was admissible to show the intention of all parties. Kleuter v. Joseph Schlitz Brewing Co. 143 Wis. 347, 32 L.R.A.(N.S.) 383, 128 N. W. 43; 2 Jones, Ev. § 460; 2 Parsons, Contr. 500; 4 Wigmore, Ev. § 2465; 17 Cyc. 662, 668, 682, 685; 35 Cyc. 120; Barnett v. Hagan, 18 Idaho, 104, 108 Pac. 743; Miller v. Wiggins, 227 Pa. 564, 76 Atl. 711, 19 Ann. Cas. 942; San Miguel Consol. Gold Min. Co. v. Stubbs, 38 Colo. 359, 90 Pac. 842; Bache v. Coppes, Z. & M. Co. 35 Ind. App. 351, 111 Am. St. Rep. 171, 74 N. E. 41; Miller v. Tanners' Supply Co. 150 Mich 292, 114 N. W. 61; Viernow v. Carthage, 139 Mo. App. 276, 123 S. W. 67; Buster Brown Co. v. North-Mehornay Furniture Co. 140 Mo. App. 707, 126 S. W. 988; Meyer v. Everett Pulp & Paper Co. 113 C. C. A. 643, 193 Fed. 857; Willis v. Jarrett Constr. Co. 152 N. C. 100, 67 S. E. 265; Dean v. Gibson, 34 Tex. Civ. App. 508, 79 S. W. 363; O'Neill v. Ogden Aerie, F. O. E. 32 Utah, 162, 89 Pac. 464; Pine Beach Invest. Corp. v. Columbia Amusement Co. 106 Va. 810, 56 S. E. 822; Parks v. Elmore, 59 Wash. 584, 110 Pac. 381; New England Dressed Meat & Wool Co. v. Standard Worsted Co. 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. 112; Ross v. Frank, 13 Cal. App. 88, 108 Pac. 1025; McKeefrey v. Dimmick, 166 Fed. 370; 9 Cyc. 578; 2 Elliott, Contr. § 1531; Fearnley v. Fearnley, 44 Colo. 417, 98 Pac. 821; MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co. 156 Mich. 11, 120 N. W. 26.

The order and contract are clearly ambiguous and are open to several different meanings. They are too indefinite. Webster's New Int. Dict. p. 1525; 38 Cyc. 670; Toedtemeier v. Clackamas County, 34 Or. 66, 54 Pac. 954.

The vendor must deliver the subject-matter of the sale. The thing that both parties intended. His contract is not satisfied with less. He

must comply with his full contract. Mechem, Sales, §§ 1154, 1210, 1333, 1334; Northwestern Cordage Co. v. Rice, 5 N. D. 432, 57 Am. St. Rep. 563, 67 N. W. 298; Columbian Iron Works & D. D. Co. v. Douglas, 84 Md. 44, 33 L.R.A. 103, 57 Am. St. Rep. 362, 34 Atl. 1118; King v. Rochester, 67 N. H. 310, 39 Atl. 256; National Water Purifying Co. v. New Orleans Waterworks Co. 48 La. Ann. 773, 19 So. 865; Webster-Gruber Marble Co. v. Dryden, 90 Iowa, 37, 48 Am. St. Rep. 417, 57 N. W. 637; Huson Ice & Mach. Works v. Bland, 167 Ala. 391, 52 So. 445; Standard Oil Co. v. Weeks, 167 Ala. 403, 52 So. 443; Pruitt Commission Co. v. Dispatch Co. — Tex. Civ. App. —, 129 S. W. 1150; Birdsall v. Coon, 157 Mo. App. 439, 139 S. W. 243; Mette & K. Distilling Co. v. Lowrey, 39 Mont. 124, 101 Pac. 966; Springfield Shingle Co. v. Edgecomb Mill Co. 52 Wash. 620, 35 L.R.A.(N.S.) 258, 101 Pac. 233; Morse v. Moore, 83 Me. 473, 13 L.R.A. 224, 23 Am. St. Rep. 783, 22 Atl. 362; Pope v. Allis, 115 U. S. 363, 29 L. ed. 393, 6 Sup. Ct. Rep. 69; Avil Pub. Co. v. Bradford, 121 Mo. App. 577, 97 S. W. 238; Mine Supply Co. v. Columbia Min. Co. 48 Or. 391, 86 Pac. 789.

If the defendant had voluntarily retained and accepted the substituted engine, his rights would be controlled by the contract as construed by the courts of this state, and he could recoup or counterclaim damages as allowed thereby. 35 Cyc. 431; 2 Mechem, Sales, 1392, 1393; Northwestern Cordage Co. v. Rice, 5 N. D. 432, 57 Am. St. Rep. 563, 67 N. W. 298; Watson v. Bigelow Co. 77 Conn. 124, 58 Atl. 741; Morse v. Moore, 83 Me. 473, 13 L.R.A. 224, 23 Am. St. Rep. 783, 22 Atl. 362; Springfield Shingle Co. v. Edgecomb Mill Co. 52 Wash. 620, 35 L.R.A.(N.S.) 258, 101 Pac. 233; Mine Supply Co. v. Columbia Min. Co. 48 Or. 391, 86 Pac. 789; 35 Cyc. 430.

Scott Rex, for respondents.

The rule that parol evidence is inadmissible to alter or vary a written contract has uniformly been held and followed by this court in this class of cases. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Reeves v. Corrigan, 3 N. D. 415, 57 N. W. 80; Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903.

This case does not come within any exception to such rule. The parties here deliberately put their contract into a writing which is com-

plete in itself, and is in such language and plain terms as import a complete legal obligation, without ambiguity or uncertainty. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104, 28 L.R.A. 53, 39 Pac. 1035; Seitz v. Brewer's Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; Richardson v. Carlis, 26 S. D. 202, 128 N. W. 168, Ann. Cas. 1913B, 47; Kleeb v. Bard, 7 Wash. 41, 34 Pac. 138; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903.

Where, in a contract of sale, the description of the chattel is followed by express words of warranty, the warranty does not extend to the descriptive recital. Ehrsam v. Brown, 76 Kan. 206, 15 L.R.A.(N.S.) 877, 91 Pac. 179; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co. 101 Me. 114, 6 L.R.A.(N.S.) 180, 63 Atl. 555; Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co. 66 Minn. 156, 68 N. W. 854; Holt v. Sims, 94 Minn. 157, 102 N. W. 386; Fuchs & L. Mfg. Co. v. R. J. Kittredge & Co. 242 Ill. 88, 89 N. E. 723; Buckstaff v. Russell, 25 C. C. A. 129, 49 U. S. App. 253, 79 Fed. 611; Lower v. Hickman, 80 Ark. 505, 97 S. W. 681; Reeves & Co. v. Byers, 155 Ind. 535, 58 N. E. 713; 35 Cyc. 381.

Stipulations in contracts such as above quoted for notice to the seller of defects are quite uniformly held to be valid and enforceable. J. I. Case Threshing Mach. Co. v. Vennum, 4 Dak. 92, 23 N. W. 563; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; Hanson v. Lindstrom, 15 N. D. 584, 108 N. W. 798; Aultman & T. Co. v. Gunderson, 6 S. D. 226, 55 Am. St. Rep. 837, 60 N. W. 859; Larson v. Minneapolis Threshing Mach. Co. 92 Minn. 62, 99 N. W. 623; Heagney v. J. I. Case Threshing Mach. Co. 4 Neb. (Unof.) 745, 96 N. W. 175; Nichols & S. Co. v. Dallier, 23 N. D. 532, 137 N. W. 570; Kingman v. Watson, 97 Wis. 596, 73 N. W. 438; Fox v. Wilkinson, 133 Wis. 337, 14 L.R.A.(N.S.) 1107, 113 N. W. 669; Murphy v. Russell, 8 Idaho, 133, 67 Pac. 421; Palmer v. Banfield, 86 Wis. 441, 56 N. W. 1090; Nichols v. Knowles, 31 Minn. 489, 18 N. W. 413; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145.

One cannot, except in the case of a breach of warranty, retain and use the property as his own and still recoup damages. The respondent has complied with the contract in every particular, and it is not necessary to speculate on what the rights of the parties might have been if it had not done so. American Theatre Co. v. Siegel, C. & Co. 4 L.R.A. (N.S.) 1167, and case note, 221 Ill. 145, 77 N. E. 588; Fox v. Wilkinson, 133 Wis. 337, 14 L.R.A.(N.S.) 1107, 113 N. W. 669; Springfield Shingle Co. v. Edgecomb Mill Co. 35 L.R.A.(N.S.) 258, note VII-b, pp. 280 et seq; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Zipp Mfg. Co. v. Pastorino, 120 Wis. 176, 97 N. W. 904; Cream City Glass Co. v. Friedlander, 84 Wis. 53, 21 L.R.A. 135, 36 Am. St. Rep. 895, 54 N. W. 28; Walter A. Wood Mowing & Reaping Mach. Co. v. Calvert, 89 Wis. 640, 62 N. W. 532; Springfield Engine Stop Co. v. Sharp, 184 Mass. 266, 68 N. E. 224; DeKalb Implement Works v. White, 59 Ill. App. 171; Noel v. Kauffman Buggy Co. 32 Ky. L. Rep. 576, 106 S. W. 237; Chambers v. Lancaster, 160 N. Y. 342, 54 N. E. 707; Fred W. Wolf Co. v. Monarch Refrigerating Co. 252 Ill. 491, 50 L.R.A.(N.S.) 808, 96 N. E. 1063; Wilmerding v. Strouse, 112 N. Y. Supp. 1091.

Appellant's right to claim damages herein is necessarily governed by the terms of the contract. His affirmative claims for damages fall with his defense. Avery Planter Co. v. Peck, 86 Minn. 40, 89 N. W. 1123; Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227.

BURKE, J. This is a trial *de novo*. In January 20, 1910, defendant gave to plaintiff a written order for a 20-horse power International, Type C, tractor gasolene engine; on March 29, 1910, an engine was delivered for which he executed and delivered to the plaintiff two notes, a chattel and real estate mortgage securing the same, for the sum of $1,550, the first note falling due October 1, 1910. Defendant retained said engine and used it until October, 1910, when he notified the plaintiff that he would not accept the same. The written order for the engine mentioned above contained the following provision: "The undersigned hereby acknowledges having received a true copy of this order, agreement, and warranty, as indorsed on the back hereof." The warranty reads as follows: "The International Harvester Company of America (incorporated) warrants the within described engine to do

good work, to be well made, of good material, and durable if used with proper care. If upon one day's trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to the International Harvester Company of America, at Chicago, Illinois, and to the agent from whom it was purchased, stating wherein the engine fails; shall allow a reasonable time for a competent man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to said agent and the price paid shall be refunded, which shall constitute a settlement in full of the transaction. Use of the engine after three days, or failure to give written notice to said company and its agent, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfilment of its warranty. No agent has power to change the contract or warranty in any respect, and the within order can be canceled only in writing from said company's Chicago office. This express warranty excludes all implied warranties, and said company shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If, within ninety days' time, any part proves defective, a new part will be furnished on receipt of part showing defect."

Plaintiff had judgment in the court below for a foreclosure of the mortgage and defendant appeals. Although divided into many subdivisions by the assignments of error, we believe the contention of appellant may be narrowed to one, to wit, that the engine actually delivered was not the identical article ordered from the company. In support of this contention, plaintiff offered in evidence the testimony of conversations had by Alger with the sales agent, to the effect that the engine which plaintiff had for sale would develop 20-horse power as a tractor upon the drawbar. Among other things defendant testifies that the agent told him that the engine would draw a larger load than the Hart-Parr 45-22 engine, and that it would do the work of sixteen horses, etc. This testimony is not offered, as we understand it, to show a breach of the written warranty above set forth, but merely to support the contention that the company did not deliver the engine described in his written order. He also offered in evidence statements of the same nature made in March, 1910, by one Smith, who came

out to start the engine and who told him that the engine would do the work of sixteen good work horses,—not ordinary farm horses,—sixteen good big horses. This evidence also was offered to show that the engine delivered was not the one ordered. Likewise, the testimony of defendant that one McManus, the local agent at Minot, made representations to defendant which induced him to believe the engine to be the one ordered, and to retain the same in his possession until fall. Finally, defendant testified that after plowing some 175 acres with the tractor, and keeping the same until October, he learned from the collector whom the company sent to his place, that the engine was only a 10-horse power by actual drawbar test, and he thereupon repudiated the entire transaction.

In other words, if we understand appellant, his contention is that a smaller weaker engine was substituted for the one ordered by him, and the cases cited in appellant's brief are cases where substitution existed. It was expressly conceded through the whole argument that the engine in question was a good engine for its size, was well made, and gave perfect satisfaction in every respect excepting that it would not deliver 20-horse power at the drawbar, although it did deliver more than 20-horse power at the fly wheel by the brake test, and in all respects fulfilled its written warranty. After careful consideration of the evidence, which, of course, cannot be set forth in detail in the confines of this opinion, we have reached the conclusion that the evidence will not bear out appellant's contention. In the first place the order calls for a trade article, a 20-horse power engine. And while the defendant himself testifies that it was understood by the sale agent that he desired to purchase an engine that would deliver 20-horse power at the drawbar, we do not believe such testimony impeaches the written order signed by the defendant which names only 20-horse power International, Type C, tractor gasolene engine. If defendant did not understand the trade meaning of this description, he could easily have ascertained the same from the dealer or from the company direct. The trade talk of the sale agent should not be relied upon to vary the terms of this written order.

Again, the fact that defendant kept and operated the engine nearly six months was a circumstance casting great doubt upon the sincerity of the defendant's present claim. The evidence shows that defendant

is a man of mature years, of more than ordinary intelligence, being a member of the bar of this state. We do not believe that he failed to understand the meaning of the order which he signed, nor the size and power of the engine when it was delivered to him. Nor do we believe he understood said order to mean that the company would deliver him an engine that would deliver 20-horse power at the drawbar. It also appears that this was the largest gas tractor engine at that time manufactured by the plaintiff. It is our judgment, sitting as we do as a trial court in this action, that the engine which appellant ordered was delivered to him; that it complied in all respects with the warranty on which it was sold, and that he should pay therefor. This being the case, the judgment of the trial court is affirmed without a more detailed analysis of the legal points advanced.

JOHN W. STIMSON v. BELLE FLOWER STIMSON.

(152 N. W. 132.)

Appeal — remedy — constitution — legislature — causes which may be reviewed — power to prescribe.

1. The right of appeal pertains to the remedy, and in the absence of constitutional inhibition, it is within the power of the legislature to prescribe the cases in which parties are entitled to a review by an appellate court.

Interlocutory orders — appeals from — statute — causes authorized by statute.

2. Appeals from interlocutory orders are entirely the creation of statute, and will lie only in the cases authorized by the statute.

Striking amended complaint from files — order for — involves the merits — appealable.

3. An order striking an amended complaint from the files is an order which involves the merits of an action or some part thereof, and hence is appealable under subdivision 4 of § 7841, Compiled Laws.

Res judicata — issues — questions within.

4. All questions which were actually and directly at issue on an appeal are *res judicata*, and will not be considered on a subsequent appeal in the same action.

Appeal — dismissal — prosecution — want of — judgment — affirmance.

5. When an appeal is dismissed for want of prosecution, and the order of

dismissal did not provide that it was made without prejudice, such dismissal was in effect an affirmance of the judgment.

Appeal — questions involved — decided on appeal from appealable order — judgment — appeal from — dismissal.

6. When it is shown that all the questions involved in the appeal from the judgment were decided on appeal from an appealable order made before judgment, the appeal from the judgment will be dismissed.

Opinion filed March 16, 1915.

From a judgment of the District Court of Dunn County, *Crawford,* J. Plaintiff appeals.

Dismissed.

F. E. McCurdy, Bismarck, and *Casey & Burgeson,* Dickinson, North Dakota, for plaintiff and appellant.

C. H. Starke, Dickinson, North Dakota, for defendant and respondent.

CHRISTIANSON, J. Respondent moves to dismiss the appeal on the grounds that the only question presented in this appeal has been determined on a former appeal in this case, and that the judgment from which the present appeal is taken was entered in accordance with the remittitur from this court on the former appeal. The material facts appearing from the record in this case are as follows: The present action was commenced by the service of summons and complaint in April, 1913. The defendant appeared and demurred to the complaint on September 25, 1913. The demurrer was brought on for argument, and the trial court sustained the demurrer, but granted plaintiff leave to serve an amended complaint. Such amended complaint was served October 22, 1913. The defendant thereupon moved that the amended complaint be stricken from the files for the reason that it changed the claim set forth in the original complaint, and set forth an entirely different cause of action. This motion was submitted to the court, and on December 12, 1913, the court entered its order granting defendant's motion, and ordered the amended complaint to be stricken from the files. On February 9th, 1914, the plaintiff perfected an appeal from the order striking the amended complaint from the files. On September 10, 1914, pursuant to notice, the appeal from such order was dismissed by

this court for failure to prosecute the same. On September 16, 1914, the district court, in accordance with the remittitur from this court and the provisions of the order striking the amended complaint from the files, entered its order for judgment for a dismissal of the action, and judgment was thereafter entered pursuant to the order for judgment. On December 3d, 1914, the plaintiff perfected an appeal from the judgment. The only error asserted on this appeal is that the court erred in granting defendant's motion to strike the amended complaint from the files. This is the same ground that was urged as error on the appeal from the order striking the amended complaint from the files. It is not seriously contended that this appeal can be sustained, if the order striking the amended complaint from the files was an appealable order. Appellant's counsel contends that this order was not appealable, and could only be reviewed on an appeal from the judgment.

Section 109 of the Constitution provides: "Writs of error and appeals may be allowed from the decisions of the district courts to the supreme court *under such regulations as may be prescribed by law.*" And while the law usually considers it a right of a suitor to have his rights examined in some appellate tribunal, still this right pertains to the remedy given, and in the absence of constitutional inhibition, it is within the power of the legislature to prescribe the cases in which the parties are entitled to a review by the appellate court. 2 Cyc. 507; 2 Enc. Pl. & Pr. 19. And it is a general principle of law that in the absence of a statute permitting it, an appeal will not lie from an interlocutory order or judgment, but there must be a final order, judgment, or decree rendered in the cause to permit a review. Appeals from interlocutory orders are entirely the creation of statute and will only lie in the cases authorized by the statute. 2 Cyc. 586, 591; 2 Enc. Pl. & Pr. 61.

The legislature of this state, in conformity with the constitutional provision, has adopted certain statutes regarding appeals. And in so doing has provided for a review upon appeal of certain interlocutory orders. The statute in question is § 7841, Compiled Laws, 1913. If this order is appealable, it must be classified with those orders enumerated in subdivision 4 of this section, which grants an appeal from an order "when it involves the merits of an action or some part thereof."

As stated by this court in the case of Bolton v. Donavan, 9 N. D.

575, 84 N. W. 357, our statute relative to appeals from orders is almost identical in terms with the statutes of Wisconsin, Minnesota, and South Dakota, as they existed at the time of that decision. And in Stecker v. Railson, 19 N. D. 677, 678, 125 N. W. 560, this court stated that our statute relative to appeals was borrowed from Wisconsin, and this is doubtless correct. The parent statute, of which § 7841 was a part, was first incorporated in the laws of this jurisdiction by the legislature of Dakota territory in 1887, where it is found as § 23 of chapter 20 of the Laws of Dakota. It was again re-enacted without change, by the legislature of this state in 1891. See § 24, chapter 120, Laws of North Dakota for 1891. This section was at the time of its original enactment adopted literally from Wisconsin, being § 3069 of the Wisconsin Revised Statutes of 1878. The Wisconsin statute apparently remained unchanged up to 1895, but by the amendment adopted by the Wisconsin legislature that year, the provision corresponding to subdivision 4 of § 7841, N. D. Compiled Laws of 1913, was eliminated, so the decisions in Wisconsin subsequent to 1895 are inapplicable so far as a construction of the provisions of this section are concerned. But prior to its re-enactment by the legislature of this state in 1891, and prior to its original enactment by the territorial legislature in 1887, the particular provision under consideration had been construed a number of times by the supreme court of Wisconsin. Thus, in Matteson v. Curtiss, 14 Wis. 437, that court held that an order allowing a defendant to file a supplemental answer was appealable; and in Clark v. Langworthy, 12 Wis. 442, an order denying a motion to make a complaint more specific was held appealable; and in Akerly v. Vilas, 21 Wis. 378, an order refusing leave to withdraw a reply and interpose a demurrer in place thereof was held appealable; and in Spensely v. Janesville Mfg. Co. 62 Wis. 549, 22 N. W. 574, an order denying a motion to make the complaint more definite and certain was held appealable; in Nischke v. Wirth, 66 Wis. 319, 28 N. W. 342, an order requiring an answer to be made more definite and certain was held appealable; and in Adamson v. Raymer, 94 Wis. 243, 68 N. W. 1000, an order striking out material portions of an answer was held appealable; and in Kewaunee County v. Decker, 34 Wis. 378, an order refusing to strike an amended complaint from the files was held appealable. The supreme court of Iowa, in construing a similar provision in the laws of that

state, has held the following orders to be appealable: An order denying a motion to strike out a portion of the complaint (Seiffert & W. Lumber Co. v. Hartwell, 94 Iowa, 577, 58 Am. St. Rep. 413, 63 N. W. 333); an order overruling a motion to strike out an amendment to a petition in intervention (Bicklin v. Kendall, 72 Iowa, 490, 34 N. W. 283); an order striking out material and relevant portions of an answer (Mast v. Wells, 110 Iowa, 128, 81 N. W. 230). And in the case of Barnes v. Century Sav. Bank, 149 Iowa, 367, 128 N. W. 541, 545, the Iowa court held that an order granting a motion to strike a part of a reply was appealable, and in that case the court, speaking through Chief Justice Deemer, said: "In the light of past decisions, there can be no doubt that ruling on the motion to strike is an appealable one." The supreme court of Michigan in the case of McMann v. Westcott, 47 Mich. 177, 10 N. W. 190, held that an order striking an amended bill was appealable, and the Supreme Court of the United States in the case of Fuller v. Claflin, 93 U. S. 14, 23 L. ed. 785, held that an order striking out an answer was appealable. See also Schaetzel v. Huron, 6 S. D. 134, 60 N. W. 741, and Whitlaw v. Illinois L. Ins. Co. 86 Kan. 826, 122 Pac. 1039. The supreme court of Minnesota, in construing a similar statutory provision in that state, held in Wolf v. Banning, 3 Minn. 202, Gil. 133, an order striking out an answer with leave to answer again; and in Kingsley v. Gilman, 12 Minn. 515, Gil. 425, an order striking out portions of an answer; in Harlan v. St. Paul, M. & M. R. Co. 31 Minn. 427, 18 N. W. 147, an order striking out an answer; and in Vermilye v. Vermilye, 31 Minn. 499, 18 N. W. 832, 21 N. W. 736, an order striking out a portion of an answer,—to be appealable orders. And in Floody v. Chicago, St. P. M. & O. R. Co. 104 Minn. 132, 116 N. W. 111, that court, speaking through Chief Justice Stark, said: "An order striking out a pleading or a material part thereof is appealable; but one refusing to strike out is not." In the case of Lovering v. Webb Pub. Co. 108 Minn. 201, 120 N. W. 688, 121 N. W. 911, the Minnesota supreme court passed on the identical question involved in this case, and held that an order striking out the complaint was appealable as involving the merits of the action or some part thereof. This court has also had an opportunity to construe this provision, although the question presented on this appeal has never been decided. Under this provision this court in the case of Bolton v. Donavan, 9 N. D. 575, 84 N. W. 357, held that an order

bringing in an additional party defendant involved the merits and was appealable; and in Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082, that an order granting a change of venue was appealable. In Johnson v. Great Northern R. Co. 12 N. D. 420, 97 N. W. 546, this court decided an appeal from an order overruling a motion to make a complaint more specific, on its merits, and declined to decide whether or not such order was appealable. In Northern P. R. Co. v. Barlow, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912C, 763, this court held that an order setting aside a stipulation "involved the merits of the action or some part thereof," and hence was appealable. (See also Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N. W. 1124.) And in the recent case of State ex rel. Noggle v. Crawford, 24 N. D. 8, 138 N. W. 2, an order permitting certain parties to intervene in a garnishment action was held to be appealable. Therefore, in view of the construction placed upon this provision by the various courts as indicated above, we are compelled to hold that an order striking a complaint from the files is appealable. As already stated, the only error assigned on this appeal is that the court erred in striking the amended complaint from the files. It is conceded that this is the same and only error assigned on the appeal from the order. This is therefore in effect a second appeal to this court to review the same error. It is well settled that when an appeal is taken, all questions presented, or which were actually and directly at issue on that appeal, are *res judicata,* and will not be considered on a subsequent appeal in that action. Bem v. Shoemaker, 10 S. D. 453, 74 N. W. 239; Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Scottish American Mortg. Co. v. Reeve, 7 N. D. 552, 75 N. W. 910; 3 Cyc. 395; 2 Enc. Pl. & Pr. 355; 2 R. C. L. § 187.

The fact that the former appeal was dismissed for nonprosecution without a hearing on the merits does not change the rule. No application was made to this court by the appellant to have the dismissal of this appeal made without prejudice, but appellant defaulted at the hearing of the motion to dismiss, and permitted an absolute dismissal to be made for failure to prosecute the appeal. The dismissal of the former appeal, being absolute, was therefore equivalent to an affirmance on the merits of the order appealed from. Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170; Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Dunterman v. Storey, 40 Neb. 447, 58 N. W. 949; Collins v. Gladiator Consol. Gold

Min. & Mill. Co. 19 S. D. 358, 103 N. W. 385; 3 Cyc. 200; R. C. L. § 188, p. 226. See also Thornhill v. Olson, 26 N. D. 27, 142 N. W. 913.

The appeal taken by the plaintiff from the order striking the complaint from the files was therefore in effect decided against plaintiff's contentions on its merits, and the court's decision on the questions raised on that appeal is *res judicata,* and cannot be considered by this court on this appeal. When an appeal is taken from an appealable order made before judgment, the questions presented on that appeal are *res judicata,* and cannot be again presented on an appeal from the judgment. Coats v. Harris, 9 Idaho, 470, 75 Pac. 246; Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W. 141; Padgett v. Smith, 206 Mo. 303, 103 S. W. 943. See also 2 R. C. L. § 160, p. 187; Krantz v. Rio Grande Western R. Co. 13 Utah, 1, 32 L.R.A. 828, 43 Pac. 623; Patten Paper Co. v. Green Bay & M. Canal Co. 93 Wis. 283, 66 N. W. 601, 67 N. W. 432; Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855; Stewart v. Salamon, 97 U. S. 361, 24 L. ed. 1045. This being so, there is no question presented for determination by this appeal, and it must be dismissed.

It is so ordered.

FIRST STATE BANK OF ECKMAN, a Corporation, v. PETER KELLY.

(152 N. W. 125.)

Negotiable promissory note — legal existence — delivery — parties — intention.

1. As a general rule, a negotiable promissory note, like any other written instrument, has no legal or operative existence as such until it has been delivered in accordance with the purpose and intention of the parties.

Note.—Where an agreement contemporaneous with the execution of a promissory note constitutes a condition which is to happen before the note is delivered or goes into effect, a failure to perform the agreement is a good defense to the note. This is shown by a review of the authorities in division VII. of a note in 43 L.R.A. 449, on contemporaneous agreements and their breach as defense to a promissory note;

Promissory note — executed by one person — delivery upon condition to be signed by another — payee cannot enforce.

2. A promissory note delivered by a person who has executed the same upon the express condition that such note shall not be deemed the note of the party so executing it, or as delivered, unless it is also executed by another person as a comaker, cannot be enforced by the payee against the person so executing it, unless also executed by the other person so named in the condition as a comaker.

Evidence — notes — delivery — conditions — parol evidence — rule — written instruments.

3. In such case evidence tending to prove the condition upon which such notes were executed and delivered to the payee, and that such condition had never been complied with, is competent, and does not come within the rule that parol evidence is inadmissible to contradict or vary the terms of a written instrument.

Original payee — action by — negotiable instruments — consideration — subject of inquiry — parol evidence.

4. In an action by the original payee of a negotiable instrument, or by one having notice, the question of the consideration may be inquired into, and parol evidence is admissible to show the real consideration for the instrument.

Accommodation note — action on — by party accommodated — parol evidence.

5. One who signs a promissory note for the accommodation of another may show that fact by parol in an action against him by the party accommodated.

Execution of promissory note — agreement to release maker — prior contemporaneous — inadmissible.

6. Parol evidence is inadmissible to show that prior to, or contemporaneous with, the execution of, a note, the payee agreed to release the maker upon the happening of a certain contingency, and take a note of another person in lieu thereof.

Improper evidence — objection to — cross-examination — not a waiver.

7. Objection to improper evidence is not waived by cross-examination of the witness on the same subject.

Promissory note — action on — parol evidence — tending to vary terms of — instructions — request for — estoppel.

8. Where, in an action on a promissory note, parol evidence tending to vary

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and the cases reviewed in a note in 18 L.R.A.(N.S.) 288, show that it is generally held that as between the immediate parties and those taking with notice it can be shown by parol that a note was not to operate as a valid obligation until the happening of a certain event.

and contradict its terms is improperly admitted, over objection, the mere fact that plaintiff's counsel requests an instruction in order to limit as far as possible the prejudicial effect of such evidence does not, where such instruction is refused by the trial court, estop the latter from asserting on appeal that the admission of such evidence was error.

Accommodation maker — defense — pleading.

9. The party for whose accommodation a promissory note was executed is not entitled to recover from the accommodation party thereon, but such defense in order to avail must be specially pleaded.

Judgment notwithstanding the verdict — merits — law.

10. The laws of this state authorize a judgment notwithstanding the verdict only in cases where it is clear upon the whole record that the moving party is, as a matter of law, entitled to judgment on the merits.

Judgment notwithstanding the verdict — when properly made or granted — defects — remedied — further or new trial.

11. It is not sufficient to warrant such judgment that the evidence was such that the trial court ought to have granted either a motion for a directed verdict, or a new trial on the ground of insufficiency of the evidence to sustain the verdict, but it must, also, appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial.

Evidence — pleading — variance — amendment — not cured by.

12. Such judgment is not warranted on the ground merely that the evidence was variant from and inadmissible under the allegations of the defendant's answer, but it must further appear that no amendment of the answer can properly be made making such testimony competent.

Opinion filed March 16, 1915.

Appeal from the District Court of Bottineau County, *Burr*, J.

Judgment for defendant, and plaintiff appeals.

Reversed and remanded.

Bangs & Robbins for appellant.

Oral evidence of a collateral agreement is inadmissible. 17 Cyc. 589, 644; 1 Enc. Ev. 453; 1 Dan. Neg. Inst. § 80; Joyce, Defenses to Com. Paper, 320; 3 Randolph, Com. Paper, § 1901; 4 Am. & Eng. Enc. Law, 2d ed. 146–484; American Gas & Ventilating Mach. Co. 43 L.R.A. 453, note.

The execution of a contract in writing, whether the law requires it or not, supersedes all oral negotiations or stipulations concerning the matter which preceded or accompanied the execution of the instru-

ment. Thompson v. McKee, 5 Dak. 172, 37 N. W. 367; National German American Bank v. Lang, 2 N. D. 66, 49 N. W. 414; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 579; Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588; Merchants' State Bank v. Ruettell, 12 N. D. 519, 97 N. W. 853; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; Earle v. Enos, 130 Fed. 467; Payne v. Mutual L. Ins. Co. 72 C. C. A. 493, 141 Fed. 339; Harrison v. Morrison, 39 Minn. 319, 40 N. W. 66; Kulenkamp v. Groff, 71 Mich. 675, 1 L.R.A. 594, 15 Am. St. Rep. 283, 40 N. W. 57; Central Sav. Bank v. O'Connor, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11; Lipsett v. Hassard, 158 Mich. 509, 122 N. W. 1091; Dendy v. Gamble, 59 Ga. 434; Byrd v. Marietta Fertilizer Co. 127 Ga. 30, 56 S. E. 86; Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Commonwealth Trust Co. v. Coveney, 200 Mass. 379, 86 N. E. 895; Fambro v. Keith, 57 Tex. Civ. App. 302, 122 S. W. 40; Gerli v. National Mill Supply Co. 78 N. J. L. 1, 73 Atl. 252; Dickson v. Harris, 60 Iowa, 727, 13 N. W. 335; Chapman v. Chapman, 132 Iowa, 5, 109 N. W. 300; City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942; Homewood People's Bank v. Heckert, 207 Pa. 231, 56 Atl. 431; Bass v. Sanborn, 119 Mo. App. 103, 95 S. W. 955; Jamestown Business College Asso. v. Allen, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952; Western Carolina Bank v. Moore, 138 N. C. 529, 51 S. E. 79; Cline v. Farmers' Oil Mill, 83 S. C. 204, 65 S. E. 272; Farmers' Bank v. Wickiffe, 131 Ky. 787, 116 S. W. 249.

The cashier was loaning the bank's money upon the responsibility of Kelly. He did not have the implied power to so loan the money, and at the same time make an agreement that Kelly was not to be held, and thereby wipe out the security of the bank in the original transaction. 1 Morse, Banks & Bkg. 4th ed. § 167; 1 Bolles, Bkg. p. 361; 2 Thomp. Corp. 2d ed. §§ 1532, 1533; Thompson v. McKee, 5 Dak. 172, 37 N. W. 367; Mead v. Pettigrew, 11 S. D. 529, 78 N. W. 945; State Bank v. Forsyth, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914; First Nat. Bank v. Lawther-Kaufman Oil & Coal Co. 66 W. Va. 505, 28 L.R.A.(N.S.) 511, 66 S. E. 713; First Nat. Bank v. Foote, 12 Utah, 157, 42 Pac. 205; Gallery v. National Exch. Bank, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; Bank of United States v. Dunn,

6 Pet. 51, 8 L. ed. 316; United States v. City Bank, 21 How. 356, 364, 16 L. ed. 130, 133; Bank of Metropolis v. Jones, 8 Pet. 1216, 8 L. ed. 850, 851; Martin v. Webb, 110 U. S. 7, 14, 28 L. ed. 49, 52, 3 Sup. Ct. Rep. 428; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 169, 28 L. ed. 385, 390, 4 Sup. Ct. Rep. 345; Potts v. Wallace, 146 U. S. 689, 706, 36 L. ed. 1135, 1141, 13 Sup. Ct. Rep. 196.

Kelly was chargeable with notice that the cashier possessed no such authority; he knew the money was being loaned to him, that the money was the bank's money, and that the cashier could not release him from liability in the same transaction. State Bank v. Forsyth, 41 Mont. 249, 28 L.R.A.(N.S.) 501, 108 Pac. 914; Rev. Codes 1905, §§ 6331, 6494, Comp. Laws 1913, §§ 6914, 7076; Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280; Cellers v. Meachem (Sellers v. Lyons) 49 Or. 186, 10 L.R.A.(N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 430; Hunter v. Harris, 63 Or. 505, 127 Pac. 786; Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888; Murphy v. Panter, 62 Or. 522, 125 Pac. 292; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; White v. Savage, 48 Or. 604, 87 Pac. 1040; Packard v. Windholtz, 88 App. Div. 365, 84 N. Y. Supp. 666; Smith v. State Bank, 54 Misc. 550, 104 N. Y. Supp. 750; Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1.

The admission of evidence of such agreement was prejudicial error. White v. Savage, 48 Or. 604, 87 Pac. 1040; Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427.

The evidence was insufficient to justify the verdict. No fact was pleaded showing fraudulent conduct of the bank, nor was there any showing by proof of fraud. State ex rel. Dorgan v. Fisk, 15 N. D. 224, 107 N. W. 191.

The delivery of a note upon the promise of the party to whom it is delivered that he will have another sign it is not a conditional delivery. Mitchell v. Altus State Bank, 32 Okla. 628, 122 Pac. 666; Whitaker v. Richards, 134 Pa. 191, 7 L.R.A. 749, 19 Am. St. Rep. 684, 19 Atl.

501; Sellers v. Territory, 32 Okla. 147, 121 Pac. 228; Trustees of Schools v. Sheit, 119 Ill. 579; Risse v. Hopkins Planing Mill Co. 55 Kan. 518, 40 Pac. 904; Simpson v. Bovard, 74 Pa. 351; Whitaker v. Richards, 134 Pa. 191, 7 L.R.A. 749, 19 Am. St. Rep. 684, 19 Atl. 501.

The presumption is that where an instrument has passed out of the hands of the maker, an intentional delivery is made. The contrary must be clearly proved. Rev. Codes 1905, § 6318, Comp. Laws 1913, § 6901; Ewell v. Turney, 39 Wash. 615, 81 Pac. 1047; Hayne, New Trials & App. p. 623; Driscoll v. Market Street Cable R. Co. 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591, 11 Am. Neg. Cas. 186; Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; McMillen v. Aitchison, 3 N. D. 183, 54 N. W. 1030; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Fulton v. Cretian, 17 N. D. 335, 117 N. W. 344; Idaho Mercantile Co. v. Kalanquin, 8 Idaho, 101, 66 Pac. 933; Wilson v. Vogeler, 10 Idaho, 599, 79 Pac. 508; Golstone v. Rustemeyer, 21 Idaho, 703, 123 Pac. 635; Ilo v. Ramey, 18 Idaho, 642, 112 Pac. 126; Heink v. Lewis, 89 Neb. 705, 131 N. W. 1051; International & G. N. I. R. Co. v. Brice, — Tex. Civ. App. —, 111 S. W. 1094; Wiley v. Atchison, T. & S. F. R. Co. 103 Tex. 336, 127 S. W. 166; Drum v. Capps, 240 Ill. 524, 88 N. E. 1020; Southwestern Development Co. v. Boyd, 7 Ind. Terr. 773, 104 S. W. 1174; Branson v. Caruthers, 49 Cal. 374; Field v. Shorb, 99 Cal. 661, 34 Pac. 504; Re Wilson, 117 Cal. 262, 49 Pac. 172, 711; Re Coburn, 11 Cal. App. 604, 105 Pac. 924; Houston v. Davis, 162 Ala. 722, 49 So. 869; Geier v. Howells, 47 Colo. 345, 27 L.R.A.(N.S.) 786, 107 Pac. 255.

Where the failure of the principal to sign the instrument in no way affects the rights or liability of the surety, the instrument is valid, and the surety is bound, unless the surety signs upon the express condition that the principal shall also sign before delivery to the obligee. 32 Cyc. 41; 1 Brandt, Suretyship, § 169, note 33; March v. Phillips, — Tex. Civ. App. —, 144 S. W. 1160; Mitchell v. Hydraulic Bldg. Stone Co. — Tex. Civ. App. —, 129 S. W. 148; Wright v. Jones, 55 Tex. Civ. App. 616, 120 S. W. 1139; Star Grocer Co. v. Bradford, 70 W. Va. 496, 39 L.R.A.(N.S.) 184, 74 S. E. 509.

Both Kelly and Chase were principals. The mere fact that one was called a surety does not make him such. Kelly was paying his own

debt. Garrison v. Nelson, 4 Tex. App. Civ. Cas. (Willson) 534, 19 S. W. 248; Pape v. Randall, 18 Ind. App. 53, 47 N. E. 530; Gund v. Ballard, 73 Neb. 547, 103 N. W. 309; Wimberly v. Windham, 104 Ala. 409, 53 Am. St. Rep. 70, 16 So. 23.

Greenleaf, Bradford, & Nash, for respondent.

There must be a consideration or there is no contract. The accommodated party cannot recover from the accommodation maker of a promissory note. Weeks v. Bussell, 8 Wash. 440, 36 Pac. 265; Corlies v. Howe, 11 Gray, 125, 71 Am. Dec. 693, and cases cited.

It may be shown in such cases that the party against whom a recovery is sought was merely a surety. Windhorst v. Bergendahl, 21 S. D. 218, 130 Am. St. Rep. 715, 111 N. W. 544.

The note was only conditionally delivered, and was not to take effect until and unless sgined by another party, one Chase. The note was entirely without consideration to Kelly. He was a mere surety. McCormick Harvesting Mach. Co. v. Faulkner, 7 S. D. 363, 58 Am. St. Rep. 839, 64 N. W. 163.

A new trial will be granted where the verdict is plainly and clearly against the evidence; where the verdict shocks the sense of justice, or indicates that the jurors were influenced by passion, prejudice, or other improper motives. 29 Cyc. 821–830.

But one or more of these conditions must be clearly manifest. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359.

Christianson, J. This is an appeal from the judgment and an order of the district court of Bottineau county denying plaintiff's alternative motion for judgment notwithstanding the verdict or for a new trial. The action was brought to recover upon a promissory note in the sum of $730.30, which it is alleged was executed and delivered to the plaintiff by the defendant for value. The complaint is in the usual form, and the answer alleges that the plaintiff induced the defendant, by means of fraud and misrepresentation and without consideration, to affix his signature to an instrument presented by the plaintiff to the defendant for the purpose of having the defendant become surety for one W. N. Chase, and that the defendant signed the said note with the understanding and agreement with the plaintiff that the plaintiff would have the said Chase sign the said note, and that on the signing of the

said note by Chase the said Chase was to receive the said money from the plaintiff. The following facts are undisputed: On March 4, 1909, one William N. Chase executed and delivered to the defendant, Peter Kelly, his certain promissory note for $670, payable November 1, 1909, and at the same time, to secure payment thereof, executed and delivered a chattel mortgage upon 6 head of horses, 1 set of harness, 10 tons of hay, and a half interest in certain crops for that season on 480 acres of land in Bottineau county. On the same day the defendant, Kelly, sold the note and chattel mortgage to the Citizens State Bank of Russell, at the same time guarantying payment thereof. Subsequently the Citizens State Bank of Russell sold and indorsed the note to the First State Bank of Russell. At the time this note became due on November 1, 1909, Chase apparently was in such financial difficulties that he was unable to pay the note, at least he did not pay it. The First State Bank of Russell thereupon notified Kelly that the note was unpaid, and demanded payment. About December 1, 1909, Chase went to the plaintiff bank to arrange for a loan to pay up the note, and afterwards on the same day Chase went to see Kelly about the matter, and took Kelly with him to the plaintiff bank, and Kelly, while there, signed the note involved in this action. The plaintiff some time thereafter sent a draft to the Russell bank in payment of the note signed by Chase and indorsed by Kelly. This note was canceled by the First State Bank of Russell as having paid on December 11, 1909, and was shortly thereafter returned to Kelly by mail, together with a release of the chattel mortgage. At the time Kelly signed the note involved in this action, he had on deposit with the plaintiff bank about $800. This money remained on such deposit some months before and after the execution of the note involved herein. There is, however, a square conflict in the testimony as to what took place at the time Kelly signed the note involved in this action.

Respondent's counsel contends that the answer raised three different issues: (1) That the contract was without consideration; (2) that it was vitiated by the fraud of the plaintiff; (3) that the instrument was conditionally delivered, and that the condition was never performed. As we interpret the answer, however, in reality it only raised one issue; namely, that the note was never delivered by the defendant to the plaintiff, but that the defendant, Kelly, merely signed

the note, and delivered it to the cashier of the plaintiff bank, to take effect only upon the execution thereof by Chase; and the first two alleged defenses are merely incidental facts, which may be considered in connection with the question of whether or not it was agreed between the plaintiff and defendant at the time the note was signed that it was not to become effective until it was signed by Chase.

While it is a general principle of law, applicable also to promissory notes, that parol evidence is inadmissible to vary or contradict the terms of a written contract as between the parties thereto, in the absence of fraud or mistake, still such evidence is always admissible between the immediate parties, and subsequent holders with notice, to show that the contract never became effective. A promissory note does not become effective until delivered. A delivery is essential to its very existence and validity as a contract. Dan. Neg. Inst. 6th ed. §§ 68a, 81b, and 630. "As a general rule a negotiable promissory note, like any other written instrument, has no legal inception or valid existence as such until it has been delivered in accordance with the purpose and intention of the parties." McCormick Harvesting Mach. Co. v. Faulkner, 7 S. D. 363, 366, 58 Am. St. Rep. 839, 64 N. W. 163; Compiled Laws 1913, §§ 5891, 6901; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576.

It may, therefore, be established by parol that the instrument was delivered conditionally, to take effect only upon the happening of a certain event, and that the condition upon which it was to become operative never occurred. In discussing this matter, the Supreme Court of the United States in the case of Ware v. Allen, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174, said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or be ascertained thereafter.

"The present case is almost identical in its circumstances with that of Pym v. Campbell, in the court of Queen's bench, 6 El. & Bl. 370, 373. The defendants in that case had signed an agreement for the purchase

of an interest in an invention, which the evidence showed was executed with the understanding that it should not be a bargain until a certain engineer, who was to be consulted, should approve of the invention. There was a verdict for the defendants, which was sustained, and the following language was used by Earle, J., on discharging the rule to show cause: 'I think that this rule ought to be discharged. The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show that it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. . . . If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.' "

The defendant in this case was doubtless entitled to offer evidence for the purpose of showing that the note involved in this action was to become effective only after it had been signed by Chase. This issue was raised by the answer, and under the laws of this state would constitute a defense to plaintiff's cause of action. Comp. Laws 1913, § 6901. See also Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816; Dan. Neg. Inst. 6th ed. §§ 68a, 81b, and 630; 8 Cyc. 260; 2 Enc. Ev. 450.

It is also generally permissive, as respondent contends, in an action between the immediate parties or subseqeunt holders with notice, to establish the real consideration by parol; and such evidence is also admissible, in such action to rebut the presumption of a consideration, and to impeach a mere recital of consideration. The rule is stated in Daniel on Negotiable Instruments, 6th ed. § 81a, as follows: "In an action by the original payee of a negotiable instrument, or by one having notice, the question of consideration may be inquired into. And so parol evidence may be received, as against such original party or one having notice, to show a want of consideration, or failure of consideration, or that the consideration was illegal." See also 8 Cyc. 252, and 2 Enc. Ev. 491, and authorities cited.

And under this rule it is, also, true as respondent contends, that, in

an action by the payee, or one having notice, the maker of a note may show by parol that he executed the note for the accommodation of the payee, and received no other consideration therefor. National Citizens' Bank v. Bowen, 109 Minn. 473, 124 N. W. 241; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 482; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706; Nelson v. Millen, 205 Mass. 515, 91 N. E. 995; Dan. Neg. Inst. 6th ed. § 81a; see also 8 Cyc. 252, note 39, and authorities cited.

During the trial, however, defendant was permitted to introduce testimony to the effect that the cashier of the plaintiff bank agreed with the defendant, that the defendant would not be required to pay the note, but that if the defendant would sign the note for a short time until Chase could go through and receive a discharge in bankruptcy, that then after Chase had been so discharged in bankruptcy, the bank would then take a note signed by Mr. Chase alone, and release the defendant from liability. This testimony was all admitted over plaintiff's subjection that it was incompetent and tended to contradict and vary the terms of a written instrument. We think this testimony was improperly received. Such oral agreement is clearly at variance with the terms of the written contract itself.

Respondent's counsel claims that this testimony was competent and admissible under the allegations of the answer to establish the fact that defendant was induced to sign the note by means of fraud and misrepresentation on the part of the plaintiff. We are unable to agree with respondent's counsel in this contention. It is not contended that defendant was laboring under disability, or any misunderstanding as to the character of the instrument he was signing. The defendant was in possession of all his faculties,—and so far as the record shows could read and write. Defendant knew that he was signing a note, and this note in plain and unequivocal terms obligated him to pay a certain amount of money at a certain time. To permit the defendant to show by parol testimony that at the time he signed the note it was orally agreed that he was not to be bound by the conditions thereof, but was to be relieved and released from the payment thereof at some future date when the payee should take the note of another person in place thereof, is so obviously contradictory to and variant from the terms of the note itself that its incompetency is self-evident. Parol testimony,

as we have held, is admissible to show that for some reason the written contract never became effective or has no valid legal existence. A consideration and delivery are essential to a valid contract. Therefore it may be shown by parol that the contract never became effective, or has no legal existence. Hence, in a proper case, it may be shown by parol that the note never was delivered; that the maker received no consideration therefor; or that the contract was vitiated by fraud or mistake. The testimony under consideration in this case, however, does not come within any of the recognized rules for the omission of parol testimony. Its purpose and effect was to establish a contract different in terms from that of the written contract. We are satisfied that this testimony should have been excluded, and that its admission was prejudicial error. First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; 17 Cyc. 589, 644; 2 Enc. Ev. 453; Dan. Neg. Inst. § 80; 4 Am. & Eng. Enc. Law, 2d ed. 146; See also § 5889, Comp. Laws 1913. As was said by the supreme court of Michigan in the case of Central Sav. Bank v. O'Connor, 132 Mich. 578, 102 Am. St. Rep. 433, 94 N. W. 11, in considering this question: "It is doubtless true, as contended by the appellant's counsel, that it may be shown that a promissory note, unconditional in terms, was conditionally delivered; that is to say, that it was placed in the hands of the payee, but with the distinct understanding that it was not to be operative, or to become a binding obligation, until the happening of some event. . . . On the other hand, the rule is firmly established that where a promissory note for a certain amount, payable at a certain time, is delivered into the hands of the payee, to take effect presently as the obligation of the defendant, parol evidence to introduce conditions or modifications of the terms is not admissible. The case of Hyde v. Tenwinkel, 26 Mich. 93, illustrates this rule. It was there held that an attempt to show a verbal contemporaneous agreement to reduce a note from an absolute and specific promise to a defeasible engagement was inadmissible. . . . We think it clear that the present case falls within that line of cases which precludes parol evidence offered to vary the terms of a written instrument."

This testimony was not admissible as evidence of fraud on the part of the plaintiff. The supreme court of Michigan in the case of Kulen-

kamp v. Groff, 71 Mich. 678, 1 L.R.A. 594, 595, 15 Am. St. Rep. 283, 40 N. W. 57, used certain language which is directly applicable to the case at hand. It said: "As far as the claim of fraud is concerned, it is not tenable. The signature of Groff was not procured by false pretenses, by the statement of any fact as existing which did not exist, but upon false promises which have not been performed. It is no more nor less than the nonperformance of an oral agreement made at the time the note was signed, and which oral agreement was totally at variance with the terms of the written contract as set forth in the note. This cannot be considered such a fraud as would nullify the note. If proof of this unperformed agreement not to hold Groff upon this note, in plain contradiction to its terms, can be admitted to destroy his liability upon it, then any unperformed oral agreement made at the time a written contract or note is executed may be admitted under the claim of fraud, to defeat the terms and purpose of the written agreement. The maker of a note, as well as the surety or indorser, may say: 'It is true, I signed the note, but it was agreed I was not to pay it, and the collection of it is a fraud upon me.' Written instruments, under the admission and use of such proof to defeat them, would be of little value, and altogether uncertain, and of no more strength than oral agreements."

It is insisted, however, by respondent that plaintiff is estopped to assert errors in the admission of this testimony for the reason that appellant's counsel cross-examined on the same matter. We do not believe that respondent's position is well taken. It is true that there are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but we do not believe that these holdings are sound in principle, and they are clearly contrary to the weight of authority. "It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthfulness of the evidence given in chief, in the event, as would most usually occur, that the witness should on his cross-examination repeat or restate some or all of his evidence given on his direct examination." Cathey v. Missouri K. & T. R. Co. 104 Tex.

39, 42, 33 L.R.A.(N.S.) 103, 109, 133 S. W. 417, 419. We are satisfied that the plaintiff did not waive the erroneous admission of evidence over its objection by cross-examining the witness on the same subject; but that it had the right to attempt to destroy its harmful effects by cross-examination, if possible. Kurtz v. Payne Invest. Co. 156 Iowa, 376, 135 N. W. 1075; Hydraulic Press Brick Co. v. Green, 177 Mo. App. 308, 164 S. W. 250; McIlvaine v. First Nat. Bank, 33 S. D. 389, 146 N. W. 574; Finkelstein v. Keene Electric R. Co. 75 N. H. 303, 73 Atl. 705; Story v. Green, 164 Cal. 768, 130 Pac. 870, Ann. Cas. 1914B, 961. See also 38 Cyc. 1399.

Respondent's next contention is that plaintiff waived the error in the admission of this testimony by requesting the court to give the following instruction: "If the defendant delivered the note to the plaintiff with the understanding and agreement that he was not to be liable thereon, but that Chase, after he had gone through bankruptcy, was to pay the note and relieve the defendant of any liability thereon to the plaintiff, then such delivery was a complete delivery, and the defendant was liable to plaintiff on said note."

The court refused to give the instructions requested, hence we are not called upon to decide whether, in the event such instructions had been given, plaintiff would be estopped to assert the error in the admission of such testimony. There are cases holding that where an instruction assuming the competency of the evidence complained of is given at the request of the objecting party, that the objection to the admission of such incompetent evidence is waived. Shannon v. Potts, 117 Ill. App. 80. On the other hand, there are cases holding that such objection is not waived by asking for and receiving such instructions. Arnold v. Maryville, 110 Mo. App. 254, 85 S. W. 107. We are unable, however, to find any instance where it has been held that such objection was deemed waived, or the error cured by a mere request for an instruction. It is obvious that if the instruction requested in this case had been given, an entirely different condition would have existed. The plaintiff would then have obtained the benefit of whatever deduction the jury might have made in plaintiff's favor, from such evidence. It is unnecessary for us, in this case, to decide whether the objection would have been waived or the error cured in the event that the requested instruction had been given. That is not the condi-

tion here. The incompetent evidence was admitted over objection, and defendant's request for an instruction was denied. We are entirely satisfied that the error in its admission was neither waived nor cured by plaintiff's request for such instruction.

It is also contended by the respondent that the note involved in this action was signed by Kelly at the request and for the accommodation of the plaintiff bank. It is contended that Chase was farming certain lands belonging to the plaintiff; that plaintiff held a second mortgage upon the horses covered by the mortgage given by Chase to Kelly and assigned to the Russell bank, and that plaintiff desired to have the mortgage held by the Russell bank released in order that plaintiff's mortgage might become a first lien.

It is doubtless true, as a general rule, that the party for whose accommodation a note is executed is not entitled to recover from the accommodation party thereon. Dan. Neg. Inst. 6th ed. § 175; 7 Cyc. 725; 3 R. C. L. § 336. This principle, however, can have no application in this case. It is not necessary for us to decide whether or not the facts indicated would have constituted the defendant an accommodation maker; or whether the defendant under the undisputed facts in the case could claim to be an accommodation maker. A sufficient answer to respondent's contention is that there is absolutely no tangible evidence in the record of any such condition; nor is this defense alleged in the answer. And it is obvious that this defense, in order to be available, must in the first place be pleaded; and next established by competent evidence at the trial.

Plaintiff asks for judgment notwithstanding the verdict; but this should not be granted unless it clearly appears from the whole evidence that the defense sought to be established could not, in point of substance, constitute a legal defense. In other words, before the plaintiff is entitled to such judgment, it must appear clearly, upon the whole record, that the plaintiff is entitled to a judgment on the merits as a matter of law. Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617.

The mere fact that the evidence was such that the trial court ought to have granted plaintiff's motion for a directed verdict, or ordered a new trial on the ground of the insufficiency of the evidence to sustain the verdict, would not warrant this court in ordering such judgment,

but it must also clearly appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial. Meehan v. Great Northern R. Co. 13 N. D. 432, 442, 101 N. W. 183; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Ætna Idemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346.

Nor is such judgment warranted because some of the evidence offered, or which defendant may be able to produce upon a new trial is variant from and inadmissible under the allegations of the answer; but it must further appear that no amendment of the answer can properly be made, making such testimony competent. Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396. While the defendant's testimony, as a whole, is not at all satisfactory, the admission of the incompetent testimony hereinbefore referred to apparently confused counsel on both sides, and the issue raised by the pleadings seems to have been almost wholly overlooked; and while it is clear to us that the judgment and order appeared from must be reversed, still we do not feel justified or warranted in saying that the plaintiff is entitled to judgment on the merits as a matter of law. The judgment and order appealed from are therefore reversed and set aside, and the cause remanded for another trial.

A. P. RYDING v. CARL HANSON.

(152 N. W. 120.)

Plaintiff impounded three certain cows and notified the owner that he could have same by paying $25 damages and costs.

Thirteen days later the owner, this defendant, offered plaintiff $25, which was refused. After a trial in justice court an appeal was taken to district court, wherein plaintiff was awarded $25 damages, besides interest and costs.

Pounds — impounding — damages and costs — tender — offer of payment — time of — debt — how extinguished by.

Held, that the offer made by defendant did not extinguish the debt nor constitute and offer of judgment for that amount. Plaintiff is entitled to costs in lower court.

Opinion filed March 17, 1915. Rehearing denied April 10, 1915.

Appeal from the District Court of Pierce County, *Burr*, J.

Affirmed.

L. R. Nostdal, for appellant.

Notice of damages claimed as resulting from trespass of animals must be given to the owner of such animals before the commencement of action. No such notice was given. Pol. Codes, § 1942, article 9, chap. 24; Ugland v. Farmers' & M. State Bank, 23 N. D. 536, 137 N. W. 572; Code Civ. Proc. chap. 44.

The effect of tender and deposit is to discharge the debt. Ugland v. Farmers' & M. State Bank, 23 N. D. 536, 137 N. W. 572; 11 Cyc. pp. 73, 75, 79 & 80, ¶ 2.

Torson V. Wenzel, for respondent.

Costs are in the discretion of the court in such cases. Rev. Codes 1905, § 7179, Comp. Laws 1913, § 7795.

Clerk must tax and insert costs upon application of successful party. Rev. Codes 1905, § 7184, Comp. Laws 1913, § 7800.

The question was properly before the court upon the order to show cause. Rev. Codes 1905, §§ 7182 & 7186, Comp. Laws 1913, §§ 7798, 7802.

The clerk has no authority to enter judgment other than has been ordered. N. D. Laws 1905, §§ 7179, 7182, 7184 & 7186, Comp. Laws 1913, §§ 7795, 7798, 7800, 7802; Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Beem v. Palmer, 97 Mich. 491, 56 N. W. 760.

In determining whether a recovery is more favorable than an offer, interest to the time of the tender must be included. 11 Cyc. 76 (D–2*), 80 (2).

Burke, J. On the 1st of August, 1910, plaintiff impounded three cows belonging to the defendant, claiming that they had trespassed upon and damaged his crops. The next day he sent to the defendant the following letter:

Rugby, N. D., August 2, 1910.

Carl Hanson:—

You are hereby notified that I have three of your cows taken on my land. When you pay me $25 damages and costs to date, you can have the cows.

A. P. Ryding.

August 15th the defendant offered plaintiff $25 and, upon the offer being refused, deposited the same in the Security Bank of Rugby, and caused notice of the deposit to be served upon plaintiff at 12:10 P. M. August 15, 1910. August 19, 1910, plaintiff served upon defendant a new notice claiming damages in the sum of $50 and expenses of keeping the said cows, amounting to $15, which $65 was demanded to be paid at once. This was served on defendant by the sheriff, who requests $3.35 for such service. August 22, 1910, summons was issued in justice court and plaintiff recovered the sum of $40 and costs. Appeal was taken to the district court, where a jury awarded plaintiff the sum of $25 *and costs.* Plaintiff then insisted that the amount of his judgment, interest, and costs be taxed in his favor, while defendant strenuously insisted that he had made a proper tender of the actual amount of the damages under chapter 44, Rev. Codes 1905, Comp. Laws 1913, §§ 8500–8506, and that he should be allowed all costs incurred after the plaintiff had declined such tender. The matter was thereupon brought before the trial judge, who, after several hearings, ruled with the plaintiff, and this appeal followed. The question to be determined is whether or not the offer of $25 affected a payment of the debt so that the costs thereafter incurred should be borne by the plaintiff, when a jury finally determined that his damages did not exceed this amount.

(1) The subject is governed by chapter 44, Rev. Codes 1905, Comp. Laws 1913, §§ 8500–8506. Section 7865 makes the owner of trespassing stock liable for damages in a civil action, and provides that the procedure shall be the same in all respects as in civil actions except as therein modified, and providing a short term statute of limitations of sixty days for the enforcement of such lien. Section 7866 provides that any person occupying cultivated land shall be considered the owner thereof. Section 7867 reads: "Notice of damages. The party sustaining damages from the trespass of animals, before commencing an action therefor shall, if he knows to whom such animals belong, notify him or the person having them in charge, of such damage and the probable amount thereof." Section 7868 provides that a person suffering damages may keep the offending animals until the damages and costs are paid, or until security is given for such payment, and provides that a person holding possession of such animals shall notify the own-

ers of their detention. Section 7869 provides for a lien upon the animals and their sale to satisfy any judgment. Section 7870 provides for a service by publication upon unknown owners. Section 7871 provides for the sale and distribution of any surplus. Section 1942, Rev. Codes 1905, Comp. Laws 1913, § 2626, in a measure duplicates § 7867, and applies to counties where the herd law has not been repealed by vote of the people, but is to the same general effect. Section 5259, Rev. Codes 1905, Comp. Laws 1913, § 5815, provides that an "obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit in this state, of good repute, and notice thereof is given to the creditor." While the appellant has stated this point in six different ways by six separate assignments of error, they all are answered by the same argument and will be considered together. Appellant in his brief states his propositions as follows: "When this tender and deposit was made the obligation was extinguished and the matter was settled, and there was therefore no cause of action in favor of plaintiff and against the defendant for the same matter." He complains, also, because the court refused to give the following instruction: "If you find from the evidence that the plaintiff suffered damages, but that the said damages did not exceed the sum of $25, the amount deposited in the bank by the defendant, then you must find in favor of the defendant for the dismissal of this action." Also for refusal to give the following instruction: "That plaintiff cannot recover more than $25." And again we quote from the brief: "The appellant claims that when such deposit was made, his obligation was extinguished and settled, and he was under no further liability to the plaintiff." And again: "Even if the tender and deposit by the defendant would not extinguish the obligation, it would certainly have the same effect as an offer of judgment. Section 7237 of the Civil Code of Procedure." And, "unless the plaintiff recover a more favorable verdict than the said tender and deposit, he could not recover costs, but the defendant would be entitled to recover his costs against the plaintiff." And the fifth and sixth assignment of error relate to the taxation of costs.

(1) As already stated, the cows were taken up on the 1st of August and notice given to defendant the following day. Nothing was done

by defendant, however, until the 15th of said month, or thirteen days later, during which time the cows had been placed in the public pound. At that time the defendant deposited $25 as aforesaid, but this comes far short of extinguishing the obligation, under § 5259, Rev. Codes 1905, Comp. Laws 1913, § 5259 as claimed by the appellant. To constitute payment and settlement of the action, he should have promptly accepted plaintiff's offer of $25 *and costs* and obtained his cattle. Thirteen days is too long a delay under those circumstances.

(2) Neither can plaintiff substantiate his position that this deposit is equivalent to a tender of judgment. At the time the deposit was made no action had been commenced. Had an offer of judgment been made it must necessarily have included the costs incurred to date, and would, no doubt, have been accepted by plaintiff. For the same reasons the instructions mentioned were properly refused, and costs were properly taxed in favor of the plaintiff. The judgment of the trial court is in all things affirmed.

JAMES O'HAIR v. S. S. SUTHERLAND.

(152 N. W. 123)

Defendant traded a tract of land to plaintiff, giving him warranty deed with a covenant against encumbrances, excepting a mortgage for $3,500. There were of record two other mortgages,—one for $650 and one for $5,700. Plaintiff sought to rescind under subdiv. 2, § 5849, Comp. Laws, 1913.

Sale or trade for land — contract for — representations — rescission of contract — deceit — fraud — title — remedied — damages.

1. Evidence examined, and shows that defendant believed the representations made by him to be true and had ample reasons for so believing. That he did not attempt to deceive or defraud plaintiff. That plaintiff was not damaged in any particular, and within six weeks of learning of the defects in the title defendant remedied the same. Each case must rest upon its own facts and be governed by its own equities, and it is accordingly *held*, that defendant did not

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Note.—The rescission of a land contract because of mistake as to the extent of the grantor's title is the subject of a note in 15 L.R.A.(N.S.) 1039, and the question whether fraud may be predicated of misstatement as to title to real property is treated in notes in 28 L.R.A.(N.S.) 202, and 39 L.R.A.(N.S.) 1142.

make positive assertions in a manner not warranted by the information in his possession at the time of making the statements, and plaintiff could not rescind the contract.

Consideration — failure of — evidence.

2. Further *held*, that there was no failure of consideration of the original contract.

Opinion filed March 19, 1915.

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

Affirmed.

Thomas H. Pugh, for appellant.

The statements made by defendant to plaintiff, regarding the condition of the title to the lands he was trading, are of *material facts*, and not mere matters of opinion. Robins v. Hope, 57 Cal. 495; Zunker v. Kuehn, 113 Wis. 421, 88 N. W. 606.

The seller of property is bound to know that the representations he makes to induce the sale are true. Allen v. Hammond, 11 Pet. 63, 9 L. ed. 633; 2 Pom. Eq. Jur. § 887.

It is immaterial whether the vendor had knowledge or not of the falsity of the representations. Brown v. Linn, 50 Colo. 443, 115 Pac. 908; Fischer v. Hillman, 68 Wash. 222, 39 L.R.A.(N.S.) 1140, 122 Pac. 1016; 14 Am. & Eng. Enc. Law, 2d ed. pp. 120, 121; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. 4 N. D. 219, 37 L.R.A. 593, 59 N. W. 1066; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 517, 101 N. W. 903; Chilson v. Houston, 9 N. D. 498, 84 N. W. 354; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; Field v. Morse, 54 Neb. 789, 75 N. W. 58; Benjamin, Contr. 2d ed. 196 and cases cited; Kathan v. Comstock, 28 L.R.A.(N.S.) 201 and note gathering authorities, 140 Wis. 427, 122 N. W. 1044; Flaherty v. Till, 119 Minn. 191, 137 N. W. 815; Maupin, Marketable Title, § 338; Severson v. Kock, 159 Iowa, 343, 140 N. W. 220; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Mohler v. Carder, 73 Iowa, 582, 35 N. W. 647; Hunter v. French League Safety Cure Co. 96 Iowa, 573, 65 N. W. 828; Maine v. Midland Invest. Co. 132 Iowa, 272, 109 N. W. 801; McFadden v. Alexander, 154 Iowa, 716, 135 N. W. 398; New York Brokerage Co. v. Wharton, 143 Iowa, 65, 119 N. W. 969; Wilcox v. Iowa Wesleyan

University, 32 Iowa, 367; Moyle v. Silbaugh, 105 Iowa, 531, 75 N. W. 362; Strothers v. Leigh, 151 Iowa, 214, 130 N. W. 1019; Piche v. Robbins, 24 R. I. 325, 53 Atl. 92.

The mere fact that a warranty deed was given, does not affect the right to rescind. Diggs v. Kirby, 40 Ark. 420; Crutchfield v. Danilly, 14 Ga. 432; Napier v. Elam, 6 Yerg. 108; Kathan v. Comstock, 28 L.R.A.(N.S.) 211, note.

Even though fraud is pleaded, if mutual mistake of fact is shown, relief may be granted. Hood v. Smith, 79 Iowa, 621, 44 N. W. 903; Moehlenpah v. Mayhew, 138 Wis. 561, 119 N. W. 826; Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149; Lewis v. Mote, 140 Iowa, 698, 119 N. W. 152; Houston v. Northern P. R. Co. 109 Minn. 273, 123 N. W. 925, 18 Ann. Cas. 325; Strothers v. Leigh, 151 Iowa, 214, 130 N. W. 1021; Weise v. Grove, 123 Iowa, 589, 99 N. W. 191; Smith v. Bricker, 86 Iowa, 285, 53 N. W. 250; Clapp v. Greenlee, 100 Iowa, 595, 69 N. W. 1049; Campbell v. Spears, 120 Iowa, 673, 94 N. W. 1126; 39 Cyc. 1252.

In such case the requisite mutuality of assent is wanting; there is no meeting of minds,—no contract. What has been thus done is regarded as though not done. Utley v. Donaldson, 94 U. S. 29, 24 L. ed. 54; Scott v. United States, 12 Wall. 443, 20 L. ed. 438; Allen v. Hammond, 11 Pet. 63, 71, 9 L. ed. 633, 636; 8 Enc. U. S. Sup. Ct. Rep. 422; Waldem v. Skinner, 101 U. S. 577, 25 L. ed. 963.

Each of the properties exchanged being consideration for the other, where the title to either fails, or fails to meet the representations made, there is a failure of consideration. Plaintiff was not exchanging valuable property for property burdened as was this property. Such was *not* the contract. Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149; 17 Cyc. 839, 840; Hunt v. Sackett, 31 Mich. 18; Johnson v. Ryan, 62 Wash. 60, 112 Pac. 1116.

Plaintiff was not guilty of laches. But if so, laches being an independent defense in the nature of estoppel, must be pleaded, or it cannot be raised. German Nat. Bank v. First Nat. Bank, 55 Neb. 86, 75 N. W. 531; Costello v. Muheim, 9 Ariz. 422, 84 Pac. 406; Hill v. Barner, 8 Cal. App. 58, 96 Pac. 111; Smith v. Russell, 20 Colo. App. 554, 80 Pac. 474; Keller v. Harrison, 151 Iowa, 320, 128 N. W. 851, 131 N. W. 53, Ann. Cas. 1913A, 300; Treadwell v. Clark, 190 N.

Y. 51, 82 N. E. 505; Zebley v. Farmers' Loan & T. Co. 139 N. Y. 468, 34 N. E. 1067; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804.

In considering the question of laches, the conditions and circumstances surrounding the parties and the transaction must be taken into account. Marston v. Simpson, 54 Cal. 189, 13 Mor. Min. Rep. 36; Strothers v. Leigh, 151 Iowa, 214, 130 N. W. 1019; Sanborn v. Eads, 38 Minn. 211, 36 N. W. 338; Goss v. Herman, 20 N. D. 306, 127 N. W. 78; Walker v. Schultz, 175 Mich. 280, 141 N. W. 543; Parker v. Bethel Hotel Co. 96 Tenn. 252, 31 L.R.A. 706, 34 S. W. 209.

This is an equity action, and the court had full jurisdiction. The remedy at law, if any, could only afford *partial* relief. 16 Cyc. 41, et seq. 129; 5 Enc. U. S. Sup. Ct. Rep. 826; Reynes v. Dumont, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486; Tyler v. Magwire, 17 Wall. 253, 21 L. ed. 576; Brown, B. & Co. v. Lake Superior Iron Co. 134 U. S. 530, 33 L. ed. 1021, 10 Sup. Ct. Rep. 604.

C. H. Starke and *W. F. Burnett,* for respondent.

Where a person makes a statement of fact in the honest belief that it is true, and such belief is based upon reasonable grounds which actually exist, it is not fraudulent either in law or in equity. 2 Pom. Eq. Jur. 888.

An executed contract where the purchaser is protected by warranty will not be rescinded. N. D. Rev. Codes 1905, § 5435, Comp. Laws 1913, § 5994; Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513; Decker v. Schultze, 11 Wash. 47, 27 L.R.A. 336, 48 Am. St. Rep. 858, 39 Pac. 261; Leal v. Terbush, 52 Mich. 100, 17 N. W. 713; Miller v. Miller, 47 Minn. 546, 50 N. W. 612; Fellows v. Evans, 33 Or. 30, 53 Pac. 491; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 723; Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112; Baird v. New York, 96 N. Y. 567; Roseboom v. Corbitt, 116 C. C. A. 301, 196 Fed. 627; Wilde v. Gibson, 1 H. L. Cas. 605, 12 Jur. 527.

Fraud, without proof of damage resulting therefrom, is no ground for an action either in deceit or by way of rescission. Nelson v. Grondahl, 12 N. D. 133, 96 N. W. 299; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344; 2 Pom. Eq. Jur. § 898.

An allegation of fraud is not sustained by proof of mistake. Mercier

v. Lewis, 39 Cal. 532; Connell v. El Paso Gold Min. & Mill. Co. 33 Colo. 30, 78 Pac. 677; Dashiell v. Grosvenor, 27 L.R.A. 67, 13 C. C. A. 593, 25 U. S. App. 227, 66 Fed. 334; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Spies v. Chicago & E. I. R. Co. (C. C. S. D. N. Y.) 6 L.R.A. 565, 40 Fed. 34.

Where a contract is executed and a warranty taken, the only remedy of the vendee for mistake, whether mutual or otherwise, is upon the warrantee for damages. Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513; Leal v. Terbush, 52 Mich. 100, 17 N. W. 713; Reuter v. Lawe, 86 Wis. 106, 56 N. W. 472; Miller v. Miller, 47 Minn. 546, 50 N. W. 612; Fellows v. Evans, 33 Or. 30, 53 Pac. 491; Thompson v. Jackson, 3 Rand. (Va.) 504, 15 Am. Dec. 723; Newman v. Kay, 57 W. Va. 98, 68 L.R.A. 917, 49 S. E. 926, 4 Ann. Cas. 39; Decker v. Schulze, 11 Wash. 47, 27 L.R.A. 335, 48 Am. St. Rep. 858, 39 Pac. 261; note to Burton v. Haden, 15 L.R.A.(N.S.) 1042; Bingham v. Bingham, 1 Ves. Sr. 126; Lawrence v. Beaubien, 2 Bail. L. 623, 23 Am. Dec. 155; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Houston v. Northern P. R. Co. 109 Minn. 273, 123 N. W. 922, 18 Ann. Cas. 325.

Where a party has an election of remedies, he has but one election. Bigelow, Fraud, 436; 6 Pom. Eq. Jur. 687.

Plaintiff's admissions that he intended to rely upon his deed and upon Sutherland for damages are proof of his election, and his delay and silence for so long a time show ratification. Schiffer v. Dietz, 83 N. Y. 300; Bailey v. Cox, 102 Cal. 333, 36 Pac. 650; Re California Mut. L. Ins. Co. 81 Cal. 364, 22 Pac. 869; Condon v. Hughes, 92 Mich. 367, 52 N. W. 638; Foster v. Rowley, 110 Mich. 63, 67 N. W. 1077; Ward v. Packard, 18 Cal. 391; Watson v. Atwood, 25 Conn. 313; Fitzhugh v. Davis, 46 Ark. 346; Maimlock v. Fairbanks, 46 Wis. 415, 32 Am. Rep. 716, 1 N. W. 167.

Relief will not be granted in equity on the ground of mistake, where defendant's liability or other trouble is the result of his own want of proper diligence. Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Marshall v. Homier, 13 Okla. 264, 74 Pac. 368; note to Dolvin v. American Harrow Co. 28 L.R.A.(N.S.) 882.

There was a plain, speedy, full remedy at law. Pleading facts which show this is sufficient. 1 Pom. Eq. Jur. 129; Union Power Co. v.

Lichty, 42 Or. 563, 71 Pac. 1044; Love v. Morrill, 19 Or. 545, 24 Pac. 916.

BURKE, J. This is a trial *de novo*. On August 16, 1911, defendant was the owner of a quarter section of land in Stark county, and upon that date traded the same to plaintiff, giving a warranty deed with an expressed consideration of $2,900, free of all encumbrances excepting a mortgage for $3,500 to the Winona Savings Bank, which plaintiff assumed. The land was traded to plaintiff for a house and the furniture therein contained, situated in the city of Dickinson, plaintiff paying $200 in addition. Plaintiff now attempts to rescind the contract upon the grounds that there were of record against said land two other mortgages; to wit, one for $650 and one for $5,700.

We do not understand that there is much dispute between the parties as to the law applicable. Section 5933, Comp. Laws 1913, provides that "a contract is extinguished by its rescission." And § 5934: "A party to a contract may rescind the same in the following cases only: 1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake or obtained through duress, menace, fraud or undue influence exercised by [the plaintiff] or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party. 2. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part." (3, 4, and 5 not in point.) Section 5849, Comp. Laws 1913, reads: "Actual fraud within the meaning of this chapter, consists in any of the following acts committed by a party to the contract, or with his connivance with intent to deceive another party thereto or to induce him to enter into the contract. 1. . . . 2. The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true." 1, 3, 4, and 5 not in point). Plaintiff justifies his rescission upon the grounds of fraud and failure of consideration.

(1) In his brief appellant says: "We admit there is no evidence on which to base an accusation against the defendant of moral turpitude in the transaction, although the defendant was anxious to make the deal, and the landmarks of the case point to actual fraud; but we do

assert that there is sufficient evidence to support a finding that the statements of the defendant regarding the title to his property amount to such fraudulent representations as will support a rescission of the transaction in equity." The first and principal controversy, therefore, is whether defendant made positive assertions regarding his title in a manner not warranted by the information in his possession at that time. This necessitates the recital of certain incidents leading up to the sale, and we will quote from the testimony briefly as possible. Plaintiff testifies: "I knew that Sutherland was financially responsible, and that any warranty that he might make he could be compelled to make good. I relied on that, and that is why I did not examine the records." Defendant bought the farm from one Vaughn, who was also responsible, and who had assured defendant that the place was free from all encumbrances excepting the $3,500 mortgage. It is conceded, we believe, that neither Vaughn nor Sutherland had the slightest suspicion of the extra mortgages of record. Vaughn, in his turn, had bought the place from one John Drenkenshuh and he from one Schwindt. Schwindt had executed the mortgage to the savings bank for $3,500 and the $650 to Rising, president of said bank, partly as a commission and partly for other debts paid by Mr. Rising at that time in clearing up the title. The $5,700 mortgage was very largely a duplication of the savings bank mortgage, the facts being that Schwindt had sold the land for $3,500, some personal property for $2,500, making $6,000. Drenkenshuh had paid, however, $300 cash, leaving $5,700 due to Schwindt. Instead of having Drenkenshuh assume the $3,500 mortgage and give a second mortgage for the balance, Schmidt took a mortgage from Drenkenshuh for the entire amount, but had later paid for most of the extra amount. However, this entire transaction was unknown to Sutherland.

Defendant testifies:

"I got this land from Mr. Vaughn. His deed to me mentioned the $3,500 mortgage, the same as I had mentioned it to Mr. O'Hair, and no other. I had known Vaughn for twenty years, and had confidence in his assertion and warranty that there was no encumbrance against the land except the $3,500 mortgage. The deeds from Mr. O'Hair to me and from me to Mr. O'Hair were drawn up in Mr. Hevener's office. While Mr. Hevener was drawing up the papers, we

talked over the deal, and I told him there was $3,500 against it, and if he wished he could look it up on the records any time. I told him I had never looked up the title, just took Vaughn's deed for it. . . . I believed at all times that there was but $3,500 against the land. I did not know it; just took Vaughn's word for it."

This portion of defendant's testimony is practically admitted by plaintiff, who testifies as follows:

Q. Did not Sutherland tell you at that time that he was deeding the land over to you just as he got it from Mr. Vaughn?

A. I believe he did.

Plaintiff, however, claims that there was a conversation had at the farm before this, in which plaintiff told him that the land was "clean as a whistle" excepting for the $3,500. Defendant's version is further corroborated by Hevener, the attorney who drew up the papers and heard all the conversations that occurred at that time. He says: "He (defendant) said that he had purchased this land of Jerome Vaughn and had received an abstract from him; had taken the land subject to a mortgage of $3,500 and was deeding it to Mr. O'Hair under the same conditions that he received it." That defendant was surprised to learn of the condition of the title is testified to by the plaintiff himself. It is undisputed that defendant practically cleared the title of such defects within six weeks after the matter was brought to his attention, and, as a matter of fact, most of the $5,700 mortgage arose from the peculiar manner in which the deeds and mortgages had been drawn up.

Appellant has cited us to the case of Joines v. Combs, 38 Okla. 380, 132 Pac. 1115, which is a construction of a statute identical with ours. An examination of this case shows that the defendant therein sold Indian allotment lands to the plaintiff and represented to him that the title was good, but the court says: "The lands involved consist of 920 acres, for the most part, of inherited Indian allotments, reliance for title in which is placed upon deeds executed by the parties purporting to be the heirs of the descendants [decedents] and generally without probate proceedings to establish the verity thereof. In addition thereto there is 100 acres, title to which was secured direct from the original allottee, W. M. James, who is enrolled as a full blood Choctaw and

whose deed to the land was executed subsequent to the date of April 26, 1906, and at a time when his restrictions were unremoved by congressional action. . . . The validity of his title to the greater portion of the 900 acres of land was, at that time, and still is, in dispute. Suits were pending, both in the trial and appellate courts, to determine the question also the right of the original patentees or allottees, as well as of certain heirs of such patentees and allottees, to convey title to said real estate; and this court entertains serious doubt as to the validity of the defendant's title to a large portion of said real estate at the time the contract to convey the same was made, as well as at the time of the trial of this action." The Oklahoma court allowed a rescission. We would have held likewise under the facts in their case, but the misrepresentations there were of a very serious nature, and the defendant had knowledge in that case of facts which should have put him on inquiry, and were much stronger than in the case at bar. He knew that he was dealing in Indian Allotment lands, and that his title came from purported heirs whose identity was being disputed in the courts. In the case at bar the fee title was good, the defect being encumbrances largely arising from careless conveying. The defect could be and was speedily remedied. Each case must rest on its own facts and be governed by its own equities. We, like the trial court, conclude that considering all of the circumstances of the case, defendant was not guilty of making false statements not justified by the information which he possessed.

(2) Appellant further contends that the consideration has failed, and that he, therefore, was justified in rescinding. The evidence already given, however, does not substantiate this claim. Plaintiff was not evicted from his premises nor bothered in any manner. As soon as defendant learned of the defects he proceeded to remedy them, and plaintiff is now in possession of the full fruits of his bargain. In this respect the case differs from those cited by appellant wherein the title fails leaving the purchaser bootless. See:

Decker v. Schulze, 11 Wash. 47, 27 L.R.A. 335, 48 Am. St. Rep. 858, 39 Pac. 261; Miller v. Miller, 47 Minn. 546, 50 N. W. 612; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Nelson v. Grondahl, 12 N. D. 130 (at top page 133), 96 N. W. 299; note in 15 L.R.A. (N.S.) 1042.

Respondent calls our attention to the distinction between the remedy in cases of executed and unexecuted contracts, and maintains that plaintiff must recover, if at all, upon the covenants of warranty contained in the deed, citing § 5994 Comp. Laws 1913 (but see Maupin, Marketable Title, 2d ed. 338), and raises also the question of laches upon the part of the plaintiff in not rescinding until some four months after learning of the defects, but in view of the above holding a discussion of these questions is not necessary. The order of the trial court is affirmed.

D. C. GREENLEAF v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation.

(L.R.A.—, 151 N. W. 879.)

Attorneys' lien — on money — in hands of adverse party — tort actions — personal injuries — actions on contracts.

1. Section 6293, Rev. Codes 1905, being § 6875, Compiled Laws of 1913, and which provides for an attorney's lien on "money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing," applies to tort actions for personal injuries as well as to actions which are founded upon contract, and this although such actions do not survive the death of the plaintiff.

Actions — proceedings — damages — personal injuries.

2. The words "action" and "proceeding" as used in § 6293, Rev. Codes 1905, § 6875, Compiled Laws 1913, include actions and proceedings for the recovery of damages for personal injuries.

Note.—A review of the authorities in a note in 3 L.R.A.(N.S.) 379, on the question of attorney's lien on cause of action for tort, shows that, in the absence of statute, there is no such lien. But where the statute in general terms gives an attorney a lien upon "money due his client in the hands of an adverse party," as was the case in GREENLEAF v. MINNEAPOLIS, ST. P. & S. STE. M. R. Co. without expressly limiting it to actions upon contract, he is entitled to a lien for his fees in actions of tort.

The general question of lien of attorney is treated in notes in 51 Am. St. Rep. 251 and 19 L. ed. U. S. 992.

Action — an orderly proceeding in a court of justice — party's right — enforcement of — wrong — prevention of.

3. An action is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

Proceeding — meaning of — courts.

4. The term "proceeding" includes the form and manner of considering judicial business before a court or judicial officer, and regular and ordinary proceedings in form of law, including all possible steps in an action from its institution to the execution of judgment.

Statutes — language of — unambiguous — legislature — motive — not for courts to inquire.

5. Where the language of a statute is unambiguous, it is not for the courts to inquire as to the motive of the legislature nor to depart from the meaning which is clearly conveyed.

Attorney's lien — merger — judgment — compromise agreement — voluntary payment — cannot satisfy.

6. The attorney's lien given by § 6293, Rev. Codes 1905, § 6875, Compiled Laws of 1913, when sought to be asserted in an action or proceeding for the recovery of damages for personal injuries, attaches to that into which the right of action is merged. If a judgment is recovered the lien attaches to it; if a compromise agreement is made the lien attaches to it; and in either case the attorney's lien is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent.

Policy of the law — attorney — lien — settlement by client — agreement to deprive client from right — void.

7. It is opposed to the policy of the law, and § 6293, Rev. Codes, 1905, § 6875, Compiled Laws of 1913, gives to an attorney no right, to prevent his client from himself settling his claim for damages for personal injuries and without dictation by such attorney. An agreement which seeks to deprive the client of such right is void, but it does not otherwise invalidate an agreement for contingent fees which is otherwise valid.

Lien — notice of — settlement of claim with client — attaches to proceed — percentage.

8. Where a lien is claimed under § 6293, Rev.Codes, 1905, § 6875, Compiled Laws of 1913, in an action for personal injuries, and due notice thereof is given to the defendant and a settlement or compromise is made with the plaintiff, with or without the consent of the attorney, such lien will attach merely to the proceeds of the settlement, and if the contract or lien is for a percentage of the claim or recovery, will merely be for such percentage of the amount for which such claim is settled or compromised.

Opinion filed January 9, 1915, Rehearing denied March 18, 1915.
30 N. D.—8.

Appeal from the District Court of Ward County, *F. E. Fisk,* J., special judge. Action to recover on an attorney's lien. From an order sustaining a demurrer to the complaint plaintiff appeals.

Reversed and remanded.

E. R. Sinkler and *W. F. Doherty,* for appellant.

Where the legislature enacts a provision taken from a statute of another state or country in which the language of the act has received a settled construction, it is presumed to have been intended that such provision should be understood and applied in accordance with that construction. Cass County v. Security Improv. Co. 7 N. D. 536, 75 N. W. 775; Besser v. Alpena Circuit Judge, 155 Mich. 631, 119 N. W. 902; Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577; State ex rel. McCue v. Blaisdell, 18 N. D. 31, 119 N. W. 361; Kan. Gen. Stat. 1868, § 8.

An attorney has a lien in a tort action. Anderson v. Metropolitan Street R. Co. 10 Kan. App. 575, 61 Pac. 982; Smith v. Chicago, R. I. & P. R. Co. 56 Iowa, 720, 10 N. W. 244; Gibson v. Chicago, M. & St. P. R. Co. 122 Iowa, 565, 98 N. W. 474; Barthell v. Chicago, M. & St. P. R. Co. 138 Iowa, 688, 116 N. W. 813; Winslow v. Central Iowa R. Co. 71 Iowa, 197, 32 N. W. 331; Clark v. Sullivan, 3 N. D. 283, 55 N. W. 733; Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12, 291; Corson v. Lewis, 77 Neb. 449, 114 N. W. 281; 23 Am. & Eng. Enc. Law, 155.

There can be no departure from the terms of the statute where no absurdity or inconvenience will follow from a liberal construction. 26 Am. & Eng. Enc. Law, 598; Gibson v. Chicago, M. & St. P. R. Co. 122 Iowa, 565, 98 N. W. 475.

Palda, Aaker, & Greene, for respondent.

The plaintiff's firm did not acquire any interest in their client's cause of action, or any lien upon any sum of money which might be recovered either through judgment or compromise settlement. An attorney's valid lien amounts to an assignment of an interest in his client's cause of action. Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733; Lown v. Casselman, 25 N. D. 44, 141 N. W. 73.

This is an action in tort, and such a cause, for personal tort, is not assignable, and defendant could settle or pay without hindrance. 4 Cyc. 24, and note 46; Weller v. Jersey City, H. & P. Street R. Co.

68 N. J. Eq. 659, 61 Atl. 459, 6 Ann. Cas. 442; Howard v. Ward, 31 S. D. 114, 139 N. W. 771; Lawrence v. Martin, 22 Cal. 174; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; John V. Farwell Co. v. Wolf (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109; Pulver v. Harris, 52 N. Y. 73; Murray v. Buell, 76 Wis. 657, 20 Am. St. Rep. 92, 45 N. W. 667; Tyler v. Superior Ct. 30 R. I. 107, 23 L.R.A.(N.S.) 1045, 73 Atl. 467; Boogren v. St. Paul City R. Co. 97 Minn. 51, 3 L.R.A.(N.S.) 379, 114 Am. St. Rep. 691, 106 N. W. 104; Smelker v. Chicago N. W. R. Co. 106 Wis. 135, 81 N. W. 994; Hanna v. Island Coal Co. 5 Ind. App. 163, 51 Am. St. Rep. 246; Hammons v. Great Northern R. Co. 53 Minn. 249, 54 N. W. 1108; Anderson v. Itasco Lumber Co. 86 Minn. 480, 91 N. W. 12, 291.

The original action was for a personal tort, did not survive, and was not assignable. 4 Cyc. 23, 24; Courtney v. McGavock, 23 Wis. 619.

Bruce, J. This is an appeal from an order sustaining a general demurrer to a complaint. The only question involved is whether an attorney who has made an agreement with his client in a personal injury action for a percentage "of any amount received, recovered, or obtained from the said defendant by reason of the injuries sustained by him, either in settlement or by action," and who subsequently serves upon the defendant a notice of an attorney's lien based upon such agreement, can recover from such defendant such percentage on the amount which the said defendant has paid to the plaintiff in settlement of the claim and action, before judgment, and without the knowledge or consent of the said attorney. More specifically the question is: Does subdivision 3 of § 6293, Rev. Codes 1905, § 6875, Compiled Laws 1913, provide for attorneys' liens in the case of unliquidated claims for personal injuries? We think it does.

The statute, § 6293, Rev. Codes 1905, 6875, Compiled Laws of 1913, provides that "an attorney has a lien for a general balance of compensation in and for each case upon: . . . 3. *Money due* his client in the hands of the adverse party, or attorney of such party, in *an action or proceeding* in which the attorney claiming the lien was employed *from the time* of giving notice in writing to such adverse party or the

attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed and in general terms for what services."

Counsel for defendant and respondent claims, and the demurrer was no doubt sustained upon the theory, that: "(1) Lundy's claim against the defendant was for damages alleged to have been sustained through the negligence of the defendant, which resulted in certain personal injuries of a serious character to said Lundy. It was, therefore, a tort action or demand. (2) An attorney's lien, if a valid one, amounts to an assignment of an interest in his client's cause of action. (3) A cause of action for a personal tort cannot be assigned unless there is a statute declaring that such a cause of action shall not abate on the death of the injured party, or a statute expressly authorizing such assignment. (4) There is no statute in this state in derogation of the common-law rule that a cause of action for personal tort is not assignable, and does not survive. (5) It is against public policy, and therefore contrary to law, to recognize the right of a person to assign an interest in a claim which would not survice his death."

The first proposition, of course, is to be accepted. The action is certainly a tort action.

We, too, no doubt, have held in the cases of Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733, and Lown v. Casselman, 25 N. D. 44, 141 N. W. 73, that an attorney's lien is in the nature of an equitable assignment of an interest in the claim. The subsequent conclusions of counsel, however, seem by no means to flow from these premises. Nor can we concede that in North Dakota, or indeed in any state, it is necessarily against public policy and therefore contrary to law to recognize the right of a person to assign an interest in a claim which would not survive his death, or at any rate that the legislature may not authorize such an assignment. Would anyone, for instance, claim that if a person had contracted for an annuity during his life, and interest in that annuity during the lifetime of the insured could not be assigned merely because under the contract the payments would stop at his death?

There is, in short, nothing in the nature of things which makes survivorship an essential to the legislative right to create a statutory lien. All that the question of survivorship affects is the right of assignability and the securing of a claim thereby when the statute is

silent and itself creates no lien. It is true that there is some confusion of thought upon the subject to be found among the authorities; but the confusion can, we believe, all be traced to one basic error, and that is the failure to distinguish between the cases which were decided in states and at a time when no statutory lien or right of an assignment was given or authorized, and in which the common-law rules as to assignability and as to attorneys' liens were alone to be relied upon, and those in which the legislature had spoken and in which a statutory lien such as ours had been created.

The Illinois cases of North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 177, 49 N. E. 222, and Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65, illustrate the point. At the time of the transaction which was passed upon in the former of these cases, no statutory lien existed in Illinois, and the plaintiff's attorney had attempted to avoid the fact and to protect his claim by having the cause of action assigned to him as security for his fees. This the court held could not be done in the absence of statutory authority, as *the cause of action did not meet the common-law criterion* of assignability which seems to have been survivability. Between the handing down of the opinion in this case, however, and that in the later case of Standridge v. Chicago R. Co. supra, the legislature had intervened and created such a lien, and the court in the later opinion sustained the statute and the lien without even mentioning the elements of survivability or assignability.

The question, indeed, for us to determine is not whether the cause of action survives and is assignable, but whether, in enacting the statute under consideration, the legislature intended that its provisions should apply to tort as well as to contract actions. We think it did. If the North Dakota legislature intended that such a lien should exist, the cases which are founded on the common-law rule are certainly not applicable. There is no constitutional provision which forbids the enactment of any such statute. The allowance of such a lien cannot be said to be against public policy if the statute is otherwise valid, for public policy is the policy of the people of a state as a whole, and in the absence of a constitutional inhibition can be adequately and fully expressed by the legislature of a state. Northern P. R. Co. v. Richland County, 28 N. D. 172, L.R.A.1915A, 129, 148 N. W. 545.

It is true that the statute in North Dakota does not provide that actions for personal injuries shall survive the death of the plaintiff. It seems, however, to be universally conceded, and even by the authorities on which respondent relies, that if such a statute existed, a lien such as that which is claimed in the case at bar would be valid and enforceable. Corson v. Lewis, 77 Neb. 449, 114 N. W. 281. It seems, too, to be conceded that, even in the absence of a statute of survivorship, such a lien would be enforceable upon the rendition of the judgment. Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12.

In commenting upon the Iowa case of Smith v. Chicago, R. I. & P. R. Co. 56 Iowa, 720, 10 N. W. 244, the Minnesota court, for instance, in the case of Anderson v. Itasca Lumber Co. supra, says: "For authority we are cited to the case of Smith v. Chicago, R. I. & P. R. Co. supra. In that case attorneys were employed by a party claiming a cause of action against the defendant for personal injuries, and notice of the attorney's lien had been served upon the defendant pending the action. After the entry of judgment, the client and defendant settled the case regardless of the attorney's notice, whereupon they brought suit against defendant to recover the amount of their fees, claiming a lien upon the money in its possession, and the court held in their favor. The statute upon which the court based its decision is similar to our own, but there is this distinction between the cases: In the Iowa suit the cause had ripened into a judgment, and therefore the attorney's claim had become vested in that judgment by virtue of which money actually became due the plaintiff from the adverse party." What distinction, however, there can be between a tort action after judgment and a tort action after a settlement between the parties it is difficult for us to see. The Minnesota case of Anderson v. Itasca Lumber Co. supra, says that the lien in the Iowa case of Smith v. Chicago, R. I. & P. R. Co. supra, was properly asserted because there was money which was actually due. Would anyone claim that after a valid settlement and agreement between the plaintiff and the railroad company, and before the payment of the amount agreed upon on such settlement, there was not a liquidated sum of money actually due in the hands of the company and belonging to the plaintiff? After such settlement, he certainly could have sued in contract for the recovery thereof. It is admitted

that an action in contract is assignable and the subject of a lien. It is also admitted that the inchoate right to a lien, which was suspended until the rendition of a judgment in the Iowa case, was not made invalid because it had been so suspended, but, when the judgment was once obtained, could rest thereon. Why in the case at bar is it not reasonable to hold that under our peculiar statute the lien of the attorney, though suspended until a settlement or a judgment, became vested when that settlement was agreed upon and became a contract and the subject of an action in assumpsit? The only question in such cases should be whether there was any such settlement, and the defendant cannot deny the fact in this case, as it seems to have recognized it by paying over the money.

It is to be noticed indeed that the North Dakota statute uses the terms "action" and "proceeding" generally, and in no sense limits or qualifies their use. If it did not intend that the terms should cover tort as well as contract actions, why did it not use some qualifying clause, such as "an action or proceeding arising in contract" or "an action or proceeding not arising in tort?" We have, indeed, no option but to adopt the ordinary and statutory definition of the term "action" as well as the generally accepted meaning of the word "proceeding." According to the Code, an action is "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." Rev. Codes 1905, § 6742, Comp. Laws 1913, § 7330. According to the general acceptation of the term also, "the term 'proceeding' includes the form and manner of conducting judicial business before a court or judicial officer, regular and orderly progress in form of law; including all possible steps in an action from its institution to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." 23 Am. & Eng. Enc. Law, 2d ed. 155.

The rule of statutory construction is well established. It is that, "if the language is clear and admits of but one meaning, the legislature should be intended to mean what it has plainly expressed, and there is no room for construction. The plain and sound principle is to declare it *lex scripta est,* although, so understood, the statute leads to absurd and

mischievous results, or to consequences not contemplated by the legislature; for courts are not to inquire as to the motive of the legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy. *A fortiori,* there can be no departure from the terms of the statute, where no absurdity or inconvenience will follow from a literal interpretation, 26 Am. & Eng. Enc. Law, 2d ed. 598.

It would appear to us that a plain reading of the statute before us can admit of but one construction, and that is that the words "action" and "proceeding" therein used include every form of action, whether founded on tort or in contract. We cannot say that the statute intervenes public policy, for, as we have before intimated, the legislature can announce its own public policy.

Nor are we without authority for coming to this conclusion. In speaking of a statute of Kansas which was in all material respects identical to our own, and from which our statute can no doubt trace its origin, even if it was not directly copied therefrom, the late Mr. Justice David J. Brewer, then a judge of the supreme court of Kansas, and before the adoption in North Dakota or in the territory of Dakota of the statute which is now before us, said: "Will the lien exist where the only claim of the plaintiff is one for damages for personal injury, unliquidated and undetermined by judgment or verdict? In other words, may a defendant when sued in such an action, and before trial and verdict, settle with the plaintiff, pay him a certain amount, obtain a release and satisfaction of the claim, and thus free himself from all further liability either to the plaintiff or to his attorney, notwithstanding such attorney has, prior to the settlement, given notice of a claim for a lien, and such plaintiff is insolvent and irresponsible? This question must be answered in the negative. The lien will exist, and the defendant cannot thus defeat it. *It is unnecessary to inquire whether this would have been the rule independent of statute. This gives a lien not simply upon a judgment, but upon 'money due.'* It does not specify *for what the money must be due, nor limit the lien to any particular class of liability or form of action.* Wherever an action is pending, in which money is due, the attorney may establish his lien. And in an action, the verdict and judgment do not create the liability,

do not make the 'money due.' They are simply the conclusive evidence of the amount due from the commencement of the action. Again, according to the statute the lien dates from 'the time of giving notice.'" Kansas P. R. Co. v. Thacher, 17 Kan. 92; Anderson v. Metropolitan Street R. Co. 10 Kan. App. 575, 61 Pac. 982.

Following these cases, also, are the Iowa cases of Smith v. Chicago, R. I. & P. R. Co. 56 Iowa, 720, 10 N. W. 244; Gibson v. Chicago, M. & St. P. R. Co. 122 Iowa, 565, 98 N. W. 474; Barthell v. Chicago, M. & St. P. R. Co. 138 Iowa, 688, 116 N. W. 813; and Winslow v. Central Iowa R. Co. 71 Iowa, 197, 32 N. W. 331, which base their holdings upon the Kansas decision and come to the same conclusion, and later still and to the same effect the Illinois case of Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65.

It is true that in Iowa there was also a statute which made a cause of action for personal injury survive the death of the plaintiff. The Iowa court, however, in no way based its holding upon this fact, nor did it make any reference to it or to the statute in any of the opinions cited. In the leading case of Smith v. Chicago, R. I. & P. R. Co. supra, the Iowa court said: "In the case at bar the parties agreed upon $200 as the amount due. So far, the lien caused no embarrassment in the payment. The company should have paid the claimants' attorneys, the present plaintiffs' and allowed them to settle with their client for what their services were worth. But the defendant claims that it was its right to pay the claimant directly, in the absence of the attorneys, and without their knowledge. The right to make such payment would doubtless be valuable in many cases. It is well known that irresponsible and unscrupulous claimants can be settled with upon more favorable terms after expensive litigation, if they can be allowed to receive the whole payment and cheat their attorneys. But, however valuable the right may be, this consideration has no weight when addressed to a court; nor do we think that there is anything which we can notice in the objection that, if a lien is allowed, attorneys will advise against proper settlements by compromise. The lien is valuable mainly where the claimant is irresponsible. Where such is the case, and the claim is a doubtful one, the attorneys are as much interested in settling by compromise as the claimant. Having considered how the

question stands upon principle, we have to inquire how it stands upon authority. The defendant relies upon Wood v. Anders, 5 Bush, 601; Henchey v. Chicago, 41 Ill. 136; Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 443, 27 Am. Rep. 75; Hobson v. Watson, 34 Me. 20, 56 Am. Dec. 632; Hutchinson v. Howard, 15 Vt. 544; Foot v. Tewksbury, 2 Vt. 97; Hutchinson v. Pettes, 18 Vt. 614; Chapman v. Haw, 1 Taunt. 341, 9 Revised Rep. 786. All these cases, except the first, are cited in support of the proposition that there cannot be an attorney's lien before judgment. *But under our statute it is evident that there can be.* The provision under consideration *is found in subdivision* 3 *of § 215 of the Code.* Subdivision 4 of the same section provides for obtaining a lien after judgment. If no lien could be had except after judgment, no force could be given to subdivision 3. Besides, in Myers v. McHugh, 16 Iowa, 335, above cited, the existence of an attorney's lien before judgment was expressly recognized. The case of Wood v. Anders, 5 Bush, 601, cited by defendant, was decided under a statute which is in these words: 'Attorneys at law shall have a lien upon any chose in action, account, or other claim or demand put into his hands for suit or collection.' It was held that the claim or demand contemplated by the statute was a claim or demand arising only by contract. We cannot say, taking the whole provision together, that the construction placed upon the language used is not correct. *But our statute is different. It gives a lien upon money due.* It gives a lien, we think, wherever there is a liability to be discharged in money and an action is brought for its recovery. Damages for a tort are to be paid in money. It may be that the lien in such case, or in any case, *is not enforceable until the amount* has been determined by judgment *or agreement.* But whenever enforceable, the lien dates from the service of the notice. Code, § 215. The only decision to which our attention has been called, made by an appellate court upon a statute similar to ours, is in Kansas P. R. Co. v. Thacher, 17 Kan. 92. That action, like the present, was brought to recover for personal injuries. Notice of a claim of an attorney's lien was given. Afterwards the company settled with and paid off the claimant, and no judgment was rendered. The court held that the lien attached, and that the attorneys were entitled to recover of the company. The court said: "This (statute) gives a lien not simply upon a judgment, but upon "money due." It does not specify for what

the money must be due, nor limit the lien to any particular class of liability or form of action. Wherever an action is pending in which money is due, the attorney may establish his lien. And in an action the verdict and judgment do not create the liability, do not make the money due. They are simply the conclusive evidence of the amount due from the commencement of the action.' *In our opinion, then, the fact that the action in which the plaintiff's lien was sought was for a tort, and no judgment was rendered, is not sufficient to defeat their lien.*"

In speaking of this subject the author in Ruling Case Law says: "The lien which the statute fixes on the plaintiff's cause of action follows the transition, without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the lien attaches to that; *if a compromise agreement is made,* the lien attaches to that; and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent. Money *paid to a litigant in settlement of* a claim is held to be *'recovered'* within the meaning of that word as used in an attorney's lien law." 2 R. C. L. 1081.

We agree with counsel for respondent that it is opposed to the policy of the law that any barrier shall be interposed to the right of the client to settle his controversy himself, and to dismiss his own cause of action without the dictation of his counsel. Howard v. Ward, 31 S. D. 114, 139 N. W. 771; Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 14 L.R.A.(N.S.) 1105, 94 Pac. 262; Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Williams v. Ingersoll, 89 N. Y. 508; Davis v. Webber, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822; North Chicago Street R. Co. v. Ackley, 171 Ill. 100, 44 L.R.A. 147, 49 N. E. 222; Lipscomb v. Adams, 193 Mo. 530, 112 Am. St. Rep. 500, 91 S. W. 1046.

We realize, of course, that there are some authorities which hold that the invalidity of an agreement which provides that the client shall not settle the controversy without the consent of the attorney renders the whole contract invalid, the preliminary oral negotiations and the right to recover for the reasonable value of the services being merged in the written contract, and the written contract being void. See Kansas City Elev. R. Co. v. Service, 77 Kan. 316, 14 L.R.A.(N.S.) 1105, 94 Pac. 262; Moreland v. Devenney, 72 Kan. 471, 83 Pac. 1097; Bowman

v. Phillips, 41 Kan. 364, 3 L.R.A. 631, 13 Am. St. Rep. 292, 21 Pac. 230. The cases cited, however, do not seem to express the general rule; and we prefer to follow that general rule which seems to be that "where a contract between an attorney and his client is valid except as to the clause prohibiting either from settling without the consent of the other, this clause may be stricken from the contract and the balance of it upheld." See Newport Rolling Mill Co. v. Hall, 147 Ky. 598, 144 S. W. 760; Jackson v. Stearns, 48 Or. 25, 5 L.R.A.(N.S.) 390, 84 Pac. 798.

The holding which we make, however, in no way interferes with this right of settlement when legitimately and honestly pursued. We, in fact, adopt the statement of the law on the subject which is to be found on page 1080, vol. 2, of Ruling Case Law, and which is as follows: "Since the charging lien of an attorney does not attach before judgment, *in the absence of statute giving a lien on the cause of action or on the property involved, or on money in the hands of the adverse party,* or where a contract between the parties operates as an equitable lien on or an assignment of the cause of action, the fact that the lien of the attorney will attach to the judgment, decree, or award when obtained, *will not affect the almost universally conceded right* of the client at any time before judgment to *dismiss, compromise, or settle his cause of action* without his attorney's consent or even over his objection, where such dismissal, compromise, or settlement is effected in good faith, and thereby to prevent the attorney's lien from attaching to the money or property received by the client in settlement. The lien of the attorney may be defeated by such act of the client, though the latter agreed to pay the attorney a percentage of the proceeds of the judgment, and notwithstanding an express agreement on the part of the client not to dismiss, settle, or compromise without the consent of the attorney. *Even in those jurisdictions where the attorney's lien attaches by virtue of statute to the cause of action, to the property involved, or to money in the hands of the adverse party, it has been held that the client may compromise or settle the litigation without the consent of the attorney, but where such right is exercised the lien of the attorney will not be defeated thereby,* but *will attach to the proceeds of the settlement.* The lien which the statute fixes on the plaintiff's cause of action follows the transition, without interruption, and simply attaches to that into which the right of action is merged. If a judicial recovery is obtained, the

lien attaches to that; *if a compromise agreement is made, the lien attaches to that;* and in each case the attorney's interest is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent." (See also Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65.

It is perfectly clear that a lien would have existed in favor of the attorney on any judgment that might have been obtained, and that such a lien would not have been against the policy of the law, even though the action happened to be a tort action. It seems to be equally clear that if a settlement has been agreed upon in the action, and the attorney had been afterwards employed to sue on and to enforce that contract of settlement, a lien could have been given to him in the matter. What supposed rule of public policy then does a statute violate which, though not depriving the client of the right to settle when and how he pleases, gives to the attorney, through whose services that settlement has presumably in a large measure been made obtainable, a lien upon whatever amount may be agreed to be paid?

Counsel is entirely in error in his assumption made upon the oral argument that contingent fees in personal injury suits are frowned upon by the law. Their validity is now, at least in America, everywhere recognized, and it is a matter of common knowledge, or should be a matter of common knowledge to every lawyer and judge, that the American Bar Association has refused to disapprove of them, and, although recognizing their liability to abuse, has merely sought to guard against that abuse. The code of ethics of the American Bar Association goes no further than to say that "contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges." See 34 Am. Bar Asso. Rep. p. 1163.

The reason is very clear and that is that the original reason for the protest against contingent fees and champertous contracts no longer exists, and not only the American bar, but the American legislatures, have long since come to recognize the fact. The English rule against contingent fees has never in fact generally prevailed in America, and even that rule was the result of an effort to cover up and perpetuate injustice rather than to prevent it. It was the result, indeed, of two great arbitrary confiscations of property; those perpetrated by the Norman

Kings when they dispossessed the Saxon proprietors and parceled their lands among their own retainers, and those perpetrated by the Parliament of Henry VIII. when the churches were dispossessed and the same division of property took place. Those in control did not want titles litigated or suits encouraged, and hence the rules against champerty and maintenance, while those against contingent fees have only been justified in England in later days by a resort to the fiction that the attorney is not a "laborer entitled to his hire," but an aristocrat, beneath whose dignity it is, and who therefore is not allowed, to contract for any fees at all. "The dignity of the role, instead of any principle of policy, furnished all the argument that can be brought to the support of the rule." Chief Justice Gibson in Foster v. Jack, 4 Watts, 334; see Lytle v. State, 17 Ark. 608; Foster v. Jack, supra; Davis v. Webber, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822. Here in America not only is the contingent fee generally allowed, but in many cases it is socially necessary. The poor man who loses his legs or arms in an accident is perforce pauperized and liable to become a public charge unless some redress can be obtained from the guilty party, and that cannot be had without the help of counsel. Contingent fees are abused, and the ambulance chaser is abroad, but so also is the defaulting client who refuses to pay for service rendered, as well as the unconscionable claim agent. These evils, however, can be cured by legislation or by proper court supervision, and their cure by no means necessitates the abolition of the contingent fee.

The refinements of ethical theory indeed cannot overcome plain ethical facts. If contingent fees in personal injury suits are not permissible, how, in the majority of instances, can a poor man get any redress at all? When, indeed, the states everywhere provide for employers' liability acts which shall be enforced by the states themselves, or poor men's lawyers who shall not be mere fledgling volunteers, but competent attorneys, then, and not till then, can the contingent fee be done away with.

In dealing with this question of public policy, we cannot do better than to quote from the case of O'Connor v. St. Louis Transit Co. 198 Mo. 641, 115 Am. St. Rep. 495, 97 S. W. 150, 8 Ann. Cas. 703, where the supreme court of Missouri says: "It is insisted by appellant that this act restricts or destroys the defendant's right to contract. We are

unable to give our assent to this insistence. The provisions of this act simply create a lien upon the cause of action in favor of the attorney at law, and requires the defendant, after due notice, which creates such lien, in dealing with the party as to such cause of action, that such lien shall be respected. If we are dealing with the owner of a horse, and have notice that there is a valid subsisting lien upon the horse, we would not contend for a moment that such lien could be ignored. So it is in respect to other property,—in dealing with the owner of it, if we have notice of the existence of a lien, such lien cannot be ignored. Is there any difference if a defendant has notice of the existence of a lien of an attorney upon a cause of action, and the instances above cited? We think not. This law does not deprive a defendant of any of his rights. When the lien is created, in dealing with the plaintiff in respect to such cause of action he must act accordingly. It does not deprive him of the right to make a settlement, but in making such settlement it simply requires that he shall take into consideration the fact that the attorney at law has a lien upon the cause of action, and, if such lien is ignored, he will be required to account to him in an action at law for the amount of such lien. This act is vigorously assailed by learned counsel for appellant on the ground that it tends to lead to the commission of unprofessional acts on the part of attorneys. This may be true in some instances, but the profession of law, when practised upon a high plane, is an honorable one, *and by no means should an act of the general assembly, presumably enacted for the benefit of the honorable practising lawyers of the state, be declared invalid for the reason that instances may arise by reason of the law, which enable some of the less reputable attorneys to do acts which are not commendable along professional lines.* In our opinion this law is constitutional and valid." See also Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65; Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396.

There is therefore in our opinion no merit in the contention that a contrary view must be taken because the policy of the law is undoubtedly in favor of the settlement of controversies, and that it would be against public policy for a client to relinquish to his attorney the right of settling and disposing of such an action. The statute, as we construe it, by no means gives to the attorney this right. If it did so it would ex-

press the public policy of the legislature, and we find nothing in the Constitution to prevent the establishing of that public policy. It does not, however, do so. It merely gives to the attorney a lien on the amount of "money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party, or the attorney of such party." Comp. Laws 1913, § 6875.

There was no money due in the hands of the adverse party until the settlement was made, and that settlement, under the common law and under the statute, the client was at liberty to make even without the consent of his attorney. Immediately, however, that the settlement was made, the controversy became liquidated, and there was a sum of money due and owing to the plaintiff and in the hands of the defendant. See Standidge v. Chicago R. Co. supra, 2 R. C. L. 1081. Then, and not till then, did the lien vest, but at that time it was valid and operative. It vested and was operative merely upon the amount which had been agreed to be paid to the client and the attorney, who, having no right to dictate the terms of settlement, could not claim a lien upon any greater amount. See 2 R. C. L. 1081.

We have carefully examined the authorities cited by counsel for respondent, and find them by no means as conclusive as they seem to appear to him. The case of Howard v. Ward, 31 S. D. 114, 139 N. W. 771, was one in which the plaintiff's attorney sought to set aside a settlement which had been made by the defendant with his client. There was in it no attempt to assert a lien on the amount for which the settlement was made under a statute similar to our own.

The case of Lawrence v. Martin, 22 Cal. 174, merely involved the assignability of a cause of action for malicious prosecution, and no attorney's lien or statute creating the same was in any way involved.

The case of Coughlin v. New York C. & H. R. R. Co. 71 N. Y. 444, 27 Am. Rep. 75, was handed down in 1877, and nowhere considers or passes upon the right of an attorney to a lien under a statute similar to our own. The case of John V. Farwell Co. v. Wolf (John V. Farwell Co. v. Josephson) 96 Wis. 10, 37 L.R.A. 138, 65 Am. St. Rep. 22, 70 N. W. 289, 71 N. W. 109, involves the assignability of a cause of action for fraud merely, and the right of an attorney to a lien is not

considered nor discussed. The case of Pulver v. Harris, 52 N. Y. 73, was handed down in 1873, and no statute similar to our own was discussed or involved. The case of Murray v. Buell, 76 Wis. 657, 20 Am. St. Rep. 92, 45 N. W. 667, merely involves the assignability of an action for conspiracy, and no attorney's lien is discussed or considered. The same is true of the case of Tyler v. Superior Ct. 30 R. I. 107, 23 L.R.A.(N.S.) 1045, 73 Atl. 467, the action involved, however, being one of assault and battery.

The case of Hammons v. Great Northern R. Co. 53 Minn. 249, 54 N. W. 1108, holds that a lien cannot be created upon a mere right of action for a personal tort, and bases its conclusion upon the fact that the cause of action does not survive, but discusses no statute. It relies upon the case of Hunt v. Conrad, 47 Minn. 557, 14 L.R.A. 512, 50 N. W. 614; which holds that a cause of action for false imprisonment cannot be assigned, but passes upon no statute relating to an attorney's lien. The case of Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12, 291, passed upon a statute similar to our own, and is an authority for respondent. It, however, seems to concede that a lien would vest in the judgment, and in that case there would be *money due* in the hands of the defendant. It is difficult for us to see, if this is the case, why there would not be money due after a settlement had been made. The case of Boogren v. St. Paul City R. Co. 97 Minn. 51, 3 L.R.A. (N.S.) 379, 114 Am. St. Rep. 691, 106 N. W. 104, is a case, not where the attorney seeks to impose a lien upon the amount for which the client has settled, but to continue the action in order to assert a lien. It may, however, generally speaking, be considered an authority in support of the contention of the respondent.

The case of Smelker v. Chicago & N. W. R. Co. 106 Wis. 135, 81 N. W. 994, seems to recognize an attorney's lien in a tort action, but lays down a rule of procedure which we hardly wish to recognize here, and which is not argued for by respondents. It is that "under Rev. Stat. 1898, § 2591a, providing that one claiming a right of action sounding in tort, or for unliquidated damages, may contract with an attorney to prosecute it, and give him a lien on such cause of action as security for his fees, and that, when notice of the agreement is given the opposite party, no settlement or judgment of such action shall be valid as against the lien, provided the agreement for fees be fair and reasonable, settle-

ment, without such attorneys' knowledge, does not give them a right to maintain in their own name against the defendant an action for their fees, though the agreement was that they should receive one third of any amount recovered, but their remedy is by prosecuting the original action, in which they must prove the case as though there had been no attempted settlement."

The case of Hanna v. Island Coal Co. 5 Ind. App. 163, 51 Am. St. Rep. 246, 31 N. E. 846, was handed down in a state where there was no provision for an attorney's lien on "money due" in the hands of the defendant, but merely on *any judgment rendered* in favor of any person or persons employing such attorney.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings according to law.

FISK, Ch. J. I most respectfully dissent.

On Petition for Rehearing (Filed March 18, 1915).

GOSS, J. A strong petition for rehearing has been filed. The writer can add but little to what has been well said in the main opinion by Justice Bruce. As the only statutes identical with our statute of peculiar phraseology are those of Kansas and Iowa, decisions from those states should have great weight in declaring the construction of our statute. Especially is this so when it had received a construction by the supreme court of Kansas before or practically contemporaneous with its adoption here. The decision in 1876 of Kansas P. R. Co. v. Thacher, 17 Kan. 92, characteristic of opinions written by Justice Brewer, left little unsaid. It is directly in point, and supports every contention of the plaintiffs, and is based on the same statute. That decision has ever continued without modification as the law of that state and as a satisfactory construction of the statute before us. Smith v. Chicago, R. I. & P. R. Co. 56 Iowa, 720, 10 N. W. 244, the first pronouncement of the supreme court of Iowa on the subject in tort action, cites and follows the Kansas case, and has likewise remained the law of that state. This statute was adopted here as § 9 of chapter 18 of Revised Codes of Dakota territory of 1877 prior to its construction in Iowa, but one year after it had been construed in Kansas. With the adoption of the

statute from Kansas was also adopted its construction, and this is true whether it was indirectly adopted therefrom through Iowa or directly from Kansas. The statute first appeared in Iowa as § 2 of chapter 167 of Laws of 1870. It existed prior to 1866 in Kansas.

Up to two years ago Minnesota had a statute somewhat similar, which read, "upon money in the hands of the adverse party," instead of like ours, "upon money due his client in the hands of the adverse party." The Minnesota holding, Anderson v. Itasca Lumber Co. 86 Minn. 480, 91 N. W. 12, 291, has been against the right to a lien on settlement before judgment until the holding in Desaman v. Butler Bros. 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 643, holding that a collusive settlement after verdict renders the party against whom the verdict was had liable for an attorney's lien as for the settlement of a judgment. See note to Ann. Cas. 1913E, 646. Nebraska and Minnesota long had the same statute. It is significant that on the identical statute, as so construed in Minnesota, Nebraska in Corson v. Lewis, 77 Neb. 454, 114 N. W. 281, has elected tc follow Kansas and Iowa, whose statute we have. After answering every contention made by respondent's counsel in the instant case, including that of nonassignability of causes of action for tort, the Nebraska supreme court in 1907 said: "We prefer to follow the courts of Kansas and Iowa in holding that in a pending cause of this nature, notice of an attorney's lien properly given binds the defendant, so that a settlement between the parties and payment before judgment will not operate to defeat the attorney's right."

And legislation in at least three of the states whose precedent we are urged to adopt, *viz.*, New York, Minnesota, and Wisconsin, establishes that the early statutes, as construed in those states, were so unsatisfactory in practice as to cause the enactment of unequivocal statutes granting the attorney a lien on the cause of action whether in tort or in contract. Subdivision 3 of § 4955, Minn. Gen. Stat. 1913, amending prior law, and Smelker v. Chicago & N. W. R. Co. 106 Wis. 135, 81 N. W. 994. In Fischer-Hansen v. Brooklyn Heights R. Co. 173 N. Y. 492, 66 N. E. 395, 13 Am. Neg. Rep. 396, Justice Vann reviews the legislation of that state. This case is also authority for the kind of action brought in the instant case,—a separate action in equity to define, determine, and enforce the attorney's lien of the plain-

tiffs, instead of the procedure sometimes used in some other states, that of continuing proceedings entitled as in the former action or by intervening therein, as illustrated by Desaman v. Butler Bros. and Corson v. Lewis, supra, respectively. See note in 51 Am. St. Rep. 251; also discussion in text with citation of authority at 2 R. C. L. 1080–1086. Here a statutory attorney's charging lien, sought to be enforced by an independent action in equity, is being dealt with. No common-law lien rules apply. The trend of decisions is toward adequate protection to the attorney against unjust and inequitable settlements. My conclusion is that this lien existed in an inchoate form from and after notice thereof given until a condition arose whereunder it became complete; and such was the situation immediately upon the agreement made between the client and the defendant, whereby the unliquidated liability in tort became converted into an amount certain and a recovery in the action. Standidge v. Chicago R. Co. 254 Ill. 524, 40 L.R.A.(N.S.) 529, 98 N. E. 963, Ann. Cas. 1913C, 65. Thereupon the lien of the attorney immediately attached to the fund, whatever its form. It was then money due "in the hands of the adverse party" within the meaning and intent of the statute.

Nor is the right of the defendant to buy its peace involved; nor is the right of the plaintiff to make a bona fide settlement with defendant necessary to be considered. As to these respective rights the courts of all states, those denying as well as those granting the attorney's lien, are in accord. Courts have the power, and exercise it, to protect the client from the unscrupulous attorney whenever necessary, and that power must not be confused or confounded with authority to likewise preserve the attorney's rights from his unscrupulous client in a collusive settlement with a naturally unfriendly defendant. These questions are discussed in Fischer-Hansen v. Brooklyn Heights R. Co. and in Desaman v. Butler Bros. supra, and cases cited. Paragraph 13 of the complaint charges a collusive and fraudulent settlement "secretly for the purpose of cheating and defrauding said firm out of their attorney fees in said action." As the lien attached to this money in the hands of the opposite party in that pending action before its payment to the plaintiff in that action, it was not discharged by said payment; and for the purposes of this action, to the amount of the lien, the fund is to be treated as still in the hands of the defendant company and sub-

ject to court order. This assumes, of course, on demurrer only, the truth of all matters in the complaint.

Rehearing is denied.

SAMUEL J. RABINOWITZ AND JACOB HERMAN v. W. S. CRABTREE.

(152 N. W. 130.)

New trial — motion for — application for extension of time — default in making — execution — staying proceedings — transcript from stenographer — levy under execution — discretion of court.

It is not an abuse of discretion for a trial judge to deny a motion restraining further proceedings under an execution, and excusing a defendant from default in obtaining an extension of time in which to obtain a transcript of the evidence and to move for a new trial, where the trial was had on the 12th day of April; and notice of intention to move for judgment notwithstanding the verdict or for a new trial was made on the 29th day of April, and an extension of sixty days in which to make such motion and to obtain the transcript was made and obtained on such date, and which said extension expired on the 29th day of June, and where no other extension was obtained, and a motion to set aside the default made until the 8th day of August and after the levy of an execution on the judgment, and where, though it was shown that the attorney for the movant was under the impression that no transcript could be obtained for six months, and the transcript as a matter of fact could not be begun by the stenographer until the middle of July on account of the pressure of work on previous cases; but said stenographer testified that he had refused to commence work on such transcript until a deposit was made with him, and no such deposit was made or positive order for the transcript was given before the levy of said execution, and no attempt to obtain an extension of the time in which to obtain the transcript or to move for a new trial was made until after the levy of the same.

Opinion filed March 20, 1915.

Appeal from the county court of Stutsman County, *John U. Hemmi*, J. Action to recover commissions on account of the selling of defendant's land. Motion by defendant to extend the time in which to obtain a

transcript and move for a new trial. Motion denied. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J. This is an appeal from an order refusing to excuse the defendant and appellant from default in moving for a judgment notwithstanding the verdict, or for a new trial, within the statutory period allowed therefor, and which default was occasioned by the failure of the defendant to obtain a necessary extension of time in which to obtain a transcript of the evidence, and which was rendered necessary by the inability of the stenographer to transcribe the same within the statutory time on account of an accumulation of work in other cases.

The cause was tried on the 12th day of April, 1913, and a verdict and judgment were rendered in favor of the plaintiff. Thereafter and on the 29th day of April, 1913, and within the 20-day period allowed therefor by statute, the defendant served on the plaintiff's attorneys a notice of intention to move for judgment notwithstanding the verdict, or for a new trial. Immediately after the trial the defendant notified his attorney to procure a new trial in the said cause, or to appeal from the judgment therein. Pursuant to such request, defendant's counsel obtained an order extending for sixty days the time in which to obtain his transcript, and to move for a new trial and went to the court stenographer for the purpose of obtaining a transcript of the testimony, though he apparently at no time actually ordered one. The stenographer informed him that, on account of an accumulation of work on other and prior cases, he would be unable to get out the transcript for some six months, and thereupon the said attorney requested the stenographer to furnish an estimate of the cost of preparing the transcript, which the said stenographer did within a few days. This is the testimony of defendant's attorney. The testimony of the stenographer is somewhat different, and to the effect that the attorney stated to him that he desired a transcript; that he made a note thereof, and had no intention of transcribing the record until a deposit was made to cover the cost thereof, and informed said counsel that he would notify him in the usual course when he reached the transcript; and that said stenographer reached said tran-

script and was in readiness to transcribe the same on or about the 1st day of July, 1913, at which time he telephoned the said attorney, stating that he was ready to proceed with the work upon a proper deposit being made, and that he would not commence the operation until it was made; that said counsel stated, in effect, that he did not believe his client would order the transcript if it cost the amount stated, and that he would confer with his client, and that should he desire such work to be done, he would further notify the stenographer.

It appears from the affidavits of all of the parties that no actual order was made for the transcript at any time, and that the testimony has not yet been transcribed. Later and on the 8th day of August, 1913, the plaintiff caused an execution to be levied upon the defendant's property, no steps having been taken in the interim to extend the sixty-day suspension of the proceedings which had been obtained on or about the 29th day of April, 1913, and which expired on or about the 29th day of June, 1913. It appears to be conceded that during all of this time the defendant himself was under the impression that his rights would be protected, though there is no showing that he made any inquiry into the matter before the levy of the execution, or offered to furnish the money necessary for the deposit. On being served with the notice of the levy, however, he immediately went to his attorney, and his said attorney telephoned to the stenographer for the purpose of finding out if he had reached the testimony in question. The court stenographer notified him that he had reached the same about three weeks before, or sometime about the middle of July, 1913, and counsel, within four or five days thereafter, served upon the plaintiff's counsel a notice that he would move on the 12th day of August for an order restraining further proceedings under the execution in question, and excusing the defendant from default, and granting additional time in which to procure a transcript of the testimony in the action and to prepare a statement of the case, and in which to move for judgment, notwithstanding the verdict, or for a new trial, from a denial of which motion the defendant now appeals.

On such motion, plaintiff's counsel offered two affidavits relating to the merits of the proposed motion for judgment notwithstanding the verdict. These affidavits, however, were stricken from the files on motion of counsel for plaintiff.

C. S. Buck and *John A. Jorgenson,* for appellant.

The time in which any of the acts to be done in an action, after same is commenced, may be enlarged, upon affidavits showing grounds therefor, by the judge of the court. Rev. Codes 1905, § 7328, Comp. Laws 1913, § 7948.

Where a party employs counsel to look after his interests in a lawsuit, he may rely upon such counsel to do the necessary work timely, and he is excused for any default for which he is not individually responsible, he having done all a reasonably prudent man would do. It is not necessary to show the excusable negligence of the attorney. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Further than this, all such negligence is excusable, where it is caused by a genuine mistake or miscalculation. Re Davis, 15 Mont. 347, 39 Pac. 292; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; Schoonmaker v. Albertson & D. Mach. Co. 51 Conn. 387; Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Wells v. Andrews, 133 Mo. 663, 34 S. W. 865; Heardt v. McAllister, 9 Mont. 405, 24 Pac. 263; Barlow v. Burns, 70 N. J. L. 631, 57 Atl. 262; Williams v. Breen, 25 Wash. 666, 66 Pac. 103; Montijo v. Robert Sherer & Co. 6 Cal. App. 558, 92 Pac. 512; Gumaer v. Bell, 51 Colo. 473, 119 Pac. 681; Neat v. Topp, 49 Ind. App. 512, 97 N. E. 578; Acheson v. Inglis Bros. 155 Iowa, 239, 135 N. W. 632; Nash v. Treat, 45 Mont. 250, 122 Pac. 746, Ann. Cas. 1913E, 751; New York v. Reibstein, 127 N. Y. Supp. 239.

The statutory provision relieving a party from default in taking no proceedings within the statutory time, where he has employed and relied upon counsel to act, and is not at fault himself, the negligence of counsel in failing to take timely steps is not imputable to the client. Lenz v. Rowe, 66 N. J. L. 131, 48 Atl. 525; Hewitt v. Hazard, 33 App. Div. 630, 53 N. Y. Supp. 340; Nash v. Wetmore, 33 Barb. 155; Sharp v. New York, 31 Barb. 578, 19 How. Pr. 193; Elston v. Schilling, 7 Robt. 74; Clark v. Lyon, 2 Hilt. 91; De Marco v. Mass, 31 Misc. 827, 64 N. Y. Supp. 768; Gideon v. Dwyer, 17 Misc. 233, 40 N. Y. Supp. 1053; Steer v. Head, 1 How. Pr. 15; Fenton v. Garlick, 6 Johns. 287; Philips v. Hawley, 6 Johns. 129; Tripp v. Vincent, 8 Paige, 176; Curtis v. Ballagh, 4 Edw. 635; Van Cott v. Webb-Miller, 25 Pa. Super. Ct. 51; Weir v. Craige, 13 Pa. Co. Ct. 46; Bright v. Mc-

Laughlin, 1 Pa. Co. Ct. 296; Knittle v. Compton, 4 C. P. Rep. (Pa.) 117; Scranton Supply Co. v. Cooper, 4 C. P. Rep. (Pa.) 103; North v. Yorke, 12 Montg. Co. L. Rep. 168; Brandle v. Jones, 2 Woodw. Dec. 7; Hinton v. Hart, 1 Woodw. Dec. 97; Denseheau v. Saillant, 22 R. I. 500, 48 Atl. 668; Warth v. Moore Blind Stitcher & Overseamer Co. 125 App. Div. 211, 109 N. Y. Supp. 116.

"A mistake of a party's counsel may be pleaded as an excuse for the default and as a reason for opening the judgment, provided it was genuine, and a mistake of fact, and not of law." Shurtleff v. Thompson, 63 Me. 118; Lutz v. Alkazin, — N. J. Eq. —, 55 Atl. 1041; Barnes v. Harris, 2 How. Pr. 32; Allan v. Smith, 20 Johns. 477; Wray v. Winner, 1 Phila. 335; Nahe v. Bauer, 133 App. Div. 373, 117 N. Y. Supp. 355; Robinson v. Collier, 53 Tex. Civ. App. 285, 115 S. W. 915; Boggs v. Inter-American Min. & Smelting Co. 105 Md. 371, 66 Atl. 259; Meisenheimer v. Meisenheimer, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159; Searles v. Christensen, 5 S. D. 650, 60 N. W. 29; Melde v. Reynolds, 129 Cal. 308, 61 Pac. 932; Scott v. Smith, 133 Mo. 618, 34 S. W. 864; Collier v. Fitzpatrick, 22 Mont. 553, 57 Pac. 181; Horton v. New Pass Gold & S. Min. Co. 21 Nev. 184, 27 Pac. 376, 1018; Dunham v. Van Arnum, 1 How. Pr. 225; Koch v. Porter, 129 N. C. 132, 39 S. E. 777; English v. English, 87 N. C. 497; Springer v. Gillespie, — Tex. Civ. App. —, 56 S. W. 369; Brown v. Philadelphia, W. & B. R. Co. 9 Fed. 183; Pittock v. Buck, 15 Idaho, 47, 96 Pac. 212; Michigan Ammonia Works v. Ellk, 47 Pa. Super. Ct. 294.

The negligence of an attorney may be excusable when attributable to an honest mistake or accident, or any cause which is not incompatible with proper diligence. O'Brien v. Leach, 139 Cal. 220, 96 Am. St. Rep. 105, 72 Pac. 1004; Fulweiler v. Hog's Back Consol. Min. Co. 83 Cal. 126, 23 Pac. 65; Allen v. Hoffman, 12 Ill. App. 573; Spaulding v. Thompson, 12 Ind. 477, 74 Am. Dec. 221; Ordway v. Suchard, 31 Iowa, 481; Clifford v. Gruelle, 17 Ky. L. Rep. 842, 32 S. W. 937; Lockett v. Toby, 10 La. Ann. 713; Riley v. Louisville, 2 La. Ann. 965, 46 Am. Dec. 560; Crane & O. Co. v. Sauntry, 90 Minn. 301, 96 N. W. 794; Benwood Iron-Works Co. v. Tappan, 56 Miss. 659; Cabanne v. Macadaras, 91 Mo. App. 70; Collier v. Fitzpatrick, 22 Mont. 553, 57 Pac. 181; Loeb v. Schmith, 1 Mont. 87; Lawson v. Hilton, 89 App.

Div. 303, 85 N. Y. Supp. 863; Mitchell & L. Co. v. Downing, 23 Or. 448, 32 Pac. 394; Boyer v. Jones, 1 Woodw. Dec. 498; Brown v. Weinstein, 40 Mont. 202, 105 Pac. 730; Ziegler v. Smith, 1 N. Y. Crim. Proc. Rep. N. S. 256, 115 N. Y. Supp. 99; Taylor v. Pope, 106 N. C. 267, 19 Am. St. Rep. 530, 11 S. E. 257; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Jones & Hutchinson and *Thorp & Chase* for respondents.

The statute, although very liberal, does not go so far as to allow time to be extended in such cases without cause and against objection. There must be good cause shown, and it must appear that the extention is in furtherance of justice. The matters here presented are not analogous to the opening of a default judgment. McDonald v. Beatty, 9 N. D. 293, 83 N. W. 225; Woods v. Walsh, 7 N. D. 376, 75 N. W. 769; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872; McGillycuddy v. Morris, 7 S. D. 592, 65 N. W. 14.

The trial court's action will not be disturbed unless there has been an abuse of discretion. Smith v. Hoff, 20 N. D. 419, 127 N. W. 1047; Folsom v. Norton, 19 N. D. 722, 125 N. W. 311.

Ignorance of the law affords no good excuse for negligence, and is not such a mistake as is meant or that the courts will consider, upon such an application. It is not a furtherance of justice. Moe v. Northern P. R. Co. 2 N. D. 282, 50 N. W. 716.

Bruce, J. (After stating the facts as above). This is one of the unfortunate cases of delay which would appear to be largely due to the laxity of conduct which must inevitably arise under a procedure where a transcript is deemed to be necessary in order that a motion for a new trial may be passed upon, and in a district where the stenographer is totally unable to keep up with the work of the court, so that extensions of time must necessarily be obtained in practically all cases, and are so common that motions for a new trial within the statutory period are of but rare occurrence.

We cannot help but feel that counsel for appellant and defendant was negligent. In other words, that he should have obtained an extension of the order of suspension which was obtained immediately after the trial, and which was limited to sixty days. His client, too, certainly must be presumed to know the law, and that a motion for a

new trial must be made within the sixty days prescribed by the statute unless an extension of time is had. He must also be presumed to know of the sixty-day extension and of the expiration thereof. It is clear also that no specific order for the transcript was ever made, nor was the deposit forthcoming which was necessary before the stenographer would commence work thereon. It is quite clear that if such an order had been entered, and although the work would not have been commenced thereon until the middle of July, such transcript would probably have been completed prior to the levy of the execution, which was on the 8th day of August, 1913, though not within the sixty-day period of suspension. The question before us is whether the trial court abused its discretion in refusing to consider the affidavits relating to the merits of the motion for a judgment notwithstanding the verdict or a new trial, and in refusing to extend the period of suspension already granted, so as to allow the transcript to be obtained and the motion for a new trial to be properly passed upon. We do not think that it did, as the affidavit of the stenographer conclusively shows that no order for a transcript was made and no deposit of the money necessary was ever made or offered.

Any other rule would interfere greatly with the expedition of business, and add much to the delay and burden of litigation. The knowledge of the attorney in matters of procedure must as a general rule be imputed to the client, as any other rule would allow the continuing of any case, and the endless prolongation of litigation. We do not say that if the motion had been granted we would have interfered with the court's discretion in the premises, but we must presume that the trial court exercised its best and wisest discretion; that it was conversant with the case which had been recently tried before it, and that it was not of the opinion that any injustice had been done and that any relaxation of the rules was necessary. It is true that § 6884, Rev. Codes 1905, § 7483, Compiled Laws of 1913, provides that the court may allow any "act to be done, after the time limited by this Code, or by an order enlarge such time; and may also, in its discretion and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect." There was, however, no surprise in this case as far as defend-

ant's counsel was concerned, and it would be extending the law too far to say that a client is surprised who, though knowing that a transcript must be obtained, makes no personal effort to obtain the same or to deposit the money therefor, and who by appointing the attorney as his agent to make the motion and to perfect the appeal, if necessary, must have intrusted him with the necessary negotiations. We must remember that this is not a case like that of Citizens' Nat. Bank v. Brandon, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102, where no trial had been had and where a default was sought to be set aside, but one in which a trial was had and a verdict rendered.

It is true that the affidavits disclose the fact that defendant's counsel was laboring under the honest belief that the court stenographer would not reach the transcript in question for a period of six months. This fact, however, would hardly justify the failure to apply to the court for an extension of the sixty-day order for the suspension of the proceedings. There must be some end to litigation, and trial courts must have some reasonable control over their calendars. The general rule seems to be that, unless there is a grave question whether the discretion of the district court has been soundly exercised, it will not be disturbed. Smith v. Hoff, 20 N. D. 419, 127 N. W. 1047; Woods v. Walsh, 7 N. D. 376, 75 N. W. 767; Moe v. Northern P. R. Co. 2 N. D. 282, 50 N. W. 715; McGillycuddy v. Morris, 7 S. D. 592, 65 N. W. 14.

We, too, must remember that the court reporter positively swore that he "reached said transcript, and was in readiness to transcribe the same on or about the 1st day of July, 1913,"—some two or three days after the stay of the execution had expired,—"and at or about said time secured the stenographic notes from the files of the clerk of said court, and thereupon called the said C. S. Buck over the telephone between our offices within the city of Jamestown, North Dakota, and at said time so informed said C. S. Buck that affiant was ready to prepare transcript of said case upon C. S. Buck making a proper deposit to cover the cost of preparation of the same, and then and there informed said C. S. Buck that under the 1913 new practice act, the estimate of the said transcript would be the sum of $75, and that affiant would not commence the preparation of said transcript until the same was placed in my hands or on deposit on my account, whereupon said C. S. Buck stated in effect that he did not believe his client, the

defendant herein, would order the transcript if the cost was to be in such an amount, and that he would confer with him, and, should he desire affiant to prepare said transcript, said C. S. Buck would further notify affiant to that effect; and that affiant has never received any other or further order for said transcript, and has never at any time received in hand or on deposit from said defendant, or his counsel, any money as compensation for the preparation thereof; and that affiant retained said stenographic notes in said case for some weeks thereafter, after the said telephone communication with said C. S. Buck, and not having received any further notice relative to the preparation of said transcript, affiant on the 18th day of July, 1913, returned the stenographic notes in said case back to the files of the clerk of said court, and took it for granted that no transcript in said action was desired, and affiant noted the date of returning of said stenographic notes to the clerk's files, and the matter with reference to the ordering of transcript as a memorandum for further reference, if necessary; and affiant, in the preparation of this affidavit, has made reference to such memorandum; that at the time of the said telephone communication with C. S. Buck, affiant also stated to said Buck the estimated cost for a single copy of said transcript." These facts are not disputed by Mr. Buck, nor by his partner, Mr. Jorgenson. The only conversations that Mr. Jorgenson, in fact, swears to or about are those held personally between him and the court reporter, and the first of these was held August 9th. Mr. Buck also makes no reference to the conversation of July 1st which was sworn to by the reporter, McFarland, and neither affirms nor denies the reporter's affidavit in relation thereto.

This being the state of the record, we hardly have a case where this court would be justified in interfering with the discretion of the trial judge, and it is only in the case of a clear abuse of discretion that we have any right to interfere. The trial court could certainly well infer from the affidavits that were filed, that the defendant's counsel had purposely refrained from ordering the transcript, and from taking the necessary steps to obtain a hearing upon the motion.

The order appealed from is affirmed.

JOHN NYSTROM, in his own Behalf and in Behalf of All Other Taxpayers of Ellefson School District No. 11 of Adams County, State of North Dakota, Similarly Situated, v. WALTER F. KELLEY, as the County Auditor of Adams County, State of North Dakota.

(152 N. W. 275.)

Opinion filed March 20, 1915. Rehearing denied April 10, 1915.

Appeal from an order of the District Court, Adams County, *W. C. Crawford,* J.

E. C. Wilson, Hettinger, North Dakota, for appellant.

Paul W. Boehm, Hettinger, North Dakota, for respondent.

PER CURIAM. The appellant by this action seeks to perpetually enjoin the defendant, as county auditor of Adams county, from doing certain acts and making certain public records in his office pursuant to certain alleged void proceedings wherein it was sought to transfer certain territory from Ellefson School District, and annexing the same to Hettinger School District. At the commencement of the action plaintiff applied for and obtained a temporary restraining order against the defendant, together with an order to show cause why a temporary injunction should not issue pending the final determination of such suit. On the return day of such order to show cause, an order was made dissolving such restraining order and refusing to issue an injunction *pendente lite.* From such order the appeal is prosecuted. The merits of the action are not involved on this appeal except in so far as they tend to shed light upon the question as to whether, in denying such temporary injunction, the trial court abused its discretion.

This appeal is controlled by the decision in the case of Sand v. Peterson, post, 171, 152 N. W. 271, just decided, the facts as well as the principles involved being in all essential particulars the same.

It follows that the order appealed from was correct, and the same is accordingly hereby affirmed.

BURKE, J., not participating.

SUNSHINE CLOAK & SUIT COMPANY v. ROQUETTE BROTHERS.

(152 N. W. 359.)

Contracts — time — essence of — must be so expressed.

1. Time is never considered as of the essence of a contract unless by its terms expressly so provided.

Contracts — time of performance — conditions precedent — intention of parties — time — essence of.

2. In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the court seeks simply to ascertain what the parties really intended, and if time appears, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.

Sale and delivery of merchandise — contract for — time of shipment — repudiation.

3. In a contract for the sale and delivery of merchandise, a statement as to the time of shipment is ordinarily regarded as a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.

Condition precedent — right dependent thereon.

4. A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed.

Contracts — obligations — fulfilment — performance.

5. Before any party to an obligation can require another party to perform any act under it, he must fulfil all conditions precedent thereto imposed upon himself.

Executory contract — time essence of — sale of goods — future delivery — title.

6. Time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser.

Purchaser of goods — future delivery — specific time — acceptance — refusal.

7. A purchaser of goods to be shipped by August 15th is justified in refusing them if shipment is not made until on the 28th of September.

Goods sold and delivered — action for — acceptance.

8. Shipment made on September 28th of goods bought for shipment by August 15th is not, where the buyer refuses to accept them, such a delivery to him as will sustain an action for goods sold and delivered.

Acceptance refused — not timely delivered — goods returned — reasons assigned — immaterial.

9. Where the purchaser refused to accept the goods and immediately returned them to the seller, the mere fact that the purchaser wrote a letter stating that he could not take the goods owing to certain local conditions affecting the purchaser's business does not, as a matter of law, constitute a waiver of the condition as to the time of shipment.

Repudiation — reasons assigned — waiver of terms — circumstances — for jury.

10. The writing of such letter is only a circumstance, which may be considered by the jury in determining the questions as to the terms of the contract, and whether there was a waiver on the part of the purchaser of the delay in making shipment.

Opinion filed March 24, 1915.

From a judgment and an order denying an alternative motion for judgment notwithstanding the verdict, or for a new trial of the District Court of Stark County, *W. C. Crawford,* J., plaintiff appeals.

Affirmed.

Thomas H. Pugh, for appellant.

No rescission of a contract can be had unless ground therefor exists and is pleaded, and proved upon the trial. This is a question of law, and not one for the jury. Rev. Codes 1905, §§ 5378–5380; Comp. Laws 1913, §§ 5934–5936; American Case & Register Co. v. Walton & D. Co. 22 N. D. 188, 133 N. W. 309; Dowagiac Mfg. Co. v. Higinbotham, 15 S. D. 547, 91 N. W. 330; 10 Current Law, 1561; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026.

The defendants not having put their attempted rescission upon the ground that the goods were not timely delivered, but expressly upon other grounds, have waived their right to reject the goods on the ground that they were not delivered in time. Littlejohn v. Shaw, 159 N. Y. 189, 53 N. E. 810.

Time is never of the essence of a contract unless so expressly stated in the contract. Fargusson v. Talcott, 7 N. D. 183, 73 N. W. 207; Rev. Codes 1905, § 5362; Comp. Laws 1913, § 5918; Miller v. Cox, 96 Cal. 339, 31 Pac. 161; Strunk v. Smith, 8 S. D. 407, 66 N. W. 926; Puls v. Casey, 18 Okla. 142, 92 Pac. 388; Snyder v. Rosenbaum, 215 U. S. 261, 54 L. ed. 186, 30 Sup. Ct. Rep. 73.

H. J. Blanchard and *W. F. Burnett,* for respondents.

The failure of defendants to say anything about the goods not having been delivered in time, in their letters to plaintiff, is immaterial, and is not a waiver on their part of the time of delivery. Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; Arons v. Cummings, 31 L.R.A.(N.S.) 942, and note, 107 Me. 19, 78 Atl. 98; Bamberger Bros. v. Burrows, 145 Iowa, 441, 124 N. W. 333; Fountain City Drill Co. v. Lindquist, 22 S. D. 7, 114 N. W. 1098; Jones v. United States, 96 U. S. 24, 24 L. ed. 644; 35 Cyc. 175.

Time as of the essence of a contract for the sale of goods to be delivered on a future date named, and performance by the seller according to the terms of such a contract is a condition precedent to his right of recovery. Tascott v. Rosenthal, 10 Ill. App. 639; Bamberger Bros. v. Burrows, 145 Iowa, 441, 124 N. W. 333; Peninsula Produce Exch. v. Scott, 53 Pa. Super Ct. 625; Fountain City Drill Co. v. Lindquist, 22 S. D. 7, 114 N. W. 1098; Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882; Jones v. United States, 96 U. S. 24, 24 L. ed. 644.

Where a specified time for delivery is agreed upon, the presumption of law is that time is of the essence of the contract. Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882; Jones v. United States, 96 U. S. 24, 24 L. ed. 644; Fountain City Drill Co. v. Lindquist, 22 S. D. 7, 114 N. W. 1098.

CHRISTIANSON, J. The plaintiff brought this action in the district court of Stark county to recover of defendants the sum of $173.25. The complaint alleges that on the 24th day of March, 1911, the defendants purchased of the plaintiff certain ladies' cloaks and coats to be manufactured by the plaintiff, and to be delivered to the defendants in the fall of 1911, and that the agreed and reasonable price of said cloaks and coats was the sum of $173.25, which the defendants agreed to pay to plaintiff on the delivery of said property; that thereafter the plaintiff manufactured said cloaks and coats and delivered the same to the defendants on September 28, 1911, and that the defendants have not paid for the same or any part thereof. The defendants answered, setting forth, among other things, that the goods mentioned in the complaint were not delivered to the defendants in accordance with the

contract between the parties thereto; that the said goods were ordered for the fall trade of the year 1911, that the plaintiff undertook and agreed to deliver the said goods for the said fall trade; that in consequence of the negligence of the plaintiff the said goods were delivered to the defendants too late for the business for which the said goods were ordered; and that upon receipt of said goods, defendants immediately returned the same to plaintiff, who accepted and still retains the said goods. The case was tried to a jury. At the close of the testimony, plaintiff moved for a directed verdict. The motion was based on two main legal propositions: First, that time was not of the essence of the contract; that the precise date of shipment was not material or vital, and, that hence defendants were not relieved from the contract by plaintiff's failure to make shipment within the time prescribed by the contract, but that the remedy of the defendants was to bring an action for the damages sustained. Second, that the defendants waived the delay in shipment (1) by failing to rescind the contract with reasonable promptness, (2) by failing to assert such delay as one of the grounds for refusal to accept the goods in a letter written by defendants to the plaintiff in returning the shipment. The motion for a directed verdict was denied, the case submitted to the jury, and a verdict returned in favor of the defendants for a dismissal of the action. Judgment was entered pursuant to the verdict, on April 12, 1913. A motion for judgment notwithstanding the verdict or for a new trial was thereafter made by the plaintiff, and an order entered on November 14, 1913, denying the same, and this appeal is from the judgment and the order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial.

It is established by the undisputed testimony that on March 24, 1911, one Weinstein, a traveling salesman for the plaintiff, called upon the defendants at their place of business in Dickinson in this state, and took an order for certain ladies' cloaks and coats. The order was not reduced to writing and signed by the defendants, hence its terms rested in parol. The only part of Weinstein's testimony relating to the time of delivery of the goods is as follows: "I took this order in March for the fall trade of 191I. The fall trade is where they buy fall and winter cloaks."

The testimony of the defendant Fred L. Roquette relative to this matter, including the objections offered thereto, was as follows:

I recollect the order for goods as set out by the plaintiff, but do not recollect the exact date of the order. The traveling salesman of the Sunshine Cloak & Suit Company sold these goods to me. 1 bought that class of goods myself.

Q. You may state the conversation relative to the time of shipment, if there was such a conversation.

Mr. Pugh: That is objected to as incompetent, irrelevant, and immaterial, and if established no ground for rescission of the sale.

The Court: Overruled. Exception taken.

A. My instructions to all orders the same as this was August 15th, and *I stated to the representative of the Sunshine Cloak & Suit Company I wanted these goods shipped by August 15th. These goods were ordered for the fall trade.* We buy considerable of this class of goods. There is a distinction as to the time of the year when the goods for certain seasons are being shipped. Shipment for the season of fall and winter goods are usually made anywhere from July 15th to September 1st. It is not customary on regular orders of this kind where they are not special orders to ship later than September 15th in this community. . . . The order was received too late for the fall trade. These goods were received by me about October 10th or 11th. They were returned immediately. I think they were returned that same evening or the next morning. The goods were brought down to my store. I did not know before I opened the parcel or box what they were; there were no identification marks on the case. Immediately on discovering what was in the box I put the cover back on and called the dray and returned them. I immediately notified them of the return of the goods. I think I wrote them a letter and inclosed a copy of the bill of lading.

No other objection (except the one stated above) was made to any part of this testimony, nor was any motion made to strike it out.

The testimony on the part of the plaintiff further shows that the goods in question were shipped by the plaintiff on September 28, 1911, by freight to Dickinson, and that it would take from ten to twelve days, or sometimes a month, for such goods to reach their destination. Plain-

tiff's witnesses also testified that on October 17th, they received the following letter from the defendants:

Dickinson, N. D. 10/13–1911.

Sunshine Cloak & Suit Co.,
Toledo, Ohio.

Gentlemen:–

Inclose please find Exp bill of a case of coats which we are returning, we have no bill nor duplicate of order. We cannot use the goods on acct of the crop conditions are very poor. I am sorry to be obliged to return this or any goods. I should have advised you had we had a duplicate.

Yours very truly,
Roquette Bros.

While several errors are assigned, still the only one seriously urged by the appellant, and worthy of consideration on this appeal, is the denial of the motion for a directed verdict. Incidentally, however, appellant alleges error in the admission of the testimony of the defendant Fred L. Roquette over the objection made thereto. It is obvious that the testimony was not subject to objection upon any of the grounds mentioned in the objection. It is conceded that the bargain for the goods in question rested in parol. The testimony called for, by the question objected to, merely called for the conversation containing the terms of that bargain. We are entirely satisfied that it was not objectionable upon any of the grounds specified, and that the trial court committed no error in overruling the objection interposed.

(1) It is doubtless true, as appellant contends, that time is never considered as of the essence of a contract, unless by its terms it is expressly so provided. In fact this is a statutory provision in this state. Comp. Laws 1913, § 5918. And if no time is specified for the performance of an act required to be performed, a reasonable time is allowed. But if the act is in its nature capable of being done instantly, as for example if it consists in the payment of money only, it must be performed immediately upon the thing to be done being exactly ascertained. Comp. Laws 1913, § 5917.

(2–3) But, although it is true that time is never considered as of

the essence of the contract, unless it is so provided by the terms thereof, still it is not necessary to declare in so many words "that time is of the essence of the contract," but it is sufficient if it appears that it was the intention of the parties thereto that time should be of the essence thereof. The rule is stated in Benjamin on Sales as follows: "In determining whether stipulations as to the *time* of performing a contract of sale are conditions precedent, the court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent." Benjamin, Sales, 6th ed. § 539. See also 9 Cyc. 604. In the case of Standard Lumber Co. v. Miller & V. Lumber Co. 21 Okla. 617, 626, 96 Pac. 761, 765, the Supreme Court of Oklahoma, in considering a provision in the Codes of that state similar to § 5918, Compiled Laws 1913, said: "It was clearly not the intention in the adoption of such a statutory provision as this to require the identical language of the statute to be inserted in a contract before time could become the essence thereof. Code provisions have ever been adopted for the purpose of abolishing technicalities and applying substantial justice, and it necessarily follows that where it appears by the language expressed in a contract, regardless of the phraseology or the form of expression used, that it was the intention of the parties thereto that time should be the essence of the contract, that should be the construction in law. Of course, in making a proper construction, a court will be confined to what is expressed in the contract, and will be precluded from going outside of the same and considering contemporaneous and extraneous matters." See also Green Duck Co. v. Patterson, 36 Okla. 392, 128 Pac. 703.

South Dakota has a statute identical with § 5918, Compiled Laws of this state (see § 1267, Civ. Code, S. D. Rev. Codes 1903), and in the case of Fountain City Drill Co. v. Lindquist, 22 S. D. 7, 114 N. W. 1098, in ¶ 2 of the syllabus, it was said: "Where a contract for the sale of machinery required it to be shipped on or about February 1st in a mixed car, and it was shipped by local freight about forty days after the time specified, the burden of proving a waiver by the buyer of the terms of the contract, or legitimate excuse for its violation, was on the seller in an action by him to recover damages for the buyer's re-

fusal to accept the machinery." And in discussing contracts of this nature it was said in the opinion in that case: "In construing contracts like the one before us, stipulations to ship in a manner designated and *at a specified time* are usually treated by the courts as warranties of conditions precedent, with which the vendor must comply in order to recover damages arising from the refusal of the vendee to accept the shipment." (Citing a number of authorities, 22 S. D. 12.)

The supreme court of Iowa, in considering this question in Bamberger Bros. v. Burrows, 145 Iowa, 441, 450, 124 N. W. 333, 337, said: "In the law of sales it is a settled rule that time may be of the essence of the contract; and, when the time for delivery is fixed, it is generally so regarded. Therefore, if the seller fails to make delivery on the date so fixed, the buyer may rescind or recover damages for the seller's breach of contract." No court has spoken more clearly on this subject than the Supreme Court of the United States. In the case of Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 30 L. ed. 920, 7 Sup. Ct. Rep. 882, that court said: "In a case decided upon much consideration at the last term, the general rule was stated as follows: 'In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident *such as the time or place of shipment,* is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.' Norrington v. Wright, 115 U. S. 188, 203, 29 L. ed. 366, 368, 6 Sup. Ct. Rep. 12. See also Filley v. Pope, 115 U. S. 213, 29 L. ed. 372, 6 Sup. Ct. Rep. 19; Pope v. Porter, 102 N. Y. 366, 7 N. E. 304; Rommel v. Wingate, 103 Mass. 327.

"When a merchant agrees to sell, and to ship to the rolling mill of the buyer, a certain number of tons of pig iron at a certain time, both the amount of iron and the time of shipment are essential terms of the agreement; the seller does not perform his agreement, by shipping part of that amount at the time appointed and the rest from time to time

afterwards; and the buyer is not bound to accept any part of the iron so shipped."

The various text writers are practically in accord, in their adherence to the doctrine as promulgated by the Supreme Court of the United States.

In 35 Cyc. 175, it is said: "If the contract specifies the time when delivery is to be made, time is of the essence of the contract, and if delivery is not made within the time agreed on, the buyer is not liable. In such case the buyer may refuse to accept the goods, or he may receive them and rely on his right to damages for the breach, unless his acceptance is under such circumstances as to constitute a waiver of the breach."

Mechem on Sales, vol. 2, §§ 810, 811, 1138, and 1139, reads as follows: Section 810. "It is clear enough that one party alone cannot ordinarily rescind the contract or force the other to rescind, unless his act is in some way authorized or acquiesced in by the other. What two at least are needed to make, one alone cannot ordinarily undo. But while one alone cannot thus usually unmake the contract, the act of one may be so treated or regarded by the other that the combined acts of both will result in a termination. Many instances will be met with hereafter wherein one party has broken or repudiated the contract on his part, and the other, at his option, may either treat that act as a breach and recover damages for it, or he may acquiesce in it as a termination of the contract and thus bring it to an end."

Section 811. "Thus, for example, if the seller has undertaken to supply goods of a certain kind, or at a certain time, or in a certain amount, or at a certain place, the buyer is not bound to receive goods of a different kind, or at a different time, or in a different amount, or at a different place. The seller's performance is here a condition precedent to the buyer's liability; and if the seller makes default in any of these particulars, the buyer may treat the contract as broken simply and claim damages for the breach, or he may treat the contract as at an end. He is not, in any event, bound to give the seller another trial, or wait while the seller experiments to see if he can perform his contract, and he may, of course, insist upon strict performance without rescinding."

Section 1138. "Where the time for the performance is thus fixed,

it is, in the language of the law, deemed usually to be 'of the essence of the contract,' and, unless waived by the other party, performance at the time stipulated is indispensable. It is not necessary that it shall be so declared in express terms; it is enough if it is a term of the contract."

Section 1139. "Obviously, therefore, unless the seller can show that he did what was incumbent upon him to do, as that he delivered, shipped, or tendered the goods at the time when such performance was due,—neither later nor earlier,—or that performance at that time was waived by the other party, he is in no situation either to enforce the contract on his own behalf or resist an action against him by the other party."

Williston on Sales, § 189, lays the rule down as follows: "Frequently contracts require shipment or delivery by a certain date. As it is settled that in mercantile contracts time is essential, the buyer may refuse the goods unless the delay is very trifling, whether his promise is expressly conditional on the goods having been shipped or delivered on time, or whether the stipulation in regard to time is wholly contained in the seller's promise."

(4–6) "A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed." Comp. Laws 1913, § 5771.

It is clear that, if the agreement between plaintiff and defendant in this case was as testified to by Fred L. Roquette,—that the goods were to be shipped by August 15th,—that time was of the essence of the contract, and the condition as to the time of shipment was a condition precedent. Under the laws of this state, "when an obligation fixes a time for its performance an offer of performance must be made at that time within reasonable hours, and not before nor afterwards." Comp. Laws 1913, § 5805. And "before any party to an obligation can require another party to perform any act under it, he must fulfil all conditions precedent thereto imposed upon himself. . . ." Comp. Laws 1913, § 5774. And, it is equally clear that the contract involved in this action was an executory contract (Compiled Laws 1913, § 5921); and that no right of property in the clothing passed to the defendants by the mere order or bargain between the parties, Comp. Laws 1913, §§ 5535 and 5536. And as was said by the Supreme Court of the United States in Jones v. United States, 96 U. S. 24, 30, 24

L. ed. 644, 647, "time is usually of the essence of an executory contract for the sale and subsequent delivery of goods, where no right of property in the same passes by the bargain from the vendor to the purchaser; and the rule in such a case is that the purchaser is not bound to accept and pay for the goods, unless the same are delivered or tendered on the day specified in the contract. Addison, Contr. 185; Gath v. Lees, 3 Hurlst. & C. 558; Coddington v. Palaeologo, L. R. 2 Exch. 196, 36 L. J. Exch. N. S. 73, 15 L. T. N. S. 581, 15 Week. Rep. 961. . . . Whether one promise be the consideration for another, or whether the performance, and not the mere promise, be the consideration, is to be determined by the intention and meaning of the parties, as collected from the instrument, and the application of good sense and right reason to each particular case. . . . Where an act is to be performed by the plaintiff before the accruing of the defendant's liability under his contract, the plaintiff must prove either his performance of such condition precedent, or an offer to perform it which the defendant rejected, or his readiness to fulfil the condition until the defendant discharged him from so doing, or prevented the execution of the matter which the contract required him to perform. . . .

"None will pretend that any right of property in the clothing passed to the United States by the bargain between the parties; and *the rule in such cases is that time is and will be of the essence of the contract, so long as the contract remains executory, and that the purchaser will not be bound to accept and pay for the goods, if they are not delivered or tendered on the day specified in the contract.* Addison, Contr. 6th ed. 185. . . .

"Cases arise where either party, in case of a breach of the contract, may be compensated in damages; and in such cases it is usually held that the conditions are mutual and independent; but where the conditions are dependent and of the essence of the contract, it is everywhere held that the performance of one depends on the performance of another, in which case the rule is universal that, until the prior condition is performed, the other party is not liable to an action on the contract. Addison, Contr. 6th ed. 925.

"Where time is of the essence of the contract, there can be no recovery at law in case of failure to perform within the time stipulated. Slater v. Emerson, 19 How. 224, 15 L. ed. 626.

"Additional authorities to show that a party bound to perform a con-

dition precedent cannot sue on the contract without proof that he has performed that condition is scarcely necessary, as the principle has become elementary. Gouverneur v. Tillotson, 3 Edw. Ch. 348.

"Conditions, says Story, may be either precedent or subsequent, but a condition precedent is one which must happen before either party becomes bound by the contract. Thus, if a person agrees to purchase a cargo of a certain ship at sea, provided the cargo proves to be of a particular quality, or provided the ship arrives before a certain time, or at a particular port, each proviso is a condition precedent to the performance of such a contract; and unless the cargo proves to be of the stipulated quality, or the ship arrives within the agreed time or at the specified port, no contract can possibly arise. Story, Contr. 5th ed. 33." See also 35 Cyc. 531, and 9 Cyc. 603, 643.

Many of the authorities cited by appellant are actions in equity, and in such cases a somewhat different rule applies. The distinction is stated in Williston on Sales, § 453, as follows: "The general rule of contracts is that a party is not excused by the other party's breach of contract unless the breach was material or essential; and in equity stipulations as to time in contracts for the sale of land are not regarded as essential. But it has been said that 'to apply the equitable rule to mercantile contracts would be dangerous and unreasonable,' and it is well settled that as a general rule in such contracts time is of the essence."

But even in equitable actions, a stipulation in a contract making time an essential element in a contract will be recognized and enforced.

The supreme court of this state in the case of Forgusson v. Talcott, 7 N. D. 183, and 186–188, 73 N. W. 207 in considering this question said: "The general principles which govern the decision of this case are well settled. In equity time is not ordinarily regarded as an essential element in a contract. But the parties may make it so by express agreement. This was done by the terms of the contract here involved. It is true that there is an express agreement that, for failure to comply with the provisions of the contract, the defendants shall be liable in damages. But this did not in any manner qualify the clause making time of the essence. . . . This provision need not be in any particular form, but it is usual to express it in the manner in which it was expressed in the contract in question. After some vacillation on the

part of the English chancellors, the rule was there adopted, and it prevails in this country as well, that the parties may by their agreement make time of the essence thereof; and that in such a case a failure to comply with the terms of the contract, at the time named therein for performance, will debar the person in default from claiming any rights thereunder, even in a court of equity. Our statute recognizes this doctrine. Rev. Codes, §§ 3806, 3916."

(7–8) If the testimony of Fred L. Roquette was correct, and the bargain as to the time of shipment such as he claimed,—and that was a matter for the jury to determine,—then the goods in question were to be shipped by August 15th. It is conceded that shipment was not made until September 28th, and did not reach defendants until about October 11th or 12th. It appears that at least a part of the goods ordered were for the fall trade. Plaintiff's own witnesses testified that it would take from ten to twelve days to a month for a shipment from Toledo, Ohio, to reach Dickinson. Roquette testified that it was customary to have goods of this kind shipped anywhere from July 15th to September 1st. It certainly seems reasonable to suppose that the defendants when ordering goods in March for their fall trade would insist on shipment in time to insure them the benefit of the entire selling season for fall goods,—a shipment arriving by the middle of October would hardly give them this opportunity. We are satisfied that the agreement to ship by August 15th was a condition precedent, and that before plaintiff could insist upon performance, *i. e.*, payment by the defendants, it must be able to prove that it had fulfilled this condition,—at least, substantially so. It seems obvious that shipment made on September 28th was no substantial compliance with the agreement to make such shipment by August 15th. The purchasers were clearly within their rights in refusing to accept these goods when received; and the delay on the part of the plaintiff to make shipment until September 28th was such failure to perform on its part as will prevent a recovery, where the purchasers refused to accept the goods.

Appellant's next contention is that defendants waived the right to reject the goods, first, by not notifying the plaintiff with reasonable promptness; and, second, by failing to assert the delay as one of the grounds for refusing to accept the goods in the letter written by defendants to plaintiff on October 13th.

The first ground asserted is wholly untenable. If the agreement between the parties was to the effect that the goods were to be shipped by August 15th, then it was incumbent upon plaintiff to show a compliance with this condition in order to recover. When plaintiff failed to comply with this condition defendants were justified in treating the contract as terminated, if they so desired. No duty was incumbent upon them to notify plaintiff. See authorities cited above, and 35 Cyc. 531, 9 Cyc. 603, 643.

(9) Did defendants waive the provision in the contract relating to time of delivery, by failing to mention this in their letter to plaintiff? We think not. Appellant relies solely upon the authority of Littlejohn v. Shaw, 159 N. Y. 189, 53 N. E. 810. In discussing this same question, and the authority cited, Williston on Sales, says: "It has been held in a New York case that where a buyer, on tender of goods being made to him, objects to the tender on specified grounds, all other objections are waived, and the seller, in order to recover the price, need only prove compliance with the contract in the particulars to which the objections related. This decision has been followed elsewhere. The result, however, seems contrary to principle and a considerable weight of authority upon closely allied questions. Upon principle if goods are open to more than one objection, and the buyer, when they are tendered, contents himself with giving one reason, it is hard to see why he thereby conclusively admits that there is no other reason. His conduct may afford some evidence that the goods are subject only to the one objection stated, but no more than this can be said. This criticism is strengthened by authorities bearing on the same question as applied to contracts other than those of sale. In contracts of service, the general rule is established that when a servant is discharged on insufficient grounds and sues his employer, the master may prove that a sufficient cause existed which was not specified or even known at the time of the discharge. And in other cases of contracts it has been held that 'the legal effect of an act amounting to breach of contract must be the same whether it is known or unknown to the opposite contracting party.' The only proper qualification of the doctrine here advocated arises where the objection set up at the trial might have been obviated by the seller had he not supposed that the buyer's objection related only to the matter specifically referred to. The cases in which it has been held that a tender of money

if objected to on one ground cannot later be objected to on another rest on this principle. In the leading case Bayley, B., said: 'If you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but by not doing so and claiming a larger sum, you delude him.'" Williston, Sales, § 495.

The defendants returned the goods immediately after they were received. They evidenced no intention to retain them, or waive the failure of the plaintiff to ship the goods at the time agreed. The mere fact that they wrote a friendly letter calling attention to certain local conditions which affected their business, and made no reference to the failure to ship the goods at the time agreed, would not of itself constitute a waiver on the part of the defendants of the condition as to the time of shipment. Actions frequently speak louder than words in matters of this kind. The question is whether or not the conduct or acts of the defendants, including what they may have said or written, evinced an intention to be bound by the contract. Their prompt return of the goods indicates a contrary intention. The plaintiff was in no manner prejudiced by the failure of the defendants to assign the delay in making shipment as a ground for refusal to accept it. There was no way whereby plaintiff could remedy this defect. We are entirely satisfied that the evidence did not establish, as a matter of law, that defendants had waived the delay in the time of shipment. Williston, Sales, supra; Tascott v. Rosenthal, 10 Ill. App. 639; Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967; Crescent City Mfg. Co. v. Slattery, 132 La. 917, 61 So. 870; Connell Bros. Co. v. H. Diederichson & Co. 130 C. C. A. 251, 213 Fed. 737.

(10) The failure to assign such delay as one of the grounds for refusal to accept the goods was merely a circumstance which the jury might, and presumably did, take into consideration in determining whether or not a definite time for shipment was agreed upon, as one of the terms of the order, and, also, upon the question of whether or not defendants waived the delay in making shipment. See authorities cited above. See also Strain v. Pauley Jail Bldg. & Mfg. Co. 80 Tex. 622, 16 S. W. 625; Morley Auto Co. v Pittsburg Mach. Tool Co. 54 Pa. Super Ct. 223; Peninsula Produce Exch. v. Scott, 53 Pa. Super Ct. 625; Tobias v. Lissberger, 26 N. Y. S. R. 152, 6 N. Y. Supp. 823;

Bamberger Bros. v. Burrows, 145 Iowa, 441, 124 N. W. 333, 338; 35 Cyc. 186.

We are entirely satisfied that the plaintiff was not entitled to a directed verdict, and that the action of the trial court in submitting the issues of fact to the jury was entirely proper.

The other errors assigned are merely incidental to the propositions heretofore considered, and are not worthy of consideration. It follows from what has been said that the judgment and order appealed from must be affirmed. It is so ordered.

E. C. BERGH v. JOHN WYMAN FARM LAND & LOAN COMPANY a Corporation.

(152 N. W. 281.)

Nonresident plaintiff — security for costs — motion for — reasonable time in which to furnish — dismissal of action — continuance.

1. Where a nonresident plaintiff fails to furnish security for costs as required by §§ 7812 and 7814, Compiled Laws of 1913, it is not error for the trial court to refuse to dismiss the action for such reason on a motion being made at the opening of the trial, and without other notice, though it would be error to refuse to enter an order, if asked for, ordering a dismissal of the case if such security were not furnished within a reasonable time to be fixed by the court, and for a continuance until such time.

Jury case — jury waived — trial by court — findings — have same weight and effect as verdict — supported by evidence — conflict in.

2. Where a jury is waived and the case is tried by the court without a jury, the findings of the trial court have the same weight and effect as those of a jury, and will not be set aside if supported by competent evidence, even though there is a conflict therein.

Contract — performance — time of statute of frauds.

3. A contract which may be performed within a year does not come within the provisions of the statute of frauds, and is not required to be in writing.

Opinion filed March 24, 1915.

Appeal from the County Court of Cass County, *Hanson*, J. Action

for damages for breach of a contract of employment occasioned by wrongful discharge. Judgment for plaintiff. Defendant appeals. Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from a judgment of the county court of Cass county, North Dakota, having increased jurisdiction, and rendered in an action brought by the respondent to recover damages for the breach of a contract of employment to act as foreman in charge of one of appellant's farms, which contract was alleged to have been made about May the 20th, 1911, and presumed to continue until April 1st, 1912, and which respondent claims appellant broke by discharging him on the 1st day of November, 1911. The judgment was for the agreed wages for the months of November and December, 1911, and January, February, and March, 1912, at $75 per month, less the sum of $100 earned by respondent during said period.

Pollock & Pollock, for appellant.

This action by plaintiff, a nonresident, should have been dismissed, on defendant's motion, for his failure to furnish security for costs. Such motion cannot be denied and no security required, but the court may determine what reasonable time shall be allowed plaintiff within which to furnish security. Rev. Codes 1905, §§ 7196–7198, Comp. Laws 1913, §§ 7812–7814; Stewart v. Dwyer, 22 N. D. 356, 133 N. W. 990; Cranmer v. Dinsmore, 15 N. D. 604, 109 N. W. 317.

The contract attempted to be shown by the proof of the plaintiff, if such contract could be proved, would be within the statute of frauds. It was oral, and was not to be fully performed before the expiration of fifteen months. Rev. Codes 1905, § 5332, subdiv. 1; Comp. Laws 1913, § 5888; 20 Cyc. 198 B.; Sharp v. Rhiel, 55 Mo. 97; Biest v. Ver Steeg Shoe Co. 97 Mo. App. 137, 70 S. W. 1081; Chase v. Hinkley, 2 L.R.A.(N.S.) 738, and note, 126 Wis. 75, 110 Am. St. Rep. 896, 105 N. W. 230, 5 Ann. Cas. 328.

Plaintiff was discharged from the employment of defendant for good and sufficient cause. An employment, even for a specified term, may be terminated at any time by the employer in case of habitual neglect of duty, or continued incapacity to perform such duty. Rev. Codes

1905, §§ 5567, 5577; Comp. Laws 1913, §§ 6130, 6140; McGregor v. Harm, 19 N. D. 599, 30 L.R.A.(N.S.) 649, 125 N. W. 885; Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A.(N.S.) 524, 93 N. W. 901; Armour-Cudahy Packing Co. v. Hart, 36 Neb. 166, 54 N. W. 262; Posey v. Garth, 7 Mo. 94, 37 Am. Dec. 183; 26 Cyc. 987, 989.

Plaintiff was rightfully discharged and forfeited any balance of compensation that might have been due him. McGregor v. Harm, 19 N. D. 599, 30 L.R.A.(N.S.) 649, 125 N. W. 885; Huntingdon v. Claffin, 38 N. Y. 182; Von Heyne v. Tompkins, 5 L.R.A.(N.S) 531—IV. note.

Engerud, Holt, & Frame, for respondent.

The right to require security for costs existed at common law, and statutes requiring it are merely cumulative. The remedy is enforced in different ways in different jurisdictions. But the principle is the same everywhere, and such right may be waived by the defendant for failure to timely and promptly insist upon its exercise. Robinson v. Sinclair, 1 Denio, 628; Persse & B. Paper Works v. Willet, 14 Abb. Pr. 119; Sims v. Bonner, 42 N. Y. S. R. 10, 16 N. Y. Supp. 800; Shuttleworth v. Dunlop, 34 N. J. Eq. 489; Carpenter v. Aldrich, 3 Met. 58; Trustees of Schools v. Walters, 12 Ill. 154; Courson v. Browning, 78 Ill. 208; Weeks v. Napier, 33 Ala. 568; Heflin v. Rock Mills Mfg. & Lumber Co. 58 Ala. 613; Muldoon v. Place, 2 Ariz. 4, 6 Pac. 479; Brazell v. Cohn, 32 Mont. 556, 81 Pac. 341.

The contract here relied upon was not within the statute of frauds. There was no definite time fixed. Plaintiff was simply to continue working at a monthly salary as long as his services were satisfactory. Justification for discharge cannot be proved under a general denial. Such a defense raises a new issue which must be pleaded. Linton v. Unexcelled Fireworks Co. 124 N Y. 536, 27 N. E. 406; Schreiber v. Ash, 84 N. Y. Supp. 946; Browne v. Empire Typesetting Mach. Co. 44 App. Div. 598, 61 N. Y. Supp. 126; Hicks v. New Jersey Car-Spring & R. Co. 22 Misc. 585, 49 N. Y. Supp. 401.

The so-called bill of particulars was fatally defective in failing to specify the times and places of the alleged acts of misconduct. Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Dwight v. Germania L. Ins. Co. 84 N. Y. 493.

A mere order allowing an amendment to a pleading, unless the plead-

ing is correspondingly amended, is of no effect. The original pleading remains unchanged. Satterlund v. Beal, 12 N. D. 127, 95 N. W. 518; MacLaren v. Kramar, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 89; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; Linton v. Unexcelled Fireworks Co. 124 N. Y. 536, 27 N. E. 406.

BRUCE, J. (after stating the facts as above). It is conceded that the plaintiff was a nonresident. The statute in relation to the filing of security for costs is mandatory in form. It provides that "in cases in which the plaintiff is a nonresident of the state or a foreign corporation, the plaintiff *must,* before commencing such action, furnish a sufficient surety for costs," etc. See § 5597, Rev. Codes 1899, §§ 7196 and 7197, Rev. Codes 1905, and §§ 7812, 7813, Compiled Laws of 1913. The motion for the dismissal for the failure to furnish such security was, it is true, not made until the trial, but the duty to furnish the security was fundamental and obligatory, and if any time was desired or required by the plaintiff in which to furnish the same, he should have applied to the court therefor. The extension in such cases is a matter of favor to the plaintiff and something which he should ask for. He has no right to proceed in the case, and the court has no right to allow him to proceed, without the furnishing of the security. If, therefore, the defendant had moved for a dismissal of the action unless the security should be furnished within a reasonable time, and for a continuance of the action until such time, a denial of such motion would have been palpable error. Cranmer v. Dinsmore, 15 N. D. 604, 109 N. W. 317; Stewart v. Dwyer, 22 N. D. 356, 133 N. W. 990.

Section 7814, Compiled Laws of 1913, being § 7198 Rev. Codes 1905, § 5599, Rev. Codes 1899, however, provides that "an action in which security for costs is required by the last section, and has not been given, shall be dismissed on *motion and notice* by the defendant at any proper time before judgment, unless, in a reasonable time to be allowed by the court, such security for costs is given," and it is one thing to dismiss an action and another to insist upon its continuance for a reasonable time until such security is given. Our conclusion, therefore, is that the court did not err in refusing to dismiss the action for the failure to furnish the security, as no notice had been given prior

to that made in open court and at the beginning of the trial of the motion to dismiss.

There seems to be no merit in appellant's second contention, that the contract was made on January 6, 1911, and was to cover a period of employment up to April 1st, 1912, that is to say, of fifteen months, and therefore should have been in writing, under the provisions of subdivision 1 of § 5332, Rev. Codes 1905, Comp. Laws 1913, § 5888. The only testimony in relation to the subject is that furnished by the plaintiff and by John Wyman, the president of the defendant land company. Wyman testifies as follows: "He, Bergh, met me on the street and asked me for a job. I told him there might be a vacancy soon and I might decide to give him a job. This was in December, 1910, or the first of January, 1911. I later employed him. At that time there was no agreement made as to what wages were to be paid plaintiff. The understanding was to the effect that it was to be left to me. He was willing to accept whatever I saw fit to pay him. Later I met some people in the neighborhood of Hendrum and wrote him a letter and he went to work for me pursuant to that letter. No further agreement as to wages was made until some time in May or the last of April. There was an agreement that he was to get $75 a month from the 1st of April, during the summer season. That employment was to continue as long as he suited me at $75 per month. There was no definite time. He had already worked for me for quite a while. He was paid at the rate of $30 per month for the time he worked up to the 1st of April, and $75 per month after that. I said nothing to him about employing him for a year. The first talk I had with Mr. Bergh I think was in Fargo in January, 1911. The conversation took place before the letters which are in evidence. The letters were written afterwards when I hired him. January 6th he came in response to these letters. The understanding was that he was to receive $50 a month and as much more if he could do the work. After he had been on the farm three months the question was taken up again. I went out there to talk the matter over with him. I did not at that time state to him that I would be criticized by the stockholders of my company if I allowed him $75 during the winter months. I told him I wanted to keep him. If he was a good man I wanted to keep him by the year. When I got out there he wanted $900 a year, and I could not

stand for that, and said that would be $75 the year around, and I finally consented to give him $30 for the winter months and $75 for the balance of the season as long as he stayed. My original proposition was $50. In this letter I say I will be willing to pay him considerably more providing he is able to earn it. After he had been there three months and I had an opportunity to satisfy myself as to his ability, I agreed to pay him $75 a month if he took $30 for the winter. No sir, as a matter of fact Mr. Bergh did not refuse to accept $30 a month unless I entered into a contract to give him $75 for the whole year." This testimony is borne out by the letters. One dated December 29, 1910, reads as follows: "Kindly let me know at your earliest convenience whether we can depend on you to go to work for us on or about the 1st of March. . . . Now regards to salary, I offered you $50; I will be willing to pay you considerably more, providing you are competent to earn it. I am sure you understand farming thoroughly, but the question in my mind is whether you are a captain so as to manage the hired help, so as to get a fair amount of work out of them for the wages we have to pay them. Furthermore, if everything is satisfactory between us, there is no doubt I will be glad to double your salary, and your position with us may last for a good many years. Would like to hear from you by return mail." On January 3, 1911, Wyman again wrote: "Replying to yours of December 30th, will say that I will be in Fargo all of this week, so if you will come down this week I will be glad to meet you so that we may be able to talk over the matters pertaining to our business. Sooner you come the better it will suit me." Mr. Bergh testified: "In response to these letters I went down to Fargo and to the office of the defendant. I there had a talk with Mr. Wyman with reference to working for the John Wyman Company. Nothing definite was said with reference to the wages which I was to receive. If I could handle the work he would be willing to pay me a good salary. . . . I started to work for the defendant company January 6, 1911. . . . I had further negotiations with Mr. Wyman relative to the time of my employment and the wages which I was to receive about the 20th of May at the Hurley farm. He had come down there for that purpose. I had written him on that subject. I wrote him that I was willing to take $75 per month, $900 per year. . . . He got my letter. We had conversation at that time with

reference to my wages. He asked me what I wanted. I told him $75 per month. He told me that he would give me $75 per month from the 1st of April, 1911, to the 1st of April, 1912, and $30 per month from January 6th, 1911, to April 1st, 1911. He explained this difference in wages in that he was afraid the farm trustees would kick on the payment of more than $30 per month. I did not object to doing that if he hired me until the 1st of April, 1912. I was working for the defendant at this time and continued to work for the defendant. I did the work I was hired to do, and continued to do that work until the evening of the last day of October, 1911. . . . I went to work for Mr. Wyman, January 6th, 1911. There was no agreement made as to wages at that time. I was to receive wages, nothing in particular. He offered me $50 a month. I would not take that. He was willing to pay me that and probably more. Yes, I had been anxious to secure this job. . . . This talk with reference to $75 a month that was agreed upon in the spring was at the Hurley farm. Mr. Wyman was present at that time. Nobody else was present. I asked him for $75 a month. The agreement was to pay me $75 a month. The agreement was that he was going to give me $30 a month from the time I started to April 1st, and from then $75 to April 1st, 1912. He offered me $50 when I went to work for him.

Q. You accepted $30 from January to April?
A. Yes, I was hired to the 1st of April, 1912.

We can come to no other conclusion than that the learned trial judge was correct in concluding the agreement which was sued upon and made the basis for the complaint was made somewhere about the 20th day of May, 1911, or at any rate after the 1st of April, 1911, and that at no time was there any agreement that the employment should last longer than to the 1st of April, 1912, and that part of the consideration for the defendant allowing the plaintiff the sum of $75 per month was that the plaintiff should accept $30 per month from the time at which he had gone to work up to April 1st, 1911, and that the prior agreement was entirely indefinite as to time. Such being the case the provisions of the statute of frauds do not apply.

It is not necessary for us to decide whether the court erred in allowing

the amendment to the answer in this case, and which sought to justify the discharge, nor to consider the point which is raised by the fact that though the amendment was permitted it was never in fact reduced to writing or physically incorporated within the original complaint. See Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518. It is sufficient to say that the evidence which was introduced in support of the defense was far from undisputed or convincing. This is not a trial *de novo,* but one to the court in the place of a jury, and the findings of the trial court must be given the same weight and effect as would be given to those of a jury under similar circumstances. The defense, in short, is far from being conclusively proved, and we see no reason for our overruling the findings of the trial court in relation thereto.

The judgment of the County Court is affirmed.

ESTHER STRAND and Joseph Strand v. W. A. MARIN and WARD COUNTY, a Municipal Corporation.

(152 N. W. 280.)

Seed grain lien — not a tax — priority.

1. The seed lien or charge which is provided for by chapter 210 of the Laws of 1909, Comp. Laws 1913, §§ 3471–3490, though in some respects treated as a tax, is not a tax in the strict sense of the term, so as to be a paramount lien under the provisions of §§ 1557 and 1572 Rev. Codes 1905, Comp. Laws 1913, §§ 2171 and 2186.

Tax — burden or charge for public purpose — legislative power to impose.

2. A tax is an enforced burden or charge imposed by the legislative power upon persons or property to raise money for public purposes.

Seed lien — not charge or burden for public purpose.

3. The seed lien or charge which is provided for by chapter 210 of the Laws of 1909, Comp. Laws 1913, §§ 3471–3490, is not an enforced burden or charge which is imposed for the purpose of raising money for public purposes.

Prior mortgage — seed lien — priority.

4. The seed lien charge which is provided for by chapter 210 of the Laws of 1909, Comp. Laws 1913, §§ 3471–3490, is not paramount to the lien of an antecedent real estate mortgage.

Opinion filed March 25, 1915.

Appeal from the District Court of Ward County, *Leighton,* J. Action to quiet title to real estate. Judgment for plaintiff. Defendant Ward County appeals.

Affirmed.

R. A. Nestos and *Dorr H. Carroll,* for appellant.

The doctrine of liens as between debtor and creditor is just and equitable. Jacobs v. Latour, 5 Bing. 130, 2 Moore & P. 201, 6 L. J. C. P. 243.

A lien is not a collateral contract. It is a right in the subject of the contract created by the law as an incident to the contract itself. Pelham v. The B. F. Woolsey, 3 Fed. 457; Hayden v. Delay, Litt. Set. Cas. (Ky.) 278.

A lien may be permitted, or the right to a lien given, by statute, without the property owner's consent. The Menominie, 36 Fed. 197; Kreling v. Kreling, 118 Cal. 413, 50 Pac. 546; Frost v. Atwood, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 96; Garr, S. & Co. v. Clements, 4 N. D. 559, 62 N. W. 640.

As a rule liens have priority with reference to the date of the filing of the required notice; but the legislature may make exceptions to such rule. O'Neil v. St. Olaf's School, 26 Minn. 329, 4 N. W. 47; Bohn v. McCarthy, 29 Minn. 23, 11 N. W. 127; Donahy v. Clapp, 12 Cush. 440; Phillips, Mechanics' Liens, § 65; Laird v. Noonan, 32 Minn. 358, 20 N. W. 354; Smith v. Stevens, 36 Minn. 303, 31 N. W. 55; Bardwell v. Mann, 46 Minn. 285, 48 N. W. 1120; 25 Cyc. 660 et seq.; Rev. Codes 1905, §§ 6273, 6276, 6277; Comp. Laws 1913, §§ 6853, 6856, 6857.

Persons who transact business or contract with each other, do so with full knowledge of the laws affecting their dealings. Garr, S. & Co. v. Clements, 4 N. D. 559, 62 N. W. 640; Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78; 20 Am. & Eng. Enc. Law, 2d ed. 347; Smith v. Stevens, 36 Minn. 303, 31 N. W. 55; Joslyn v. Smith, 2 N. D. 53, 49 N. W. 382.

Where a county in this state furnishes one of its residents with seed grain, the debt so created is regarded as in the nature of a tax, and to be collected as such. Re Columbian Ins. Co. 3 Abb. App. Dec. 239, 3 Keyes, 123; Butler v. Baily, 2 Bay, 244; Jack v. Weiennett, 115 Ill., 105, 56 Am. Rep. 129, 3 N. E. 445; Re Brand, 3 Nat. Bankr. Reg.

324; Osterberg v. Union Trust Co. 93 U. S. 428, 23 L. ed. 965; Jenkins v. Newman, 122 Ind. 99, 23 N. E. 683.

Thompson & Wooledge, for respondents.

If a seed lien obligation is a tax in the proper sense, then the state may give it a priority of lien. If not a tax, then the legislature cannot, by designating it a tax, give it any greater preference as a lien than could be given it should no such name be affixed to it. Such obligation is a mere debt. Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721; 37 Cyc. 706; State v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; State v. Bank, 36 Am. Dec. 561, note.

When entering into contract relations, the state or a municipality is to be treated the same as an individual. 37 Cyc. 1138, 1139; People ex rel. Atty. Gen. v. Michigan C. R. Co. 145 Mich. 140, 108 N. W. 772.

Where an obligation properly a tax is sought to be made prior and paramount to these existing liens, the statute must be very plain and specific. Such a result will not be brought about by implication. 37 Cyc. 1144, and cases cited; New England Loan & T. Co. v. Young, 10 L.R.A. 473 note; Black, Tax Titles, 2d ed. §§ 185, 186; Hulin v. Butte County, 18 S. D. 339, 100 N. W. 739; Miller v. Anderson, 1 S. D. 539, 11 L.R.A. 317, 47 N. W. 957.

Where a statute goes so far as to work a confiscation of prior vested property rights, or deprive the holder of these rights without notice and without his consent, it is void. 8 Cyc. 1102, note 84, and cases cited; Meyer v. Berlandi, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; John Spry Lumber Co. v. Sault Sav. Bank Loan & T. Co. 77 Mich. 199, 6 L.R.A. 204, 18 Am. St. Rep. 396, 43 N. W. 778; Mellis v. Race, 78 Mich. 80, 43 N. W. 1033; Randolph v. Builders' & Painters' Supply Co. 106 Ala. 501, 17 So. 721; Brooks v. Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445; Creech v. Pittsburgh, A. & W. R. Co. 11 Ohio Dec. Reprint, 764.

In the case of Agister's liens, the weight of authority is that such liens are inferior and subsequent to existing chattel mortgages. National Bank v. Jones, 18 Okla. 555, 12 L.R.A.(N.S.) 310, 91 Pac. 191, 11 Ann. Cas. 1041; Rev. Codes 1905, § 6266; Comp. Laws 1913, § 6846;

Wright v. Sherman, 3 S. D. 290, 17 L.R.A. 792, 52 N. W. 1093; Chapman v. First Nat. Bank, 98 Ala. 528, 22 L.R.A. 78, 13 So. 764.

BRUCE, J. This is an action brought by the holder of a sheriff's deed under a mortgage foreclosure, to quiet the title to the land purchased by him against the purchaser under a delinquent tax sale arising out of a lien or tax for certain feed and seed sold to the original owner of the land by the county of Ward under the provisions of chapter 210 of the Laws of 1909, Comp. Laws 1913, §§ 3471–3490.

The mortgage was dated on the 24th day of November, 1909, and recorded on the 25th day of November, 1909, and the mortgage sale was held on the 20th day of January, 1912, the sheriff's deed being issued on January 21st, 1913. The seed, on the other hand, was furnished by the county in the month of May, 1911, the amount of the indebtedness was entered upon the tax list of the county for the year 1911 as taxes, on the 13th day of November, 1911, and on the 10th day of December, 1912, the said land was sold at a delinquent tax sale and bought in by the defendant Ward county. Judgment was entered quieting title in the plaintiffs, and the defendant Ward county has appealed. The question at issue is whether the seed lien provided for in chapter 210 of the Laws of 1909, Comp. Laws 1913, §§ 3471–3490, was intended to be and could be made superior to the lien of the mortgage, which was executed prior to the furnishing of the seed, and such seed being furnished without the knowledge or consent of the mortgagee, but after the passage of the act.

It is not necessary for us to pass upon the constitutionality of the act which is before us, nor of any of its provisions. Nor is it necessary for us to decide whether or not such a paramount lien or tax, as is contended for by the defendant, could be created by the legislature. All that is necessary for us to say is that in our opinion it was not the intention of the legislature that the lien created by the statute should be considered a tax in the technical or ordinary sense of the term, nor that such lien should, by virtue of the provisions of §§ 2171 and 2186, Comp. Laws 1913, be deemed superior to antecedent liens or mortgages. A tax is "an *enforced proportional* contribution of persons and property, levied by authority of the state for the support of the

government and for all public needs." See Adjudged Words & Phrases, vol. 8, pages 6867 and 6868, and cases cited; 37 Cyc. 706.

Such is not the nature of the charge or indebtedness which is before us, and the mere calling it a tax does not make it such. Yeatman v. King, 2 N. D. 421, 33 Am. St. Rep. 797, 51 N. W. 721. It is in no sense an enforced contribution. It is a voluntary loan which is made by the husbandman, not for the support of the machinery of government nor for the general needs of the public, but for the support and needs of the borrower alone. In such a case, indeed, the state is not acting in a governmental capacity, but in one which is friendly or paternalistic. Not in short as an all-powerful governor or autocrat, but as a public spirited and kind-hearted banker or business man. It loans money and makes a contract and becomes a creditor or a lien holder by the mutual assent of both parties. It does not arbitrarily require a contribution or impose a tax.

The intention of a paramount lien or of the imposition of a tax in the general sense of the term is in fact negatived by the terms of the act itself. Section 11 of the act provides that applicants for seed grain must sign the contract agreeing to pay to the county the amount of the cost of said seed grain; and it further provides that such contract shall contain a stipulation that the sum so agreed upon "shall be taxable against all the real and personal property of said applicant; that such tax shall be levied by the county auditor or county clerk of his county, and collected as other taxes are collected under the laws of this state." Section 12 of the same act reads as follows: *"Upon the filing of the contracts* provided for in § 10, the county shall acquire a just and valid lien upon the crops of grain raised each year by the person receiving said grain, to the amount of the sum then due to the county upon said contract, as against all creditors, purchasers, or mortgagees, whether in good faith or otherwise, and the filing of said contract shall be held and considered to be full and sufficient notice to all parties of the existence and extent of said lien, which shall continue in force until the amount covered by said contract is fully paid."

The act does not anywhere say that the so-called tax shall become a first lien as to the real estate. Even as to the crop it does not take priority as a tax under the provisions of §§ 2171 and 2186, Compiled Laws of 1913, but is based upon a contract with the county, and be-

comes operative only when that contract is filed. If the legislature had intended that the so-called tax or charge should be a first lien upon the land, why did it not say so, and use the same direct and positive language that is used when making it a first lien upon the crops?

So, too, in doubtful cases, and where the language of a statute does not preclude us from so holding, we must presume that the legislature acted with full knowledge of local conditions and the financial needs of the state and of its citizens.

The first need of every new country is that outside capital shall feel free to circulate therein, and that its citizens may be able to borrow freely and at reasonable rates. That this may be possible it is absolutely necessary that foreign as well as local investors shall be secure, and shall feel secure, in their investments. A state or an individual that repudiates its debts or wastes the security it has given may profit thereby in the instant case, but it will never again be able to obtain credit.

If, indeed, the act were construed as desired by appellant, all confidence in North Dakota securities would be shaken, and the loaning of money to farmers and homesteaders would be greatly discouraged. The statute makes the debt a lien not only upon the land upon which the seed is sown, but upon *all the land* of the debtor. A money loaner or investor therefore would not only have to keep watch on his debtor's farming operations on the land upon which he had a mortgage, but upon all of his farm operations. The only justification for any such lien as against prior mortgages, too, is by this clause of the statute taken away, and that is the justification that the value of the security is enhanced by the lien. How, indeed, could section 2 in township 1 be benefited as a security or in any way by the seeding of grain on section 1 of township 6, yet under the statute the lien for the seed sown on section 1 covers section 2 also. We cannot believe that the legislature intended any such construction as is contended for by appellant, and in the absence of clear language indicating such a desire and intention, we refuse to infer it.

The judgment of the District Court is affirmed.

SUMNER SAND, in His Own Behalf and in Behalf of All Other Taxpayers of Scott School District No. 12 of Adams County, State of North Dakota, Similarly Situated, v. O. F. PETERSON, J. A. Balsinger, Theo. Lokken, Paul M. Brown, and F. M. Jackson.

(152 N. W. 271.)

Temporary injunction — pendente lite — not matter of right — discretion — abuse of.

1. A temporary injunction *pendente lite* is not granted as a matter of right, but the granting or refusal of the same is a matter largely in the discretion of the trial court, and its order will not be disturbed except in case of a clear abuse of discretion.

Appeal — order — merits of action — supreme court — review in showing — same as in lower court.

2. On appeal to this court from an order denying a temporary injunction, this court will not pass upon the merits of the main action, but will only review the order appealed from, upon the same showing as was made by the parties in the lower court upon the hearing there had.

Temporary injunction — application for — allegations of complaint — equities — denied by answer — refusal of application.

3. Upon the hearing of an application for a temporary injunction, where the allegations or equities of the complaint are positively denied by answer or other proof, the court will ordinarily deny the application.

Trial court — refusal of application — showing — discretion.

4. *Held* that, upon the showing made by the parties on the application for the temporary injunction, the trial court was fully justified in denying such temporary injunction, and did not abuse its discretion in making the order complained of.

Opinion filed March 20, 1915. Rehearing denied April 10, 1915.

Appeal from the District Court, Adams County, *Honorable W. C. Crawford,* Judge.

Action in equity by Sumner Sand against O. F. Peterson, J. A. Balsinger, Theo Lokken, Paul M. Brown, and F. M. Jackson for a permanent injunction.

From an order denying a temporary injunction, *pendente lite* upon return of an order to show cause, plaintiff appeals.

Order affirmed.

E. C. Wilson for appellant.

The presumption always is that a school district is common. Laws 1911, chap. 266, § 37.

A school district, being originally common, remains so, until legally organized into a special district. The procedure is purely statutory, and the provisions must be followed. The law requires the petition to be signed by one third of the *"Voters"* in the district. A "resident" is not necessarily a "voter." Dartmouth Sav. Bank v. School Dist 6 Dak. 332, 43 N. W. 822; School Dist. v. Pace, 113 Mo. App. 134, 87 S. W. 580.

The *fact* that one third of the voters have signed the petition must appear *from the petition* affirmatively. Potter v. Trustees of Schools, 10 Ill. App. 343.

Such petition must also give the boundaries of the territory to be organized. 35 Cyc. 837.

Even if it were a *de facto* district, the plaintiff must succeed. Dartmouth Sav. Bank v. School Dist. supra.

The petition for annexation is void on its face, because it fails to recite that the lands sought to be annexed are adjacent to the Hettinger district, and that it was signed by the requisite number of voters. Re Heidler, 122 Pa. 653, 16 Atl. 97; Re Wolfe, 8 Kulp, 181; Potter v. Trustees of Schools, supra.

The posting of notice of hearing on such petition is absolutely jurisdictional. Likewise, the publication, as by law provided. Graves v. School Inspectors, 102 Mich. 634, 61 N. W. 60; Huyser v. School Inspectors, 131 Mich. 568, 91 N. W. 1020; Howard v. Forrester, 109 Ky. 336, 59 S. W. 10; Noble v. White, 25 Ky. L. Rep. 1282, 77 S. W. 678; Re Clearfield Independent School Dist. 79 Pa. 419.

The purpose of annexation is for relief and convenience. 35 Cyc. 856 (3); Re Wolfe, 8 Kulp, 181.

Paul W. Boehm and *F. M. Jackson,* for respondents.

The rightful existence of a corporation cannot be raised in a collateral proceeding, or by private individuals. The question can only be raised by the state. 10 Enc. L. & P. 256; St. Paul Gaslight Co. v. Sandstone, 73 Minn. 225, 75 N. W. 1050; Gilkey v. How, 105 Wis. 41, 49 L.R.A. 483, 81 N. W. 120; State v. Fuller, 96 Mo. 165, 9 S. W. 583; Miller v. Perris Irrig. Dist. 85 Fed. 693; Shapleigh v. San

Angelo, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957, and cases cited; 28 Cyc. 174, note 55; Kuhn v. Port Townsend, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 923.

The order made by the board of education, that the territory be annexed, presumes regularity in all steps in the annexation proceedings. Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499; Jones Ev. §§ 41, 42; Bank of United States v. Dandridge, 12 Wheat. 64, 69, 6 L. ed. 552, 554; Nofire v. United States, 164 U. S. 657, 41 L. ed. 588, 17 Sup. Ct. Rep. 212; Hayes v. United States, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735.

The proceedings were legal and regular in all respects. Redfield School Dist. v. Redfield Independent School Dist. 14 S. D. 229, 85 N. W. 180; Wood v. Bangs, 1 Dak. 179, 46 N. W. 586; Grant County v. Colonial & U. S. Mortg. Co. 3 S. D. 390, 53 N. W. 746.

F. E. Fisk, District Judge. This is an appeal from an order of the district court of Adams county dissolving a temporary restraining order and refusing to grant a temporary injunction upon a hearing of an order to show cause why a temporary injunction should not issue *pendente lite.*

The material allegations of the complaint are as follows:

1. "That prior to January 25, 1913, defendants formed and associated themselves together under the name and style of 'the Board of Education of Hettinger School District No. 13.'

"2. That Hettinger school district No. 13 is, and has been during all of the times hereinbefore referred to, a common-school district of said county, principally comprised of township 129 of range 96.

"3. That it is not possible for said common-school district to have a board of education, nor never has been, nor were any of said defendants ever elected or appointed as members of any such board. That such school district is, and always has been, governed by a district-school board consisting of three members.

"4. That township 129 of range 95 of said county is called 'Scott school district No. 12.'

"5. That plaintiff is a resident, legal voter, and taxpayer of said county and Scott school district, and the owner of 146 acres of land therein, and an undivided half of another tract of land of 160 acres,

all within the limits of such district, and also a large amount of personal property.

"6. That at a special meeting of said defendants on January 25, 1913, there was an application in writing presented to them under their fictitious name of 'the Board of Education of Hettinger School District No. 13' in words and figures, to wit:

'Hettinger, N. D., January 18, 1913.

We, the undersigned, legal voters of and within the territory hereinafter described, do hereby petition the Honorable Board of Education of Hettinger School District No. 13 of the state of North Dakota to attach and embrace for school purposes, to the said Hettinger school district No. 13, the following described territory lying and being in the county of Adams and state of North Dakota, to wit: All of sections 6, 7, 8, 18, 17, 19, west half and the northeast quarter of section 20; west half of the northeast quarter and the northeast quarter of the southeast quarter of section 20; west half of section 30; north half of northwest quarter, southwest quarter of northwest quarter of section 29; west half of the northwest quarter, west half of the southwest quarter section 16; southwest quarter of the northwest quarter, west half of southwest quarter section 9; west half of northwest quarter, southeast quarter of northwest quarter, and the southwest quarter of section 5, all in township 129 north, range 95 west, fifth principal meridian.'

[9 signatures attached].

"That thereupon said defendants, unlawfully assuming to act as and under their said fictitious name of 'the Board of Education of Hettinger School District No. 13,' pretended to grant the prayer of said application without any notice of hearing, and on the 26th day of February, 1913, made, issued, and entered upon the records of said district-school board an order in form, attaching and annexing said territory to said Hettinger school district No. 13 for school purposes, without either publishing or posting notices of hearing.

"7. That said defendants are now threatening and making preparations to further their unlawful purpose of annexing said territory to said Hettinger school district, and they as said pretended board of education are about to unlawfully select and appoint an arbitrator, and to cause the district-school board of said Scott school district to likewise select an arbitrator, and to then cause said two arbitrators and the

county superintendent of schools of said county to act as a board of arbitration and to unlawfully effect an equalization of property, funds on hand, and debts as between said two school districts, and to thereby deprive this plaintiff of his property, school privileges, and advantages naturally belonging to him and to his said land, and to burden him and his property with debts and heavy taxation, and thereby do him an irreparable injury, for which he has no adequate remedy at law.

. . . . . .

"8. That much of said territory is more than 3 miles distant from the central school of said Hettinger district.

. . . . . .

"9. That the purpose of said annexation is to obtain from and to deprive said Scott school district of its taxes for school purposes, and to bring more property for taxing purposes within the limits of said Hettinger district. That the signers upon said application are not the real parties in interest, but the entire plan and purpose of said annexation is that of said defendants, and they are using said signers as the means and instruments to effect such annexation under color of right, and in taking advantage of the depopulated condition of said territory outside of said sections 6, 7, and 18.

"That none of the signers of said application are residents of said Scott school district, nor are any of them voters therein for school purposes, nor were they at the time of said signing."

This complaint was duly verified by the plaintiff, and, together with the following affidavit of plaintiff's attorney, E. C. Wilson, constituted the basis for the issuance of the order to show cause and the temporary restraining order, and was the only proof offered by plaintiff upon the hearing of such order to show cause, which resulted in the order complained of being made.

Affidavit.—"E. C. Wilson, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action, and as such drew the accompanying complaint therein; that he has had under consideration from a legal standpoint all of the acts and proceedings leading up to and forming the basis of the actions threatened to now be done by said defendants, and he has fully and carefully examined as to the validity of all proceedings, and all of the records in the various proceedings attempted to be had and leading up to the present threatened ac-

tions, and he is fully convinced that the allegations contained in said complaint are true and the conditions are as therein alleged. That he hereby adopts said complaint as a part of this affidavit, and constitutes as a part hereof all of the allegations of such complaint, as fully as though they were specifically set out and reiterated herein."

The defendants answered jointly, admitting the allegations of paragraphs 1 and 4, and denying the other portions of such complaint. They further allege that plaintiff is not a resident of, or property holder in, the territory sought to be annexed. They then plead a further defense by affirmatively alleging the regularity of the proceedings by which Hettinger school district No. 13 was organized into a special school district on May 2, 1911; that the defendants are the duly elected members of the board of education; that said school district has been governed by a board of education since July 11, 1911, and that such board has transacted all of the business of said school district since its organization.

They further allege the presentation to said board of an application substantially as set forth in ¶ 6 of the complaint, signed by 9 out of 10 school voters residing within said adjacent territory, and allege further the various acts of the board of education leading up to the annexation of the territory in question.

This answer was verified positively by all of the defendants, and in addition thereto, upon the hearing of the order to show cause, the defendants made written return, to which were attached certified copies of the records and proceedings regarding the organization of Hettinger special school district, and also the annexation of the adjacent territory to said district.

The granting or refusal of a temporary injunction is a matter largely in the discretion of the trial court, and its order will not be disturbed except in case of a clear abuse of discretion. 22 Cyc. p. 748, and cases cited.

It is not granted as a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case. High, Inj. ¶ 11.

From the printed briefs and oral arguments of counsel in this case, it appeared to the writer that they expected this court, upon this appeal, to pass upon the merits of the main action, and, if that be true, they

are mistaken. This court is limited to a review of the order denying the temporary injunction, and in such review will be governed solely by what appears from the allegations of the complaint and affidavit in support thereof on the part of plaintiff, and the answer and return on the part of defendants.

In Beaudry v. Felch, 47 Cal. 184, the court used the following language: "It is claimed by counsel for appellant that the decision of this court upon the order granting the temporary injunction has become the law of the case, and must now control the decision upon this appeal. That decision determined nothing as to the merits of the case. It held only that the complaint, assuming its allegations to be true in point of fact, was sufficient to support the injunction, and that, even if all the allegations were denied by the answer, the question of granting or refusing the injunction was one calling for the exercise of the sound discretion of the court below." Also the following language is found in Santa Cruz Fair Bldg. Asso. v. Grant, 104 Cal. 306, 37 Pac. 1034: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction *in limine*. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the case. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing and the delay dangerous."

Upon the hearing of an application for a temporary injunction, the rule appears to be that where the allegations or equities of the complaint are positively denied by answer or other proof on the part of the defense, the court will ordinarily deny the temporary injunction.

Marks v. Weinstock, 121 Cal. 53, 53 Pac. 362; Grant County v. Colonial & U. S. Mortg. Co. 3 S. D. 390, 53 N. W. 746, and cases cited; 22 Cyc. 987, and cases cited.

Applying the foregoing well-settled rules to this case, we have no hesitancy in reaching the conclusion that the learned trial court kept well within its discretion in denying the temporary injunction.

The reason upon which we largely base our decision is that by the answer and return of defendants they have denied positively the principal allegations and equities of the complaint, each of the five defend-

ants making the same denials and allegations as against the plaintiff alone. Further than this it affirmatively appears that Hettinger school district No. 13 has been governed by the defendants, who were at least acting as the board of education under some color of right, since in the spring of 1911, and no objection has been made thereto until this action was commenced about two years later. During that period such board has transacted all of the business and performed all of the duties of a board of education. Under the rule announced in Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 394, p. 399, 127 N. W. 499, there might be a serious question upon the final hearing as to whether or not the plaintiff could at this late hour question the organization of said district into a special district. Then, again, perhaps upon the final hearing the plaintiff would not be allowed to question the purported organization of Hettinger special school district in this proceeding.

From the showing made by defendants it would appear that their acts and proceedings relative to the annexation of the lands which is sought to be enjoined were regular on their face, providing they had authority to act as "the Board of Education of Hettinger School District," and in that event no injunction should be granted, either temporary or final.

In view of what has heretofore been said, and the showing made upon the hearing of the order to show cause, the order appealed from was correct and fully within the court's discretion, and the same is therefore in all things affirmed.

BURKE, J., not participating, F. E. Fisk, District Judge, sitting by request.

On Petition for Rehearing (Filed April 10, 1915).

F. E. FISK, District Judge. Appellant has filed a petition for rehearing, in which he complains, first, that questions decisive of the case and duly submitted by counsel have been overlooked by the court; and, second, the decision is in conflict with controlling decisions to which the attention of the court was not called, neither in the briefs nor oral argument, and which decisions have been overlooked by the court.

Counsel cites the case of Bissel v. Olson, 26 N. D. 60, 143 N. W. 341, as being a case overlooked and an authority in his favor. We cannot construe that case as an authority for appellant herein. We consider it quite in line with our holding in this case wherein we stated as follows: "The granting or refusal of a temporary injunction is a matter largely in the discretion of the trial court, and its order will not be disturbed except in case of a clear abuse of discretion."

The following language is found in the case of Bissel v. Olson: "This appeal was only argued for plaintiff by counsel appearing *amicus curiæ;* and he submits no extended brief on the merits, but seems to rest his contention upon the lower court, having exercised its discretion in granting this temporary restraining order, which also commands the destruction of the bridge. We should be disposed to go some ways to sustain the action of the lower court in a matter largely within its discretion, had it not entered a mandatory order destroying the property of the defendant before the trial of the action upon the merits, or in case of grave doubt on the showing made. . . . It should be a strong case which warrants the trial court in granting a mandatory injunctional order for the destruction of property, pending the trial of an action upon its merits."

In the present action the defendants claim to be duly elected public officers, and claim, further, that they were doing nothing outside of the duties imposed upon them by virtue of their offices which they claim to hold, and claim that the plaintiff is attempting to prevent them from so doing, and the lower court refused to grant a temporary injunction to restrain them pending the hearing of the action upon the merits. It is a well-settled rule that the interests of the public are to be taken into consideration by the court in the granting or refusal of a temporary injunction; and when the issuance of an injunction will cause serious public inconvenience or loss without a correspondingly great advantage to the complainant, no injunction will be granted; and counsel is in error when he says that this case does not come within the general rules as announced in the opinion relative to the granting or refusal of temporary injunctions and the wide latitude and discretion of the trial courts in such matters.

Counsel says that the case of Marks v. Weinstock, 121 Cal. 53, 53 Pac. 362, does not support the rule announced just preceding such cita-

tion in the main opinion, and in this counsel is correct. This citation was inadvertently placed improperly in the opinion, and should have followed the citation of 22 Cyc. 748 as supporting the rule announced just preceding such citation, and the opinion in the case will be corrected to the extent of placing this citation at such place. There are, however, many California decisions which support the rule announced as follows: "Upon the hearing of an application for a temporary injunction the rule appears to be that where the allegations or equities of the complaint are positively denied by answer or other proof on the part of the defense, the court will ordinarily deny the temporary injunction," such authorities being found in 22 Cyc. 987.

Counsel says in his petition that there are exceptions to this rule, and cites a number of cases in support of such exceptions. We do not claim that there are not exceptions to the general rule as announced, and this only goes to show that the discretion granted the trial courts in granting or refusing temporary injunctions where the relief sought is preventive, is a wide discretion, and that in some cases, where the averments of the complaint are positively denied by the answer, courts have granted the temporary injunction, and it has been held to be no abuse of discretion; on the other hand, a large number of cases will be found, following the general rule announced in the main opinion.

Counsel suggests a modification of the opinion, claiming it is a little misleading as to the facts, though not material to affect the final result, by reason of the fact that in the main opinion we proceeded upon the theory that no temporary injunction was granted. Counsel all the way through this case, in his briefs and petition for rehearing, has proceeded upon the theory that a temporary injunction was in fact issued, and, while we thought of calling his attention to this in the main opinion, we did not do so, as we deemed it unnecessary to any material question to be decided. We, however, cannot construe the order made by the district court as a temporary injunction.

At the commencement of this litigation there was presented to the district judge the verified complaint and an affidavit upon which was issued by the court an order. This order is directed to the defendants, and orders them, until the further direction of said court, to desist and refrain from doing the acts complained of, and further orders that on the 8th day of April, 1913, at 10 o'clock in the forenoon, they show

cause before the court why said order and injunction should not continue and be in force until the final determination of the suit on the merits. This order was dated the 14th day of March, 1913. Upon the hearing of this order to show cause, the order complained of, and from which this appeal was taken, was made, and while it is labeled, "Order vacating injunction," in legal effect it amounts to nothing more nor less than an order denying a temporary injunction and vacating the temporary restraining order. If the order issued in the first place had been a temporary injunction issued without notice, the same would have enjoined the defendants from doing any of the acts complained of until the final determination of the action upon the merits, and would not have cited them to show cause some three weeks later why the same should not be continued in force until the final determination of the action upon the merits. See State ex rel. Plattsmouth Teleph. Co. v. Baker, 88 N. W. 124, and 22 Cyc. 745, 746.

From the very reading of the order issued in the first instance, it is apparent that the district court intended to give the defendants an opportunity to be heard before making an injunctional order effective throughout the entire litigation, because the reading of the order requires defendants to show cause, if any they have, why they should not be restrained by the continuing of said order in force until the determination of the action upon the merits, and this in legal effect was nothing more than a temporary restraining order upon an order to show cause under § 7533, Comp. Laws 1913.

Again, counsel criticizes the language used, which he says nearly amounts to a holding that when this action comes on for trial on the merits the plaintiff would be estopped as was the plaintiff in the case of Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 394, 127 N. W. 499. The questions which we decided in the opinion in this case are contained in the syllabus, and what was said in regard to the question of estoppel, and the question of the regularity of the proceedings was said not as deciding this case upon the merits or of going into the merits of it, which we expressly declined to do at the outset of the opinion, but was only said as illustrative of the various phases which the trial court may have had in mind in passing upon the question of whether or not a temporary injunction should issue *pendente lite,* and in using his discretion in making the order complained of.

Counsel also states that in this action "the injury is pressing and the delay dangerous." We do not know what condition the calendar of the district court of Adams county is in, but it is more than two years since this action was commenced, and the law provides for two terms of court a year in Adams county; and it seems to us that there certainly must have been an opportunity for counsel to have had this case tried on the merits during the past two years, had the injury been as pressing and the delay as dangerous as he would now have us believe.

The petition for rehearing is denied.

CITIZENS' STATE BANK, a Corporation, v. CHRIST CHRISTIANSON (and Hans Westby, Sole Appellant) et al.

(152 N. W. 346.)

Mortgages — liens — equitable title — foreclosure — trial de novo.

This is a trial *de novo* of a mortgage foreclosure action against Christianson and wife, mortgagors of land standing of record in the name of the subsequent grantor, Hans Westby, sole appellant, in which the issue presented is whether Christianson was the equitable owner of the premises mortgaged, as against Hans Westby, legal owner who claims sole and entire ownership. If Christianson is not the equitable owner, the mortgage foreclosed never attached.

Held that Hans Westby is the sole owner; that Christianson has no equitable title to said premises; that the mortgage is not a lien and should be canceled of record as to the land involved and this action be dismissed as to Hans Westby; and title be confirmed in him.

Opinion filed April 3, 1915. Rehearing denied April 26, 1915.

From a judgment of the District Court of Pierce County, *Burr,* J., defendant Hans Westby appeals.

Reversed and dismissal ordered.

Duncan J. McLennan, Henry G. Middaugh, and *Rollo F. Hunt,* for appellant.

There is no resulting trust, nor does the doctrine of constructive trust apply, and at most there was only an oral promise to *sell the land,* and such promise, being within the statute of frauds, is not enforceable.

Graham v. Selbie, 8 S. D. 604, 67 N. W. 831; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Pickler v. Pickler, 180 Ill. 168, 54 N. E. 311; Barger v. Barger, 30 Or. 268, 47 Pac. 702; Wallace v. Dunton, 30 S. D. 598, 139 N. W. 345; Webb v. Webb, 130 Iowa, 457, 104 N. W. 438; Crane v. Read, 172 Mich. 642, 138 N. W. 223; Cunningham v. Cunningham, 125 Iowa, 681, 101 N. W. 470; Drake v. McDonald, 91 Neb. 775, 137 N. W. 863; Matt v. Matt, 150 Iowa, 503, 137 N. W. 489; McClenahan v. Stevenson, 118 Iowa, 106, 91 N. W. 925; Veeder v. McKinley-Lanning Loan & T. Co. 61 Neb. 892, 86 N. W. 982; Derry v. Fielder, 216 Mo. 176, 115 S. W. 412; 2 Devlin, Real Estate, 3d ed. §§ 1168, 1175, 1177, 1183; First Nat. Bank v. Mather, 29 S. D. 555, 137 N. W. 51; Mullong v. Schneider, 155 Iowa, 12, 134 N. W. 957; Norton v. Brink, 75 Neb. 566, 7 L.R.A.(N.S.) 945, 121 Am. St. Rep. 822, 106 N. W. 668, 110 N. W. 669; Evans v. Moore, 247 Ill. 60, 139 Am. St. Rep. 302, 93 N. E. 118; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 47 N. W. 402; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Hingtgen v. Thackery, 23 N. D. 329, 121 N. W. 839, 16 Cyc. 42.

There is no estoppel in this case. To constitute equitable estoppel it is necessary that the person asserting estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. Hingtgen v. Thackery, supra; 16 Cyc. 742.

Albert E. Coger, for respondent.

It is well settled that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped to set up his title as against an innocent purchaser. Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360.

An intention to mislead is not a necessary ingredient of the conduct from which an estoppel may arise. Wyatt v. Quinby, 65 Minn. 537, 68 N. W. 109; Shelby v. Bowden, 16 S. D. 531, 94 N. W. 420; Coram v. Palmer, 63 Fla. 116, 58 So. 721; Gregg v. Von Phul, 1 Wall. 274, 17 L. ed. 536; Macomber v. Kinney, 114 Minn. 146, 128 N. W. 1004, 130 N. W. 851.

Neither the statute of frauds nor the various statutory provisions enacted for the protection of a homestead claimant can be held to do away with the general equity doctrine of estoppel *in pais.* Engholm v.

Ekrem, 18 N. D. 185, 119 N. W. 35; Knauf & T. Co. v. Elkhart Lake Sand & Gravel Co. 153 Wis. 306, 48 L.R.A.(N.S.) 744, 141 N. W. 704.

One should not fail to *speak* when the circumstances are such that his silence will work great injury. Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 840.

In such cases the considerations of common honesty require one to *speak* and assert his claims, to the end that another, about to act to his injury and detriment, may be advised and saved from loss. Gill v. Hardin, 48 Ark. 409, 3 S. W. 519; 2 Pom. Eq. Jur. §§ 803, 818; Dann v. Cudney, 13 Mich. 239, 87 Am. Dec. 755; Truesdail v. Ward, 24 Mich. 134; Gregg v. Von Phul, 1 Wall. 280, 17 L. ed. 537; Allen v. Cannon, 8 Utah, 8, 28 Pac. 868; Farr v. Semmler, 24 S. D. 290, 123 N. W. 838; Cady v. Owen, 34 Vt. 598; Staats v. Wilson, 76 Neb. 204, 124 Am. St. Rep. 806, 107 N. W. 232, 109 N. W. 379; Grigsby v. Larson, 24 S. D. 628, 124 N. W. 859; Gray v. Crockett, 35 Kan. 66, 10 Pac. 457; Richardson v. Beaber, 62 Misc. 542, 115 N. Y. Supp. 821; Jackson v. Burgott, 10 Johns. 461, 6 Am. Dec. 349.

If the owner knowingly and without disclosing his title stand by and permit his property to be mortgaged or sold by another, to one who is, to the owner's knowledge, relying upon the apparent ownership of the person executing the conveyance, such conduct will estop the owner from asserting title against the mortgagee or grantee. Thompson v. Sanborn, 11 N. H. 201, 35 Am. Dec. 490; Crawford v. Bertholf, 1 N. J. Eq. 471; Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340; Brewster v. Baker, 16 Barb. 613; Bigelow, Estoppel, 5th ed. 586; 11 Am. & Eng. Enc. Law, 2d ed. 427–430; 16 Cyc. 761–764; East Greenwich Inst. for Sav. v. Kenyon, 20 R. I. 110, 37 Atl. 632; Atlanta Nat. Bldg. & L. Asso. v. Gilmer, 128 Fed. 293; 1 Story, Eq. Jur. § 185; Stone v. Tyree, 30 W. Va. 687, 5 S. E. 878.

A fraudulent grantee will not be awarded a prior lien for the amount of disbursements made by him as an incident to the consummation of his fraudulent purpose. Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Roberts, Fraud. Conv. 591, 597; Humberton v. Howgil, Hobart, 72b; Warneford's Case, 2 Dyer, 193a, 3 Dyer, 294, 295a, pl. 16; Fermor's Case, 3 Coke, 78b; Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1,174; Sands v. Codwise, 4 Johns. 598, 4 Am. Dec. 305;

Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320; Beidler v. Crane, 135 Ill. 92, 25 Am. St. Rep. 349, 25 N. E. 655.

Goss, J. Plaintiff seeks to establish title in defendant Christianson, and to foreclose a real estate mortgage given by Christianson and wife for $2,200 and interest. Defendants answered separately. Westby pleads title in himself and denies that C. ever had any interest in the quarter section attempted to be mortgaged by him, and asks that title be quieted against the mortgage sought to be foreclosed. To this plaintiff replies, alleging C. to be the equitable owner of said premises, and that Westby holds the legal title in trust for C. and procured the deed to himself to defraud and defeat the lien of plaintiff's mortgage. Plaintiff recovered judgment, from which Hans Westby appeals, demanding a trial *de novo*.

Briefly stated the issues hang upon the following statement of facts: C. came to Pierce county in 1906, where W. was residing. He moved upon W.'s homestead and farmed it that year. W. was working on the railroad as a section hand. Christianson had previously married W.'s sister. W. was unmarried. C. farmed W.'s homestead that year on halves, W. furnishing 600 bushels of oats, giving the use of four horses and machinery, $10.60 in cash, and allowing C. to take all the crop that year, W.'s share amounting to $300, leaving C. indebted to him that fall in the sum of $490.60. Of the foregoing there is no dispute, nor anything upon which to question the good faith of the dealings between W. and C. In the early spring of 1907 a neighbor, defendant Fjeld, desired to sell an adjoining quarter section and the subject of this litigation. He talked with C. about his buying it, and got him interested to the extent that C. made a trip to Rugby and attempted to raise the money or credit sufficient to buy the land, but he failed and could get neither money nor credit for the purpose. During this time and throughout all times involved in this litigation, W. was working on the section in another county and away from his home, except as he would visit it over Sunday. After it became apparent that C. could not purchase this land, F., who was apparently anxious to sell, went to McCumber in Rolette county to interest W. in purchasing this land, and succeeded in negotiating a deal wherein W. agreed that F. should procure a loan of $1,200 on it and that W. then would purchase it,

assume the mortgage, and pay F. $2,500 above the mortgage, or a total of $3,700 for the farm. On F.'s first visit C. was not along, but on the second visit he accompanied F. On the 23d of April, 1907, a written contract for deed duly acknowledged was entered into between F. and W., wherein F. agreed to sell this land to W., who agreed to purchase it. The first payment thereunder due in December, 1907, was $400, the next one year later, $600, and the balance of $1,500 fell due in three annual $500 payments in December of each succeeding year, 1909, 1910, and 1911. The $2,500 to be paid drew interest at 6 per cent, while the $1,200 mortgage assumed bore 8 per cent, with W. to pay the taxes. This contract was filed for record July 27, 1907. As additional security for the performance of the contract, the payments were evidenced by notes, to secure which W. mortgaged his homestead to F. for $2,500, subject, however, to a prior mortgage thereon of $700. Thus at the commencement of the farming season of 1907 W. had purchased under written contract the Fjeld farm, and had pledged his own homestead as additional security for $2,500 of said purchase price. And this, too, after C. had been unable to purchase said tract. This is important as the basis from which to commence an analysis of the testimony under the claim of the plaintiff that, notwithstanding the deal was thus made, it was in reality also understood as between W. and C. that the former was buying the farm for the latter; or in other words that, while the deal on paper was between F. and W., it was understood as between W. and C. to be actually from F. to C., with W. holding the title as security and as a conduit for title from F. to C., and that whatever W. did in the matter was not for himself, but instead for C. And plaintiff points to the attempt of C. to purchase in the spring of 1907, and his later visit with F. to W., and subsequent events, as proof of its contentions that C. was the beneficiary of whatever was done by W.; and that thereunder, when the contract was performed and even though the deed was taken by W. pursuant to and under the terms of the contract from F. to him, the facts in the case it is contended establish that W. did so merely as trustees of the legal title for C., the alleged equitable owner. And it may be here remarked that the reason for this claim is that two years later C. purchased 120 acres from a third party, paying nothing down, but giving the seller a purchase-price mortgage on the 120 acres and

upon this Fjeld land, then and for two years afterwards still owned by F. The said mortgage is the one in suit.

To pursue the facts in the light of the foregoing contentions, C. farmed W.'s homestead and the Fjeld land for the next five years under an oral understanding whereby one half of the crop raised on W.'s homestead each year, less the thresh bill, should belong to W.; that C. should take all the balance of the crop raised on the homestead and on the Fjeld land, but should pay the taxes, and the interest due upon the Fjeld contract and upon the first mortgage. This left W.'s share of the crop from his homestead free to be applied in reduction of principal of the contract and to meet its payments, leaving the balance of the crop on both quarters with which to pay interest and taxes, with whatever that was left to go to C. as his property and to pay running expenses. W. sold C. his farm machinery and two teams for $600 on time. W. continued to work on the section at $55 per month. Under this arrangement W.'s one half of the grain raised on his homestead netted him the following amounts. For 1907, $502.40; for 1908, $398.90; for 1909, $804.19; for 1910, nothing, a crop failure; for 1911, $319.45. In December, 1911, F. and wife deed to W., which deed was placed of record January 25, 1912, F. having been fully paid off that fall through the mortgaging by W. of his homestead for $1,000, and with the balance from his crop of that year, making a payment by W. to F. for the deed of $1,122.45. The payments made and indorsed upon the contract of purchase were all sent by C. and were all made December 23d of the respective years; to wit, 1907, $400 and interest on $2,500 to that date, $100; 1908, payment on contract $600, with one year's interest on $2,100 to date, $126; 1909, contract payment due of $500, with one year's interest on $1,500, $90. Nothing was paid on the principal in 1910 on account of crop failure, W. paying the interest on the mortgage, $96, and on the $1,000 still due on the contract, $60, or total interest paid of $156 that year, and a like amount of interest was paid in 1911, when the deed was taken. Thus, in addition to the $2,500 paid from four crops raised in the five years, there had been paid in interest on the contract and $1,200 mortgage, at 6 per cent and 8 per cent respectively, $436 interest on the contract and five years' interest at $96 per year, or $480, on the mortgage, or $916 aggregate interest, or a total of $3,416 up to the time title was vested

in W., all of which was paid as a part of the purchase of this tract of land. In addition to this the $700 first mortgage on W.'s homestead was paid off in March, 1910, to pay which $450 was used of the $804.19 proceeds of W.'s share of the 1909 crop. Thus, for the four seasons when crops were raised $1,574.94 of W.'s share of the crop raised on his homestead was turned over on the contract, and in addition thereto in 1908 from his wages he contributed $179.40, and in 1910, $271, or $450.40 more, making an aggregate of $2,025.34 paid by W. individually from crop proceeds of his homestead, and concerning which there can be no dispute. It is true that throughout the cross-examination of W. and C., and throughout the briefs, an inference is cast by respondent that their testimony is unreliable and should be disregarded, but it is inference only, and W. has produced the figures; and one strong corroborative fact that cannot be questioned is that the contract was paid up and it took $3,416 to pay it, of which amount $2,416 came from the crop raised on these tracts and W.'s wages and $1,000 more from the mortgage of W.'s homestead. It is also uncontradicted that in 1908 C. advanced a balance of $22.70 to make up the payment due that year, and in 1909, the year that W.'s $700 mortgage on his homestead had to be met, C. advanced the further sum of $156.40, or an aggregate of $189.10. In addition to this it must be borne in mind that the taxes for five years on these two farms, and which was C.'s burden under the arrangement, must have exceeded $200, so that the aggregate amount to be paid to purchase this farm was above $3,600, including principal, interest, and taxes, and omitting the principal of the $1,200, mortgage thereon assumed and remaining unpaid.

Throughout these years C. and family resided on the Fjeld tract, upon which he had made improvements in buildings, fencing, and planting of trees, and otherwise, all of which was an indirect advantage to W. The land was generally known in the neighborhood as C.'s place,—a fact, however, of no special significance, as C. had at all times resided there. C. had evidently always desired the place as a home, and about the time of the crop arrangement in 1907 an indefinite sort of an understanding was had between the two, in which it was taken for granted that the farm should some day become C.'s and that W. would not sell it to any one else; that C. should have it for the amount

W. was to pay under the contract with F. No attempt was ever made to reduce this understanding to writing.

W. testifies:

I told C. I will be fair with him and will let him have this land for the same price as I paid for it, but I wanted to pay off Fjeld; I wasn't going to do any dealings before Fjeld was paid off.

C. testifies:

Q. You were to pay the interest and taxes on the Fjeld contract for the use of the land?

A. Yes.

Q. Now, when you made those payments of the notes on the Fjeld contract, where did you get the money?

A. I took Hans' crops; he told me to haul it out and pay the notes.

Q. Hans' share of the crops on the homestead?

A. Yes.

Q. How did you pay the interest and taxes?

A. Hauled out some other crop and paid it.

Q. Did Hans tell you he would sell you this land after he got it paid for from Fjeld?

A. He told me I was going to have it when the land was paid for, for the same price he bought it for.

Q. What do you mean by that, that you were to pay him $3,700?

A. Well, I do not know.

Q. The same price?

A. As he bought it for.

Q. You never paid him any money?

A. Not yet.

Nor was a more definite understanding agreed upon between these two brothers-in-law, one of whom, W., was the property owner and benefactor, and the other without means and obliged to rely wholly upon the former. A charge is made in plaintiff's brief on this appeal, based on the harmony in the testimony of the two, that they have at all times been acting in collusion. But it would seem that C.'s attitude in desiring W. to succeed in this litigation would be but the natural

result of the latter's course of kindness toward him through these years. The bone of contention and the origin of this lawsuit is next in order.

In 1909 one Simon Westby (of no relation to Hans Westby) owned 120 acres, known as the Frohold land, near by the Fjeld farm upon which C. was residing. Simon induced C. to purchase the Frohold 120 acre tract for $3,600, under the terms of which purchase C. was to assume a $1,400 mortgage thereon. In addition he executed notes for $2,200 bearing 8 per cent, secured by a purchase price second mortgage for $2,200 given by C. and wife on the Frohold 120 acres and on the Fjeld place, running to Nellie Westby, wife of Simon Westby. This mortgage was dated October 5, 1909, and due in instalment notes of $500 each year, the first due February 1, 1912. These notes were indorsed to plaintiff bank; none of them have been paid. C. defaulted in interest with this foreclosure following in November, 1911. Before C. purchased he consulted Hans Westby, who advised against his buying this land. In the course of the deal Simon Westby and C. went together to Hans Westby, who still advised C. not to buy it, and that he had enough to work without it, and who told Simon not to sell it to C, and "told them both that I didn't want anything to do with it." In this Hans is fully corroborated by C. and in part by Simon Westby as well. Simon testifies that "Hans said that he was against the purchasing of the Fjeld land, and Christianson wanted it, and he was against the proposition; then he said Chris had made good and he would leave it to him." Later the sale was made and the mortgage taken when Hans was not present, and Hans was never asked to sign it. Hans testified as follows: "The first I heard of it was when Simon and Christianson came to Rolette together, as it appeared to me on a visit, and Simon told me first that he was going to sell Chris the three forties, the Frohold land as he called it. I said, 'Is that so?' And he says, 'Yes;' and I asked him what he wanted to sell that land for to Christianson and at what price, and he said $30 an acre. I told him it seemed a pretty stiff price, and he said it was, but that it was the least he would sell it for. So he didn't say much more, and after a while he commenced talking about security; whether or not I asked him or he mentioned it first I cannot say, but anyway they was talking about security, and he said, 'I will take security on those three forties and the land that Christianson lives on.' I told him, 'You know that

land is not Christianson's,' I says, 'do you?' He says, 'Yes,' he knows that, 'but it is going to be Christianson's,' he said, 'isn't it?' I said 'Yes, when Christianson pays for it it is going to be Christianson's;' that is all I said to him. Well, he says, 'I am satisfied with that.' This was shortly before the mortgage was taken." And in response to the question as to whether that was the only conversation had, Hans continues: "Just about. I asked him why he wanted to sell this land to Christianson for on such a condition. I asked him, 'What is that mortgage good to you for;' and he said, 'It is not good for anything before Christianson gets the land in his name, but *it is the same as a preliminary mortgage,*' he said, 'as we used to give on a homestead when we first filed on land here.'" It is undisputed that Christianson hesitated to mortgage this land over the remonstance of Hans. He produced the original contract from F. to Hans Westby, and asked the advice in the matter of the lawyer whom Simon took along with him to Christianson's place the day the mortgage was obtained. This is testified to both by Simon and the attorney. There is hearsay testimony of events and conversations there transpiring in the absence of Hans, in which it appears that C. there stated that Hans was interested in the land as security only for his advancements for C., upon the strength of which statements he was advised by the lawyer that he had a mortgageable interest in the premises. C. and wife then and there executed and delivered the mortgage in the purchase of the Frohold land. At this time there was still $1,500 and interest, or about $1,700, remaining due F. over and above the $1,200 mortgage on the Fjeld land. Thus, when the mortgage was taken it was with full knowledge of the entire situation and claims of the parties, and in the face of the written contract running from F. to W. and with full knowledge that any claim of C. thereto rested in parolé, and upon whether an actual agreement for purchase and sale existed or should be made in the future between Hans and C. It is apparent, too, that soon after this purchase of the Frohold land C. became sick of his deal, as he has never paid a cent of interest or principal. The year following, in 1910, there was an entire failure of crop when the wages to the amount of $271 of Hans were called upon to pay interest, taxes, and seed. In 1911 the proceeds of the Fjeld and Westby farms were again paid in upon the contract, which

with $1,000 more procured by Hans from mortgaging his homestead entirely paid up F.

The plaintiff makes much of the admitted fact of an oral agreement at the time of the purchase of the Fjeld land, to the effect that when $1,500 of the contract price had been paid by W. to F., the latter would discharge the $2,500 mortgage taken as security on W.'s homestead. Plaintiff strenuously contends that this is strong evidence that Hans had an understanding with C. that the latter should be the real owner, and that the mortgaging of the homestead was but the giving of friendly financial assistance. But this discards the testimony of Hans, in which he says that at the time of the purchase he told F.: "I have a $700 note that will come due in about three years from now; if I haven't got the money I won't be in shape to renew that loan when you hold the second mortgage on my homestead; I want you to release that land so that it will put me in shape if I have to, so I can renew my loan on my homestead. He said: 'By that time you will have about $1,500 paid on it, and there will only be about $1,000 left, and it ought to be all right surely,' and I said he would. That was about all." An understanding that a discharge of this mortgage on the homestead could be exacted was but good business, and rather tends to strengthen than discredit Hans, and there is nothing worthy of consideration in the testimony to impeach his motives or his statements, or otherwise discredit his explanation. Simon testifies to having had a conversation in 1908 at Rolette, in the course of which he said that Hans had told him that he (Hans) had taken the contract to himself because he had had to give a mortgage on his land, his homestead, to secure it up, otherwise he said Chris could not have bought the land. "I told him that you were going to get married now, and while it has been all right while you were single it might not be if you were married at the time of the transfer of this land, and I think you ought to transfer the contract to Chris now before you get married. He said, 'I will not turn over that contract until my land is out of soak, until it is released, whether I get married or not, but when my land is clear and out of it I will turn it over to Christianson whether my wife wants to or not.' He asked me if I didn't think Chris had bought a nice farm. I told him I thought he had. He said, 'Chris is a good worker and will get along all right; he will pay for the farm if anybody can.'"

This was a year before Simon dealt with C. for the Frohold farm. Simon also testifies to a conversation had with Hans while he was a juror staying in Rugby in 1906 at Simon's house, in which, the year before the purchase of the Fjeld land and before the matter of its purchase had been considered by anyone, Simon quotes Hans as having said "he would like to fix him [Chris] out with a home." Simon testifies to an attempt in 1911 to get Hans to help out Isaac Westby, a brother, by mortgaging the land of Hans, together with that of Isaac, to pay this plaintiff bank a debt Isaac was owing it, in which also a cousin of Simon's was involved. Both Isaac and Simon went to Rolette to see Hans for that purpose. But Hans turned down the proposition because "he might have to help out Chris again; he had to borrow money on the land to help out; Chris was not able to make it this fall, and if he wasn't able to make it next year then he would have to help him out." Then Simon attempted to get C. to go to the plaintiff bank at Rugby and obtain from it a loan and pay F. off, "and get it all fixed up," and that the bank was "willing to loan him all the money he needed to pay up *both Hans and Fjeld,* and he would be through with Hans; and after he thought the matter over a while he said he thought it was the best thing to do, he would go to Rugby the next day." But in the meantime he saw Hans, who blocked that deal. C. told Simon the next day that, "Hans says your point is no point at all." Then in 1911 Hans sidestepped another of Simon's plans when he procured his $1,000 loan of another bank than this plaintiff bank, contrary to Simon's arrangements and desires.

It is admitted that C. during the five years in question always marketed all of the crop, including the share of Hans, but both agree that it was always done under the instructions of Hans to haul in the wheat and pay the notes as they fell due each year; also that the contract was left in the possession of C., who sent the money each year to F., and who in 1910 procured from F. a year's extension of the $500 payment due that year on Hans paying the contract and mortgage interest and taxes; and Hans admits that he did not know F.'s address, but left the matter to C., he, Hans, working on the section. Simon's brother Ole testifies to a conversation in 1908 in which Hans told him that C. would come out all right and he had a good crop on his quarter; and on witness asking Hans whether he intended to farm himself he was told,

"No, not as long as he could keep a good renter, and when he could not get a good renter any more he said he would either sell or quit;" and the next year in the fall Hans told witness that he and C. had had a good crop again, and that C. "went to work and bought another 120 acres, and he also said that he didn't want him to buy any more land until he had cleared up what he did have, and Christianson went ahead and bought it just the same, thought he could win again." The testimony of Simon and Ole Westby as to statements made by Hans are in the main denied by Hans. In 1909 Simon wrote Hans a letter, the first page of which was lost. Under cross-examination Hans produces the second page of it, which reads:

In case that Chris will be able next fall to take up the *contract* without borrowing any money at a higher rate of interest, *I think that would be advisable,* and I for my part will not crowd him for any part of the amount due me until he is in shape to pay it. Just tell Chris to get the amount *he pays the bank* indorsed on the *contract,* and leave it go the way it is until I can spare time to go up with him and have the thing fixed up. *There also should be a settlement between you and Chris, that is, he ought to have something to show that this land is going to be his after he had paid for it,* but I think that will be time enough to fix this up when he pays it, the amount due, in March. You tell him not to worry about it, and that I will look after it, and that it is simply because I cannot possibly spare the time that I cannot at this time be there. . . .

In conclusion, I wish you all a Merry Christmas and a Happy and Prosperous New Year.

Most sincerely yours,

Simon Westby.

I would have written to Chris but I did not know whether he would get it or not.

S. W.

It is noticeable that this letter is a purely self-serving declaration, written for the future use to which it was applied in this lawsuit. The parts italicized in this opinion plainly disclose the reason why this letter was written to Hans, instead of to Chris. Hans testifies: "I

didn't understand that letter, so I didn't answer it. Didn't pay any attention to it." Another circumstance that should not be overlooked is that the date of the summons in this action is November 27, 1911, and the acknowledgment of the deed of F. and Wife to Hans Westby is dated December 9, 1911, two weeks later, and the service on C. and wife was not made until the 13th of December, 1911, and upon Hans Westby on December 30, 1911. With the balance of the contract price due the 23d of December, 1911, it is plain the mortgagee and the assignor was evidently in touch with the situation, with full knowledge that Hans was mortgaging his farm to get the money with which to procure title in himself, intending that as soon as this was done the final act would immediately take place, that of attempting by an action in foreclosure to subject the property to the lien of the plaintiff's mortgage. The reasonable inference from the testimony is that this suit had been incubating for at least a year before, in disregard of the rights of Hans, and, acting at his peril, Simon finally took the mortgage to his wife upon the land, to which he must have known title would be perfected in another than his mortgagee.

This is a fair and substantially complete *résumé* of the testimony, upon which this farm was held to belong to C. as the equitable owner thereof, and subjected to the rights of this third party mortgagee, and in doing of which $2,025.34 in cash payments coming from the share of the crop belonging to Hans Westby and raised upon his homestead, and inclusive of $450.40 of his wages paid on the contract by him, were utterly cast out and disregarded, while the final payment made by him of $1,122.45 was allowed as a prior lien to that of the mortgagee plaintiff. Certainly Hans Westby was entitled to a prior lien for all that he had paid if he was entitled to one for the last payment made. If it be contended by respondent that Hans is unworthy of belief, the unanswerable fact remains that the money was procured from these two places with which to meet $3,600 in five years paid from four crops, and the testimony is wholly uncontradicted that Hans has gotten none of it, even the crop from his own homestead, except the benefits he may have derived by turning in his half of the crop on his homestead in payment of this contract. It is undisputed that he made the contract. Concede that he knew that C. had attempted to buy the land before he dealt with F. and knew at the time that C. wanted it, nevertheless he,

and not C., purchased it; and his security and credit brought about his purchase. It is undisputed that C., his brother-in-law, had nothing. Plaintiff's own proof that C. was unable to buy establishes that, as does the uncontroverted fact that, when Hans purchased, C. was owing him $490.60 for sustenance and farming expenses of the previous season. The man with substance was Hans, who had a steady wage income of $55 per month the year around, and who foresaw that by the purchase of this farm he could not only help his brother-in-law, already heavily indebted to him, but himself as well. He took a chance that C., a good worker, would assist and thus help both. Respondent's contention, which must be found to be established as a basis for this action, that Hans purchased, though in his own name, for his impoverished brother-in-law as a gift over the above indebtedness already owing him, with Hans contributing for five years the entire crop on his homestead to boot, inasmuch as it has all been turned in for five years on the contract while he worked on the section, it would seem should not merit credence. Either Hans dealt for himself or, as respondent contends, whole-heartedly for C. and then later, when he saw that the benefits of his charity were going to Simon's wife, changed his mind and entered into a conspiracy with C. his beneficiary to retain the farm. Certainly the mortgagee comes into this case with the burden of proof upon it, and the proof should be by facts proven and established, not by mere inferences and innuendoes amounting at the most to little more than a suspicion; and this too when plaintiff must first establish at the threshold of this case that Hans acted purely as a benefactor to C., with the result that the latter acquired equitable title, the fruits of which he has frittered away by mortgage assigned to this plaintiff, which would avail itself thereby of the results of the original alleged charity of Hans to C. Then, again, if it be assumed that every word of competent testimony offered for the plaintiff is true, still there is no case for it, because it has not established in the face of the written documents contracting for and deraigning title to Hans Westby, a definite agreement at all wherein Hans was ever to transfer title to C. Plaintiff is put in the position of being obliged to discredit and cast out every word of testimony contrary to its interests, and claim, nevertheless, as the Gospel truth every syllable in the record from the same witnesses in its favor. Even if this is done, as was evidently the course pursued in

the trial, nevertheless plaintiff, taking with full notice and knowledge presumed in it, has shown no right to relief, because the evidence fails to establish to any reasonable certainty when, how, and for what consideration C. ever became invested with any claim to equitable title to this land. There is not only in such respects a failure of proof, but all the proof, except barest inference, negatives any equitable title in C.

Much is made of the fact that October 27, 1911, found C. in debt to Hans Westby in the sum of $1,478, for which amount a chattel mortgage was that day taken on C.'s personal property, including horses and machinery. When questioned as to what the items were composed of, Hans itemized the amount as follows: "In 1906 he got 600 bushel of oats, 30 cents a bushel amounting to $180; my share of the crop in 1906, $300; cash $10.60; 5 per cent interest and interest on this at 8 per cent, $196, four horses and machinery (sold in 1907 to C.) $600 and four years' interest on that $192–$1,478." This is attempted to be discredited by a showing that in 1908 C. had advanced $22.70 to make up the payment for that year, and in 1909, $156.40, or a total of $179.-10; and it is admitted that these items, and the improvements made on the Fjeld farm were not taken into consideration in computing the $1,478 indebtedness. That it was not casts no doubt upon the testimony, as the proof is ample that these two men have never dealt closely with each other. And probably foreseeing that, through the intermeddling of others in their affairs, an attempt might soon be made to collect of C. on the Frohold mortgage indebtedness, these two parties adjusted the indebtedness of six years of dealings at the above figure and secured its payment by chattel mortgage. It was not to their discredit that they did so. It was not in fraud of creditors, but merely the giving of a preference of one creditor over another. Some comment is made on the fact that Hans did not bring with him his book of original entry, but instead a note book upon which he had noted many of the transactions, and also that he did not produce some checks to substantiate his testimony. This is trivial. There is nothing to show that the book of original entry could not have been produced had it really been desired, and as to the checks the burden was not upon Hans to corroborate his assertions, apparently frank and straightforward, but instead

upon the plaintiff to establish its case by something besides mere negative testimony.

Respondent has attempted to invoke an estoppel against W. and in favor of the mortgagee and this assignee thereof, and has quoted law to the effect that "the owner of land who stands by and sees another sell it without making known his claim is forever estopped from setting up his title against an innocent purchaser." There are no facts upon which to base any such estoppel. The testimony is all to the effect that the mortgagee had full knowledge of Hans Westby's interests; that she, through her husband, dealt with knowledge of every fact, and knew that Hans was in position to consistently claim to be the purchaser and the only real party in interest. All the testimony to the contrary comes from alleged conversations had with C. in the absence of Hans, or from at the most ambiguous statements in casual conversation of Hans to interested parties; while plaintiff's testimony from its own witnesses establishes that Simon was told by Hans that C. had no interest in the land, but that on the contrary it belonged to Hans. Not only that, but C. produced to Simon the contract running to Hans as purchaser before the deal, and hesitated to deal until it became necessary that a lawyer be employed to put this transaction through, and in the course of which, in the presence of Simon, his attorney explained to C. that the mortgage would merely cover any interest in the land that C. might have. The mortgagee parted with nothing in reliance upon any act or word of Hans or C., but instead dealt at her peril. If the testimony be taken at face, and the same deductions drawn in weighing the testimony as would be indulged in under ordinary circumstances, it would not be unfair to say that the presumptions are strong that Simon was fully aware of the exact situation for at least a year before the sale of the Frohold place and the taking of the C. mortgage, and regarded the same as what has been characterized as a "preliminary mortgage" which might be good should Hans at some future time sell the place to C. that the term "preliminary mortgage" was used is a circumstance against plaintiff, as it has a certain significance all its own to anyone who has lived in frontier settlements. He therefore knew he was taking a chance, and took it with knowledge that it might or might not in the future avail as security. As heretofore remarked, any rights of plaintiff would necessarily not only be subject

to $1,122 merely, the last payment made by Hans, but also $2,025 in addition thereto, which the proof overwhelmingly establishes as having been paid by Hans from his means for his deed. In other words Hans Westby's interests, even under the plaintiff's contentions, could not be less than $3,147.79, together with 7 per cent interest on each payment from the date it was made to date of judgment, should plaintiff possess a right of recovery, as plaintiff would necessarily have been compelled to put in that amount to have acquired title in C., conceding him to have been, as it claims he was, the real purchaser (which fact is negatived by the testimony). When this mortgage was taken, the contract was before the mortgagee, who was charged with actual notice of all past payments made by Hans Westby as well as constructive notice, as the contract was recorded the year it was taken, in 1907. Then, too, at that time, in the neighborhood of $1,800 was necessary to perfect title under the contract for deed, so that, if Hans Westby had never made another payment, that amount and interest would necessarily have been paid by the mortgagee. Respondent in its brief makes a claim of collusion between Hans and C., and asserts that in some way Hans is a fraudulent grantee, and "respectfully urge that it is not consonant with equity and justice that Hans Westby be awarded a prior lien upon this property in the sum of $1,122.45, together with interest." Thus does the respondent complain of the action of the trial court in allowing Hans Westby a prior lien for the last payment, concededly made by him from his own property, to put title where plaintiff could assert a claim to it. Had not this payment been made, plaintiff would have been forced to make it before it could have even claimed a mortgage lien attached to the property. It is difficult to see how the fact that Hans put in his money in the face of a pending lawsuit to enable title to vest in him that plaintiff might make its claim can be said to be fraudulent, or any badge of bad faith on his part. While many cases have been cited by counsel, it is unnecessary to consider them. The facts decide this case adversely to the plaintiff. The preponderance of the proof is not in favor of the claims of plaintiff, but against them. Before C. could be held to be the equitable owner of these premises standing of record in the name of Hans Westby, the proof should be clear and convincing that C. is the equitable owner, the real purchaser. The evidence establishes the contrary, and that the proof of the plaintiff

is insufficient to raise any substantial question but what the written contract and the deed evidence the actual situation. Hans Westby is the owner. C. has no claim in equity to this land.

It is directed that judgment be entered quieting title to the land in suit in Hans Westby, and canceling as a cloud upon his title the mortgage in question, executed by C. and wife to Nellie Westby and assigned to plaintiff bank; that plaintiff's complaint be dismissed as without merit; and that appellant Hans Westby recover of plaintiff and respondent judgment for his costs and disbursements both on the trial of this case and on his appeal, as provided by law. The District Court will vacate the judgment entered, including the findings, conclusions, and order upon which the same is based, and enter judgment in conformity with this opinion.

CHARLES TURK v. MARTIN BENSON.

(152 N. W. 354.)

Abstracter — making abstract of title — liability on.

An abstracter is not liable for failure to show a judgment against William J. Rideout upon search for William G. Rideout.

Opinion filed April 10, 1915. Rehearing denied April 26, 1915.

Appeal from the District Court of Pierce County, *Burr*, J.

Reversed.

Torson & Wenzel, for appellant.

A judgment is not a lien upon specific property, but merely gives a right to levy, to the exclusion of subsequent adverse interests. 23 Cyc. 1350 (A).

The erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien. 23 Cyc. 1358 (ii) and note 40;

Note.—The liability of a title abstracter is the subject of notes in 12 L.R.A. (N.S.) 449; 26 L.R.A.(N.S.) 1207; 42 L.R.A.(N.S.) 176; and 72 Am. St. Rep. 315.

Johnson v. Hess, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445; Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; Hutchinson's Appeal, 92 Pa. 186; Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188.

Under such circumstances, plaintiff should not have paid the judgment. He had no valid notice of its existence, and it was not enforceable against him. 16 Am. & Eng. Enc. Law 133, note 1; Wood v. Reynolds, 7 Watts & S. 406; Hopper v. Lucas, 86 Ind. 43; Stott v. Irwin, 2 Chester Co. Rep. 137; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; King v. Clark, 7 Mo. 269; Carney v. Bigham, 51 Wash. 452, 19 L.R.A.(N.S.) 905, 99 Pac. 22; Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729; Ambs v. Chicago, St. P. M. & O. R. Co. 44 Minn. 266, 46 N. W. 321; Bowen v. Mulford, 10 N. J. L. 230.

Albert E. Coger and *T. A. Toner,* for respondent.

It is generally held that the omission of the middle initial, or a mistake in such an initial, is entirely immaterial in legal proceedings, whether civil or criminal. The law recognizes but one Christian name. Johnson v. Day, 2 N. D. 295, 50 N. W. 701; Rev. Codes 1905, § 2238; Comp. Laws 1913, § 3097; Pollard v. Fidelity F. Ins. Co. 1 S. D. 570, 47 N. W. 1060; Stever v. Brown, 119 Mich. 196, 77 N. W. 704; Moseley v. Reily, 126 Mo. 124, 26 L.R.A. 721, 28 S. W. 895; Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; Fincher v. Hanegan, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821; Huston v. Seeley, 27 Iowa, 190; Pinney v. Russell & Co. 52 Minn. 443, 54 N. W. 484; Miltonvale State Bank v. Kuhnle, 50 Kan. 420, 34 Am. St. Rep. 129, 31 Pac. 1057; 21 Am. & Eng. Enc. Law, 307; 16 Am. & Eng. Enc. Law, 114; Laflin & R. Powder Co. v. Steytler, 14 L.R.A. 690, note; People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146; Sullivan v. State, 6 Tex. App. 333, 32 Am. Rep. 580; Allen v. Taylor, 26 Vt. 599; Felker v. New Whatcom, 16 Wash. 178, 47 Pac. 505; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; State v. Martin, 89 Me. 117, 35 Atl. 1023; Re Snook, 2 Hilt. 568; Bletch v. Johnson, 40 Ill. 116; Games v. Stiles, 14 Pet. 322, 327, 10 L. ed. 476, 478; Fink v. Manhattan R. Co. 15 Daly, 479, 8 N. Y. Supp. 327, 29 N. Y.

S. R. 153; Erskine v. Davis, 25 Ill. 251; Milk v. Christie, 1 Hill, 102; Morgan v. Woods, 33 Ind. 24; Mutual L. Ins. Co. v. Doherty, 23 C. C. A. 144, 39 U. S. App. 468, 77 Fed. 853; Rooks v. State, 83 Ala. 80, 3 So. 720; State v. Smith, 12 Ark. 622, 56 Am. Dec. 287; Hicks v. Riley, 83 Ga. 332, 9 S. E. 771; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Schofield v. Jennings, 68 Ind. 232; Ross v. State, 116 Ind. 495, 19 N. E. 451; State v. Bowman, 78 Iowa, 519, 43 N. W. 302; Nicodemus v. Young, 90 Iowa, 423, 57 N. W. 906; Sparks v. Sparks, 51 Kan. 195, 32 Pac. 892; Nolan v. Taylor, 131 Mo. 224, 32 S. W. 1144; King v. Hutchins, 28 N. H. 580; Dilts v. Kinney, 15 N. J. L. 130; Western Loan & Sav. Co. v. Silver Bow Abstract Co. 31 Mont. 448, 78 Pac. 774; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; Holmes v. Crooks, 56 Neb. 466, 76 N. W. 1073; Hirshiser v. Ward, 29 Nev. 228, 87 Pac. 171; United States Wind Engine & Pump Co. v. Linville, 43 Kan. 455, 23 Pac. 597; Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545; Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729; People ex rel. Bush v. Collins, 7 Johns. 549; Geller v. Hoyt, 7 How. Pr. 265; Clute v. Emmerick, 26 Hun, 10; Weber v. Fowler, 11 How. Pr. 458; Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 326; Hibberd v. Smith, 50 Cal. 511; Gillespie v. Rogers, 146 Mass. 612, 16 N. E. 711.

A judgment at once becomes a lien against real property of the judgment debtor in the county, upon docketing and recording same. Bostwick v. Benedict, 4 S. D. 414, 57 N. W. 79.

If the names as indexed are *idem sonans,* the docket entry is sufficient. Green v. Meyers, 98 Mo. App. 438, 72 S. W. 128; Delaney v. Becker, 14 Pa. Super. Ct. 392.

BURKE, J. In April, 1907, defendant Benson was a bonded abstracter, and as such prepared and certified an abstract of title for plaintiff to a certain lot which defendant was about to purchase from one William G. Rideout. At said time, there was in said county a judgment docketed against William J. Rideout upon which there was due the sum of $87.58. The abstracter knew neither the judgment debtor nor any person of the name of Rideout within the county, and certified that there was no judgment of record "against any of the within-named grantees, . . . which are liens on said premises." On

the strength of this abstract, plaintiff purchased the lot, and claims that he was later forced to pay the amount due upon the judgment because said judgment was a debt of William G. Rideout which had been erroneously docketed against an imaginary William J. Rideout. Plaintiff had judgment in the court below and defendant appeals.

(1) But one question is presented to us for decision, namely, whether it was the duty of the abstracter to show that there was a judgment docketed against William J. while making certificates relative to William G. Respondent relies largely upon the case of Johnson v. Day, 2 N. D. 295, 50 N. W. 701. He admits in his brief, however, that there has always been a division of the authorities as to the effect of the omission of, or mistake in, the middle initial, and further admits that in the case of Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729, the court says: "But there has been a growing dissatisfaction with the doctrine of the ancient cases upon this subject; and in this state (and Massachusetts) the old doctrine must be regarded both by the precedents and practice as overruled." The trial court in his memorandum decision, although attempting to follow the Johnson-Day Case, recognizes the weight of the contrary doctrine and the fact that in the Johnson-Day Case the question at issue was between the parties to a mortgage,—the rights of third persons not being involved.

Appellant cites a long line of cases showing that the ancient rule that the court would pay no attention to a middle initial has been largely, if not entirely, abrogated by the modern decisions. This is, of course, a natural consequence of the increase of population and the frequence with which persons appear with both Christian names and surnames identical. Aside from the distinction as to the age of the authority, there is a still further division of the cases along the lines of the extraneous knowledge of the person making the examination. Thus, if William G. Rideout had been served in a civil action with a summons in which his name had been erroneously written William J. Rideout, it is not likely that the proceedings would have been held to be a nullity, because certain duties devolved upon him by reason of the fact that he was made the recipient of a copy of the summons. For this very reason the case of Johnson-Day, supra, is not in point in this case, it being evident that a notice relative to mortgage wherein there was a description of the land, and page where it might be found in a certain book,

and other means of identification, would not as readily be vitiated by an erroneous initial in the mortgagor's name as would the judgment in the case at bar. In a case note at page 415 of volume 7 L.R.A. (N.S.) will be found a *résumé* of most of the cases in point upon this question. A perusal thereof will impress the reader with the necessity of considering the circumstances of each case, rather than relying upon any rule of law. The rule is likewise given in Cyc.: "The erroneous omission or introduction of a middle initial in defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien." 23 Cyc. 1358 (ii) and note 40; Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358; Hutchinson's Appeal, 92 Pa. 186; Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188; Notes in 14 L.R.A. 394 and 7 L.R.A. (N.S.) 416; Warvelle, Abstracts, §§ 466, 467; Johnson v. Wilson, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392; Johnson v. Hess, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 446; Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769; Phillips v. McKaig, 36 Neb. 853, 55 N. W. 259; Grundies v. Reid, 107 Ill. 304.

As stated in the note in 23 L.R.A. 818: "The general rule by which an initial of a middle name is regarded as no part of the name is denied application to the case of docketing a judgment for constructive notice." Judgments stand in a class by themselves because there is no extraneous data from which the examiner can determine the identity of the person. In this it differs from chattel mortgages, where the searcher always has the description of the property covered thereby as a guide to aid him in determining the identity of the person executing the same. For these reasons we limit the application of this rule to judgments alone, leaving other questions to be determined when reached. In the case at bar there is nothing to indicate that William J. was the same and identical person as William G., the middle initials being different. Had one or the other of the initials been entirely omitted, and either the grantee of the deed or the judgment debtor been shown as simply William Rideout, a different state of facts would exist, and possibly it would be the duty of the abstracter to show the judgment. Upon this, however, we express no opinion. Under the existing facts, however, he was confronted with a name which, though similar, was yet complete, and

distinctly different from the one for whom his search was being conducted, and he could not be expected to index this different name. If plaintiff's contention were adopted it would cast upon the abstracter not only the duty of making search for similar names, but also the burden of determining the validity of the lien created by these judgments. This is not the contemplation of the law. The plaintiff herein, being a subsequent purchaser without notice, was under no obligation to pay such judgment. 16 Am. & Eng. Enc. Law, 133, note 1, and cases cited. The judgment is reversed, with instructions to dismiss the action.

Goss, J., dissenting. Did the judgment docketed in the name of Wm. J. Rideout operate to give constructive notice that the judgment was against Wm. G. Rideout, the true name of the judgment debtor, or put the searcher upon inquiry to determine the fact of identity? This precedent stops not with the question of constructive notice concerning judgment dockets, but under our law as to filing of chattel mortgages also indexed only as against the mortgagor, our holding as to constructive notice will likewise apply to constructive notice afforded by the chattel mortgage indices of mortgagors, and either oblige a party to search, or relieve the party interested from search, with reference to the middle initial or name, according as this case is determined. The laws as to constructive notice afforded by tens of thousands of entries of record are thus in effect passed upon by this decision. This is mentioned that the importance of this precedent in business affairs may not be overlooked in connection with the policy of electing, if so it may be termed, which rule of several prevailing throughout the United States as to constructive notice concerning middle names shall be imputed by these records. Because of this the writer offers this dissent.

In order to avoid confusion in application of precedent it is well to state some of the general rules to be deduced from decisions. It should be remarked that indices of real estate records and decisions thereon concerning identity of names and initials or abbreviations for names are not altogether precedent as to the rule of constructive notice to be here announced. Concerning real estate transactions the records compelled to be kept by law usually, if not always, afford a double check to the purchaser against error, inasmuch as in addition to the index by

grantors and mortgagors there is the tract index, so that notice is afforded from indices of both the tract and the grantor. However, in the judgment docket as in the index of mortgagors of chattel mortgages, the searcher or prospective purchaser must rely for notice upon the name alone, in the absence of any actual knowledge of the facts. Then, again, between the parties themselves the name or designation is wholly immaterial, as proof may supply identity, or actual knowledge may impute facts, or the parties may be estopped from asserting invalidity of or want of record notice. And the same is true in pleadings in both civil and criminal cases. While old decisions may be found requiring strictness of proof in criminal cases, they have long since ceased to be the law, and the matter has resolved to the mere question of identity of the party as the party served with process or charged with crime. So decisions on such matters are not precedent.

At common law there were but two material parts to a name, namely, the surname and the Christian name; the former the family name, the latter the baptismal name. No middle name was recognized at common law as the badge of identity, but strictness was required in the designation of both Christian and surnames, but the Christian name could be designated by initial or abbreviation and still impart constructive notice. Thus, John Brown could be designated as J. Brown, and constructive notice in the latter would operate as well as in the former; but Jas. Brown could, under no circumstances, be held to impart constructive notice that the person intended was John Brown. Thus emphasis was laid at common law upon the correct designation of the Christian name or abbreviation for it. And such explains decisions like Johnson v. Hess, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 446, wherein a judgment against one William Mankedick was held not to charge constructive notice to a purchaser from Henry William or H. W. Mankedick, inasmuch as no notice could be imputed that they were in the same person, because the Christian name or initial standing therefor apparently designated a different person. To that extent there is unanimity in the holdings.

Some few states, as Wisconsin, base their holdings upon the letter of their statute, and are driven to what, in the absence of statute, can properly be designated as extremely technical or unreasonable holdings. The Wisconsin statute requires an entry to be made of "the name *at length*

of each judgment debtor." Under this statute it was held in Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769, quoting from the syllabus, "a docket of a judgment against Edward Davis is not, under a statute requiring the entry to set out 'the name at length of each judgment debtor,' constructive notice to a bona fide purchaser of a judgment against E. A. Davis or Edward A. Davis." Manifestly the statement of this holding condemns it as precedent, where we have no statute requiring such a conclusion. The Massachusetts rule is that, whether the record is right or wrong as a compliance with the statute, the loss must fall upon the purchaser. This is on the theory that the fault, if at all, must be held to be in the law as to constructive notice. If the law does not properly safeguard the purchaser, the fault is charged to the purchaser or the law, and not to prior parties. In Illinois the rule is that the law protects the purchaser of property by the title which appeared of record, unless there was notice of something to the contrary; "therefore, one who made a loan in reliance on the record title was protected against a prior judgment against the owner by another name, although he was as well known by the latter as by the former." Note in 7 L.R.A.(N.S.) at p. 417, and Grundies v. Reid, 107 Ill. 304, although in the case announcing that rule the decision could have been put upon common-law grounds that Charles E. and Conrad E. were not, from constructive notice, to be presumed to be the same person.

Maine in Dutton v. Simmons, 65 Me. 583, 20 Am. Rep. 729, departed admittedly from the common law and "the law of the Supreme Court of the United States, and of many, if not most, of the state courts in this country," and followed Massachusetts, which state had in Com. v. Hall, 3 Pick. 262, held that Charles Hall and Charles James Hall are to be regarded as different names.

Pennsylvania in 1844 departed from the common-law rule in a *per curiam* opinion (Wood v. Reynolds, 7 Watts & S. 406), holding that a judgment entered against John M. Gruver in the name of John Gruver did not impart constructive notice. There was no discussion of cases attempted. It was later followed by a *per curiam* opinion in Hutchinson's Appeal, 92 Pa. 186, cited in the majority opinion. These cases were later overruled by Jenny v. Zehnder, 101 Pa. 296, wherein an entry on the judgment index as "F. Zehnter" was held to be notice

to a purchaser of title from "John Jacob Frederick Zehnder," an extreme holding even under common-law doctrine. In this case an opinion was written. Later the Zehnder Case was expressly overruled in Crouse v. Murphy, 140 Pa. 335, 12 L.R.A. 58, 23 Am. St. Rep. 232, 21 Atl. 358, and that court reverted to its early rule, and held that, where record title was in the name of Daniel J. Murphy, a judgment against Daniel Murphy did not attach to defeat a purchaser who, subsequent to the judgment and in ignorance thereof, bought from the judgment debtor by deed taken in the name of Daniel J. Murphy; and in the opinion it is said that a judgment entered in the name of D. Murphy or Dan Murphy or Daniel Murphy is no notice to one who takes title from the same party as Daniel J. Murphy. And this is the only logical outcome of the holding in the instant case. *If the change of the initial is material, to be consistent its omission must likewise be held to be fatal,* and consistency is no less a jewel in judicial opinions than in demeanor. But in the recent decision of Burns v. Ross, 215 Pa. 293, 7 L.R.A. (N.S.) 415, 114 Am. St. Rep. 963, 64 Atl. 526, that same court holds, "The record of a judgment against one whose Christian name is Francis, if indexed under the name of Frank, charges a prospective purchaser from the judgment debtor's heirs with notice of the existence of the judgment," on common-law reasoning concerning Christian names and their derivation, though in that jurisdiction the common law is repudiated as to middle names or initials for middle names, the common law recognizing no middle name. It is upon these Pennsylvania cases and that of Johnson v. Hess, 126 Ind. 298, 9 L.R.A. 471, 25 N. E. 445, heretofore discussed (which really turned upon a difference in Christian names instead of the use of initials for middle names) upon which the text at 23 Cyc. 1358, is wholly based. It reads: "Further the erroneous omission or introduction of a middle initial in the defendant's name, or a mistake in such middle initial, will prevent the judgment from having effect as a lien." This classifies and differentiates authority apparently sustaining the majority holding. It seems to me apparent that the weight of authority, as well as of reason, is to the contrary and supports the judgment rendered. Nearly all the other jurisdictions hold to the common-law theory as declared in Games v. Stiles, 14 Pet. 322–327, 10 L. ed. 476–479, that "the law knows but one Christian name, and the *omission or insertion* of *the middle name* or of *the initial*

letter of that name is immaterial." 21 Am. & Eng. Enc. Law, 2d ed. 307, says that "it is generally held that the law does not recognize a middle name, and therefore in a legal instrument an omission of the middle name or initial, or a mistake in such name or initial, or the insertion of a middle initial in a name, which has only two members, is of no importance;" citing cases from many jurisdictions. Fallon v. Kehoe, 99 Am. Dec. 347, and note (38 Cal. 44); note to Choen v. State, 21 Am. Rep. 181; Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A.(N.S.) 129, and note (232 Ill. 234, 83 N. E. 815); Fincher v. Hanegan, 24 L.R.A. 543, and note (59 Ark. 151, 26 S. W. 821); Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; and note to Burns v. Ross, 7 L.R.A.(N.S.) 415. These authorities cite many other cases. Last, but not least, this state in Johnson v. Day, 2 N. D. 295, 50 N. W. 701, years ago elected to follow the common law, "It is now quite generally held that the omission of the middle initial, or a mistake in such initial, is entirely immaterial in legal proceedings, whether civil or criminal; *the law recognizes but one Christian name;*" and in the syllabus of the case the statement is reiterated that "the law recognizes but *one* Christian name." There is merit in respondent's contention that the statements in this holding have become a rule of property in this state; and it may have been under reliance thereon that plaintiff paid this judgment, assuming from the language and reasoning in Johnson v. Day that it was necessary to do so to protect his property. It has been held in State Finance Co. v. Halstenson, 17 N. D. 145, 114 N. W. 724, following similar reasoning, that the omission "of the initial letter (of the middle name) creates no doubt or suspicion as to the identity of the person requiring extrinsic evidence to show identity;" holding that a mortgage given by Ole S. Ackerland on land standing of record in the name of Ole Ackerland would be presumed to be given by the record owner, the court stating that "the use of the initial 'S' in the mortgages, although it was not used in the patent, is immaterial; it is not an unusual occurrence to drop an initial in writing a name, and the authorities are general that such fact does not constitute a misnomer or variance;" citing Johnson v. Day, 2 N. D. 295, 50 N. W. 701. In Styles v. Theo. P. Scotland & Co. 22 N. D. 469–479, 134 N. W. 708, it was held that a mortgage given by "Charlie" was not an instrument recorded without the chain of title which stood of

record in the name of "Charles W. Goodman;" citing Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623.

As intimated at the beginning of this dissent, the rule announced in this case is bound to be precedent as to what constructive notice is imputed from the index of mortgagors of chattel mortgages. No fine-spun distinction consistently can be drawn between constructive notice imparted from a judgment docket and the constructive notice imparted from an index of chattel mortgagors. There is a lame attempt in the main opinion to make this distinction in the assertion, "judgments stand in a class by themselves, because there is no extraneous data from which the examiner can determine the identity of the person. In this it differs from chattel mortgages, where the searcher always has the description of the property covered thereby as a guide to aid him in determining the identity of the persons executing the same. For these reasons we limit the application of this rule to judgments alone, leaving other questions to be determined when reached." This statement begs as well as befogs the issue, because it is not the chattel mortgage that affords constructive notice, but the record of the indexing of it. When the searcher running through, not the mortgages, but the chattel mortgage index of mortgagors, discovers indexed a chattel mortgage given by W. J. Rideout upon a search of chattel mortgages for Wm. G. Rideout, the searcher must have the same right to rely or not upon whether the middle initial imparts notice, as he does in this instance where the judgment docket shows Wm. J. instead of Wm. G. It is the judgment docket which, by imparting notice or not, says he must or must not search further. Under the rule announced in the majority opinion he need not consult the judgment or make further inquiry, something that must strike the ordinary man as permitting culpable negligence in a search of the records by one about to buy on the strength of them. It certainly renders an abstract of title a delusion and a snare. The rule is announced emphatically in 24 Am. & Eng. Enc. Law, 151, in the following language, every word of which is used advisedly and is of importance as defining the rule governing searches of judgment dockets and chattel mortgage indexes both and alike "the constructive notice which flows *exclusively from the record* cannot be more extensive than the facts stated *therein,* and must be understood to be only such notice as could have been obtained from an actual inspection of *the record.* A subse-

quent purchaser is entitled to rely upon the *record,* and cannot be charged with constructive notice of latent equities or facts not disclosed or suggested by the *record itself.*" If this be law, this decision will prove embarrassing the first time a subsequent encumbrancer in effect says to us that, "following the rule announced in Turk v. Benson, I was under no obligation to look for a prior chattel mortgage upon this property, as the name of my mortgagor is Wm. G. Rideout, and the purported prior chattel mortgage in question, that I did not look up, was against Wm. J. Rideout." It will be equally perplexing when the situation is presented to this court that arose in the leading cases followed by it, cited in the majority opinion from Pennsylvania and Wisconsin, and this court is asked to pass upon whether a judgment entered as against Daniel Murphy, judgment debtor, was a lien upon land owned of record in the name of Daniel J. Murphy but deeded out from under said judgment. Again, the majority opinion attempts to hedge by the following statement contained in it: "Had one or the other of the initials been entirely omitted, and either the grantee of the deed or the judgment debtor been shown as simply William Rideout, a different state of facts would exist, and possibly it would be the duty of the abstractor to show the judgment. *Upon this, however, we express no opinion.*" Why not express an opinion? Every case cited to support and that does support this holding most emphatically expresses just that opinion. The trouble is the opinion, and the holdings followed are so out of harmony with business usage and ordinary ideas of prudence that the majority opinion has seen fit to refrain from expressing an opinion upon something that the precedent cited and followed has held upon. To illustrate, examining the precedent cited: In Crouse v. Murphy, the holding is that Daniel Murphy is not Daniel J. Murphy. In Davis v. Steeps, 87 Wis. 472, 23 L.R.A. 818, 41 Am. St. Rep. 51, 58 N. W. 769, from Wisconsin, it is expressly held that a judgment entered against Edward Davis is not constructive notice that the judgment debtor is E. A. Davis or Edward A. Davis. Our court refrains from expressing an opinion upon this matter, but by the very fact of refusing to do so indicates that it may or may not follow in the future the same precedent it cites and follows as authority for this decision, upon which and similar precedent, it justifies its departure in this case from the common-law rule. Grundies v. Reid, 107 Ill.

304, is cited, while Illinois, as heretofore stated, has a separate rule of its own. Likewise, too, Johnson v. Hess, the Indiana case cited, but followed the common law. In Phillipps v. McKaig, 36 Neb. 853, 55 N. W. 259, cited in the majority opinion as authority, it is held that a judgment entered against "May *Alley*" was not constructive notice to a purchaser of the real estate from "May Ann *Alley;*" the decision could not have been otherwise and the common law been followed. In Johnson v. Wilson, 137 Ala. 468, 97 Am. St. Rep. 52, 34 So. 392, cited in the majority opinion, the following from the syllabus makes its citation seem strange: "The record of a mortgage executed in the name of *A.* W. Dickson is not notice to purchasers for value that *J.* W. Dickson executed it." This decision also but follows the common law. But in Johnson v. Wilson is found the following: "The case of Fincher v. Hanegan, 59 Ark. 151, 24 L.R.A. 543, 26 S. W. 821, cited by appellant's counsel, only involved a mistake in the *initial letter of the middle name* of the mortgagor. In that case the mortgagor executed the first mortgage by his *true* Christian name and surname. The court held that the middle letter was *immaterial as the law recognizes but one Christian name.* It is therefore not an authority upon the question here involved, if abstractly sound, of which we express no opinion." That court there expressly refrained from venturing an opinion upon the very subject upon which the majority here cites and deems it an authority. Wicker v. Jenkins, 49 Tex. Civ. App. 366, 108 S. W. 188, does squarely support the majority holding. It also cites and follows the same cases from Pennsylvania, Wisconsin, and Indiana, as does the majority opinion. In that opinion is the following: "Would one in searching the record of this abstract know that 'W. B. F. Wicker' was the same person as 'W. F. B. Wicker?'" Ordinary prudence would seem to say, "Yes, ascertain the fact,—such similarity should invoke inquiry." Common law also answers, "yes." If this be authority for its holding, evidently this court should also be prepared to hold that any transposition of middle initials destroys any presumption of identity. The L.R.A. notes cited in the majority opinion but classify the holdings, as has been attempted in this dissent, and but little if anything more.

To the writer it would seem that, if any departure from the common law is to be declared, it should be based upon the Illinois rule wherein the record title of the real estate controls. The rule is arbitrary, but

no more so than the hybrid or mongrel one that must be adopted wherever the common-law rule that the middle names or initial is immaterial is departed from. This decision seems to me to, in effect at least, overrule the basic reasoning in Johnson v. Day, and to demonstrate its fallacy by its attempt to draw distinction, contrary to the very authorities upon which it is based. It can, therefore, result only in unsettling the prior settled and established law of this state upon a very important matter. But whatever the effect of this precedent it has been declared after thorough consideration. The writer is of the opinion that the judgment should be affirmed.

JOHN O'LAUGHLIN v. PETER CARLSON, County Auditor of Renville County, North Dakota.

(152 N. W. 675.)

Mandamus proceeding — judgment in — appeal from — nominating petition — county auditor — statute — constitutionality.

1. An appeal from a judgment in a mandamus proceeding commanding a county auditor to receive and file a nominating petition and print the respondent's name upon the official ballot will not be dismissed merely because the election has been held, where the judgment of the trial court was based solely upon the ground that the statute, under which the then incumbent held such office, was unconstitutional.

County commissioners — term of office — legislature has power to fix.

2. Under the provisions of § 172 of the Constitution, the legislature is empowered to fix the term of office of county commissioners.

Legislative enactment — constitutionality — presumption — organic law.

3. A legislative enactment is presumed to be constitutional, and will be upheld, unless it is manifestly violative of the organic law.

Constitution — statute — political questions — construction — government — political departments of.

4. In construing a constitutional provision or statute, involving questions political or quasi political in their character, courts will always give great consideration to constructions placed thereon by the political departments of the government.

Term of office — legislature may change — when.

5. In the absence of a constitutional prohibition, the legislature may change the term of an office even after the election or appointment of the incumbent thereof.

County commissioners — order of succession — method of determining — legislature may provide — Constitution.

6. Chapter 123 of the 1913 Session Laws (§ 3264, Comp. Laws), providing a method to determine the order of succession of county commissioners, is not violative of the Constitution of this state.

Opinion filed April 16, 1915.

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

Reversed.

H. J. Linde, Attorney General; *John Swenson,* State's Attorney; *Geo. I. Rodsater,* Assistant State's Attorney, for appellant.

No appearance for respondent.

CHRISTIANSON, J. This is an appeal from a judgment of the district court of Renville county, in a mandamus proceeding commanding the defendant as county auditor, to receive and file the petition of the plaintiff, John O'Laughlin, for nomination to the office of county commissioner of the second commissioner district of said county, and place and cause his name to be printed on the official ballot to be used at the general election held on November 3, 1914. The material facts are undisputed and as follows: That the county of Renville came into existence in the year 1910, being organized out of territory theretofore forming a part of Ward county; that after the creation of the county, the governor appointed three persons to act as county commissioners, who afterwards qualified and assumed the duties of their office, and thereafter divided the county into three county commissioner districts; that the commissioners so appointed held their offices until January, 1911; that at the general election held in November, 1910, a county commissioner was duly elected from each of the three county commissioner districts in said county; that one R. D. Johnson was elected county commissioner from the second county commissioner district, and that on the 14th day of July, 1913, the county commissioners

of Renville county met, and, in accordance with the provisions of chapter 123 of the Session Laws of 1913, drew lots to determine their order of succession, and that upon the drawing of such lots, the said R. D. Johnson drew a term of four years to commence on the 1st day of January, 1913.

(1) The sole question presented by this appeal is whether or not chapter 123 of the Session Laws of 1913 (§ 3264, Compiled Laws), is constitutional. The contention of the relator is that this law is unconstitutional, and that for that reason the term of office of said Johnson as county commissioner of the second commissioner district would be for the period of four years only, from and after the first Monday in January, 1915. The defendant, on the other hand, contends that this law is constitutional, and hence that the term of office of Johnson as commissioner does not expire until January 1, 1917, and hence necessarily no commissioner could be elected for this district at the election to be held on November 3, 1914. As the election has been held, the question of whether or not the judgment appealed from ought to be affirmed or reversed is to some extent moot, but as that decision directly involved the duration of the term of office of R. D. Johnson, the then incumbent, and also involved the constitutionality of the act in question, it is obvious that the real question presented is of great public interest, and still remains unsettled, and under such circumstances this court will determine the real questions at issue. State ex rel. Dakota Trust Co. v. Stutsman, 24 N. D. 68, 139 N. W. 83, Ann. Cas. 1914D, 776. See also Re Madden, 148 N. Y. 136, 42 N. E. 534.

(2) Section 172 of the Constitution provides for a county government by a board of county commissioners, and reads as follows: "Until the system of county government by the chairmen of the several township boards is adopted by any county the fiscal affairs of said county shall be transacted by a board of county commissioners. Said board shall consist of not less than three and not more than five members, whose term of office shall be prescribed by law. Said board shall hold sessions for the transaction of county business, as shall be provided by law." It will be observed that this section expressly provides that the terms of office of the county commissioners shall be prescribed by law.

The first statute in this state relative to the terms of county commissioners appeared as § 575 of the Compiled Laws of Dakota of 1887,

and reads as follows: "The commissioners shall hold their office for the term of three years, except as provided in the statute for the organization of counties, and one shall retire and one be chosen annually, and in counties now organized the order of their election and succession shall remain as now established, and commissioner districts in such counties shall continue as now constituted until changed as provided by law." This territorial statute became part of the laws of this state under the provisions of § 2 of the schedule of the Constitution, and was subsequently adopted as § 1896 of the Revised Codes of 1895.

Section 124 of the Constitution provided that general elections of the state should be biennial and held on the first Tuesday after the first Monday in November. The first election to be held on the first Tuesday after the first Monday in November, 1890. It will be observed that the statute relative to the terms of county commissioners still provided that their terms should be for three years, and that one should be chosen and one retired annually, which necessarily resulted in a vacancy occurring in each odd-numbered year, which had to be filled by appointment. This condition remained until the law was amended by the legislature in 1901 so as to extend the term of the office of county commissioners to four years. And this act (chapter 52, Session Laws of 1901) provided that the vacancies which would occur in the board of county commissioners in the years 1901 and 1903 should be filled in the manner provided by law for the filling of other vacancies in such board. This section was again amended by the legislature in 1903, so as to provide for a method of determining the order of succession of the county commissioners theretofore elected under the provisions of special laws, and was finally embodied as § 2390 of the Revised Codes of 1905, Comp. Laws 1913, § 3264, and reads as follows: "The commissioners shall hold their office for the term of four years, except as provided by law for the organization of counties, and in counties now organized the order of their election and succession shall be as herein provided, and commissioner districts in such county shall continue as now constituted until changed as provided by law; provided, that in all counties in this state, wherein heretofore commissioners have been elected under the provisions of any special law, that at the next regular meeting of the board of county commissioners, immediately after the

taking effect of this article, the county commissioners in such counties shall by lot settle and determine upon the order of their succession, three commissioners to hold their office for four years and two for two years from the first Monday in January, 1903." A reading of the section just quoted discloses that it applies only to counties having five commissioners.

Prior to 1913, several new counties were organized in North Dakota, and at the 1913 session of the legislature, § 2390 was amended to read as follows: "The commissioners shall hold their office for the term of four years, except as provided by law for the organization of counties, and in counties now organized, the order of their election and succession shall be as herein provided, and commissioner districts in such counties shall continue as now constituted until changed as provided by law. Provided, that at the general election next after the organization of a county, either from unorganized territory or from territory segregated by division from another county, one county commissioner shall be elected for a term of two years and two commissioners for a term of four years, and thereafter as provided by law, the order of succession to be determined by lot. Provided, further, that in all counties in this state wherein heretofore commissioners have been elected after the organization of a new county, either from unorganized territory or upon division or segregation from another county, and where all the commissioners now serving were elected for the same term, the county commissioners shall, at the regular meeting of the board of county commissioners next after the taking effect of this act, . . . by lot determine the order of their succession; three commissioners to hold their office for four years and two for two years from the first Monday in January, 1913, in counties having five commissioner districts; two commissioners to hold their office for four years and one for two years from the first Monday in January, 1913, in counties having three commissioner districts." Chapter 123, Session Laws of 1913; § 3264, Compiled Laws.

(3–4) As already stated, the only question presented for our determination on this appeal is whether or not the act just quoted is constitutional. It is a well-settled principle of constitutional law, that a law enacted by the legislature is presumed to be constitutional, unless it is shown that it is manifestly violative of the organic law. And

the courts will construe statutes so as to harmonize their provisions with the Constitution,—if it is possible to do so,—to the end that they may be sustained. 8 Cyc. 801–803; Black, Const. Law, p. 58; State ex rel. Baughn v. Ure, 91 Neb. 31, 135 N. W. 224. The authority to fix the duration of the terms of office of county commissioners is, by the Constitution, expressly vested in the legislature. This matter relates directly to the government of counties, and hence is largely of a political or quasi political character. And in cases of that kind, courts will always give great consideration to constructions placed on constitutional provisions, or statutes, by the political departments of the government. 8 Cyc. 727; Cooley, Const. Lim. 5th ed. pp. 49–54. See also Black, Const. Law, p. 59.

(5–6) Plaintiff contends that the legislature, under the provisions of the law in question, in effect appointed the then incumbents of the office of county commissioners in several counties of the state for an additional term of two years. We do not believe that this contention is tenable. As already indicated, the laws in force at the time of the enactment of chapter 123 of the 1913 Session Laws, Comp. Laws 1913, § 3264, made no provision for determining the order of succession in counties having only three commissioners, and it seems clear to us that the purpose of the legislature in passing the act in question was to remedy the defect existing in the former law. The same reasons or governmental policy, making it desirable to always have members of previous experience upon the board of county commissioners, apply with equal force to counties having three commissioners as to those having five commissioners. There is nothing to indicate any intention on the part of the legislature to extend the term of office of any particular person or persons holding the office of county commissioner. Any such intention is negatived, as the legislature merely prescribed a method whereby the order of succession might be determined, and the particular persons whose terms of office were so extended would not be known until after the lots had been drawn. And where the Constitution contains no negative words to limit the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution. Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572. The legislature provided that the order of succession should be determined by

lots. This method is recognized by the Constitution of this state as a proper method of determining the order of succession to an office. Constitution of North Dakota, § 92. It is true the office of county commissioner is created by the Constitution, but the term of office is expressly left to be determined by the legislature without any limitation as to the duration thereof, and, in the absence of a constitutional prohibition, the legislature may change the term of an office even after the election or appointment of the incumbent thereof. 8 Cyc. 954; Mechem, Pub. Off. § 389; 2 McQuillin, Mun. Corp. §§ 486, 494; Throop, Pub. Off. § 305.

Every presumption is in favor of the propriety and constitutionality of the legislation, and improper motives in its enactment are never imputed to the legislature. The object attempted to be accomplished by the legislature by the enactment of the act in question was clearly to extend the provisions of the then existing laws to counties having only three commissioners, so as to make it possible for such counties to determine the order of succession of its county commissioners and thereby obtain the benefit of always having some experienced men as members of the board of county commissioners. The mere fact that as an incidental result, the terms of the then incumbents were extended, would not of itself show any intention on the part of the legislature to deprive the office of county commissioner of its elective character, or evince any intention on the part of the legislature to exercise the appointive power. And it is generally held that the legislature has the power to pass general laws for the purpose of obtaining uniformity in official terms, or a proper order of succession; and the mere fact that as an incident thereto the incumbents of such offices are permitted to hold over for a limited time does not invalidate such legislative enactment. Jordan v. Bailey, 37 Minn. 174, 33 N. W. 778; Christy v. Sacramento County, 39 Cal. 3; State ex rel. Teague v. Silver Bow County, 34 Mont. 426, 87 Pac. 450; Spencer v. Knight, 177 Ind. 564, 98 N. E. 342; Graham v. Roberts, 200 Mass. 152, 85 N. E. 1009; State ex rel. Godard v. Andrews, 64 Kan. 474, 67 Pac. 871. See also 29 Cyc. 1397.

It should also be observed that § 172 of the Constitution, while creating the office of county commissioner, does not in terms provide that such office shall be either appointive or elective. This is a significant

fact, when considered in connection with §§ 150 and 172 of the Constitution, which expressly provide that certain other designated county officers shall be elected. It is unnecessary for us, however, to determine in this action whether or not the legislature could abolish the elective character of the office of county commissioner, and provide that such office should be filled by appointment. We are entirely satisfied that the legislature had the right to change the term of office of county commissioners, as well as to provide for an order of succession of such officers in the various counties in the state. And as it is obvious that, under such circumstances, vacancies naturally would result, it follows as a necessary incident that the legislature would have the right to provide a method for filling such vacancies. This was expressly recognized and acted upon by the legislature in the act relative to county commissioners adopted in 1901.

Under our Constitution, no limitation is placed upon the power of the legislature as to the method to be prescribed for filling such vacancies. And even though it be conceded that in this case the legislature exercised appointive power, and sought to fill the prospective vacancies in the offices of county commissioners by appointment, this would not necessarily render the act unconstitutional as an excess of the powers of the legislature. In considering the question of whether or not the power to appoint to office to fill vacancies was an inherent and implied executive function, or might, in a certain sense, be exercised by the legislature, this court in the case of State ex rel. Standish v. Boucher, 3 N. D. 389, 395, 21 L. R. A. 539, 56 N. W. 142, said: "It is conceded in this case, as it must be in all cases arising under our political institutions, that the sovereign authority, the people, in creating a state government, can lodge the authority to appoint its officers in any branch of that government, or bestow it at pleasure upon any official upon whom they may elect to bestow the same. In granting such power it may be conferred in full measure, and without limitation, or it may be conferred only to a limited extent. . . . Just at this point it may naturally be asked, since the power of the governor to appoint to office extends only to cases of vacancies not otherwise provided for, and since there is no express grant of appointing power in the Constitution to any other functionary or department of government, where does the power of appointment of officers and their successors in

office rest? *The power to appoint to office is an attribute of sovereignty. All attributes of sovereignty essential to the administration of government must be vested in the several departments of government by the people; otherwise, the government founded by the people would not constitute a full grant of governmental power.* Such government would, to that extent, be defective, for the reason that the people themselves, in their collective capacity, exercise no governmental functions. Now, we have seen that the power to appoint to the offices in question is not vested by the Constitution in the governor. Neither is any appointing power vested in judicial department, except to appoint certain court officials. Unless, therefore, this power resides in the legislature, it is lodged in no part of the government. As to this it will suffice to say that *all governmental sovereign power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions.*" See also Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

It follows from what has been said that chapter 123 of the 1913 Session Laws is a valid legislative enactment. The judgment appealed from is reversed, and the District Court is directed to enter judgment in favor of the defendant for a dismissal of the action, with costs.

IN RE APPEAL OF MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILROAD COMPANY, a Corporation, CONCERNING AN ORDER OF THE COMMISSIONERS OF RAILROADS OF THE STATE OF NORTH DAKOTA.

(152 N. W. 513.)

The Board of Commissioners of Railroads of this state ordered a separate daily passenger service to be installed on the Ambrose-Flaxton branch of the appellant railway company, which appealed to the district court where the

Note.—In regard to the right to a direct appeal to the courts from a decision of a railroad commission, the authorities, which are reviewed in a note in 49 L.R.A. (N.S.) 565, seem to establish the rule that there can be no appeal except pursuant to constitutional or statutory provision.

Board's decision was affirmed, and it appeals to this court, alleging that the findings are insufficient to support the judgment of the district court. The Board's order was a denial of the railroad's application to be relieved under chap. 200, Sess. Laws 1907, Comp. Laws 1913, §§ 4789–4795, from running a daily passenger service, which had been ordered by the Board. The Board denies the right of the railroad to appeal, asserting that its order is final and that a statute granting a right of appeal would be unconstitutional because administrative, instead of judicial, functions are concerned. Since the decision below was made, this branch line has been extended into Montana. Both parties request a decision on the merits and that the case not be treated as moot. *Held:*—

Board of Railroad Commissioners — decisions of — appeals — courts.

1. Though chap. 200, Sess. Laws 1907, Comp. Laws 1913, §§ 4789–4795, did not expressly grant an appeal to the courts, yet as it is *in pari materia* with similar earlier statutes in themselves granting and contemplating generally a right of appeal from decisions of the Board to the courts, a right of appeal exists as to the matters embraced in the statute in question.

Subject-matter — ligislative — administrative — statutes — appeals — review.

2. That the subject-matter is legislative or administrative does not render a statute unconstitutional authorizing a review of the action of the Board in the courts on an appeal to them.

Railroads — passenger train service — relief from — right to apply to Commissioners — permissive statute — discretion of Board.

3. That the right of the railroad to apply to the Commission to be relieved from maintaining a separate daily passenger service (by installation of a daily mixed passenger and freight service on branch lines) is permissive in language, and not a positive direction to the Board, and vests in it a discretion does not negative a right of appeal.

Relief — earnings — cost of operation — branch line — statutory exception.

4. In determining whether such relief shall be granted, the earnings and cost of operation of branch line service must be determined as near as possible, and where it plainly appears that the cost of operating the branch line with separate daily passenger service installed greatly exceeds the railroad's earnings and revenues derivable from the operation of such branch line, the carrier is prima facie within the statutory exception and prima facie is entitled to be permitted to operate a daily mixed passenger and freight train.

Branch lines — statute revenues — service — cost — investment — dividend on.

5. The statute granting such relief has particular application to branch lines, and the revenues from service and cost of branch line service only must be considered. The petitioner cannot be compelled to operate a separate daily passenger service on this branch line at a great loss, and be compelled to make up such loss from its main line revenues. The intent of the statute is that the

revenues from branch lines shall justify a daily passenger service independent of whether the railroad as a whole within the state is returning a fair dividend on its investment.

Passenger service — revenues — express.

6. The proof discloses that the G. N. Crosby-Berthold line furnishes ample passenger service for four fifths of the length of this Soo branch line. A separate passenger service should not be forced for the convenience alone of the town of Ambrose and vicinity, when to do so will cause an additional annual expenditure of $14,000, added to a loss already sustained under mixed train service, the revenues being inadequate to meet even the expenses of a mixed train service.

Order — judgment — interstate commerce.

7. The order and judgment appealed from are reversed. Since trial, this line has been extended into Montana, and questions of interstate commerce may now be involved, which conditions will be taken into consideration in future proceedings had herein.

Opinion filed April 23, 1915.

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

Reversed and remanded.

Palda, Aaker, & Greene, of Minot, *John L. Erdall* and *Alfred H. Bright,* of Minneapolis, of counsel, for appellant.

W. H. Stutsman, of Mandan, and *Henry J. Linde,* Attorney General, for respondents, the Commissioners of Railroads.

Goss, J. This appeal is from the decision of the district court, wherein trial was had on testimony taken relating to an application by the railroad company to the State Board of Railway Commissioners, made under chap. 200 of Sess. Laws of 1907, Comp. Laws 1913, §§ 4789–4795. Mixed train service was given on the Ambrose-Flaxton Soo branch line. In November, 1910, residents of Ambrose petitioned the Board of Railway Commissioners to order installation of separate daily passenger and freight service. On hearing had the petition was granted. The railroad immediately applied to be relieved therefrom, and upon a second hearing had the application of the railroad was denied and an order was entered June 24, 1911, directing installation of a separate daily passenger service. From this order the railroad appealed to the district court of Burke county. The matter came on

for trial as an issue of fact and law on May 30, 1912, and a decision was rendered adverse to the railroad company. It appeals, assigning as error that the evidence is insufficient to justify certain findings entered, and that the findings are insufficient to support the judgment rendered.

This opinion is written after a rehearing had. Prior to rehearing it was held that the order made by the Board of Railway Commissioners, and upon which the appeal was taken to the district court, was non-appealable in that it was merely an order denying the carrier's application to be relieved from the general statutory requirement to run a daily passenger train, instead of an order directing or compelling action in the matter; and for the further reason that no right of appeal was considered as granted by chap. 200 of the Session Laws of 1907, Comp. Laws 1913, §§ 4789–4795, concerning the matters there mentioned, and that the intent of that particular statute was to leave the Board vested with a discretion as to said matters, uncontrolled by resort to the courts by appeal. It was also mentioned in said opinion that the case was moot, inasmuch as this Ambrose branch had been extended into Montana, pending the appeal, and now accommodates a much greater territory.

Undoubtedly this case might be disposed of as moot and the decision be within the law. However, the Board and the corporation desire a decision as precedent for future action.

The legislature has seen fit to declare that both a daily passenger and daily freight train shall be run each way over every railroad within this state, "provided, however, that, if any railroad corporation shall make it appear to the Board of Railroad Commissioners of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for, and said Board shall so order, said company may operate one mixed train on such line each way on every business day in the year for such time as said Board may direct." The order made is appealable, and a review of the action of the Board may be had in the courts and in this court on appeal. Whether the order be merely negative, or on the contrary affirmative action, does not affect the right of appeal. To hold otherwise would allow the right to an appeal to be dependent on the caprice of the Board in the framing of its order. The right is

absolute if granted by the statute, and it is plainly apparent from the codification of the laws pertaining to the powers and duties of the Railroad Commissioners, as codified in chap. 115 of the Session Laws of 1897, that it was the legislative intent that as to all enactments, past and future, unless the contrary was clearly apparent from the future act itself, a right of appeal, retrial, and review should be allowed from the decision of that body to the courts. As nothing contained in chapter 200 of the Session Laws of 1907, Comp. Laws 1913, §§ 4789–4795, manifests a contrary intention, it must be taken as *in pari materia* with similar existing enactment and as having been enacted subject to an understood and generally applicable right of appeal in this as in all other similar and related matters. Lewis's Sutherland, Stat. Constr. 2d ed. §§ 443–448; 36 Cyc. 1147.

The Board of Railroad Commissioners urges that it is a part of the executive department of the state, with functions purely administrative; that the courts have universally established and maintained a sharp distinction between purely administrative acts and those which are purely judicial, relegating one to the executive and the other as belonging to the judicial departments of government respectively. It urges that such distinction here exists pertaining to the acts under review, and that "the judicial department is powerless to control or review the executive department so long as it does not exceed its legal authority;" that if its acts are reviewable at all by the courts, it is only when they are in palpable excess of jurisdiction or power, and that then they are reviewable only on certiorari if at all; and if the power to review by appeal has been granted, the statute attempting to confer it is unconstitutional "for the reason that the courts have no power over a commission belonging to the executive department acting within the scope of its authority." It next contends that certiorari will not lie for a mere excess of jurisdiction exercised, and finally arrives at the conclusion that its acts, because administrative and it constituting a branch of the executive arm of government, are practically wholly beyond judicial review.

The powers and duties of this constitutional Board are not prescribed by the Constitution, but are left to the legislature to create and define. Section 83 of the state Constitution declares that they "shall be as prescribed by law." As well observed in Kermott v. Bagley, 19 N. D.

345, 124 N. W. 397, the powers of government, although divided generally into three distinct departments, legislative, executive, and judicial, are otherwise undistributed. In other words, our Constitution contains no distributing clause specifically apportioning the three different classes of governmental power. Merely because the duty is administrative, strictly speaking, and nonjudicial in the broad sense of the term, does not bar the legislature from requiring its exercise, nevertheless, by a district court, the constitutional court of general original jurisdiction. Kermott v. Bagley, supra, following Com. ex rel. Carson v. Collier, 213 Pa. 138, 62 Atl. 567. The Constitution does not prevent the legislature (upon which it has imposed the duty of prescribing the powers and duties of the Railroad Commission) from saying that such powers or duties, even though administrative in character, may be reviewable in the district court on appeal, and in which tribunal a trial *de novo* of even administrative issues may be had.

It is immaterial whether the duties of the Board of Railroad Commissioners may be technically legislative or judicial. There is nothing in the Federal Constitution to hinder a state from uniting "legislative and judicial powers in a single hand." Prentis v. Atlantic Coast Line Co. 211 U. S. 210–225, 53 L. ed. 150–158, 29 Sup. Ct. Rep. 67; Dreyer v. Illinois, 187 U. S. 71–84, 47 L. ed. 79–85, 23 Sup. Ct. Rep. 28, 15 Am. Crim. Rep. 253; Winchester & S. R. Co. v. Com. 106 Va. 264–268, 55 S. E. 692; 6 R. C. L. 147); and though in our state Constitution the three departments of government, executive, legislative, and judicial, are primarily separately invested with powers to be so classified respectively, "it is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." Story, Const. 5th ed. 393. "Again, 'indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim [separation of the powers of government to be administered by the three arms of government separately], and at the same time some admixture of powers constituting an exception to it.'

Story, Const. 395." Winchester & S. R. Co. v. Com. 106 Va. 264–270, 55 S. E. 692.

The duties of this Board relative to granting permission to discontinue operation of this daily train are legislative. 6 R. C. L. 159. The order made will be prospective in operation, and relate not to past, but to future, matters. It is analogous to the establishing of rates. The inquiry preliminary to determining the rule to be made concerning it is but such as might, with propriety, have been made by a legislative committee. That the inquiry may be reviewed on appeal in court proceedings matters not, as "that question depends not upon the character of the body, but upon the character of the proceedings." Ex parte Virginia, 100 U. S. 339–348, 25 L. ed. 676–680, 3 Am. Crim. Rep. 547; also Prentis v. Atlantic Coast Line Co. 211 U. S. 210–232, 53 L. ed. 150–161, 29 Sup. Ct. Rep. 67, wherein it is held that the fact that an appeal is taken from the Commission to the courts, and a decision given confirming a rate, does not render such decision judicial, instead of legislative, in character. "A state may permit appeals to its courts from the rate-making orders of its Railroad Commission, and upon the review of such orders, it may expressly authorize its judicial tribunals to investigate and decide questions which otherwise would not belong to them, *or even to act legislatively.*" Louisville & N. R. Co. v. Garrett, 231 U. S. 298, at p. 314, 58 L. ed. 229, at p. 243, 34 Sup. Ct. Rep. 48, citing Prentis v. Atlantic Coast Line Co. 211 U. S. 210–227, 53 L. ed. 150–159, 29 Sup. Ct. Rep. 67. Conceding the premise of the Commission, that its acts may be either legislative or administrative, it does not follow that an appeal to the courts from its decisions in such matters cannot constitutionally be granted. Kermott v. Bagley, 19 N. D. 345–350, 124 N. W. 397; Com. ex rel. Carson v. Collier, 213 Pa. 138, 62 Atl. 567. The original exercise of the power is left with the Commission for its administration, and until the appeal the whole legislative power is there, which suffices the test prescribed by constitutional provisions distributing generally the three powers of government to the three arms of government. Winchester & S. R. Co. v. Com. 106 Va. 264, 55 S. E. 692. While duties cannot be imposed upon this court except such as are judicial, under § 96 of the state Constitution, the limitation does not apply to district court original jurisdiction (Kermott v. Bagley, supra); and it is true that the character of the act, as being

legislative or judicial, is determined by the nature of the final act under consideration, yet this proceeding on appeal is but an exercise of appellate jurisdiction, even though concerning administrative subject-matter. Though practically a retrial may be had in this court on the appeal, it does not alter the fact that the jurisdiction exercised is appellate, and the trial in that manner is but one method of exercise of strictly appellate jurisdiction. Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300; Re Peterson, 22 N. D. 480, at p. 505, 134 N. W. 751. The legislature having the authority to vest the courts of general trial jurisdiction with the appellate jurisdiction of the subject-matter, though administrative or legislative in kind, could prescribe a further appellate jurisdiction therefor and vest this court therewith. The constitutional limitation on the supreme court is not on subject-matter, but instead is that the jurisdiction exercised or conferred shall be appellate jurisdiction only; except, of course, in the instance prescribed by §§ 86, 87 of the state Constitution conferring original jurisdiction on this court. The question is rather one of power of the legislature to grant the right of trial and an appeal therefrom.

Along with nearly every power granted, this board is provided a right of appeal to the courts. It is declared that "the district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions, and orders" its "reasonable rulings, orders, and regulations affecting public right." Comp. Laws, § 4732. Section 4736 not only grants the right of appeal to the district courts, but gives them general power to try and determine all issues, whether of a judicial, administrative, or legislative nature. "The district court shall, upon the hearing of such appeal, receive and consider such evidence as may be adduced by either party, and shall rescind, modify, or alter said order appealed from in such manner as may be equitable and just." Consult also §§ 4744, 4745, a part of the general scheme of review in the courts of such orders.

The weight of the finding of the Board originally made in the matter is a question different from that concerning the power of the courts over the issue on which such findings are offered as evidence. No doubt cases may arise where the findings of the Commission, as is said in Puget Sound Electric R. Co. v. Railroad Commission, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763, reiterated in State ex rel. Great

Northern R. Co. v. Public Service Commission, 76 Wash. 625, 137 Pac. 132, at p. 136, may necessarily be of an expert character and because thereof entitled to great weight, yet the same is not true in the instant case. Courts can satisfactorily determine the issue presented of the reasonableness or unreasonableness of the order made in the light of all the circumstances.

It may be conceded that the legislature could have passed this statute without the proviso, and required daily passenger train service. It had the power to declare such to be the public policy. But it also had the power to declare an exception to be the public policy to be observed, and has done so. Had no exception been made, but a daily train been required, it would not only have been within the power, but it would have been the duty, of the Commission to compel a daily service. With the exception made, however, it is the duty of the Commission to likewise comply with the law and observe the exception. What the Commission might have done had the statute not contained the proviso can furnish no basis for disregard of the proviso, nor make it any the less the statute. That the exception is granted in permissive, rather than in mandatory, language, is immaterial, as it does not signify that it is not its declared policy that, when the facts bring the carrier within the exception, it should enjoy its benefits; nor because it is framed in permissive language does it place the ruling of the Commission beyond appeal and court review.

Now as to merits. The branch line from Flaxton to Ambrose was 51 miles long. Tabulations of receipts and expenditures made, allotted, or apportioned to this line for the three years ending respectively June 30, 1909, 1910, and 1911 are in evidence. During this period mixed train service was given. From freight, passenger, mail, and express, apportioned on a mileage basis, the earnings of this branch show $50,030, $51,818, and $49,147 per year respectively. It is urged that the apportionment made of these earnings is improper, and does not truly reflect the benefit of the branch to the railroad system as a whole. But of all known methods of apportionment, that on the mileage basis seems most equitable, and has met generally with the approval of the courts. Against these earnings must be charged approximately $22,000 per year for strictly transportation expenses alone, an expense unquestionably disbursed on the branch line in producing its earnings. To this

there must necessarily be added $14,000 per year for taxes of this branch line, another expense equally certain, making a total definite expense from these two items alone of $36,000, which includes no overhead charge, such as maintenance of way and structures, maintenance of equipment, traffic, and general expenses of the general railway system, a proper proportion of all of which upon an equitable basis must be allotted to or charged against this branch line under the holding in Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed. —, P. U. R. 1915C, —, 35 Sup. Ct. Rep. 429, just decided by the Supreme Court of the United States, or what is commonly known as the North Dakota Lignite Coal Rate Cases. The Federal court reversed this court partially upon the very proposition now under consideration. Our holding was that "out of pocket costs" in effect constituted the real and actual cost of transportation of the particular commodity in fixing a commodity rate, inasmuch as the overhead charges would continue regardless of any or all business done. The Federal Supreme Court, however, has announced the rule applicable to a commodity (and necessarily applicable as well to the total earnings of a branch line), that in calculating the cost of carriage there must be a proper allocation or apportionment of all overhead charge made and added to the out of pocket costs. The portion of such general overhead charge to this branch line is in excess of $20,000 per year, or about the amount of the local branch line operating expense. This may be, and probably is, somewhat excessive, as ordinarily the ratio of operating "out of pocket" expense to overhead charge is as 60 to 40. Figured on this basis the total expense apportionable to this branch line, exclusive of taxes, will reach between $37,000 and $38,000 per year. When taxes are added in the sum of $14,000 per annum, the total expense exceeds by approximately $2,000 the total revenues of the branch. And these figures are the result of a three-year test, during all of which time mixed passenger and freight service only was given. The testimony is that the addition of daily passenger service, as ordered installed by the Commission, will increase the yearly operating expense $14,000. This would increase the actual deficit or expenses over receipts to about $16,000 per annum. These are our deductions. The railroad's figures are that the deficit will be much greater, approximately $40,000 annually. It is apparent that, if the train service

ordered be installed, it will be at an actual outlay in expense over receipts of at least $1,000 a month. There can be no escape from this fact, any more than there can be any from the further conclusion that the people, the patrons of the road elsewhere, must make good this needless deficit if the order is enforced. And the carrier's property right to a reasonable rate of return on its money invested has been wholly omitted from the foregoing calculations. It has been held that, in prescribing the carrier's duties to the public, a matter that the public may to an extent control, the public may compel a daily passenger service to be rendered wholly independent of expense to the company. This requirement is held valid on the basis of it being a requirement concerning the public service, and a mere incident to the railroad business as a whole. However, the statute in question contains a proviso in effect excusing the company from operating a separate daily passenger and freight service when it "shall make it appear to the Board that the business *on any link of its road will not justify its operating both the passenger and freight train herein provided for.*" The statute has reference to a portion, *i. e.,* branch lines, and not the entire railroad system. Whether any particular part of the main line of the system may be segregated and come within the statute is unnecessary to determine. It is certain that the statute has particular reference to branch line service. The portion of this road to be taken in this case for the purpose of placing total earnings against total cost of earnings, to determine whether the traffic will or "will not justify its operating both passenger and freight" service, must be this branch line only. In other words, the statute speaks of the business on branch lines, and hence as to this case contemplates that this branch as the one in question shall be considered separate and independent from the receipts and disbursements necessary elsewhere on the system. When the receipts will not "justify its operating both the passenger and the freight train" daily, mixed trains may be run. The receipts must justify, in a business way, the disbursements occasioned by a daily service. It was but another way of stating that the receipts must be sufficient or nearly so to bear the expense of a daily service. Necessarily some reasonable latitude for judgment and discretion on the part of the Board must be allowed. And such is allowed by the language used. The measure is the "business" done on the particular line. The railroad cannot, as

a matter of strict legal right, refuse to install daily passenger service on the sole ground that to do so would run the total expense above the total income from the branch, as the element of public service which the road is chartered to perform enters into consideration. But in the absence of some strong reason to the contrary, proof that the necessary expense is in excess of total receipts should control the situation, and authorize the conclusion being drawn that the business will not justify such daily service. On proof of these facts the company prima facie justified its failure to install a separate daily passenger service or exonerate itself from so doing.

Of course, this court, like the Board of Railroad Commissioners, has the right to take judicial notice of and consider with the evidence many outside matters throwing light upon the situation. In so doing it is to be observed that, shortly after this branch was built to Ambrose, a rival and competing branch of the Great Northern Railroad was built from Crosby to Berthold. This Flaxton-Ambrose branch parallels the international boundary, running east and west from 3 to 10 miles south of it. For about four fifths of its entire length, or from Crosby down, it is closely paralleled on the south by the Great Northern Berthold branch line. The only territory left solely tributary to this Soo line is that portion between Crosby and Ambrose, and not exceeding 9 miles. A daily passenger service from Crosby to Minot and return via Berthold has been maintained, affording all residents in this territory very convenient passenger service on the Great Northern, the only way to meet which by the Soo would necessitate installing a similar return service from Ambrose to Minot and return. The receipts from this branch show that such competition could but result in added useless expense under conditions as they were when this trial was had. The long and short of the whole proposition is that in a territory capable of sustaining but one line of railroad two have been built, and one or both must suffer the consequences of competition for territory. The reason for the deficit then on this branch is as self-evident as is the fact that the branch will sustain or justify but a mixed freight and passenger service. And the fact, too, that the public as a result of such competitive service is having its wants supplied by the Berthold branch is also inconsistent with any claim of justification that might otherwise be urged for a daily Soo passenger service. This does not apply to Ambrose or the territory

immediately tributary thereto. But it would be unjust to say that an unprofitable passenger service over 50 miles of branch line railroad should be compelled merely to suit the convenience of a town of 500 people and surrounding community, at the most not exceeding in the aggregate 1,000 people, while all other towns on the line are otherwise adequately served, and then, too, when the particular town complaining has the benefits already of a mixed passenger and freight service. To enforce the order made would be to compel an additional expenditure of $14,000 per annum over receipts, where the traffic now will not return the expense it causes, all to suit the convenience of a single small community. Such an order is not "justified," to use the statutory term.

It is easy to understand how the opposite conclusion was reached by the Board of Railway Commissioners and the district court. It is explained by the fifth finding of fact, wherein the court found that the entire mileage of this railroad company in this state is 1,110 miles, producing annual earnings of $4,000,000, and that "there is no evidence that the total mileage of the company in the state is operated at a loss as a whole, or that the earnings of that portion of the mileage of the company within this state are not sufficient to pay a reasonable income upon the sum of money invested in the property and rolling stock of the company within the state." The only purpose of such finding was to allow the court to reason along lines parallel with those heretofore followed by this court in the Lignite Coal Rate Cases, but as this reasoning was recently condemned by the Federal Supreme Court when applied to a commodity or a classification, it must be equally untenable when used as a basis for determining whether or not the income of a branch line is to be treated with reference to the earnings of the whole system within the state. The Federal Supreme Court negatives any such conclusion, and by analogous reasoning we must determine the question as one of receipts and expenditures of the branch line alone. To quote from the recent Federal decision, "The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return, as to the sufficiency of which in the aggregate it is not entitled to complain." In the West Virginia rate case,

Norfolk & W. R. Co. v. Conley, 236 U. S. 605, 59 L. ed. —, P. U. R. 1915C, —, 35 Sup. Ct. Rep. 437, decided at the same time as the North Dakota Lignite Coal Rate Cases, Northern P. R. Co. v. North Dakota, 236 U. S. 585, 59 L. ed.—, P. U. R. 1915C, —, 35 Sup. Ct. Rep. 429, the same principle was enforced as to different classes of traffic and freight. By analogy the precedent applies. This branch should not be compelled to operate in a particular manner at a great increase of loss over present cost of operation, because forsooth the railroad can afford to suffer this loss by recouping itself from increased rates of revenue obtained elsewhere, or on its other lines within the state. Nor is such the intent of the statute, as has been observed, it providing that the character of the branch service to be given shall be determined from the proceeds of that branch line, and not from the proceeds of all of the system within the state.

Judicial notice is taken of the fact that this branch has been extended into Montana, and present conditions may warrant a daily passenger service. Questions of interstate commerce may now arise. Suitable allowance will be made for possible changed conditions in any judgment and order to be entered herein. The judgment appealed from is ordered vacated, and the District Court will direct the Board of Railway Commissioners of this state to vacate its order of June 24, 1911, as an order erroneously made, and also direct that said Board may either dismiss these proceedings, or may enter such further order, after full hearing afforded the railway company, as present conditions may in its judgment require and the law permit in the matter herein litigated.

CHRISTIANSON, J., did not participate; Burr, District Judge, sitting in his stead.

BRUCE, J. (dissenting). I am compelled to dissent from the opinion of the majority. The province of this court, as I understand it, is to construe the law, and not to administer it, nor to legislate. This court has no right to ignore the plain and unequivocal language of a valid legislative enactment.

The legislature of North Dakota has ordered (as it had a right to do, and with the wisdom of the enactment we are not concerned) that

daily passenger trains shall be run on the branch as well as on the main lines of the railroads within the state, "provided, however, that if any railroad corporation shall make it appear *to the Board of Railroad Commissioners* of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for, *and said Board shall so* order, such company may operate one mixed train on such line each way on every business day in the year *for such time as said Board may* direct." Laws of 1907, chap. 200, Comp. Laws 1913, §§ 4789–4795. The statute expressly provides that such train shall be run and that the running of daily passenger trains shall be the uniform *public policy* of the state unless the *Board of Railroad Commissioners* (which is an administrative agency intrusted with the general supervision of railroad matters in North Dakota) shall order otherwise. But the majority of this court holds that *it,* and not the *Board of Railroad Commissioners,* may issue such order or grant such excuse. The statute expressly provides that such general policy of daily passenger trains shall prevail unless the railroad corporation "shall make it appear *to the Board of Railroad Commissioners* of this state that the business on any line of its road will not justify its operating both the passenger and freight train herein provided for." The majority, however, holds that if a railroad company makes it appear, not to the *Board of Railroad Commissioners,* but to the *district court, upon a trial de novo and upon evidence totally different from that produced before the commissioners,* that such district court must grant the excuse. It holds in short that, where the legislature says that a matter shall be made *to appear to the Board of Railroad Commissioners,* it means that it shall be made to appear to the *district court* upon a trial *de novo* and upon totally different evidence.

Not only this, but it holds that in case the district court happens to be of the same opinion as the Board of Railroad Commissioners, an appeal even can be taken from its decision, and that if it shall be made to *appear to the supreme court* that such excuse from the operation of daily passenger trains should be granted, the supreme court may grant the same. It holds in short that when the legislature provides that a fact or condition must be made to appear *to the Board of Railroad Commissioners,* it really means that this fact or condition must be made

to appear to the *supreme court.* It would be hard, indeed, to find any other case where a clear legislative enactment has been so distorted and perverted.

The only excuse for the holding of the majority is that an act, which was passed in 1897, and ten years before the enactment of the statute now under consideration, provided for an appeal from orders of the Board of Railroad Commissioners issued under *"the act."* The majority, however, absolutely ignores the fact that this prior act of 1897 nowhere made any provision for the running of passenger trains. It related almost entirely to the regulation of railroad rates and to the orders of the Board of Railroad Commissioners in relation thereto. It made it the duty, it is true, of the Railroad Commissioners to see that the railroads obeyed the laws of the state. It nowhere, however, provided that either the railroads or the Board of Railroad Commissioners could overrule the positive mandates of a future act, nor can it be contended that when it provided for an appeal from orders *regulating rates* it tied the hands of subsequent legislatures, and prevented them from establishing a public policy of *daily passenger trains,* and vesting the responsibility of its carrying out in the discretion of the Board of Railroad Commissioners.

The provision of the act of 1897 (chapter 115) which relates to appeals, is expressly limited in its application. It (§ 32) provides that "any railroad, railroad corporation, or common carrier, subject to the provisions of this act, or any other person interested in the order made by the Commissioner of Railroads, may appeal to the district court of the proper county in the judicial district of this state from which the complaint arose, and which is the subject and basis of the order made by the Commissioners of Railroads *regulating or fixing its tariffs or rates, fares, charges, or classification, or by any other order made by said Commissioners under the provisions of this act."* This limited clause, and in a statute which says nothing about the running of passenger trains and which is interested solely in tariff classifications and rates, and in the general details of railroad operation in relation thereto, is construed by the majority opinion to apply to a statute which is passed ten years later, which provides for a general policy of passenger service, and which provides that the only person or body which can grant an excuse from an observance of such policy is the Board of Railroad

Commissioners. See Robinson v. Sunderland [1899] 1 Q. B. 751, 68 L. J. Q. B. N. S. 330, 80 L. T. N. S. 262, 63 J. P. 341, 19 Cox, C. C. 245, 15 Times L. R. 195.

When the discretion of granting such an excuse is, by chapter 200 of the Laws of 1907, Comp. Laws 1913, §§ 4789–4795, vested exclusively in the Board of Railroad Commissioners, and then only in case certain facts are *made to appear to them,* can it be said that it was the intention of the legislature that new evidence should be introduced in the district court, and that that court should be vested with the power to hold that that *was* made *to appear* to the Board of Commissioners, which *did not in fact appear to them,* and that in case of a holding of that court which was adverse to the railroad company an appeal could again be taken to this tribunal and that we could say the same thing? Is it not clear that the general policy of the state, as announced by chapter 200 of the Laws of 1907, Comp. Laws 1913, §§ 4789–4795, was a policy of daily passenger service, unless the Board of Railroad Commissioners (which is an administrative branch of the government and which is intrusted with the duty of subserving the interests of all parties concerned) should be satisfied that the business of the branch line did not justify the expense, and that in that event an excuse should be granted *for a limited time? Does this court, we may now ask, assume the power to fix the limits of that time?* Is it not also clear that the writer and subscribers to the majority opinion have confused the rights of the railway company which arise under statutes which regulate rates with those which arise under statutes which merely relate to the method of the operation of its lines? Are they not influenced in their decision by a feeling that the operation of a passenger train on the line in question would be an unprofitable venture, and that the railway company should by some means be protected against loss? Do they not absolutely ignore the fact that the railway company has its remedies, and that, even if it had not, they have no right to themselves usurp legislative functions? "There is," says the Supreme Court of the United States in Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330, "a difference between the exertion of the legislative power to establish rates in such a manner as to confiscate the property of a public service corporation by fixing them below a remunerative standard and one compelling the corporation to render a

service which it is essentially its duty to perform; and an order directing a railroad company to run a regular passenger train over its line, instead of a mixed passenger and freight train, is not, even if such train is run at a loss, a deprivation of property without due process of law, or a taking of private property for public use without compensation; nor is such an order an unreasonable exercise of governmental control."

The reason for this rule is that the charter of every railroad corporation must be deemed to have been granted upon the theory of public service, and that the road will really serve the public. On no other theory, indeed, can the right of eminent domain, which is universally conceded to railroad companies, be justified. It lies also in the fact that the railroad corporation has a remedy against confiscation in the right and power to charge rates that will compensate it and guarantee to it a reasonable profit after meeting all of the requirements of the state in regard to service. Having this power to insist upon an adequate compensation, and to demand rates which will be commensurate to the duties imposed, it cannot complain if the public, for reasons of basic convenience or of public safety, demands passenger, rather than mixed, trains.

Independently of statute and under its charter, it is the duty of the railroad company to carry passengers, as well as freight. Having this duty, and even in the absence of a statute, it is its duty to furnish reasonable conveniences and a reasonably safe method of transportation for such passengers. "It cannot be said that the carrier of passengers in a car attached to a freight train is a suitable and proper operation of a railroad, as far as the carriage of passengers is concerned. The transportation of passengers on a freight train, or on a mixed train, is subordinate to the transportation of freight, a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train." People ex rel. Cantrel v. St. Louis, A. & T. H. R. Co. 176 Ill. 512, 35 L.R.A. 656, 52 N. E. 292.

This must be universally conceded. In fact it needs no evidence to

show that from the standpoint of public safety, to say nothing of speed or convenience, there is no parallel between a freight or mixed train and a strictly passenger train. Is not this the clear policy which is announced by the legislature? It is a self-evident fact that the interests of the railway companies and of the public are one. We have adopted the theory of quasi public corporations. We have given to the railway companies extraordinary rights, such as eminent domain. They are also essentially businesses which are "clothed with a public interest," which are to a greater or lesser extent monopolies, and which are, therefore, subject, even under the common law, to legislative control. Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

On the other hand, the constitutional provisions which forbid a deprivation of property without due process of law and the general spirit of fair play in the community, as well as the economic fact that no man or corporation can, for a long period of time, be induced or compelled to operate at a loss, have given rise to the rule that they can in all cases insist upon a fair return for the capital which is reasonably invested and on the reasonably economical administration of their property, and that this right cannot be taken from them by the legislature. This rule, of course, implies that, though the public may impose duties upon the railway company, and may insist that its needs be reasonably served, yet that when these requirements impose an additional cost upon the corporation, it may reimburse itself in the form of added rates, so that the total result will be a reasonable profit on its enterprise. On this theory and as a last analysis, the public themselves pay for insisting upon added requirements or upon an obedience to the duties imposed in the first place by the charter of the company; for it is perfectly clear that every new expense which is imposed upon the railroad company, whether in the form of adequate service or in the form of taxes, is ultimately paid by the traveling and freight consuming public, as such expenses only tend to elevate the point which divides loss and profit, and to raise the point where a reasonable profit is exceeded and the public may insist upon a reduction of rates. Northern P. R. Co. v. Richland County, 28 N. D. 172, L.R.A. 1915A, 129, 148 N. W. 545. The Board of Railroad Commissioners, therefore, are intrusted with the duties of subserving the interests of both the railroad companies and of the public. Among those duties (and imposed by chapter 200 of the

Laws of 1907, Comp. Laws 1913, §§ 4789–4795) is the duty to determine whether the business of a branch line really justifies the imposing upon the railway company, as well as upon the public, the increased cost of passenger service, or rather whether or not the loss is so apparent that they should excuse the railway company *for a limited period of time* from complying with the provisions of the general law, which require the running of such trains and the incurring of such expense. This is purely an administrative function, and is clearly made so by the act of 1907, and there is no justification nor excuse for attempting to limit that act by claiming that there is an appeal from the discretion of such Commission, which appeal is not provided for in the act in question, and which is sought to be based on the provisions of a statute which was passed ten years before and which has no connection whatever with the statute under consideration.

The plaintiff railway company is, as a matter of fact, entitled to but little consideration in this particular controversy, though of course, as the rule which is announced by the decision is far reaching, it and the general public are entitled to the fullest consideration of the questions involved. It at no time has complied with the provisions of the statute, and much of the confusion which is apparent in the record, and in the opinion of the majority, I believe is due to this fact. It has delayed for many years a decision in a matter which long ago should have been settled. The act of 1907 provides for a general policy of passenger service. It provides that passenger trains shall be run unless an excuse is granted, and then that that excuse shall only be "for such time as said Board may direct." It presupposes the institution of that service in the first instance. I do not say that the railway company should necessarily have immediately instituted the service after the law became operative and applicable to it, but I do say that, if it did not do so, it *should have immediately applied to the Board of Railroad Commissioners for the excuse.* Instead of doing this, the railway company, however, has never attempted to comply with the statute, and it made no application to the Board of Railroad Commissioners to be excused from such compliance until the road had been in operation for some years and until the Board of Railroad Commissioners had been compelled to issue an order requiring it to comply with the provisions of the statute. It now seeks to avoid the provisions of the statute which vests the exclusive discretion

as to the granting of such permission or excuse in the Board of Railroad Commissioners by appealing from the order which requires it to obey the law, and which necessarily must be valid unless, in the first instance, it had obtained such excuse. It may be that such order is appealable, but on such appeal it can only be shown that the railway company was not actually within the state and subject to the jurisdiction of the Board, or that, as a matter of fact, the passenger train was in operation, or that the Board of Railroad Commissioners had, for some other reason, acted outside of its jurisdiction.

The railway company cannot, by appealing from such order, accomplish the same results as if it had appealed, and an appeal had been allowed by the statute, from the refusal of the Commissioners to grant the excuse. It, it is true, tried the two matters together, and the record is greatly confused, but the fundamental fact still remains that the only defense to the order was the alleged fact that the Board of Railroad Commissioners did not grant the excuse and should have done so. But this decision was not reviewable in the district court, and is not reviewable here.

I fully agree with the conclusion of the majority that it was the intention of the legislature that it was the business of the branch line, and not of the railway company as a whole within the state, that should justify the operation of the passenger train. In other words, that it was this criterion that should be adopted by the Board of Railroad Commissioners. The matter, however, with this general rule or criterion as a guide, was left to their discretion. I should also add that there is serious doubt in my mind as to whether the evidence offered by the railway company was in any way competent and controlling. When I say that, in my opinion, it was the business of the branch line that should justify the incurring of the expense of the daily passenger service, I do not mean that in every instance a branch line should show a profit on the basis of its mileage, for in many instances a branch line is but a feeder, and though but a few miles in length may be the origin of hundreds of miles of long distance freight or passenger transportation, and become in this way the source of a large revenue, which is entirely disproportionate to its length. The proof of the railway company was defective in this respect. Instead of showing what the branch line really furnished in the way of business, it apportioned *its receipts*

to the branch line on the basis of the mileage of that line. If this theory be adopted, I believe I am safe in saying that there is hardly a paying branch line in North Dakota. It must, however, be clear to all that a branch line, though short in its mileage, may open up a pocket of grain or of coal, or other freight or passenger traffic. That grain or coal is carried for a few miles over the branch line and then is carried for many hundreds of miles over the main line for which service the company is compensated. A branch line, in short, may be a feeder and the basis of a large revenue, not because of its mileage, but because it furnishes the material for hundreds and even thousands of miles of through transportation. There is hardly a carload of wheat, for instance, that stops at the end of the branch line and does not go on to Duluth or to Minneapolis, or even to Chicago. In any view of the case the Railroad Commissioners can hardly be said to have abused their discretion when they failed to grant the excuse upon the proof that was furnished. It can hardly be said that it *must* have satisfactorily appeared to them that the branch line was not a paying line. I am of the opinion that the judgment of the district court should be affirmed.

BURR, D. J. (dissenting). I reach the same conclusion as Justice Bruce. The issue involved is this: Has the railway company the right of appeal from the action of the Board of Railroad Commissioners in refusing permission to be relieved from the observance of the provisions of § 4789 of the Compiled Laws of 1913? The Board of Railroad Commissioners is a part of the executive department of this government; free from the control of the judiciary, unless such control is given by the Constitution and the law. It is true the powers and duties of the Board "shall be as prescribed by law" (Const. § 83); but this does not presuppose appeal to the courts. The right of appeal must be clearly defined,—there is no presumption in its favor,—and unless jurisdiction to revise these acts is given to the courts, it does not exist. As Justice Bruce has pointed out, the section relied on as granting appeals from orders of the Board is not applicable. In addition to the fact that the matter involved here was not in the contemplation of the legislature when § 4736 was enacted, there is this feature,—the evidence of the action of the Board of Railroad Commissioners is not an order in that sense. The fact that an order is in the negative is not the question,—

there is no order here within the meaning contemplated, simply a refusal to grant permission. It is immaterial what it may be called. The Board is not requiring the railway company to do or not to do a certain thing,—the law requires the company to run the passenger trains. It is the duty of the company to do so. The legislature recognized that this may entail expense and loss which could only be compensated by an increase in rates, and made provision whereby one part of the executive department may waive compliance with this section, provided the railway company "makes it appear to the Board" that the business does not justify this expenditure *and the said Board shall so order.* There is no analogy between the provisions of this section and the control of rates. Primarily the carrier controls the rates. It is its road and its business. Only to prevent injustice does the state interfere. The so-called "Lignite Cases," in the United States Supreme Court, show this. But the requirement to run trains is an entirely different matter. It is conceded the state has the right, from the very first, to insist on this action, and has placed with the administrative department the power of waiving compliance. The duties prescribed and orders made pursuant to the provisions of § 4736 have no relation to this matter. This section is part of chap. 115 of the Session Laws of 1897, and is entitled, "An Act to Regulate the Transportation of Passengers and Property by Common Carriers; . . . to Provide for the Control thereof, in the Matter of Rates to be Charged for Such Transportation and the Manner thereof, to Define the Powers and Duties of the Commissioners of Railroads." The right to appeal, as given by the provisions of this chapter, is the right to appeal from any order "regulating or fixing tariffs of rates, fares, charges, or classifications, or from any other order made by said Commissioners *under the provisions of this act.*" Section 4789 is part of chapter 200 of the Session Laws of 1907, entitled: "An Act to Regulate the Operation of Passenger and Freight Trains of Railway Lines in This State." This act in form is not an amendment to chapter 115 of the Session Laws of 1897, nor does it refer to such a chapter or to the act therein stated. It is a separate and distinct act, and so far as the first section is concerned (§ 4789 of the Compiled Laws) it is an entirely different matter. The last paragraph of this new act of 1907 says: "Nothing in this act contained shall in any manner be construed as repealing or in any manner altering any other act, or part of act, hereto-

fore adopted by the legislature of this state, but the remedies herein provided shall be cumulative to all other remedies now existing." It is clear from this § 7 that chapter 200 is intended to be additional to chapter 115 of the Session Laws of 1907, Comp. Laws 1913, § 8729, and any control given therein, or declaration made, is additional to chapter 115 of the Session Laws of 1897. Therefore, the provisions of chapter 115 of 1897 Laws, with reference to appeals from the orders of the Commissioners, should not be extended to chapter 200 of Session Laws of 1907, Comp. Laws 1913, §§ 4789–4795, unless the nature of the subject-matter treated is so connected with chapter 115 of the Session Laws of 1907, Comp. Laws 1913, § 8729, as to be construed an amendment. The judicial does not control the other departments of the government, unless the power is given explicitly,—not by implication.

Then again the expression "made to appear to the Board of Railroad Commissioners" is broader than judicial discretion—it is analogous to personal satisfaction. The Board alone can say whether it is *made to appear* to the Board. The Legislature desired the opinion and judgment of the Board on the question whether it would be better in certain cases to permit a waiver of what the state has a right to insist on, or have the company raise its rates. It is not a question of arbitrary power, although this is always involved, even in the decision of cases. The number of times the question may be reviewed does tend to justice; but the final determination must be somewhere. The legislature has seen fit to confide to the Board the power of saying whether the state will waive its right to insist on running of daily passenger trains. It is a matter of grace on the part of the state, not a matter of right to which the road is entitled when it brings itself within the limit. The railway may present a strong showing why it should be permitted to substitute a mixed train, and I believe it has, but the Board may, in its judgment, think it better to require this service to the public even though it merely suits the convenience of a town of 500 inhabitants. This is a matter which appeals to the legislature, and it is the judgment of the Board the legislature desires. It must be made to appear to the Board, and not to the courts. It may be asked, What is to be done in case the Board acts arbitrarily? The answer is found in Worman v. Hagan, 78 Md. 152, 21 L.R.A. 720, 27 Atl. 616, where the court says: "It would not be becoming in this court to suppose that such a contingency would

ever happen. The courtesy due to the executive department forbids us to entertain such conjecture. But if, unhappily, in future times, it ever should occur, assuredly a sufficient remedy will be found. The resources of a free government are ample, and will always be found adequate to punish and redress offenses against its sovereignty." But the company is not injured in any way. The law does not compel the road to do business at a loss, and the facts and figures set forth appear to be beside the question, except so far as they appeal to the judgment of the Board in determining whether it be better to substitute mixed trains for a time and thus save expense, or have a readjustment of schedules with all of the attendant trouble and delay. This matter can be adjusted readily. Primarily, the carrier fixes its own rates. Laws fixing too low rates are frequently declared confiscatory, and therefore this element of hardship and injustice is not involved. As Justice Bruce has pointed out, the state, as an incident to its sovereignty, has a right to require the service, and the company must accede. The company has the right to fix remunerative rates, however, and if the state, in insisting on its rights of adequate service to the public, requires action which increases expense, the added rate will not be controlled unless it is unreasonable. The legislature has seen fit to place this power with the Board, and, as after noted, did not contemplate appeal therefrom.

There are special features involved here. The railway company is asking a review of the judgment of the Board of Railroad Commissioners, but the review is based on matters not before the Board, if the contention of appellant be correct. How can it be said that the railroad "makes it to appear to the Board" when the Board denies the request on the showing before it? The courts may have new evidence regarding rates,—this is a matter where the state cannot interfere unless the railroad is guilty of injustice and the interference is aimed to secure justice. In this situation cited the Board is the first agency, and appeal to the courts is given; but the question at issue in that case is one where the company has the primary right to fix its own rates. In the case at bar we are concerned with a matter where the state has the absolute right to require the service. The company claims conditions have so changed, through the extension of the road, etc., that now the Board should relieve it. This contention comes with very poor grace. The

law was passed in 1907. Concededly, it has never been complied with. The state has a right to require the service, and it is the duty of the company to obey. The company, without any attempt to comply and after years of violation, at a time when action was being taken to compel its compliance, asked to be excused. The Board of Railroad Commissioners, in its wisdom, denied the request, and now, having extended its line and changed conditions, the appellant says the judgment of the Board should be overruled and permission given because the conditions existing at the time the Board acted have changed.

In Robinson v. Sunderland [1899] 1 Q. B. 751, the question before the court involved the judgment or decision of a local authority in regard to matters where the statute authorized such local authority to do certain things if it appeared to such authority necessary, and in that case, Channell, J., says: "The words, 'appear to such authority,' are obviously put in for the purpose of making the local authority the judges on the question. . . . It depends upon the opinion of the local authority, not upon the fact of sufficiency or insufficiency. It cannot possibly be a matter for the justices to decide; they can only inquire in this respect whether [or not] in the opinion of the local authority, there is a sufficient. . . . They may also inquire, I think, whether the local authority have taken the proper procedure—whether they have done everything which is made by the statute a condition precedent to the right to enter."

And in the same case, Lawrence, J., says: "The decision of that question rests with the local authority. When they have arrived at the conclusion that the premises are not in a proper condition, the justices have no power to interfere with it." It seems to me clear, therefore, that where the personal judgment of the Commission is involved, there can be no appeal therefrom, and this must have been the legislative intention.

The matter is far reaching. If the district courts and the supreme court may review the action of the Board in denying or granting requests to substitute mixed trains for passenger trains for such seasons as may be desired, then the statute involved is rendered practically nugatory. The long process to be used before final determination becomes, in effect, a bar. Of course, if this be the method prescribed by law, then the courts must give effect to it; but such a construction should not

be placed on this section unless it clearly appears to be the only proper one. The nature of the acts suggests this. The law contemplates merely a temporary suspension, speedily granted and speedily rescinded as the season of the year may justify, and the suspension must be for a definite time. From time to time the legislature prescribes the duties and powers of the Board, and states whether appeal to the courts lies. In enacting § 4789 the legislature could have readily provided for appeal. The fact that no appeal is provided for in this act is presumptive that none was intended, particularly when we view the nature and scope of the power vested in the Board. Had not power to relieve from the duties been vested in the Board, the company would be compelled to operate the trains in question, and would have no recourse to the courts in this matter. Why there should be appeal, in the absence of express provision, when the state says we will give the Board power to waive our rights when certain conditions are made to appear to the Board, does not appear clear, especially when we view the temporary nature of the permission to be granted. The construction given by the majority opinion will greatly cripple the effectiveness of the Board, and as the conditions which would guide the Board in granting or refusing permission are changeable and variable in their nature, by the time the courts have finally determined the judicial discretion of the Board in such requests, the judgment of the Board might vary the action first contemplated, and thus by appeals to the courts such delay may be occasioned that the very conditions justifying the Board in refusing permission may have so changed by the time the courts are through taking testimony that the Board itself, on a new application, may come to a different conclusion. The law recognizes the element of changing conditions, and places finally with the Board the power of adjusting the requirements to the conditions, in order that the public may be served and the company be uninjured. It may be claimed that this is one of the powers of the Board, and the powers are subject to review by virtue of the provisions of § 4736. Section 4789 is not a part of the article included in the language of § 4736, and the language of § 4736 should not be construed so as to control the acts of the administration, unless the legislature has explicitly shown such construction to be intended, and I respectfully suggest that this has not been done. I therefore believe the judgment of the district court should be affirmed.

L. T. GUILD v. A. Y. MORE.

(152 N. W. 275.)

Statement of case — preparation — settlement of — extension of time — trial court — right to grant.

1. Under the facts of this case, briefly mentioned in the opinion, the trial court had the legal right to extend the time within which a statement of the case might be settled, and the facts justify the extension.

Supreme Court — brief in — service of — appeal — motion to dismiss.

2. Appellant has been slightly negligent in serving his brief in this court, but motion to dismiss appeal on that ground is denied on condition he serve and file such brief by May 25, 1915, and argue case in this court at last June, 1915, assignment.

Opinion filed April 24, 1915.

Motion to dismiss appeal for nonprosecution; to strike out statement of case, and to advance upon calendar.

First parts denied, last allowed.

Watson & Young and *E. T. Conmy,* of Fargo, North Dakota, for motion.

Fowler & Greene and *Pollock & Pollock,* of Fargo, North Dakota, *contra.*

BURKE, J. Plaintiff and respondent has filed three motions: (1) To dismiss the appeal herein for nonprosecution; (2) to strike out the statement and assignments of error; and (3) to advance said appeal upon the calendar of this court. The action was begun December 1, 1913. Trial was begun April 9, 1914, and concluded May 26, 1914, resulting in verdict for plaintiff in the sum of $11,127.55. It appears that a transcript of the evidence was ordered from the official stenographer, who, after some unavoidable delay, furnished the same, complete, October 24, 1914, although he had furnished some 603 pages thereof on September 20, and 408 pages on October 10, the total transcript containing 1,250 pages. An appeal to the supreme court was perfected June 26, 1914. On November 30, 1914, defendant served his alleged assignment of error containing 501 assignments.

At the close of the trial, defendant applied for and obtained from the court a stay of all proceedings excepting the entry of judgment which expired June 28, 1914. On October 20, 1914, plaintiff served written notice on respondent under rule 26 of this court, requiring the record to be sent up within twenty days, or that the appeal would be deemed abandoned. Before the expiration of such time, defendant applied to the trial court for an order extending the time within which the statement of the case might be settled, and the same was granted under date of October 31, 1914, the period being extended thirty days. This was upon affidavits showing all steps taken up to that time, among which it appears that the official stenographer had been paid the sum of $900 for the transcript. On November 23, 1914, plaintiff applied to this court for an order to dismiss said appeal because of the failure of the defendant to send up the record and for nonprosecution, which, after full hearing on the merits, was denied by this court. The present motions present the same reasons urged at that time and the additional grounds that delay has existed since such order, all of which is set forth in affidavits accompanying the papers. We do not intend to set out either the affidavits or a further *résumé* of the facts. What we have already stated is to show the importance of the litigation and the volume of the testimony offered. We have reached the conclusion from an examination of the record before us that the trial court had the right, under the law, to grant such extension of time for the settling of a statement of the case, and that there is no merit in the contention of respondent that such application for extension of time should have been made to this court. We are also satisfied that there were sufficient grounds for the granting of the extension upon the merits. 2. Regarding the propositions advanced by the respondent that appellant has been negligent in the preparation and service of his brief, we find more ground for argument. The entire transcript was in the hands of appellant in October, 1914, some six months ago, and it seems that he should have his brief prepared by this time. Respondent, of course, cannot conveniently file his brief until he has received appellant's.

However, we do not think it just that an appeal of this importance should be dismissed upon this ground alone, and we will deny said motion upon the condition that said brief is prepared, served, and

filed in this court by the 25th of May, 1915, and upon the further condition that such cause be argued and submitted at the last assignment of cases in June, 1915.

L. H. MILLER, George M. Miller, and A. S. Miller v. J. M. THOMPSON (Sole Appellant) and Devils Lake State Bank, a Corporation.

(152 N. W. 279.)

Opinion filed April 24, 1915.

Appeal from the District Court of Ramsey County, *C. W. Buttz*, J.
Motion interposed by respondents to dismiss the appeal.
Motion denied.
W. M. Anderson, Esq., Devils Lake, North Dakota, for the motion.
Middaugh, Cuthbert, Smythe, & Hunt, Devils Lake, North Dakota, *contra*.

PER CURIAM. Respondents have presented and argued a motion to dismiss this appeal. Two of the grounds specified in the motion were abandoned on argument, but the two remaining grounds are insisted upon. Respondent contends that appellant is precluded from appealing because he procured the order entered upon his own motion and accepted it, and availed of its benefits, and should be estopped from appealing from it, and not be allowed the inconsistent position of accepting its benefits, but appealing from the very order conferring the same.

The answer to this contention is that the defendant appealing has neither received nor accepted benefits. Trial was had as against two defendants, the Devils Lake State Bank, a corporation, and J. M. Thompson, with a verdict returned and judgment rendered thereon

against both. On a motion for new trial the judgment against the bank was set aside, and it was dismissed from the action, but it was ordered "that the said judgment stand against the defendant Thompson," and the motion for new trial as to him be denied. He appeals. He received no benefits from that order, unless it be said that the denial of a motion for new trial confers a benefit.

Respondents also contend that under Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276, failure to appeal from the order denying a new trial leaves that order *res judicata* as to all error that might be urged on an appeal from it. Conceding, without deciding, that appellant may be unable on this appeal to review such error as can be brought into the record only by the statement of the case and a motion for new trial based thereon, still this in no wise affects his right to appeal from the judgment, presenting for review all error appearing upon the judgment roll. Thus, the omission to appeal from the order denying a new trial can at the most affect only the scope of the review on appeal, but does not in any way affect the perfected appeal from the judgment roll. The motion to dismiss is therefore denied.

CHRISTIANSON, J., being disqualified, did not participate in the above matter.

FARMERS' CO-OPERATIVE ELEVATOR COMPANY, a Corporation, v. E. S. MEDHUS.

(152 N. W. 352.)

Action to recover for overpayment of wheat.

Storage tickets — stubs of tickets — both one original instrument — identification — mutilations — evidence.

1. The storage tickets and stub thereof constitute one original instrument. The scale book ticket and stub likewise constitute one original exhibit. Said tickets and stubs, being properly identified and mutilations explained, were properly received in evidence.

Tickets — memoranda — testimony — refreshing memory — agent.

2. The testimony of the agent, after refreshing his memory from the tickets, was properly received under the circumstances of this case.

Exhibits — testimony — jury — case for.

3. The exhibits received, together with the testimony offered, were sufficient to require the submission of the case to the jury.

Appeal from the County Court of Benson County, *Liles,* J.

Affirmed.

Cowan & Adamson and *H. S. Blood,* for appellant.

Books of account are admissible as evidence of transactions therein recorded, but as a general rule mercantile books can be admitted only as affirmative evidence, and are not competent to establish that no transaction was had, for the reason that no entry was made in the books. In other words, they cannot be used to prove a negative. Boor v. Moschell, 55 Hun, 604, 8 N. Y. Supp. 583; Winner v. Bauman, 28 Wis. 563; Kerns v. McKean, 76 Cal. 87, 18 Pac. 122; Riley v. Boehm, 167 Mass. 183, 45 N. E. 84; Mattocks v. Lyman, 18 Vt. 98, 46 Am. Dec. 138.

Torger Sinness, for respondent.

The tickets and the stubs of same were not secondary evidence, but were primary and proper evidence, and sufficient foundation was laid. Kelly v. Cargill Elevator Co. 7 N. D. 343, 75 N. W. 264; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871.

The dilapidated condition of a book is no justification for its exclusion, but is only a matter going to the weight and credibility of the evidence, where there is no fraud. Weigle v. Brautigan, 74 Ill. App. 285; Jones v. Dekay, 3 N. J. L. 956; Lunsford v. Butler, 102 Ala. 403, 15 So. 239.

The fact that an account book contains errors may affect its credibility, but it does not render it inadmissible. Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Webster v. San Pedro Lumber Co. 101 Cal. 326, 35 Pac. 871; Robinson v. Dibble, 17 Fla. 457; Bookout v. Shannon, 59 Miss. 378; Peck v. Pierce, 63 Conn. 310, 28 Atl. 524; Smith v. Smith, 52 L.R.A. 574, notes.

Accounts supported by the oath of the person making most of the entries have been held to be admissible. Union Cent. L. Ins. Co. v.

Smith, 119 Mich. 171, 77 N. W. 706; Ward v. Wheeler, 18 Tex. 249; Kelly v. Cargill Elevator Co. 7 N. D. 343, 75 N. W. 264.

The doctrine permitting the use of books of accounts is largely one of necessity. Such books in mercantile affairs are in many instances the only evidence. Hall v. Chambersburg Woolen Co. 52 L.R.A. 712, note; Bank of Monroe v. Culver, 2 Hill, 534; Kerns v. McKean, 76 Cal. 87, 18 Pac. 122.

Books of entry may be used to prove a negative. Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403; Huebener v. Childs, 180 Mass. 483, 62 N. E. 729; Mattocks v. Lyman, 18 Vt. 98, 46 Am. Dec. 138; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; Livingston v. Tyler, 14 Conn. 493; Peck v. Pierce, 63 Conn. 310, 28 Atl. 524; Lawrence v. Stiles, 16 Ill. App. 489; McLean County Bank v. Mitchell, 88 Ill. 52; Goff v. Stoughton State Bank, 84 Wis. 369, 54 N. W. 732; Doolittle v. Gavagan, 74 Mich. 11, 41 N. W. 846; Ramsey v. Cortland Cattle Co. 6 Mont. 498, 13 Pac. 247; Oliver v. Phelps, 21 N. J. L. 597; People v. Kemp, 76 Mich. 410, 43 N. W. 439; Woods v. Hamilton, 39 Kan. 69, 17 Pac. 335; Woodward v. Chicago, M. & St. P. R. Co. 75 C. C. A. 591, 145 Fed. 577; Union Bank v. Knapp, 3 Pick. 96, 15 Am. Dec. 182.

The objection to the testimony here raised was not presented at the time of trial, and it cannot be raised for the first time on appeal. Ladd v. Sears, 9 Or. 244.

A witness who has made book entries may testify therefrom, even though he has no independent recollection of the facts. Schettler v. Jones, 20 Wis. 412; Curran v. Witter, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 706; Riggs v. Weise, 24 Wis. 545.

The agent had the right to produce the stubs from which he figures, for the purpose of showing his mistake. Elsworth Coal Co. v. Quade, 28 Mo. App. 421; Winnett v. Detroit United R. Co. Ann Cas. 1914B, 1259, note.

BURKE, J. In the fall of 1909 defendant delivered at plaintiff's elevator several thousand bushels of wheat, receiving therefor storage tickets. Among other such tickets was one dated November 6, 1909, for 873 bushels, net, known in this case as exhibit 32. Plaintiff contends that clerical error occurred at the time of the execution of this

exhibit, and that in truth and fact said ticket was intended to be and should have been for 473 bushels, net. The action was tried in the court below to a jury, and found in favor of the plaintiff for the full amount demanded. The specifications of error necessary to a decision of this case relate to the introduction of certain books and memoranda of the elevator company, and allowing the agent of the elevator company to testify therefrom that such clerical error had in fact occurred.

(1) One Myhre acted as buyer for plaintiff's elevator at the time of the transactions, and was a witness at the trial. He testifies that it was the invariable custom of his elevator to write down in a scale book the gross and net weights of each load of grain received. This scale book consisted of about two hundred slips of paper fastened together in tablet form and perforated in the middle, so that each end was a duplicate of the other and containing blank lines as follows:

Load of .....
From .....
To .....
Weighed .....
Gross ..... Lbs.
Tare ..... Lbs.
Net ..... Lbs.
Net ..... Bus.
Price ..... cts.
Amt. $ .....
Man on—off. Test ——

He testifies that when a load was received, each half of the slip was filled out, and the stub retained in the pad while the detached end was given to the farmer. He further testifies that those slips were preserved for the purpose of checking and auditing, and that none of the slips delivered were ever destroyed; that occasionally one of the slips would become soiled or otherwise rendered useless, and in those cases the entire slip was torn out of the pad and thrown away. He produced at the trial four of those scale books or pads, and identified them as the originals used in his elevator at or about the time of the transactions in dispute, and identified and offered in evidence all of the

stubs showing receipts of grain from the defendant. He also offered in evidence the storage receipts and stubs used during the same time, as well as the checks used in paying defendant for his grain during that period. Upon the back of exhibit 32 aforesaid, we find the following figures:

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 7750
 4210
 7730
 4180
 4990
-------
6) 28,860 (481
           8
         ---
          473
```

Said agent testified that these figures were made by him, and that they represented the net pounds of five storage loads delivered to him November 3–6, 1909, and produced the stubs from the scale book corresponding therewith. He testified that the storage tickets and the scale book stubs tallied in all particulars excepting that exhibit 32 was for 400 bushels more than was shown by the stubs. Said agent testified that he had no independent recollection of the facts, but that he kept the scale book in the regular course of business, and never issued anything but scale tickets in regular form, and that the same were correct. He also testifies that when he had helpers in the elevator, they conformed in all respects to these rules. All of the scale book stubs and storage tickets issued to defendant were offered and received in evidence over objection, and the agent using the same as memoranda testified as aforesaid. The specific objection to the scale book stubs was that they were mutilated, and that the scale tickets had been issued to the farmer and were the original, the stubs being merely secondary evidence. We do not believe there is anything in these objections. The agent testified that the scale ticket was made in duplicate, one delivered to the farmer and one kept. In such case each would be an original. Kelly v. Cargill Elevator Co. 7 N. D. 343, 75 N. W. 264.

Moreover, the duplicate had been issued to defendant, and was presumably in his possession at the time of the trial. Neither is the objection that the book had been mutilated sound, where it is shown that all of the original entries are kept, and that only blanks and spoiled sheets have been detached.

Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Weigle v. Brautigam, 74 Ill. App. 285; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855. See also chap. 118, Sess. Laws 1907, now § 909, Comp. Laws 1913. And in Robinson v. Dibble, 17 Fla. 457, it is held that where there are erasures and interlineations, the trial court determines as a matter of discretion whether or not they shall be submitted to the jury, and this discretion will not be reversed excepting for abuse. Peck v. Pierce, 63 Conn. 310, 28 Atl. 524, being a case especially in point, and there is a note in 52 L.R.A. 575, giving a full synopsis of the cases upon this question.

We are satisfied that the exhibits were admissible and should have been received in evidence.

(2) This objection goes to the testimony of the agent. Said agent admitted he had no independent recollection of each of the tickets that went to make up exhibit 32, but claims that he knew that the entries were made according to the facts, and that, therefore, the tickets were a verity, and that no wheat had been received unless shown upon such scale book. This is admissible. Schettler v. Jones, 20 Wis. 412. Vol. 10 M. A. L. 331. We find no errors in the admission of any testimony of this witness.

(3) The remaining assignments of error relate to the refusal of the trial court to direct a verdict in favor of the defendant upon the theory that no competent evidence had been offered by plaintiff, and, therefore, there was nothing for the jury to consider. We have already held in ¶¶ 1 and 2 that such evidence was properly admitted. It was sufficient to carry the case to the jury, and supports the verdict at this time. The judgment of the trial court is in all things affirmed.

Goss, J. (specially concurring). To my mind this case presents a much closer issue than appears from the facts as written in the main opinion. The issue of fact turns on whether a storage ticket issued for 873 bushels was 400 bushels in excess of wheat received. The

stub therefor, the elevator record, was filled in for 473. In the absence of proof of error, the presumption must be that the ticket is correct and the stub is wrong. Both are in evidence. Over two years elapsed after the transaction and before the suit was brought, and about that time elapsed before the purported error was discovered. The buying agent in charge had for a year and half been out of the employ of plaintiff. After his leaving plaintiff's employ it was discovered that his books and accounts were in bad shape. A dividend of 10 per cent was declared as part of the profits of stockholders in plaintiff company for 1909, but before its distribution an outstanding and unpaid wheat ticket for 1,300 bushels, which the elevator records had shown as canceled by payment, was presented. There is testimony that, besides this, he was short some $2,000 in his cash account. All this bears upon the matter in a double way: First, upon the abuse of the discretion of the court in admitting in evidence the various stub books and records of purchases of wheat during October and November, 1909, tending to establish error in the ticket as issued; and, secondly, as bearing upon the credence to be given to such records, if admissible, together with its bearing upon the testimony of the buyer, plaintiff's main witness. It seems that the discretion exercised in admitting records is controling unless abused. Had the court ruled the other way and excluded them upon the foundation laid, including the proof bearing upon custody of such records, its ruling could not have been disturbed on appeal. But having admitted them, the question of weight of said testimony is for the jury.

Defendant claims that the record should not have been received, because offered as negative testimony; that is, to prove the nonreceipt of the 400 bushels, the alleged excess. An examination of cases and text books seems to establish their admissibility. Earlier cases are to the contrary, but the tendency of later authorities is to admit them for what they are worth. Elliott, Ev. § 467; 3 Chamberlayne, Ev. § 1757; 2 Enc. Ev. p. 660. But their admissibility does not turn alone upon that. Upon the back of the wheat ticket in question are found the figures set out in the majority opinion. There is testimony that these figures were upon that exhibit when it was delivered to defendant. The records, if admissible at all, then are receivable as corroboration of this affirmative testimony of the fact of error, and not alone as

mere negative testimony of nondelivery of wheat. For these reasons I concur in the affirmance of the judgment.

W. W. HORTON, Surviving Partner of the Firm of Lord & Horton, v. R. H. EMERSON.

(152 N. W. 529.)

Contractor — special contract — substantial compliance — failing to make — quantum meruit — reasonable value to owner — amount of recovery — negligence — bad faith.

1. Where a contractor has constructed a building under a special contract, but has failed to substantially comply with its terms, preventing a recovery on such contract, he will be permitted to recover on the *quantum meruit* for the reasonable value to the owner not exceeding the contract price of his labor and materials of which such owner has received and is receiving a benefit, provided the contractor did not intentionally or in bad faith neglect or omit to fulfil such contract.

Mechanic's lien — action to foreclose — judgment in — for defendant — quantum meruit — action on — former judgment no bar.

2. A judgment in defendant's favor in a former action based on the contract and for a foreclosure of a mechanic's lien is not *res judicata* in the case at bar, for numerous reasons stated at length in the opinion.

Judgment in former suit — same parties — other action — issues different — not conclusive — tried and determined.

3. A judgment in a former suit between the same parties is not conclusive in a subsequent action involving different issues, where it does not appear that the identical question sought to be concluded was necessarily tried and determined in such prior litigation.

Answer in former suit — admission of amount owing — tender thereof — competent evidence in subsequent suit.

4. An admission contained in defendant's answer in a former suit of the

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Note.—The doctrine that substantial performance of a building contract will support a recovery by the builder seems to be firmly established in the United States, as shown by a full review of the authorities in a note in 24 L.R.A.(N.S.) 327, though there is a conflict as to whether a recovery will be permitted where the performance is less than substantial; and where the performance is substantial some courts allow recovery on the contract while others allow recovery only on *quantum meruit*.

amount owing by him to plaintiff, and a tender of such sum to plaintiff, although afterwards withdrawn, is competent testimony in plaintiff's behalf.

Findings of fact — trial court — evidence.

5. Evidence examined, and *held*, that the findings of fact of the trial court have ample support in the evidence.

Opinion filed April 3, 1915. Rehearing denied May 4, 1915.

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

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

Affirmed.

Cowan & Adamson and *H. S. Blood,* for appellant.

As a general rule there is no implied contract except in the absence of one expressed by the parties. 4 Cyc. 327, and cases cited; Marshall v. Jones, 11 Me. 54, 25 Am. Dec. 260.

Where a contract provides that payment shall be made only upon the certificate of the architect, unless the plaintiff furnishes such certificate or shows that it is wrongfully withheld, no recovery can be had. Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. 185; New Teleph. Co. v. Foley, 28 Ind. App. 418, 63 N. E. 56; Boden v. Maher, 95 Wis. 65, 69 N. W. 980; Coorsen v. Ziehl, 103 Wis. 381, 79 N. W. 562; John Pritzlaff Hardware Co. v. Berghoefer, 103 Wis. 359, 79 N. W. 564; McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. 428.

Where a builder voluntarily fails to substantially comply with his contract, he cannot compel the owner to either accept the building, or to pay for it. Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740; Schindler v. Green, 7 Cal. Unrep. 233, 82 Pac. 631; Elliott v. Caldwell, 43 Minn. 357, 9 L.R.A. 52, 45 N. W. 845; Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573; Smith v. Brady, 17 N. Y. 190, 72 Am. Dec. 442; Anderson v. Pringle, 79 Minn. 433, 82 N. W. 682; Crouch v. Gutmann, 134 N. Y. 45, 31 N. E. 271, 30 Am. St. Rep. 609, see note at p. 616.

Mere occupancy and use of a building erected on lands of the owner does not warrant an interference of acceptance of the work. 6 Cyc. 67, and cases there cited; Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Wildey v. Fractional School Dist. 25 Mich. 419; Bozarth v. Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

Where plaintiff has departed from his contract and has been permitted to recover, the measure has been the contract price less the amount of diminished value to the building. Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 422.

In a prior action, where the dismissal is because of the status of the claim, the judgment there extinguishes plaintiff's right to recover in any subsequent action, so long as the rights of the parties remain unchanged. 24 Am. & Eng. Enc. Law, 806, and cases cited; 23 Cyc. 1194, 1289, and cases cited; Millikan v. Werts, 14 Ind. App. 223, 42 N. E. 820.

E. R. Sinkler, for respondent.

Where an action for the foreclosure of a mechanic's lien fails, the plaintiff may sue upon a *quantum meruit.* Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Marchand v. Perrin, 19 N. D. 794, 124 N. W. 1114.

The measure of such recovery is the contract price less compensation for imperfections of work or materials. In other words, a recovery may be had for the amount of added value to the owner's property. Lighthall v. Colwell, 56 Ill. 108; Fuller v. Rice, 52 Mich. 435, 18 N. W. 204; Mosaic Tile Co. v. Chiera, 133 Mich. 497, 95 N. W. 537; Sheldon v. Leahy, 111 Mich. 29, 69 N. W. 76; Matthews v. Farrell, 140 Ala. 298, 37 So. 325; Higgins Mfg. Co. v. Pearson, 146 Ala. 528, 40 So. 579; Barnwell v. Kempton, 22 Kan. 314; McKnight v. Bertram Heat & Plumbing Co. 65 Kan. 859, 70 Pac. 345; Walsh v. Jenvey, 85 Md. 240, 36 Atl. 817, 38 Atl. 938; Orem v. Keelty, 85 Md. 337, 36 Atl. 1030; Gross v. Creyts, 130 Mich. 672, 90 N. W. 689; Yeats v. Ballentine, 56 Mo. 530; Keith v. Ridge, 146 Mo. 90, 47 S. W. 904; Clapper v. Mendell, 96 Mo. App. 40, 69 S. W. 669; Decker v. School Dist. 101 Mo. App. 115, 74 S. W. 390; Empire Coal & Coke Co. v. Hull Coal & Coke Co. 51 W. Va. 474, 41 S. E. 917; Cope v. Beaumont, 104 C. C. A. 292, 181 Fed. 756; Merritt & Co. v. Layton, — Del. —, 75 Atl. 795; Scholz v. Schneck, 174 Ind. 186, 91 N. E. 730; R. D. Burnett Cigar Co. v. Art Wall Paper Co. 164 Ala. 547, 51 So. 263; Rubin v. Cohen, 129 App. Div. 395, 113 N. Y. Supp. 843; Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Reed v. Phillips, 5 Ill. 39.

The disclosure of a special contract at the trial of an action on a *quantum meruit* will not defeat the action, but will merely limit the

amount of recovery. Henderson v. Mace, 64 Mo. App. 393; Scott v. Congdon, 106 Ind. 268, 6 N. E. 625.

Even though such a contract was not substantially performed, the contractor still has his right of action on *quantum meruit.* If the property derives any benefit from the services done and materials furnished by the contractor, he must pay for their value, not exceeding the contract price. 15 Am. & Eng. Enc. Law, 1903; Katz v. Bedford, 77 Cal. 319, 1 L.R.A. 826, 19 Pac. 523; Blakeslee v. Holt, 42 Conn. 226; Smith v. Scott's Ridge School Dist. 20 Conn. 312; Eldridge v. Rowe, 7 Ill. 92, 43 Am. Dec. 41; Dermott v. Jones, 23 How. 220, 16 L. ed. 442; Rubin v. Cohen, 129 App. Div. 395, 113 N. Y. Supp. 843; Thomas v. Ellis, 4 Ala. 108; Merriweather v. Taylor, 15 Ala. 735; Taylor v. Renn, 79 Ill. 181; Gleason v. Smith, 9 Cush. 484, 57 Am. Dec. 62; Allen v. McNew, 8 Humph. 46; English v. Wilson, 34 Ala. 201; McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470; Major v. McLester, 4 Ind. 591; McClay v. Hedge, 18 Iowa, 66; Morford v. Mastin, 6 T. B. Mon. 610, 17 Am. Dec. 168; Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 269; Freeman v. Aylor, 62 Mo. App. 613; Payne v. Hodge, 71 N. Y. 598; Aikin v. Bloodgood, 12 Ala. 221; 50 Century Dig. § 28; Caffrey v. Omilak Gold & Silver Min. Co. 4 Cal. Unrep. 601, 36 Pac. 388; Schwartzel v. Karnes, 2 Kan. App. 782, 44 Pac. 41; Skillings v. Norris, 50 Me. 72.

A plea of tender is an admission of plaintiff's demand, to the extent of the tender. Birmingham Paint & Roofing Co. v. Crampton, — Ala. —, 39 So. 1020; Uedelhofen v. Mason, 201 Ill. 465, 66 N. E. 364; La Salle County v. Hatheway, 78 Ill. App. 95; Metropolitan Nat. Bank v. Comercial State Bank, 104 Iowa, 682, 74 N. W. 26; Mahan v. Waters, 60 Mo 167; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Murray v. Cunningham, 10 Neb. 167, 4 N. W. 953; Cobbey v. Knapp, 23 Neb. 579, 37 N. W. 491.

The pleading of a party, made and filed in another action, is competent evidence against him. 1 Enc. Ev. 424, 425; Shafter v. Richards, 14 Cal. 125; Purcell v. St. Paul F. & M. Ins. Co. 5 N. D. 109, 64 N. W. 943; Cook v. Barr, 44 N. Y. 156; O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740.

The former judgment between these parties, which is a dismissal of the action, cannot be pleaded as *res judicata* in this action. Bray v.

Booker, 6 N. D. 530, 72 N. W. 933; 24 Am. & Eng. Enc. Law, 775; Arnold v. Grimes, 2 Iowa, 1.

A party seeking to avail himself of a former judgment as conclusive evidence, or as a bar to a subsequent action, must affirmatively show that the question which precludes relief in the second action was determined in the former one. Sanford v. King, 19 S. D. 334, 103 N. W. 28; Erickson v. Russ, 21 N. D. 208, 32 L.R.A.(N.S.) 1072, 129 N. W. 1025; Germania Bldg. & L. Asso. v. Wagner, 61 Cal. 349; Marean v. Stanley, 5 Colo. App. 335, 38 Pac. 395; Bice v. Marquette Opera-House Bldg. Co. 96 Mich. 24, 55 N. W. 384.

A judgment merely denying the lien claimed will not bar an action on the debt. 23 Cyc. 1194, 1311; Geary v. Bangs, 138 Ill. 77, 27 N. E. 462; Selbie v. Graham, 18 S. D. 365, 100 N. W. 755; McPherson v. Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76; Teigen v. Drake, 13 N. D. 502, 101 N. W. 893; Kammann v. Barton, 23 S. D. 442, 122 N. W. 418.

It must appear that the precise question was litigated in the former action. Strother v. Butler, 17 Ala. 733; Hanchey v. Coskrey, 81 Ala. 149, 1 So. 259; Campbell v. Butts, 3 N. Y. 173; Davis v. Tallcot, 12 N. Y. 184; Munro v. Meech, 94 Mich. 596, 54 N. W. 290; Jepson v. International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; 23 Cyc. 1300.

Fisk, Ch. J. Plaintiff, as surviving partner of the firm of Lord & Horton, seeks in this action to recover upon the *quantum meruit* for labor and material furnished to defendant at his request in the erection of a building in the city of Minot, known as the Arcade Building. A jury was expressly waived in the district court, and at the conclusion of the trial findings of fact and conclusions of law favorable to the plaintiff were made, and pursuant thereto plaintiff had judgment for the sum of $1,792.92 and interest, together with the costs. Thereafter defendant moved for a new trial, which motion was denied, and the case is here on appeal, both from the judgment and from such order.

Before noticing the specifications of error, a brief statement of the important facts will be made. On June 3, 1907, Lord & Horton, contractors and builders of Minot, entered into a written contract with the defendant, a resident of said city, whereby such contractors undertook

and agreed for and in consideration of the sum of $16,000 to erect for the defendant in such city, a two-story and basement brick structure according to certain plans and specifications therein referred to. Such contract price was to be paid as follows: $3,000 upon the completion of the foundation for such building, $6,000 when the brick work was completed and the roof on and the window openings closed up, and the final payment of $7,000 within thirty days after the completion of the building and when certificates for the same are issued.

That between June 15, 1907, and January 15, 1908, the said firm of Lord & Horton furnished the necessary labor and material for such building, and caused the same to be erected under the contract aforesaid, and shortly after the completion of such building the defendant went into possession thereof and occupied the same continuously until the trial. That he has made payments on such contract aggregating $13,600.

In March 1908, Lord & Horton commenced an action in the district court of Ward county against the defendant for the purpose of foreclosing a mechanic's lien which they had theretofore filed against said building for the balance alleged to be due them under such written contract. Defendant answered the complaint in such action, and among other things alleged: "Defendant further alleges that heretofore, to wit, and on or about the 4th day of February, 1908, this defendant tendered in lawful money of the United States, to the said Lord & Horton, the sum of seventeen hundred ninety-two and ninety-two hundredth dollars ($1,792.92), that *being the whole sum due and payable under the terms and conditions of said contract, after deducting the items of damage hereinbefore specified, and allowing for all just claims due to said plaintiffs,* which said tender was by said plaintiffs refused, and thereupon this defendant did, on said 4th day of February, 1908, deposit in the Second National Bank of Minot the said sum last above mentioned to the order of said Lord & Horton; that said sum is at the date hereof on deposit in said bank, to the order of said plaintiffs, and is sufficient in amount to completely pay said plaintiffs all sums due and owing to said plaintiffs." Also, "that the said sum so specified still remains on deposit in said bank, and this defendant now offers to produce the same in court, in full payment of all claims of said plaintiffs." That as thus alleged defendant in fact made such tender and deposit,

but prior to the trial of said action withdrew the same and amended his answer accordingly. On February 4, 1908, defendant caused to be served upon Lord & Horton a written notice as follows: "You will please take notice that I have this day deposited to your credit in the Second National Bank of Minot, North Dakota, the sum of $1,792.92, and directed said bank to pay the said amount to you upon receipt from you in full for all accounts by me owing to you this day."

Such foreclosure action came on for trial before the late Judge Charles F. Templeton of the first judicial district, and at the conclusion of the trial findings of fact and conclusions of law favorable to the defendant were made and judgment entered dismissing the action. The gist of these findings of fact is to the effect that Lord & Horton, the plaintiffs, failed to comply with the contract in numerous particulars detailed in such findings, clearly showing a failure to substantially perform the contract. It is a very significant fact which must not be overlooked that this distinguished jurist, who possessed a keen legal mind and a high sense of equity and justice, not only did not find as a fact that plaintiffs wilfully or intentionally departed from the terms of the contract, but he expressly refused to so find. We have examined his original findings of fact and conclusions of law, which disclose that he refused to make the following finding: "The court further finds as conclusions of fact that the plaintiffs did not intend to comply with the contract and did intend in some particulars at least to deceive the defendant, Emerson, with reference to what was being furnished, and did endeavor to deliver second and third class work and material in place of first-class; that the plaintiff took no care, and, in places at least, did not intend to follow the plans and specifications with reference to the matters of construction resulting in a very inferior combination, greatly damaging the building; that the building is damaged by virtue of failure to comply with the plans and specifications in the sum of not less than $3,431.10, thus offsetting the whole amount claimed to be due by the plaintiffs." The refusal to make such requested findings, as well as the refusal of various conclusions of law requested, unmistakably disclose that it was the intention of Judge Templeton to hold merely that no recovery could be had by plaintiffs *on the contract,* and he studiously avoided making any finding or conclusion which would in the least hamper or interfere with plaintiffs' right to recover upon the

quantum meruit. His letter addressed to plaintiffs' counsel and which was introduced in evidence in the case at bar, fully corroborates us in the foregoing statement. The letter is as follows:

Grand Forks, N. D., Oct. 26, 1908.

L. W. Gammons,
Minot, N. D.

Dear Sir:–

I have yours of the 24th regarding the case of Lord & Horton v. Emerson. My view of the case is that the present action should be dismissed upon the merits. The action is brought *upon the contract* to foreclose a lien. An action *of this nature* under the terms cannot be maintained, because there was not a substantial compliance with the contract, and the architect's certificate was not fraudulently or arbitrarily withheld. That this action cannot be maintained under these circumstances, see Anderson v. Todd, 8 N. D. 158, 77 N. W. 599. As the lien cannot be upheld, plaintiffs cannot *in this action* recover a money judgment. Bray v. Booker, 6 N. D. 526, 531, 72 N. W. 933. I should not find all of the defendants proposed findings in any event. If you wish to submit a transcript of the testimony and argue the matter before I sign any findings, I will give you a reasonable time to do so.

Let me know your desire in the matter by early mail, as I am anxious to dispose of it.

Yours truly,
Charles F. Templeton.

At the trial of the present action but little testimony was introduced. The only evidence offered as to the reasonable value of the work and materials that went into the construction of such building was by stipulation that if one of plaintiff's witnesses, who was absent, were present and sworn he would testify that such reasonable value was $16,355.15. Proof was then offered to show that the plaintiff, Horton, is the surviving partner of the firm of Lord & Horton. Defendant was then called for cross-examination, and testified to the fact that he took possession of the building shortly after its completion and has been in possession ever since; also that he paid to Lord & Horton on the con-

tract the sum of $13,600; also that he tendered to Lord Horton prior to the commencement of the foreclosure action, the said sum of $1,792.-92, and deposited the same to their credit in the Second National Bank, and served written notice of such deposit. He also testified that in his prior answer in the foreclosure suit he alleged the making of such tender and deposit as above stated, and also that he subsequently withdrew such deposit. The portion of his answer in such foreclosure suit relative to the tender and deposit and notice thereof as aforesaid was offered in evidence by plaintiff's counsel.

Among other things, defendant testified relative to his entering into possession of the building as follows:

Q. You did, however, in the fall of 1908, a short time after Lord & Horton had quit work on the building, go into the building and commenced to use it?

A. Yes, sir.

Q. You used all parts of the building?

A. Yes, sir.

Q. And went into full control of the building, with full and complete control of the building, did you? Did you have full control of the building?

A. Expect I did.

Q. You expect you did; don't you know?

A. I accepted—but never got an order from the architect.

Q. Did you have to have an order from the architect to have control of the building?

A. Don't know.

Q. You did have control?

A. We went in.

Q. You know you had control of the building?

A. I suppose so.

Q. You don't suppose, you know?

A. I did then.

Plaintiff then offered in evidence the letter from Judge Templeton heretofore quoted, after laying a foundation therefor, whereupon plaintiff rested.

Defendant then identified the exhibit "A" being the contract for the construction of said building, and offered the same in evidence, and proved by plaintiff, who was called for cross-examination, that he is seeking in this action to recover for the identical work and materials covered by such contract.

Defendant then offered in evidence the record of the judgment in the prior action, together with the judgment roll, consisting, among other things, of the pleadings, of findings of fact and conclusions of law, and the exhibits attached thereto, all of which were objected to by plaintiff's counsel. The foregoing is in substance all of the testimony offered in the case at bar.

Appellant sets forth 12 so-called specifications of error, but they are treated under five points or subdivisions of their brief, which points we will notice only in a general way. Under point 1 counsel seem to contend that it was error to permit plaintiff in this action to prove the reasonable value of the material and labor which went into such structure. They call attention to the general rule that where parties have made an express agreement the recovery must be had on such contract, or not at all. It is, no doubt, true, as they contend, that as a general rule no implied contract can be found to exist in the face of an express contract entered into by the parties, but this general rule has an exception which is universally recognized by the courts. We shall not attempt to cite more than a few of the authorities recognizing such exception. Anderson v. Todd, 8 N. D. 158, 77 N. W. 599; Marchand v. Perrin, 19 N. D. 794, 124 N. W. 1112; Sheldon v. Leahy, 111 Mich. 29, 69 N. W. 76; Columbus Safe Deposit Co. v. Burke, 32 C. C. A. 67, 60 U. S. App. 253, 88 Fed. 630; Scholz v. Schneck, 174 Ind. 186, 91 N. E. 730; Merritt v. Layton, 1 Boyce (Del.) 212, 75 Atl. 795; Henderson v. Mace, 64 Mo. App. 393; Geary v. Bangs, 138 Ill. 77, 27 N. E. 462; Manning v. School Dist. 124 Wis. 84, 102 N. W. 356; Sutherland, Damages, 3d ed. § 711; 30 Am. & Eng. Enc. Law, 1224–1227, and cases cited.

It is, no doubt, true that in order to recover on such implied contract it must appear that the contractor in good faith endeavored to comply with his contract, and also that his labor and material have added value to the owner's property, resulting in a necessary benefit accruing to him. In a few states, notably Wisconsin and California

(Manning v. School Dist. 124 Wis. 84, 102 N. W. 356; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96) a recovery cannot be had on the *quantum meruit,* even though the contractor has in good faith partly performed his contract resulting in some enrichment of the proprietor, without proof of acceptance other than such as may be inferred from the mere fact that the improvement is retained and used. Judge Marshall of the Wisconsin court, while following the earlier precedents in his state, admits that there are many respectable authorities in other jurisdictions to the contrary. In this jurisdiction the question is one of first impression, and we therefore feel free to adopt the rule which seems to be more equitable and in accord with the weight of modern authority. Such rule is stated in 3 Sutherland on Damages, 3d ed. § 711, as follows: "But there is generally a more liberal consideration of the equitable rights of the contractor where he has in good faith endeavored to comply with his contract, and his labor has added value to his employer's property, and a benefit necessarily accrues to him. Independently of any election to accept, the honesty of the contractor's efforts towards full performance, the beneficial character of the work, and the impossibility of the employer declining and rejecting it so that the contractor may make it useful to himself, have induced the courts to adopt the rule of awarding compensation to the contractor to the extent that the employer is thus benefited. As early as 1828 this rule was acted upon in Massachusetts, and it has been repeatedly approved in later cases there as well as elsewhere. It was thus stated as a question on which there were many conflicting opinions: 'Whether when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet, nevertheless, the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum meruit* for the work and labor done, and on a *quantum valebant* for the materials. We think the weight of modern authority is in favor of the action, and that, upon the whole, it is conformable to justice that the party who has the possession and enjoyment of the materials and labor of another shall be held to pay for

them, so as in all events he shall lose nothing by the breach of the contract.'

"The sole ground upon which a contractor is entitled to anything under this rule is that if he were not paid something the defendant would profit at his expense, although his claim is without merit as far as rights under the contract are concerned. Hence the amount which may be recovered is the amount by which, were no payment made, the defendant would profit at the plaintiff's expense; that is to say, the amount which represents the fair market value of the structure which, against the wishes of the defendant, has been put upon his land. This value the plaintiff must prove before he can recover. If the contract is a beneficial one to the landowner the contractor is not entitled to recover any margin of the benefit which the former secured by the making of the contract; but the contractor is entitled to the value of the building as it is in the light of the landowner's right to have the building built, and properly built, for the contract price. If, for example, the landowner secured by his contract the erection for $2,000 of a building worth $3,000, and the plaintiff, in erecting the building, fails to comply with the contract in matters going to the essence of the contract, and the building, erected as it is erected, is worth $2,500, the plaintiff is not entitled to recover $2,500; all that he is entitled to recover is $^{25}/_{30}$ of $2,000. The additional value of the land to the owner by reason of the labor and materials performed and furnished may, at least in many cases, be ascertained by deducting from the contract price what the house was worth less to the defendant by reason of the deviations from the contract.

"The doctrine is firmly established in Vermont that where a contract has been substantially, though not strictly, performed; where the party failing to perform according to its terms has not been guilty of a voluntary abandonment or wilful departure therefrom, has acted in good faith, intending to perform according to the stipulations, and has failed in a strict compliance with its provisions; and when, from the nature of the contract and of the labor performed, the parties cannot rescind, and stand *in statu quo,* but one of them must derive some benefit from the labor or money of the other, in such cases the party failing to perform strictly may recover of the other as upon a *quantum meruit* for such sum only as the contract, as performed, has been of real and

actual benefit to the other party, estimating such benefit by reference to the contract price of the whole work. The rule is treated as a relaxation from the strictness of the ancient law, standing upon the solid ground of necessity and equity, but to be guarded with care, lest in its application it should tend to impair the obligation and faithful performance of agreements. The contractor must have intended in good faith to fulfil the terms of the contract; its spirit must be faithfully observed, though the very letter of it fail. A voluntary abandonment or a wilful departure from its stipulations is not allowed. The principle applies only in cases where the contract cannot be rescinded, and where, from its nature, the labor performed under it must inure to the benefit of the employer, and it would be inequitable for him to retain it without making compensation. The party failing to perform can only recover such a sum as his labor has benefited the other. Had he strictly and literally kept his agreement, he would have been entitled to the contract price. Failing in this: 1st. He must deduct from the contract price such sum as will enable the other party to get the contract completed according to its terms; or, where that is impossible or unreasonable, such sum as will fully compensate him for the imperfection in the work, and the insufficiency of the materials, so that he shall in this respect be made as good pecuniarily as if the contract had been strictly performed; 2d. He must also deduct from the contract price whatever additional damages his breach may have occasioned to the other.

"The substantial performance which is mentioned as requisite to bring a case within this equitable principle is not that near approach to perfect and complete fulfilment of the contract which is necessary to entitle the contractor to recover on it. In one case the contractor was reported to deserve about half price and was allowed to recover. In another, he agreed to build a stone wall 4½ feet high, and more than half of it was less; but it was held that the contract was substantially performed for the purpose of that remedy. . . .

"The principle enunciated in these cases has been applied in Connecticut. It is there held by a majority of the court that, if the result of a builder's labor is a structure adapted to the purpose for which it was designed, and the employer is in the use and enjoyment of it, and it cannot be made to conform to the contract otherwise than by the ex-

penditure of a sum which would deprive the contractor of all compensation for his labor, a deduction may be made from the contract price to the amount of the diminution in value of the building, and not the amount it would cost to make it conform to the contract. Principles more or less liberal have been declared in other states in favor of defaulting contractors who have performed in part, and from whose work the employer in fact derived a benefit, and recoveries permitted on a *quantum meruit* for a beneficial performance which was not sufficient to support an action upon the contract, either on the ground of voluntary appropriation, or the benefit the employer must necessarily derive from the work as done."

We have quoted at much length from this author because of the very clear statement of the rule which we adopt in this jurisdiction, as not only sound on principle, but having the support of the great weight of authority.

By applying this rule to the facts before us, we have no hesitation in overruling appellant's contentions under all his points, provided the contractors are not, under the evidence, to be charged with bad faith in deviating from the plans and specifications. Even under the restricted rule adhered to in a few jurisdictions as to acceptance of the building by the owner, we think plaintiff should recover, for the testimony of the defendant himself shows that he not only paid $13,600 on the contract, but that he accepted the building shortly after its completion and has retained the same ever since. True, he should not be held to have accepted the same as a full compliance with the contract (Anderson v. Todd, 8 N. D. 158, 77 N. W. 599), but in the light of these facts, together with the fact that admittedly he thereafter tendered to the contractors the further sum of $1,792.92 and conceded by his answer that this balance was due after deductions for damages occasioned by failure to fully comply with the contract, we think warrants the presumption that he voluntarily accepted the benefits flowing to him from such partial performance of the contract.

Where, we ask, is the proof of bad faith? We have set out practically all the testimony, and there is not a scintilla of evidence in this record from which the court would be warranted in finding bad faith, unless such proof is furnished in the judgment roll in the prior action. It is contended that the findings contained in such judgment roll furnish

conclusive evidence of bad faith and an intentional and wilful departure from the terms of the contract; but such contention is devoid of merit for obvious reasons. First, as we have above observed, Judge Templeton expressly refused to so find. This is alone conclusive against appellant's contention. Second, the sole, and in fact the only, competent purpose of introducing such judgment roll was to show a former adjudication, as pleaded in the answer, of the issues sought to be litigated in the case at bar. Manifestly, such proof falls far short of the mark. The first essential to proof of *res judicata* is wholly lacking. The issues in the two actions widely differ. Proof which would support one cause of action would not support the other. In the foreclosure suit, proof of a failure in any respect to substantially perform the contract would defeat a recovery, but not so in the case at bar. *Bad faith* or *intentional departure* from the contract in substantial particulars was not necessarily involved in the former litigation; nor does the answer in the case at bar, much less the proof, allege or show that any such issue was in fact litigated in the prior suit, or that it formed any basis whatever for the judgment therein rendered, but the contrary is true, as we have above observed. It necessarily and logically follows that in this action we cannot look to the judgment roll in the former case for evidence of bad faith or a wilful or intentional departure from the contract.

The doctrine as to when and upon what conditions a former judgment may be successfully urged as *res judicata* in a subsequent action is too well settled to require extended discussion. In the early history of this court the rule was correctly announced and applied in Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580. We quote from the opinion of Mr. Justice Corliss: "The case we have to decide falls within that class of cases where a judgment on one cause of action is sought to be used as conclusive in a suit on another cause of action. In such cases the judgment is final only as to the matters which were in fact determined in the former case and adjudicated by the judgment. Foye v. Patch, 132 Mass. 105, and cases cited; Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55. The least uncertain-

ty as to what was in fact determined in the suit before the justice of the peace is fatal to the use of the judgment as an estoppel on the question of breach of warranty and rescission. The uncertainty created by the record of the proceedings before the justice is not in any manner cleared up by allegations in the answer that the question was in fact determined by the justice against the defendant therein, the plaintiff in the case at bar. 'According to Coke, an estoppel must be certain to every intent; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence. It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty upon this head on this record,—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' Russell v. Place, 94 U. S. 606, 24 L. ed. 214. To same effect are Bell v. Merrifield, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55; Stowell v. Chamberlain, 60 N. Y. 272; Stone v. St. Louis Stamping Co. 155 Mass. 267, 29 N. E. 623; Cook v. Burnley, 45 Tex. 97; McDowell v. Langdon, 3 Gray, 513; Downer v. Shaw, 22 N. H. 277; Chrisman v. Harman, 29 Gratt. 494, 26 Am. Rep. 387; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772." See also Carter v. Carter, 14 N. D. 66, 103 N. W. 425, to the same effect. In Geary v. Bangs, 138 Ill. 77, 27 N. E. 462, the court, in speaking on this identical point, said: "The next point made is that the special plea setting up the proceedings and final judgment in the mechanic's lien suit presented a complete defense to the action in this case. The plaintiff's right to a mechanic's lien depended upon principles essentially different from

those upon which his right to recover for his work and labor performed and materials furnished in an action of assumpsit are based. To maintain his lien he was required to allege and prove a case within the provisions of the mechanic's lien law, and it is therefore apparent that he was liable to be defeated in that proceeding upon various grounds which would have no bearing upon his right to recover in assumpsit. Neither the plea, nor the evidence offered under it, indicated the precise ground upon which the mechanic's lien was denied, but only the general fact that the proceeding resulted in a final judgment denying the plaintiff his lien. We are therefore unable to see how the facts thus presented can be held to amount to a defense of *res judicata,* or estoppel." See also 23 Cyc. 1297–1309, and cases cited. Also Draper v. Medlock, 2 Ann. Cas. 650, and note (122 Ga. 234, 69 L.R.A. 483, 50 S. E. 113).

The foregoing sufficiently answers in a general way the various contentions of appellant, with the exception of the specifications challenging the correctness of the finding as to the reasonable value of the work and material furnished by said contractors in the construction of such building. It is undoubtedly true that the burden was on plaintiff to establish such reasonable value, but we think the finding challenged has ample support. In fact the only testimony offered at all consisted of the stipulation that a witness for plaintiff, if present and sworn, would testify "that the reasonable value of the materials, work, and construction of the building described in the complaint amounted to $16,355.15," together with the proof as to the admission by defendant in his original answer in the foreclosure case of the fact that, after deductions for damages occasioned by failure to fully perform the contract, there remained due to the contractors only the sum of $1,792.92, payment of which sum was tendered to the contractors by him and such tender kept good by deposit. The trial court evidently accepted such admission as sufficient proof upon this issue, and we think he was fully warranted in so doing. It is well settled that such admission was competent evidence of the fact thus admitted, where, as here, it was shown by the defendant himself that it was incorporated in his answer with his knowledge and consent. 1 Enc. Ev. 424, 425; O'Riley v. Clampet, 53 Minn. 539, 55 N. W. 740; 16 Cyc. 969–971.

The judgment of the District Court not only has ample support

in the evidence, but it appears to be clearly just and free from error, and the same is accordingly affirmed.

Goss, J., not participating.

FRANK DAHLUND v. CHRIST LORENTZEN and C. H. Huyssen (Appellant).

(152 N. W. 684.)

Thresher's lien — owner of machine — cropper — landlord — grain — purchaser of machine — title reserved by seller — entitled to file thresher's lien as "owner."

A thresher who had purchased his rig from one D., who reserved title therein until payment, and also took blanket assignment of earnings of same, filed thresher's lien against grain grown by a cropper without naming the landlord in said lien. *Held*,—

1. That plaintiff was entitled to file lien as "owner" of said rig.

Verification of lien.

2. Said lien was properly verified.

Lien attaches to all grain threshed — landlord not named therein.

3. The lien attached to all grain threshed, even though landlord not named therein.

Foreclosure of lien — attorney's fee.

4. The item of $25 attorneys' fees modified.

Errors — without merit.

5. Other alleged errors examined and found without merit.

Opinion filed March 16, 1915. Rehearing denied May 18, 1915.

Appeal from the District Court of Pierce County, *Burr*, J.

Affirmed.

Asa J. Styles, for appellant.

The lien statement filed does not substantially comply with the statute, in that it does not state the name of the person for whom the threshing was done. Parker v. First Nat. Bank, 3 N. D. 88, 54 N. W. 313.

The lien must contain a correct description of the land where the

grain threshed was grown. Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87, 5 N. D. 66, 63 N. W. 895; Moher v. Rasmussen, 12 N. D. 73, 95 N. W. 152, and cases cited.

The purpose of the thresher's lien law in requiring the name of the person for whom the threshing was done, and a correct description of the land, to be embodied in the lien statement, is for the benefit of third persons, who may become interested in the grain. I Dak. Dig. "Liens," subtitle IV., for Threshing, p. 799; II Dak. Dig. "Liens," subtitle IV. for Threshing, p. 633; Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87, 5 N. D. 66, 63 N. W. 895; Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152; Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250; Mitchell v. Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001; Gorthy v. Jarvis, 15 N. D. 509, 108 N. W. 39.

A lien statement describing only a part of the land on which the grain threshed was grown, gives no lien. Martin v. Hawthorne, 5 N. D. 66, 63 N. W. 895; Moher v. Rasmusson, 12 N. D. 73, 95 N. W. 152.

Dahlund was not the owner of the threshing machine. He had contracted to purchase it, but the seller has reserved title in himself. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

The name of the cropper and that of the landowner should appear in the lien statement. Laws of 1897, chap. 177, p. 281.

Albert E. Coger, for respondent.

The object of the thresher's lien law is to give security for threshing grain. It is remedial in its nature. It should be construed liberally to carry out its object, if that can be done by a reasonable construction of its language. In the case at bar, the omission of the landowner's name, as an individual, is not fatal. Mitchell v. Monarch Elevator Co. 15 N. D. 500, 107 N. W. 1085, 11 Ann. Cas. 1001.

Dahlund was the "owner" of the machine for threshing, and for thresher's lien purposes. He had contracted to buy the machine from one Dickey. He had full possession and control of the machine. He had been clothed with all the indicia of ownership. 28 Am. & Eng. Enc. Law, 233.

BURKE, J. This is a trial *de novo* of foreclosure of a thresher's lien filed by the plaintiff against grain grown upon the farm of the defend-

ant, and involves a construction of §§ 6854, 6855, Comp. Laws 1913, which read as follows: Section 6854: "Any owner or lessee of a threshing machine who threshes grain for another therewith shall, upon filing the statement provided for in the next section, have a lien upon such grain for the value of his services in threshing the same from the date of the commencement of the threshing."

Section 6855: "Procedure to Obtain Lien. Any person entitled to a lien under this chapter shall, within thirty days after the threshing is completed, file in the office of the register of deeds of the county in which the grain was grown a statement in writing, verified by oath, showing the amount and quantity of grain threshed, the price agreed upon for threshing the same, the name of the person for whom the threshing was done, and a description of the land upon which the grain was grown. Unless the person entitled to the lien shall file such statement within the time aforesaid, he shall be deemed to have waived his right thereto." Dahlund was in possession of and exercised full control over a threshing machine. Defendant Huyssen was the owner of a farm which was being operated by Lorentzen under a croppers' contract to the terms of which reference will be hereinafter made. Lorentzen made contract with plaintiff to do the threshing upon the farm, and in accordance with such contract plaintiff threshed all the grain for the year 1912 and shortly thereafter the defendant Huyssen, the owner of the land, paid one half of said threshing bill according to the terms of his cropping contract with Lorentzen, who, however, failed to pay his half of said bill. Plaintiff thereupon filed a lien under said sections, naming therein, however, only the defendant Lorentzen. The trial below resulted in a judgment in favor of plaintiff against the defendant Lorentzen for the amount due, and allowed him a lien against all of the grain grown upon said land. Appellant in his brief raises four questions; namely, "whether plaintiff Dahlund was the 'owner or lessee' of a threshing machine within the meaning of § 6854, Comp. Laws, 1913, and whether he was legally entitled to file any threshing lien whatever against anyone,—Dickey being by the terms of the conditional contract of purchase, exhibit 1, the real and legal owner of the machine at all times so far as the evidence shows;

"Whether the alleged lien statement was ever 'verified by oath' as required by the statute;

"Whether the alleged lien complies with the statute, which requires it

to state 'the name of the person for whom the threshing was done,' naming as it does the defendant Lorentzen, whereas the testimony shows, and the findings of fact find, that the same was done for Lorentzen and Huyssen. In other words, whether the lien can be established against the owner of grain without even naming him in the notice of lien, or giving notice to persons who might purchase grain thereon either.

"Whether a $25 attorney's fee can be charged in foreclosing a threshing lien and including in the costs taxed."

(1) Taking up the questions raised in the order named, we hold: First, that plaintiff is the owner within the meaning of said section. He was in possession of the rig, operating the same and having full control thereof. It is true that under exhibit 1, Dickey had made a conditional sale of said rig to the plaintiff, under which the title of said property remained in Dickey until the full purchase price had been paid, and that said Dickey was to have control and own one half of the gross earnings of said outfit until said sum had been paid. Plaintiff, however, was the equitable owner, and in contemplation of the statute entitled to file the lien, volume 28 Am. & Eng. Enc. Law, 233, and cases cited. Dickey makes no claim whatever in this action.

(2) An examination of the record shows that the lien was duly verified, and inasmuch as appellant lays little stress upon this in his brief, it will not be discussed further.

(3) Appellant states in his brief that this is the proposition most relied upon and the one which he deems conclusive of the whole matter. It is his contention that the lien filed "does not substantially comply with the statute in that it does not state the 'name of the person for whom the threshing was done,' and that the omission of the name of Huyssen from the statement, either alone or combined with the name of Lorentzen, renders the lien a nullity, at least as to Huyssen, and as to his share of the grain."

As already intimated, Huyssen was the owner of the land and Lorentzen was his lessee under a cropping contract, sometimes erroneously called a lease. Under the terms of this agreement, Lorentzen was to do all of the work incident to the planting and care of the crops, and to "thresh and secure the crops grown thereon," but "party of the first part (Huyssen) is to pay one half of twine bill and one half of threshing machine bill," and it was agreed that until a final settlement and division

the title to said crops should remain in Huyssen. Under those circumstances the tenant Lorentzen employed the plaintiff to do the threshing upon the land in question. When the lien was filed it contained the statement that "under and pursuant to the terms and conditions of said contract he threshed for the said Christ Lorentzen all the grain grown upon said land during the said year." And then follows a description of the land and a description of the grain, with the price for each kind of the same and the sum total, etc., and the same was filed with the register of deeds of the proper county. Huyssen paid one-half of said bill a few days after the lien was filed. As already stated, the trial court held that plaintiff was entitled to a personal judgment against Lorentzen alone, and was entitled to a thresher's lien upon all of the grain grown upon the land to secure said judgment. Appellant, in his brief, attacks said judgment as inequitable, and contends that the omission of Huyssen's name was fatal to the lien in its entirety, or at least so far as Huyssen's share of the grain is concerned, and has advanced an ingenious argument in support of their contention. However, we are not persuaded that they are correct, and will set forth briefly some of the reasons for this conclusion. The lien statement names Lorentzen as the person for whom the threshing was done, and this is proper. Not only did he actually make the contract, but he was the person whose duty it was to see that the threshing was done under the terms of his contract with Huyssen. If the thresher could not look to the crop for his pay, he might be without protection, as the cropper might, under the terms of his contract, owe the landlord more than the value of his share of the crop. The intent of the legislature was, undoubtedly, to subjugate the grain itself to the payment of this necessary expense, without which it might be lost, not only to the tenant, but to the landlord as well, and the landlord in making his lease should take into consideration the contingency that arose in this case. Having reserved the title to the grain in himself until a division, he must anticipate the possible burden imposed upon the grain by the thresher's lien law.

Again, if appellant's theory is correct and the landlord must be named in the lien, by analogy it would be contended that every mortgagee or any person claiming an interest in said grain would likewise have to be named, and, if the encumbrances against the property were more than the value of the grain, the thresher would be entirely without remedy,

which is inconsistent with the provisions of the Code which makes the thresher's lien a first lien against the grain. In Mitchell v. Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001, it is said: "The object of the statute is to give security for threshing grain. The statute is remedial in its nature. It should be construed liberally to carry out its object, if that can be done by a reasonable construction of its language." Without elaborating upon the subject, we hold the lien in question good against all of the grain sown upon the land.

(4) A careful search of the statutes has failed to disclose any authority for the allowance of a $25 attorney's fee upon a foreclosure of a thresher's lien by action. Section 7792, Comp. Laws 1913, reads in part: "In all actions or proceedings for the foreclosure of a mortgage upon personal property, or of a mortgage or other lien upon real property, the plaintiff or person commencing such action or proceeding shall be entitled to tax as a part of his costs, when the amount of the debt secured by such mortgage or liens does not exceed the sum of $500, the sum of $25. . . ." It will be noticed that this section fails to provide for such attorneys' fees upon foreclosure of *liens* upon personal property. This court in Power v. King, 18 N. D. 600, 138 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108, has refused to allow the attorneys' fees in equitable suits generally unless authorized by the statute. Sections 8137–8143, Comp. Laws 1913, make no provision for attorneys' fees. Section 6878, Comp. Laws 1913, reads: "Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice, and in the manner provided for the foreclosure of mortgages upon personal property, and the holder of such lien shall be entitled to the possession of the property covered thereby for the purpose of foreclosing the same. The costs and fees for such foreclosure shall be the same as are provided in § 8132. A report of such foreclosure shall be made in the manner set forth in § 8128; provided that when the lien has not been filed in the office of any register of deeds, then a report of such sale shall be filed in the office of the register of deeds in the county wherein the property is sold. Such liens may also be foreclosed by action, as provided in chapter 29 of the Code of Civil Procedure." A reading of this section seems to give an attorney fee in foreclosures by advertisment only.

It is thus apparent that there is no authority for the trial court to order that a $25 attorney's fee be taxed as part of plaintiff's judgment, and the order is accordingly modified.

(5) There are one or two incidental objections to the record made by appellant which are not discussed at length in his brief. We have examined same, however, and find them without merit. The judgment of the trial court is modified by striking out the $25 attorney's fee and as so modified is affirmed.

Respondent will recover his costs in this action, less the sum of $12.50, which we consider a fair proportion of appellant's expense upon the modification.

JOSEPH STEIDL v. DAVID AITKEN and Andrew Catherwood.

(L.R.A. 1915E, —, 152 N. W. 276.)

Chattel mortgages — insecurity clause — mortgagee taking possession — by force and with malice — trespasser — conversion — lien of mortgage extinguished.

1. A mortgagee who, under the insecurity clause in his mortgage, seeks to obtain the possession of the property mortgaged, and does so maliciously and by force or fraud, is a trespasser, and as such is guilty of wrongful conversion which, under the provisions of § 6721, Compiled Laws of 1913, extinguishes the lien of the mortgage.

Wrongful conversion of mortgaged property — lien extinguished — damages — mitigation of — claim and delivery — does not apply.

2. The provision contained in § 6721, Compiled Laws of 1913, which provides that, even though the wrongful conversion of the mortgaged property by the mortgagee will extinguish the lien of the mortgage, such mortgagee may, if an action is brought for the conversion of the property, prove the amount of the debt secured by the mortgage in mitigation of damages, does not apply to actions in claim and delivery.

Conversion — action for — mortgagee — pleading and proof necessary.

3. Even in an action of conversion against the mortgagee for the wrongful

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Note.—As to the necessity of good faith and the existence of reasonable grounds to justify mortgagee taking possession of mortgaged chattels under the "safety" or "insecurity clause" in the mortgage, see notes in 23 L.R.A. 780, 19 L.R.A. (N.S.) 915, and 51 Am. Rep. 805.

seizure of mortgaged property, such mortgagee must plead and prove the amount of his mortgage debt if he seeks to mitigate the damages for such unlawful seizure.

Claim and delivery — possession of property — plaintiff entitled to trial to court — without jury — specific valuation — demand for — judgment — alternative — aggregate value of property.

4. In a claim and delivery proceeding in which the plaintiff is shown to be entitled to the possession of property seized by the defendant, and in which the trial is had to a court without a jury and in which no demand is made for a specific valuation of the property, a judgment for the return of the property which is specified or in the alternative for the payment of a certain sum, being the aggregate value thereof, in case said return cannot be had, is not invalid because of a lack of a specific valuation of each article in said judgment. Smith v. Willoughby, 24 N. D. 1.

Claim and delivery — return of property — alternative judgment — aggregate value.

5. Although in an action of claim and delivery, and in cases where a return of the property cannot be had, and a judgment in the alternative is directed for the value thereof, such judgment may be in the aggregate, and need not specify the value of each article unless a demand for such specification has been made upon the trial.

Opinion filed March 30, 1915.

Appeal from the District Court of Walsh County, *Kneeshaw,* J. Action of claim and delivery to recover possession of personal property and damages for the taking and detention. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action in claim and delivery to recover the possession of certain horses and other personal property, and damages for the detention thereof. The case was tried by the court without a jury. The learned trial judge, among other things, found that on September 9, 1912, the plaintiff, Joseph Steidl, was the legal and rightful owner and in possession of the property in controversy; that on the said 9th day of September, 1912, the defendants wrongfully and unlawfully seized and took said personal property out of the custody and possession of the plaintiff, and that such seizure was made under the instructions of the defendant David Aitken; that at the time of such seizure and taking

the defendant was absent from the immediate place of seizure; that said property was on the highway 5 miles from Park River, and in the possession of the plaintiff's servants or hired men; that such seizure and taking was accomplished by fraud by the defendants; that the defendant Catherwood at said time represented that he was an officer of Walsh county, North Dakota, and that he had the necessary and sufficient papers to take said property, and partly exhibited to the said agents and employees of the plaintiff some kind of papers, but did not remove said papers from his pocket or from the envelop in which they were encased, but did in fact represent and state to said agents and servants that he was an officer of the law, and that he had the necessary papers, and that he then ordered and directed the said servants and agents of plaintiff to turn about and drive said property back to Park River; that the said servants, believing it to be their duty to obey the said Catherwood as an officer of the law clothed with proper papers, complied with the demand; that the said Catherwood was not acting as an officer of the law, nor did he have in his possession any papers in claim and delivery, or any attachment or any papers or court process whatever, nor had any action for the recovery of the possession of said property been instituted in Walsh county; that said taking was *wrongful, unlawful, and malicious;* that the only papers that the said Catherwood had in his possession were some promissory notes and a chattel mortgage, which covered only a part of the property; that on arriving at Park River, the said property was turned over immediately to the defendant David Aitken; that the plaintiff made a personal and persistent demand upon the defendants for a return of said property; that the defendants, each and both of them, refused to return the same; that within a short time after the horses had been placed in a livery barn, the plaintiff and two of his agents and servants attempted peaceably and quietly to recover the possession of the same, but the same were retaken by the defendant Andrew Catherwood by force and threats. The court further found that the defendant Aitken claimed that the plaintiff Steidl became indebted to him in the sum of $1,400 on or about August 2, 1912, and that the plaintiff made, executed, and delivered to the said Aitken a chattel mortgage on the said property, but that none of the promissory notes which the said mortgage attempted to secure, nor any part of the said $1,400, was due until long after September 9, 1912. The court further

found that no default had been made in the conditions of the notes and mortgage at the time of said seizure, and that as a matter of fact the security was not unsafe or insecure. The court further found the aggregate market value of the personal property and the specific value of each article.

Upon the foregoing findings of fact, the learned trial judge made the following conclusions of law: (1) That the plaintiff was at all times herein mentioned, and now is, the owner of the personal property, hereinbefore described and that the same was wrongfully and unlawfully seized and taken from him by the said defendants, as hereinbefore stated and found, and that the plaintiff is entitled to the immediate possession and return of each and all of the said personal property so seized and taken by the defendants, as hereinbefore described, and that the same be returned and delivered back into the possession of the plaintiff, and in case a return, delivery, or possession thereof cannot be made or had, then that the plaintiff have judgment against the defendant David Aitken, for the actual value of the said personal property, to wit, for and in the sum of six hundred and fifty ($650) dollars; (2) that as a matter of law, no default of any kind existed in the chattel mortgage to the defendant Aitken, under which he alone and only claimed and claims said property and his right to the possession thereof, and, further, that neither of the said defendants was or is entitled to the possession of said property, or any part thereof, and that the seizure and taking of said property from the plaintiff, by the defendants as hereinbefore stated and found, was wrongful, unlawful, and malicious. That under the undisputed facts in this case, the defendant Aitken's remedy, if any at all, existing on September 9, 1912, was by proper and orderly action in claim and delivery, and that the law will not permit the defendants, or either of them, to justify their action in this case, under the said chattel mortgage, no default having been made on the terms and conditions of said mortgage; (3) that the plaintiff is entitled to recover judgment against the defendant David Aitken for the sum of three hundred ($300) dollars as damages for the unlawful and wrongful taking and detention of said property; (4) that the action is dismissed as to the defendant Catherwood, without costs, as the evidence discloses that he was not in possession or control of the personal property at the time of the commencement of this action, but plaintiff was

justified under the circumstances of the case in making him a party defendant; (5) that plaintiff is entitled to judgment against the defendant David Aitken for his costs and disbursements, to be taxed by the clerk.

On these findings and conclusions of law, judgment was entered in favor of the plaintiff for the immediate return of the property mentioned, with the alternative that if such return and delivery could not be had forthwith, the plaintiff should have judgment in the sum of $650, the actual value of such property, and in addition thereto the sum of $300 as damages for the unlawful taking and detention. From this judgment the defendant David Aitken has alone appealed.

H. C. DePuy, for appellant.

The mortgagee's right to take possession under the insecurity clause of his mortgage becomes operative *eo instanti,* when condition happens before debt is due. Ellestad v. Northwestern Elevator Co. 6 N. D. 88, 69 N. W. 44; Cases cited in 9 Century Dig. cols. 2868–2870.

Facts were sufficient to justify Aitken in deeming himself insecure, and he was therefore entitled to possession. Roy v. Goings, 96 Ill. 361, 36 Am. Rep. 151; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137; Botsford v. Murphy, 47 Mich. 536, 11 N. W. 375; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; J. I. Case Plow Works v. Marr, 33 Neb. 215, 49 N. W. 1119; Schouweiler v. Hough, 7 S. D. 163, 63 N. W. 777; Jones, Chat. Mortg. § 431; Cases cited in 9 Century Dig. cols. 2683–2686; 4 Decen. pp. 1069–1072; 7 Cyc. 12 (b).

Aitken being entitled to the possession of the property plaintiff cannot successfully maintain replevin. 7 Cyc. 15.

In claim and delivery, plaintiff's right to possession and defendant's unlawful detention, are the only issues involved, except incidentally, demand, value, and damages, and it is immaterial whether defendant acquired possession in an unlawful manner. Willis v. De Witt, 3 S. D. 281, 52 N. W. 1090; Nichols v. Knutson, 62 Minn. 237, 64 N. W. 391; Kierbow v. Young, 20 S. D. 414, 8 L.R.A.(N.S.) 216, 107 N. W. 371, 11 Ann. Cas. 1148; Cases cited in 42 Century Dig. cols. 2100, 2125.

The taking of the property away from plaintiff was without resistance, and accomplished in a peaceable manner. Bordeaux v. Hartman Furniture & Carpet Co. 115 Mo. App. 556, 91 S. W. 1020.

In claim and delivery where the mortgagor's right of possession is devested by maturity of the debt and default in payment before trial, the mortgagor can, as against the mortgagee, recover nothing beyond such damages as he may have sustained up to the time of default in payment. He is not entitled to judgment for the return of the property or its value. Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 835; Jones, Chat. Mortg. § 437; Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014; 9 Century Dig. cols. 2611, 2614, 2551; 4 Decen. Dig. p. 1085; 7 Cyc. 16–18; Finley v. Cudd, 42 S. C. 121, 20 S. E. 32; Brook v. Bayless, 6 Okla. 568, 52 Pac. 738.

In a proper action the mortgagee is entitled to have his money debt deducted from the damage sustained by the mortgagor through a wrongful taking, and this without pleading a counterclaim. Cushing v. Seymour & S. Co. 30 Minn. 301, 15 N. W. 249; Brink v. Freoff, 44 Mich. 69, 6 N. W. 94; Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. 956; Angell v. Egger, 6 N. D. 398, 71 N. W. 547; Woodruff v. King, 47 Wis. 261, 2 N. W. 452; Lloyd v. Goodwin, 12 Smedes & M. 223; 7 Cyc. 17, and cases cited; Cases cited in 9 Century Dig. col. 2614; 42 Century Dig. col. 2409; Rev. Codes 1905, §§ 6585, 7075, Comp. Laws 1913, §§ 7168, 7682.

Where the evidence establishes that the property is separate chattels, in no way dependent upon one another for their value, judgment in the aggregate cannot be given in case it cannot all be returned. Wallace v. Cox, 94 Neb. 194, 47 L.R.A.(N.S.) 835, 142 N. W. 891, Ann. Cas. 1914D, 109; First Nat. Bank v. Calkins, 16 S. D. 445, 93 N. W. 646.

H. A. Libby, for respondent.

Plaintiff not only had the lawful and peaceable possession of the property in question under the terms of the mortgage and the laws of this state, but he was dispossessed of the same by the defendants in a wrongful, unlawful, and malicious manner. Jones, Chat. Mortg. 2d ed. p. 705.

Where a person has been so disposed of property, replevin or claim and delivery lies for its recovery. Thornton v. Cochran, 51 Ala. 415.

A mortgagee so taking property from the mortgagor, under the so-called "insecurity clause" of the mortgage, and without actual, existing, and substantial reasons for such action, and without legal process, is a trespasser, and he cannot escape the consequences of his trespass on the

ground of an express power contained in such mortgage. Street v. Sinclair, 71 Ala. 110; Thorn v. Kemp, 98 Ala. 425, 13 So. 749.

Where a mortgagor refuses to surrender possession of property covered by a mortgage containing such insecurity clause, when demand is made by a constable who asserts that it is his duty as an officer of the law to take the property, and the mortgagor thereupon ceases to resist, and the property is surrendered, such act does not constitute a voluntary turning over of the property by the mortgagor. Street v. Sinclair, 71 Ala. 110; Thorn v. Kemp, 98 Ala. 425, 13 So. 749; Kidd v. Johnson, 49 Mo. App. 486; Cole v. Wabash, St. L. & P. R. Co. 21 Mo. App. 443; Cobbey, Replevin, §§ 447, 453; Kilpatrick v. Haley, 13 C. C. A. 480, 27 U. S. App. 752, 66 Fed. 133.

The taking of property by color of legal process is, in fact, taking by force, and is a trespass, and it is no excuse to the officer that the owner yielded. McClure v. Hill, 36 Ark. 268; Niven v. Burke, 82 Ind. 455; First Nat. Bank v. Teat, 4 Okla. 454, 46 Pac. 474.

Under such a mortgage, the mortgagee has not the arbitrary right to take possession of the property, but reasonable and real grounds must exist, and even then, he must resort to his legal remedies, and not resort to force, violence, or fraud. 7 Cyc. 12–14; Pray v. Cadwell, 50 Mich. 222, 15 N. W. 92; Rector-Wilhelmy Co. v. Nissen, 35 Neb. 716, 53 N. W. 670; Ferris v. Johnson, 136 Mich. 227, 98 N. W. 1014; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 88; Brashier v. Tolleth, 31 Neb. 622, 48 N. W. 398.

This case, by stipulation, was tried to the court without a jury. The court's findings in such cases have the same weight and force as the verdict of the jury, and will not be disturbed on appeal, where there is no competent and substantial evidence to support them, even though there is a conflict in the evidence. Caledonia Gold Min. Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911; Pierce v. Manning, 2 S. D. 517, 51 N. W. 332; Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; Phillip Best Brewing Co. v. Pillsbury & H. Elevator Co. 5 Dak. 62, 37 N. W. 763; Smith v. Tosini, 1 S. D. 641, 48 N. W. 299; Paddock v. Balgord, 2 S. D. 103, 48 N. W. 840; Cannon v. Deming, 3 S. D. 431, 53 N. W. 863; Duggan v. Davey, 4 Dak. 110, 26 N. W. 887, 17 Mor. Min. Rep. 59; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225; Nichols

& S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089; Axiom Min. Co. v. White, 10 S. D. 202, 72 N. W. 462; Magnusson v. Linwell, 9 N. D. 157, 82 N. W. 743; Flath v. Casselman, 10 N. D. 420, 87 N. W. 988; Bissonette v. Barnes, 4 N. D. 311, 60 N. W. 841; Bressler v. Stanek, 10 S. D. 625, 74 N. W. 1118; Seim v. Smith, 13 S. D. 138, 82 N. W. 390.

In such cases, where the evidence is evenly balanced, or nearly so, the appellate court will favor the view of the evidence adopted by the trial court. Nichols & S. Co. v. Stangler, 7 N. D. 102, 72 N. W. 1089.

In such cases, it will be presumed on appeal that the decision of the trial court upon the weight of the evidence is correct. Randall v. Burk Twp. 4 S. D. 337, 57 N. W. 4; Webster v. White, 8 S. D. 483, 66 N. W. 1145; Reid v. Kellogg, 8 S. D. 601, 67 N. W. 687; Hulst v. Benevolent Hall Asso. 9 S. D. 147, 68 N. W. 200; Farwell v. Sturgis Water Co. 10 S. D. 421, 73 N. W. 916; Reagan v. McKibben, 11 S. D. 274, 76 N. W. 943, 19 Mor. Min. Rep. 556; Christ v. Garretson State Bank, 13 S. D. 24, 82 N. W. 89; First State Bank v. O'Leary, 13 S. D. 206, 83 N. W. 45; Charles Betcher Co. v. Cleveland, 13 S. D. 349, 83 N. W. 366; Henderson v. Hughes County, 13 S. D. 582, 83 N. W. 682; Krueger v. Dodge, 15 S. D. 166, 87 N. W. 965; Caulfield v. Bogle, 2 Dak. 464, 11 N. W. 511; Herbert v. Northern P. R. Co. 3 Dak. 38, 13 N. W. 349; Moline Plow Co. v. Gilbert, 3 Dak. 255, 15 N. W. 1; Franz Falk Brewing Co. v. Mielenz Bros. 5 Dak. 136, 37 N. W. 728; Finney v. Northern P. R. Co. 3 Dak. 282, 16 N. W. 500.

The losing party has no redress on error, except for the wrongful admission or rejection of evidence, where a jury is waived, and there is testimony raising a controversy, and the court finds generally for the other party. Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306; Eli Min. & Land Co. v. Carleton, 47 C. C. A. 167, 108 Fed. 25.

Nor will findings be disturbed merely because they are based upon unsatisfactory evidence. First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362.

Such findings when supported by substantial evidence are conclusive. Hostetter v. Brooks Elevator Co. 4 N. D. 357, 61 N. W. 49.

Nor does the number of witnesses change the rule. Grewing v. Minneapolis Threshing-Mach. Co. 12 S. D. 127, 80 N. W. 176; Hill v. Whale Min. Co. 15 S. D. 579, 90 N. W. 853; Ricker v. Stott, 13 S. D.

210, 83 N. W. 47; State ex rel. McClory v. McGruer, 9 N. D. 566, 84 N. W. 363; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225.

BRUCE, J. (after stating the facts as above). In the case before us the findings of the court have the same effect as those of a jury. We cannot say that there is not only some, but much competent and creditable, testimony in support thereof, and such being the case, we are bound thereby. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454.

We are not called upon to decide in this case the much mooted question whether a belief in the insecurity of the debt, which is not founded upon the fact, will justify the taking possession of the property by the mortgagee before the maturity of the debt, nor are we required to pass upon the question as to whether a clause in a mortgage to the effect that the mortgagee may take possession of the property "whenever he shall chose to do so" will be enforced by the courts or be repudiated upon grounds of public policy. It is enough for us to say and to hold, as we must and should, that a mortgagee in such a case is not authorized by the law or by the contract to take other than quiet and peaceable possession of such property, or possession by means of some legal remedy such as claim and delivery. If he takes possession of it either by force or fraud he is a trespasser. Thornton v. Cochran, 51 Ala. 415; Street v. Sinclair, 71 Ala. 110; Thorn v. Kemp, 98 Ala. 425, 13 So. 749; Kidd v. Johnson, 49 Mo. App. 486; Kilpatrick v. Haley, 13 C. C. A. 480, 27 U. S. App. 752, 66 Fed. 133; McClure v. Hill, 36 Ark. 268; First Nat. Bank v. Teat, 4 Okla. 454, 46 Pac. 474; 7 Cyc. 12–14. Cobbey, Chat. Mortg. §§ 493, 870; Ford v. Ransom, 39 How. Pr. 429.

Not only does he become a trespasser in such a case, but, when such seizure is accompanied by malice, under the provisions of § 6721, Compiled Laws of 1913, being § 4695, Rev. Codes 1895, § 6145, Rev. Codes 1905, the wrongful act extinguishes his lien, and in any subsequent action in claim and delivery, whether brought by himself or against him by the person wronged, he can no longer assert or rely upon it. There is therefore no merit in defendant's contention that all the damages that can be recovered in this case is the value of the use of the property

from the time of its seizure to the time of the maturity of the mortgage debt, if debt there was.

The seizure was actuated by malice, and accomplished by force and fraud, and was therefore wrongful. Such wrongful seizure extinguished the lien of the mortgage, and therefore the plaintiff was entitled to the possession of the property. It is true that § 6721, Compiled Laws of 1913, provides that even in such a case and provided the debt secured is a valid one, "in an action *for the conversion* of personal property, the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid by the defendant or any person under whom he claims." The action before us, however, is one in claim and delivery, and not in conversion. Technically speaking, it is an action of replevin or detinue. See Willis v. DeWitt, 3 S. D. 281, 52 N. W. 1090; Dow v. Dempsey, 21 Wash. 98, 57 Pac. 355.

The mere fact that the statute provides for a recovery of the value of the property in case delivery cannot be made does not change the action into one of conversion or of trespass. Dow v. Dempsey, supra. At the time of the beginning of the action of claim and delivery, the lien had been extinguished by the force of the statute, and no claim of possession could be made by the defendant under his alleged notes and chattel mortgage, even if the same were valid. So, too, in the case at bar, there is no attempt made to plead the facts which are attempted to be relied upon in mitigation of damages, and that such facts must be specially pleaded is well settled. Phillips on Code Pleading, § 385, p. 396; 5 Enc. Pl. & Pr. 773. It is true that the answer mentions the mortgage, but the mortgage is merely mentioned and relied upon as an excuse for the seizure. There is no attempt to plead or prove the mortgage debt in mitigation of damages. All the defendant asks for, indeed, is for judgment to the effect that he is entitled to the possession of the property. Such being the case, and the lien of the mortgage being extinguished, the contention of the defendant that all that the plaintiff can possibly recover is the value of the use of the property between the time of the seizure and the time when the alleged mortgage debt became due, which was sometime after the seizure but before the trial, can have no foundation.

We are not unmindful of the case of Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. 956, which held that in an action of con-

version the amount secured by the mortgage might be offset or pleaded in mitigation of damages. That case, however, was an action of conversion, and was specifically treated as such. The opinion was handed down in a case which arose under § 1718 of the Civil Code of 1877, which section contented itself with merely declaring the lien extinguished, although the appeal was argued after the section was amended by § 6145, Rev. Codes 1905, § 6721, Compiled Laws of 1913, which provided that "in an action for the conversion of personal property the defendant may show in mitigation of damages the amount due on any lien to which the plaintiff's rights were subject, and which was held or paid by the defendant or any person under whom he claims." The decision held that in order to avoid a circuity of actions, and on account of the fact that the general rule of a necessity of a possession in the defendant at the time of the beginning of the action did not apply to actions for damages, the defendant in an action for conversion would be allowed to recoup the value of the specific lien, and that he might likewise mitigate the damages by limiting the plaintiff's recovery to the amount which would compensate him for the actual loss to him by such conversion. The court, however, emphasized the fact that the action was one of conversion, and distinguished the case then at bar from that of Everett v. Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31, by stating that the former action was one in claim and delivery. This very distinction the legislature seems also to have made and intended in the amendment contained in § 4695, Rev. Codes 1895, § 6145, Rev. Codes 1905, § 6721, Compiled Laws of 1913, which puts in statutory form the rule announced in Lovejoy v. Merchants' State Bank, supra, and which seems to have as expressly limited the right to actions in conversion as did the opinion just cited.

We have no fault to find with the trial court's estimate of the value of the property, nor with his assessment of damages. There was, it is true, a conflict in the testimony, but there was sufficient evidence on which the court could base its findings. Jasper v. Hazen, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; State ex rel. Morrill v. Massey, 10 N. D. 154, 86 N. W. 225.

Appellant contends that where the evidence establishes that the property consists of separate chattels which are in no way dependent upon one another for their value, a judgment cannot be rendered for the ag-

gregate value of the property in case it cannot all be returned. This objection would, no doubt, be good in some jurisdictions. The rule, however, which it announces, has no application in North Dakota, or rather no application under the record in the case at bar. As intimated by us in the case of Smith v. Willoughby, 24 N. D. 1, 138 N. W. 7; "it does not seem . . . that under our peculiar statute such specific valuation is necessary except where it is demanded upon the trial and the jury are instructed to ascertain the same." See §§ 7036 and 7075, Rev. Codes 1905, being §§ 7635 and 7682, respectively, of the Compiled Laws of 1913. See also 34 Cyc. 1535. There was no demand for a specific valuation in the case at bar. There was therefore no error in finding the value in the aggregate.

So, too, although the judgment was in the aggregate, there was a specific finding of fact as to the value of each chattel which was taken, and if the motion or demand had been made in the court below, we have no doubt that the learned trial judge would have changed the judgment into a specific form.

The judgment of the District Court is affirmed.

BURKE, J.: I concur in the result only.

JAMES K. HARNEY v. A. J. WIRTZ et al.

(152 N. W. 803.)

Contracts — construction — rules of — intent of parties — expressed in words of contract — governs.

1. The first and main rule for the construction of contracts is that the intent of the parties as expressed in the words they have used must govern.

Written contracts — intent ascertained therefrom.

2. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible.

Contracts — interpretation — subject-matter — intended by parties.

3. The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping interpret the others; but, however broad may be the terms of the contract, it extends only to those things concerning which it appears that the parties intended to contract.

Contracts — clauses — subordinate to general intent — inconsistent words — rejection.

4. Particular clauses of a contract are subordinate to its general intent;

and words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected.

Chattel mortgage — real estate mortgage — habendum clause — default — power of sale.

5. L. executed to H. a chattel mortgage upon the crop grown during the year 1904 on certain described real estate owned by the mortgagor. The granting clause was of "all the crops of every kind and description including hay," etc. Following the description of the real estate on which the crops were to be grown was the following statement: "And it is mutually covenanted and agreed that this mortgage is a charge and lien on said real estate until said debt hereby secured is paid, and said lien may be foreclosed in the same manner as other mortgages on real estate." The instrument was expressly named a chattel mortgage both at the top and on the back thereof. The habendum covered only the "personal property aforesaid," and all the provisions relating to the care and custody of the property, conditions of default, power of sale, and the sale, were confined to the personal property *Held*, that the instrument did not constitute a mortgage on real estate, but constituted only a chattel mortgage.

Parol evidence — to contradict terms of mortgage — admissibility.

6. Parol evidence is not admissible to contradict or vary the terms of a mortgage.

Written contracts — recites actual agreement — presumption — prior conversations — to vary terms.

7. When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it, and parol evidence as to their negotiations or conversations prior to its execution is not admissible to vary or explain it.

Secret intention — contract — expressed intention prevails.

8. The secret intention of the parties, if different from the expressed intention, will not prevail, as the law looks to what the parties said as expressing their real intention.

Patent ambiguity — inherent uncertainty — face of instrument — appearing on — when arises.

9. A patent ambiguity is an inherent uncertainty appearing on the face of the instrument, and arises at once on the reading of the instrument.

Latent ambiguity — not apparent on face of instrument — collateral matter.

10. A latent ambiguity is an uncertainty which arises not by the terms of the instrument itself, but is created by some collateral matter not appearing in the instrument.

Intention — clearly expressed — latent ambiguity.

11. When the intention of a party or parties is clearly expressed, and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is a latent ambiguity.

Parol evidence — chattel mortgage — intended as mortgage on real estate — admissibility — action to foreclose.

12. Parol evidence to show that the chattel mortgage set forth in ¶ 5 of this syllabus was intended to be a mortgage on the realty was not admissible in an action for the foreclosure of such mortgage, brought by H. against subsequent encumbrancers or purchasers without notice.

Opinion filed March 31, 1915.

From a judgment of the District Court of Benson County, *K. E. Leighton,* Special Judge, defendants appeal.

Reversed.

Middaugh, Cuthbert, Smythe, & Hunt, for appellants.

The habendum clause in the mortgage relates entirely to the *chattel mortgage feature* of the instrument. The entire instrument is merely a chattel, and not a real estate mortgage. Mortgage Bank & Invest. Co. v. Hanson, 3 N. D. 465, 57 N. W. 345.

A written contract supersedes all prior or accompanying oral negotitations touching its subject-matter. Rev. Codes 1905, §§ 5333, 6153, Comp. Laws 1913, §§ 5889, 6729; National German American Bank v. Lang, 2 N. D. 66, 49 N. W. 414; N. D. Comp. Laws, 1913, § 3545; Thompson v. McKee, 5 Dak. 176, 37 N. W. 367; Northwestern Fuel Co. v. Burns, 1 N. D. 137, 45 N. W. 699; Jasper v. Hazen, 4 N. D. 2, 23 L.R.A. 58, 58 N. W. 454; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289.

Defendant's motion to dismiss, made at conclusion of plaintiff's case, should have been granted. Plaintiff had failed to make a prima facie case or to prove the material allegations of the complaint. A certified *copy* of the *record* of a mortgage is not the best evidence. It is *no* evidence when it appears that the original instrument is in the possession of the witness testifying. Rev. Codes 1905, § 7297, Comp. Laws 1913, § 7916; American Mortg. Co. v. Mouse River Live Stock Co. 10 N. D. 290, 86 N. W. 965.

There is also a failure to allege or prove facts to negative other proceedings. Rev. Codes 1905, Subdiv. 1, §§ 6859, 7480, Comp. Laws 1913, §§ 7448, 8103.

A man having a first lien on chattels and real property, knowing of a second lien upon the real property, must proceed with the chattel

security in such manner as to make as much as possible out of it, to the end that the burden of his prior mortgage on the land may be thereby lessened. This is what common honesty demands. Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 201, 73 N. W. 527.

In a suit in equity, the rights of the parties are fixed as of the date of the judgment. In an action at law, such rights are determined as of the date of the trial or verdict. Brown v. Newman, 15 N. D. 1, 105 N. W. 941.

In this case no compound interest should have been computed or allowed. In any event, interest cannot be compounded where to do so will make a greater annual rate than 12 per cent. Rev. Codes 1905, §§ 5511, 6722, Comp. Laws 1913, §§ 6073, 7310.

T. H. Burke, for respondent.

The habendum clause may limit, restrain, lessen, enlarge, explain, vary, or qualify, but not totally destroy or contradict or be repugnant to, the estate granted in the premises, but if the habendum be repugnant to the grant, the former will be controlled by the manifest intent and terms of the latter. 13 Cyc. 619; 2 Devlin, Deeds, 3d ed. 1, 1531; 1 Devlin, Real Estate & Deeds, § 213, p. 309.

The granting clause in a deed must prevail over the habendum unless the contrary intention is shown by the deed. 1 Devlin, Real Estate & Deeds, § 214, p. 309; French v. Carhart, 1 N. Y. 102; McConnell v. Rathbun, 46 Mich. 305, 9 N. W. 526; Wilson v. Terry, 130 Mich. 73, 89 N. W. 567; Farquharson v. Eichelberger, 15 Md. 63.

The validity of a mortgage on real estate is not affected by the fact that it also pledges personal property. Harriman v. Woburn Electric Light Co. 163 Mass. 85, 39 N. E. 1004.

An instrument is a mortgage where the intention is clear to charge certain property as *security* for the payment of a debt, and contains nothing impossible or contrary to law. 27 Cyc. 985; Jasper v. Hazen, 4 N. D. 2, 23 L.R.A. 58, 58 N. W. 454; Standorf v. Shockley, 16 N. D. 73, 11 L.R.A.(N.S.) 869, 111 N. W. 622, 14 Ann. Cas. 1099; Rev. Codes 1905, § 6153, N. D. Comp. Laws 1913, § 6729; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601, 102 N. W. 160; Wells v. Geyer, 12 N. D. 316, 96 N. W. 289.

Parol evidence is always admissible, either between the original or third parties, to explain an ambiguity in the written instrument. 17 Cyc. 640, 662; 9 Cyc. 470; Columbus Sewer Pipe Co. v. Ganser, 58

Mich. 385, 55 Am. Rep. 697, 25 N. W. 378; Mayo v. Murchie, 3 Munf. 358; Sturges v. Detroit, G. H. & M. R. Co. 166 Mich. 231, 131 N. W. 709; Ferris v. Wilcox, 51 Mich. 105, 47 Am. Rep. 551, 16 N. W. 252; Rundle v. Scully, 144 Mich. 62, 107 N. W. 694; Bedford v. Kelley, 173 Mich. 492, 139 N. W. 252, Ann. Cas. 1914D, 848; 32 Cyc. 40; Big Rapids Nat. Bank v. Peters, 120 Mich. 518, 79 N. W. 891; R. L. Polk Printing Co. v. Smedley, 155 Mich. 249, 118 N. W. 984; Colean Implement Co. v. Strong, 126 Iowa, 598, 102 N. W. 506; Smith v. McLean, 24 Iowa, 322; Weber v. Illing, 66 Wis. 79, 27 N. W. 834; Sheehey v. Fulton, 38 Neb. 691, 41 Am. St. Rep. 767, 57 N. W. 395; Ripon College v. Brown, 66 Minn. 179, 68 N. W. 837.

If the language used presents a patent ambiguity as to its meaning, such evidence is always admissible. Baldwin v. Winslow, 2 Minn. 213, Gil. 174; Case v. Young, 3 Minn. 209, Gil. 140; Kelly v. Bronson, 26 Minn. 359, 4 N. W. 607.

Resort is frequently made to such evidence, or to such method of proof, not to vary the terms of the written contract, but to throw light upon the *meaning* of the terms used, as *intended* by the parties. Hazelton Boiler Co. v. Fargo Gas & Electric Co. 4 N. D. 365, 61 N. W. 151.

Wirtz brothers took the mortgage and their interest in the premises, with full knowledge of the plaintiff's mortgage. They cannot rely upon a mistake in law, as to the legal effect of an instrument. Knowledge of the *facts* is sufficient to charge them. 27 Cyc. 1186; Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 700, 18 Ann. Cas. 11.

It is only necessary for a person holding the prior mortgage to resort first to property upon which his lien is exclusive, when he can do so without risk of loss to himself, or of injustice to others, and *then only* upon the *demand* of a party interested. Rev. Codes 1905, § 2033, Comp. Laws 1913, § 2743; McIlvain v. Mutual Assur. Co. 93 Pa. 30; Groesbeck v. Mattison, 43 Minn. 547, 46 N. W. 135.

CHRISTIANSON, J. This is an action for the foreclosure of a mortgage. The plaintiff obtained judgment in the court below for a foreclosure of the mortgage, and the defendant appeals from the judgment and asks for a trial *de novo* in this court. The only question presented in this case arises upon the construction of the mortgage sought to be foreclosed, which is in words and figures as follows:

CHATTEL MORTGAGE. Great Western Ptg. Co., Minneapolis.

Know all Men by these Presents, That I,.....*Carl O. Lindemann*,.....*a single man*....Mortgagor of the Town of....*155*....Range....*69 w*....in the County of *Benson*,....State of North Dakota, being justly indebted to....*James K. Harney*,....Mortgagee, in the sum of.....*Three hundred seventy seven*.....DOLLARS, have, for the purpose of securing the payment of said debt, Granted, Bargained, Sold, and Mortgaged, and by these presents do Grant, Bargain, Sell, and Mortgage, unto the said....*James K. Harney*,....all the crops of every kind and description, including hay, which have been or may hereafter be grown, sown, cultivated, cut or harvested, during the years A. D. ....*1904*,....and until said debt is fully paid, on the following described real estate, to-wit....*The North east quarter (N. E. ¼). Section thirty-two (32) in township one hundred fifty-five (155) north of Range sixty-nine (69) west of the 5 P. M., in Benson County*.....State of North Dakota.

And it is mutually covenanted and agreed, that this mortgage is a charge and lien on said real estate, until said debt hereby secured is paid, and said lien may be foreclosed in the same manner as other mortgages on real estate.

And in case of failure to properly sow, cultivate, harvest or care for said crop, the said Mortgagee is hereby authorized to enter on said land and do all that is necessary to properly sow, harvest or care for such crops at my expense, and apply the net amount realized therefrom in the payment of said indebtedness. And personal property as follows, to-wit:.....

.....

One grey mare named "Belle" age about 10 years, weight about 1,150 lbs.;.....

.....

One bey mare white strip in face named "Maud" age about 10 years, weight about 1,150 lbs.; .....

.....

One dark brown mare, white star in forehead, named "Maud," age about 14 years, weight about 1,200 lbs.; .....

.....

One new Western King wagon, wide tiers complete with double box, neckyoke, and whipple trees. .....

.....

.....

And all increase of above stock until the debt hereby secured is fully paid. And I hereby covenant that all of said property is now in my possession in the county and State aforesaid, and free from all incumbrance.....

TO HAVE AND TO HOLD ALL AND SINGULAR, The personal property aforesaid, Forever, as security for the payment of the note and obligations hereinafter described: Provided, always, and these presents are upon this express condition, That is the said Mortgagor shall pay or cause to be paid unto the said Mortgagee, his executors, administrators, or assigns, the sum of..*Three hundred seventy-seven*..DOLLARS, according to the conditions of...*one*...certain promissory note payable to..*James K. Harney*,..viz., $..*377.00*..dated..*June 14, 1904*..due..*Oct. 15, 1904*,..with interest at 12 per cent per annum until paid

$.....dated.....due.....with interest at 12 per cent per annum until paid
$.....dated.....due.....with interest at 12 per cent per annum until paid
$.....dated.....due.....with interest at 12 per cent per annum until paid
$.....dated.....due.....with interest at 12 per cent per annum until paid

Or any other note of said Mortgagor given hereafter to the Mortgagee herein, as renewal hereof, then these presents to be void and of no effect. But if default shall be made in the payment of said sum or sums of money, or the interest thereon, at the time the said note or notes shall become due, or if any attempt shall be made by the said Mortgagor or any other person to dispose of or injure said property or to remove said property or any part thereof, from said county of..*Benson*...or if said Mortgagor does not take proper care of said property, or if said Mortgagee shall at any time deem himself insecure; then thereupon and thereafter, it shall be lawful, and the said Mortgagor hereby authorizes said Mortgagee, his executors, administrators, or assigns, or his authorized agent, to take said property wherever the same may be found, and hold or sell and dispose of the same and all equity of redemption at public auction, with notice as provided by law, and on such terms as said Mortgagee or his agent may see fit, retaining such amount as shall pay the aforesaid note or notes and interest thereon and an attorney's fee of five dollars, and such other expenses as may have been incurred, returning the surplus money, if any there may be, to the said Mortgagor or his assigns, and said Mortgagor hereby further authorizes said Mortgagee, his executors, administrators, or assigns, or his authorized agents, if he so elect, to sell the crops herein mortgaged when harvested, in any usual market therefor, at any time, in the usual manner, at the market price thereof in such market and without the notice provided by law. And so long as the conditions of this mortgage are fulfilled, the said Mortgagor to remain in peaceful possession of said property, and in consideration thereof he agrees to keep said property in as good condition as it now is, at his own cost and expense.

IN TESTIMONY WHEREOF the said Mortgagor has hereunto set....*his*....hand and seal this....*14th*....day of....*June*....A. D. 1904.

Signed, Sealed and Delivered in the Presence of
.....*Geo. Duncan*.....
.....*A. O. S. Karsten*.....

.....*Carl O. Lindemann*.....
..... [SEAL]

State of North Dakota, } ss.
County of.....*Benson*.....

On this.....*14th*.....day of.....*June*.....in the year one thousand nine hundred .....*four*.....before me.....*George Duncan*.....a Notary Public in and for said County and State, personally appeared....*Carl O. Lindemann*,.... ....*an unmarried man*,.....

known to me to be the same person who....*is*....described in, and who executed the foregoing and within instrument, and acknowledged that he executed the same.

.....*George Duncan*.....

Notary Public, Benson Co.,
Notary Public.....*North Dakota*,.....County, N. D.
My Commission expires Aug. 10, 1908.

R. E. No. **17547** *G. N. C.*

Chattel Mortgage

C. M. No. **49465**

....*CARL O. LINDEMANN*....
TO
J. E. TRUESDELL.
.....*JAMES K. HARNEY*.....

Office of Register of Deeds
County of....*Benson*....North Dakota.

I hereby certify that the within instrument was filed in this office for record on the ..*14*..day of..*June*..A. D. 1904 at....*2*....o'clock..*P*...M., and was duly entered in Book *1904 and recorded in Book 153 of Mtges., Page 455*.....
.....*Geo. Dickinson*.....
.....Register of Deeds.
By.....*A. O. S. Karsten*.....
Deputy.

Office of Register of Deeds
County of.....North Dakota.

I hereby certify that I have compared the within instrument with the original Mortgage No..... now on file in my office, and that it is a true and correct copy of the same, and the whole thereof, and that the above is a true copy of the filing thereon.
Dated.....190
.....
Register of Deeds.
By .....
Deputy.

Chd. 1.75

This instrument was duly signed, witnessed, and acknowledged, and on the 14th day of June, 1904, was recorded as a real estate mortgage in the office of the register of deeds of Benson county, and also filed in that office as a chattel mortgage.

On September 8, 1904, Lindeman gave a mortgage upon the land described in the mortgage above set forth, to the Minneapolis Threshing Machine Company to secure the payment of $3,085. This mortgage, it is conceded, was a regular real estate mortgage in usual form, containing the stipulations, covenants, and conditions usually contained in such mortgages in this state, including a good and sufficient power of sale. This mortgage was recorded in the office of the register of deeds of Benson county on September 12, 1904, and was duly assigned by the mortgagee named herein, to the defendants, Wirtz Brothers, by a written assignment in regular form, dated June 14, 1907, and recorded in the office of the register of deeds of Benson county on August 14, 1907. It is conceded that this last mortgage was duly foreclosed in the manner provided by law, and a sheriff's deed duly issued thereon to the defendants, Wirtz Brothers, on the 6th day of October, 1908, and recorded in the office of the register of deeds of Benson county on October 13, 1908.

The plaintiff brought this action in equity to foreclose the mortgage given to him by Lindeman upon the realty alone,—no foreclosure of the mortgage upon the chattels being asked for. The defendants, Wirtz Brothers, first demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and these defendants, thereupon answered, stating, in substance, that they were the owners of the premises, and that the mortgage set forth in plaintiff's complaint was only a chattel mortgage upon the personal property therein described, and did not constitute a lien on the realty, and also that the plaintiff had permitted the personal property to be dissipated and disposed of by Lindeman after the defendants, Wirtz Brothers, had notified the plaintiff to satisfy his mortgage out of the personal property. It will be unnecessary for us, however, to consider the latter defense, because in our judgment the controlling question—and really the only question presented for our consideration—arises upon the construction of the mortgage held by the plaintiff and sought to be foreclosed by this action. Does the in-

strument in question constitute a mortgage upon the land therein described; or does it only constitute a chattel mortgage? This is the prime question submitted to this court for determination.

(1) "The law furnishes certain rules for the construction of written contracts for the purpose of ascertaining from the language the manner and extent to which the parties intended to be bound; and those rules should be applied with consistency and uniformity; and it is not proper for a court to vary, change, or withhold their application. *The first and main rule of construction is that the intent of the parties as expressed in the words they have used must govern.* Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. If the words clearly show the intention, there is no need for applying any technical rules of construction, for where there is no doubt there is no room for construction." 9 Cyc. 577.

(2–4) The law relative to the construction of contracts, as stated above, has been in substance enacted into, and become a part of, the statutory law of this state. Sections 5895–5921 of the Compiled Laws of 1913 furnish a complete guide for the interpretation of contracts.

Section 5896 provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." Section 5897 provides that, "for the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied." Among the rules governing the interpretation of contracts enumerated are the following: "The language of a contract is to govern its interpretation if the language is clear and explicit, and does not involve an absurdity." Comp. Laws, § 5898. "*When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible,* subject, however, to the other provisions of this article." Comp. Laws, § 5899. "The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the others." Comp. Laws, § 5901. Section 5904 provides that words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to

them by usage; and § 5905 provides that technical words are to be interpreted as usually understood by persons in the profession or business to which they relate unless clearly used in a different sense. *"However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract."* Comp. Laws, § 5908. "Particular clauses of a contract are subordinate to its general intent." Comp. Laws, § 5910. "Words in a contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected." Comp. Laws, § 5913. Section 5911 provides that when a contract is partly written and partly printed, the written parts control the printed parts. By applying the rules of interpretation provided by the Codes of this state, to plaintiff's mortgage, we have no serious difficulty in reaching a conclusion in this case.

(5) The instrument in question has every element of a chattel mortgage, and in fact it is expressly labeled a chattel mortgage, not only at the top of the instrument itself, but also on the back thereof. There is absulutely nothing about the instrument to indicate that its purpose was to mortgage realty, unless the single clause, appearing as a part of the clause relative to crop mortgages, be so construed.

The name of the instrument, its appearance, and contents are those of a chattel mortgage. The whole nature, tenor, and purport thereof is that of a chattel mortgage. The main intention of the parties as manifested by the terms of the contract itself was to create a chattel mortgage. The term "chattel mortgage" has not only a technical and strict legal meaning, but has also a well-understood meaning in an ordinary and popular sense. In both instances, however, it is understood to refer to a mortgage upon chattels only; and it is never understood to mean a lien upon real property. The instrument under consideration was expressly named, "chattel mortgage." We venture to say that not one person in a thousand signing the mortgage in question would have known that it was intended to mortgage realty. The instrument by its name, appearance, and general contents would unquestionably convey to the person executing it the idea that he was signing only a chattel mortgage. The granting clause in the instrument is: "That I . . . by these presents do grant, bargain, sell, and mortgage unto the said James K. Harney, all the crops of every kind and description, including hay which had been or may hereafter be grown, sown, cultivated, cut, or harvested

during the years of 1904, and until said debt is fully paid on the following described real estate, to wit: The Northeast quarter (N.E.¼) section thirty two (32) in township one hundred fifty-five (155) north, of range sixty-nine (69) west of the 5th P. M. in Benson county, state of North Dakota." Then follows the statement: "That this mortgage is a charge and lien on said real estate until said debt hereby secured is paid, and said lien may be foreclosed in the same manner as other mortgages on real estate." Immediately following this statement is a continuation of the crop mortgage clause, providing that in case of failure to properly sow, cultivate, harvest, and care for said crop that the mortgagee be authorized to do so, etc. It will be observed that the mortgage in question nowhere says that the mortgagor grants or mortgages the realty. The provisions relative to the power of sale, the conditions relative to default, and in fact all the conditions and stipulations in the body of the mortgage are confined exclusively to the chattel property, and are those usually found in a chattel mortgage in this state, and by their plain and unmistakable terms can have no possible application to the realty. The habendum clause in the mortgage says: "To have and to hold all and singular, the personal property aforesaid, forever as security for the payment of the note and obligations hereinafter described."

While it is true that the habendum clause is not of the same importance that it used to be, still "the habendum may limit, restrain, lessen, enlarge, explain, vary, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. . . ." 13 Cyc. 619. The whole of the instrument is to be taken together (§ 5901 Comp. Laws), and the particular clauses are subordinate to its general intent (§ 5910 Comp. Laws); and regardless of however broad may be the terms of the contract, it extends only to those things concerning which it appears that the parties intended to contract (§ 5908 Comp. Laws), and the words in the contract which are wholly inconsistent with its nature or with the main intention of the parties are to be rejected. (§ 5913 Comp. Laws). The instrument under consideration, when so construed, is clearly what it is named, *viz.*, a chattel mortgage, and nothing more, and does not in any sense constitute a mortgage on realty. An instrument almost identical in language was construed by this court in the case of Mortgage Bank & Invest. Co. v. Hanson, 3 N. D. 465, 57 N. W. 345, to be a chattel mortgage. The reasons advanced

for the court's decision in that case apply equally in this case. We consider that decision sound in principle, and entirely approve of the doctrine promulgated thereby.

(6–8) Upon the trial, the plaintiff introduced testimony relative to conversations had at and prior to the execution of the mortgage, to show that the plaintiff and Lindeman intended the mortgage set forth in the plaintiff's complaint to be a mortgage, not only upon the personal property, but also upon the real property. This testimony was all objected to upon proper grounds by the attorneys for the appellants. Respondent's counsel contends that this testimony was admissible for the purpose of showing the intention of the parties. We are unable to agree with respondent's counsel in this contention, and are satisfied that it is necessary to arrive at the intention of the parties from the instrument itself. Comp. Laws, § 5899; Miller v. St. Paul F. & M. Ins. Co. 26 S. D. 45, 128 N. W. 709. It is obvious that any intent or ideas existing in the minds of the contracting parties, or dependent upon oral understandings between them, was not in any manner made a matter of record by the recording of plaintiff's mortgage. The only notice with which defendants were chargeable was that given by the record itself. The question is whether or not the instrument involved mortgages both real and personal property or only personalty. To permit parol testimony to be admitted to add something to the mortgage which does not appear on its face, would be in effect to permit the plaintiff in this case to establish an oral mortgage on realty. There is no evidence that the appellants had any actual knowledge or notice of the mortgage, or of any intent on the part of the parties thereto not contained in the mortgage. All the evidence tends to show that the only notice the appellants had is such as was imputed to them from the records. If respondent's position is sustained, the recording acts would be of no value. The records are notice of what is there shown,—no more, no less; and all persons are chargeable with knowledge of the facts shown by the records. Either the mortgage involved mortgaged the realty or it did not; and, as we view the matter, any secret intention in the minds of the parties can neither add to, nor detract from, the notice imparted to innocent third parties by the record of the mortgage in question. "The secret intention of the parties, however, if different from the expressed intention, will not prevail, as the law looks to what the parties said as expressing

their real intention." 9 Cyc. 578. "Parol evidence is not admissible to contradict or vary the terms of a mortgage. When a contract is reduced to writing, the presumption is that the entire actual agreement of the parties is contained in it; and parol evidence as to their negotiations or conversations prior to its execution is not admissible to vary or explain it." 27 Cyc. 1136.

(9–12) Respondent's counsel further contends that the mortgage is ambiguous, and that parol evidence was admissible to explain the ambiguity. It is true that parol testimony is admissible in certain cases to explain an ambiguity in a written instrument, but it has no application in this case. The rule (relative to admission of such evidence) was laid down by Lord Bacon, that a latent ambiguity may be explained by extrinsic evidence, but that a patent ambiguity may not. And although this general distinction has sometimes been criticised by the courts, and for that reason it is necessary to examine the statement closely in order to see what it really means and how far it is a correct exposition of law, still it has been very generally accepted by the courts as correct. A latent ambiguity is defined by Lord Bacon to be "that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." The following definition of latent ambiguity is given by Cyc.: "A latent ambiguity arises when the writing upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain. . . . It is to be observed, however, that while parol evidence may be admitted in explanation where there is a latent ambiguity, it can do no more than explain the doubtful expressions of the instrument consistently with the relations of the parties and the other incidents of the contract. *The rule that where an ambiguity is created by parol it may be removed by parol was never intended to violate the rule that a writing shall not be contradicted or explained by inferior testimony.* If, therefore, when an ambiguity is created by parol, the instrument itself removes the ambiguity, it cannot be controlled." 17 Cyc. 676. A patent ambiguity has also been defined as follows: "A patent ambiguity is an uncertainty that arises at once on the reading of the contract. We do not have to wait until some other fact is brought to our knowledge before the uncertainty is apparent, but the doubt is suggested at once and

by the phrase itself. A patent ambiguity is one that appears on the face of the instrument, and that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction on it, placing itself in the situation of the parties, cannot ascertain what they meant. A patent ambiguity appears on the face of the instrument, while a latent ambiguity is raised by evidence." Jones, Ev. § 473. Justice Story in discussing this proposition said: "Nothing is clearer than the general rule,—latent ambiguities may be removed by parol evidence, for they arise from the proof of facts *aliunde;* and where the doubt is created by parol evidence, it is reasonable that it should be removed in the same manner. *But patent ambiguities exist in the contract itself; and if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not merely construe, the contract. You attempt to do that for the party which he has not chosen to do for himself; and the law very properly denies such an authority to courts of justice."* Peisch v. Dickson, 1 Mason, 9, Fed. Cas. No. 10,911. "In other words, and more generally speaking, if the court, after placing itself in the situation in which the parties stood at the time of executing the instrument, and with full understanding of the force and import of the words, cannot definitely ascertain the meaning and intention of the parties *from the language of the instrument thus illustrated,* it is a case of incurable and hopeless uncertainty; *and* the instrument is so far inoperative and void; *and it cannot be sustained or rendered operative by the introduction* of evidence which would necessarily have the effect of adding new terms to the writing." 17 Cyc. 682.

Black's Law Dictionary says: "An ambiguity may be either latent or patent. It is the former, where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings. But a patent ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used." Anderson's Dictionary of Law gives the following definitions: *"Patent ambiguity:* Such ambiguity as appears upon the face of the writing itself. *Latent ambiguity:* Where a writing is perfect and intelligible upon its face, but, from some circumstances admitted in proof, a doubt arises as to the

applicability of the language to a particular person or thing. *Ambiguitas patens* is that which appears to be ambiguous upon the instrument. *Ambiguitas latens* is that which seems certain and without ambiguity for anything that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity." Stroud's Judicial Dictionary gives the following clear statement regarding the matter, *viz.:* "There are two kinds of ambiguity: First, where the ambiguity arises from the fact that the parties have expressed inconsistent intentions on the face of the deed. An ambiguity of this class is apparent to any person perusing the deed, even if he be unacquainted with the circumstances of the parties; and is called a 'patent ambiguity.' Second, where no ambiguity is apparent to a person perusing the deed until, on obtaining evidence of the circumstances of the parties, it is discovered that there are several persons or things, or classes of persons or things to each of which a name or description contained in the deed seems to be equally applicable. An ambiguity of this class is called a 'latent ambiguity,' or an 'equivocation.'"

The ambiguity arising in this case—if there is one—is an inherent uncertainty appearing on the face of the instrument, and arises from the defective, obscure, or insensible language used. It seems clear that no ambiguity exists which can be explained by parol. The only doubt existing in this case, if any, is as to the intention of the parties. This is not such an ambiguity as can be explained by parol. When the intention of the parties is clearly expressed, and a doubt exists, not as to the intention, but as to the object to which the intention applies, it is a latent ambiguity. The evidence offered by plaintiff was not to explain an ambiguity, but merely to add something to the contract. The purpose of the evidence was to convert a chattel mortgage into a real estate mortgage. This is not explaining an ambiguity, but varying the terms of a written contract and creating a new contract by parol entirely different and variant from the written contract. We are entirely satisfied that this evidence was wholly inadmissible. Comp. Laws, § 5889; First State Bank v. Kelly, ante, 84, 152 N. W. 125. "The description in the mortgage as to the property included therein and intended to be covered thereby is conclusive, and parol or extrinsic evidence is not admissible to contradict, add to, or vary the same by showing the intention of the parties in this respect to have been other than that expressed by

the instrument." 17 Cyc. 628. See also 27 Cyc. 1137; 9 Enc. Ev. 466, 467.

It is seriously contended by appellants' counsel that the plaintiff is estopped from asserting that the mortgage is anything more than a chattel mortgage,—that the name, general form, and contents of the instrument are those of a chattel mortgage; that its appearance, in every respect, is such as would lead any person to believe it to be a chattel mortgage, and that plaintiff, having held the instrument out to be such,—under the familiar rules of estoppel,—will now be estopped to assert that the mortgage is anything but what he held it out to be; *viz.*, a chattel mortgage.

Appellants' counsel also earnestly assert that the form of the instrument is such that it is a mere trap whereby innocent persons may be led into giving mortgages on their lands while believing that they are only signing chattel mortgages, and that for that reason the contract is unlawful and contrary to public morals, and is void as against public policy, under the provisions of § 5922, Compiled Laws. In view of what has already been said in this opinion, we find it unnecessary to pass upon the propositions thus advanced. It is clear to us that the instrument in question, when construed, as a whole, in accordance with the principles laid down in the Civil Code of this state for the construction of contracts is only a chattel mortgage, and that the parties intended to contract only concerning personal property. But, it also is self-evident that if the mortgage involved herein should be sustained as a mortgage on realty, that it would, as appellant's counsel assert, put a premium upon fraud and deceit, and enable unscrupulous persons to obtain real estate mortgages under the pretext that they were taking chattel mortgages only. The persons who are compelled to give chattel mortgages in order to obtain credit would in a great number of cases prove easy victims in the hands of unscrupulous creditors, if this instrument were sustained as a mortgage on realty. The fact that no charge of fraud or deceit is involved in this case does not alter the result which would naturally follow a decision sustaining the instrument under consideration as a real estate mortgage. The mortgage in question is either a mortgage on the realty or it is not. Its contractual effect would be the same whether the mortgagee was honest or dishonest. The same rules of law apply to all. There is no hardship in requiring that a person

obtaining a real estate mortgage be required to use a form which will inform the party executing the same that he is mortgaging realty. We are satisfied that the instrument in question is only a chattel mortgage, and did not mortgage the realty, and that therefore the judgment of the trial court is erroneous. The District Court will therefore reverse its judgment, and enter judgment in favor of the appellants, as prayed for in their answer.

Mr. Justice BURKE did not participate in the above, Honorable CHAS. A. POLLOCK, Judge of the District Court of the Third Judicial District, sitting in his stead.

M. B. DOWD v. L. A. McGINNITY.

(152 N. W. 524.)

Action for damages for assault and battery. Plaintiff had judgment for $6,550 and interest. Defendant appeals.

Assault and battery — action for damages — depositions — objections to certain questions therein — time of making.

1. Certain questions asked of one Dr. Judd, whose testimony had been taken up by deposition, were objected to when such deposition was offered in evidence. The better practice is to offer the objection at the time the witness gives the testimony. In this case, it is difficult to tell from the record what part of the doctor's testimony was in evidence at the time the objections were taken, and it is therefore difficult to review the trial court's rulings. No error, however, appears from the record which we have before us.

Note.—The holding of the court to the effect that a witness who is not an expert will not be permitted to testify to the mental condition of a person unless it is shown that the witness has had an opportunity for observation, and that he is in possession of such information as will enable him to form an intelligent opinion, is in accord with the authorities as shown in the notes in 38 L.R.A. 721; 19 Am. Rep. 410; and 30 Am. St. Rep. 38.

The authorities on the question of the right of an expert witness to testify to the mental or physical condition of a person, based upon his observation or examination, are presented in the note in 39 L.R.A. 308.

Medical expert testimony — opinion evidence — based upon the testimony of another witness whom he had heard — assumption of truth.

2. Dr. LaBarge was asked for an opinion based upon the testimony of another witness whom he had heard testify. After objection that the truth of such doctor's testimony was not assumed, the trial court said: The Court: "That is, assuming that the evidence given by such and such witnesses are true. Overruled, I will let him answer." This ruling was heard by the witness and became part of the original question. Later, the trial court struck out the doctor's testimony relative to this matter. If there was any error, the same was thereby cured.

Defendant on stand — questioned as to having been arrested and convicted for same offense — error — motion to strike out.

3. While the defendant was upon the stand, and being cross-examined, he was asked whether or not he had been arrested and convicted in a criminal action for assault and battery relative to those same facts. The objection was overruled, and witness replied that he had been. Later, the trial court stated that he would entertain a motion to strike out such testimony, and upon motion of the defendant the same was stricken out and the jury admonished to disregard the same. This cured any error.

Plaintiff's mental condition — witness questioned as to — competency of witness — must be shown.

4. One Reiser, witness for defendant, was asked certain questions relative to plaintiff's mental condition. Same were properly excluded because the witness had not shown himself competent to testify.

Evidence of mental condition — competency of witness.

5. Defendant's witness Hankey failed to show sufficient foundation for his testimony as to plaintiff's mental condition, and the questions quoted in the opinion were properly excluded.

Witness — must be acquainted with conditions.

6. The court struck out the testimony given by defendant's witness Spangerud, relative to plaintiff's mental condition, after the witness had admitted that he had not observed plaintiff's condition.

Questions — improper — unfair.

7. The question asked of defendant's witness Rock was properly excluded, being unfair.

Doctor's evidence as to mental condition — personal examination — facts — not hearsay.

8. Dr. Stobey gave testimony relative to plaintiff's mental and physical condition. *Held*, that the doctor's opinion was based upon his personal examination, and not upon statements made to him by the plaintiff, and therefore was not hearsay.

Witness — signature — ability to sign.

9. One of defendant's witnesses was asked as to plaintiff's ability to sign his name in the spring of 1911. Witness had not observed plaintiff sufficiently to testify as to his mental condition, and if the question was asked for any other purpose it was immaterial.

Verdict — evidence — sufficient to sustain.

10. Evidence examined, and *held,* sufficient to sustain the verdict in the sum found by the jury.

New trial — motion for — affidavits — denial.

11. A motion for a new trial based upon the affidavit of a witness, who turned away as soon as she realized there was going to be a fight, was properly denied by the trial court.

Opinion filed April 5, 1915.

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

E. R. Sinkler, for appellant.

Where the erroneous and incompetent evidence is grossly prejudicial, its withdrawal by the court, after having been received over objection, does *not cure* the error. Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506; Manzer v. Phillips, 139 Mich. 61, 102 N. W. 292; Roydan v. Heberstumpf, 129 Mich. 137, 88 N. W. 386.

And where the evidence so admitted creates such a strong impression on the minds of the jury that its subsequent withdrawal will not remove effect caused by its admission, the original objection may be available on motion for new trial, or on appeal. Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73; Taylor v. Adams, 58 Mich. 187, 24 N. W. 864; Glascock v. Chicago & A. R. Co. 69 Mo. 589; Meyer v. Lewis, 43 Mo. App. 417; Cobb v. Griffith & A. S. G. & Transp. Co. 12 Mo. App. 130; Mueller v. Weitz, 56 Mo. App. 36; Nelson v. Spears, 16 Mont. 351, 40 Pac. 786; Wisconsin State Bank v. Dutton, 11 Wis. 372.

The question, "is a person in the condition that the testimony of Doctor Stabey shows, and in the condition as shown by your own observation, in a condition to perform mental and physical labor, is not a proper hypothetical question, and is wholly incompetent, and does not assume the truth of the testimony of the witness mentioned, and does not seek the opinion of the witness on the stand, upon any

specific state of facts: That it invades the province of the jury. Re Barber's Appeal, 63 Conn. 393, 22 L.R.A. 90, 27 Atl. 973; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908; Stoddard v. Winchester, 157 Mass. 567, 32 N. E. 948; Elliott v. Russell, 92 Ind. 526; Chicago, R. I. & P. R. Co. v. Moffitt, 75 Ill. 524; Burns v. Barenfield, 84 Ind. 43; McCarthy v. Boston Duck Co. 165 Mass. 165, 42 N. E. 568; Getchell v. Hill, 21 Minn. 464; State v. Lautenschlager, 22 Minn. 514; Jones v. Chicago, St. P. M. & O. R. Co. 43 Minn. 279, 45 N. W. 444; Carpenter v. Blake, 2 Lans. 206; Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696; Armendaiz v. Stillman, 67 Tex. 458, 3 S. W. 678; Luning v. State, 2 Pinney (Wis.) 215, 52 Am. Dec. 153; Henry v. Hall, 13 Ill. App. 343; Rush v. Megee, 36 Ind. 69; Woodbury v. Obear, 7 Gray, 467; Reynolds v. Robinson, 64 N. Y. 589; Hagadorn v. Connecticut Mut. Ins. Co. 22 Hun, 249; Gregory v. New York, L. E. & W. R. Co. 55 Hun, 303, 8 N. Y. Supp. 525; Re Snelling, 136 N. Y. 515, 32 N. E. 1006; Gottlieb v. Hartman, 3 Colo. 53; Elgin, A. & S. Traction Co. v. Wilson, 217 Ill. 47, 75 N. E. 436, 19 Am. Neg. Rep. 145; Keyes-Marshall Bros. Livery Co. v. St. Louis & H. R. Co. 105 Mo. App. 556, 80 S. W. 53; Bedford Belt R. Co. v. Palmer, 16 Ind. App. 17, 44 N. E. 686; Crozier v. Minneapolis Street R. Co. 106 Minn. 77, 118 N. W. 256; Williams v. State, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512; People v. Millard, 53 Mich. 63, 18 N. W. 562; State v. Scott, 41 Minn. 365, 43 N. W. 62; People v. McElvaine, 121 N. Y. 250, 18 Am. St. Rep. 820, 24 N. E. 465; State v. Coleman, 20 S. C. 441; Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 912; People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 828, 7 Am. Crim. Rep. 345; State v. Maier, 36 W. Va. 757, 15 S. E. 991; 1 Wigmore, Ev. § 681.

The testimony of the other witnesses to which reference is made in such a question *must be assumed to be true.* Bennett v. State, 57 Wis. 69, 46 Am. Rep. 26, 14 N. W. 918; People v. Lake, 12 N. Y. 362; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 828, 7 Am. Crim. Rep. 345; Porter v. State, 135 Ala. 51, 33 So. 695; Gunter v. State, 83 Ala. 96, 3 So. 605; Page v. State, 61 Ala. 16; People v. McElvaine, 121 N. Y. 250, 18 Am. St. Rep. 820, 24 N. E. 465; Reynolds v. Robinson, 64 N. Y. 595; Guiterman v. Liverpool,

N. Y. & P. S. S. Co. 83 N. Y. 358; Luning v. State, 2 Pinney (Wis.) 215, 52 Am. Dec. 154; People v. Millard, 53 Mich. 63, 18 N. W. 562; French v. Wilkinson, 93 Mich. 322, 53 N. W. 530, 1 Am. Neg. Cas. 146.

The court erred in permitting evidence to be offered that defendant had been arrested and convicted of crime, and striking it out later on did not cure the error. Caverno v. Jones, 61 N. H. 623.

Where it is asserted that a person is simulating mental incompetency, the wildest latitude will be allowed in establishing facts that will disprove such state or condition. Nash v. Hunt, 116 Mass. 237; McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358; Hewitt v. John Week Lumber Co. 77 Wis. 548, 46 N. W. 822.

A nonexpert witness cannot testify as to any apparent change in the intelligence or mutual capacity of the person being investigated. Clark v. Clark, 168 Mass. 523, 47 N. E. 510; Bridge v. Oshkosh, 71 Wis. 363, 37 N. W. 409.

A physician cannot testify to what his patient told him as to his *past condition* or symptoms. This does not relate to a *present state of facts.* Such evidence is incompetent and highly prejudicial. State v. Dart, 29 Conn. 153, 76 Am. Dec. 596; Rowland v. Philadelphia, W. & B. R. Co. 63 Conn. 415, 28 Atl. 102; People v. Foglesong, 116 Mich. 556, 74 N. W. 733; Bacon v. Charlton, 7 Cush. 586; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 543, 31 Am. Rep. 321; Lacas v. Detroit City R. Co. 92 Mich. 412, 52 N. W. 745; Johnson v. McKee, 27 Mich. 473; Bennett v. Northern P. Co. 2 N. D. 127, 13 L.R.A. 465, 49 N. W. 408.

A new trial will be granted on newly discovered evidence, even though such evidence is cumulative. Hart v. Brainerd, 68 Conn. 50, 35 Atl. 776; Anderson v. State, 43 Conn. 514, 21 Am. Rep. 669; Keet v. Mason, 167 Mass. 154, 45 N. E. 81; Preston v. Otey, 88 Va. 491, 14 S. E. 68; Ellis v. Ginsburg, 163 Mass. 143, 39 N. E. 800; Kochel v. Bartlett, 88 Ind. 237; Mercer v. King, 19 Ky. L. Rep. 781, 42 S. W. 106; State v. Stowe, 3 Wash. 206, 14 L.R.A. 609, 28 Pac. 337; Smythe v. State, 17 Tex. App. 244.

Positive and uncontradicted testimony, not inherently improbable, is prima facie evidence of the fact which it seeks to establish, and, as against a mere suspicion of its falsity, justifies a directed verdict, since

the jury are not at liberty to disregard the testimony. Brown v. Petersen, 25 App. D. C. 359, 4 Ann. Cas. 980; Crane v. Morris, 6 Pet. 598, 8 L. ed. 514; United States v. Wiggins, 14 Pet. 334, 10 L. ed. 481; Quock Ting v. United States, 140 U. S. 417, 35 L. ed. 501, 11 Sup. Ct. Rep. 733, 851; Kelly v. Burroughs, 102 N. Y. 93, 6 N. E. 109; Hull v. Littauer, 162 N. Y. 569, 57 N. E. 102.

Cowan & Adamson and *H. S. Blood,* for respondent.

Doctor LeBarge qualified as a medical expert. He had heard all of Doctor Stabey's testimony. He had known plaintiff well prior to the injury. He was asked to state, from all of the testimony including that of Doctor Stabey, and from his own observations, if a complete recovery was probable. Such testimony was competent. Walters v. Rock, 18 N. D. 45, 115 N. W. 511.

Plaintiff's questions to the arrest and conviction of defendent on a charge of assault and battery were not properly objected to, to avail defendant here. The general objection is of no avail. First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558.

The questions were proper, in any event. Blackburn v. Minter, 22 Ala. 613.

If such evidence was improperly admitted, it did not prejudice the defendant, as it would operate in mitigation of damages if it had any effect at all. Sometimes in such cases the defendant himself seeks to show conviction, sentence, and the imposition of a fine in mitigation of damages. Phillips v. Kelly, 29 Ala. 628; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Reddin v. Gates, 52 Iowa, 210, 2 N. W. 1079; Corwin v. Walton, 18 Mo. 71, 59 Am. Dec. 285; Wolff v. Cohen, 8 Rich. L. 144; Hoadley v. Watson, 45 Vt. 289, 12 Am. Rep. 197; Smithwick v. Ward, 52 N. C. (7 Jones, L.) 64; Jackson v. Wells, 13 Tex. Civ. App. 275, 35 S. W. 528.

A nonexpert witness may testify as to observations made by him of a person's mental or physical condition, without first relating the facts upon which his opinion is based. State v. Barry, 11 N. D. 441, 92 N. W. 809; Moore v. Spier, 80 Ala. 129; Atkins v. State, 119 Tenn. 458, 13 L.R.A.(N.S.) 1031, 105 S. W. 353; Ryder v. State, 38 L.R.A. 721, and brief, 100 Ga. 528, 62 Am. St. Rep. 334, 28 S. E.

246; Auld v. Cathro, 20 N. D. 461, 32 L.R.A.(N.S.) 71, 128 N. W. 1025, Ann. Cas. 1913A, 90.

BURKE, J. This is an action for damages alleged to have been sustained by reason of an assault and battery. Plaintiff recovered judgment in lower court for $6,550 damages, with interest. Defendant appeals, assigning thirty-four errors of law relating to the admission and rejection of testimony; that the evidence is insufficient to justify the verdict, and the further grounds that the court erred in refusing to allow him a new trial upon showing of newly discovered evidence. He has grouped his assignments under eleven points in his brief, and we will discuss the same in the order selected by him.

(1) In support of the damages alleged to have been sustained, plaintiff offered in evidence the deposition of a Dr. Judd, of Rochester, Minnesota, who testified that he had examined the records of St. Mary's Hospital at that place to refresh his memory, and that the same showed that Mr. Dowd had a systolic cardiac murmur. When the deposition was read, the objection was made that the doctor had not testified from his own recollection independently, nor after refreshing his memory so that he was able thereafter to testify of his own knowledge, and that therefore the testimony was based entirely upon the written records of the hospital which may have been made by other persons. It is difficult to tell from the printed abstract, whether or not such was admissible. The objections to the deposition as a whole were not made in writing and filed prior to the trial as provided in § 7906, Comp. Laws 1913, but were made orally at the time such deposition was offered in evidence and to specific questions. This is a very unsatisfactory procedure, and leaves this court in doubt as to the state of the evidence when the rulings were made.

This is the entire record:

Q. Did you, on or about the 16th day of June, 1910, examine M. B. Down concerning injuries to his head? (Objection overruled.)

A. I think I examined him about this time. I feel pretty sure I did.

Q. Are these records kept in your hospitals concerning the date and facts in reference to such an examination? (Objection overruled.)

A. They are.

Q. Consulting those to refresh your memory, I ask you to state what condition you found Mr. Dowd to be in, in reference to injuries to his head and skull, if you found any such injuries or evidence thereof? (Objection overruled.)

A. The record shows that M. B. Dowd was examined on the 6-16-10.

Mr. Sinker. Move to strike out the answer on the same grounds set forth in the objection.

The Court. Strike out the answer.

A. (continued) Aside from the subjective murmur, he had a systolic cardiac murmur. (Objection.)

The Court. I think the court will let it go in.

Mr. LeSueur. We ask leave of the court, in view of the objection, to be allowed to read that portion of the answer showing the result of the X-ray examination, leaving out the balance of the answer.

The Court. We can't split it up.

This is all of the record concerning Dr. Judd's testimony that is presented to us in the settled statement of the case. Instead of making the objection at the time the doctor was being examined, thus allowing the plaintiff to supply any inadvertent omissions, such objection was offered at a time when the correction could not possibly be made. We are unable to see any prejudicial error in this incident.

(2) Dr. LeBarge was called as a witness for plaintiff, and was asked this question: "Q. Is a person in the condition that the testimony shows—that the testimony of Dr. Stobey shows, and in the condition as shown by your own observation—in a condition to perform mental and physical labor?" This question was objected to on the ground that it was not a proper question, based upon the opinion of another witness without assuming the truth thereof. The Court. "That is, assuming that the evidence given by such and such witnesses are true. Overruled,—I will let him answer." And it further appears that after cross-examination and the doctor had testified that he differed with Mr. Stobey as to the result of the injury, the court struck out his evidence and cautioned the jury as follows: "The court instructs you that when the evidence he gave is stricken out, it is not to be considered." It is doubtful whether any error occurred in the admissions of the testimony in the first place, but if there were

it was cured by the later ruling and the cautionary instructions to the jury. Appellant has devoted many pages of his brief to the conceded proposition that a witness may not give his opinion based on the testimony of other witnesses, without assuming such testimony to be true. In view of the fact that, in this instance, the court only admitted the testimony upon the assumption, as stated by him and heard by the doctor, that such evidence was true, such authorities become immaterial. Other questions to which objections were made, were not answered by the witness, and no error therefore can be predicated. Again, Dr. LaBarge was asked to state from all of the testimony, including that of Dr. Stobey, and from his own observation, if a complete recovery of the plaintiff was probable, and he answered: "Not probable." This question and answer occurred after the statement of the trial court that he would only admit such testimony if it assumed the truth of the previous testimony, and was likewise stricken out by the court after cross-examination of the witness. Respondent relies upon Walters v. Rock, 18 N. D. 45, 115 N. W. 511, to show that the question was proper because the testimony of Mr. Stobey was not disputed. The question is also treated in Kerstein v. Great Northern R. Co. 28 N. D. 3, 147 N. W. 787. In view of all of the facts it is apparent that no reversible error can be predicated upon this ruling.

(3) While the defendant was upon the stand in his own behalf, and being cross-examined by plaintiff's attorney, he was asked whether or not he had been arrested and convicted in a criminal action for assault and battery relative to those same facts. This testimony was admitted over objection, and defendant replied that he had been. The objection was that the evidence was incompetent, irrelevant, and immaterial. This did not point out to the trial court the particulars in which the question was considered objectionable. Whether or not this alone would justify the trial court in overruling the same, we need not discuss. For a correct statement of this rule, see the recent case of Huston v. Johnston, 29 N. D. 546, 151 N. W. 774, but in this particular instance the abstract shows that later in the trial the court said: "The court thinks it admitted some evidence that was improper, yesterday, in regard to permitting the defendant to answer questions in regard to whether he was convicted of assault, and I will entertain a motion to strike it out at this time." (Motion to strike made by the

defendant.) "Let the record show that the motion is granted. Gentlemen of the jury, this court sustained a motion to strike out the evidence in connection with the conviction of the defendant for assault and battery connected with this same transaction. In considering the evidence in this case, you mustn't consider that in your deliberations." If any error existed and the objection was properly raised, such error was cured.

(4) One Reiser, a witness for defendant, testified that he had called upon plaintiff shortly after the alleged assault and had talked with him at that time. Certain questions were asked him in an attempt to show that in witness's opinion plaintiff at that time talked rationally. In State v. Barry, 11 N. D. 428, 92 N. W. 809, at page 441 of the state report it is said: "The rule is well established, and applies to civil as well as to criminal cases, that upon an issue of insanity, the layman when called as a witness may be required to give an opinion. But in such cases there must be laid a foundation upon which the opinion called for is to rest for support. The preliminary examination must develop sufficient facts to show the competency of the witness; *i. e.* sufficient to show that he is in a position to give an opinion which will possess at least some value as testimony. The foundation facts must furnish a rational ground for the opinion." We have examined the record carefully upon this phase of the case, and have reached the conclusion that those questions were excluded by the trial court upon the grounds of incompetency of the witness to testify. The same kind of questions were allowed when the witnesses qualified themselves, showing that the rule was well understood by the court. For instance, the same witness was asked: "Q. Did anything occur at that time? Did he at that time speak in a slow tone of voice or as he ordinarily did?" Objected to as incompetent, no foundation laid, calling for a conclusion and leading. Overruled. "Q. And was there any difference between this talk at this time when you were in the hotel there, and talk you had with him before?" Objected to as calling for a conclusion of the witness, no proper foundation laid for it. Overruled." It appears from the record that defendant was allowed to examine the witness in full as to everything that occurred, and to give all the conversations had with the plaintiff, and if the witness was not allowed to state whether or not in his opinion such conversation was rational, it

was upon the ground of incompetency only. Upon this phase, the witness states: "I talked to him just a few minutes. He talked all right for a little while. . . . I think it was the same summer of the trouble—though I would not swear to it. . . . I think I saw him once just prior to the injury, to know him, that was all. I would not swear I had talked three times, or more or less, to him." The witness also testified as follows: "Q. Then he got excited and rattled in his speech? A. Not for a while. He didn't talk just the same all the time. He apparently forgot what he was going to say. He turned to his wife. He says: 'What was that I was going to say?' That was the second occasion I met him." We do not think defendant has any cause for complaint upon this assignment. The examination was full and complete, and there was ample reason for excluding the three questions.

(5) One Hankey testified for the defendant to the effect that he had known plaintiff and talked with him in the spring of 1911. He was asked several questions tending to show that the plaintiff's mental condition was better than claimed at the trial, and as a sample we set forth the following: "Q. Was his manner yesterday while he was in the court room any different from his manner when he was transacting this business with you?" Objected to as "improper comparison, irrelevant, and immaterial." The record shows that the witness had one talk with the plaintiff about half an hour in the spring of 1911, and that this was the only conversation he had had with him, and there is no showing that he made any observation of plaintiff at that time. It is thus evident that he was not in a position to draw a comparison between his conduct on that occasion and at the trial. The question is obviously unfair. As stated in the preceding paragraph, the foundation laid for an opinion of this kind must be thorough. There is no error in said rulings.

(6) One Spangerud was called as a witness for the defendant, and testified that he did not notice any difference in plaintiff's actions or talk since the 26th of May, 1910, the date of the alleged assault. This was stricken out, after the cross-examination of the witness had elicited the following admission: "I have never paid any attention to Mr. Dowd's speech—I couldn't honestly say that I had observed it," the trial court did perfectly right in striking out the opinion previously given.

(7) One Rock was a witness for defendant. He testified that he had known plaintiff since May, 1911, and went to his home in the spring of 1911 to rent some land, and that he had an opportunity to notice plaintiff's appearance, demeanor, and manner of talk. He was then asked this question: "Q. Was his appearance, demeanor, and manner of talk yesterday on the witness stand different from his appearance, demeanor, and manner of talk at the time you met him in the spring of 1911?" To this the objection was made that it was improper comparison, and no foundation laid; therefore, incompetent. The objection was sustained, and properly so. Witness had not shown any particular observation of the plaintiff at that time, and the question was so framed that the slightest difference in those respects, would allow an answer "yes" to be interposed. The question was unfair and was properly excluded.

(8) One Mr. Stobey, a witness for the plaintiff, as an expert was asked this question: "Q. From an examination of the plaintiff since the injury, are you able to state in what nervous condition you found him? A. Well, he can't sleep without having all kinds of hallucinations, dreaming all kinds of things, when he did sleep; and complains of pains at different regions." Defendant moved to strike out this answer as hearsay, and to strike out the words, "complains of pains in different regions," as not being part of the *res gestæ*. The motion was denied. It is argued that the answer of the witness must, of necessity, be based upon what was told to him by the patient, and therefore hearsay. The record, however, does not bear out this contention. The doctor had treated plaintiff immediately after his injuries and off and on from that time until the trial. He states over and over again that his testimony is based upon his personal examination. For instance, he says: "The result of the examination was that I found plaintiff in practically the same condition, nervous as before. . . . At the time I was treating plaintiff, I made an examination of his skull. I found an injury over the left eye; about an inch from the central orbit I found a depression, and I found it would be likely to cause the neurasthenic condition. This neurasthenic condition is a probable result of such an injury. . . . In my examination of Mr. Dowd, I noticed a deformity of the nasal bones. It was a fracture of the nasal bones." The very question to which objection was taken begins with

the words, "from an examination of the plaintiff, . . ." It is thus apparent that the doctor's testimony was based, partially at least, upon his personal examination of plaintiff's physical condition, and possibly he was able from such an examination to state positively that plaintiff's nervous system was in such a condition that dreams must of necessity come and hallucinations torment him. The objection that it is based upon hearsay is without merit.

(9) One of the witnesses for defendant was asked whether or not the plaintiff was able to sign his name to a mortgage in the spring of 1911. The witness had testified as follows: "I don't know as I ever had any conversation with him at all before the 26th of May, 1910. I just knew the man when I met him,—passed the time of day." There being no foundation laid for an opinion, the witness was clearly incompetent to testify upon the subject of insanity, and otherwise the testimony was immaterial. The objections were properly sustained.

(10) Under this heading, defendant insists that the evidence in the case is insufficient to justify the verdict, and that in any event the verdict is excessive. We have examined the evidence with care, and have reached the conclusion that it is sufficient to support a verdict, and that the verdict is not excesive. We will, as briefly as possible, set forth a few quotations from the testimony of the various witnesses which go to support this conclusion. Plaintiff used fourteen, and the defendant twenty-one, witnesses. It is impossible, of course, to give extracts from all of their testimonies. It is apparent that some hard feelings existed between the plaintiff and defendant prior to the assault, and there is evidence that upon one occasion defendant invited plaintiff to come off from his (plaintiff's) land to fight, and that plaintiff declined, whereupon defendant remarked that he would catch him off of the place sometime, and, "pound the hell out of you." Upon the 26th of May, 1910, defendant and plaintiff met in one of the side streets of the vilage of Tioga. Plaintiff testifies that he did not see the defendant at all, and has no recollection of the assault. Defendant testifies that plaintiff was the aggressor. One Furstenow was a witness to the assault, and testifies as follows: "The first I saw was Mr. McGinnity apparently laying his coat on some packages that were on the ground,—he had just let go of it, and Dowd was standing possibly a rod or two southeast of him towards the depot. Dowd was facing

towards me, and McGinnity had his back towards me. Just as McGinnity dropped his coat, he went—started to run towards Mr. Dowd. Dowd at the same time raised up his arms to his face, and Mr. McGinnity got to him and hit him and knocked him down. . . . And after he knocked him down, Mr. Dowd fell on his side and rolled over on his face, and Mr. McGinnity took hold of his neck and chucked his face into the street several times, then rolled him over on to his back. After he rolled him over on to his back, he took hold of his neck, or clothing somewhere about the neck, and raised him high enough so his head hung from the ground a few inches, possibly 4 or 5, and hit him in the face again. Then he let him down easy, and at that time Dr. Stobey came around the corner, and McGinnity faced him, and that was all that was done. . . . The street along there was apparently a very hard street. I think there are stones there. I did not see Dowd strike McGinnity or offer to strike him. He did not strike McGinnity at any time. I was watching the case. He made no effort to strike McGinnity. . . . When I first saw Dowd, he was facing the northwest, apparently doing nothing. McGinnity was stooping over in the act of dropping a coat. He was in a partially stooping position. When he went towards Dowd, he ran. Dowd backed up, put his hands above his face. When McGinnity came up to him, he struck him in the face. He knocked him down the first blow. Dowd apparently tried to protect his face from the blow at the time that McGinnity struck him. He had his arms across his face. . . . Dowd was trying to back up; backing up. He did not advance towards McGinnity at all. I was in a position where I could see the parties plainly. There was no obstruction to my view. . . . I think McGinnity is a larger man than Dowd. I know that by contrast. When McGinnity struck Dowd down with the first blow, he did not try to throw the blow aside with his hands, just simply stood there and took it. Only he had his hands raised up. I saw he made no effort whatever to attempt to parry the blow. I know he held his hands. Simply held them still. He did not move them in either one way or the other, in order to avoid any blows that were being struck. . . . Dowd did not have his coat off. . . . McGinnity picked up his coat and put it on—took his packages and left. And Dr. Stobey called to Mr. Nesseth. They picked up Mr. Dowd and

took him to Dr. Stobey's office." Dr. Stobey testified that they took plaintiff to his office and examined him. Found several cuts and bruises. A cut on the lip, about a quarter of an inch deep, clear through the upper lip, a broken nose, and an injury to the skull over the left eye where there was a depression. He testifies that plaintiff remained unconscious about an hour, and was unable to leave the hotel for about ten days, and that later he went to Rochester, Minnesota, for treatment. Also that the witness had treated him for about a year after the injury. He testifies: "I noticed a difference physically and mentally in the condition of Mr. Dowd after the injury. The difference I noticed was that he could not talk coherently for any length of time, or probably for any time. He had a tendency to cry when you talked to him a while, and considerable worry it seems on his mind. Complains of pains in his head at times, and those things; 'Do not feel strong,' he says. . . . Ever since the injury he could not talk coherently. . . . I mean by the word 'coherently,' asking a certain question, and not answering the question. Probably talking about some other subject altogether. . . . I have made an examination of the plaintiff since the injury to ascertain his nervous condition. The result of the examination was that I found plaintiff in practically the same condition, nervous as before. I mean that there has been practically no change in his nervous condition since the injury. . . . Any injury to the brain would be likely to cause the condition, and that is one of the usual causes. . . . I found an injury over the left eye about an inch from the central orbit. I found a depression. I found it would be likely to cause the neurasthenic condition. This neurasthenic condition is a probable result of such an injury. I noticed a deformity of the nasal bones. It was a fracture of the nasal bones. . . . The patient did not have a full appreciation and memory of things that were transpiring around him. He was not the same after that . . . as he was before. He did not do any work. That is, he was not working while I was out there. He refused to talk, lots of times. Simply would not say a word, and that was apparently one of those abnormal periods." Dr. LeBarge also examined the plaintiff, and testifies: "His manner, mental and physical condition, were first class prior to the injury. Since the injury I have met him a few times at Williston. Have met

him quite recently. I have noticed a change in the condition of plaintiff before and after this injury. . . . I have deduced that there was a lack of memory and an impediment in his speach, and a staring look, with pupils of both eyes widely dilated, and a general emaciation of the whole muscular system, and impediment in his walk,—unsteadiness in his walk. The conditions continue up to the present time. I have not formed any opinion as to whether or not he will ever completely recover from it." Dr. Windell made an examination of the plaintiff under the direction of the court, and testified: "I found a man apparently in a weak physical condition, with a marked impediment in his speech, a tendency to reach a stage of excitement with very little provocation, crying at the least attempt to cross him in anything, with an unequality of the pupils as I remember at the time, and symptoms very distinct of some disordered condition of the brain. . . ."

Other witnesses testified to plaintiff's mental condition, and fully corroborate the conclusion announced by the doctors. Moreover, plaintiff was witness at the trial, and it is apparent from his cross-examination that he was either suffering from some mental disorder or was an extraordinary simulator. The attorney for defendant abandoned the cross-examination under circumstances which leave the impression that he (said attorney) believed the witness mentally unsound. Anyhow, the question was one for the jury, who saw all of the witnesses, including plaintiff, upon the stand, and were in a better position to judge of the injury than are we. We believe there was sufficient evidence, not only to carry the case to the jury, but to support the amount found by them.

(11) The last assignment of error relates to the refusal of the trial court to allow a new trial for newly discovered evidence. This newly discovered evidence was presented in the form of an affidavit of one Nora Van Waggennen, who deposes that on the 26th of May, 1910, she saw the two parties, and that Dowd first spoke to McGinnity, and that both parties talked a little, and that Dowd used words in an angry manner towards McGinnity and then appeared to be about to attack McGinnity; and that, realizing there was to be a fight, she looked the other way so she would not see it. We do not believe the testimony was material enough to justify a new trial. She saw nothing after

McGinnity dropped his coat. True, her testimony had a tendency to show Dowd the aggressor, but it will be remembered that the jury found no punitive, only actual, damage, and the verdict can be supported regardless of who was the aggressor. The showing of diligence is likewise very weak. The trial court had wide discretion in such matters, and will not be reversed excepting for abuse. The judgment of the trial court is in all things affirmed.

BRUCE, J. (specially concurring). I concur in the result of the foregoing opinion. However, I merely concur in the conclusions reached in ¶¶ 3 and 8 of the syllabus, because I believe that a fair trial was had and that no real prejudice arose from the rulings. As far as ¶ 3 is concerned I believe that the trial court erred, and that the subsequent instruction could not have cured the error if it had in fact been prejudicial. This evidence, however, shows conclusively that the defendant was the real aggressor in the assault before us, and I am satisfied that the jury must and would have found this to have been the fact outside of any prior verdict or conviction.

THE FIRST NATIONAL BANK OF COOS BAY, a Corporation, v. JOHN F. HENRY.

(152 N. W. 668.)

Agent — agency — sale of land — authority — purchase price — no implied authority to receive — principal allowing agent to believe he has such authority — deemed to have conferred actual authority to receive it.

1. While, as a general rule, an agent authorized to negotiate a sale of land

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Note.—Authority of a traveling salesman to receive payment, see note in 18 L.R.A. 663. As to authority of agent to accept payment in anything else than money, see notes in 18 L.R.A. 666; 19 L.R.A.(N.S.) 324; and 15 Am. Dec. 130. As to the authority of sales agent who is authorized to collect the whole or a part of the purchase price on making the sale to receive payments afterwards, see note in 38 L.R.A.(N.S.) 700.

On the question of payment to agent as a defense to an action by undisclosed principal, see note in 28 L.R.A.(N.S.) 230.

As to effect of fact that agent does not have possession of securities upon question of his authority to receive payment, see note in 23 L.R.A.(N.S.) 414.

has no implied authority to receive the purchase price, still where the principal, intentionally or by want of ordinary care, allows the agent to believe that he possesses such authority, the principal will be deemed to have conferred actual authority upon the agent to receive such payment.

Agent — authority to receive payment — principal allowing purchaser to so believe — ostensible authority.

2. And where the principal, intentionally or by want of ordinary care, causes or allows the purchaser to believe that the agent has authority to receive such payment, then the agent has ostensible authority to receive payment.

Agent authorized to sell land — authority to receive check in part payment — how determined — circumstances.

3. The authority of an agent who negotiated a sale of realty, to receive a check for the balance of the purchase price, after the delivery of the deed, like his authority generally, is to be determined in the light of all circumstances surrounding the parties and the transaction.

Agent — authority — check in part payment — to receive and cash — balance of purchase price.

4. It is *held* that under the evidence in the instant case, the agent had authority to receive and cash a check payable to the order of the principal for a balance of $150, remaining due upon a total purchase price of $6,650.

Opinion filed April 15, 1915.

From a judgment of the District Court of Nelson County, *Cooley,* J., defendant appeals.

Reversed.

M. H. Brennan, for appellant.

The agent Serumgard was authorized by his principal, Converse, to receive the check in payment of the balance due from the defendant; the principal permitted a course of business dealing in regard to the property and in regard to the negotiations for the sale thereof, as to evidence an ostensible agency on which the defendant might rely, and on the strength of which he might make payment to such agent with the same effect as though made to the principal. Grant v. Humerick, 123 Iowa, 571, 94 N. W. 510; Berkley v. Stewart, 94 Neb. 550, 143 N. W. 820; Harrison Nat. Bank v. Austin, 65 Neb. 632, 59 L.R.A. 294; Johnston v. Milwaukee & W. Invest. Co. 46 Neb. 480, 64 N. W. 1100; Walker v. Hale, 92 Neb. 829, 139 N. W. 658; Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811; Duncan v. Hartman, 143 Pa. 595, 24 Am. St. Rep. 570, 22 Atl. 1099.

It is not alone the actual authority that must govern, but, regardless of private instructions, it is the apparent authority permitted that controls. Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Wachter v. Phœnix Assur. Co. 132 Pa. 428, 19 Am. St. Rep. 603, 19 Atl. 289; Lister v. Allen, 31 Md. 543, 100 Am. Dec. 78.

The defendant cannot be bound by conversations or instructions had between principal and agent in regard to which he knew nothing. The evidence was insufficient to justify the verdict, and if the testimony contains any evidence about which fair minds might differ on the question of actual or ostensible authority, the case should have been submitted to the jury.

Where the court directs a verdict for a party, the evidence of the opposing party, against whom the verdict is directed, must be considered as undisputed, and should be given the most favorable construction possible. Ney v. Eastern Iowa Teleph. Co. 162 Iowa 525, 144 N. W. 383; Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; McRea v. Hillsboro Nat. Bank, 6 N. D. 353, 70 N. W. 813; Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; Hall v. Northern P. R. Co. 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; Carr v. Minneapolis, St. P. & S. Ste M. R. Co. 16 N. D. 217, 112 N. W. 972.

Frich & Kelly, for respondent.

An agency is either actual or ostensible. Rev. Codes 1905, § 5754, Comp. Laws 1913, § 6322.

An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another, who is not really employed by him, to be his agent. Rev. Codes 1905, § 5770, Comp. Laws 1913, § 6338.

A principal is bound by acts of his agent under a merely ostensible authority to those persons only who have in good faith and without ordinary negligence incurred a liability or parted with value upon the faith thereof. Rev. Codes 1905, § 5784, Comp. Laws 1913, § 6352.

The independent declarations, acts and conduct of the agent himself have no bearing upon the question and are not to be considered. Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556.

Mrs. Converse did nothing, nor did she say anything, that led or

could lead Henry to believe Serumgard had authority to receive the payment in question. It is nowhere claimed that the power of attorney to Serumgard to collect rents, renew insurance and make leases, had such effect. Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047.

One who makes payment to an agent must, at his peril, discover whether the agent has authority to receive payment at all, or to receive payment in anything but money. 31 Cyc. 1322–1324.

Agency will never be presumed; and where its existence is denied, the burden of proof is upon him who affirms its existence, and the proof must be clear and specific. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570.

The principal's own admissions, whenever made, may be given against him; but the declarations of his agent bind him only when made during the continuance of the agency, and in regard to a transaction then pending, *et dum fervit opus.* 1 Greenl. Ev. § 113; Mechem, Agency, § 714; Short v. Northern P. Elevator Co. 1 N. D. 159, 45 N. W. 706.

Serumgard was not the actual or ostensible agent of Mrs. Converse for the collection of the money in dispute, and the payment of the same to him by Henry was voluntary. Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643, 24 N. E. 456; Brewster v. Carnes, 103 N. Y. 556, 9 N. E. 323; Bruen v. Kansas City Agri. & H. Fair Asso. 40 Mo. App. 425; Cummings v. Hurd, 49 Mo. App. 139; Cox v. Cutter, 28 N. J. Eq. 13; Corey v. Hunter, supra.

CHRISTIANSON, J. This is an appeal from a judgment of the district court of Nelson county. The case was tried to a jury and resulted in a directed verdict for the plaintiff. The following facts are undisputed,—or clearly established by the evidence. In August, 1911, and prior thereto, one Mrs. Esther B. Converse was the owner of a one-third interest in a business block in the city of Devils Lake. The defendant, Henry, was the owner of another one-third interest. It appears that the property formerly belonged to Mrs. Converse's husband, and that Mrs. Converse became owner as his heir. In the summer or fall of 1909 or 1910, Mrs. Converse came to Devils Lake, and retained Siver Serumgard, an attorney at that place, to take care of her interests in connection with this property and other matters incident

thereto,—including some difficulty she had had with the defendant, Henry, regarding the management of her husband's estate,—to collect a claim of $40 for certain alleged over-charges for probate expenses, and also suggested to Serumgard that he make a sale for her of the property in question. At that time Mrs. Converse retained Attorney Serumgard generally to look after all of her interest in connection with the management of the property, including any trouble which might thereafter occur. On the 1st day of August, 1911, Mrs. Converse executed and delivered to one W. S. Nicholson, her son-in-law, a power of attorney, giving him full and complete authority to lease, sell, and mortgage the property in such manner and on such terms as he might see fit. The power of attorney is very general and unrestricted in its scope, and gives to Nicholson complete power over the property. Shortly thereafter Nicholson came to Devils Lake and saw the defendant, Henry, and informed him that he and Mrs. Converse had appointed Attorney Siver Serumgard of that city as the agent of Mrs. Converse, to look after the rental of said property, collect rents, etc., and at the same time Nicholson did execute and deliver to Serumgard a power of attorney, giving him full and complete authority to collect the rents, pay taxes, renew insurance, see that the premises were kept in repair, and do everything necessary in caring for, managing, and renting the premises. Nicholson, together with the defendant, Henry, executed a lease for the property, and in the lease it was provided that the rental coming to Mrs. Converse was to be paid monthly at the office of Siver Serumgard, and it appears that during the rental period, such rents were, to the knowledge of the defendant, Henry, paid to Serumgard. In the fall of 1912, the defendant commenced certain improvements in the property, and on September 14, 1912, Serumgard, at the request of Nicholson and Mrs. Converse, served upon the defendant, Henry, and the contractors performing the labor, a notification protesting against the making of the improvements. Subsequent thereto negotiations for the sale were instituted, with the result that Mrs. Converse sold her interest in the property to the defendant, Henry. Such negotiations were apparently instituted, as the result of a certain letter written by Nicholson to Serumgard, dated September 30, 1912, wherein, after stating that Mrs. Converse is not in financial condition to permit the improvements sought to be made by Henry to be constructed, he goes on and makes the following proposition of sale: "The property shows a valuation of $25,000 on rentals. She will do this,

take $7,000 for her interests, cash net, or she will take a first mortgage on the whole property of $7,000, at 8 per cent, payable in three years, interest payable semiannually through the First National Bank of Coos Bay, Marshfield, Oregon. Or she will continue to hold her interests as the property now is, without any improvements, until such time as we can buy out the other interests. Replace green shed with corrugated iron sheeting, and fix the wall, which ought to be done for about $300. *Will ask you to guard Mrs. Converse's interests. . . .*" Thereupon negotiations were commenced by Siver Serumgard, acting for Mrs. Converse, with the defendant, Henry, for a sale of the property. Offers and counter-offers were made, until finally the price of $6,650 was agreed upon, on October 12, 1912. Some delay occurred in completing the deal, and apparently there was some further misunderstanding between the parties as to the details in closing the transaction. On October 29, 1912, Nicholson wrote Serumgard as follows:

Siver Serumgard,
Devils Lake, N. D.
Dear Sir:—

Your letter of the 11th at hand and as I had your telegram of later date accepting a cash offer I did not think necessary to reply. However there was nothing of importance in it, as it has all been gone over thoroughly. Now as they have taken everything in their hands, *will ask you as our agent* not to sign for any improvements whatever and to continue to remonstrate on any being done. *Tell me what is necessary on our part to get the case in U. S. Court if Henry does not accept deed sent him through First Nat. Bank.*

Yours truly,
W. S. Nicholson.

It appears also that the defendant, Henry, was requested to send the money to the plaintiff bank, to be turned over upon the execution of a deed by Mrs. Converse. This the defendant refused to do, and on October 30, 1912, the defendant, after depositing the amount of the purchase price agreed upon in the Devils Lake State Bank, prepared and served a notice of deposit and demanded a delivery of the deed.

This notice was addressed to Esther B. Converse, and Siver Serumgard and W. S. Nicholson, her agents. The notice was served on Siver Serumgard, who admitted due and personal service as agent for Mrs. Converse. Immediately after the receipt of the notice Serumgard wired Nicholson as follows:

Devils Lake, N. D.
Oct. 30–31, 1912.

W. S. Nicholson,
Marshfield, Ore.

Henry to-day served notice of deposit of purchase money in Devils Lake State Bank; demands immediate delivery of deed by Esther B. Converse; refuses to send money to Marshfield; law here upholds him. Will you send deed? Answer. Next step will be action for specific performance.

Siver Serumgard.

In accordance with Serumgard's telegram the papers were transmitted to the First National Bank of Devils Lake, with instructions to deliver the same to the defendant, Henry, upon the payment of the sum of $6,500. It appears that the deed was transmitted by the plaintiff bank, and that, through some error on its part, the Devils Lake Bank was instructed to collect only $ 6,500. The defendant, Henry, called at the First National Bank of Devils Lake about November 9, 1912, paid this amount, and received the deed. Shortly after receiving it, he observed that the bank had collected only $6,500, whereas the purchase price agreed upon was $6,650, or a difference of $150. Immediately on discovering the mistake the defendant, Henry, went to the First National Bank of Devils Lake to pay the $150. The trial court refused to permit it to be shown whether or not the bank declined to accept this money, but apparently it must have refused to accept it, otherwise it would doubtless have been paid. Thereupon Henry went to the office of Siver Serumgard and paid the $150 to him by giving him a check payable to Mrs. Esther B. Converse. Serumgard afterwards cashed the check he received from defendant in the same manner in which he had always cashed checks payable to her order received for rent, by indorsing the same, "Esther B. Converse, by Siver Serumgard,

Agent." On November 13, 1912, Nicholson wrote Serumgard a letter wherein he, after referring to the mistake of $150, goes on to say:

Of course Judge Henry will make his offer good, as I have turned the telegrams and letter over to them where he was to pay $6,650, Net, while they collected only $6,500. If he neglects to make this discrepancy good, we can add it to the amount he has taken in rents during the past three years, and make a case out of it, although I had hoped we were through with him after consummation of sale. Of course we do not blame him for the bank's blunder, but when shown this error it will be up to him to make his acceptance good. Mrs. Converse joins me in thanking you for the care you have taken of our interests. I remain

Yours truly,
W. S. Nicholson.

Mrs. Converse and Nicholson were living somewhere in the state of Oregon during this time, and the defendant had no knowledge of their residences or whereabouts, but all the negotiations regarding the purchase of the property had been had by the defendant, Henry, solely with Serumgard as the agent of Mrs. Converse. In fact, every transaction of every kind which he had had in regard to this property since the fall of 1909 or 1910 had been had with Serumgard as her agent. The defendant, Henry, had been dealing with Serumgard for two years and over,—first, as attorney, in general charge of the affairs of Mrs. Converse, and next as her agent in general charge of her interests at that place. The notices served by Mrs. Converse were signed by Serumgard; the notice served on Serumgard as her agent, regarding the sale of the property, was recognized by her, and the deed forwarded to Devils Lake for delivery in accordance with the demand of such notice. Serumgard retained the proceeds of the check as part of his alleged commission for making the deal, and notified Nicholson of this fact. Under the original arrangement between Serumgard and Nicholson it was agreed that Serumgard should receive 10 per cent of the moneys collected for his services. Nicholson claims that this applied only to moneys collected for rent, and had no application to a sale. Nicholson claimed that Serumgard is entitled to no commission for making the sale, and refused to pay any; he thereupon, as agent for

Mrs. Converse, assigned the claim against Henry for the $150 balance on the purchase price to the plaintiff bank, who brought this action therefor as such assignee.

While numerous errors are assigned upon rulings of the trial court in the admission and rejection of evidence and failure to suppress depositions, still the principal question presented is whether or not a verdict should have been directed in favor of the plaintiff. A determination of this question depends solely upon whether or not Serumgard, as agent of Mrs. Converse, had authority,—either actual or ostensible,—to receive the check from the defendant, Henry, for $150, the balance of the purchase price.

Agency is either actual or ostensible. Comp. Laws, § 6322. An agency is actual when the agent is really employed by the principal. Comp. Laws, § 6323. An agency is ostensible when the principal, intentionally or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him. Comp. Laws, § 6324. An agent has such authority as the principal actually or ostensibly confers upon him. Comp. Laws, § 6336. Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself to possess. Comp. Laws, § 6337. Ostensible authority is such as the principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Comp. Laws, § 6338. It is undisputed that Serumgard, who is an attorney at law, located at the city of Devils Lake, was originally retained as an attorney by Mrs. Converse in the fall of 1909 or 1910. The employment of Serumgard at that time was with respect to the property involved in this litigation. The relations then entered into continued unbroken up to the time the defendant, Henry, delivered the check for $150 to him. The various dealings in regard to this property and other affairs of Mrs. Converse largely relate to the defendant, Henry, and all the transactions which he had in regard thereto were had with Serumgard as her attorney and agent. It should also be remembered that the sale grew out of the very matter wherein Serumgard had actual authority to represent Mrs. Converse, and also that he had actual authority to negotiate the sale. It is conceded that Serumgard had not only ostensible, but actual, authority to collect rents, make repairs, insure, and generally manage the property. In the various letters written to him by Nicholson, while

the deal for the land was pending, he expressly instructed Serumgard to "guard Mrs. Converse's interests," and referred to him as "our agent." Mrs. Converse expressly recognized or ratified the authority of Siver Serumgard to negotiate the sale, and recognized the service upon him as her agent of the notice of deposit and demand for the delivery of the deed. This notice was apparently construed as a preliminary step on the part of Henry before instituting an action for specific performance. The letters written by Nicholson show that Serumgard was recognized not only as their agent, but also as an attorney, and certainly no limitation is attached to his powers, in the letters or in any form conveyed either to Serumgard or Henry. Mrs. Converse recognized the authority of Serumgard to negotiate the sale, and accepted the benefits thereof, hence, she is estopped to say that Serumgard was not fully authorized to negotiate the sale, and she ratified his acts by accepting the benefits. Townsend v. Kennedy, 6 S. D. 47, 60 N. W. 164; Union Trust Co. v. Phillips, 7 S. D. 225, 63 N. W. 903; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; McLeod v. Morrison, 66 Wash. 683, 38 L.R.A.(N.S.) 783, 120 Pac. 528. And therefore when Henry paid the money to Serumgard he was justified in believing that Serumgard had actual authority to make the sale, to admit service of the notice of deposit and demand, and that service of such notice upon Serumgard was deemed by Mrs. Converse to be service upon her. He also had notice of the fact that Serumgard was generally authorized to manage all of her business interests in connection with this property; had authority to collect moneys due her for rents and other indebtedness, and had authority to receive checks payable to her order in payment of such claims. While it is true that an agent authorized to negotiate a sale as a rule has no implied authority to receive the full purchase price, yet it is held that he has authority to accept so much of the purchase price as is to be paid in hand. Alexander v. Jones, 64 Iowa 207, 19 N. W. 913; Rodgers v. Bass, 46 Tex. 505; Clark & S. Agency, § 231. See also Little Rock & Ft. S. R. Co. v. Wiggins, 65 Ark. 385, 46 S. W. 731.

It is true the deed was sent to the First National Bank of Devils Lake for delivery. This bank had no former connection with the deal. Its connection was limited and its instructions specific. The bank collected $6,500, which concededly was all it was authorized or directed

to collect, and apparently refused to accept the remaining $150. To whom would defendant naturally go, if not to the person with whom the deal had been made? Mrs. Converse had clearly held Serumgard out as having authority to collect claims for her, and generally manage her business, and to make sale of this property. She saw fit to employ a special agency to deliver the deed, and collect the greater portion of the purchase price,—the small balance remaining would of itself be a circumstance which would justify the defendant in paying this money to Serumgard, as he might well presume that this represented his compensation in the matter. Having paid to the bank the sum it had been instructed to receive, he fulfilled the requirement thus made, and extinguished the authority of, and duty imposed upon, the bank as such special agency. There was no other person, with whom he had dealt, except Serumgard,—who had been vested with authority to collect rents, and other claims, and to manage and sell this property. The fact that Mrs. Converse and Nicholson were living at a great distance, and had generally authorized Serumgard to represent them in the various transactions enumerated, and led defendant to believe that he had authority to manage and look after Mrs. Converse's interests generally, is a matter which may be taken into consideration in determining the ostensible authority of such agent. Carr v. Eastabrook, 2 Cox, Ch. Cas. 390; De La Viesca v. Lubbock, 10 Sim. 629; Kimball v. Perry, 15 Vt. 414. Serumgard was acting not only as agent, but also as attorney for Mrs. Converse. This fact is expressly recognized by Mr. Nicholson in his letters, and was recognized and acted upon by Serumgard and the defendant, Henry. His authority as an attorney was in connection with Mrs. Converse's matters in general. All these matters must be taken into consideration in determining whether or not it was within the scope of the authority of Serumgard to receive the $150 check. Because the authority of the agent to collect moneys, or receive payment, like his authority generally, is to be determined in the light of all circumstances surrounding the parties, and the business transactions. Walker v. Hale, 92 Neb. 829, 139 N. W. 658; First Nat. Bank v. Mutual Ben. L. Ins. Co. 145 Mo. 127, 46 S. W. 615; Davis v. Waterman, 10 Vt. 526, 33 Am. Dec. 216; Bridenbecker v. Lowell, 32 Barb. 9; Valiquette v. Clark Bros. Coal Min. Co. 83 Vt. 538, 34 L.R.A.(N.S.) 440, 138 Am. St. Rep. 1104, 77 Atl. 869. So, in the case of Cockerline v.

Fisher, 140 Mich. 95, 103 N. W. 522, the supreme court of Michigan held that "where a notice to a tenant to quit or pay rent was intrusted to the agent of the landlord for service, and was served on the premises, the tenant was entitled to treat such agent as having authority to receive the rent, and discharge his obligation by making payment." In Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11, this court held that, under the facts in that case, one Jackson had ostensible authority to receive payment for lands. See also Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, 150 N. W. 736. Clark & Skyles on Agency, (§ 231), in discussing this matter says: "But where the principal has held the agent out as having such authority, or where he has permitted the agent to so hold himself out, or where the principal has otherwise conducted himself so as to lead third parties to believe that the agent has authority to receive payments on land sales he will be estopped from denying it to the prejudice of one who has acted thereon; and a payment made by the purchaser to an agent under any of the above circumstances will protect such purchaser. Thus, a company is estopped to assert that its agent had not authority to receive deferred payments on land sales, though he had originally no authority therefor; he having on several occasions collected and remitted them without objection from the company, having in some instances been requested by the company to collect some small balances, and it having been known that payment by other persons had been made to him before those in question, and had been recognized by the company. *So, the fact that an agent had managed the rental of his principal's property for several years, and collected the rent, is sufficient to show his authority to collect the purchase price of the property when sold by him as her agent.*" See also Beck v. Minnesota & W. Grain Co. 131 Iowa, 62, 7 L.R.A.(N.S.) 930, 107 N. W. 1032; Trankla v. McLean, 18 Misc. 221, 41 N. Y. Supp. 385; McCarty v. Stanfill, 19 Ky. L. Rep. 612, 41 S. W. 278. It should also be remembered that Henry did not pay the money to Serumgard, but gave him a check payable to the order of Mrs. Converse. Henry delivered this check to the same person, who had admitted service on the notice of deposit as the agent of Mrs. Converse,—and who as her agent had negotiated a sale of this property, and represented her, both as her agent and attorney in the entire transaction. What

was the actual authority of Serumgard, and what was his duty as agent for Mrs. Converse with reference to receiving the check from the defendant, Henry, when he found that the bank had received instructions to collect only $6,500 or $150 too little? The defendant, Henry, had the deed. He could place it on record, and sell or encumber the premises to third parties. Serumgard had received instructions to "guard Mrs. Converse's interest." He had the letter from Nicholson of October 29th, strongly intimating that Mrs. Converse desired to bring an action against Henry, to compel performance on his part of the contract of sale in the event he refused to accept the deed. He was aware of the general authority with which he had been invested by Mrs. Converse. We are satisfied that he was justified in believing that he was authorized to receive and cash the check as he did. Whether or not he was entitled to a commission for his services is not involved in this case, and would not in any manner affect his ostensible authority, and not necessarily his actual authority, to receive and cash the check. When all the facts in this case, including the relations of the parties and surrounding circumstances, are taken into consideration, we are entirely satisfied that the defendant, Henry, was justified in delivering to Serumgard the $150 check; and that it was within the scope of the authority of Serumgard to indorse the check. Harbach v. Colvin, 73 Iowa, 638, 35 N. W. 663; National F. Ins. Co. v. Eastern Bldg. & L. Asso. 63 Neb. 698, 88 N. W. 863. It follows from what has been said that it was error to render judgment against the defendant. The judgment appealed from is reversed, and inasmuch as the evidence affirmatively discloses that the facts necessary to constitute a cause of action do not exist, the District Court is directed to enter final judgment in favor of the defendant, and against the plaintiff, dismissing the action, with costs.

F. W. CATHRO v. D. H. McARTHUR, Administrator, et al.

WILLIAM BERGMAN, Appellant.

(152 N. W. 686.)

Adverse claims — action to determine — plaintiff's claim of title — mortgagor — successor in interest — administrator's sale — heirs at law — quitclaim deeds.

1. In an action to determine adverse claims to real property, plaintiff bases his claim of title through a redemption from a mortgage foreclosure sale as the successor in interest of the mortgagor. He claims to be such successor in interest, first, by purchase at an administrator's sale; and, second, by purchase through quitclaim deeds, from the heirs of the deceased mortgagor. Defendant's contention that such administrator's sale was a nullity because of certain irregularities in the probate proceedings as to the description of the land, and that there is no competent proof that the grantors in such quitclaim deeds were the heirs at law of the deceased mortgagor, held untenable.

Probate proceedings — irregularities in — description of land — petition for license to sell — jurisdiction — county court — authority to allow amendments.

2. Certain irregularities in the description of the property in the probate proceedings are held not jurisdictional where the correct description was contained in the original petition for license to sell. *Held*, further, that the county court had ample authority to, and did on full notice to all persons concerned, amend and correct such irregularities.

Administrator's sale — quitclaim deeds — successor in interest — heirs at law.

3. Even if it should be held that such administrator's sale was void on account of such irregularities, it is clear that plaintiff became the successor in interest of the mortgagor under the quitclaim deeds, the undisputed proof showing that the grantors in such deeds were heirs at law of the deceased mortgagor.

Heirs at law — decree establishing — other evidence competent.

4. The appellant's contention that the only competent proof that such grantors were heirs of the decedent is a decree establishing heirship, *held* untenable.

Opinion filed April 23, 1915.

Appeal from District Court, Bottineau County, *K. E. Leighton*, J.

Action by F. W. Cathro against William Bergman et al. to determine adverse claims to real property.

From a judgment in plaintiff's favor, defendant Bergman appeals.

Affirmed.

J. D. Scherer (*Newton, Dullam, & Young,* of counsel), for appellant.

In an administrator's notice of sale of land, the land must be described with common certainty. Rev. Codes 1905, § 8137, Comp. Laws 1913, § 8774; 3 Kerr's Cyc. § 1544; Crosby v. Dowd, 61 Cal. 557; Hill v. Wall, 66 Cal. 130, 4 Pac. 1139; Huwes v. Cox, 1 Pinney (Wis.) 551; Melton v. Fitch, 125 Mo. 281, 28 S. W. 612; Hanson v. Ingwaldson, 77 Minn. 533, 77 Am. St. Rep. 692, 80 N. W. 702; Kurtz v. St. Paul & D. R. Co. 65 Minn. 60, 67 N. W. 808.

Such a sale is an adverse proceeding, so far as the heirs are concerned. It is not a proceeding *in rem.* The heir may not be devested of his title without his day in court, and upon proper notice. Mickel v. Hicks, 19 Kan. 578, 27 Am. Rep. 161; Fudge v. Fudge, 23 Kan. 416; Rogers v. Clemmans, 26 Kan. 522; French v. Hoyt, 6 N. H. 370, 25 Am. Dec. 464; Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617; Gibson v. Roll, 30 Ill. 172, 83 Am. Dec. 181; Valle v. Fleming, 19 Mo. 454, 61 Am. Dec. 566; Doe ex dem. Mitchell v. Bowen, 8 Ind. 197, 65 Am. Dec. 758; Gibbs v. Shaw, 17 Wis. 198, 84 Am. Dec. 737; Root v. McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

In such cases, strict compliance with the law is necessary. Nothing required by law will be implied or inferred. Jackson ex dem. Watson v. Esty, 7 Wend. 148; Bloom v. Burdick, 1 Hill, 130, 37 Am. Dec. 299; Hewitt v. Durant, 78 Mich. 186, 44 N. W. 318; Reynolds v. Wilson, 15 Ill. 394, 60 Am. Dec. 753; Wilson v. Ford, 190 Ill. 623, 60 N. E. 876; Stevenson v. McReary, 12 Smedes & M. 9, 51 Am. Dec. 102; Jenkins v. Young, 35 Hun, 569; Doe ex dem. Platter v. Anderson, 5 Ind. 33; Ferguson v. Crawford, 70 N. Y. 264, 26 Am. Rep. 589.

A decree of heirship when made by the county court is conclusive and binding upon all persons. 18 Cyc. 664, note 35, and cases cited.

Testimony of persons that certain others are "heirs at law" is a mere conclusion, and wholly incompetent. 3 Elliott, Ev. § 193; Currie v. Fowler, 5 J. J. Marsh. 145; Morrill v. Otis, 12 N. H. 466; Skinner v. Fulton, 39 Ill. 484; 2 Greenl. Ev. § 254.

Plaintiff was not a redemptioner. He had no right to redeem.

Mercer v. McPherson, 70 Kan. 617, 79 Pac. 118; Murphy v. Farwell, 9 Wis. 102; Skinner v. Young, 80 Iowa, 234, 45 N. W. 889.

This appellant did not receive or accept the redemption money. He has not parted with title to the property. McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281.

Weeks & Moun, for respondent.

The original petition for license to sell gives the correct description and gave the county court jurisdiction, and this being true, even though there may be defects in the proceedings, the sale cannot be attacked collaterally. Rev. Codes 1905, §§ 7895, 7955, 7956, Comp. Laws 1913, §§ 8530, 8590, 8591; 18 Cyc. 802.

Heirs of full age may bind themselves by an express ratification of an irregular sale, and will not thereafter be heard to question its validity. 18 Cyc. 799; O'Dell v. Rogers, 44 Wis. 136.

When one dies, the title to both his real and personal property passes at once to the heirs. Rev. Codes 1905, § 5186, Comp. Laws 1913, § 5742.

A judgment and decree rendered in a proceeding to administer the estate of a deceased person is evidence of heirship. But this is not the *only* competent proof of heirship. 4 Enc. Ev. 577; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596; 2 Greenl. Ev. 15th ed. 353–355; Rev. Codes 1905, § 8159.

Statutes giving the right of redemption are to be construed liberally, and the construction, in case of doubt, should be in favor of the right to redeem. 27 Cyc. 1800; 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; Sutherland, Stat. Constr. § 420.

After the purchaser has accepted a pretended redemptioner's money, he cannot question the latter's right to redeem. Freeman, Executions, § 317; Carver v. Howard, 92 Ind. 173; McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; Sexton v. Rhames, 13 Wis. 99; 27 Cyc. 1834.

FISK, Ch. J. This is the statutory action to determine adverse claims to real property, the complaint being in the usual form. The defendant Bergman is the sole appellant, and he bases his claim of ownership of the property under a mortgage foreclosure sale and the purchase by

him at such sale on February 25, 1911, pursuant to which sale a sheriff's certificate in due form was issued to him.

The plaintiff asserts title under an alleged redemption from such foreclosure sale made on February 24, 1912, to whom was issued a certificate of redemption in due form.

The ultimate question presented is whether plaintiff, at the time of his alleged redemption, was authorized, under the statute, to make such redemption. It is appellant's contention that plaintiff had no such interest in the property as entitled him to redeem. We are agreed that such contention is without merit, and our reasons for this conclusion will be briefly stated.

The real property in controversy was formerly owned by one Robert Winter, who died intestate, leaving as heirs the persons other than McArthur who are named as defendants herein. McArthur was the duly appointed and acting administrator of the estate of said Winter, and as such administrator gave the mortgage which was foreclosed. Prior to such foreclosure proceedings, the necessary steps were taken in the probate court to effect a sale of the premises to the plaintiff, and the latter purchased the same for the sum of $2,400, paying to such administrator the sum of $940, the balance of such purchase price after deducting the encumbrances on the property.

It is appellant's contention that plaintiff acquired no title through such probate sale, owing to certain irregularities in the proceedings which it is said rendered such sale null and void. The irregularities consisted in a misdescription of the range, it being described as range 74, instead of range 75, in the order of license to sell, the notice of sale, the order of hearing of sale, and the notice of hearing report of sale. It is not claimed that the petition for license to sell, the order and notice of hearing on petition to sell, the report of sale, and the order confirming the sale, do not correctly describe the property. After such irregularities were discovered, an application was made to the county court, upon due notice to all persons interested, to correct the errors in the description, which application was granted after hearing. It is contended by appellant, however, that such errors in the description were jurisdictional, and therefore could not be correct so as to pass title to the plaintiff. Such contention, we think, is unsound. The county court obtained jurisdiction upon the filing of a proper petition.

Rev. Codes 1905, § 7895, Comp. Laws 1913, § 8530, and any errors in the description in subsequent proceedings would, we think, constitute irregularities only which could not be challenged except by a direct attack. 18 Cyc. 802, and cases cited. Furthermore, under §§ 7955 and 7956, Rev. Codes, 1905, Comp. Laws 1913, §§ 8590 and 8591, the county court had ample authority to correct such irregularities.

But we need not rest our decision upon the ground that plaintiff acquired title through such probate proceedings, for the undisputed proof shows that the heirs of Robert Winter executed and delivered to the plaintiff quitclaim deeds to the premises in controversy; and we entertain no doubt that he acquired, through such quitclaim deeds, a sufficient interest in the premises to entitle him to redeem. It is of course true that at the death of Robert Winter the title held by him immediately vested in his heirs at law, he having, as before stated, died intestate. See § 5186, Rev. Codes 1905, Comp. Laws 1913, § 5742. It follows, therefore, that such heirs could, by deed, transfer their interest to the plaintiff. Whether plaintiff obtained the entire interest in such property through these quitclaim deeds is not controlling, for the Code provides that a redemption may be made by the mortgagor or his successor in interest in the whole *or any part of the property.* Rev. Codes 1905, § 7465, Comp. Laws 1913, § 8085.

But it is contended by appellant that there is no competent proof that the grantors named in these quitclaim deeds are the heirs of Robert Winter, deceased, the particular point being that the only competent proof of heirship is a decree establishing heirship. In this they are clearly in error. 4 Enc. Ev. 577; Jetter v. Lyon, 70 Neb. 429, 97 N. W. 596; 2 Greenl. Ev. 15th ed. 353–355. The Nebraska court in the above case, among other things, said: "Again one may establish ownership to real estate as the heir of a deceased person, even where no probate proceedings whatever have been had relating to the estate of the deceased. In this state our district courts have jurisdiction in ejectment suits, and the heirs of a deceased person, even before the estate is probated may maintain ejectment as to all persons except the executor or administrator. . . . The record in this case shows that Waldo H. Lyon testified that he and his coplaintiffs were the only surviving chil-

dren and heirs at law of Waldo Lyon, the grantor in the deed in question. Such evidence was clearly competent."

Section 8159, Rev. Codes 1905, Comp. Laws 1913, § 8797, which is similar to the Nebraska statute, expressly authorizes the heirs to maintain an action for the possession of the real estate, or for the purpose of quieting title to the some, against anyone except the executor or administrator. If appellant's contention is sound the heirs who have not been determined by a decree of heirship would be powerless to redeem from a mortgage foreclosure or execution sale, and they might, therefore, be devested of all interest in the property before a decree of heirship could be obtained. Such is clearly not the law.

The proof that the grantors in such quitclaim deeds are heirs of Robert Winter, deceased, is clear and beyond controversy. In addition to such proof, the fact that they are such heirs is disclosed by the original petition for letters of administration, as well as by all the records of the county court relating to such estate, which are in evidence in this case.

We entertain no doubt that plaintiff had such an interest in the property as entitled him to redeem, and that he was within the statutory time permitted for making a redemption.

The plaintiff, being a successor in interest of the mortgagor, was not required to serve notice of redemption. In paying the amount due, he did all that the law required. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702.

The judgment is affirmed.

Goss, J. disqualified, not participating.

Honorable Chas. M. Cooley, Judge of the First Judicial District, sitting in his stead.

PETER MARQUART v. H. B. SCHAFFNER.

(152 N. W. 660.)

Amended complaint — order of district court allowing — appeal therefrom — no provision for.

Section 7841, Comp. Laws 1913, does not provide for an appeal from the district to the supreme court from an order allowing an amended complaint to be filed.

Opinion filed April 24, 1915.

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

Appeal dismissed.

F. E. McCurdy, for appellant.

The complaint in justice court must be so explicit as to inform the defendant of the nature of plaintiff's claim, and that a judgment thereon will be a bar to another suit on the same cause. 24 Cyc. 558, 563 and notes.

A defective statement or pleading will afford no basis for allowing an amendment. Maxwell v. Quimby, 90 Mo. App. 469; Lamb v. Bush, 49 Mo. App. 337; Lustig v. Cohen, 44 Mo. App. 271; Dahlgren v. Yocum Bros. 44 Mo. App. 277; Nelson v. Barker, 3 McLean, 379, Fed. Cas. No. 10,101; Brigham v. Este, 2 Pick. 420; Terra Haute & I. R. Co. v. Zehner, 3 L.R.A.(N.S) 297 note.

T. F. Murtha and *George H. Purchase,* for respondent.

The requirement that the justice enter in his docket a concise statement of each pleading made orally, is merely directory. Rev. Codes, 1905, §§ 8350, 8378, Comp. Laws, 1913, §§ 9011, 9039; Sinnamon v. Melbourn, 4 G. Greene, 309.

The district court had authority, and it was the duty of such court, to permit plaintiff to file a new complaint, even in the absence of any complaint in justice court. Bergman v. Margeson, 31 S. D. 1, 139 N. W. 374; Simon v. Spiro, 124 Mich. 484, 83 N. W. 146; Hilliard v. Loeb, 31 S. D. 329, 140 N. W. 703.

The objection that a cause of action is barred by the statute of limitations must be made by answer. Rev. Codes, 1905, §§ 6770, 6796, Comp. Laws 1913, §§ 7358, 7384.

It is not necessary to serve a complaint with the summons in an action in justice court, and as long as the cause of action is foreshadowed in the summons, the complaint when made and filed relates back to the commencement of the action. 31 Cyc. 464; Love v. Southern R. Co. 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475; Sanger v. Newton, 134 Mass. 308; Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461; Elting v. Dayton, 67 Hun, 425, 22 N. Y. Supp. 154.

Per Curiam. The facts in these cases are in all material matters identical with those in Holobuck v. Schaffner, post, 344, 152 N. W. 660, just decided by this court. For the reasons therein stated the appeals are hereby dismissed.

EMIL HOLOBUCK v. H. B. SCHAFFNER.

(152 N. W. 660.)

Amended complaint — order allowing — appeal from — does not lie.

Section 7841, Comp. Laws 1913, does not provide for an appeal from the district to the supreme court from an order allowing an amended complaint to be filed.

Opinion filed April 24, 1915.

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

Appeal dismissed.

F. E. McCurdy, for appellant.

A justice has no power to receive pleadings after the expiration of the time prescribed by law. Mattice v. Litcherding, 14 Minn. 142, Gil. 110; Holgate v. Broome, 8 Minn. 243, Gil. 209.

The rule allowing amendments in justice court is liberal. But the amendment here is too indefinite, and is not sufficiently specific to identify the claim attempted to be set forth. 24 Cyc. 558, and note 76; Nelson v. Barker, 3 McLean, 379, Fed. Cas. No. 10,101; Brigham v. Este, 2 Pick. 420; Bricken v. Cross, 163 Mo. 449, 64 S. W. 99.

Neither can an amendment which seeks to or actually does state a new cause of action be allowed. Where the original complaint failed to state a cause of action, and the claim became barred by the running of the statute of limitations, and an amended complaint was thereafter offered setting forth facts sufficient, but on the *Barred Claim,* such amended complaint sets forth a new cause of action in new counts,—one never before pleaded. Eylenfeldt v. Illinois Steel Co. 165 Ill. 185, 46 N. E. 266.

Where the declaration fails to set forth a cause of action, after the statute of limitations has run, plaintiff will be denied the right to set up and allege new and different grounds on which to base his claim for damages. Illinois C. R. Co. v. Campbell, 170 Ill. 163, 49 N. E. 314.

T. F. Murtha and *George H. Purchase,* for respondent.

A complaint in justice court may be oral or written. Rev. Codes

1905, § 8376, Comp. Laws 1913, § 9037; Sinnamon v. Melbourn, 4 G. Greene, 309.

The district court has authority, and it is its duty, to permit the plaintiff to file a new complaint therein. Bergman v. Margeson, 31 S. D. 1, 139 N. W. 374; Simon v. Spiro, 124 Mich. 484, 83 N. W. 146; Hilliard v. Loeb, 31 S. D. 329, 140 N. W. 703.

The objection that a cause of action is barred by the statute of limitations must be by answer. Rev. Codes 1905, §§ 6770, 6796, Comp. Laws 1913, §§ 7358, 7384; Amended Laws, 1911, p. 297.

Where the complaint is fairly foreshadowed by the summons, the complaint, either original or amended, relates back to the time of the commencement of the action. 31 Cyc. 464; Love v. Southern R. Co. 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475; Sanger v. Newton, 134 Mass. 308; Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461; Elting v. Dayton, 67 Hun, 425, 22 N. Y. Supp. 154; Chamberlain-Wallace Co. v. Akers, 26 N. D. 395, 144 N. W. 715.

BURKE, J. In June, 1913, plaintiff brought action against the defendant in justice court for damages alleged to have been received on account of the trespass of domestic animals. Judgment was entered by default in favor of plaintiff, and appeal taken to the district court. When the case was called for trial in said district court, and before any testimony was taken, plaintiff's attorney prepared and handed to the attorney for the defendant copies of an amended complaint in such action, but no application was made to the trial court for an order allowing the same to be substituted for the original and filed. At the close of all the testimony, application was made to the court for leave to file the amended complaint. Such leave was granted by the court upon condition that said plaintiff pay to the defendant a term fee of $10, and that the defendant be allowed time to prepare and serve an answer thereto. From this order, defendant has appealed.

(1) Section 7841, Comp. Laws 1913, covers the matter of appeal from orders from the district to the supreme court, and reads as follows: "What Orders Reviewable.—The following orders when made by the court may be carried to the supreme court:

"1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.

"2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment.

"3. When an order grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction, or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of § 8074 of this Code; when it sets aside or dismisses a writ of attachment for irregularity; when it grants or refuses a new trial; or when it sustains or overrules a demurrer.

"4. When it involves the merits of an action or some part thereof; when it orders judgment on application therefor on account of the frivolousness of a demurrer; answer or reply on account of the frivolousness thereof.

"5. Orders made by the district court or judge thereof without notice are not appealable; but orders made by the district court after a hearing is had upon notice, which vacate or refuse to set aside orders previously made without notice, may be appealed to the supreme court when, by the provisions of this chapter, an appeal might have been taken from such order so made without notice, had the same been made upon notice."

The order from which the appeal in the case at bar is taken does not come under any of the above subdivisions, and is clearly not appealable. If an appeal were allowed from this order, skilful litigant by succession of such appeals could greatly delay, if not entirely prevent, final judgment in any case. The authorities are to be found in the annotations following said section in the 1913 Compiled Laws, and we will not reproduce them here. Appeal is accordingly dismissed.

H. P. REMINGTON v. JOHN GEISZLER.

(152 N. W. 661.)

From a recovery by verdict of $1,000 damages for alleged slander of plaintiff by defendant, the latter appeals.

Note.—The question of privilege of an informal communication made to an officer of the law with respect to the misconduct or criminal offense of another seems to

Slander — damages — action for — defense of truthfulness of statements charged — instructions — failure to instruct as to truth of statements — error.

1. The defense was that the alleged slanderous statements were true, and their utterance was admitted in six of the eight instances charged. The court instructed the jury fully as to the plaintiff's side of the case, but failed to instruct as to the effect of the proof of the truth of the alleged slanderous statements. *Held* error.

Instructions — testimony of impeached witnesses — effect of — failure to instruct upon.

2. The court's instructions permitted the jury to disregard the testimony of witnesses impeached on immaterial matters, and constituted a misinstruction concerning impeachment of witnesses.

Witnesses — credibility of — instructions on.

3. Error was committed in the instructions given on credibility of witnesses, the court instructing upon the weight of the testimony.

Privileged communications — by defendant to state's attorney.

4. The jury were not given a plain instruction upon an alleged privileged communication made by defendant to the state's attorney in his attempt to procure issuance of a warrant of arrest.

Plaintiff — statements made to persons named — questions relating thereto — times and places shown — error to refuse.

5. Error was committed in refusing to permit plaintiff to be examined as to whether he made statements to persons named, at times and places shown, that the alleged slanderous statements did him no injury.

Slanderous statements — truth or falsity of — promissory note — change of after execution — evidence as to making "without interest" — exclusion of — error.

6. The truth or falsity of the alleged slanderous statements turned on whether a promissory note given by defendant to one C., but drawn by Remington in his office in the presence of defendant, C., and the stenographer of plaintiff, Amanda Nelson, when drawn, contained an interest-bearing clause. Defendant claimed it was to bear no interest. It was negotiated, and, when presented to defendant, contained a provision calling for interest at 12 per cent. The alleged slander consisted of statements made by defendant accusing Remington of having changed the note after its delivery by insertion of the words, "interest at 12 per cent." The jury by their verdict found Remington had not

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depend on the question whether it was made in good faith, see notes in 4 L.R.A. (N.S.) 149, and 32 L.R.A.(N.S.) 740.

On the question of truth as a defense to libel or slander, see notes in 21 L.R.A. 502; 31 L.R.A.(N.S.) 132; and 50 L.R.A.(N.S.) 1040.

altered it. Amanda Nelson was called as a witness of plaintiff, and testified to having seen defendant sign the note and Remington then hand it to C., who put it in his pocket; and that Remington did not have the note in his possession after it was signed, the parties then leaving Remington's office. The effect of this was to disprove any opportunity of Remington to change the note after it was signed. In the cross-examination it was shown that there was a discussion concerning interest when Geiszler signed the note. She was then asked in cross-examination whether she "heard Geiszler say to Remington and C. that he would give his note without interest." The answer was excluded as without the scope of proper cross-examination. *Held* error, as such a statement, if made, could be shown to characterize the acts done and as bearing directly upon the important issue of fact in the case.

Jury — verdict — judgment.

7. It cannot be said that the jury would probably have returned the same verdict had these errors not been committed. The judgment appealed from is ordered set aside and a new trial granted.

(Opinion filed April 27, 1915).

Appeal from the District Court of Richland County on change of venue from McIntosh County, *Allen,* J.

G. M. Gannon and *Purcell, Divet & Perkins,* for appellant.

It is the duty of the court to charge on all material points, whether requested so to do or not. He shall instruct upon the *whole* law of the case—not upon a part only. Rev. Codes 1905, § 7021; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; State ex rel. Pepple v. Banik, 21 N. D. 425, 131 N. W. 262; Zilke v. Johnson, 22 N. D. 83, 132 N. W. 640, Ann. Cas. 1913E, 1005; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Capital City Brick & Pipe Co. v. Des Moines, 136 Iowa, 243, 113 N. W. 839; Hume v. Des Moines, 146 Iowa, 624, 29 L.R.A.(N.S.) 126, 125 N. W. 849, Ann. Cas. 1912B, 904; Owen v. Owen, 22 Iowa, 270; Barton v. Gray, 57 Mich. 622, 24 N. W. 638.

The giving of an erroneous instruction raises an immediate presumption of prejudice which calls for the reversal of the case. McKay v. Leonard, 17 Iowa, 569; Hook v. Craghead, 35 Mo. 380; Freeman v. Rankins, 21 Me. 446; Hayne, New Trials, § 287; Rosenbaum Bros.

& Co. v. Hayes, 5 N. D. 481, 67 N. W. 951; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

The failure of the court to instruct the jury concerning the defense of justification by proving the truth of the charge, in a slander case, is reversible error. Burnham v. Stone, 101 Cal. 164, 35 Pac. 627; Relf v. Rapp, 3 Watts & S. 21, 37 Am. Dec. 528; Virtue v. Creamery Package Mfg. Co. 123 Minn. 17, L.R.A.1915B, 1179, 142 N. W. 930, 1136; Greengard v. Burton, 88 Minn. 252, 92 N. W. 931; Forzen v. Hurd, 20 N. D. 54, 126 N. W. 224; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Troy Min. Co. v. Thomas, 15 S. D. 238, 88 N. W. 106; Crow v. Burgin, — Miss. —, 38 So. 625; Memphis Street R. Co. v. Newman, 108 Tenn. 666, 69 S. W. 269; Souey v. State, 13 Lea, 472; Nashville, C. & St. L. R. Co. v. Egerton, 98 Tenn. 541, 41 S. W. 1035; Wooten v. State, 99 Tenn. 189, 41 S. W. 813; International G. N. R. Co. v. Williams, — Tex. Civ. App.—, 129 S. W. 847; Bangle v. Missouri, K. & T. R. Co. — Tex. Civ. App. —, 140 S. W. 374; Murphy v. Connecticut Co. 84 Conn. 711, 81 Atl. 961.

Each party is entitled to an instruction upon his theory of the case, if it is supported by any evidence. Waniorek v. United R. Co. 17 Cal. App. 121, 118 Pac. 947; Julius Winter, Jr. & Co. v. Forrest, 145 Ky. 581, 140 S. W. 1005; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Whittaker v. McQueen, 128 Ky. 260, 108 S. W. 236; Duncan v. Brown, 15 B. Mon. 186; Bisbey v. Shaw, 12 N. Y. 67; Hart v. Sun Printing & Pub. Asso. 79 Hun, 358, 29 N. Y. Supp. 434; Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345.

An instruction upon a legal proposition not involved in the case is erroneous. Welter v. Leistikow, 9 N. D. 283, 83 N. W. 9; Bertelson v. Chicago, M. & St. P. R. Co. 5 Dak. 313, 40 N. W. 531, 11 Am. Neg. Cas. 269; Chisholm v. Keyfauver, 110 Cal. 102, 42 Pac. 424; Frederick v. Kinzer, 17 Neb. 366, 22 N. W. 770; Summerlot v. Hamilton, 121 Ind. 87, 22 N. E. 973; Hickman v. Link, 116 Mo. 123, 22 S. W. 472; Boyce v. Aubuchon, 34 Mo. App. 315; Knudson v. Laurent, 159 Iowa, 189, 140 N. W. 392; O'Neil v. Cardina, 159 Iowa, 78, 44 L.R.A.(N.S.) 1175, 140 N. W. 196; Larson v. Chicago, M. & St. P. R. Co. 31 S. D. 512, 141 N. W. 353; Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; Sargent v. Linden Min. Co. 55 Cal. 204, 3 Mor. Min. Rep. 207; Baltimore Elevator Co. v. Neal, 65

Md. 438, 5 Atl. 338; Waddingham v. Hulett, 92 Mo. 528, 5 S. W. 27; Scott v. Clayton, 54 Wis. 499, 11 N. W. 595; Abbott, Trial Brief, Civil, 676 note 1, and cases cited; Iverson v. Look, 32 S. D. 321, 143 N. W. 332; Blair v. Groton, 13 S. D. 211, 83 N. W. 48; Bowen v. Epperson, 136 Mo. App. 571, 118 S. W. 528; Jones v. Matthieson, 2 Dak. 523, 11 N. W. 109.

The giving of a correct charge as to part of a case will not overcome the reiteration of an erroneous charge as to some other part of the case. Rosenbaum Bros. & Co. v. Hayes, 5 N. D. 481, 67 N. W. 951; Lindblom v. Sonstelie, 10 N. D. 145, 86 N. W. 357; Marshall v. Heller, 55 Wis. 392, 13 N. W. 236.

A communication made in good faith to a prosecuting officer, concerning the commission of a crime, is privileged. Eames v. Whittaker, 123 Mass. 342; Klinck v. Colby, 46 N. Y. 427, 7 Am. Rep. 360; Dale v. Harris, 109 Mass. 193; Chapman v. Battle, 124 Ga. 574, 52 S. E. 812; Craig v. Burris, 4 Penn. (Del.) 156, 55 Atl. 353.

If the court does not properly instruct the jury as to the law on the subject of the impeachment of witnesses, it is reversible error. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280, 91 N. W. 436; State v. Johnson, 14 N. D. 288, 103 N. W. 565; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58, 72 N. W. 935.

An instruction that greater weight should be given to the testimony of a witness whose information is superior, is reversible. It attempts a comparison of the witnesses, and only tends to confuse the jury as to what is meant, or what is required of them. Winklebleck v. Winklebleck, 160 Ind. 570, 67 N. E. 451; Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; Muncie, H. & Ft. W. R. Co. v. Ladd, 37 Ind. App. 90, 76 N. E. 790; Hudson v. Best, 104 Ga. 131, 30 S. E. 688; Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S. E. 964; Frizell v. Cole, 42 Ill. 362.

Trial courts should not merely read or substantially read the pleadings to the jury, but should explain the real issues raised by the pleadings and covered by the evidence. The jury should be told the meaning of the different pleadings and allegations; they should, by their instructions, simplify rather than involve the issues. Swanson v. Allen, 108 Iowa, 419, 79 N. W. 132; Gorman v. Minneapolis & St. L. R. Co. 78

Iowa, 518, 43 N. W. 330; Robinson v. Berkey, 100 Iowa, 136, 62 Am. St. Rep. 549, 69 N. W. 434; Black v. Miller, 158 Iowa, 293, 138 N. W. 535; Stevens v. Maxwell, 65 Kan. 835, 70 Pac. 873; 11 Enc. Pl. & Pr. 154; Kansas City, Ft. S. & M. R. Co. v. Eagan, 64 Kan. 421, 67 Pac. 887, 11 Am. Neg. Rep. 418; Kansas City, Ft. S. & M. R. Co. v. Dalton, 66 Kan. 799, 72 Pac. 209; 38 Cyc. 1608, and cases cited; Baltimore & O. R. Co. v. Lockwood, 72 Ohio St. 586, 74 N. E. 1071, 18 Am. Neg. Rep. 590; Murray v. Burd, 65 Neb. 427, 91 N. W. 278.

Evidence that plaintiff was damaged by causes other than the publications made by the defendant is admissible. Consolidated Traction Co. v. Mullin, 63 N. J. L. 22, 42 Atl. 764; Yaeger v. Southern California R. Co. 5 Cal. Unrep. 870, 51 Pac. 190; Wier v. Allen, 51 N. H. 177.

The defendant is only liable for the damage which he has occasioned; the damage must be the result of the injury of which complaint is made,—the legal, proximate consequences of the words spoken. 2 Saunders, Pl. & Ev. 927; 2 Greenl. Ev. §§ 254, 420; King v. Watts, 8 Car. & P. 614; Dixon v. Smith, 5 Hurlst. & N. 450, 29 L. J. Exch. N. S. 125; Olmsted v. Brown, 12 Barb. 657; Vickars v. Wilcocks, 8 East, 1, 9 Revised Rep. 361; 2 Starkie, Ev. 873; Miller v. Hamilton Brown Shoe Co. 89 S. C. 530, 72 S. E. 397, 27 Ann. Cas. 106; Newell, Defamation, Slander, p. 899; Fowler v. Fowler, 113 Mich. 575, 71 N. W. 1084, and cases cited; 8 Enc. Ev. 270, and cases cited; 25 Cyc. 418; Comstock v. Smith, 20 Mich. 348.

Statements made by plaintiff that slanders did not hurt him are admissible. McKelvey, Ev. 124; 1 Enc. Ev. 504, and cases cited; 16 Cyc. 978, et seq. and cases cited; 2 Sedgw. Damages, § 450; Samuels v. Evening Mail Asso. 6 Hun, 5; Porter v. Henderson, 11 Mich. 20, 82 Am. Dec. 59; Richardson v. Barker, 7 Ind. 567; Evans v. Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74; Hobart v. Plymouth County, 100 Mass. 159.

Conversations between plaintiff and defendant, overheard by witnesses, are admissible. State v. Kent (State v. Pancoast) 5 N. D. 547, 35 L.R.A. 518, 67 N. W. 1052; McKelvey, Ev. 343, et seq.; 16 Cyc. 1148, et seq.; People v. Barker, 60 Mich. 277, 1 Am. St. Rep. 501, 27 N. W. 548; Beal v. Nichols, 2 Gray, 264; 2 Phillipps, Ev. p. 898; 16 Cyc. 1148, et seq.

T. A. Curtis and *Forbes & Lounsbury,* for respondent.

Counsel cannot sit quietly by and listen to the charge of the trial court to the jury, and make no request for instructions upon any question, and then come into the supreme court and complain that the court failed to instruct as it should have done. Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; Landis v. Fyles, 18 N. D. 587, 120 N. W. 566; State ex rel. Pepple v. Banik, 21 N. D. 425, 131 N. W. 262; Zilke v. Johnson, 22 N. D. 83, 132 N. W. 640, Ann. Cas. 1913E, 1005; 11 Enc. Pl. & Pr. 217, et seq.

It is proper to give an instruction in the language of our Code. This is especially true where no explicit instruction is requested. Bertelson v. Chicago, M. & St. P. R. Co. 5 Dak. 313, 40 N. W. 531, 11 Am. Neg. Cas. 269; State v. Campbell, 7 N. D. 58, 72 N. W. 935.

If instructions as a whole are correct in law, they are sufficient. They cannot be broken up or singled out. Boyle v. State, 105 Ind. 469, 55 Am. Rep. 218, 5 N. E. 203; Hart v. Newton, 48 Mich. 401, 12 N. W. 508; Pennsylvania Co. v. McCormack, 131 Ind. 250, 30 N. E. 27; State v. Williams, 70 Iowa, 52, 29 N. W. 801; Davis v. Walter, 70 Iowa, 465, 30 N. W. 804; 1 Blashfield, Instruction to Juries, pp. 875, 876; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857; Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Sackett, Instruction to Juries, p. 33; United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547; Bowers v. People, 74 Ill. 418; Gill v. Crosby, 63 Ill. 190; State v. Waln, — Idaho, —, 80 Pac. 221.

An instruction that greater weight should be given to the testimony of a witness who is shown to have possessed greater means of knowledge and information concerning the matter on which he was testifying is held proper by many authorities. In any event, it was not in any way prejudicial in this case. Sackett, Instructions to Juries, 1st ed. p. 31; People v. Bodine, 1 Edm. Sel. Cas. 36; Grabill v. Ren, 110 Ill. App. 587; Fifer v. Ritter, 159 Ind. 8, 64 N. E. 464; Re Wharton, 132 Iowa, 714, 109 N. W. 492; Missouri P. R. Co. v. Moffatt, 56 Kan. 667, 44 Pac. 607; St. Louis & S. F. R. Co. v. Brock, 69 Kan. 448, 77 Pac. 86.

In any event, courts will not set aside verdicts simply because of the giving of an irrelevant or even an erroneous instruction, unless they

can see and say that the giving of such instruction may have been prejudicial. 11 Enc. Pl. & Pr. 180, and cases cited; State v. Denny, 17 N. D. 519, 117 N. W. 869; Fowler v. Iowa Land Co. 18 S. D. 131, 99 N. W. 1095; Stewart v. State, 111 Ind. 554, 13 N. E. 59; State v. Price, 75 Iowa, 243, 39 N. W. 291; Bassett v. Inman, 7 Colo. 270, 3 Pac. 383; Robinson v. Imperial Silver Min. Co. 5 Nev. 44, 10 Mor. Min. Rep. 370; Sharon v. Minnock, 6 Nev. 377; 1 Blashfield, Instruction to Juries, p. 877, and cases cited.

Rumors or statements concerning respondent, other than those charged against appellant, are not admissible. Evidence of general reputation must be confined to a period of time at or prior to the publication of which plaintiff complains. 25 Cyc. 419, and cases cited; 8 Enc. Ev. 280, and cases cited; Townsend, Slander, 2d ed. § 411; Newell, Defamation, p. 890; 18 Am. & Eng. Enc. Law, 2d ed. 1101, and cases cited; Bathrick v. Detroit Post & Tribune Co. 50 Mich. 629, 45 Am. Rep. 63, 16 N. W. 172.

In a slander case the defendant cannot show, in the reduction of compensatory damages, that the same libelous charge was published in other papers. Miller v. Cook, 124 Ind. 101, 24 N. E. 577; Folwell v. Providence Journal Co. 19 R. I. 551, 37 Atl. 6; 25 Cyc. 516, and cases cited; 1 Jones, Ev. 1906 ed. § 149; Krulic v. Petcoff, 122 Minn. 517, 142 N. W. 897, Ann. Cas. 1914D, 1056; Gripman v. Kitchel, 173 Mich. 242, 138 N. W. 1041; Newell, Defamation, 890; 18 Am. & Eng. Enc. Law, 1102; 8 Enc. Ev. 229, 278, 279, 285, 306, and cases cited.

In such a case, evidence tending to prove rumors detrimental to the plaintiff was not admissible under the pleadings. No mitigating circumstances are pleaded in the answer. Wrege v. Jones, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 Ann. Cas. 482; Lauder v. Jones, 13 N. D. 525, 101 N. W. 907; Fenstermaker v. Tribune Pub. Co. 13 Utah, 532, 35 L.R.A. 611, 45 Pac. 1097; Willover v. Hill, 72 N. Y. 37; Adamson v. Raymer, 94 Wis. 243, 68 N. W. 1000; Hahn v. Lumpa, 158 Iowa, 560, 138 N. W. 492; Hess v. Sparks, 44 Kan. 465, 21 Am. St. Rep. 300, 24 Pac. 979; 13 Enc. Pl. & Pr. 73, 77; 25 Cyc. 464, 465; Ladwig v. Heyer, 136 Iowa, 196, 113 N. W. 767; Townshend, Slander & Libel, 2d ed. 561.

Compensatory damages may properly include recompense for loss of

patronage; imputations of lack of fitness; want of necessary moral trait; dereliction in professional practice; or injury to the feelings, mental anxiety, and suffering. 3 Sutherland, Damages, pp. 659, 668; 1 Bouvier's Law Dict. 4th ed. p. 366; 8 Am. & Eng. Enc. Law, pp. 542, § 7, 543.

Plaintiff's statement, if made, that defendant's charges did him no harm, is wholly immaterial, and not binding on him. The law itself concludes that damages follow a false and slanderous statement by one of another, and such statement on the part of plaintiff was not an admission against his own interest which would bind him. Porter v. Henderson, 11 Mich. 20, 82 Am. Dec. 59.

Goss, J. Plaintiff brings this action to recover damages because of certain alleged slanderous and defamatory statements uttered by defendant about him to others. Eight separate causes of action in slander are set forth. All was said of and concerning a single transaction wherein Geiszler had executed and delivered to one Curtis a promissory note for $50, drawn by Remington and signed and delivered in his office. Geiszler claims to have read the note carefully before signing it, and that it bore no interest, and by necessary inference charges that it was materially altered by the insertion of "interest at 12 per cent." When the note was discounted at the bank it contained those words. Remington claims the note bore that interest when signed. Geiszler charges that it bore none, but was altered by Remington. On the day it was signed it was taken by Curtis to the bank for discount, and while he and Remington were there, or shortly afterwards, defendant appeared and was shown the note by the banker. He says he then discovered it had been altered to bear interest. He immediately went to Remington and Curtis, who happened to be at the depot. Curtis was about to take the train. Words there passed between defendant and plaintiff over the interest matter, defendant charging such alteration and plaintiff warmly denying it. In justice to Remington it should be stated that the jury in effect have found that the note was not altered, but bore interest when signed. The state's attorney of that county was also at the depot, and Geiszler immediately made complaint to him and requested a warrant of arrest for Remington for forgery. This was refused. Subsequently on various occasions Geiszler made similar ac-

cusations against Remington to others. These statements made at different times to different people are set forth under eight different causes of action. The first cause of action is based upon the narration of events by defendant to state's attorney Gannon, as made at the depot. To this cause of action defendant admits that he made the statements he is charged therein with making, but justifies the statements made as having been "wholly and entirely true," and made without malice, and secondly as being absolutely privileged, as a privileged communication uttered to a prosecuting officer as a part of a complaint made for the purpose of initiating a criminal prosecution for a crime of forgery, believed by defendant to have been committed. The second, third, fourth, fifth, and eighth causes of action are, so far as the words therein uttered are concerned, admitted, but by way of affirmative defense are justified as but a statement of the truth based on fact and uttered without malice. Defendant denied the utterance of the alleged slanderous words charged to have been uttered by him and set out in the sixth and seventh causes of action.

The most serious of the assignments of error are directed at the oral charge of the court. One of these taken is that the court has not instructed or given the jury to understand that, if they found that the statements charged by plaintiff to have been slanderous were in fact but the truth, they should find for the defendant. This assignment is well taken. Its omission constitutes a failure to instruct upon the main and sole affirmative defense to five of the causes of action, and to one of the two defenses to the first cause of action, the statement made to the state's attorney. Though defendant has justified by pleading the truth of the statements as his defense, the court has not instructed upon the effect of his defense, if found established. And this, too, when the defendant has admitted making the statements attributed to him in five of the causes of action. The court extensively and minutely instructed as to plaintiff's right of recovery, instructing at length concerning malice, actual and presumed. In short, there is an entire omission to charge upon the defense to six of these alleged causes of action, as the effect of the proof of the truth is entirely omitted. It is urged that, because the court defined slander, and in so doing stated it to be "a false and unprivileged publication other than libel;" that the jury was inferentially informed that, in order to find slander as a fact, they must

have found the statement to have been false, but defendant had the right to a plain and unmistakable instruction as to the consequences to follow proof of his defense. The importance of this is the more apparent under the court's instructions that the defendant admitted, by answer, making the statements set forth in six of the causes of action, and that "the burden of proof is upon the defendant to establish by a preponderance of the evidence each of the affirmative allegations of his answer," to absolve himself from compensatory damages. A careful examination of the charge reveals it to be at least close to the border line as an extreme instruction in plaintiff's favor, taken as a whole, without a single statement therein upon defendant's theory of defense. In effect the jury are fully instructed as to every claim of plaintiff, the extent to which the law will permit a recovery on the admitted statements of the defendant; that the jury could infer malice and thereon base a recovery granting both compensatory and punitive damages; but without an instruction outlining the law applicable to a defense to such admitted statements made. Respondent's counsel recognize this to be the situation, but seek to avoid its consequences by contending that "it seems to us ridiculous to say that twelve men, who were considered sufficiently intelligent to form a jury in this case, could listen to the testimony of the witnesses and the various altercations and arguments of counsel in the case for a period of more than a week, and then hear the instructions which the record shows the court gave the jury, without knowing that the main controversy in the case was the truth or falsity of the defamatory words set forth in the complaint, and that if the words were true the verdict must be for the defendant." Carried to its logical conclusion this same reasoning would dispense altogether with instructions. It is the equivalent of arguing that, had the jury not been instructed, their finding should be considered as made with knowledge of the law, because they must have gotten it at some time during the course of the trial in "the various altercations and arguments of counsel in the case." It is quite likely that a jury might draw more nearly correct conclusions from a standpoint of abstract justice without instructions, than it would where the plaintiff's side is fully presented, and defendant's affirmative defenses are wholly uninstructed upon. In any event this cure of error contended for can only lead to the ridiculous result of allowing the jury to speculate upon the law ap-

plicable to the case, or compel them to get such instructions from the attorneys' arguments in the case, which, to say the least, is not altogether conducive to wholly satisfactory results. A court should hesitate before affirming the findings of the jury returned under these circumstances. Putnam v. Prouty, 24 N. D. 517–530, 140 N. W. 93, 38 Cyc. 1691B.

The court instructed that "the jury are at liberty to disregard the statements of such witnesses, if any there be, as have been successfully impeached either by direct contradiction or in any other legal manner, except in so far as such witnesses have been corroborated by other credible evidence or by facts and circumstances proved on the trial. If you believe that any witness has knowingly and wilfully sworn falsely as to any material matter in issue, then you are at liberty to disregard the whole or any part of the testimony of such witness which has not been corroborated by other witnesses or by surrounding circumstances proved on the trial." Exception is taken to this as a misinstruction in that direct contradiction is not necessarily impeachment, that impeachment is not defined, and that the impeachment or falsity found, if any there be, is not confined to material testimony or issues. The instruction is open to all of these criticisms, and constituted a misinstruction as to matters of law, and misleading. See McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58–66, 72 N. W. 935; First Nat. Bank v. Minneapolis & N. Elevator Co. 11 N. D. 280–288, 91 N. W. 436; State v. Johnson, 14 N. D. 288, 103 N. W. 565. If the admission of impeaching testimony upon a collateral issue is reversible error, as was held in Schnase v. Goetz, 18 N. D. 594, 120 N. W. 553, an instruction permitting a jury to reject the entire testimony of a witness because he may be found to have been impeached upon immaterial matters must likewise be considered reversible error.

The court instructed "that when witnesses are otherwise equally credible, and the testimony otherwise equally entitled to equal weight, the greater weight and credit should be given to the testimony of those whose means of information is superior, and also to those who swear affirmatively to fact, rather than to those who swear negatively or to a want of knowledge or want of recollection." This instruction invades the province of the jury in several particulars. It is an instruction upon the weight of evidence, a matter solely for the jury. It undertakes to

direct them, as a matter of law, to the weight to be given to affirmative and negative testimony, that they should take the testimony of those affirming a fact, rather than those giving negative testimony. The weight of either kind of evidence was not for the court. It should have been left for the jury to determine. If otherwise permissible, "may" should have been used instead of "should," but even then the instruction would be subject to criticism at least. This identical instruction, nearly word for word, is found at § 3303, Brickwood's Sackett on Instruction, under the heading "Erroneous Instructions," and as held in Winklebleck v. Winklebleck, 160 Ind. 570, 67 N. E. 451; Jones v. Casler, 139 Ind. 382, 47 Am. St. Rep. 274, 38 N. E. 812; Muncie, H. & Ft. W. R. Co. v. Ladd, 37 Ind. App. 90, 76 N. E. 790; Hudson v. Best, 104 Ga. 131, 30 S. E. 688; Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434, 38 S. E. 964; Frizell v. Cole, 42 Ill. 362. Instructions somewhat similar have been sustained in negligence cases where witnesses swear to hearing a bell rung, and others give negative testimony that they did not hear a bell rung. But this instruction as given is improper. Exceptions taken thereto are sustained.

Exception is taken to the court's instruction concerning the communication of defendant to the state's attorney, claiming that the defendant was entitled to an instruction that, if the jury found the statement was a privileged communication, it should find for the defendant on that cause of action. The jury were not so instructed except by inference, and defendant was doubtless entitled to a plain instruction to that effect. But this omission was not reversible error, because the jury by their verdict found Geiszler's claim, upon which he made the complaint to the state's attorney untrue, the equivalent of finding the complaint unwarranted and the attempted prosecution not in good faith. Defendant was entitled to a plain instruction, however. It is mentioned in view of a new trial.

In the instructions is found the following: "If the defendant lacks a legal excuse for the slander of the plaintiff, the law presumes malice, and the defendant ought to respond to the full extent of the actual injury done the plaintiff." This instruction was given in connection with damages punitive and compensatory. As no exception is taken thereto, it is not discussed more than to say that it is open to criticism. This is said in view of a new trial.

However, the assignments of error, based upon the refusal to permit plaintiff to answer as to whether at times and places mentioned he had not stated to two different persons named, after a basis had been laid for the question, "In the course of that conversation you stated, did you not, that Geiszler's statement didn't hurt you?"—were error. The question called for an admission against his own interests directly concerning the damages arising from these slanders, a matter that he himself by his pleadings and his testimony had placed in issue. It was error to not permit defendant the benefit of what would have been his admission had he answered the question in the affirmative. 8 Enc. Ev. 263; 2 Sedgw. Damages, 9th ed. § 450; Porter v. Henderson, 11 Mich. 20, 82 Am. Dec. 59; Evans v. Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74; Hobart v. Plymouth County, 100 Mass. 159.

In the cross-examination of Amanda Nelson, stenographer for plaintiff and present when the note in question was signed by Geiszler, she was asked these questions, and made these answers:

Q. You heard these discussions, did you not, of the matters in their settlement?

A. I did hear some talking going on.

Q. In the discussion that was had, it is a fact, is it not, that you did hear discussed the question as to whether or not that note should bear interest?

A. Yes, I did hear Geiszler say something about interest.

Q. It is a fact, is it not, at that time that you heard Geiszler say to Remington and Curtis that he would give his note without interest? Objected to as irrelevant, immaterial, and not proper cross-examination, and not having been touched upon in the direct-examination.

By the Court: Sustained.

The exclusion of this testimony was clearly error. Defendant was entitled to an answer to this question. It was directed to the most vital part of the entire transaction, and the very occurrence upon which turned the truth or falsity of the charges set up as slanderous. Had this witness answered the question in the affirmative, a different verdict might have resulted, as it would have corroborated Geiszler and impeached the plaintiff; and this, too, from a disinterested listener. Plaintiff says

that appellants have not specifically assigned this as error. It is argued in the brief and classified therein among the errors alleged and even indexed. Its omission in the formal statement of errors assigned was evidently an oversight, otherwise it would not have been briefed. Respondent urges the objection that the question was beyond the scope of the direct-examination. The witness was called by plaintiff, testified to her employment by him, and that she was still in his employ; that she was present when the note was executed; that Remington, Geiszler, and Curtis also were there; testified as to their places in the room when the note was signed; that Geiszler signed the note; that she saw Remington hand it to Curtis, who put it in his pocket; that Geiszler left ahead of them; that Remington did not have the note in his possession after it was signed. The effect of this testimony was to make full proof of execution and delivery of the note, and to negative any change in it by Remington adding interest to the note, as Geiszler claims was done, and was upon the crucial point in the whole case; but yet she was not permitted to testify in answer to whether Geiszler stated when he signed the note "that he would give his note without interest." This amounted to prejudicial error.

This sufficiently covers the assignments of error presented for consideration. It is not necessary to pass upon other errors assigned, as they will not necessarily arise on another trial. Everything considered, it is impossible to permit the verdict to stand in the face of the errors assigned and sustained. Cases of this nature are difficult to try, but it cannot be said that the jury would have returned the same verdict had the record been free from the errors discussed in this opinion. A new trial must therefore be granted, and it is so ordered.

JOHN MILLER COMPANY, a Corporation, v. JOHN A. MINCKLER et al.

(152 N. W. 664.)

This action was pending undetermined for six years, and was subject to dismissal under the statute providing that causes so pending for five years

Note.—As to what judgments and orders may be appealed from, see note in 20 Am. St. Rep. 173.

may be dismissed, when plaintiff's attorney procured an order of reference. The defendant defaulted in appearance before the referee who heard the cause, and who returned findings and conclusions, upon which a default judgment erroneously was entered without an order therefor or confirmation of the findings. All this was irregular, and in the absence of the defendant and without his knowledge. Soon afterwards plaintiff moved to vacate the judgment and to confirm the findings, and for an order directing re-entry of the judgment. While this motion, duly served, was pending, defendant by a countermotion moved to dismiss for nonprosecution under § 7598, Comp. Laws, 1913. Both motions were heard simultaneously. The court vacated the erroneous judgment, but conditionally confirmed the findings, and directed re-entry of the judgment, and denied defendant's motion to dismiss for nonprosecution. Defendant perfected two appeals,—one from the order denying his motion to dismiss, and one from the judgment entered upon confirmance of the referee's findings. *Held:*—

Actions — pending six years — default judgment — referee — findings — order confirming — order for judgment — motion to re-open and for re-entry of judgment — motion to dismiss — order denying motion to dismiss — nonappealable.

1. The order denying the motion to dismiss is a nonappealable order.

Judgment — appeal from — order denying motion to dismiss — review of.

2. The appeal from the judgment wil permit review of the propriety of the order denying motion to dismiss for nonprosecution.

Statute of limitations — repose — must be invoked — to avail.

3. Section 7598 is analogous to the ordinary statute of limitations, and is a statute in repose, which to avail must be invoked.

Cause — conditionally in final judgment — motion to dismiss — not timely made — meaning of and reason for statute.

4. The motion to dismiss came too late because at the time it was made and heard the cause was conditionally in final judgment, and proceedings for its final determination were pending and immediately before the court. Further delay was then impossible, and the reason for the statute had ceased to exist, and the provisions of the statute were not applicable. The court could not, in the face of the motion for judgment conditionally granted, have found the cause to be one to which the statute in question could apply.

Opinion filed April 29, 1915. Rehearing denied May 18, 1915.

An appeal from the District Court of Benson County, *Burr,* Special Judge.

Affirmed.

Cowan & Adamson and *H. S. Blood,* for appellant.

The showing of defendants on their application for a dismissal was

absolute against the plaintiff, and they were entitled to a formal order dismissing the case as a matter of right. Code, 1913, § 7598; Lambert v. Brown, 22 N. D. 107, 132 N. W. 781.

R. A. Stuart (*Newton, Dullam, & Young* of counsel,) for respondent.

The order of the district court refusing to dismiss the action is not appealable. Strecker v. Railson, 19 N. D. 677, 125 N. W. 560.

Notice of appeal may be served by mail. Gooler v. Eidsness, 18 N. D. 338, 121 N. W. 83.

The service was complete from the time the paper was deposited in the postoffice, properly addressed and postpaid. Clyde v. Johnson, 4 N. D. 92, 58 N. W. 512; 4 Wait, Pr. 622; Griffin v. Walworth County, 20 S. D. 142, 104 N. W. 1117.

The order is not a part of the judgment roll. Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

On defendant's application for dismissal, they were not, as a matter of right, entitled to an order of dismissal. Lambert v. Brown, 22 N. D. 108, 132 N. W. 781.

On such motion, the court has the right to exercise an impartial, legal discretion; such a discretion as will subserve the ends of justice, and not impede or defeat such purpose. Bailey v. Taaffe, 29 Cal. 423; Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037; Atty. Gen. v. Nethercote, 11 Sim. 529, 10 L. J. Ch. N. S. 162; Wiltsey v. Wiltsey, 153 Iowa, 455, 133 N. W. 665.

Denial of such a motion accords with the principle that delay is excused where it has been caused or acquiesced in by the defendant, and frequent promises made to settle. 2 Wait, Pr. p. 612; Harris v. Ensign, 1 How. Pr. 103; Stinnard v. New York F. Ins. Co. 1 How. Pr. 169; Brown v. Vedder, 2 How. Pr. 71; Merritt v. Seacord, 1 How. Pr. 95; Munn v. Greenwood, 1 How. Pr. 32; Herman v. Pacific Jute Mfg. Co. 131 Cal. 210, 63 Pac. 344; Hillside Coal & I. Co. v. Heermans, 191 Pa. 116, 43 Atl. 76; Pickett v. Hastings, 39 Cal. 105; 1 Black, Judgm. 2d ed. § 354; Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 229, 130 N. W. 228.

If the defense was a sham, it was undoubtedly interposed to secure delay and to induce a settlement more favorable to defendants. Under

such circumstances a defendant will not be allowed to complain of delay. Herman v. Pacific Jute Mfg. Co. 131 Cal. 210, 63 Pac. 344.

But they did not invoke dismissal while the cause was at repose. Plaintiff was allowed to take steps *looking to a trial* without *objection*. This amounted to a waiver. Fernes v. Hutchinson, 1 Russ. & M. 22; Home Ins. Co. v. Howell, 24 N. J. Eq. 238; Troedor v. Hyams, 153 Mass. 536, 27 N. E. 775; Chapman v. Van Alstyne, 6 Wend. 517; People ex rel. Wineman v. Judge of Wayne Circuit, 35 Mich. 498; Miller v. Hemphill, 9 Ark. 488.

The defendants were estopped to claim the right to dismiss, because their conduct was inconsistent with an intent to exercise such right. Bray v. Libby, 71 Me. 276; Ex parte Barclay, 49 Ala. 42; Herman v. Pacific Jute Mfg. Co. supra.

It is the rule that until he has notice of substitution of attorneys, a party to an action is justified in dealing solely with the original attorneys. Hoppin v. First Nat. Bank, 25 Nev. 84, 56 Pac. 1121; Parker v. Williamsburgh, 13 How. Pr. 250; Robinson v. McClellan, 1 How. Pr. 90; Waterhouse v. Freeman, 13 Wis. 339; Boyd v. Stone, 5 Wis. 240; Comfort v. Stockbridge, 38 Mich. 342; De Vall v. De Vall, 57 Or. 128, 109 Pac. 761, 110 Pac. 705.

In vacating a judgment, it is discretionary with the court as to what reasonable terms may be imposed. Warder v. Patterson, 6 Dak. 83, 50 N. W. 484; Griswold Linseed Oil Co. v. Lee, 1 S. D. 531, 36 Am. St. Rep. 761, 47 N. W. 955; Whereatt v. Ellis, 70 Wis. 207, 5 Am. St. Rep. 164, 35 N. W. 314; Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.

In opening a default judgment it is proper for the court to require that defendant shall agree to an immediate or speedy trial, without asking for a postponement. Chicago v. English, 198 Ill. 211, 64 N. E. 976; Muller v. Rost, 58 Hun, 604, 11 N. Y. Supp. 615.

Goss, J. While this action is against several, the real defendant is J. A. Minckler. He had given warranty deeds in May, 1905, to his co-defendant, Willard, and procured Delameter and wife to deed property owned by Minckler to Willard. These were deeds of trust for plaintiff's benefits as security for a balance of grain sale transactions. Willard accepted said trust. Personal judgment is asked against Minckler,

with foreclosure of said deeds as mortgages. Minckler admits by answer that the deeds were given at a time when an accounting was due between plaintiff and himself for over 200 car loads of grain shipped plaintiff; that the deeds were to secure any balance due plaintiff on an accounting which has never been had; that his tenants were evicted and his rents since 1907 appropriated by plaintiff. He asks for an accounting and a reconveyance of the trust property to him. Summons was served in May, 1908. Plaintiff's attorneys then were Bangs, Cooley, & Hamilton; defendants' attorneys subscribing the answer were Buttz & Sinness. For nearly six years the action remained untried. Reasons for this delay are immaterial except to establish that it was inexcusable. Meanwhile attorney Buttz had become district judge and disqualified to act; Bangs, Cooley, & Hamilton had been succeeded by attorney Stuart as plaintiff's attorney in April, 1914. He immediately served a new notice of trial upon Attorney Sinness. Minckler was temporarily absent from the state. Under date of April 6, 1914, Sinness wrote Minckler in Idaho as follows: "Saturday R. A. Stuart handed me the inclosed. I presume that I do not represent you in this matter now, and am therefore sending you the papers that you may make arrangements for the trial of the case. I do not know anything about the matter at all, since nothing has been done about it since Mr. Buttz has been elected judge nor for a long time before that. Kindly acknowledge receipt." Minckler did not receive this letter until May 16th, on his return home. Meanwhile, and on April 15th, Sinness had signed a stipulation with Stuart, referring the case for trial before a referee, and pursuant to the stipulation Judge Buttz had signed the order of reference accordingly. A month later, and on May 15th, a trial was had before the referee with defendant defaulting. Plaintiff's proof was submitted and judgment ordered against Minckler for over $28,000, with foreclosure of the deeds as mortgages. Judgment was erroneously entered May 21, 1914, upon the findings and conclusions of the referee and without confirmation or an order for judgment by the court. In his affidavit Minckler states that he had a year previously discharged the firm of Buttz & Sinness and notified them thereof accordingly, but evidently Sinness was somewhat uncertain as to whether he was Minckler's attorney or not. No order of substitution was made or filed. Early in June, 1914, Minckler went to Sinness for

information as to what had been done, and immediately employed his present counsel. It seems that the records in the case could not be located for sometime during which they were in the office of the clerk of the district court of Benson county. The records of that office show the entry of a judgment against defendant on May 21, 1914. Before any steps were taken to be relieved from this judgment, plaintiff's attorney, Stuart, in its behalf on July 24, 1914, made an application upon notice for an order setting aside and vacating the judgment erroneously entered May 21, 1914, for an order confirming the report of the referee and for entry of judgment thereon. This motion was referred on July 25th to Judge Burr to be heard at Rugby, August 8, 1914. On August 5, 1914, upon affidavits reciting the irregularities in the proceedings upon which the first judgment was entered upon the referee's report, Minckler by his attorneys, Cowan & Adamson and H. S. Blood, noticed for hearing before the judge of the second judicial district at chambers in Devils Lake a motion to dismiss, for the reason that the plaintiff had not brought the case to trial or taken proceedings for the final determination thereof within five years from the time of the commencement of said action, and in the notice of motion requested its reference to another district judge for determination, the judge of the second district being disqualified. This motion was referred to the judge of the ninth judicial district, and came on for hearing August 8th at the same time as the pending motion for vacation of the judgment and confirmation of the referee's findings. Many affidavits and counter affidavits were served for said hearing by both parties. The two motions were heard together and ruled upon August 8, 1914. The former judgment of May 21st, entered upon the referee's findings, was vacated and the motion to dismiss was denied. Confirmation of the report of the referee was conditionally granted, providing that defendant have "ten days within which they could exercise their right and option given them by this court for a rehearing of said action, either before the same referee or another referee, or before the district court of Benson county at the next term thereof, to put in their defense and evidence in support thereof; said option to be exercised within ten days by giving written notice thereof to R. A. Stuart; and, failing to exercise the said option, the said motion to be granted and the report of said referee to be in all things confirmed and judgment ordered entered thereon." Defendant refused

to exercise or avail of this option, and on August 20, 1914, on proof of such refusal, the court by an order reciting the record confirmed the findings of the referee and ordered judgment in conformity therewith, which was duly entered August 22, 1914. Soon after, defendant perfected two separate appeals,—one from the final judgment entered and the other from the order of August 8, 1914, denying his motion for dismissal.

No appeal will lie from the order denying the motion to dismiss. Persons v. Simons, 1 N. D. 243, 46 N. W. 969; Re Eaton, 7 N. D. 269–273, 74 N. W. 870. See notes to Olson v. Mattison, 16 N. D. 231–233, and Strecker v. Railson, 19 N. D. 677. But though the order to dismiss is nonappealable, it is nevertheless reviewable on an appeal from the judgment, as was done in Donovan v. Jordan, 25 N. D. 617, 142 N. W. 42. Of course, had the judgment entered been for dismissal for nonprosecution, it would have been reviewable on appeal; Lambert v. Brown, 22 N. D. 107, 132 N. W. 781. The last two cases cited bear upon the construction of § 7598, Comp. Laws 1913, upon which defendant bases its claimed right of dismissal.

Both of the briefs in this case fail to touch the real issue upon which this decision must turn. Appellant's brief is devoted to an analysis of the affidavits in the record to show that the long delay ensuing between the commencement of the action in 1908 and the resumption of proceedings in April, 1914, was wholly inexcusable and insufficient upon which to base any discretion, and relieve plaintiff from the penalty of a dismissal for nonprosecution. Defendant proceeds upon the theory that at the end of five years from its commencement, if the case was not finally determined, it was, as termed in the brief, dead, and he was entitled to its dismissal as a matter of right. Respondent's brief is largely devoted to an attempt to justify the delay because of involuntary bankruptcy proceedings brought against Minckler, and other matters shown by voluminous correspondence. It is possible that respondent has succeeded in excusing nontrial of the case for the period between its commencement and 1911. But the excuse must cover the entire period to avail. The statute cannot be tolled until 1911, and the five years be reckoned from that time. To do so would be to do violence to the terms of the statute itself. The inexcusable delay of three years from 1911 to 1914 of the five-year period would have warranted a dis-

missal as for nonprosecution under the statute, had the defendant moved dismissal prior to May, 1914. But this statute is analogous to the ordinary statute of limitations, and is a statute in repose, which, to avail, must be invoked. The case had been partially tried by a referee. Whether regularly referred is immaterial, as the referee's findings were confirmed subsequently. Before the motion for dismissal was noticed, a motion to confirm the findings and to enter judgment thereon had been made and was pending. It was the granting of this motion that placed the cause in final judgment. The plaintiff, therefore, had taken "proceedings for the final determination thereof," and defendant's day of grace under the statute had gone by. When the motion to dismiss was presented, in the face of the pending motion for final judgment the court could not have found the case to have been one then subject to dismissal under § 7598. It must have found before dismissing that proceedings had not been taken for the final determination of the cause, as well as found that the cause was not in judgment. And upon the hearing the court was confronted with the fact that findings had been made and the case ripe for its confirmation and entry of judgment thereon, under which conditions it was compelled to deny dismissal. The court ruled upon the condition then and there prevailing, and the motion was well taken or not according to the conditions to which it was subject when taken and presented. It is unnecessary to determine what disposal should have been made of a similar motion, had the court set aside the findings, and defendant, subsequently and before the trial of the case on merits, had interposed a motion to dismiss on these grounds and during the time when the case was not in judgment, and when no proceedings were in progress looking to the immediate final determination thereof. But on the facts presented the court could do aught but deny the motion to dismiss. This court is not concerned about the subsequent entry of this judgment by default pursuant to conditions under which the temporary vacation of judgment was allowed. No assignments of error challenge such proceedings subsequently taken, all assignments going only to the motion to dismiss, under the contention that the court should substitute relief of dismissal upon the motion for the final judgment entered in plaintiff's favor. The judgment appealed from is affirmed.

STATE OF NORTH DAKOTA v. GEORGE F. HART.

(152 N. W. 672.)

Criminal action — defendant — preliminary examination — no such constitutional right — merely statutory.

1. A defendant in a criminal action has no constitutional right to a preliminary examination, but this right is only statutory.

Complaint — magistrate — preliminary hearing — degree of certainty — information — indictment.

2. A complaint made before a magistrate for the purpose of a preliminary examination only does not require the same certainty in the statement of the offense as an information, indictment, or complaint upon which the accused is tried.

Complaint — time and place — description of offense — general terms — sufficient if fairly informs defendant of charge.

3. Such complaint is sufficient, as a basis of examination, where, after stating the time and place, it names or describes an offense in general terms, and sets out such facts of the offense as will fairly apprise a person of average intelligence of the nature and cause of the accusation against him.

Information — entering plea of not guilty — waives defects — extent of waiver.

4. By entering a plea of not guilty to an information, the accused waives all defects and irregularities which may be objected to by motion to quash or set aside the information.

Opinion filed April 29, 1915.

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

George F. Hart was convicted of the crime of adultery, and appeals. Affirmed.

Palda, Aaker & Greene, for appellant.

Failure to demur to an information does not waive defendant's right to object to the jurisdiction of the court. Comp. Laws 1913, § 10745.

R. A. Nestos, State's Attorney, and *O. B. Herigstad,* Assistant State's Attorney, for respondent.

An information or indictment may be set aside on timely and proper motion, before plea. Comp. Laws 1913, § 10728.

If the motion is not made before demurrer or plea, the objections are

waived. Comp. Laws 1913, § 10728; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; State ex rel. Poul v. McLain, 13 N. D. 368, 102 N. W. 407.

The proper method of raising the objections was by motion to set aside the information before entering plea. State v. Winbauer, 21 N. D. 161, 129 N. W. 97; State ex rel. Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541; State v. Rozum, 8 N. D. 549, 80 N. W. 477; State v. Wisnewski, 13 N. D. 619, 102 N. W. 883, 3 Ann. Cas. 907.

CHRISTIANSON, J. The defendant was convicted in the district court of Ward county of the crime of adultery. This appeal is taken from the judgment of conviction. The material facts are as follows: On the 25th day of June, 1913, a criminal complaint was filed before T. N. Engdahl, a justice of the peace in Ward county, subscribed and sworn to by one J. H. Griffin, charging "that during the last three years in said county, the above-named defendant at various times committed the crime of adultery by having illicit relations with Rosina C. Griffin, wife of J. H. Griffin." The words, "wife of J. H. Griffin," appear subsequently to have been struck out of the complaint. When this was done is not disclosed, and, in view of the conclusions we have reached in the case, is immaterial. Upon this complaint a warrant of arrest was issued by the justice, and the defendant arrested and brought before such justice of the peace for preliminary examination. The defendant appeared with his attorney, B. A. Dickinson, at such preliminary examination, and waived examination. The justice thereupon made an indorsement on the complaint as follows:

It appearing to me that the offense in the within complaint mentioned has been committed, and that there is sufficient cause to believe the within named George F. Hart guilty thereof, I order that he be held to answer the same.

(Signed) T. N. Engdahl,
Justice of the Peace, Examining Magistrate.

The defendant was admitted to bail in the sum of $1,000, which was furnished.

On the 21st day of July, 1913, the state's attorney of Ward county

filed an information against the defendant, which is concededly insufficient form and the charging part of which is as follows: "That heretofore, to wit, on the 24th day of June in the year of our Lord, one thousand nine hundred thirteen at the county of Ward, in said state of North Dakota, one George F. Hart, late of said county of Ward and state aforesaid, did commit the crime of adultery committed as follows, to wit: That at said time and place the said George F. Hart did wilfully, unlawfully, and feloniously have voluntary sexual intercourse with, and carnal knowledge of, Rosina C. Griffin, a married woman, then and there the wife of J. H. Griffin, and not the wife of the said George F. Hart, and that this prosecution was commenced by said J. H. Griffin, the husband of said Rosina C. Griffin. This contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of North Dakota." To this information the defendant entered a plea of not guilty, and subsequently on the 13th day of November, 1913, the case was brought on for trial, and a jury sworn and impaneled to try the same. After the jury had been so sworn and impaneled, and after the first witness for the state had been sworn, the defendant's attorney made the following objection to the first question asked of such witness: "We object to the question and to any further testimony in this action as incompetent, irrelevant, and immaterial, for the reason and on the ground that there was no sufficient complaint filed as the basis of this action; that there was no complaint filed by J. H. Griffin in which any crime whatever is charged; that there is no complaint signed by the said Griffin charging sexual intercourse between the defendant and Rosina Griffin; that there was no complaint filed in which any charge is made at any time within the statute of limitations." The objection was overruled; defendant excepted to the ruling, and predicates error thereon in this appeal.

At the close of the state's case, defendant submitted the following motion: "Comes now the defendant and moves that the action be dismissed, on the ground that there is a total failure of proof of any allegation of the information, and on the further ground that there was no complaint upon which to base the information as required by law, and that the defendant never had any preliminary hearing on a valid complaint, nor did he waive one; that there is no complaint charging adultery, or facts sufficient to constitute adultery, made by J. H. Griffin, the

alleged spouse of Rosina Griffin." This motion was renewed at the close of the entire testimony. Both motions were denied, and these rulings are, also, asserted to be erroneous. The case was submitted to the jury, a verdict of guilty returned, and sentence pronounced pursuant to the verdict. No motion, either in arrest of judgment or for a new trial, was made.

The only errors assigned on this appeal challenge the correctness of the rulings made by the trial court in sustaining the objection to the introduction of testimony, and the denial of the motions to dismiss. These errors are all based upon the alleged insufficiency of the criminal complaint filed in the justice court. It was established by the undisputed testimony upon the trial that J. H. Griffin, who verified the criminal complaint, was the husband of Rosina C. Griffin, and the sufficiency of the evidence to sustain the verdict is not questioned. And there is no claim made by the appellant that the prosecution was not instituted upon the complaint of the husband of the offender; and the attack upon the proceedings is not based upon this ground, but is directed solely to the alleged insufficiency of the description of the offense in the criminal complaint. Appellant's counsel claims that the district court was without jurisdiction to try the case; and while the objection to the introduction of testimony and motions to dismiss in the district court seem to have been based on the ground that the defendant had not had a preliminary examination, still it is not seriously contended by appellant's counsel in this court that this question could be raised in the manner attempted. But in this court, appellant's counsel assert that the criminal complaint filed before the justice of the peace was a nullity, and all subsequent proceedings had in the case were void under the provisions of § 18 of the Constitution of this state. The section in question reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized." This constitutional provision was designed for the protection of the person sought to be arrested, and he may waive its protection. State ex rel. Poul v. McLain, 13 N. D. 368, 371, 102 N. W. 407.

It is probably true, the criminal complaint did not contain all the

matters, or state the offense with the same certainty, which would be required in an information or indictment in order to charge the offense of adultery, but this is not required. As was said by this court in State ex rel. Peterson v. Barnes, 3 N. D. 131, 136, 54 N. W. 541: "We hold that a complaint, after stating time and place, which names or describes an offense in general terms, and which, in addition thereto, sets out such facts and circumstances of the offense as will fairly apprise a person of average intelligence of the nature and cause of the accusation against him, will be sufficient, as a basis of an examination, even in cases where other averments, not inserted in such complaint, would be essential to a valid information charging the same offense. Tested by this criterion, the complaint against the petitioner was sufficient as an accusation charging him with the same offense as that embodied in the information filed in the district court." See also State v. Wisnewski, 13 N. D. 649, 102 N. W. 883, 3 Ann. Cas. 907; State v. Reedy, 44 Kan. 190, 24 Pac. 66.

The criminal complaint distinctly charged the defendant with having committed the crime of adultery with one Rosa C. Griffin within Ward county, North Dakota, at various times during the three years preceding the date of the complaint. And it seems clear that the defendant, and any other person of average intelligence, would have no difficulty in knowing the nature of the offense with which he was charged, and this is all that is required.

The term "adultery" has no technical meaning in law, distinct from its significance in its ordinary and popular sense. It is defined by Webster's New International Dictionary: "Unfaithfulness of a married person to the marriage bed; voluntary sexual intercourse by a married person with another than her or his husband or wife." And by Funk & Wagnall's New Standard Dictionary: "The sexual intercourse of two persons either of whom is married to a third person." And by the Penal Code of this state: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife; and when the intercourse is between a married woman and a man that is unmarried the man is also guilty of adultery." Comp. Laws 1913, § 9579.

The defendant, as already stated, appeared at the preliminary examination with his council. No objection was made to the sufficiency

of the complaint, but the defendant waived examination, and was admitted to bail, and it is generally held that where a defendant waives examination he also waives any insufficiency which may exist in the complaint, or warrant of arrest issued thereon. Everson v. State, 4 Neb. (Unof.) 109, 93 N. W. 394; People v. Turner, 116 Mich. 390, 74 N. W. 519; Reinoehl v. State, 62 Neb. 619, 87 N. W. 355; State ex rel. Poul v. McLain, supra.

The defendant had no constitutional right to a preliminary examination. State v. Gottlieb, 21 N. D. 179, 129 N. W. 460; State v. Winbauer, 21 N. D. 161, 129 N. W. 97. But this right is granted by statute only, and, hence, it necessarily follows that it is dependent upon and limited by the statutory provisions relative thereto. Under the provisions of § 10728, Compiled Laws 1913, an information must be set aside by the court in which the defendant is arraigned for the following reasons: "(1) In all cases when the defendant is entitled to a preliminary examination before a magistrate, before the filing of such information, when he has not had such examination and been held to answer before the district court, or has not waived such examination in writing, or orally before a magistrate; (2) When the information is not subscribed by a person authorized to act as informant; (3) When an information is not verified."

The subsequent section (Comp. Laws 1913, § 10729) prescribes the method of asserting an objection to the information, based upon any of the grounds specified in § 10729, Compiled Laws, and reads as follows: "The motion to set aside the information or indictment must be in writing, subscribed by the defendant or his attorney, and must specify clearly the ground of objection to the information or indictment, *and said motion must be made before the defendant demurs or pleads, or the objection is waived.*"

We are entirely satisfied that a defendant in a criminal action cannot raise the question that he has been deprived of a preliminary examination, or attack the sufficiency of the proceedings had before the committing magistrate, after having entered a plea to the information on its merits. Reinoehl v. State, 62 Neb. 619, 87 N. W. 355; Re Cummings, 11 Okla. 286, 66 Pac. 332; State v. Eldred, 8 Kan. App. 625, 56 Pac. 153; Emery v. State, 101 Wis. 627, 78 N. W. 145; see, also, State ex rel. Poul v. McLain, 13 N. D. 368, 371, 102 N. W. 407.

The judgment of the District Court must be affirmed. It is so ordered.

JOHN O'LEARY v. F. W. SCHOENFELD, the Dayton-Clark Land Company, Emma Tipple, and Maria R. Tipple.

(152 N. W. 679.)

Mortgage sale — first-mortgage foreclosure — second-mortgage purchaser — redemption by third mortgagee — amount necessary to tender or pay.

1. Where a second mortgagee purchases at the sale under a foreclosure by the first mortgagee, a third mortgagee whose mortgage expressly states that it is given subject to such second mortgage must, in order to redeem from such purchaser, not only pay the amount of his purchase with 12 per cent interest, together with the amount of any assessments or taxes which such purchaser may have paid thereon after the purchase and interest at the same rate on such amount, but must also pay the amount of the second-mortgage lien with interest, and a tender to the sheriff of the mere amount of the purchase, with interest, which is not consented to or accepted by the second mortgagee, will not affect a redemption under § 7754, Compiled Laws of 1913, even though the second mortgage may not yet be due.

Redemptioners — purchasers — law relating to.

2. Section 7756, Compiled Laws of 1913, applies merely to redemptioners, and not to purchasers.

Adverse claims — action to determine — plaintiff's title — must recover upon.

3. In an action to determine adverse claims, the plaintiff must recover upon the strength of his own title, and the failure to show such title will be fatal to his action.

General denial — puts plaintiff's title in issue.

4. A general denial which is filed in an action to determine adverse claims in which the plaintiff alleges title in fee in himself puts in issue such title.

Mortgage — naming adjoining county in — erroneous — section — town — range — correctly stated — mortgage valid.

5. The erroneous insertion in a mortgage of the name of an adjoining county will not invalidate the instrument where the section, township, range, and state in which the land is located are correctly stated.

Courts — judicial notice — location of land — will take of — where section, town and range are stated correctly — wrong county.

6. The courts will take judicial notice of the location of land which is de-

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Note.—As to description of property in mortgage, see note in 137 Am. St. Rep. 252.

As to judicial notice of boundaries and localities, see note in 82 Am. St. Rep. 439.

scribed in an instrument, and in so far as the county is concerned, provided the section, township, range, and state are correctly stated therein, even though the wrong county is mistakenly inserted.

Depositions — taking — presumption of regularity — motion to suppress — absence of prejudice — denied.

7. There is a presumption in favor of the regularity of taking depositions and of the proper performance of duty by the officer taking them, and a motion to suppress a deposition should generally be denied where no prejudice is shown which arises from the defect complained of.

"Transmit" — relating to depositions — clerk of court — law — satisfied by any means chosen by officer.

8. The word "transmit" as used in § 7900 of the Compiled Laws of 1913, and in relation to the transmission of depositions by the officer taking them to the clerk of the district court of the county in which the action is pending, does not mean the personal carrying by the officer, nor necessarily the sending through the mails, but is satisfied by any means selected by such officer which will secure the safe transfer of the document without its being tampered with by anyone.

Discretion of court — abuse of — motion to suppress — denial of — deposition carried to clerk — by attorney — seal unbroken — fraud — mutilation — no evidence of.

9. A court does not abuse its discretion which refuses to suppress a deposition for the mere reason that it was carried to the clerk of such court by one of the attorneys interested in the case, and where the evidence shows that such deposition was addressed and sealed and promptly delivered and that when delivered to such clerk such seal was unbroken, and where there is no evidence whatever or attempt to show that said deposition has been changed or mutilated in any manner.

Opinion filed April 29, 1915.

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

Action to determine adverse claims to real property. Judgment of dismissal. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action to quiet title to a half section of land in Mercer county, North Dakota. A judgment was entered dismissing the complaint, and a trial *de novo* is requested. The original owner of the half section appears to have been one J. H. Babcock. On the 15th day of

August, 1907, Babcock mortgaged the land to A. D. Clark & Company to secure the payment of a debt of $1,280. This mortgage was recorded on the 21st day of February, 1908. On the 22d day of August, 1907, the said Babcock conveyed the land to the Dayton-Clark Land Company, a corporation, and this deed was also recorded on the 21st day of February, 1908. On the 26th day of April, 1909, the Dayton-Clark Land Company deeded the land to one Richard Champion, who assumed and agreed to pay the A. D. Clark & Company mortgage before mentioned. This deed was recorded on the 9th day of March, 1910. On the same day the said Champion mortgaged the land to the said Dayton-Clark Land Company to secure the payment of two notes of $800 and $144 respectively, due April 26, 1911, and also to secure the payment of two notes for $800 and $96 respectively, due April 26, 1912, which mortgage was recorded on the 6th day of April, 1910. On the 3d day of March, 1910, the said Richard Champion again mortgaged the land to the Empire Land Company to secure the payment of the sum of $354, which mortgage was recorded on the 25th day of April, 1910, and recited the mortgage before given by J. H. Babcock to A. D. Clark & Company for $640 and the mortgage from the said Richard Champion to the Dayton-Clark Land Company for $1,600. On the 14th day of October, 1910, the said Richard Champion deeded the land free of all encumbrances to one Edith Smith, and this deed was recorded on October 17, 1910. Later the original mortgage which was given on the 15th day of August by the original owner, J. H. Babcock, to A. D. Clark & Company, was foreclosed by advertisement, and the land sold on January 4, 1911, to the Dayton-Clark Land Company for the sum of $772.35, and a certificate issued to the said Dayton-Clark Land Company, which was recorded on the 9th day of January, 1911. Later and on the 21st day of February, 1911, Edith Smith, the purchaser from Richard Champion, the purchaser from the Dayton-Clark Land Company, the purchaser from J. H. Babcock, deeded the land to the defendant, F. S. Schoenfeld, "subject to mortgages of $2,600," although there was no express assumption thereof, and this deed was recorded on the 18th day of April, 1911. Later still, and on the 12th day of April, 1911, the said Schoenfeld and wife deeded the northeast quarter of said section to the defendant Emma Tipple, and the southeast quarter to the defendant Maria R. Tipple, which deeds were recorded on the 18th

day of April, 1911, and both of which deeds were subject to "a certain mortgage of $1,300," which the grantee assumed and agreed to pay. Prior to these conveyances to Edith Smith and to F. W. Schoenfeld, namely, on March 26, 1910, the Empire Land Company assigned to the Moody County Bank the mortgage given by the said Richard Champion to the said Empire Land Company on the 3d day of March, 1910, which assignment was recorded on April 25, 1910. Later and on the 4th day of January, 1912, the Moody County Bank, as assignee of such mortgage, paid to the sheriff of Mercer county the sum of $889.73, being the amount for which said land was sold under the foreclosure of the mortgage made by J. H. Babcock to A. D. Clark & Company, with interest thereon, and the fees of said sheriff for executing the certificate of redemption, said payment being made for the purpose of redeeming from the foreclosure sale to the Dayton-Clark Land Company, which was on that date the holder of the sheriff's certificate under the foreclosure and also owner and holder of the mortgage for $1,600 given by said Richard Champion to the said Dayton-Clark Land Company, no part of which had been paid, and which mortgage was prior in execution and record to the mortgage held by the said Moody County Bank, as assignee of the Empire Land Company, and under which the Moody County Bank sought to redeem, having been made prior to the said mortgage to the Empire Land Company, and said last mortgage being also by its express terms subject thereto. No other offer was made to pay the amount of said mortgage of $1,600, nor tender made either to the sheriff or to the owner of such mortgage, nor was the amount which was paid ever paid by the sheriff to the Dayton-Clark Land Company. It is shown, however, that such mortgage of $1,600 was not entirely due at the time of the attempted redemption by the Moody County Bank, but one note thereof of $800 was due and payable on April 26, 1912.

The sheriff, however, executed and delivered a certificate of redemption to the Moody County Bank, reciting the payment of the said sum of $889.73, and this certificate was recorded on January 4, 1912. The money received, however, seems never to have been paid by the sheriff to the Dayton-Clark Land Company, nor to have been tendered to them, and is still in the possession of the sheriff. Later and on the 15th day of February, 1912, the Dayton-Clark Land Company, without any

actual notice of said payment by the Moody County Bank, assigned to the defendant F. W. Schoenfeld, for a valuable consideration, the sheriff's certificate of sale, executed by the sheriff on the 4th day of January, 1911, and on the foreclosure sale of said land to the Dayton-Clark Land Company of the mortgage from J. H. Babcock to A. D. Clark & Company, together with a written assignment of the mortgage on said land given by said Richard Champion to the Dayton-Clark Land Company on the 26th day of April, 1909. Later and on the 14th day of February, 1912, the said sheriff executed and delivered to the said defendant F. W. Schoenfeld, a sheriff's deed to said land based on the certificate of sale issued to the Dayton-Clark Land Company, and by it assigned to the defendant F. W. Schoenfeld. This was recorded on the 20th day of February, 1912. Later and on the 27th day of May, 1912, the sheriff executed and delivered another deed to the said Moody County Bank, based on its payment to said sheriff of the $889.73 aforesaid, as a redemptioner, and on the 23d day of September, 1912, the Moody County Bank deeded the said land to the plaintiff, John O'Leary, who brought this action to quiet title, and who appears to have paid the taxes for the year 1911. The trial judge rendered a judgment decreeing that the plaintiff had no estate or interest in, nor lien nor encumbrance in, said land, and dismissing the plaintiff's action. From this judgment an appeal is taken, and a trial *de novo* is asked.

Rice & Benson and *C. B. Craven,* for appellant.

In an action to quiet title, where plaintiff has proved in himself a good record title, it is incompetent for defendant to prove title in a third person, and thereby attempt to defeat plaintiff's title, where the evidence is silent as to possession. Gibson v. McGurrin, 37 Utah, 158, 106 Pac. 669.

A defendant cannot maintain a defense against a prima facie good title, without showing in himself some interest in the subject-matter of the action. To hold otherwise would not only be absurd, but dangerous, and contrary to all well-considered authorities. Inman v. White, 21 Colo. App. 427, 122 Pac. 65.

Appellant, by his grantor, redeemed and has proved in himself a good record title, and as against one who has not in any manner shown himself interested in the title, or in the land, this is sufficient. He need not

prove in himself an indefeasible title. Webster v. Kautz, 22 Colo. App. 111, 123 Pac. 139; Empire Ranch & Cattle Co. v. Bender, 49 Colo. 522, 113 Pac. 494.

Neither the existence of a relation of trust between the parties, nor title in a third person, is a good defense. If defendant has no title, he cannot question that of plaintiff. Los Angeles County v. Winans, 13 Cal. App. 257, 109 Pac. 650; Empire Ranch & Cattle Co. v. Bender, 49 Colo. 522, 113 Pac. 494; Cramer v. McCann, 83 Kan. 719, 37 L.R.A.(N.S.) 108, 112 Pac. 832.

Defendant being without any title to the land, which is not in the possession of anyone, is not in position to question plaintiff's title. Horner v. Jarrett, 99 Ark. 154, 137 S. W. 820; Maynor v. Tyler Land & Timber Co. 236 Mo. 722, 139 S. W. 393.

By defendant's general denial, he denied plaintiff's claim of title, or that he was the owner in fee simple; but defendant also denied that he himself had any claim, title, or interest in the land hostile to plaintiff. Therefore, defendant cannot be injured by a judgment in plaintiff's favor. Gilchrist v. Bryant, 213 Mo. 442, 111 S. W. 1128; Larson v. Christianson, 14 N. D. 476, 106 N. W. 51; Brown v. Comonow, 17 N. D. 84, 114 N. W. 728; Donohue v. Ladd, 31 Minn. 244, 17 N. W. 381.

Defendant can neither question the redemption proceedings, because he has no interest in the land. The sheriff is not the agent of the holder of the sheriff's certificate to the extent that he can waive irregularities in the redemption proceedings, but he is his agent to the extent that such holder is bound by his acts unless expressly disaffirmed. 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.

A redemptioner who permits the statutory time of redemption to elapse without any effort to redeem is barred from challenging the regularity of a former redemption. McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281; MacGregor v. Pierce, 17 S. D. 58, 95 N. W. 281.

Depositions not sealed up and indorsed with the title of the cause and the name of the officer taking them, and transmitted to the clerk of the proper court, but carried to such clerk by the attorney in the case, in the form of typewritten sheets, must be suppressed on motion. Rev. Codes 1905, § 7282, Comp. Laws 1913, § 7900; North Dakota Horse & Cattle Co. v. Serumgard, supra.

No notice of subsequent lien was filed and served. Such must be done before such lien can be included in a redemption proceeding. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702.

A redemption from the purchaser at a sheriff's sale, and the issuance thereon of a certificate of redemption, is equivalent to an assignment of the certificate of sale. The converse of this rule is also true. Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256; White v. Costigan, 134 Cal. 33, 66 Pac. 78.

Respondents are now estopped to come in and attempt to avoid the effect of their own solemn contract and the agreement to pay these mortgages. Connor v. Howe, 35 Minn. 518, 29 N. W. 314; Yerkes v. Hadley, 5 Dak. 331, 2 L.R.A. 363, 40 N. W. 340.

One who is liable to pay an encumbrance on account of which a sale is made cannot build up an additional title on his own default. His purchase at such sale would only operate as a payment of the encumbrance. Maxfield v. Willey, 46 Mich. 252, 9 N. W. 271; Allison v. Armstrong, 28 Minn. 276, 41 Am. Rep. 281, 9 N. W. 806; Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; Smith v. Gaub, 19 N. D. 337, 123 N. W. 827; Franklin v. Wohler, 15 N. D. 613, 109 N. W. 56.

Where a proper redemption is made by the debtor or mortgagor, the effect of the sale is terminated, and he is restored to his estate. Work v. Braun, 19 S. D. 440, 103 N. W. 764.

Appellant, having paid in full the lien of the sheriff's certificate of sale, is entitled to be subrogated to the rights of the holder of the certificate. Rev. Codes 1905, § 6142; Comp. Laws 1913, § 6718; MacGregor v. Pierce, 17 S. D. 58, 95 N. W. 281.

A defense available to one person, or to one certain class of persons, is not available to others, indiscriminately. First Nat. Bank v. Messner, 25 N. D. 263, 141 N. W. 999.

C. F. Lamb, and *Oliver Leverson,* for respondent.

The judgment debtor or redemptioner may redeem the property sold within one year from sale on paying the purchaser the amount of his purchase with 12 per cent interest, and assessments and taxes paid after purchase, with such interest.

If the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the redemptioner must also pay such prior lien, and interest.

State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692; 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. 455; Leverson v. Olson, 25 N. D. 624, 142 N. W. 917; 25 Am. & Eng. Enc. Law, 2d ed. 8477; Boyle v. Dalton, 44 Cal. 332, and citations; Gilchrist v. Comfort, 34 N. Y. 235; 2 Freeman, Executions, 3d ed. § 320, note 161; Knight v. Fair, 9 Cal. 117; Rosekrans v. Hughson, 1 Cow. 428; Case v. Fry, 91 Iowa, 132, 59 N. W. 333; People ex rel. Rice v. Ransom, 2 Hill, 51; Vandyke v. Herman, 3 Cal. 295; Jones v. Langhorne, 3 Bibb, 453; People ex rel. Austin v. Fralick, 12 Mich. 234; Grigg v. Banks, 59 Ala. 311.

In an action to determine adverse claims, the plaintiff must recover upon the strength of his own title, and a failure to show ownership will be fatal to plaintiff's action. In such an action a general denial puts in issue plaintiff's title. Larson v. Christianson, 14 N. D. 476, 106 N. W. 51; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503; Conrad v. Adler, 13 N. D. 199, 100 N. W. 722; Dever v. Cornwell, 10 N. D. 123, 86 N. W. 227; Youker v. Hobart, 17 N. D. 296, 115 N. W. 839; Young v. Engdahl, 18 N. D. 166, 119 N. W. 169; Morse v. Pickler, 28 S. D. 612, 134 N. W. 809.

It is only after plaintiff has shown a right in himself that defendant's title becomes material. State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692; McGinnis v. Wheeler, 26 Wis. 655.

The courts of this state take judicial notice of the location of lands, where the section, town, and range are given, and the mere misnomer of the county will not nullify the instrument. Civil Code, Subdivs. 15, 30, 49, § 7319.

BRUCE, J. (after stating the facts as above). The main question which is presented to us for determination is this: A. D. Clark & Company, holder of a $640 first mortgage, foreclosed, and the Dayton-Clark Land Company, holder of a second mortgage for $1,600, purchased at the sale for $732.35. Later the plaintiff's grantor, the Moody County Bank and the holder of a third mortgage, which by its terms was subject to the first and second mortgages before mentioned, attempted to redeem from the Dayton-Clark Land Company, without

paying or offering to pay in addition to the sum called for by the sale and amounting to $889.73, the sum of $1,600 and interest, the amount of the Dayton-Clark Land Company second mortgage. It is admitted that part at least of this $1,600 mortgage was not at the time due. It is also admitted, however, that no tender of any amount of said mortgage was either made to the sheriff or to the Dayton-Clark Land Company. Was such redemption effectual as against the holder of a sheriff's deed, which was afterward issued to the said Dayton-Clark Land Company, and as against the subsequent grantees of said company, a sheriff's deed having been first issued to the Dayton-Clark Land Company and later another sheriff's deed to the Moody County Bank? We think it was not. The statute indeed seems to be very clear upon the subject, and as the Dayton-Clark Land Company was a purchaser at a sheriff's sale, and not a redemptioner under a lien, the case is in no way limited by the decisions of this court in cases where the rights of redemptioners have been considered. Section 7140, Rev. Codes 1905, being § 7754, Comp. Laws 1913, provides: "The judgment debtor or redemptioner may redeem the property from the purchaser within one year after the sale, on paying the purchaser the amount of his purchase, with 12 per cent interest thereon, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase and interest at the same rate on such amount; and if the purchaser is also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest."

We find nowhere in the statute which relates to the rights of a redemptioner as against a *purchaser* any provision which requires the purchaser, who as a creditor has other liens at the time of his purchase, to file any notice of such liens such as is required by § 7756, Comp. Laws 1913, where the person sought to be redeemed from is a redemptioner, but not a purchaser.

The Moody County Bank also must be presumed to have had notice of the lien of the second mortgage, which was held by the Dayton-Clark Land Company, as the third mortgage, under which it sought to redeem, was expressly given subject thereto, and the second mortgage was also of record.

The purpose of the statute seems to be clear. "The legislative pur-

pose, no doubt, was to obviate the necessity of requiring the person from whom the redemption is made, in order to protect his liens, which are subsequent to the one under which the sale was made, but prior to that of the redemptioner, to go through the useless ceremony of redeeming back from the person who had just redeemed from him." Leverson v. Olsen, 25 N. D. 624, 142 N. W. 917.

It is quite clear that the only right that the Moody County Bank had to redeem was a statutory right. See State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692; 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. 455, 456. The conclusion is inevitable that when appellant's grantor, the Moody County Bank, paid only the amount of the face of the certificate of sale and interest and fees, and omitted to pay or tender the amount due on the $1,600 mortgage held by the Dayton-Clark Land Company, it failed to make an effective redemption, and consequently its certificate of redemption and sheriff's deed based thereon are null and void. 3 Freeman, Executions, 3d ed. § 320; Vandyke v. Herman, 3 Cal. 295; Knight v. Fair, 9 Cal. 117.

But it is claimed that the judgment of a dismissal was erroneous because the defendants have failed to show title in themselves, and the question is asked: "Where, in an action to quite title, plaintiff has proved in himself a good record title, carrying with it the presumption of actual possession, is it competent for a defendant, without showing the slightest interest in himself in the premises in controversy, to prove title in a third person in which he is in no manner in privity, and thereby attempt to defeat plaintiff's title?" We fail, however, to see that the defendants have failed to show any interest or title in themselves, or that the answer fails to allege the same, and refer merely to the statement of facts and to the chain of title therein set forth as being conclusive on this proposition. The action, too, is one to determine adverse claims in which the plaintiff positively asserts title in fee simple in himself, and the answer includes a general as well as a specific denial to the allegations of the complaint. It is elementary that, in an action to determine adverse claims, the plaintiff must recover upon the strength of his own title, and that the failure to show such title will be fatal to his action. It is also clear that a general denial in such an action puts plaintiff's title in issue. See Larson v. Christian

son, 14 N. D. 476, 106 N. W. 51; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85, 87.

"The difficulty with the plaintiff's case," says the supreme court of Wisconsin, in McGinnis v. Wheeler, 26 Wis. 651, 655, "is, that the defendant has the first chance to apply that rule, having proved to the satisfaction of the court below, and of this court, that the plaintiff had no title, and the burden being on her to show title in order to maintain the action, she becomes the first victim of the rule that one without a title" has no right to possession.

The question, indeed, is not raised by the record. Defendants are not here seeking to defeat plaintiff's title by proof of such title in a third person. They are merely seeking to show that the plaintiff never at any time had any title in the land at all. They seek to show, and have shown, this by proving that plaintiff's title could only be based upon a redemption from the purchaser at a prior mortgage sale to the Dayton-Clark Land Company, and that no such redemption has ever been made or accepted by the said company.

We think there is no merit in the contention that there is no evidence in the record that the Dayton-Clark Land Company's second mortgage was not paid at the time of the attempted redemption by the plaintiff's grantor. The action is brought, and the relief is sought, not by the defendant, but by the plaintiff. The complaint asserts a title in fee simple. This is denied by the answer. The sheriff's deed to Schoenfeld, the grantor of the defendants Tipple, is prior to that issued to the plaintiff's grantor, the Moody County Bank. The record also shows that the mortgage to the Dayton-Clark Land Company was of record, and still is of record, and is mentioned and assumed in the subsequent conveyances. It is also specifically mentioned as an encumbrance in the plaintiff's exhibit "L," which is a mortgage from Richard Champion to the Empire Land Company, which mortgage is taken subject thereto. The mortgage is put in evidence, and it would seem that the burden of proving payment, if any there was, would be upon the plaintiff. There is, too, to be found in the record, a letter from the attorneys for the plaintiff to one of the defendants, which practically concedes the nonpayment of the lien.

Nor do we see any merit in the objection that the second mortgage to the Dayton-Clark Land Company "shows upon its face that the

land mortgaged was not in Mercer county, North Dakota, and in no manner affects the land in suit." The mortgage, in addition to stating the county, positively gives the section, township, and range. Subdivision 14 of § 7319, Rev. Codes 1905, being § 7938, Compiled Laws of 1913, provides that the courts of North Dakota shall take judicial notice "of the limits of the county and the fact that a place proved was within such limits." Subdivision 15 of the same section provides that such courts shall take judicial notice "of the lines of the counties." Subdivision 30 of the same section provides that the courts shall take judicial notice "of whatever ought to be generally known within the limits of the court's jurisdiction." Subdivision 49 of the same section provides for like judicial notice "of the government surveys and the legal subdivisions of public lands."

Under these rules the court must take judicial notice that section 11, township 144, range 85, is in Mercer county, and not in Oliver county, and hence the second mortgage was properly recorded in Mercer county. The recording of this mortgage was notice to the appellant, and to his grantor, and sufficient to put them on inquiry.

Objection is made to the introduction in evidence of the deposition of Charles Lamb, for the reason stated on the trial, "that said deposition was not sealed up and indorsed with the title of the cause and the name of the officer taking the same, and was not subscribed, authenticated, and transmitted as provided by the laws of this state," and to the introduction of the deposition of the witness Joseph W. Hobbins, for the reason that "the said deposition was not sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the court, as provided by § 7282, Rev. Codes 1905 (§ 7900, Comp. Laws 1913), and the Code of Civil Procedure of the state of North Dakota, that said deposition is not certified, indorsed, subscribed, and transmitted as provided by the laws of the state, and is not authenticated as provided by law." It is contended in appellant's brief that "these so-called depositions were not sealed up and indorsed with the title of the cause and the name of the officers taking the same, and were not by such officers addressed and transmitted to the clerk of the district court of Mercer county, North Dakota, in which court the said action was pending. They were at no time under seal, but on the contrary, Mr. Lamb, the attorney for re-

spondents, carried these typewritten sheets, called depositions, in his pocket, and handed them to the clerk," and reference is made to § 7282, Rev. Codes 1905, being § 7900 of the Compiled Laws of 1913, in which it is provided that "a deposition so taken shall be sealed up and indorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the clerk of the district court of the county in which the action or proceeding is pending, if the same is pending in the district court; otherwise to the court, officer, or tribunal in which the action or proceeding is pending. It shall remain under seal until opened by order of the court, officer, or tribunal, or at the request of a party to the action or proceeding, or his attorney." The trial court in a memorandum opinion made the following statement: "Before the trial, Rice & Benson, attorneys, appearing for plaintiff, filed written exceptions to the depositions of Joseph W. Hobbins and Charles F. Lamb, and filed written motion to suppress both of said depositions. The exceptions to said depositions were that they were not indorsed with the title of the cause by the notary before whom they were taken, and were not addressed to the clerk of the district court of Mercer county, North Dakota, and no indorsement of the filing of the same by the clerk of court appeared on the envelop containing same, and as to the deposition of said Charles F. Lamb, the further exception that he was present in person before the court. The clerk of court and said Charles F. Lamb testified orally as to the depositions, and it appears therefrom that the depositions, when taken pursuant to the notice attached and a stipulation by counsel for plaintiff, were placed in an envelop, sealed and delivered to the said Charles F. Lamb, who is attorney for the defendants Tipple, and were by him carried to and delivered to the clerk of court on the day before the trial, and had not been opened, altered, or interfered with in any way. The envelop containing the depositions contained no indorsement, by the notary taking the depositions, of the title of the case, or of the fact that it contained depositions in the case, and was not addressed to the clerk of court, and contained no indorsement of filing by the clerk of court. The court is fully satisfied that the depositions are the identical depositions that were taken on notice to counsel for plaintiff, and with their consent, and that they have not been tampered with in any way, and therefore denied the motion to suppress the depositions; but refused to allow the use of the deposition

of the said Charles F. Lamb, and he testified as a witness concerning the subject-matter contained in his deposition. The court is firmly of the opinion that the statute with reference to the sealing, indorsing, and transporting of depositions is only directory, and for the purpose of preserving the identity of the deposition, and to prevent fraud by altering the deposition. F. A. Patrick & Co. v. Nurnberg, 21 N. D. 377, 131 N. W. 254."

This finding of the trial court is abundantly sustained by the testimony of both the witness Lamb and by the clerk of the court, and the only criticism that can be offered is the fact that the depositions were carried to North Dakota by the attorney for the defendants, and not sent through the mail or by a special messenger.

We are of the opinion, also, that the trial court did not err in its ruling. There is a presumption in favor of the regularity of taking depositions and the proper performance of duty by the officer taking the same; and a motion to suppress a deposition should generally be denied where no prejudice is shown which arises from the defect complained of. F. A. Patrick & Co. v. Nurnberg, 21 N. D. 377, 131 N. W. 254. The word "transmit" does not mean the personal carrying by the notary, nor necessarily the sending through the mails, but is satisfied by any means selected by the notary which will secure the safe transfer of the document without its being tampered with by any one. Davies v. New Castle & L. R. Co. 71 Ohio St. 325, 73 N. E. 213, 216; 4 Words & Phrases, 2d Series, 985. The presumption of the performance of duty would lead to the presumption that the witness Lamb was the agent for the transmission of the document, who was appointed by the notary. The proof is positive that the seals were unbroken when received by the clerk, and there is no pretense that the depositions were in any way tampered with, or were in any way different from those taken by the notary public. This being the case, we think that no error was committed in allowing them to be introduced in evidence. Waterman v. Chicago & A. R. Co. 82 Wis. 613, 52 N. W. 247, 1136; Burrall v. Andrews, 16 Pick. 551; Spear v. Richardson, 37 N. H. 23; Veach v. Bailiff, 5 Harr. (Del.) 379. We may also add that the witness Lamb testified orally, and his deposition was therefore not used; while the deposition of the witness Hobbins was at the most cumulative, and the

material facts, which are sought to be established thereby, are abundantly proved by the remainder of the record.

The case is not dissimilar to one where a judge hands his findings of fact and conclusions of law and order for judgment to one of the attorneys in the case to be filed for him, and which is done every day, although the statute, if technically construed, makes it the judge's duty to file these documents himself. We are not required to believe that our long-honored profession has sunk so low that an attorney who is both an attorney and an officer of the court cannot be trusted with the duty of carrying a sealed package to the clerk of the court, even though he may happen to have some interest in its contents. There is, as we have before said, no pretense or claim of any change in or mutilation of the depositions, or that the seal was broken when presented to the clerk, nor is there any proof of any misconduct on the part of the messenger whatever. This court has expressly held "that the exception to a deposition which is made on strictly technical grounds should not be sustained in the absence of any showing of prejudice." We fail to see how the method of transmission which was adopted in any way prejudices the plaintiff in this case. Ueland v. Dealy, 11 N. D. 529, 89 N. W. 325.

The judgment of the District Court is affirmed.

THE FIRST NATIONAL BANK OF McCLUSKY, a Corporation, v. LOUIS MEYER.

(152 N. W. 657.)

Promissory note — signer of on face — accommodation maker — no personal consideration — primarily liable to payee as joint maker — knowledge of payee of nature of transaction — immaterial — part payment of note on suit against maker and garnishee — no defense — offset — amount received by payee.

One who signs a promissory note on the face thereof as an accommodation

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Note.—Generally as to the rights and liabilities of makers and indorsers of accommodation paper, see note in 31 Am. St. Rep. 745.

As to effect under negotiable instruments law, of extension of time to principal, to release one who, on the face of the instrument, is primarily liable, but who is in fact surety, see notes in 10 L.R.A.(N.S.) 129 and 26 L.R.A.(N.S.) 99.

maker, and who receives no personal consideration for the same, is primarily liable to the payee on such note as a joint maker under the provisions of § 6914 and § 7076, Compiled Laws of 1913, even though such payee knows at the time of the signing and delivery of the accommodation nature of the transaction. Such accommodation maker, when sued upon such note, cannot plead as a complete defense and a release, the fact that the payee may have theretofore sued his joint maker on such note and in such suit partially compromised with a garnishee defendant, but can only offset as against said note the amount which was actually received and collected by the said payee.

Opinion filed April 29, 1915.

Appeal from the District Court of Sheridan County, *Nuessle,* J.

Action to recover on a promissory note. Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

The complaint in this action alleges that the defendant "made, executed, and delivered to the plaintiff his joint and several note, together with one J. L. Filbey, both being primarily liable, said defendant signing as an accommodation maker and thereby promising to pay to the plaintiff or his order the sum of $100 on the 1st day of October, 1911, with interest at the rate of 12 per cent." It also alleged that the payment has not been made, and judgment is demanded. The answer denies every allegation not specifically admitted. It admits that "on or about the 10th day of August, 1911, the defendant, together with one J. L. Filbey, made, executed, and delivered to the plaintiff herein a certain promissory note dated August 10, 1911," etc. It further alleges that "the defendant signed said note as a surety for one J. L. Filbey, the principal maker thereof; that he never received any of the consideration for said note, which fact the plaintiff well knew and understood at the time of the execution of said note." It further alleges that after the note became due an action was started in justice court against the said J. L. Filbey alone and the Northern Pacific Railway Company as garnishee "upon two certain promissory notes; one of the said notes being for the sum of $50 and interest, and the other note for $100 and interest; the last-named note being the note herein described and the same identical note which is described in the complaint and made the basis

of this action." It further alleges that in this action judgment was entered against the said J. L. Filbey and the Northern Pacific Railway Company, garnishee, for the sum of $182.27, being the principal, interest, and costs. It further alleged that thereafter, but prior to the commencement of the present action and prior to the demanding payment on the said note of the present defendant, Louis Meyer, and without the knowledge or consent of the defendant in this action, "the plaintiff in this action made a complete and full settlement of said judgment entered in its favor against the Northern Pacific Railway Company, a corporation, in such garnishment action, and by the terms of said settlement entered in its favor against the Northern Pacific Railway Company, a corporation, in such garnishment action and by the terms of said settlement did accept from such Northern Pacific Railway Company the sum of $100 for a full and complete settlement of its entire claim against the said Northern Pacific Railway Company, and a full settlement of said judgment entered in said garnishment action."

The case was tried to the district court before a jury. Both parties, however, having made a motion for a directed verdict, the court made findings of fact to the effect that the defendant signed said note as an accommodation maker; that the prior action was brought as alleged in the complaint against the defendant Filbey and the Northern Pacific Railway Company, garnishee, and that in such action the claim against the garnishee was settled for the sum of $100. The district court, however, found as conclusions of law: "(1) That the defendant is liable, jointly and severally, on the above note; (2) that the $100 recovered from the railway company must be applied on the judgment against J. L. Filbey; (3) that the plaintiff, therefore, is entitled to a judgment as follows: First, interest on the note for $100 at 12 per cent from August 10, 1911, to August 1, 1912, and in addition thereto, the sum of $82.27 and interest at 12 per cent thereon from August 1, 1912, to date of this judgment, besides the costs and disbursements of this action." The trial court, in short, held that the balance of the amount which was actually collected from the railway company in the garnishee proceedings, after paying the prior note of $50 which was executed by Filbey alone, and the costs of the proceedings, was all that was required to be credited on the note of $100, which is now sued upon, and that the compromise of the garnishee judgment in the prior proceeding did not

effect a release of the present defendant. From this judgment the defendant, Louis Meyer, appeals.

Frank I. Temple, for appellant.

An accommodation maker on a promissory note is, in fact, a surety and entitled to all the rights of such. Rev. Codes 1905, §§ 6099, 6105, 6110, 6111, 6331, Comp. Laws 1913, §§ 6675, 6681, 6686, 6687, 6914; Bailey Loan Co. v. Seward, 9 S. D. 326, 69 N. W. 60; Smith v. Willing, 123 Wis. 377, 68 L.R.A. 945, 101 N. W. 692; Nelson v. Munch, 28 Minn. 314, 9 N. W. 863; Price County Bank v. McKenzie, 91 Wis. 658, 65 N. W. 507.

The release of an attachment against a principal maker releases the surety. First Nat. Bank v. Watt, 7 Idaho, 510, 64 Pac. 223; Gotzian v. Heine, 87 Minn. 429, 92 N. W. 398; Magney v. Roberts, 129 Iowa, 218, 105 N. W. 430.

Where the payee satisfies a mortgage securing a note so signed, he releases the surety, and the debt to that extent was satisfied. King v. Parks, 26 Tex. Civ. App. 95, 63 S. W. 900; Pierce v. Atwood, 64 Neb. 92, 89 N. W. 669.

A creditor who, without the consent of the surety, voluntarily parts with the security, thereby releases the surety to the extent he has been thereby damaged. Stewart v. American Exch. Nat. Bank, 54 Neb. 461, 74 N. W. 865; 16 Decen. Dig. art. 115 p. 115.

Where a creditor sues the debtor and acquires a lien, under attachment on property, and releases such lien voluntarily, he releases those bound for the debt as sureties. First Nat. Bank v. Watt, 7 Idaho, 510, 64 Pac. 223; Brandt, Suretyship, 494; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 47 L.R.A. 131, 77 Am. St. Rep. 539, 80 N. W. 345.

Peter A. Winter, for respondent.

One who signs a note as principal cannot set up an independent collateral agreement limiting or exempting him from liability; he is bound by the terms of his obligation. Anderson v. Mitchell, 51 Wash. 265, 98 Pac. 751.

Courts should aim to follow the negotiable instruments act as far as possible, to the end that the decisions may be uniform in the country.

Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000.

All defenses not made to appear in the answer are considered waived. 31 Cyc. 128; Ex parte Bergman, 18 Nev. 331, 4 Pac. 209; St. Louis, I. M. & S. R. Co. v. Wiggam, 98 Ark. 259, 135 S. W. 889; Early County v. Fiedler & A. Co. 4 Ga. App. 268, 63 S. E. 353; W. W. Brown Constr. Co. v. MacArthur Bros. Co. 236 Mo. 41, 139 S. W. 104; State v. Clatsop County, 63 Or. 377, 125 Pac. 271; Western U. Teleg. Co. v. Harris, 105 Tex. 320, 148 S. W. 284; Swett v. Antelope County Farmers' Mut. Ins. Co. 91 Neb. 561, 136 N. W. 347.

When a special plea is made, it should be certain. 31 Cyc. 215, 216; Ward v. Brady, 63 Misc. 435, 116 N. Y. Supp. 456.

BRUCE, J. (after stating the facts as above). No exception seems to have been taken to the findings of fact of the learned trial court. They, at any rate, are borne out by the evidence. The only question for determination in this case, therefore, is whether one who signs a note upon its face as an accommodation maker, and who receives no personal consideration for the same, is primarily liable on such note as a joint maker, where at the time of such making the payee knew of the accommodation nature of his signing, and whether, when sued upon such note, such accommodation maker may plead as a defense and release that such payee had before brought suit against the defendant's comaker, and in such suit had obtained judgment against a garnishee defendant for an amount sufficient to satisfy the note, and had compromised such judgment against said garnishee defendant for a sum merely sufficient to pay another note sued upon at the same time and against the same original maker and a small amount upon the note upon which such Filbey and the present defendant were comakers, or whether all that he could expect in the present action would be that the amount that was left after such settlement, and after paying the note executed by the original maker alone and the costs of the action were paid, should be credited on the present note.

We are quite satisfied that all that the present defendant is entitled to is a credit for the money which the plaintiff actually received for credit and which he credited on the present note. This the trial court allowed, and, in our opinion, the judgment should be affirmed. When

the plaintiff sued the defendant Filbey and made the Northern Pacific Railway Company a garnishee defendant, he sued on a personal note executed by Filbey alone for $50 and on the joint note now in controversy. The present defendant was not a party to this suit, and the plaintiff had the right to make any application of the judgment and settlement that he saw fit. The personal note at any rate was prior to the joint note.

We are satisfied that the settlement with the garnishee defendant for a less amount than the judgment obtained against it did not release the present defendant. There would unquestionably be some doubt upon this proposition if we were dealing with the common law or with the law merchant. We are dealing, however, with the so-called negotiable instruments act which has been adopted in North Dakota. That act in § 6331, Rev. Codes 1905, being § 6914, Compiled Laws of 1913, provides: "An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. *Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.*" Section 6365, Rev. Codes 1905, being § 6948, Compiled Laws of 1913, provides: "A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 6421, Rev. Codes 1905, being § 7004, Compiled Laws of 1913, reads as follows: "A negotiable instrument is discharged; (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated where the instrument is made or accepted for accommodation; (3) by the intentional cancelation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right." Section 6422, Rev. Codes 1905, being § 7005, Compiled Laws of 1913, reads as follows: "A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancelation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment

made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." Section 6494, Rev. Codes 1905, being § 7076, Compiled Laws of 1913, reads as follows: *"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same.* All other parties are 'secondarily' liable."

In passing upon a similar case, the supreme court of Ohio, in the case of Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A. (N.S.) 99, 90 N. E. 1000, said: "The ultimate question, therefore, is: Where parties execute a joint and several promissory note all signing on the face thereof, one being in fact a surety, and the holder of the note, with knowledge of this fact, at the maturity of the note, extends the time of payment for a valuable consideration, and without the consent of the surety, is the latter discharged from liability on the note? . . . It is to be understood that here, and elsewhere in the opinion, we are dealing with the liability of an accommodation maker, who has signed on the face of the note. By the act under review, the discharge of negotiable instruments as to persons primarily liable is provided in § 3175j as follows: 'Discharge of Negotiable Instruments. Section 3175j. [Instrument; how discharged.] A negotiable instrument is discharged: (1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancelation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right.' The section following makes provision for discharge with respect to persons secondarily liable, *viz.:* 'Section 3175k. [When person secondarily liable on, discharged.] A person secondarily liable on the instrument is discharged: (1) By any act which discharges the instrument; (2) by the intentional cancelation of his signature by the holder; (3) by the discharge of a prior party; (4)

by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, or unless the right of recourse against such party is expressly reserved.' The entire field of discharge appears to be here covered, and, unless some controlling reason can be adduced showing that this statute doesn't apply, its application to and control of the case at bar would seem to follow. It is, however, insisted by counsel for plaintiff in error that, since there is in the later act no express repeal of earlier legislation bearing on the rights and liabilities of sureties on negotiable instruments, and since repeals by implication are not favored, we must conclude that the former legislation is still in force, and inasmuch as there is apparent conflict between the negotiable instruments act as construed by the courts below, and the earlier legislation, it must be presumed that the construction thus given the act is not the correct construction; and that the purpose ascribed by those courts to the general assembly in passing the act was not its real purpose. The sections of the Revised Statutes to which special attention is called by counsel are numbers 5419, 5832, and 5836, though general reference is made to other sections of the same chapter. Without taking space to give the above-mentioned sections in detail, their substance may be stated thus: Section 5419 provides how judgment against principal and surety may be entered, and for execution in such cases; Section 5832 provides that sureties on bank paper who were known to be such at the time the contract was made may prove that fact, notwithstanding it may contradict the face of the instrument; and § 5836, that a surety in a judgment who has paid it may be subrogated to the rights of the judgment creditor, and may revive the judgment if it has become dormant. We fail to perceive any necessary conflict between these sections and the negotiable instruments act in the particulars here involved, and in this respect we are in accord with the claims of counsel; but does it follow that the conclusion of counsel is correct? It is not contended that either of these sections, or any part of chapter 12, title 1, division 7, provides for the discharge of a surety, where a valid agreement for extension of time of payment has been made as between the holder and the principal debtor;

that rule resting entirely upon the principles of the common law. Recurring again to the above cited sections, it will be noted that §§ 5419 and 5836 are mainly for the protection and advantage of the surety as between him and the principal debtor, and affect the rights or liabilities of the surety as between him and the holder only incidentally. Section 5419 provides for a situation which may arise when judgment is taken as to the form thereof, and thereafter as to its enforcement, and § 5836 confers rights upon a surety after judgment; neither section providing for a situation arising, save as above indicated, before judgment, neither giving any discharge from liability on the instrument, and preventing judgment. The present act, § 3175j, as we have already found, provides only for the discharge of a party by a discharge of the instrument itself. Section 5832 is an ancient statute intended for the protection of sureties in contracts for the payment of money to banks and bankers, but only to the extent of having such relation defined and established, and securing to such parties the privilege of sureties, notwithstanding any contrary expression in the contract itself; that is, the terms of the written instrument can, by virtue of this section, be contradicted by oral proof, and such parties are given 'all the privileges of sureties,' but there is no attempt to define what those privileges are. In neither of these sections is there any attempt to discharge the surety from the debt itself. So, we find that each section subserves its own separate and distinct purpose, and neither appears to us, to be in any manner or to any extent inconsistent with later legislation. . . . As conclusions, therefore, our holding is that, under favor of the negotiable instruments act, one who signs a promissory note on the face thereof, though he be in fact an accommodation maker and known as such to the holder, thereby becomes primarily liable for its payment; also, that such party may be discharged from liability in any one of the ways provided in § 3175j of said act, but not otherwise; and that a contract between the holder of the instrument and the principal for the extension of time of payment, although upon a valuable consideration, and without the consent of the surety, will not have the effect of discharging him from liability. To avoid possible misconception, it perhaps should be added that this holding does not imply that the ordinary defenses which go to the original liability of the party, such as fraud, duress, or illegality in respect to the consideration, may not be resorted to as heretofore. The term 'discharge' itself implies

an original obligation. If fraud, duress, illegality as to consideration, etc., intervened at the inception of the instrument, then the accommodation party never was liable. Confusion of thought is likely to result from a failure to distinguish between a defense which goes to original liability and one which arises from some subsequent act or conduct. We further hold that §§ 3175o and 3175p apply to the physical alteration of the instrument itself, and do not apply to a contract between the holder and the principal for an extension of time of payment of the instrument."

This holding as to the liability of an accommodation maker under the uniform negotiable instruments act seems to express the now general opinion of the courts who have passed upon the question. See Vanderfort v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47; Cellers v. Meachem (Sellers v. Lyons) 49 Or. 186, 10 L.R.A. (N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Anderson v. Mitchell, 51 Wash. 265, 98 Pac. 751; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170. It seems to be based upon the clear and unequivocal language of the statute, and we see no reason for refusing to adopt this now quite general holding. It is, indeed, quite important that the interpretations by the courts of the various states of the provisions of the negotiable instruments act shall be as uniform as is now the act itself.

The fact that no personal consideration passed to the defendant Meyer, and that this fact was known to the plaintiff, makes no difference in the law. No direct consideration to him, indeed, was necessary. If a suretyship at all, the suretyship is in the form of an independent and absolute undertaking. It is a contract whereby the surety becomes bound primarily to the creditor to save him harmless independently, and whether the principal debtor makes default or not. As we have before said, we are not here construing the common law or the law merchant, but the provisions of the negotiable instruments act.

The judgment of the District Court is affirmed.

WALKER & COMPANY, a Corporation, v. W. E. HOOPES.

(152 N. W. 666.)

Furnace — installation of — unfit materials used — improper work — counterclaim for damages — issue of fact arises upon — evidence offered — foundation was laid — proof of defects — its exclusion was error.

The issue of fact arises on a counterclaim for damages through unfit materials used and improper installation of a furnace. Defendant offered testimony tending to show that four years after the furnace was installed, when for the first time the asbestos covering over it was removed, it was found that the dome was cracked and broken. This was excluded, although sufficient foundation was laid from which the jury might have inferred therefrom that the furnace was cracked and in unfit condition when installed. *Held:*— The exclusion of such testimony was error and was not cured or waived.

Opinion filed April 30, 1915.

From a judgment of the District Court of Foster County, *Coffey,* J., defendant appeals.

Reversed and new trial granted.

Geo. H. Stillman and *T. F. McCue,* for appellant.

The remark of the court that "four years was about the life of a furnace heating plant," in the presence and hearing of the jury, was highly prejudicial to defendant's case under his counterclaim, and judicially improper in any event. Skelly v. Boland, 78 Ill. 438; Kane v. Kinnare, 69 Ill. App. 83; State v. Allen, 100 Iowa, 7, 69 N. W. 274; State v. Philpot, 97 Iowa, 365, 66 N. W. 730; Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410.

A remark of a trial judge in the presence and hearing of the jury is equivalent to an instruction. State v. Stowell, 60 Iowa, 535, 15 N. W. 417; Minthon v. Lewis, 78 Iowa, 620, 43 N. W. 465; People v. Bonds, 1 Nev. 33; Shakman v. Potter, 98 Iowa, 66, 66 N. W. 1045; Valley Lumber Co. v. Smith, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. R. 412.

Edward P. Kelly, for respondent.

Proof of value must be of the time when property was delivered. Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516.

A judge's expression of opinion on a matter of fact will not be intended to have misled the jury. Robinson v. Justice, 2 Penr. & W. 19, 21 Am. Dec. 407; Gordon v. Little, 8 Serg. & R. 533, 11 Am. Dec. 632; Kirkwood v. Gordon, 7 Rich. L. 474, 62 Am. Dec. 418; Phillips v. Kingfield, 19 Me. 375, 36 Am. Dec. 760; Matthews v. Allen, 16 Gray, 594, 77 Am. Dec. 430; Porter v. Seiler, 23 Pa. 424, 62 Am. Dec. 341; Jackson ex dem. Russell v. Rowland, 6 Wend. 666, 22 Am. Dec. 557; Fredericks v. Northern C. R. Co. 157 Pa. 103, 22 L.R.A. 306, 27 Atl. 689; Rollins Engine Co. v. Eastern Forge Co. 73 N. H. 92, 68 L.R.A. 441, 59 Atl. 382; Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410.

Ruling out evidence as to facts upon which the witness has already testified, is not error. Abstract, p. 20, folio 59.

A tort cannot be set off against a contract. Braithwaite v. Aiken, 3 N. D. 365, 56 N. W. 133.

Goss, J. Action on a book account. One item was a charge for the furnishing and installation of a furnace in defendant's home in 1906. Defendant counterclaims for damages resulting from alleged unfit materials used and improper installation. Plaintiff recovered, and defendant appeals. The main issues center on the exclusion of testimony offered by defendant tending to prove that, when installed, the furnace had a cracked or broken dome or covering, through which smoke, dust, and soot were emitted to the pipes leading to the registers, and through them emptied into the house, to the discomfiture of the occupants. That the furnace was fully installed and covered with asbestos when defendant was absent; that it had always been unsatisfactory but with the cause therefor unknown. That defendant had complained to plaintiff about it without results; that in 1910, after the commencement of this suit, defendant had removed the furnace, and in so doing discovered the dome was cracked and evidently had been broken since installation. Evidence tending to establish all this was excluded, and error thereon is assigned. Defendant testified that when the furnace was to be removed in 1910, and after the asbestos had been removed, he "found that the inclosure over the fire box had a crack in it, a large one; that the dome or covering was cracked." Thereupon an exhibit and catalogue illustration of the identical furnace was offered in evidence, ex-

planatory of his and other testimony to be offered, together with further evidence of defective condition, but was all excluded. The mechanic who removed the asbestos covering was called and interrogated concerning the top and dome of the furnace as he found it, and he was allowed to partially describe it, when said testimony was stricken as "incompetent, irrelevant, and immaterial, too far removed from the installation of the heating plant, and relating to a time subsequent to the commencement of this action." This objection was consistently sustained to all similar testimony. There is no question but what a sufficient foundation was laid for the introduction of this testimony, if it was admissible, the record showing affirmatively facts from which the jury might well infer that any defective condition of the furnace disclosed on its being uncovered was the source of the troubles always had with it, and from which it could have been found that it was, when installed, broken and defective, and that such condition was unknown to defendant, who had relied upon plaintiff to install a proper furnace, instead of a defective and broken one. In the course of rulings upon this testimony, the court stated: "If you wish to offer proof at the time the furnace was put in there, probably it would be competent, but it would not be competent to prove its value by its condition four years afterwards." Thus, it seems that the rulings were had upon the theory that the lapse of time had prevented the proof of the condition of the furnace in 1910 to be any evidence of its defective condition when installed. Under the facts showing the condition in 1910 to have been but a condition which the jury could assume to have been continuous since the furnace was first installed, this amounted to the determination of a matter of fact material and relevant to the issues, and which should have been admitted for the consideration of the jury. The value of the furnace in 1910 was not in issue, nor was this evidence offered upon the question of value, so this basis for exclusion was erroneously assumed.

Counsel for respondent contends that, although the exclusion of this line of testimony was error, yet it is not prejudicial because defendant was permitted to testify that he found the furnace with a cracked dome or covering in 1910, and this testimony was not stricken, and that therefore the jury had the benefit of any inferences to be drawn from this line of testimony, even though the greater part of it was excluded. The answer to this is that the jury might well have concluded from the rul-

ings, excluding the offered proof and the court's comments thereon shown by the record, that it could draw no inferences as to the condition of the furnace in such respect when installed from its condition in 1910. Besides, defendant was entitled to the admission of the corroborating testimony of the mechanic as to such condition. It may have disregarded the defendant's testimony, or found the same to be contrary to fact, while, with the corroboration offered and rejected, it would have found the contrary, and, reasoning therefrom, have arrived at the opposite verdict to the one returned. The exclusion of the offered testimony was prejudicial error, and it cannot be said to have been cured or waived. Defendant was entitled to have this issue of fact decided. It constituted his chief defense, and the rulings operated to prejudice, if not wholly exclude its presentation to, the jury. The judgment appealed from is reversed and a new trial ordered.

P. H. LOUVA v. I. D. WORDEN.

(152 N. W. 689.)

Real estate broker — commissions — actions to recover — inconsistent contracts set out in complaint — motion by defendant to compel election.

1. In an action by a real estate broker to recover commissions on the sale of defendant's lands, plaintiff alleges in his complaint two inconsistent contracts covering the amount of the agreed compensation. At the commencement of the trial, defendant moved for an order requiring plaintiff to elect upon which contract he would rely, which motion was denied.

Held, error.

Owner — listing lands with broker for sale — net price — compensation of broker — excess received over net price — broker not entitled to hold except by express contract — compensation must be reasonable.

2. Where the owner lists real property for sale with a broker at a net price, such broker, in the absence of an express contract to that effect, is not entitled to receive as a commission all the selling price in excess of such list price, but is merely entitled to a reasonable commission not exceeding such excess.

Opinion filed May 4, 1915.

Note.—As to the nature of contract by which owner agrees to pay another all over specified sum for procuring a sale, see note in 35 L.R.A.(N.S.) 116.

Appeal from District Court, Cass County, *C. A. Pollock*, J.

From a judgment in plaintiff's favor, defendant appeals.

Reversed.

Alfred Zuger and *Miller & Zuger*, for appellant.

Where a broker with whom lands are listed by the owner for sale at a net price sells same for an amount in excess of such net price, he is not entitled to retain as his commissions all of the excess amount obtained, without a special contract to that effect. He is simply entitled to reasonable compensation for his services, not exceeding the excess above such net price. Turnley v. Micheal, 4 Tex. App. Civ. Cas. (Willson), 363, 15 S. W. 912; Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Boysen v. Robertson, 70 Ark. 56, 68 S. W. 243; Matheney v. Godin, 130 Ga. 713, 61 S. E. 703.

In such a case the law will not imply a contract whereby the broker may retain the whole of the excess over the net price. Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Allen v. J. A. Clopton Realty Co. — Tex. Civ. App. —, 135 S. W. 242; Boysen v. Robertson, 70 Ark. 56, 68 S. W. 243; Ford v. Brown, 120 Cal. 551, 52 Pac. 817; Kennedy v. Merickel, 8 Cal. App. 378, 97 Pac. 82.

M. C. Lasell, for respondent.

Where property is placed in the hands of a broker for sale at a certain price, and a sale is effected through the broker, as a procuring cause, he is entitled to comissions on such sale, even though, and in order to make the sale, the owner offers to and does accept a less or different price than that fixed, or other method of payment. Northern Immigration Asso. v. Alger, 27 N. D. 467, 147 N. W. 100; Ward v. McQueen, 13 N. D. 153, and cases cited middle of page 156, 100 N. W. 253; Jones v. Ford, 154 Iowa, 549, 38 L.R.A.(N.S.) 777, 134 N. W. 569; Paschall v. Gilliss, 113 Va. 643, 75 S. E. 200, Ann. Cas. 1913E, 778, and note on p. 784, and cases cited; Hoadley v. Savings Bank, 71 Conn. 599, 44 L.R.A. 321, 42 Atl. 667; Huntemer v. Arent, 16 S. D. 465, 93 N. W. 653; Eggland v. South, 22 S. D. 467, 118 N. W. 719; Webb v. Burroughs, 25 S. D. 629, 127 N. W. 623; Scott v. Clark, 3 S. D. 486, 54 N. W. 538; Smith v. Preiss, 17 Minn. 392, 136 N. W. 7, Ann. Cas. 1913D, 823; Prindle v. Allen, 164 Mich. 553, 129 N. W. 695; Heimberger v. Rudd, 30 S. D. 289, 138 N. W. 374; Potvin v.

Curran, 13 Neb. 302, 14 N. W. 400; Lewis v. McDonald, 83 Neb. 694, 120 N. W. 207; Reasoner v. Yates, 90 Neb. 757, 134 N. W. 651; Welch v. Young, — Iowa, —, 79 N. W. 59.

Where the jury has returned a general verdict upon controverted facts and upon an oral contract for the purpose of assigning and considering errors, it must be taken that the facts are thus in evidence which are most valuable to sustain the verdict of the jury. Oliver v. Katz, 131 Wis. 409, 111 N. W. 509.

Where the change in the price or terms is made by the owner of the land, and he consents thereto, and accepts such change, the broker is entitled to his commission upon his original contract. Ward v. McQueen, 13 N. D. 153, 100 N. W. 253.

Fisk, Ch. J. Plaintiff seeks to recover from defendant a balance claimed to be due as commission for the sale of a half section of land in Stutsman county. Paragraph 2 of the complaint alleges in substance that on or about December 15, 1912, defendant employed plaintiff to find a purchaser for such land, and that the parties entered into a verbal contract by the terms of which the defendant undertook to find a purchaser on the following terms: Plaintiff was to pay his own expenses in advertising and soliciting a buyer, and defendant agreed to sell the land to any purchaser that the plaintiff should find for the sum of $4,000 cash; plaintiff to have all that he could secure for the premises above that sum as his commission.

Paragraph 3 of such complaint, after certain immaterial averments, alleges that on or about February 26, 1912, plaintiff and defendant entered into a verbal contract whereby the latter agreed to sell the premises at the price of $4,800, out of which he agreed to pay the plaintiff $900 to recompense him for his expenses, labor, and commission in finding a purchaser, and that the defendant was to accept $3,000 cash and $1,800 on time, to be secured by a mortgage on the premises, and that plaintiff's commission was to be paid when such sale was consummated. It is further therein alleged that a sale was consummated upon the above terms, and that plaintiff is entitled to recover $900. Defendant's answer consists of a general denial, coupled with an averment that the commission agreed upon was $1 per acre, and that the same was paid prior to the commencement of the action.

It was stipulated that defendant gave plaintiff a check for $320 prior to the commencement of the action, and that such check shall be regarded the same as cash. Therefore, if defendant's version of the contract is correct the plaintiff has been paid in full, otherwise not.

At the commencement of the trial defendant requested the court to require plaintiff to elect whether he relied upon the contract alleged in ¶ 2 or that alleged in ¶ 3 of the complaint. In other words, whether he claimed to be entitled to the net amount received in excess of $4,000, or whether he demanded $900 under the alleged contract in ¶ 3. The court refused to require such election, and plaintiff was permitted to introduce evidence tending to support both theories of liability. The court, among other things, instructed the jury that the alleged agreement set forth in ¶ 2 was necessarily the basis for determining how much plaintiff was entitled to for his services in effecting the sale, provided they believed plaintiff's testimony.

The jury returned a verdict for $580 and interest, being the difference between $900 and the amount of the payment by check as aforesaid, and the appeal is from the judgment entered pursuant to such verdict.

Appellant contends that the evidence is insufficient to sustain the verdict, also that the court erred in numerous respects in instructing the jury and in admitting and excluding testimony at the trial.

As we view the record it will not be necessary to separately consider the various assignments of error made in appellant's brief. To our minds there is a basic fallacy pervading the entire proceedings in the court below and which resulted in causing a mistrial. In other words, the learned trial court proceeded throughout the trial upon the erroneous assumption that the complaint alleges, and the plaintiff's proof tended to establish, that but one contract was made by these parties, which contract authorized plaintiff to receive as his commission the sum for which the property should be sold in excess of the net price fixed by the defendant. For reasons hereinafter stated, we have no doubt that in thus holding, the learned trial judge erred to the manifest prejudice of appellant. In the first place, we think it very clear that the second and third paragraphs of the complaint set forth inconsistent contracts, and that it was error to overrule defendant's motion to require plaintiff to elect upon which he would rely. Surely, a contract alleged to have been made in December, 1911, whereby defendant agreed to accept a net

cash price of $4,000, giving to plaintiff as commissions all excess above that sum for which the property might be sold, differs radically from a contract alleged to have been made in February, 1912, whereby defendant "agreed with this plaintiff that he would sell the premises . . . for the sum of $4,800, out of which he agreed to pay the plaintiff the sum of $900 to pay his expenses for labor performed and for his commission. The said defendant to accept $3,000 cash and $1,800 in a note secured by first mortgage upon the premises. Plaintiff's commission to be paid when sale was consummated." It would seem to require no argument to demonstrate that these paragraphs of the complaint set forth two wholly inconsistent agreements. The contention that the 3d paragraph merely alleges a modification of the prior contract is, we think, without merit. It is of a wholly different character, and purports to be complete and entirely independent of any prior agreement.

But what we deem still more prejudicial to defendant's rights is the construction which the trial court placed upon the evidence, to the effect that by the terms of the contract plaintiff was to have as his commission for effecting a sale all the selling price in excess of a stated amount. This was error, and such error pervades the whole case. There is not even a scintilla of evidence in the record tending to show that any such contract was entered into; and yet the trial judge in effect instructed the jury that the court would take judicial notice of a custom that where land is listed for sale with a real estate agent or broker at a net price, such agent or broker is entitled to have and retain as his commission all the excess of the selling price above such net price. If any such custom prevails, there is no proof thereof, and we do not think it a matter of which the court may take judicial notice. The law, for reasons which appeal to us as sound, seems to be well settled to the contrary. Turnley v. Micheal, 4 Tex. App. Civ. Cas. (Willson) 363, 15 S. W. 912; Allen v. J. A. Clopton Realty Co. — Tex. Civ. App. —, 135 S. W. 242; Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Boysen v. Robertson, 70 Ark. 56, 68 S. W. 243; Matheney v. Godin, 130 Ga. 713, 61 S. E. 703; Scott v. Hartley, 126 Ind. 239, 25 N. E. 826; Ford v. Brown, 120 Cal. 551, 52 Pac. 817.

In the case of Turnley v. Michael, 4 Tex. App. Civ. Cas. (Willson) 363, 15 S. W. 912, the language of the owner was, "I will take $7,500 net to me." The broker made a sale for the sum of $8,000, and he

sued to recover the $500 received over and above the net price which the owner had said he would take. The court, however, declined to sanction such recovery, holding that the broker could recover as his commission on the sale only a reasonable sum. The holding of this case is expressly approved in Allen v. J. A. Clopton Realty Co. — Tex. Civ. App. —, 135 S. W. 242, and also in Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109. In Allen v. J. A. Clopton Realty Co. the court said: "It is well settled that a real estate broker to sell land for a certain net price is not entitled, in the absence of a contract therefor, to the excess over such price as he may obtain for the land."

In Matheney v. Godin the Georgia court in a well-considered opinion, among other things, says: "Where the owner agrees with brokers for them to sell property for a named amount, 'net to him,' such language will not be held to import by implication a contract to allow the brokers, as a fee or profit, all of the purchase price in excess of the sum so named." To the same effect are the holdings in the other cases above cited, and many more which we have not taken the space to cite. Of course, if plaintiff had proved the contract as alleged in ¶ 2 of his complaint, he would be entitled to recover the excess above the list price, but, as before stated, he offered no testimony in support of such paragraph. In the absence of proof of an express agreement as to the amount of plaintiff's commission, it is elementary that he can recover only on the *quantum meruit*.

The judgment is reversed and a new trial ordered.

KRISTINN P. ARMANN v. D. E. CASWELL.

(152 N. W. 813.)

Automobile — accident — damage to stock — action for — speed of machine — evidence of — distance from place of accident.

Defendant was driving along a public highway in an automobile when he

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Note.—As to duty and liability of operator of automobile with respect to horses encountered on the highway, see note in 48 L.R.A.(N.S.) 946.

As to speed of automobile as negligence, see notes in 25 L.R.A.(N.S.) 40; 38 L.R.A.(N.S.) 488 and 51 L.R.A.(N.S.) 993.

met a herd of cattle owned by the plaintiff. A heifer was injured through collision with the automobile. Evidence and instructions examined and, *held:*—

1. That the trial court was correct in excluding testimony as to the speed of the automobile at a distance so far from the accident that it could not have any effect thereon.

Instructions — cattle running at large — testimony — question for jury.

2. Certain instructions of the court construing § 2617, Comp. Laws, 1913, examined and *held* to be without error. The question of whether or not the cattle were running at large within the meaning of such section was properly submitted to the jury, and there was sufficient testimony to justify their finding against plaintiff.

Instructions — duty of defendant.

3. Instruction of the court as to the duty of the defendant in the premises examined and found free from error.

Instructions — negligence as a matter of law — question of fact for jury — highway — section line — public road.

4. Under the facts in this case the trial court would not have been justified in instructing the jury that defendant was negligent as a matter of law. The highway in question, while not upon a section line, was undisputedly a public road, graded and fenced, and used by the public.

Opinion filed May 14, 1915.

Appeal from the District Court of Pembina County, *Kneeshaw,* J.

Affirmed.

Geo. Peterson, for appellant.

Our statute makes it unlawful for cattle to run at large at any time. Laws 1913, chap. 178, Comp. Laws 1913, §§ 2617–2622.

But because cattle happen to be on the highway, it does not follow that they are running at large. "Running at large" means not under control of the owner; animals that are left and permitted to roam where they may go. Hinman v. Chicago, R. I. & P. R. Co. 28 Iowa, 491; Grove v. Burlington, C. R. & N. Ry. Co. 75 Iowa, 163, 39 N. W. 248; Russell v. Cone, 46 Vt. 600; Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496.

When merely upon a highway an animal is not at large, unless by some statute its presence there is made to constitute a running at large.

2 Cyc. 443, ¶ 3; McManaway v. Crispin, 22 Ind. App. 368, 53 N. E. 840; Beeson v. Tice, 17 Ind. App. 78, 45 N. E. 612, 46 N. E. 154; Kanakanui v. Manini, 8 Haw. 710.

An animal on land of its owner, or on the land of another with permission, is not at large. 2 Cyc. 443, and cases cited.

Pasturing on the highway to the center thereof is not at large. Parker v. Jones, 1 Allen, 270.

The fee to a highway is in the landowner. The right of the public to use same is a mere incident. 15 Am. & Eng. Enc. Law, 2d ed. 415, ¶ XII, and cases cited, 416 ¶ 2, and cases cited.

The accidental killing of an animal will not relieve from liability, even if the animal was at large. 2 Cyc. 418, 433, and cases cited.

The common-law duty of the owner and operator of an automobile upon the highway is to use it with that degree of prudence and consideration for the rights of others which is consistent with their safety. Shinkle v. McCullough, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196, 15 Am. Neg. Rep. 63; Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999, 12 Am. Neg. Rep. 157; Murphy v. Wait, 102 App. Div. 121, 92 N. Y. Supp. 253.

It is the duty of such person to keep a proper lookout, and to keep his machine under such control as will enable him to avoid collisions, and, if necessary, he shall slow up and stop. Thies v. Thomas, 77 N. Y. Supp. 276; Buscher v. New York Transp. Co. 106 App. Div. 493, 94 N. Y. Supp. 798, 18 Am. Neg. Rep. 575; Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999, 12 Am. Neg. Rep. 157; Kathmeyer v. Mehl, — N. J. L. —, 60 Atl. 40, 17 Am. Neg. Rep. 688; Hennessey v. Taylor, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; Davis v. Maxwell, 108 App. Div. 128, 96 N. Y. Supp. 45.

His degree of care must be commensurate with its liability to do injury. Hannigan v. Wright, 5 Penn (Del.) 537, 63 Atl. 234; Clune v. Wright, 96 Wis. 630, 71 N. W. 1041; McIntyre v. Orner, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; Harlow v. Standard Improv. Co. 145 Cal. 477, 78 Pac. 1045.

In this case, the defendant, in speeding up his machine before he was past the cow he struck, did not use "reasonable" care. Kessler v.

Washburn, 157 Ill. App. 532; Thies v. Thomas, 77 N. Y. Supp. 276; Navailles v. Dielmann, 124 La. 421, 134 Am. St. Rep. 508, 50 So. 449; Garside v. New York Transp. Co. 146 Fed. 588; Caesar v. Fifth Ave. Coach Co. 45 Mich. 331, 90 N. Y. Supp. 359.

The true question is whether the accident could have been avoided by using ordinary care. Arseneau v. Sweet, 106 Minn. 257, 119 N. W. 46; Simeone v. Lindsay, 6 Penn. (Del.) 224, 65 Atl. 778; Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 234.

Courts will take judicial notice of the fact that automobiles on the highway have a tendency to frighten animals. The driver therefore should use due care to prevent accidents. Rochester v. Bull, 78 S. C. 249, 58 S. E. 766; McCummins v. State, 132 Wis. 236, 112 N. W. 25; Salminen v. Ross, 185 Fed. 997.

A cyclist has the burden of disproving negligence, when he rides up behind another who is walking where he has the right to walk, and, without giving any warning strikes and injures such person. Myers v. Hinds, 110 Mich. 300, 33 L.R.A. 356, 64 Am. St. Rep. 345, 68 N. W. 156; Spina v. New York Transp. Co. 96 N. Y. Supp. 270; Heath v. Cook, — R. I. —, 68 Atl. 427; 38 Cyc. 1602, et seq. ¶¶ "e" and "f" and cases cited; 46 Century Dig. §§ 569, 570, 584, and cases cited.

Any intelligent person who saw the machine at the time in question, being held competent to testify as to its speed, the qualification of the witness to judge accurately goes to the *weight* of such testimony, rather than to its competency Shaffer v. Coleman, 35 Pa. Super. Ct. 386; Wolfe v. Ives, 83 Conn. 174, 76 Atl. 526, 19 Ann. Cas. 752; Matla v. Rapid Motor Vehicle Co. 160 Mich. 639, 125 N. W. 708; Miller v. Jenness, 84 Kan. 608, 34 L.R.A.(N.S.) 782, 114 Pac. 1052; Neidy v. Littlejohn, 146 Iowa, 355, 125 N. W. 198; Porter v. Buckley, 78 C. C. A. 138, 147 Fed. 140; Johnson v. Coey, 237 Ill. 88, 21 L.R.A. (N.S.) 81, 86 N. E. 678; Zoltovski v. Gzella, 159 Mich. 620, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Hough v. St. Louis Car Co. 146 Mo. App. 58, 123 S. W. 83; Dugan v. Arthurs, 230 Pa. 299, 34 L.R.A.(N.S.) 778, 79 Atl. 626; State v. Watson, 216 Mo. 420, 115 S. W. 1011.

As to the weight to which such opinion evidence is entitled, is wholly a matter for the jury. Himmelwright v. Baker, 82 Kan. 569, 109 Pac. 178; Nesbit v. Crosby, 74 Conn. 554, 51 Atl. 550; United Brew-

eries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547; Brown v. Swanton, 69 Vt. 53, 37 Atl. 280; Myers v. McFarland, 31 Pa. Co. Ct. 49.

Gray & Myers and *J. E. Garvey,* for respondent.

It is beyond dispute that, at the time of the accident, the cattle were running at large.

Where cattle are left to stray at will along the public highway without anyone in immediate attendance upon them or claiming any oversight of them, they are, for such time, "running at large." Donley v. Fowler, 147 Mich. 288, 110 N. W. 1097; Nehr v. State, 35 Neb. 638, 17 L.R.A. 771, 53 N. W. 589.

The words, "running at large," in the sense in which they are used, mean *running on the public highway or road,* or off from the owner's premises without any person in charge or near at hand with oversight. Leonard v. Doherty, 174 Mass. 565, 55 N. E. 461, 7 Am. Neg. Rep. 55; Allen v. Hazzard, 33 Tex. Civ. App. 523, 77 S. W. 268; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554; Goener v. Woll, 26 Minn. 154, 2 N. W. 163.

In no aspect do the facts in this case raise a presumption of negligence on the part of the defendant. 29 Cyc. 589–C; Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830; Solberg v Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91.

A witness need not be an expert in order to be permitted to give his opinion of the rapidity of motion of familiar objects like railway trains and street cars, but he must be shown to have had and to have availed himself of an opportunity for *observation* in the case in hand. Mathieson v. Omaha Street R. Co. 3 Neb. (Unof.) 743, 92 N. W. 639; Wright v. Crane, 142 Mich. 508, 106 N. W. 71, 19 Am. Neg. Rep. 336.

It is the rule of the law of damages that where an animal is killed and its body possesses a monetary value, the measure of damages is the difference between the animal alive and its value after death. 13 Cyc. 149; Atchison, T. & S. F. R. Co. v. Bivins, — Tex. Civ. App. —, 136 S. W. 1180; Boing v. Raleigh & G. R. Co. 91 N. C. 199; Roberts v. Richmond & D. R. Co. 88 N. C. 560.

There is no evidence on this matter in this case. Kime v. Bank of Edgemont, 22 S. D. 630, 119 N. W. 1003; Munier v. Zachary, 138 Iowa, 219, 18 L.R.A.(N.S.) 572, 114 N. W. 525, 16 Ann. Cas. 526, Greene v. Murdock, 1 Cal. App. 136, 81 Pac. 993; Ingemarson v. Coffey, 41 Colo. 407, 92 Pac. 908; Morrow v. Laverty, 77 Neb. 245, 109 N. W. 150; State Bank v. Carroll, 81 Neb. 484, 116 N. W. 276.

BURKE, J. Plaintiff is a farmer living about one mile and a half west of the village of Gardar on the road to Milton. Said public road between said villages divides plaintiff's farm almost in two, from east to west, is graded, and has a ditch and fence on each side thereof. At one side of the road is a telephone wire strung upon poles. Plaintiff's buildings are north of said road between 250 and 275 feet therefrom, and there is a lane running from the buildings to said road. The intervening ground is covered with timber and undergrowth, being situated some short distance from the Park river. Further from the road than the buildings is a creek at which plaintiff's stock were accustomed to drink. Across the road from the buildings and about 40 rods east thereof, plaintiff has a little pasture of 11 acres in which upon the 31st of October, 1913, he was pasturing about 20 head of cattle. Shortly before 4 o'clock in the afternoon of said day, plaintiff's father went to this pasture for the purpose of bringing said cattle therefrom to the buildings for water. This necessitated the opening of the gate from the pasture, so that the cattle might pass out upon the public road aforesaid along which they would proceed and up the lane leading to the house, on their way to water in the creek aforesaid. On this occasion, however, the old gentleman decided to allow the cows to make their way home, and proceeded himself through the bushes and trees to the buildings where plaintiff and a hired man were working. The cattle, left alone, were making their way leisurely along the highway towards the lane which led to plaintiff's buildings, when defendant came from the west along the Milton road. He was at that time a traveling salesman of the Standard Oil Company, an elderly man, and making his territory by auto upon the company's business. With him was the witness Volkner, also a traveling man, who was also making his territory upon business. According to defendant's testimony, he had been running between 20 and 25 miles an hour before he reached

the cattle. Upon approaching them, according to his testimony, he slowed down and even came to a stop. When he had passed all of the cattle but one, he noticed that this last one, a heifer, was about to pass on his left side, and proceeded to speed up the automobile from low to high gear. The heifer changed her mind and jumped in front of the automobile and was injured. The only witnesses to the accident were the two men in the automobile who have testified at length, and plaintiff's hired man, who, however, was at such a distance and whose view was so obstructed by trees and bushes that it is entitled to much less weight than that of the defendant and his companion. Plaintiff himself was at the buildings, and noticed the automobile approaching, but paid no further attention to it, and was not looking at the time the accident happened. Neither did the father see the collision. The hired man testifies that he was seventeen years of age, and that he saw the automobile approaching from the west while he was at the granary. He says: "I saw the automobile coming from the west and pass through the cows and strike one of the cows. Q. Was this automobile going fast or slow at the time it struck the cow? A. It was going very fast." Upon cross-examination he identified a photograph which was offered in evidence, and testifies that there was timber along the road, on the north side of the road running up past the place of the accident.

He was asked:

Q. Now, this timber runs up from this roadway, up past the place where the accident was supposed to have taken place?

A. Yes, sir.

Q. Now, looking at this picture, does that show you the kind of timber that was along the north side of that road?

A. No, sir.

Q. Can you locate this at all?

A. I think I can. . . .

Q. Now, this timber that is shown here continues east from this gate, does it not?

A. Yes, sir.

Q. And then it also continues west the way it is shown here?

A. It is not as thick further west.

Q. This is a picture of that timber, is it not?

A. It is not as thick as further west.

Q. This is the gateway that you refer to? Put an X at the place you refer to as the gateway.

A. Here is where the gate is supposed to be.

Q. Now, how far was it from the gate where you say this accident occurred?

A. It was about 20 feet. . . .

Q. Now, looking at this picture, the buildings would be up the road?

A. Yes.

Q. Then it would be towards that timber as shown in this picture?

A. Yes, sir.

Q. Now, can you see in this picture where the road comes into the house down there?

A. No, I can't see that there.

Q. And that is the way the timber looks at the place on the road shown in this picture?

A. It looks here to be more than there is. . . .

Q. But you would say this is a picture of that timber, would you not?

A. Yes, sir.

Q. Now, when you say that you saw this automobile running through the cattle, in order to see them you would have to look through these trees, would you not?

A. Yes, sir.

Q. Now, after the automobile passed the roadway that you referred to, it was going away from you, was it not?

A. Yes, sir.

Q. Now, that timber that you refer to as being on the north side of the roadway running east is pretty heavy brush in there? There is pretty heavy brush in there, near the bottom of that timber, is there not?

A. Not very.

Q. There is considerable in there, is there not?

A. A little, yes.

Q. And some of the trees are pretty high, are they not?

A. Yes, sir.

The picture which is in evidence, and cannot be reproduced, shows trees of about the same height as the telephone poles, and five or six

times as tall as a man, and so thick that nothing is shown behind them in the picture. So much for plaintiff's testimony as to the manner of the accident.

The testimony of the defendant, which is, by the way, fully corroborated by the other passenger, is as follows:

At the time it passed the opening (by plaintiff's house) I was probably going 20 miles an hour. . . .

Q. Tell the jury how fast you were going between that opening and the place where this accident happened.

A. I slowed down and went most of the way on low speed, 5 or 6 miles an hour, probably 8 miles an hour. I did not go all the way the same.

Q. Were there some cattle between these two points?

A. Yes, sir.

Q. About how many?

A. I would judge 15 or 20. . . .

Q. About how far from the roadway were the first of the cattle?

A. I would judge about 150 feet—over 100—about 150 feet.

Q. Now, when you got up as far as the first of the cattle, how fast were you going then?

A. I had to nearly stop. Three of them were standing right in the middle of the road, I had to practically stop. I was on low speed.

Q. How fast were you going from the time you nearly stopped up to the time that you got up to the gate?

A. I am positive that I did not at any time exceed 8 miles an hour.

Q. About where did you get tangled up with this heifer, in reference to the opening going up to the house?

A. About 20 or 25 rods.

Q. Did you notice when you came up on the cattle whether anyone was in attendance or whether anyone was around there?

A. I did not see a soul, and I looked.

Q. Now, which way were these cattle heading when you first came upon them?

A. They were not heading any particular way,—they were headed some one way, some another. They were simply loitering on the road. Some were feeding.

Q. Now, where was this heifer that you got tangled up with? Where was she when you noticed her first?

A. She was the farthest to the east. She was not very far when I noticed her first to when I came in contact with her. She was standing on the north side of the road. . . . As I remember, she was standing facing the east at the north side of the road, and I turned out a little to the right to go by her to the west, and she turned a little to my left as if she were going towards the weeds, and as I got to within 4 or 5 feet of her she turned right back and went diagonally across in front of me. When she turned off to the left, I speeded up, thinking she was going on and that it was pretty safe to go by. Then she started right back across in front of me, and on a Ford the brake and clutch are all of them right together, and I must have applied all of them, because I killed the engine. The engine was dead when we stopped, and whether she kicked the car or we ran into her, I do not know, but I know I did not hit her enough to feel the jar, except when she pulled us down into the ditch. I think her foot got into the axle of the car and she drew us down into the ditch, but she released herself and got out of the way before I could get out of the car to see how badly the car was damaged, and I found no particular damage; and then I said to Mr. Volkner, 'What shall we do—go back and tell these people about this?' and he said, 'I don't know,' and then I said, 'I guess I had better,' and just then he said, 'They are coming now,' so we waited until they came up. . . . I did not feel any jar. It was not hard enough for that, but she seemed to pull me off towards the ditch. I think her leg was caught in the axle—that is the only explanation I can make unless she kicked it in there in some way. There was absolutely nothing hurt on the front of the car; lights and radiator were not jammed. The right-hand fender was bent slightly, but it might have been that way before that. It was slightly bent.

He further testifies that he had driven an automobile for six years, and was fairly experienced in the handling of the machine. Upon cross-examination he testified that the radius rods were slightly bent, and that the cow was probably 12 or 15 feet from him when he saw her.

Q. It was the last cow?

A. Yes, sir.

Q. And then you say you speeded up?

A. Yes, a little.

Q. And as you speeded up, what did the cow do?

A. When I got up to within 5 or 6 feet of her she started across the road.

Q. How fast were you going when she made that start?

A. I can't say, perhaps 8 miles an hour.

Q. Then what did you do?

A. I threw out the clutch and applied the brakes. I must have pressed upon both levers, for I killed the engine.

Q. And thus your machine was stopped before you came up to the cow?

A. The engine was stopped.

Q. Did it stop before you came up to the cow?

A. It did, about the same time I came up to it. . . .

Q. Was it the cow that moved up to the auto, or was it the auto that moved up to the cow at the time the accident took place?

A. I guess the auto moved into the cow.

Q. I thought you said a while ago that the auto stopped before the auto struck the cow or the cow struck the auto.

A. The *engine* was stopped, but the auto was still moving some. As near as I can tell the engine was stopped.

Q. The engine was stopped, but the machine was moving along?

A. Yes, it was moving along.

Mr. Volkner was a witness and testifies to practically the same state of facts.

He says:

The heifer was on the north side of the road. It looked as if she was going to stay on the north side of the road, and when Mr. Caswell got within a few—well, may be a rod of her—she seemed undecided in which way to go, and Mr. Caswell turned a little to the right and started to speed up his machine, thinking that it would be safe to go on.

Q. Which way did you turn?

A. We turned to the right.

Q. Away from the heifer?

A. Yes, away from the heifer; and as we got within a few feet of her, she swung around, and started across the road, and went in a southeasterly direction, and Mr. Caswell threw the brakes on the engine and tried to stop, but killed the engine, and the automobile just ran into the animal in some way, and she got her gambled joint in some way in the car, and in some way she dragged the car, or right-hand wheel, over into the ditch, and the engine was dead at the time we hit the animal.

Q. Did you notice the instant her leg became broken?

A. I heard something snap as the cow was trying to get her leg from underneath the automobile.

Q. When was that?

A. After the automobile stopped.

And again he testifies:

Q. Do you know, Mr. Volkner, whether or not you could see Mr. Arman's place, his house from the place of the accident?

A. I could see the tops of the buildings, that is all. . . .

Q. Did you notice whether or not anyone was in attendance of these cattle when you first came upon them?

A. There was not.

Q. Did you notice anybody around there?

A. No.

Plaintiff asks $75, which he claims was the value of the heifer at the time and place mentioned. He claimed that he was obliged to butcher her on account of her injuries. Upon a trial to the district court, plaintiff offered the testimony of his hired man, which we have already mentioned. And the defendant offered his testimony, and that of his companion, which we have also set forth. At the close of the testimony the court refused to direct a verdict for defendant, but submitted the issue to the jury, who returned a general verdict for the defendant. Plaintiff appeals, alleging as error certain rulings of the trial court in the exclusion of evidence and certain instructions of the court. We will treat the same rather briefly.

(1) The first error argued in the brief relates to the exclusion of the testimony of plaintiff, his father, and the hired man, to the effect that the automobile was running at a very high rate of speed when approach-

ing and passing the house. There is no error in this ruling. For one reason, because it is conceded that the cattle were at least a hundred feet down the road from the buildings, and defendant had plenty of time to have reduced the speed of his car after passing the buildings and before meeting the cattle, while the animal injured was some 600 feet further, and it would, therefore, be immaterial at what speed he was approaching the building, as excessive speed at that time would have no connection whatever with the accident.

(2) The next objection goes to the instructions of the court and certain rulings made by the trial court along the same lines. The instructions excepted to read as follows: "And it is also the duty of other people to see that they do not let their cattle run at large on a public highway so as to endanger public safety." And again: "In this case, gentlemen of the jury, under our laws as amended in 1913, cattle are not allowed to run at large at any time of the day, and while a person would have a perfect right to drive his cattle along the highway to water, or anywhere else, but if so they should be driven by and in charge of some person at the time they are on the highway. They have no right to allow them to congregate on the highway and feed there, unless they are in charge of some person. They have no right there." Plaintiff objects to those instructions upon the grounds that the proof does not show that the cattle were running at large, but were moving along the roadway on plaintiff's land and in his sight and that of his servants. There is little dispute between the appellant and respondent in this case as to the law. They, however, differ materially as to the facts. Plaintiff insists that he saw the cattle at all times, and they were in effect under his control, and that, therefore, under the well-defined rules of law they were not at large. At volume 1, R. C. L. page 1145, the law relative to animals running at large is set forth, and from it we quote: "However, the manifest danger to travelers of permitting domestic animals to roam at will on the highways has given rise . . . to the adoption of statutes or ordinances prohibiting their owners from allowing them to be at large, and, in the event of a failure to comply therewith, either making them liable to all damages naturally flowing therefrom, or subjecting them to indictment, or to the payment of fines or penalties as a consequence of such infraction." Section 2617, Comp. Laws 1913, reads as follows: "It shall be unlawful for cattle, horses,

mules, swine, goats, and sheep to run at large at any time, except as hereinafter provided." This is a complete departure adopted by chapter 178, Sess. Laws 1913, Comp. Laws 1913, §§ 2617–2622, from the old-established herd law of this state. The question, then, of whether or not the cattle were running at large was to be determined from the evidence in this case. Had the trial court directed a verdict for the defendant upon the grounds that said cattle were running at large, contrary to law, and that the undisputed evidence disclosed that the defendant was guilty of no negligence in the premises, a different state of facts would exist. However, the trial court did not so direct, but on the contrary, under proper instruction, left those questions for the determination of the jury. By the jury's verdict it was determined that the cattle were running at large, contrary to law, and that the defendant was guilty of no negligence. The quotation from the judge's charge, is not even a complete sentence, but is an excerpt containing merely a clause. The court gave full and fair instructions upon the law, among other things, saying: "The burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence as to the truth of all of the material allegations in the complaint, and the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that, in driving his automobile, the defendant was careless and negligent, and used excessive speed, and was reckless as alleged in the complaint, before he can recover in this action." This is a correct statement of the law. The plaintiff contends that the burden of proof was upon the defendant to establish that he was not negligent, because "the uncontradicted testimony, even the defendant's own testimony, shows that he could have avoided the accident." This is upon the supposition that the evidence disclosed negligence upon the part of the defendant. We do not believe the evidence will bear this interpretation.

There certainly is testimony that the cattle were roaming at large upon the highway, although they may incidentally have been slowly working their way homeward. The animal injured was at least an eighth of a mile from the buildings where plaintiff's witness was standing, the intervening space being admittedly heavily timbered. There is some question as to whether or not any of the cattle were in sight from the buildings at the time of the injury, and the photograph makes it clear that the injured animal could not have been seen therefrom. The

spirit of the law is that some person shall be near enough to cattle to protect passers-by and adjacent property, and also to protect the cattle from passers-by, otherwise they are running at large. There is no error in the instruction complained of, of which appellant can take advantage.

(3) The next error assigned is the giving of the following charge: "Now, in this case, if you should find by a fair preponderance of the evidence that the defendant was traveling along the public highway, and came to these cattle, and saw this last cow as they testified to, on the side of the road, and, in order to get past and in believing he could get past, he speeded up his automobile, and the cow or heifer ran in front of him and was, thereby, injured, and that the defendant was using ordinary care in traveling on that road to get past them and to avoid the injury, then the defendant in this action is not liable, and you should so say by your verdict, and find your verdict in favor of the defendant." Appellant's objection to this charge is that it presupposes a state of facts not in existence, and is an erroneous statement of the law. However, we believe that the facts warrant this assumption, and there is no question about the legal principles therein stated being sound. Appellant claims that it relieves defendants of any consequences of a mistake of judgment in doing what he did. In view of the fact that the jury found that the animals were trespassing upon the public highway, plaintiff owed them no duty excepting to use ordinary care to prevent their injury, and there is no error therein. Taken as a whole, the charge is a fair statement of the law applicable to the facts in this case.

(4) In this assignment appellant insists that defendant was negligent, under his own testimony, in speeding up the machine at the time he believed the heifer would pass him on the north. In support of this position, he cites the testimony of the hired man, to the effect that defendant was going fast, and making a loud noise, and threw up a great deal of dust as he went past the roadway on which the cattle were standing. It is probably appellant's contention that the jury should have been instructed that this made the defendant liable for damages. We do not believe a fair reading of the testimony convicts defendant of negligence as a matter of law. See §§ 2972, 2976, Comp. Laws 1913, construed in Messer v. Bruening, 25 N. D. 599, 48 L.R.A.(N.S.) 945, 142 N. W. 158. We will not quote from that opinion, however, at this time. See 29 Cyc. 589. Appellant lays some stress upon the fact that

this road was not upon a section line. The exact nature of the highway was not made plain by the testimony, but it was a main traveled road between those two villages, guarded by a fence on either side, and was followed by a telephone line. Plaintiff seems to concede that it is a public highway. We refer to the case of Donley v. Fowler, 147 Mich. 288, 110 N. W. 1097, in which the facts are very similar to those in the case at bar. Also Leonard v. Doherty, 174 Mass. 565, 55 N. E. 461, 7 Am. Neg. Rep. 55; Allen v. Hazzard, 33 Tex. Civ. App. 523, 77 S. W. 268; Decker v. McSorley, 111 Wis. 91, 86 N. W. 554.

In conclusion. This is a case in which the defendant was upon a public highway in an automobile upon business. There is not the slightest indication of a joy-riding expedition. The case was fairly tried and submitted to a jury, who found that defendant was guilty of no negligence in his conduct which would support a verdict. There are no errors, and the case is in all things affirmed.

H. S. KLINE and J. Minkiewitz v. HATTIE HARRIS, A. C. Harris, G. A. Ebbert, and J. H. Mantz.

(152 N. W. 687.)

Complaint — answer — general denial — falsely pleaded — sham — good faith — inquiry as to — in advance of trial — cannot be had — plaintiff must prove demand.

1. Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendants in pleading it, nor can it be striken out as sham on an application of the plaintiffs. The defendant has the right, by a general denial, to put the plaintiff to the proof of his demand.

Answer — general denial — substitute for the general issue at common law — requires plaintiff to prove all material facts.

2. An answer, by way of a general denial, is the equivalent of and substi-

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Note.—There is considerable conflict among the cases passing upon the right of the court to strike out as sham, an answer by way of general or special denial, upon the presentation of affidavits showing that the answer is false and interposed in bad faith. Upon this question, see notes in 72 Am. Dec. 521 and 113 Am. St. Rep. 639, 647.

tute for the general issue under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea.

Under the common-law system the general issue could not be stricken out as sham, although shown by affidavit to be false.

Opinion filed May 25, 1915.

Appeal from District Court, Pierce County, *A. G. Burr,* Judge.

From an order striking out an answer as sham, and from a judgment entered based on said order, defendants appeal.

Reversed.

Palda, Aaker, & Greene, for appellants.

An answer verified by attorney in the usual form, consisting merely of a general denial, cannot be stricken out as sham. Samuel Cupples Wooden Ware Co. v. Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872; Sifton v. Sifton, 5 N. D. 187, 65 N. W. 670.

Paul Campbell, for plaintiffs and respondents.

The right to deny, on knowledge or information in pleading, is not an absolute right. Where facts are within the knowledge of the party, or where such party could ascertain the truth or falsity of his allegations by general denial, such form of pleading is frivolous and sham. Rev. Codes 1905, §§ 6866, 6867, Comp. Laws 1913, §§ 7455, 7456; Van Dyke v. Doherty, 6 N. D. 263, 69 N. W. 200; Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872; Samuel Cupples Wooden Ware Co. v. Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; Loranger v. Big Missouri Min. Co. 6 S. D. 478, 61 N. W. 686; Sigmund v. Bank of Minot, 4 N. D. 164, 59 N. W. 966; Massachusetts Loan & T. Co v. Twichell, 7 N. D. 440, 75 N. W. 786; Russell v. Amundson, 4 N. D. 112, 59 N. W 477; Chicago, R. I. & E. P. R. Co. v. Wertheim Co. 15 N. M. 505, 30 L.R.A.(N.S.) 771, 110 Pac. 573, Ann. Cas. 1912C, 148.

The statute requires good faith and honesty in pleading by general denial, and a party cannot close his eyes to known or easily ascertainable facts, and resort to such form of pleading. Wheaton v. Briggs, 35 Minn. 470, 29 N. W. 170; Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144, 1 Enc. Pl. & Pr. 813; Hance v. Rumming, 2 E. D. Smith, 48;

Mott v. Burnett, 2 E. D. Smith, 50; Wesson v. Judd, 1 Abb. Pr. 254; Samuel Cupples Wooden Ware Co. v. Jensen, 4 Dak. 149, 27 N. W. 206, 28 N. W. 193; Wayland v. Tysen, 45 N. Y. 281; Thompson v. Erie R. Co. 45 N. Y. 468; Farmers' & M. Bank v. Smith, 15 How. Pr. 329; Claflin v. Jaroslauski, 64 Barb. 463; Brown v. Lewis, 10 Ind. 232.

The general rule with regard to verifications by an attorney or agent is that he has the requisite knowledge, and therefore is able to swear positively. 31 Cyc. 537, 538.

KNEESHAW, District Judge. This action was brought to recover on a bond given to release an attachment issued in a former action and levied on property of defendants Hattie and A. C. Harris, and on which bond defendants Ebbert and Mantz were sureties. The action in which the bond was given resulted in a judgment against Hattie and A. C. Harris, and which judgment, it is alleged, was assigned to the plaintiffs in this action.

To the complaint the defendants answered by a general denial duly verified by attorney.

The plaintiffs' attorney gave notice of a motion to strike out the answer as frivolous and sham. The trial court made an order granting said motion and allowing defendants five days in which to answer over on payment of $10 costs.

The defendants appealed from said order on February 10, 1914, and on the same day an order for judgment was signed, and judgment was entered in favor of the plaintiffs thereon for $1,000.50 damages and costs.

Said order of judgment being based on the former order striking out the answer as sham, and on the failure of the defendants to answer over as provided in said order.

This appeal was taken by the defendants both from the order striking out the answer and from the judgment.

The only question involved and to be considered is the right of the district court to strike out the defendants' answer as sham, frivolous, or for want of proper verification.

The answer consisted merely of a general denial of the allegations of the complaint, and it was duly verified by the defendants' attorneys in form as provided by law, which fact is conceded.

Therefore, that disposes of the question of the proper verification of the answer, as our statute authorizes a verification by attorney. The only other question is, Can an answer by way of a general denial, duly verified by either the party or his attorney, be stricken out on motion as sham?

The court in the case of Wayland v. Tysen, 45 N. Y. 281, says:

"This answer [by way of a general denial] is the equivalent of and substitute for the general issue, under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system the general issue could not be struck out as sham, although shown by affidavits to be false."

And the court in the case of Fay v. Cobb, 51 Cal. 313, which we cite with approval, says: "Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court, as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on an application of the plaintiff." Ibid.

"The defendant has the right by a general denial to put the plaintiff to the proof of his demand."

To the same effect, see also Samuel Cupples Wooden Ware Co. v. Jensen, 4 Dak. 149, 27 N. W 206, 28 N. W. 193; Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872; King v. Waite, 10 S. D. 1, 70 N. W. 1056, and many other cases cited.

We therefore are of the opinion that the court erred in striking out the answer as sham, or on any of the grounds stated; and the order of the District Court of Pierce County in striking out the answer, and the judgment of the said court entered in said case in favor of the plaintiffs and against the defendants for $1,000.50 damages and costs, is hereby reversed, and the cause is remanded for further proceedings, with directions that the cause stand for trial on the issues made by the pleadings.

CHRISTIANSON, J., being disqualified, did not participate, Honorable W. J. KNEESHAW, Judge of the District Court of the Seventh Judicial District, sitting in his stead, by request.

ST. ANTHONY & DAKOTA ELEVATOR COMPANY v. FORTUNATE MARTINEAU.

(153 N. W. 416.)

Procedure — error — consented to — not ground for complaint.

1. Error cannot be predicated upon irregularities in procedure where such irregularities were consented to by the complaining party.

Action — jury trial — jury waived by stipulation — equity trial — not mistrial — same cannot be urged — effect of stipulation — trial de novo — errors — review.

2. At the trial of an action properly triable by jury, the parties, by stipulation, waived a jury and consented to try the cause as an equity suit under the so-called Newman statute. *Held*, that they are precluded from urging that such irregularity caused a mistrial. *Held*, further, and for reasons stated in the opinion, that such stipulation could not transpose the case from an action at law to a suit in equity, so as to authorize a trial *de novo* in the supreme court, but that such case can be reviewed only on errors of law.

Equity suit — new trial — order granting — appeal from — for trial de novo — insufficient — final judgment.

3. Even if the action were in equity and properly triable under the Newman law, an appeal from an order granting a new trial would not bring the cause here for trial *de novo*. A trial *de novo* in this court is authorized only on an appeal from the final judgment.

New trial — order granting — not disturbed if any ground urged is good.

4. An order granting a motion for a new trial will not be disturbed on appeal if any of the grounds urged on such motion are tenable.

New trial — order granting — appeal — insufficiency of evidence — discretionary — not disturbed — unless abuse clearly appears — order made by other judge — rule.

5. The rule that an order granting a motion for a new trial for alleged insufficiency of the evidence will not be disturbed on appeal, in the absence of a clear showing of an abuse of discretion, does not apply where the judge who granted such motion was not the judge who tried the case, and had no opportunity to see and hear the witnesses.

Findings of fact — conclusions of law — judgment — filing of findings — judge — term of — after — irregular — direct attack.

6. A judgment entered pursuant to findings of fact, conclusions of law, and an order for judgment, which were not filed until after the expiration of the

term of office of the judge who made them, is not for such reason void, but at the most is merely irregular, and can be challenged only by a direct attack.

Public officers — liability — municipalities — indebtedness — excess of limit.

7. The question whether § 1603, Rev. Codes 1905 (§ 2218, Comp. Laws 1913), which imposes a liability upon certain public officers for the performance of contracts entered into on behalf of a municipality, which incur indebtedness in excess of the debt limit, contravenes § 61 of the North Dakota Constitution, is urged, but not decided, for the reason that a decision of such point is unnecessary on this appeal.

Penalty — forfeiture — action — time in which to bring.

8. Section 1603, Rev. Codes 1905 (§ 2218, Comp. Laws 1913), construed and *held* to impose a penalty or forfeiture within the meaning of § 6788, Rev. Codes 1905 (§ 7376, Comp. Laws 1913), limiting the time to three years for the commencement of an action upon a statute for a penalty or forfeiture.

Opinion filed April 16, 1915. Rehearing denied June 3, 1915.

Appeal from District Court, Rolette County, *C. W. Buttz,* J.

From an order granting a new trial, plaintiff appeals.

Affirmed.

H. E. Plymat and *Mercer, Swan, & Stinchfield,* for appellant.

The allowance of the accounts as shown by the certified copies of the allowance of the bills was absolute; the warrants on their face are not payable out of such special assessments, but out of "any money in the treasury not otherwise appropriated." This being so, the allowance and the warrants constitute general debts of the city within the meaning of the statutes limiting the amount of indebtedness which may be incurred. 1 Abbott, Mun. Corp. p. 336.

Where instruments are issued by officers of a municipality acting as such, and show on their face an absolute liability, and contain an express promise to pay, a municipal indebtedness is created, and if this is in excess of the debt limit as fixed by statute, such contracts are void, and the officers are individually liable. Fowler v. Superior, 85 Wis. 411, 54 N. W. 800; Sage v. Brooklyn, 89 N. Y. 190; United States v. Ft. Scott, 99 U. S. 152, 25 L. ed. 348; United States v. County Court, 96 U. S. 211, 24 L. ed. 628; Wyandotte v. Zeitz, 21 Kan. 649; State v. Fayette County, 37 Ohio St. 526; Argenti v. San Francisco, 16 Cal. 256.

The warrants contained a written agreement for general indebtedness.

The minutes of the board allowing the claims of plaintiff and others are the best evidence. Abbott, Mun. Corp. 1452.

The acts of Bolstad, claimed as a defense, were not plaintiff's acts, and his knowledge of the facts and circumstances cannot be imputed to plaintiff. He was not acting for plaintiff. Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724; Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972; 10 Cyc. 1053, 1054; E. S. Woodworth & Co. v. Carroll, 104 Minn. 65, 112 N. W. 1054, 115 N. W. 946.

The statute in question is not a penal statute. The liability under the statute is not imposed as for an offense against the public. 16 Enc. Pl. & Pr. 231, 232; Huntington v. Attrill, 146 U. S. 657, 664, 667, 36 L. ed. 1123, 1127, 1128, 13 Sup. Ct. Rep. 224.

The test as to whether a law is penal is whether the wrong sought to be redressed is a wrong to the public or to an individual. Huntington v. Attrill, supra; 6 Words & Phrases, p. 5269; Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952; 25 Cyc. 1052.

Section 1603 of the statutes is intended to hold the officer who violates the statute liable for the performance of the contract. Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952.

An agent is individually liable when he exceeds his authority. The same principle prevails here. Rev. Codes 1905, § 5791, Comp. Laws 1913, § 6359; 2 Morawetz, Priv. Corp. § 908; 1 Am. & Eng. Enc. Law, 2d ed. 1124; Huntington v. Attrill, 146 U. S. 657, 664, 36 L. ed. 1123, 1127, 13 Sup. Ct. Rep. 224; Atlanta v. Chattanooga Foundry & Pipeworks, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

The liability under this statute is not imposed by way of punishment, but is only an additional civil remedy given to a private individual by reason of a private injury inflicted, and this liability is measured only by the extent of that private injury. American Credit-Indemnity Co. v. Ellis, 156 Ind. 212, 59 N. E. 679; Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Neal v. Moultrie, 12 Ga. 104; Hargroves v. Chambers, 30 Ga. 580; Woolverton v. Taylor, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007.

Defendant by stipulation waived all objection to trial by the court under the so-called Newman act, and it was improper for the trial court

upon motion for new trial to consider the question as to whether or not the case was properly triable under such act. All evidence should have been received. Rev. Codes 1905, § 7229, Comp. Laws 1913, § 7846; Erickson v. Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46; First Nat. Bank v. Merchants' Nat. Bank, 5 N. D. 161, 64 N. W. 941; Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Hagen v. Gilbertson, 10 N. D. 546, 88 N. W. 455; 24 Cyc. 160; Averill Coal & Oil Co. v. Verner, 22 Ohio St. 379; Bonewitz v. Bonewitz, 50 Ohio St. 373, 40 Am. St. Rep. 671, 34 N. E. 334; Beattie v. David, 40 N. J. L. 102; Moore v. Hinnant, 90 N. C. 163; Pardridge v. Ryan, 134 Ill. 247, 25 N. E. 627.

The question here presented rests upon the same general principles of waiver and estoppel. Newcomb v. Wood, 97 U. S. 581, 24 L. ed. 1085; 2 Cyc. 670, 683 and cases cited; DeLanney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499; 2 Century Dig. 1557, et seq. and cases therein cited; 21 Enc. Pl. & Pr. 664; 29 Cyc. 944; 14 Enc. Pl. & Pr. 873.

Only such grounds as are stated can be considered by the lower court on the hearing of a motion, or upon appeal. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828; Nye v. Kahlow, 98 Minn. 81, 107 N. W. 733; Colby v. McDermont, 6 N. D. 495, 71 N. W. 772; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Tootle v. Petrie, 8 S. D. 19, 65 N. W. 43; Franz Falk Brewing Co. v. Mielenz Bros. 5 Dak. 136, 37 N. W. 728; De Laney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499.

The judgment for plaintiff in the lower court was amply supported by the evidence, and by reason of the attitude of the trial judge upon the motion for new trial, the usual presumption as to the propriety and correctness of the order does not exist. He was not the judge who tried the case. 29 Cyc. 1009; citing Roche v. District of Columbia, 18 Ct. Cl. 217; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Tyler v. Haggart, 19 S. D. 167, 102 N. W. 682; Northwestern Port Huron Co. v. Zickrick, 22 S. D. 89, 115 N. W. 525; Wallace v. Wallace, 26 S. D. 229, 128 N. W. 143; Spackman v. Gross, 25 S. D. 244, 126 N. W. 389.

William Bateson and *Middaugh, Cuthbert, Smythe, & Hunt,* for respondent.

Where findings of fact and conclusions of law and an order for judgment are not filed until after the expiration of the term of the trial

judge who made them, judgment entered on them is a nullity. Crane v. First Nat. Bank, 26 N. D. 268, 144 N. W. 96.

The case was mistried in the trial court. It cannot be tried here *de novo*. This appeal should be dismissed, and the case retried in the lower court. Rev. Codes 1905, §§ 7009, 7229, Comp. Laws 1913, §§ 7608, 7846; Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676; Hagen v. Gilbertson, 10 N. D. 546, 88 N. W. 455; Otto Gas Engine Works v. Knerr, 7 N. D. 195, 73 N. W. 87; First Nat. Bank v. Merchants' Nat. Bank, 5 N. D. 161, 64 N. W. 941; Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Erickson v. Citizen's Nat. Bank, 9 N. D. 81, 81 N. W. 46; Geils v. Fluegel, 10 N. D. 211, 86 N. W. 712; Barnum v. Gorham Land Co. 13 N. D. 359, 100 N. W. 1079; Laffy v. Gordon, 15 N. D 282, 107 N. W. 969; American Case & Register Co. v. Boyd, 22 N. D. 166, 133 N. W. 65; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390.

Section 1603 of our Revised Codes is unconstitutional in so far as it imposes a penalty, forfeiture, or liability upon private individuals, as it violates § 61 of our Constitution. Divet v. Richland County, 8 N. D. 65, 76 N. W. 993; Richard v. Stark County, 8 N. D. 392, 79 N. W. 863; Laws of 1895, chap. 25; State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; State ex rel. Erickson v. Burr, 16 N. D. 581, 113 N. W. 705.

This action is barred by the statute of limitation, not having been commenced within three years after the cause arose. 16 Enc. Pl. & Pr. 232; Hudson v. Granger, 23 Misc. 401, 52 N. Y. Supp. 10; State v. Hardman, 16 Ind. App. 357, 45 N. E. 345; Butler v. Butler, 62 S. C. 165, 40 S. E. 138; Lagler v. Bye, 42 Ind. App. 592, 85 N. E. 36; Corning v. McCullough, 1 N. Y. 47, 49 Am. Dec. 287; Aldrich v. McClaine, 45 C. C. A. 631, 106 Fed. 791; Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952; Merchants' Bank v. Bliss, 35 N. Y. 412; Re Warren, 52 Mich. 557, 18 N. W. 356; Globe Pub. Co. v. State Bank, 41 Neb. 175, 27 L.R.A. 854, 59 N. W. 683; Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14.

The statute in question creates a forfeiture merely. There is a distinction between public and private corporations as regards penalties and forfeitures. Irvine v. McKeon, 23 Cal. 472; Gadsden v. Woodward, 103 N. Y. 242, 8 N. E. 653; State Sav. Bank v. Johnson, 18 Mont.

440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; Sturges v. Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Clough v. Rocky Mountain Oil Co. 25 Colo. 520, 55 Pac. 809; Jenet v. Albers, 7 Colo. App. 271, 43 Pac. 453; Gregory v. German Bank, 3 Colo. 334, 25 Am. Rep. 760; Thomp. Corp. 2d ed. § 1355, and those following; Dill. Mun. Corp. 4th ed. § 236.

The indebtedness of the village of St. John to plaintiff was not one requiring a general taxation, but was payable out of the proceeds of special assessments to which plaintiff agreed to look. Rev. Codes 1905, §§ 2880, 2899, Comp. Laws 1913, §§ 3877, 3905; 1 Dill. Mun. Corp. 4th ed. § 447; 28 Cyc. 1043, 1057; Soule v. Seattle, 6 Wash. 315, 33 Pac. 384; Park Ridge v. Robinson, 198 Ill. 571, 92 Am. St. Rep. 276, 65 N. E. 104; Quill v. Indianapolis, 124 Ind. 292, 7 L.R.A. 681, 23 N. E. 788; Cason v. Lebanon, 153 Ind. 567, 55 N. E. 768; Thomas v. Olympia, 12 Wash. 465, 41 Pac. 191; Huntington v. Force, 152 Ind. 368, 53 N. E. 443; Kirsch v. Braun, 153 Ind. 247, 53 N. E. 1082; Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; East Oakland Twp. v. Skinner, 94 U. S. 257, 24 L. ed. 126; McClure v. Oxford Twp. 94 U. S. 429, 24 L. ed. 129; Wells v. Pontotoc County, 102 U. S. 625, 26 L. ed. 122; Kelley v. Milan, 127 U. S. 139, 32 L. ed. 77, 8 Sup. Ct. Rep. 1101; Young v. Clarendon Twp. 132 U. S. 340, 33 L. ed. 356, 10 Sup. Ct. Rep. 107; Hill v. Memphis, 134 U. S. 198, 33 L. ed. 887, 10 Sup. Ct. Rep. 562; Marshall County v. Cook, 38 Ill. 44, 87 Am. Dec. 282; Bissell v. Kankakee, 64 Ill. 249, 16 Am. Rep. 554; Montgomery County v. Fullen, 111 Ind. 410, 12 N. E. 298; Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; Ripley County v. Hill, 115 Ind. 316, 16 N. E. 156; Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Law v. People, 87 Ill. 385; Davis v. Des Moines, 71 Iowa, 500, 32 N. W. 470; Swanson v. Ottumwa, 118 Iowa, 161, 59 L.R.A. 620, 91 N. W. 1048; Corey v. Ft. Dodge, 133 Iowa, 666, 111 N. W. 6; Commercial Nat. Bank v. Portland, 24 Or. 188, 41 Am. St. Rep. 854, 33 Pac. 532; North Pacific Lumbering & Mfg. Co. v. East Portland, 14 Or. 3, 12 Pac. 4; Reilly v. Albany, 112 N. Y. 42, 19 N. E. 508; Cumming v. Brooklyn, 11 Paige, 596; Barber Asphalt Pav. Co. v. Harrisburg, 29 L.R.A. 401, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283; Allen v. Davenport, 107 Iowa, 90, 77 N. W. 532; Cooley, Taxn. p. 175;

Raleigh v. Peace, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; Vallelly v. Park Comrs, 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

Bolstad was plaintiff's agent in delivering material to the city. He was clothed with possession and right to dispose of the material, and plaintiff was bound by the contract which he made. 1 Am. & Eng. Enc. Law, 1144; Johnson Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429.

Fisk, Ch. J. This is an appeal from an order of the district court of Rolette county granting defendant's motion for a new trial. The action was brought to recover a balance due for lumber sold by plaintiff to the village of St. John. The theory upon which defendant is sought to be held liable to the plaintiff in this action is that the contract between plaintiff and such village was void by reason of the fact that such indebtedness exceeded the debt limit authorized by the Constitution and statutes of this state, and that under § 1603, Rev. Codes 1905, § 2218, Comp. Laws 1913, this defendant, who was at the time president of the village board, and who participated in the purchase of such lumber, is individually liable for the performance of such contract. It also appears that plaintiff's agent, one Bolstad, who negotiated such sale, was also a member of the village board.

Notwithstanding the fact that the action was one properly triable to a jury, counsel, at the commencement of the trial in the court below, entered into a stipulation not only waiving a jury, but consenting that the case be tried under what is known as the Newman law, and it was by the consent of the court, as well as by the parties, so tried, all evidence offered being received, no rulings made or exceptions saved. This procedure was manifestly irregular, but neither party is in a position to predicate error thereon.

The case, not coming within the provisions of the so-called Newman law, cannot be tried *de novo* in this court, but can only come here for a review of alleged errors of law. Parties cannot by stipulation change the methods prescribed by law to be pursued on appeals to this court. But even though this were a case properly triable under the Newman law, we could not try it *de novo* in this court on this appeal, for the obvious reason that it is not here for trial *de novo* of the entire case, but, as before stated, is here on an appeal merely from an order granting

a new trial. Appellant's counsel in preparing their brief in this court evidently labored under considerable doubt as to the correct practice to pursue, for they have demanded a review of the entire case *de novo* and have also specified errors of law. The demand for a trial *de novo* is, of course, without avail, for reasons already stated, but this is of no serious consequence because appellant has challenged, by a proper specification, the correctness of the order appealed from. They have in fact set forth nine so-called specifications of errors of law, but the only specification requisite to a review of the order appealed from was that the trial court erred in making such order.

In determining the correctness of such order, it is well settled that if any of the grounds urged on the motion for a new trial are tenable, such order will not be disturbed. Such is the holding of this court. Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314. It is also well settled that in reviewing such order the usual rule that the same will not be disturbed in the absence of a showing of an abuse of discretion in making such order does not obtain here, for the judge who granted such order had nothing to do with the trial of the case, he being merely the successor in office of the trial judge. As was said by Chief Justice Corliss in Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419: "But this rule (the rule which makes the exercise of the discretion of the trial court binding upon the appellate court in the absence of a palpable abuse, although the latter court would have reached a different conclusion had it been called upon to exercise its own discretion in the first instance) should have but little weight in this case, for the reason that the judge by whom the new trial was granted was not the judge before whom the case was tried, and therefore was no better qualified by reason of having been present at the trial properly to exercise discretion in the matter than this court. 'The discretion vested in the trial court to grant or refuse a new trial is neither an arbitrary nor a general discretion. It is based on the theory that the judge who tries a case, having the parties, their witnesses and counsel, before him, with opportunity to observe their demeanor and conduct during the trial, and to note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and substantial justice done than the appellate tribunal.' To the judge who granted this new trial the record was as cold and lifeless as it is to us.

No recollection of the appearance, demeanor, conduct of witnesses and parties; no impressions derived from the view of the trial and its manifold incidents,—went to make up the judgment that deemed a new trial just. That judgment was the result merely of the comparison of one lifeless record with another, the affidavits with the record of the proceedings on the trial. The reason for the rule that the order granting a new trial is to be sustained although the trial court would have been justified in reaching a different conclusion, and although the appellate court might deem a different conclusion the better one, therefore, does not exist in this case, and the rule itself should not, under such circumstances, be rigidly followed, if followed at all." See also Sands v. Cruikshank, 15 S. D. 142, 87 N. W. 589, and Lavin v. Kreger, 20 S. D. 80, 104 N. W. 909.

This brings us to a consideration of the merits.

The statutory grounds urged on the motion for a new trial were (1) alleged errors of law occurring at the trial, and (2) alleged insufficiency of the evidence to justify the decision of the court.

Many specifications of errors of law are contained in the settled statement upon which such motion was based, but for reasons hereafter stated it will not be necessary to notice them all.

Certain contentions claimed to be decisive of this appeal are made in respondent's brief, and while we deem but one of them controlling, some of the others are worthy of notice, as they involve important practice questions which may frequently arise.

First, it is argued that because the findings of fact, conclusions of law, and order for judgment of the trial judge were not filed until the day after he was succeeded in office by Judge Buttz, the judgment entered pursuant thereto was a nullity, and therefore such fact alone furnished ample justification for the order vacating the same and granting a new trial. A sufficient answer to this contention is the fact that no such ground for the order complained of was suggested to or acted upon by the lower court in making the order. Furthermore, such judgment was not a nullity, but at the most one irregularly entered, and voidable only when properly challenged by direct attack. See opinion on motion to dismiss this appeal, 149 N. W. 355. No such attack has ever been made in the court below, so far as we are advised, and clearly it cannot be

made in this court for the first time by motion to dismiss the appeal or as a ground for justifying the order appealed from.

Second, it is asserted that because the action was not properly triable under the so-called Newman law, and cannot therefore be tried *de novo* in this court, there was of necessity a mistrial. Sixteen pages of respondent's brief are devoted to this point, but we deem such contention wholly without merit. It occurs to us that it would be a most novel doctrine to announce that a mistrial would of necessity result merely because the parties in a law case have by consent pursued a mode of trial in the district court adopted only to an equity suit triable under the Newman law. Upon what plausible theory or legal reasoning can such contention be upheld? True, upon an appeal from the judgment a trial *de novo* cannot be had in this court, but this the parties were bound to know when they selected by stipulation the method of trial. Even if the consequences to the defeated party of such denial of a right to a trial *de novo* in this court were destructive of important rights, he must be held to be the author of his own injury. Having made his bed he must lie in it. But, happily, no serious consequences necessarily follow from such stipulation. In the first place, as we have heretofore observed, the appeal being from the order granting a new trial, we are not concerned with the Newman law at all, and, second, we fail to perceive any obstacle in the way of the defeated party, after a trial conducted as this was conducted, from having the errors, if any, reviewed and corrected in precisely the same manner and under the same procedure that must have controlled in the absence of such stipulation, or in the absence of the Newman law. Manifestly, the stipulation did not and could not transpose the case from an action at law to a suit in equity, and most certainly not so as to control the statutory method of review of the judgment in this court. We think the above is a sufficient answer to this contention.

It is also argued that § 1603, Rev. Codes 1905, § 2218, Comp. Laws 1913, violates § 61 of the Constitution, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title" etc., and is therefore unconstitutional in so far as it imposes a penalty, forfeiture, or liability upon individuals. This statute had its origin in chapter 126, Laws of 1897, being § 101 thereof. This chapter embraces a general revenue and taxation measure, and its title is "An Act Pre-

scribing the Mode of Making Assessments of Property, the Equalization of and the Levy and Collection of Taxes and for All Other Purposes Relative Thereto," and repealing certain acts therein enumerated. It is contended that the provisions of § 101, in so far as they declare void any contract which incurs an indebtedness in excess of the debt limit of the municipality, and make each officer who makes, or participates in making, or authorizes the making of, any such contract, individually liable for its performance, are not germane to the title of the act.

While we consider such question not free from doubt, our conclusion on the following points renders a decision thereof unnecessary, and we therefore refrain from expressing any opinion thereon. We mention it here merely for the purpose of dispelling any implication which might otherwise arise, that we deem respondent's contention devoid of merit. Assuming, for the purposes of this case only, that such statute is constitutional, we approach what we deem to be the crucial and controlling point on this appeal.

It is contended that this action is barred by the statute of limitations (§ 6788, Rev. Codes 1905, § 7376, Comp. Laws 1913), which provides, among other things, that "an action upon a statute for a penalty or forfeiture, when the action is given to the party aggrieved, or to such party and the state, . . ." must be commenced within three years. This contention rests upon the assumption that the statute imposing such liability upon officers of a municipality is penal, rather than remedial. Does such statute impose a penalty upon such officers, or does it merely establish a contract right? It reads: "And every contract made in contravention of the provisions of this section shall be utterly null and void in regard to any obligation thereby imposed on the corporation on behalf of which such contract purports to be made; but every commissioner, officer, agent, supervisor, or member of any municipal corporation that makes or participates in making or authorizes the making of any such contract shall be held individually liable for its performance." [Rev. Codes 1905, § 1603, Comp. Laws 1913, § 2218.]

This law, if constitutional, concededly creates a statutory liability of some kind, and the perplexing question is whether such liability can be regarded as contractual in any true sense of the term. If such liability is not contractual, then it must, we think, be treated as in the nature of a penalty or forfeiture. We have examined the authorities cited by

appellant to support its contention that such statute does not impose a penalty or forfeiture, but, as stated by respondent, such authorities merely involve statutes imposing personal liability upon officers of *private corporations,* and therefore they are not directly in point, although they announce principles somewhat analogous to the case at bar. These authorities are: American Credit-Indemnity Co. v. Ellis, 156 Ind. 212, 59 N. E. 679; Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Neal v. Moultrie, 12 Ga. 104; Hargroves v. Chambers, 30 Ga. 580; Woolverton v. Taylor, 132 Ill. 197, 22 Am. St. Rep. 521, 23 N. E. 1007; 16 Enc. Pl. & Pr. 231, 232; Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952; Atlanta v. Chattanooga Foundry & Pipe Works, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23; Brady v. Daly, 175 U. S. 148, 44 L. ed. 109, 20 Sup. Ct. Rep. 62; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

We admit that there is much force in the argument of appellant's counsel, yet, we are constrained to hold that the statutory liability imposed under said section is in the nature of a penalty or forfeiture within the meaning of § 6788, Rev. Codes 1905, § 7376, Comp. Laws 1913, which prescribes that an action under a statute for a penalty or forfeiture must be brought within three years. We reach this conclusion with some misgivings, but after careful consideration of the language of the statute, which upon its face evidently aims to shift upon municipal officers who violate its provisions the burden of performing the contract which they have attempted to make in behalf of such municipality. No authorities directly in point under the facts have been called to our attention, and we have found none, but the following reasons prompt us in arriving at this conclusion. In the first place, the authorities, even in cases involving the nature and legal effect of statutory provisions imposing similar liability upon officers and trustees of private corporations under analogous circumstances, are not by any means harmonious, and it is at least doubtful if the weight of authority, as well as the better reasoned cases under statutes similar to ours, do not support the doctrine contended for by respondent in the case at bar. Indeed, most of the cases cited and relied upon by the appellant will, on careful examination, be found to be easily differentiated from this case on the ground of statutory provisions differing from those in this state. Others ex-

pressly recognize that there is quite an array of respectable authority holding that statutes similar to the one they construe are penal, and subject to the statute of limitations for suits based on penal statutes. See Nebraska Nat. Bank v. Walsh, 68 Ark. 433, 82 Am. St. Rep. 301, 59 S. W. 952, wherein, among other things, it is said: *"Much depends, of course, upon the language of the respective statutes,* as to the construction to be given them, and the correct application of the decisions construing them. Many New York cases are cited as authority for holding our statute penal. *The New York limitation statute is as follows: 'An action upon a statute for a penalty or forfeiture when the action is given to the person aggrieved or to that person and the people of the state, except where the statute imposing it prescribes a different limitation, shall be brought within three years.'* Other cases based on statutes embodying similar language are cited. *We do not consider cases based upon such statutes as in conflict with the view we have expressed."* See also American Credit-Indemnity Co. v. Ellis, 156 Ind. 212, 59 N. E. 679, where it is said: "Section 15, as we now find it, differs so widely from the provisions of the statutes of New York and other states, fixing the liability of officers upon the violation of the law requiring the making of a report, that the decisions of the courts of those states holding their statutes penal are wholly inapplicable." In this connection it should be noted that our statute of limitations here in question is the same as that in the state of New York. As opposed to the authorities cited by respondent we merely refer to the following: Merchants' Bank v. Bliss, 35 N. Y. 412; Wiles v. Suydam, 64 N. Y. 173; Veeder v. Baker, 83 N. Y. 156; Gadsden v. Woodward, 103 N. Y. 242, 8 N. E. 653; State Sav. Bank v. Johnson, 18 Mont. 440, 33 L.R.A. 552, 56 Am. St. Rep. 591, 45 Pac. 662; Clough v. Rocky Mountain Oil Co. 25 Colo. 520, 55 Pac. 809. See also opinion of Chief Justice Cooley in Re Warren, 52 Mich. 557, 18 N. W. 356. See also Merchants' Nat. Bank v. Northwestern Mfg. & C. Co. 48 Minn. 349, 51 N. W. 117.

That the effect, and not the mere form, of the statute, is to be considered, see Diversey v. Smith, 103 Ill. 378, 42 Am. Rep. 14. Tested by such rule it seems obvious that our statute, even though remedial in a sense, is also penal within the meaning of our three-year-limitation statute, for it most certainly penalizes the public officers who violate its provisions. Such is the inevitable effect of an enforcement thereof.

That a statute may be both penal and remedial in its operation has support in the authorities. Sedgwick, Stat. & Const. Law, 41, quoted in Diversey v. Smith, supra.

Another, and to our minds a quite controlling, reason why we should uphold respondent's contention on this point, is the fact that it evidently was the legislative intent that § 6788, Rev. Codes 1905, § 7376 Comp. Laws 1913, should apply to cases like this, for it is expressly restricted to actions "upon a statute for a penalty or forfeiture, *when the action is given to the party aggrieved,*" etc., there being in the same act a separate limitation fixing one year for the commencement of an action on a statute to recover a penalty or forfeiture by persons not aggrieved, but who nevertheless are given the privilege of collecting and retaining such penalty in whole or in part. See § 6792, Rev. Codes 1905, § 7380, Comp. Laws 1913. Manifestly, therefore, the legislature has recognized a marked distinction in the nature of statutory penalties and forfeitures, there being one class for which a recovery can be had only by the aggrieved party, to which class the statute in question belongs. If this case does not involve the latter, it is difficult to imagine any case involving this class.

Our views on this point render a consideration of the other questions unnecessary.

The order appealed from is affirmed.

LILLY MOELLER v. CITY OF RUGBY, a Municipal Corporation.

(153 N. W. 290.)

Action for damages for injury caused by defective sidewalk. Defense, contributory negligence.

Sidewalk — in dangerous condition — walking over — in darkness — contributory negligence.

Plaintiff made a trip over a known dangerous sidewalk upon a dark night,

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Note.—As to negligence in falling on an uneven sidewalk, see note in 17 L.R.A. (N.S.) 195.

As to effect of knowledge of defect in highway to charge one with contributory negligence, see notes in 21 L.R.A.(N.S.) 638, and 48 L.R.A.(N.S.) 634.

and encumbered herself with a bundle of clothes upon one arm, a framed diploma upon the other, and an electric light bulb in each hand. Under the circumstances disclosed by the opinion, plaintiff was guilty of such contributory negligence as precludes her recovery in this action.

Opinion filed April 28, 1915.

Appeal from the District Court of Pierce County, *Burr,* J.

Reversed.

A. E. Coger and *Paul Campbell,* for appellant.

A traveler who places himself in a dangerous position in the highway cannot recover for resulting injury. 15 Am. & Eng. Enc. Law, 2d ed. 468.

If one, knowing of the presence of stones, attempts to pass over them instead of around them, he is liable as a matter of law for injuries caused by tripping thereon. Nicholas v. Peck, 20 R. I. 533, 40 Atl. 418; Grandorf v. Detroit Citizens' Street R. Co. 113 Mich. 496, 71 N. W. 844; 7 Am. & Eng. Enc. Law, 2d ed. 393.

If, by the exercise of ordinary care and diligence, the person injured could have avoided the injury, and he fails to exercise such care and diligence, he cannot recover. 6 Am. & Eng. Enc. Law 2d ed. 411; 28 Cyc. 1522; Ely v. Des Moines, 86 Iowa, 55, 17 L.R.A. 124, 52 N. W. 475; Plummer v. Kansas City, 48 Mo. App. 482; Collins v. Janesville, 107 Wis. 436, 83 N. W. 695; Lerner v. Philadelphia, 221 Pa. 294, 21 L.R.A.(N.S.) 615, 70 Atl. 755; James v. Wellston, 13 L.R.A (N.S.) 1262, note.

Knowledge of defects, or where one fails to remember, constitutes conclusive evidence of negligence. Gilman v. Deerfield, 15 Gray, 577; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202.

It is his duty in such cases to take some other available route. Forker v. Sandy Lake, 130 Pa. 123, 18 Atl. 609; Grattan v. Williamston, 116 Mich. 462, 74 N. W. 668; Collins v. Janesville, 111 Wis. 348, 87 N. W. 244, 1087, 10 Am. Neg. Rep. 520, 107 Wis. 436, 83 N. W. 695; Gilman v. Deerfield, and Bruker v. Covington, supra; 17 Cyc. 57.

On the part of plaintiff, there was no evidence of care or caution to submit to the jury. She could not see on account of darkness; she burdened herself with lights and glass; the adjacent roadway was safe; the sidewalk on the other side of the street was safe. She knew the

condition of the walk she chose to use. Circleville v. Sohn, 20 Ohio C. C. 368, 11 Ohio C. D. 193; Grattan v. Williamston, 116 Mich. 462, 74 N. W. 668.

One who knows the existence of an obstruction and attempts to pass it, when in consequence of the darkness he cannot see it, has no reason to complain of an injury received by him therefrom. Lerner v. Philadelphia, 221 Pa. 294, 21 L.R.A.(N.S.) 614, 70 Atl. 755; Collins v. Janesville, 107 Wis. 436, 83 N. W. 695; Lemman v. Spokane, 38 Wash. 98, 80 Pac. 280; Lockport v. Licht, 221 Ill. 35, 77 N. E. 581, 20 Am. Neg. Rep. 292; Monroeville v. Weihl, 13 Ohio C. C. 689, 6 Ohio C. D. 188; Columbus v. Griggs, 113 Ga. 597, 84 Am. St. Rep. 257, 38 S. E. 953, 10 Am. Neg. Rep. 28; Conneaut v. Naef, 54 Ohio St. 529, 44 N. E. 236; Durkin v. Troy, 61 Barb. 437; Sickles v. Philadelphia, 209 Pa. 113, 58 Atl. 128.

Where observation would inform of danger, one who uses sidewalk takes risk. Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512; Muller v. District of Columbia, 5 Mackey, 286; Harrigan v. Brooklyn, 16 N. Y. Supp. 743.

One assumes risk of apparent dangers. Washington v. Small, 86 Ind. 462.

Where knowledge exists, instructions assuming no knowledge are erroneous. Collins v. Janesville, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520; Rusch v. Davenport, 6 Iowa, 443; McLeod v. Spokane, 26 Wash. 346, 67 Pac. 74.

Present knowledge is a complete defense. Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36; Centralia v. Krouse, 64 Ill. 19; Dehlinger v. Chicago, 100 Ill. App. 314; Gosport v. Evans, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; Wilson v. Charlestown, 8 Allen, 137, 85 Am. Dec. 693; Irion v. Saginaw, 120 Mich. 295, 79 N. W. 572; Wright v. St. Cloud, 54 Minn. 94, 55 N. W. 819; Koch v. Edgewater, 14 Hun, 544; Schaafler v. Sandusky, 33 Ohio St. 246, 31 Am. Rep. 533; Hotchkin v. Philipsburg, 5 Sadler (Pa.) 188, 8 Atl. 434; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115.

One is not excused for recklessly casting self on a known danger. Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069; Evansville v. Christy, 29 Ind. App. 44, 63 N. E. 867; Barce v. Shenandoah, 106 Iowa, 426, 76 N. W. 747; Mayhood v. New York, 119 App. Div. 100,

103 N. Y. Supp. 856; Hentz v. Somerset, 2 Pa. Super. Ct. 225; Tuttle v. Clear Lake, — Iowa, —, 102 N. W. 136; Sheats v. Rome, 92 Ga. 535, 17 S. E. 922; Corlett v. Leavenworth, 27 Kan. 673; Rogers v. Bloomington, 22 Ind. App. 601, 52 N. E. 242; Coloney v. Kalamazoo, 124 Mich. 655, 83 N. W. 618; Gosport v. Evans, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; Caven v. Troy, 32 App. Div. 154, 52 N. Y. Supp. 804; Messenger v. Bridgetown, 31 Can. S. C. 379; Slaughter v. Huntington, 64 W. Va. 237, 16 L.R.A.(N.S.) 459, 61 S. E. 155; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231; Macomb v. Smithers, 6 Ill. App. 470; Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675; Erie v. Magill, 101 Pa. 616, 47 Am. Rep. 739; Idlett v. Atlanta, 123 Ga. 821, 51 S. E. 709; Clayton v. Brooks, 150 Ill. 97, 37 N. E. 574; Richmond v. Mulholland, 116 Ind. 173, 18 N. E. 832; Munice v. Hey, 164 Ind. 570, 74 N. E. 250, 18 Am. Neg. Rep. 51; Black v. Manistee, 107 Mich. 60, 64 N. W. 868; Cohn v. Kansas City, 108 Mo. 387, 18 S. W. 973; Boyle v. Mahanoy City, 19 Pa. Co. Ct. 195; Ringelstein v. San Antonio, 21 S. W. 634; Winchester v. Carroll, 99 Va. 727, 40 S. E. 37; Roanoke v. Harrison, 1 Va. Dec. 801, 19 S. E. 179; DePere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Lockport v. Licht, 113 Ill. App. 613; Meridian v. Stainback, — Miss. —, 30 So. 607, 10 Am. Neg. Rep. 619; Smith v. Jackson, 106 Mich. 136, 63 N. W. 982; Collins v. Janesville, 111 Wis. 348, 87 N. W. 241, 1087, 10 Am. Neg. Rep. 520; Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; Bender v. Minden, 124 Iowa, 685, 100 N. W. 352; New Castle v. Grubbs, 171 Ind. 482, 86 N. E. 757; Berg v. Milwaukee, 83 Wis, 599, 53 N. W. 890; Mt. Vernon v. Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Mitchell v. Tell City, — Ind. App. —, 81 N. E. 594; Bloomington v. Rogers, 9 Ind. App. 230, 36 N. E. 439; Perry v. Cedar Falls, 87 Iowa, 315, 54 N. W. 225.

Knowledge, darkness, and attempt, constitute contributory negligence. Hesser v. Grafton, 33 W. Va. 548, 11 S. E. 211; Austin v. Charlotte, 146 N. C. 336, 59 S. E. 701; Monence v. Kendall, 14 Ill. App. 229; Casey v. Fitchburg, 162 Mass. 321, 38 N. E. 499; Forker v. Sandy Lake, 130 Pa. 123, 18 Atl. 609; Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637; Graney v. St. Louis, 141 Mo. 180, 42 S. W. 941, 3 Am. Neg. Rep. 419; Pittman v. El Reno, 4 Okla. 638, 46 Pac. 495, and cases

cited; Bohl v. Dell Rapids, 15 S. D. 619, 91 N. W. 315; Gosport v. Evans, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; Erie v. Magill, 101 Pa. 616, 47 Am. Rep. 739; Friday v. Moorhead, 84 Minn. 273, 87 N. W. 780; Marshall v. Belle Plaine, 106 Iowa, 508, 76 N. W. 797; McLeod v. Spokane, 26 Wash. 346, 67 Pac. 74; Garbanati v. Durango, 30 Colo. 358, 70 Pac. 686; Irion v. Saginaw, 120 Mich. 295, 79 N. W. 572; Wright v. St. Cloud, 54 Minn. 94, 55 N. W. 819; Beatrice v. Forbes, 74 Neb. 125, 103 N. W. 1069; Collins v. Janesville, 107 Wis. 436, 83 N. W. 695; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115; Barce v. Shenandoah, 106 Iowa, 426, 76 N. W. 747; Tuttle v. Clear Lake, — Iowa, —, 102 N. W. 136; Black v. Manistee, 107 Mich. 60, 64 N. W. 868; De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Parkhill v. Brighton, 61 Iowa, 103, 15 N. W. 853; McGinty v. Keokuk, 66 Iowa, 725, 24 N. W. 506; Cosner v. Centerville, 90 Iowa, 33, 57 N. W. 636; Sargeant v. Detroit, 156 Mich. 291, 120 N. W. 792; Stock v. Tacoma, 53 Wash. 226, 101 Pac. 830; Lemman v. Spokane, 38 Wash. 98, 80 Pac. 280; Kornetski v. Detroit, 94 Mich. 341, 53 N. W. 1106; Bowman v. Ogden City, 33 Utah, 196, 93 Pac. 563; McKenzie v. Northfield, 30 Minn. 456, 16 N. W. 264; Salzer v. Milwaukee, 97 Wis. 471, 73 N. W. 20; Mt. Vernon v. Dusouchett, 2 Ind. 586, 54 Am. Dec. 467; Quincy v. Baker, 81 Ill. 300, 25 Am. Rep. 278; Gibson v. Denison, 153 Iowa, 320, 38 L.R.A.(N.S.) 644, 133 N. W. 712; Knoxville v. Cain, 128 Tenn. 250, 48 L.R.A.(N.S.) 628, 159 S. W. 1084, Ann. Cas. 1915B, 762.

D. C. Greenleaf and *E. R. Sinkler,* for respondent.

The requests by defendant for instructions by the court were fully covered in the court's general instructions, and this is sufficient. Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 719; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 111, 127 N. W. 91; Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964.

Plaintiff thought the opening in the sidewalk where she was injured was farther west than where it actually was, and it was so dark she couldn't exactly locate it. She felt her way carefully and walked slowly. These facts do not show contributory negligence. Johnson v.

Fargo, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 719.

BURKE, J. Plaintiff was awarded $800 damages for injury alleged to have been received from fall upon defective sidewalk. Defendant appeals, relying principally upon the defense of contributory negligence. For the purposes of this appeal only, the city concedes its negligence, but alleges that plaintiff's negligence contributed to her own injury, and therefore, under well-settled principles of law, she ought not to recover.

(1) Under the circumstances, it is necessary to examine the facts disclosed by the record, and this will be given our first consideration. Plaintiff is a married woman, rather stout, was forty-one years of age at the time of the accident, and had lived in the city of Rugby about six years. Plaintiff was living with her family of four children in a house which is designated the "west" house. She had made it a practice to visit neighboring towns to give music lessons, sometimes staying several days. About the 27th or 28th of August, 1912, she started on one of those trips, returning Saturday evening, August 31st. During her absence her two daughters had moved the household effects to another house, designated the "east" house. This new location was on the same side of the street, one block and one lot, or something like 450 feet, distant. Between the two residences was a board sidewalk in a dilapidated condition. Plaintiff had resided in the west house about two years, and had passed along said street about four times a week, coming and going, though not always on that side of the street. She had noticed the condition of the walk, and on one occasion at least had spoken to the owner of the premises in an effort to get it repaired. She says she had noticed the defects of said sidewalk many times, and that everybody in Rugby must have known about them, too. Upon the evening of the said 31st of August about 10 o'clock, plaintiff went from the new location to the old house, passing over such defective sidewalk. Upon this journey she was accompanied by one of her daughters, who took her arm and piloted her safely to the old or west

house. After looking over the house to see if everything had been moved, plaintiff took some clothes on her left arm and a framed music diploma, which she suspended over her right arm by the hanging wire, and in each of her hands she took a common tungsten electric light bulb. In this condition she started back over the same sidewalk without the attendance of the daughter.

She testifies:

A. It was so pitch dark I could not have seen at all, if I had not carried a thing. . . .

Q. You say it was dark that night?

A. Yes, sir. It was pitch dark.

Q. Were you able to see any distance in front of you at that time?

A. I could not see a thing in front of me,—but not on account of the things I was carrying, simply on account of the darkness of the night.

Q. Now, did you know at that time of any defects in the sidewalk along there?

A. Yes, sir. I did. I doubt if there were many people in this town that did not know it.

Q. Go on and tell the jury how you proceeded along the sidewalk, and if anything happened to you while you were proceeding along the sidewalk.

A. I proceeded just as carefully as I could on account of the condition of the sidewalk, and dragged my feet along, but I thought this opening in the sidewalk was a little farther to the west than where it was, and it was so pitch dark I could not exactly locate the opening, and I got across the first open spot, and when I got here, of course, I was thrown into this opening on account of the darkness of the night. I could not see where I was walking. . . . I was thrown suddenly and violently to the ground, or rather I struck across the other planks on ahead of me.

Q. What happened to the bulbs in your hands?

A. They were smashed to innumerable pieces. . . .

Cross-examination:

Q. How long did you know the hole in which you fell had been in the sidewalk before you fell into it?

A. I can't exactly state. I knew it was a good while. It was a good long while. It was left that way very many months.

Q. And you had noticed it time and again in passing to and fro?

A. I had noticed it, yes, sir. I had noticed that, but there were so many others besides. . . .

Q. You are certain it was heavy clouds?

A. I am.

Q. Extremely dark?

A. Yes, sir, dark as pitch.

Q. Threatening rain?

A. It did look like rain, yes, sir, in my estimation. . . .

Q. Isn't there an electric light on that street?

A. It is so small that you can hardly see it.

Q. Isn't there one there?

A. It is one of the small incandescents.

Q. Isn't there one there?

A. Yes, sir, it wasn't burning that night. It very seldom did burn. . . . I know that light wasn't burning at our corner. . . . It was scarcely ever burning all summer long. . . .

Q. When did you first notice the darkness?

A. The moment I first stepped out of my door in the new house.

Q. Did you see it (the defect in sidewalk) as you went down?

A. I couldn't see it. It was too dark to see anything.

Q. What did you do? Did you go around?

A. We tried to walk around it, but we could not walk around it because it was so muddy and slippery. . . .

Q. And there was a beaten path around the opening in the sidewalk, was there not?

A. Not that I know of. . . .

Q. Just tell to the jury exactly how you got over or around that hole as you went down.

A. Well, I picked my way as carefully as I possibly could.

Q. Just state to the jury how you got over or around that hole as you went down.

A. I walked over it with the help of my daughter, just as carefully and slowly as I possibly could.

Q. You walked over it?

A. I did. . . .

Q. What did she (the daughter) say when she got to that hole?

A. She said, "Mamma, be careful for these walks are so dreadfully bad," so she took my arm. . . .

Q. You didn't realize when you passed over this hole?

A. Why, certainly.

Q. How did you realize it?

A. The effort to get across it.

Q. You made an extreme effort to get across it?

A. I did.

Q. How did you know where it was?

A. Why, I couldn't have known if my daughter had not led me by the arm. . . .

Q. As you went down from the east house to the west house, how many holes in the sidewalk did you step into?

A. I can't possibly tell you how many.

Q. Do you remember stepping into any?

A. I remember stumbling along, . . . and getting across them the best way I could.

Q. Explain to the jury how you picked your way from the east house to the west house; what do you mean by that?

A. Well, I used the greatest care I possibly could in picking my way across them.

Q. How?

A. Felt my way with my feet, you might say.

Q. Then you went along kind of shuffling one foot ahead of the other, feeling where you were stepping as you went down before you stepped on the foot and finished, is that correct?

A. Partly so, yes.

Q. Partly so? And in what other respect,—were you looking at the sidewalk?

A. I was trying to look, but I could not see anything.

Q. And you could not see?

A. No, sir, I could not see.

Q. You didn't see the sidewalk at all?

A. I tried to see,—all I remember of the sidewalk is it was so dark out,—I told you it was so very hard to see it.

Q. So you went out of the east house and down along this dangerous

sidewalk, and felt your way over it in the dark, over to the west house, to get some stuff, and coming back over it you fell in there?

A. Yes, sir.

Q. At the time you went down you knew of the condition and character of this sidewalk?

A. I did.

Q. And had it in your mind?

A. I certainly did, and tried to be as careful as I possibly could.

Q. Do you remember as you passed over this hole going down, thinking to yourself you must avoid it and go around it on the return?

A. I remember thinking of that hole and all of the other holes, and making up my mind to be as careful as I possibly could be.

Q. You said you remember the talk you had with Dr. Collison and myself at your house?

A. I remember you were there, yes, and remember talking to you.

Q. Do you remember saying you noticed that hole as you were going down, and that you thought to yourself, on your return, you must avoid it and go around it?

A. I remember saying I knew the hole was there, and that I tried to be as careful as I possibly could to avoid it.

Q. You say, when you reached that hole you thought to yourself, on your return, you must avoid it and go around it,—did you make that remark in the presence of Dr. Collison and myself?

A. I can't remember saying anything about going around the hole, but I did say the hole was there. . . .

Q. When, after you left the west house on your return trip, did you first begin to think about that sidewalk?

A. When I had crossed the crossing, and reached the Dr. Sorenson house. There is a—

Q. In the corner, at the corner, west corner of the block in which you lived, and in which you fell,—then is when you started to think about this sidewalk?

A. Yes, sir, it is.

Q. And you at that time thought about this hole,—you had called Mrs. Daigle's attention to it?

A. No, I thought of every hole and every plank, every condition in the whole sidewalk in that whole block.

Q. And, nevertheless, without stepping out alongside of the sidewalk, you then had the two tungsten lights in your hands, and the package, you felt your way up there on that very dark night, is that true?

A. It was muddy and I had to feel my way.

Q. You preferred to take chances on falling into a hole, rather than stepping out in the mud, is that correct?

A. It was muddy and slippery, and I was afraid I would fall there also. . . .

Q. Did you wear rubbers as you went up to the west house?

A. Yes, sir.

Q. You wore rubbers that night?

A. Yes, sir. My mind was not on that crossing at that time; it was on this sidewalk. . . .

Q. And if it had not been pitch dark you could have seen those holes in the sidewalk?

A. Sure I could—they were large enough to be seen.

Q. Is this (a photograph) a correct representation of the place where you fell?

A. Yes, sir, it seems to be.

Q. And is that a correct representation of the outside of the walk?

A. I can't say as to that, but I know it is as to the planks and boards.

Q. You noticed that there was grass on there, did you not?

A. There seems to be. . . .

We have tried to set out from plaintiff's own testimony a description of the surroundings at the time and place of the accident. Much other testimony was introduced, but it is unnecessary to refer to it in determining whether or not plaintiff was guilty of contributory negligence. No other witness saw the accident.

It is hardly necessary to say that the subject of road and sidewalk accidents has been thoroughly considered by the courts. Anyone interested in public road defects and accidents caused thereby should consult a valuable note found at page 1262, vol. 13 L.R.A.(N.S.). The question of defects in sidewalks is exhaustively briefed in a note at page 195, vol. 17 L.R.A.(N.S.), and the question of contributory negligence as affected by knowledge of a defect in a sidewalk is also exhaustively briefed at a note beginning at page 614, vol. 21 L.R.A.(N.S.). So

thoroughly covered is the matter in those various notes that we will be satisfied in this opinion to refer to and quote from them. From the note at page 614, 21 L.R.A.(N.S.), we quote: "Travelers upon streets must use all reasonable care and caution to avoid danger; they cannot carelessly run into danger and then make others pay for their negligence. [Cases cited.] While a city owes its citizens the duty to keep its highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his senses, and not to run into obstructions that he is familiar with, or which, by the exercise of ordinary care, he could discover and easily avoid. [Cases cited.] And a person injured by a defective street cannot recover of the city for the injury if he was guilty of negligence contributing to the injury. [Cases cited.] . . . Though a municipal corporation may have failed to exercise proper care in the repair of its streets in keeping them free from obstruction, and but for such negligence an injury would not have happened, yet, the party injured cannot recover if he was aware of the defect or obstruction and failed to use ordinary care to avoid the accident. [Cases cited.] To warrant a recovery for an injury caused by a defect or obstruction in a highway, the person injured must have been in the exercise of ordinary care at the time of receiving the injury. [Cases cited.] . . . So, where an injury from an obstruction or defect in a street is the result of the negligence of both parties, the person injured cannot recover, as the law will not in such cases undertake to measure and balance the degree of responsibility attributable to each. [Cases cited.] . . . [At page 622.] A person knowing a street or sidewalk to be dangerous has no right to assume it to be safe, and act upon that assumption. [Cases cited.] . . . The presumption which a traveler may indulge, that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook, has no application where the danger is known and obvious. [Case cited.] And while a traveler may indulge in a presumption that the street on which he travels is not defective, an instruction to this effect is misleading and inapplicable where the person injured knew of the existence of the defect in question. [Cases cited.] . . . And if, in passing upon a street, he sees that there is an appearance of danger, he has no right to proceed further upon the presumption that the walk is in a safe condition; he must then use care commensurate with such

apparent danger; and, if he fails so to act, and receives an injury, he cannot recover." See also 28 Cyc. 1419–1428, and cases cited. Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 719, is not in point upon the questions herein decided.

The question of contributory negligence is primarily and generally a question of fact for the jury. The question becomes one of law, authorizing its withdrawal from the jury, only when but one conclusion can be drawn from the undisputed facts. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359. If the undisputed facts are of such a character that reasonable men might draw different conclusions or deductions therefrom, then the question of negligence must be submitted to the jury. Heckman v. Evenson, 7 N. D. 173, 73 N. W. 427.

In the light of the foregoing facts and law, we now approach this case with an idea of determining whether or not plaintiff herein was guilty of such contributory negligence as precluded recovery as a matter of law, in this action. Respondent insists that the facts correspond closely enough with those in Pyke v. Jamestown, supra, to be governed thereby. But we do not agree with this contention. In the Pyke Case plaintiff was traveling upon a sidewalk with which she was somewhat familiar, but the defects of which she had forgotten. Her business was to go from her home to a hospital where she was receiving treatment. The accident occurred on March 1st and the weather was cold. In the case at bar plaintiff had no urgent business in going from the new to the old house, excepting, as she says, to "look around to see what is left." She had lived within 300 feet of this defect for over two years, and testifies that she knew about it and remembered it both coming and going. If the night was as dark as she says it was, ordinary prudence would have suggested a delay until morning or the carrying of a lantern. After traveling to the west house, she encumbered herself with a framed diploma, faced with glass, and with a package which she says contained "some waists for the girls and a couple of dressing sacks of my own,—and I can't exactly positively tell you, because I don't just remember." Then, with the knowledge of the dangerous road still in her mind, she starts back with two electric light bulbs, one in each hand. The daughter who had assisted her over the path the first time did not accompany her home. When we further remember that plaintiff was a stout woman, forty-one years of age, the only con-

clusion that can be reached is that she was guilty of negligence so palpable that reasonable minds must reach but one conclusion as to its existence. Respondent argues that the streets were muddy and that the other side of the sidewalk was equally bad, but no attempt is made to controvert the negligence pointed out by appellant, in making the trip at all, in making the return trip without a lantern, and in encumbering herself with the articles mentioned; and we believe no answer can be made thereto.

As hereinbefore mentioned, the negligence of the defendant and the negligence of the plaintiff combine to cause the injury, and there is no means of ascertaining the proportion contributed by plaintiff, and the law says that she cannot recover. Defendant moved for a directed verdict at the close of all of the testimony, and for judgment notwithstanding the verdict, upon motion for a new trial. These motions should have been granted. The trial court is directed to so order at the present time.

BERTINA RASMUSSEN v. HAROLD LEROY STONE and William T. Souder.

(152 N. W. 809.)

Mortgage of homestead — married man — wife — executed and acknowledged by — must be.

1. A mortgage on a homestead of a married man, in order to be valid must be both executed and acknowledged by the wife.

Acknowledgment — grantor must appear before officer — admission of authenticity.

2. To constitute an acknowledgment, the grantor must appear before the officer, and such grantor must in some manner, with a view to giving it authenticity, make an admission to such officer of the fact that he had executed such instrument.

Execution of mortgage — evidence of.

3. Evidence examined and *held* to be no such admission in the case at bar.

Note.—As to impeachment of certificate of acknowledgment, see note in 41 L.R.A. (N.S.) 1161.

Wife — signature of — notes and mortgage.

4. Evidence examined and alleged signatures of wife to notes and mortgage *held* not to be her signatures.

Opinion filed May 8, 1915.

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

Action to quiet title to land. Judgment for plaintiff. Defendants appeal.

Affirmed.

B. W. Shaw, for appellant.

The certificate of a notary public imports verity, and where such certificate is to an instrument affecting title to real property, the necessity for rendering such title secure requires that the proof to overthrow a certificate regular on its face must be so strong as to exclude every reasonable doubt as to its falsity. 1 Cyc. 623, and cases cited; Patnode v. Deschenes, 15 N. D. 100, 106 N. W. 573; 2 Jones, Conv. § 1196; McCardia v. Billings, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008; Northwestern Loan & Bk. Co. v. Jonasen, 11 S. D. 566, 79 N. W. 842; Phillips v. Bishop, 35 Neb. 487, 53 N. W. 375; Young v. Duvall, 109 U. S. 573, 27 L. ed. 1036, 3 Sup. Ct. Rep. 414; Englert v. Dale, 25 N. D. 587, 142 N. W. 169; Lennon v. White, 61 Minn. 150, 63 N. W. 620; Jamison v. Jamison, 3 Whart. 469, 31 Am. Dec. 536; Strauch v. Hathaway, 101 Ill. 11, 40 Am. Rep. 193; Homœopathic Mut. L. Ins. Co. v. Marshall, 32 N. J. Eq. 103; Northwestern Mut. L. Ins. Co. v. Nelson, 103 U. S. 544, 26 L. ed. 436; Citizen's Sav. & Loan Asso. v. Heiser, 150 Pa. 514, 24 Atl. 733; Heilman v. Kroh, 155 Pa. 1, 25 Atl. 751; Dolph v. Barney, 5 Or. 191; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Greene v. Godfrey, 44 Me. 25; Bissett v. Bissett, 1 Harr. McH. 211; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Mutual L. Ins. Co. v. Corey, 135 N. Y. 326, 31 N. E. 1095; Pierce v. Feagans, 39 Fed. 587.

Such evidence must be clear and convincing. Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; Young v. Duvall, 109 U. S. 573, 27 L. ed. 1036, 3 Sup. Ct. Rep. 414.

A notary's certificate is conclusive of every fact appearing on the face of the certificate, and evidence as to what passed at the time of

acknowledgment is not admissible to impeach the certificate except in cases of fraud or imposition in securing the acknowledgment, and where knowledge of it, or some circumstance sufficient to put him on inquiry, is brought home to the grantee. Meyer v. Gossett, 38 Ark. 383.

Failure to give proper credence to such certificates would render land titles insecure, and work untold injury and possible loss. O'Donnell v. Kelliher, 62 Ill. App. 641; Ramsburg v. Campbell, 55 Md. 227; Blackman v. Hawks, 89 Ill. 512; Tunison v. Chamblin, 88 Ill. 389; Carr v. H. C. Frick Coke Co. 170 Pa. 62, 32 Atl. 656; Northwestern Loan & Bk. Co. v. Jonasen, 11 S. D. 566, 79 N. W. 842; Newton v. Emerson, 66 Tex. 142, 18 S. W. 348; Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Johnson v. Van Velsor, 43 Mich. 209, 5 N. W. 265.

John F. Sullivan, for respondent.

Plaintiff had an interest, an estate, in the land in question, other than a mere possessory right. Kuhnert v. Conrad, 6 N. D. 221, 69 N. W. 185.

In an action to determine adverse claims to real property, a defendant who interposes a counterclaim for the purposes of the trial is deemed a plaintiff. Comp. Laws 1913, § 8153.

The court will take judicial notice of whatever ought to be generally known within the limits of its jurisdiction. Comp. Laws 1913, § 7983, subdiv. 30.

It is just as essential that a mortgage on the homestead be acknowledged as it is that it be executed. Compiled Laws 1913, § 5608.

Bruce, J. This is an action to quiet title in the plaintiff, Bertina Rasmussen, to a quarter section of land, and is brought in the form of the statutory action to determine adverse claims. The defendant answers, setting up certain mortgages alleged to have been executed by the plaintiff and her deceased husband, Hans C. Rasmussen, and asks to have these mortgages foreclosed. The plaintiff replies, denying the execution of the notes and mortgages as far as she is concerned, in and alleging that said notes and mortgages are void as the land involved was the homestead of herself and her husband. The trial court found for the plaintiff and quieted the title in her. Counsel for appellant admitted upon the argument that the land in question was in fact the legal homestead of the parties. The only question in this case, there-

fore, is whether the evidence in the record sustains the finding of the trial court that the notes and mortgages were not executed by the wife. This question must be determined by us upon a review of the whole evidence, as a trial *de novo* is asked.

We are of the opinion that the trial court did not err in its findings, and that the evidence sustains his conclusions. Section 5608, Compiled Laws of 1913, provides: "The homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." This statute makes essential to a valid conveyance not merely the acknowledgment by the wife, but the execution also. We are quite satisfied from a perusal of the evidence that there was no acknowledgment, as the notary public goes into the details of the transaction and can nowhere be made to say that any such thing took place. He merely testifies that the wife came to his office and told him that she would not stand in the way of her husband making a loan. He nowhere states that she told him that she had signed the notes and mortgage, or that she had attached her signature thereto.

His testimony is as follows:

Q. You don't know Bertina Rasmussen's signature when you see it?

A. I have seen it. I would not say that I would know it when I saw it, and be positive about it.

The Court: Have you seen Mrs. Rasmussen sign her name?

A. *I can't say positively that I have.*

Q. Who was present at the office when you claimed she came there that day after the papers were brought back to you?

A. No one but myself.

Q. You were there all alone?

A. Yes.

Q. Did you pick up these particular papers and go over each one of the papers and ask her if she signed it?

A. I don't know as I showed her every particular paper. I just picked up the bunch and pulled the rubber off from them.

Q. And separated them out?

A. I can't state positively that I did or did not.

Q. You won't swear that you did?

A. No, I won't swear to it.

Q. What did you say to her with reference to the signing of these papers?

A. I said I suppose you came to acknowledge these papers.

Q. Then she next objected to her husband making this loan?

A. Yes.

Q. Then she said if he was bound to make the loan, she would not stand in his way?

A. That is about the substance of it.

Q. Is that all of the conversation?

A. I said, "Do you want me to put my name and seal to these papers?" and her answer was as near as I can state it, that she did not approve of his making the loan, but if he wanted to, she would not stand in his way.

Q. Is that all of the conversation?

A. That is practically all as I remember it now.

Q. Then she went out?

A. Yes.

Q. You said first: "I suppose you came in to acknowledge these papers?" and she objected to this for answer to her husband making the loan; then you asked: "Do you want me to put my name and seal on these papers?" and she said: "If my husband wants to make the loan, I won't stand in his way," or words to that effect?

A. That is about the substance of it.

Q. And then she went out,—that is all of the transaction?

A. Yes.

In the case of Severtson v. Peoples, 28 N. D. 372, 148 N. W. 1054, we held that "to constitute an acknowledgment the grantor must appear before the officer, . . . and such grantor must in some manner, with a view to giving it authenticity, make an admission to the officer of the fact that *he had executed such instrument.*" There is no proof of any such admission in the case before us, even to be found in the testimony of the notary. There is a direct denial of such fact in the testimony of the plaintiff.

In addition to this we are absolutely satisfied that the purported signatures of the wife upon the notes and mortgage are not her signatures. She testified on the trial that in her opinion the handwriting was

the handwriting of her husband. From an examination of the instruments, which examination we must make on this appeal as a trial *de novo* is asked, we come to exactly the same conclusion. A comparison of the handwriting of the husband with that of the wife, various samples of which are to be found in the evidence, and an examination of the purported signatures of the wife to the notes and mortgage, lead us to the inevitable conclusion that the handwriting is the handwriting of the husband, and not of the plaintiff in this case.

The judgment of the District Court is affirmed.

MAGDALENA WILSON v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation.

(153 N. W. 429.)

Personal injury action — verdict in — uncertainty of.

1. In a personal injury action the jury returned the following verdict: "We, the jury, in the above entitled action, find for the plaintiff, and against the defendant, and assess the damages in the sum of $2,400, $109.25 doctor bill, 7 per cent interest on damages from October 4, 1912, to date." At the request of the plaintiff the court entered judgment allowing interest merely on the $2,400 item. *Held*, that the uncertainty of the verdict, if any, is no ground for the reversal of the judgment.

Tort action — damages — wrongful act — proximate injuries — anticipated — immaterial.

2. In a tort action damages can be recovered for injuries which proximately follow from the wrongful act, whether such injuries were or could have been anticipated or not.

Note.—Generally, as to the proximate cause of damage caused by fire, see notes in 21 L.R.A. 259, and 36 Am. St. Rep. 823. And as to negligently setting out fire as proximate cause of injury to one burned while seeking to protect his property, see note in 15 L.R.A.(N.S.) 819.

As to the right to recover for physical injury resulting from fright caused by a wrongful act, see notes in 3 L.R.A.(N.S.) 49; 22 L.R.A.(N.S.) 1073; and 24 L.R.A.(N.S.) 1159. As to fright as an element of damages, see note in 77 Am. St. Rep. 859.

Negligence — acts of — if forbidden by law — or such as might cause injuries to be anticipated.

3. An act is negligent and furnishes the foundation for an action in tort if the same is forbidden by law or the person doing it might reasonably anticipate that it might be injurious to someone. It is not necessary, however, that that someone should be the person who is actually injured.

Contract — obligation not arising out of breach of — measure of damages — detriment proximately caused.

4. For a breach of an obligation not arising from contract, and except when otherwise provided by the Code of North Dakota, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. See § 7165, Comp. Laws 1913.

Prairie fire — railway company — negligently caused by — efforts of person to extinguish — injuries resulting therefrom — damages recoverable — negligence or carelessness of such person — question for jury.

5. Where a prairie fire is negligently caused by a railway company, and the wife of a homesteader, who is left at home alone with her young daughter, uses every reasonable effort to put out such fire, and in doing so overworks and strains herself so that permanent injuries ensue, she can recover damages from such company therefor, provided that she did not unreasonably and recklessly expose herself to such injury. Whether she was reckless and negligent in this respect is primarily a question of fact for the jury, and not of law for the court to pass upon.

Appeal — record on — instructions to jury — no exceptions — presumption.

6. Where the record on appeal contains no exceptions to the instructions of the jury, and omits such instructions entirely, the presumption will be that the jury was properly instructed on all of the phases of the case.

Married woman — homestead — prairie fire — efforts to extinguish — fee title in property — not necessary.

7. It is not necessary in order that a married woman may recover damages for injuries sustained in an attempt to stop a prairie fire which threatens her home, that such woman should own the fee of the property, and the fact that she has merely a homestead interest in the same is no bar to her recovery.

Rule of damages — fright — tort — action — efforts to stop fire — reasonableness — acts of prudent person.

8. Though as a rule damages which are occasioned by fright alone cannot be recovered in a tort action without proof of a physical injury, the mere fact that a person may have been frightened by fire, and that such fright may have had some influence in inducing her to fight against it, does not preclude a recovery for injury sustained in such attempt, where the exertion put forth

was the exertion that a reasonably prudent person would have put forth under like circumstances.

Tort — injured party — duty of — to reduce damages — recovery.

9. Where a tort has been committed it is the duty of the injured party to use reasonable efforts to avoid the consequences thereof, and to reduce the damages sustained thereby, and if in such reasonable attempt he is injured damages may be recovered therefor.

Negligence — contributory negligence — jury — questions for.

10. The questions of negligence and of contributory negligence are primarily questions of fact for the jury to pass upon.

Answer — responsive in part — motion to strike — denial not sufficient cause for setting aside verdict.

11. Where a part of an answer is responsive, and a defendant objects to the whole answer as being not responsive, and moves to have the same stricken out, the verdict will not be set aside because of the failure of the court to so order.

Testimony — introduction of — objections to — rulings upon — errors.

12. Various objections to rulings on the introduction of the testimony examined and *held* not to constitute reversible error.

Opinion filed May 12, 1915.

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

Action to recover damages for injuries occasioned by overexertion in attempting to put out a prairie fire.

Judgment for plaintiff. Defendant appeals.

Affirmed.

Watson & Young and *E. T. Conmy*, for appellant.

Where improper testimony for plaintiff is allowed over objection, it is the rule that prejudice must be presumed from the error, and plaintiff must affirmatively show that the testimony was harmless. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; Miller v. Durst, 14 S. D. 587, 86 N. W. 631.

Relevant testimony is that which conduces to prove a hypothesis which, if sustained, would logically influence the issue, and hence it is relevant to put in evidence any circumstances tending to make the proposition at issue either more or less improbable. Ward v. Young, 42 Ark. 542; Shannon v. Kinny, 1 A. K. Marsh. 3, 10 Am. Dec. 705; Jones, Ev. §§ 141–146; American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99; 13 Cyc. 24; Gardner v. Detroit Street R. Co. 99 Mich.

182, 58 N. W. 49, 4 Am. Neg. Cas. 163; Warren v. Wright, 103 Ill. 298; Houston & T. C. R. Co. v. Ritter, 16 Tex. Civ. App. 482, 41 S. W. 753; Hood v. Chicago & N. W. R. Co. 95 Iowa, 331, 64 N. W. 261.

The verdict of the jury must be for a fixed and certain sum, in order to sustain a judgment. Rev. Codes 1905, § 7035, Comp. Laws 1913, § 7634; Watson v. Damon, 54 Cal. 279; 2 Thomp. Trials, § 2642; 2 Elliott, Gen. Pr. § 947; Mitchell v. Geisendorff, 44 Ind. 358; Educational Asso. v. Hitchcock, 4 Kan. 39; Thompson v. Shea, 4 McCrary, 93, 11 Fed. 847; Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477; Parker v. Lake Shore & M. S. R. Co. 93 Mich. 607, 53 N. W. 834; Buck v. Little, 24 Miss. 463; Fiore v. Ladd, 29 Or. 528, 46 Pac. 145; Newton v. St. Louis & S. F. R. Co. 168 Mo. App. 199, 153 S. W. 495; Weston v. Gilmore, 63 Me. 493; Wertz v. Cincinnati, H. & D. R. Co. 11 Ohio Dec. Reprint, 872; Lake v. Hardee, 57 Ga. 459.

The jury must correct its own verdict when necessary, under proper instructions from the court. Cookville Coal & Lumber Co. v. Evans, — Tex. Civ. App. —, 135 S. W. 750.

A new trial will be granted where the verdict is uncertain as to the amount found to be due plaintiff. Goosely v. Holmes, 3 Call Va. 424; Dorsett v. Crew, 1 Colo. 18; Holmberg v. Hendry, 2 Cal. Unrep. 650, 10 Pac. 394; Macoleta v. Packard, 14 Cal. 178; Minot v. Boston, 201 Mass. 10, 25 L.R.A.(N.S.) 311, 86 N. E. 783; Bashford v. Kendall, 2 Ariz. 6, 7 Pac. 176; Halum v. Dickinson, 47 Ark. 120, 14 S. W. 777; Voves v. Great Northern R. Co. 26 N. D. 110, 48 L.R.A.(N.S.) 30, 143 N. W. 760.

Defendant's negligence in all such cases must be the proximate cause of the injury. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 470, 24 L. ed. 256, 257; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 604; Logan v. Wabash R. Co. 96 Mo. App. 461, 70 S. W. 734; Pittsburg Southern R. Co. v. Taylor, 104 Pa. 306, 49 Am. Rep. 580; West Mahanoy Twp. v. Watson, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340.

Defendant is not liable for consequences of negligence which were unintended, and which could not be foreseen by an ordinarily prudent person. New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 38 L.R.A. 134, 22 So. 675; Cleveland, C. C. & St. L. R. Co.

v. Lindsay, 109 Ill. App. 533; Currier v. McKee, 99 Me. 364, 59 Atl. 442, 3 Ann. Cas. 57; Bannon v. Pennsylvania R. Co. 29 Pa. Super. Ct. 231; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; Sjogren v. Hall, 53 Mich. 274, 18 N. W. 812; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 392; Fox v. Borkey, 126 Pa. 164, 17 Atl. 604.

The negligence of defendant, if any, in setting the fire, is not the proximate cause of the injury she sustained. Such injury was the direct result of fright, terror, alarm, and mental anxiety, unaccompanied by any physical injury. 3 Elliott, Railroads, § 1247; Henderson v. Weidman, 88 Neb. 813, 130 N. W. 579; American Nat. Bank v. Morey, 113 Ky. 857, 58 L.R.A. 956, 101 Am. St. Rep. 379, 69 S. W. 760; Birmingham Waterworks Co. v. Martin, 2 Ala. App. 652, 56 So. 832; White v. Sander, 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; Canning v. Williamstown, 1 Cush. 451; Salina v. Trosper, 27 Kan. 544; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Morse v. Duncan, 14 Fed. 396; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Johnson v. Wells, F. & Co. 6 Nev. 224, 3 Am. Rep. 245; Indianapolis & St. L. R. Co. v. Stables, 62 Ill. 313; Terre Haute & I. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Missouri P. R. Co. v. Cox, 2 Tex. App. Civ. Cas. (Willson) 217; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Russell v. Western U. Teleg. Co. 3 Dak. 315, 19 N. W. 408.

If anxiety and suspense of mind alone are not a ground for recovery, then the effects furnish no ground. Pierce, Railroads, 1881 ed. 302; Indianapolis, B. & W. R. Co. v. Birney, 71 Ill. 391; Hobbs v. London S. W. R. Co. L. R. 10 Q. B. 111, 44 L. J. Q. B. N. S. 49, 32 L. T. N. S. 352, 23 Week. Rep. 520, 5 Eng. Rul. Cas. 38; Pullman Palace Car Co. v. Barker, 4 Colo, 344, 34 Am. Rep. 89, 9 Am. Neg. Cas. 131; Francis v. St. Louis Transfer Co. 5 Mo. App. 7; Nelson v. Atlantic & P. R. Co. 68 Mo. 593, 4 Am. Neg. Cas. 500, 2 Redf. Railways, 5th ed. 262; Trigg v. St. Louis, K. C. & N. R. Co. 74 Mo. 147, 41 Am. Rep. 308; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; White v. Sander, 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573;

Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222, 57 L. J. P. C. N. S. 69, 58 L. T. N. S. 390, 37 Week. Rep. 129, 52 J. P. 500, 8 Eng. Rul. Cas. 405; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; Lombard v. Lennox, 155 Mass. 70, 31 Am. St. Rep. 528, 28 N. E. 1125; Fillebrown v. Hoar, 124 Mass. 580; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Haile v. Texas & P. R. Co. 23 L.R.A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; Joch v. Dankwardt, 85 Ill. 331, 10 Mor. Min. Rep. 690; Canning v. Williamstown, 1 Cush. 451; Western U. Teleg. Co. v. Wood, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471; Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; Johnson v. Wells, F. & Co. 6 Nev. 224, 3 Am. Rep. 245; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121.

Where the injury is purely accidental, and results from circumstances over which defendant had no control, and which could not have been reasonably anticipated, the damages are too remote to warrant a recovery. Mitchell v. Rochester R. Co. supra; Sheldon v. Hudson River R. Co. 29 Barb. 228; Longabough v. Virginia City & Truckee R. Co. 9 Nev. 296; Smith v. Hannibal & St. J. R. Co. 37 Mo. 295; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 509, 53 N. W. 970; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; White v. Chicago, M. & St. P. R. Co. 1 S. D. 330, 9 L.R.A. 824, 47 N. W. 146; Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927; Shearm. & Redf. Neg. § 57, 58; Nason v. West, 78 Me. 253, 3 Atl. 911, 5 Am. Neg. Cas. 273; Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Garrity v. Hartstein, 26 N. D. 148, 143 N. W. 390.

Damages in such cases cannot rest upon mere conjecture or speculation. Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121.

Knauf & Knauf, for respondent.

There can be no presumption of prejudice arising from the testimony of a witness who saw the fire burning, as to the ground it covered, its direction, the location of plaintiff's home, and similar facts. Such facts are relevant. But defendant's objections were general, and cannot be considered. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213.

There was no proper hypothesis in the defendant's questions, and the court did not err in sustaining objections thereto. The questions did not specifically refer to the patient in question, the plaintiff. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 364; Ward v. Young, 42 Ark. 554.

In any event, such testimony was plainly collateral to the issues involved, and offered merely to prejudice the minds of the jury. Galveston, H. & S. A. R. Co. v. Smith, — Tex. Civ. App.—, 24 S. W. 668; Russel v. Hearne, 113 N. C. 361, 18 S. E. 711.

The verdict of the jury is plain and certain, and devoid of any ambiguity. Voves v. Great Northern R. Co. 26 N. D. 110, 48 L.R.A. (N. S.) 30, 143 N. W. 760.

The plaintiff did everything possible to stop the fire, and in so doing acted in a prudent and careful manner, and in accordance with her duty. Hawley v. Sumpter Valley R. Co. 12 L.R.A.(N.S.) 526, 527 and notes and citations, 49 Or. 509, 90 Pac. 1106; Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602.

The proximate cause of an event is that which, in a natural and continuous course, produces the event, and without which the event would not have happened. Ingalls v. Bills, 9 Met. 1, 43 Am. Dec. 346, 9 Am. Neg. Cas. 426; Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239; Harris v. Clinton Twp. 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425; Liming v. Illinois C. R. Co. 81 Iowa, 250, 47 N. W. 66; Hockstedler v. Dubuque & S. C. R. Co. 88 Iowa, 236, 55 N. W. 74; Rajnowski v. Detroit, B. C. &. A. R. Co. 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335; Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648.

The injury must result from an actual contact with the fire, or from over exertion in fighting it, and in either case is a proximate result.

Glanz v. Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575; Rajnowski v. Detroit, B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 848, 78 Mich. 681, 44 N. W. 335; Sedgw. Damages, 66; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 49, 19 L. ed. 66.

Every person is bound to use diligence to save himself from injury by the negligent act of another. Plaintiff in fighting the fire, and in back-firing, was acting strictly in the line of duty,—not only in saving the property, but in saving the defendant from damages. Little v. McGuire, 43 Iowa, 447; Kiernan v. Heaton, 69 Iowa, 136, 28 N. W. 478; Raridan v. Central Iowa R. Co. 69 Iowa, 527, 29 N. W. 599; Griggs v. Fleckenstein, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199, 1 Am. Neg. Cas. 311; Liming v. Illinois C. R. Co. 81 Iowa, 246, 47 N. W. 66; McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 311, 53 N. W. 103; Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368; Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 609; Glanz v. Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575.

Bruce, J. The complaint in this action alleges that the defendant company negligently started a prairie fire, and that "for the purpose of protecting her said property and buildings this plaintiff, then aged fifty-two years, worked in a diligent and proper manner to protect said property, and in such a manner as an ordinarily prudent and diligent person and woman would have done, and did carry out from said house and on plowed ground and on safe premises, bedding, clothes, and furniture, and did then and there carry water and assist in preventing said fire from burning up said grain, hay, buildings, house, and property, as any woman in the exercise of due diligence, prudence, and care should do in aiding to protect the same under such threatened destruction, and while in the exercise of due care in the premises aforesaid, this plaintiff became so greatly heated, exercised, and excited, and so greatly worked, as to cause her immediately thereafter to be sick, sore, and lame, and to become permanently injured in her back, head, mind, limbs, body, and nerves, rendering her thereby permanently sick, sore, lame, and a nervous wreck, to her damage in the sum of $2,500, and

a necessary cost for physicians' and surgeons' service, and medicines, board, care, and railroad fare expense in the further sum of $500."

Both at the conclusion of the plaintiff's case and of that of the defendant, the defendant moved the court to direct a verdict in its favor on the following grounds: "First, there is no testimony in this case to show that this defendant is guilty of any negligence which proximately caused the injury to the plaintiff here; and secondly, the undisputed testimony shows that if this plaintiff suffered any injury it was caused by her own negligence, and her own negligence contributed thereto; thirdly, the undisputed testimony shows that the injury to this plaintiff, if any, was occasioned by, and is the direct result of, fright or fear, unaccompanied by any physical injuries whatsoever, and the negligence of this defendant, if any, is not the proximate cause thereof, and this plaintiff cannot recover, the damages being too remote and speculative." These motions were denied. The jury returned a verdict in favor of the plaintiff, and the defendant has appealed.

The principal questions to be determined are (1) whether a married woman who attempts to protect the family property and homestead against a prairie fire which is negligently started may recover damages against the wrongdoer for injuries which arise from her overexertion in such attempt; (2) whether there is any competent proof in the record that the defendant was guilty of any negligence which proximately caused the injury. There are also several minor exceptions to the rulings upon the evidence which will be considered later. There is also to be determined in this case, and preliminary thereto, the fact as to whether there is any evidence that the plaintiff suffered any physical injury other than that which was resultant upon the fright. It is also claimed that the court erred in accepting and receiving the verdict of the jury without requiring them, and instructing them to correct it, it being claimed that the verdict was uncertain, informal, and insufficient, the verdict being as follows: "We, the jury, in the above entitled action, find for the plaintiff, and against the defendant, and assess the damages in the sum of twenty-four hundred dollars ($2,400), $109.25, doctor bill, 7 per cent interest on damages from October 4th, 1912, to date."

We see no merit in the objection to the verdict of the jury. It is claimed that it is uncertain as to whether the interest should be com-

puted on the verdict as a whole, that is, on the $2,400 plus the $109.25 doctor's bill, or on the sum of $2,400 alone. The record shows that on motion of the plaintiff interest was only allowed by the court in the final judgment on the sum of $2,400. This the jury certainly intended. Whether they intend that there should also be interest allowed on the doctor's bill is immaterial here. We very much doubt if the verdict was in any way uncertain. Even if it was uncertain, defendant has no ground for complaint.

We next come to the point that the negligence of the defendant in starting the fire, if negligence there was, "was not the proximate cause of the injury, nor could it reasonably anticipate the results of said negligence." The defendant's position is stated in its brief as follows: "We will concede for the sake of the argument that this defendant railroad negligently set the fire which burned over to the land of plaintiff's husband and burned some of his property. There is no question but that under such circumstances the defendant would be liable to Mr. Wilson for the value of his property destroyed, and also for the value of his time or that of his wife spent in fighting the fire so set. The defendant, we think, must anticipate that people would get out and fight fire which was threatening to destroy their property. In fact, we believe a great many authorities hold that it is their duty to exercise ordinary care to prevent the spread of such fires and the destruction of their property by such fires. But this defendant is not bound to anticipate, and could not reasonably anticipate, that one would be so foolish as to get out and injure himself permanently in the fighting of a prairie fire of this kind. And it certainly could not anticipate that a strong, healthy woman, such as this plaintiff claims to have been before the fire, would so work or so conduct herself as to permanently impair her health. Nor could this defendant reasonably anticipate that the setting of a prairie fire of this kind would cause a person to become so frightened and scared as to injure her nervous system permanently. This is especially applicable when we consider that the fire in question was a small fire, and was put out by three men who came to the Wilson place in less than one half an hour. And it must also be remembered that the head fire, or main fire, went by at least a quarter of a mile east of the Wilson place, and the fires came up toward the buildings against the wind slowly, as all side fires do."

There is no doubt that some authorities may be found in support of defendant's contention, and which are based upon the erroneous assumption that only those damages can be recovered in a tort action which can be reasonably anticipated by the person who occasioned the injury at the time of his wrongdoing. These cases, however, do not express the rule which prevails in this jurisdiction, nor do they express the general rule. They are founded upon a confusion between what constitutes actionable negligence in the first place, and what should be the measure of damages in the action, provided that actionable negligence is once shown. That an act cannot be held to be negligent unless the same is forbidden by law, or the person doing it may reasonably anticipate that it might be injurious to *someone,* is true. But this goes to the question of whether there is any cause of action at all, and, even in this case, the *someone* need not necessarily be the person who is in fact injured. The question as to damages, too, is an entirely different one. The rule contended for by defendant is the rule which prevails in actions upon contract. It is not the rule which prevails in actions of tort. In contract actions, only those damages can be recovered which were anticipated at the time of the making of the contract, or were so reasonably probable that if one had thought upon the matter at all he must be presumed to have anticipated them. In tort actions, however, damages can be recovered for injuries which proximately follow from the wrongful act, whether such injury was or could have been anticipated or not.

In the case of Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390, we quoted with approval from the opinion in Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640, 16 Am. Neg. Cas. 314, where Judge Mitchell, in speaking for the Minnesota court, says: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result *in any injury to anybody,* then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one

which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury *to others,* then he is liable for any injury proximately resulting from it, although he could not have anticipated the *particular injury* which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow."

This certainly expresses the rule which prevails in North Dakota, for § 7165, Comp. Laws of 1913, being § 6582, Rev. Codes 1905, provides: "For the breach of an obligation not arising from contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." See also Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676.

There can be no question that the defendant must have anticipated that the fire would be injurious to *someone.* The act, therefore, was negligent, and gives rise to a cause of action. The only question to be determined is whether the injury to the plaintiff was a proximate result of that act. If so, damages can be recovered therefor, even though they were not anticipated.

A reasonable effort to save one's property and to combat a prairie fire is certainly a proximate result of such fire, and of the original negligence which occasioned it. It is one's duty, indeed, to minimize and to reduce damages, and even if we adopt the idea of anticipation one must presume and anticipate in this prairie country, where not only crops, but homes and lives are at stake, that efforts will be made, and should be made, by the settlers to save their property and lives and to combat fires which are negligently started. The fighting of the fire was therefore the proximate result of the fire. Was overexertion in so doing a proximate result of such fighting, or did contributory negligence necessarily intervene at the moment proper exertion ceased and overexertion began? Plaintiff could certainly recover damages if all of the property were her own for her loss of time and services in fighting the fire, and this is on the theory of the duty of reducing the damages, if on no other. Is she precluded from recovering on the ground that she had merely a wife's homestead

interest in the premises, and that there might have been a point where she could have desisted without injury to herself, and that this point is the court's duty to locate and to determine? We hardly think that this is or should be the law. The question as to whether she unnecessarily and unreasonably exerted herself is certainly one which, under the circumstances of the case, the jury, and not the court, should have passed upon. The farm was her home. Part of the personal property and clothing in the house must certainly have belonged to her. The woman was alone on the prairie with her little girl of some thirteen years of age. She was in charge of the farm even if she did not own it. It was her home. If one lives in a rented house, is he precluded from fighting a fire which threatens it merely because he does not own the building? and has a married woman who has a homestead interest in her husband's property any lesser rights? Must and should the wife of a homesteader, who is left alone at home with her children upon the prairie while her husband is away earning his daily bread, sit idly by and allow her home and all that the family possesses be reduced to ashes, merely because the fee title to the property is in the name of her husband? Was the poet Burns's solicitude for the "wee mousie" whose nest and winter stores were destroyed by his plowshare only justifiable provided that the mouse he saw was a male, a freeholder? This cannot be the law.

In the case of Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239, the court said: "The plaintiff was driving a horse and gig over a defective bridge in the defendant town, when the horse broke through the bridge and fell. The plaintiff immediately jumped from his gig and undertook to extricate the horse from the hole in the bridge. In doing so, in the struggle of the horse to free himself, he was struck by the horse's head and personally injured thereby. He was at the time of the injury in the use of common care. The question is whether the defect in the way can be considered as the direct and proximate cause of the injury complained of. The defendants contend that it was not. Their counsel attempt to fortify this position by many plausible and interesting illustrations. There may be a good deal of sublety and refinement of argument upon questions of this kind. There can be no fixed and immutable rule upon the subject that can be applied to all cases. Much must therefore, as is often said, depend upon the circumstances of each particular case. Upon the facts of this case, we think that the defect in the

way was the proximate cause of the injury, and that the defendants are liable for the damages sustained. The foundation of this liability is the service rendered, or attempted to be rendered, by the plaintiff *for the benefit of the town,* when the injury was received. The law required such services of the plaintiff. *It was his duty to save the horse if possible.* He would have been guilty of negligence towards the town if he had failed to make all reasonable attempts to do so. It is a general rule of law that, where a person may sustain an injury by the fault of another, common care should be used upon his part to render the injury for which the party in fault is responsible as light as possible. *He may be compensated for an injury received when in the exercise of such care and prudence, although a mistake may be made.* In Lund v. Tyngsboro, 11 Cush. 563, 59 Am. Dec. 159, it was held that a town was liable to a traveler who, in the exercise of common care and prudence, leaps from his carriage because of its near approach to a dangerous defect in the highway, and thereby sustains an injury, although he would have sustained no injury if he had remained in the carriage. The same principle was established in Ingalls v. Bills, 9 Met. 1, 43 Am. Dec. 346, 9 Am. Neg. Cas. 426, and the same doctrine was applied to the facts in the case of Stover v. Bluehill, 51 Me. 439. The defendants, however, seek to distinguish those cases from this. They admit that such a doctrine would be applicable if the injury had happened here to the horse instead of the driver. But we do not perceive that there would be any difference upon principle whether the injury was to the plaintiff's person or his property. The accident to the horse was an injury *sustained by the owner of the horse.* The plaintiff was attempting to relieve himself of an injury to his horse and thereby of an injury to himself, when the horse in his struggles struck him with his head. This view of the facts is supported by the case of Stickney v. Maidstone, 30 Vt. 738, cited upon the plaintiff's brief, which is as near a copy of the facts in this case as two cases could well be alike. We think that all which took place at the time of the accident was, as between these parties, but a single happening or event. It was but one accident."

In the case of Harris v. Clinton Twp. 64 Mich. 447, 8 Am. St. Rep. 842, 31 N. W. 425, the court said: "It is not a universal rule that the defendant is excused from liability merely because the plaintiff, knowing of the danger caused by the defendant's negligence, volun-

tarily incurs that danger. *If the defendant has so acted as to induce the plaintiff, acting with reasonable prudence, to incur the danger,* . . . the defendant is liable." Again, in the case of Glanz v. Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575, the court said: "Appellants contend that plaintiff's injuries were not the proximate result of the setting out of the fire, and that the court should have so instructed the jury. The testimony shows that there was a high wind blowing; tithat the fire was coming directly toward the house and barn on plaintiff's premises, and that in the barn there was a large amount of personal property belonging to plaintiff and her husband; and that, had the barn caught fire, the house would also have burned. It also appears that plaintiff and her husband, with others, undertook to extinguish the fire, or to stay its progress for the purpose of saving this property, and that in so doing plaintiff's clothing was partially destroyed, her person burned, and she made sick and disabled from work. The court instructed, in effect, that, if defendant was negligent in setting out the fire, it would be liable to plaintiff for *any such personal injuries received by her as were the natural and direct result of her exertions in trying to extinguish the fire and save her property,* to which she did not by her own negligence contribute; and on the question of contributory negligence gave the following: 'In respect to the question of whether the plaintiff was or was not guilty of negligence which contributed to her alleged injuries, you are instructed that the plaintiff had the right to make such reasonable exertions for the protection of her property as a reasonably prudent person would have done under like circumstances. But if she exerted herself to a greater extent or more violently than an ordinarily prudent person would have done under like circumstances, and her injuries, if any, resulted from such exertions, then, even though she acted in good faith, or under the belief that what she did was necessary, she cannot recover for such injuries, if any, to her health. In determining whether the plaintiff was or was not guilty of negligence that contributed to the alleged injury to her health, you would not be justified in finding that she was free from any negligence that contributed to her injuries, if any, from the facts alone (if they be facts) that the danger to her property was great, or appeared to be great, and that she acted in good faith, in an honest purpose to prevent the spread of the fire, and thus protect her property from destruction

or injury, for her motive or conduct, however honest or well intended, cannot be made the basis of a recovery, if, as a matter of fact, she did not act as a reasonably prudent person would have acted under like circumstances. *In determining this question, however, you should take all the facts and circumstances concerning the fire, and the acts of the plaintiff as disclosed by the evidence, into consideration.'* It is contended that the fire was not the proximate cause of plaintiff's injuries and sickness, and that, as these results were brought about by her own volition, she cannot recover. The question of proximate cause is always difficult, and, but for the case to which we shall presently refer, we should have difficulty in determining the proposition here presented. In Liming v. Illinois C. R. Co. 81 Iowa, 250, 47 N. W. 66, the exact question now before us was considered, and it was there held that a stranger who received injuries in attempting to extinguish a fire set out by a railway company, to save property from destruction, might recover from the company; that defendant's negligence in such a case was the proximate cause of an injury to the person who attempted to save property from the consequences thereof; that the injured party was entitled to recover, provided he did not negligently contribute to the results. In that case it is said, in effect, that one who, acting with reasonable prudence, voluntarily exposes himself to danger for the purpose of protecting his property, may recover for the consequent injuries he receives from the person whose wrong caused the injury to himself, and the danger to the property he sought to protect. See also McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 103. In attempting to extinguish the fire in question, plaintiff was in the strict line of her duty; and if she acted with ordinary care and prudence, there is no reason, in justice or law, why she should not recover for the injuries received. *Bound as she was by law to save herself from the consequences of defendant's negligence, the defendant should not be permitted to say that her act was entirely voluntary, and that the injuries she received did not follow proximately from its original wrong.* The Liming Case is not without support in other jurisdictions. See Rajnowski v. Detroit B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 847, 78 Mich. 681, 44 N. W. 335; Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648. *Defendant attempts to distinguish the Liming Case from the one aat bar on the ground that in the former Liming was*

injured by the fire itself, while here the plaintiff's sickness was due to overexertion. Admitting the difference in facts, it does not follow that there is any distinction in principle. In either case the injury was the result of the fire, unless the party injured was doing a negligent and reckless act in attempting to extinguish the fire. *Whether or not he was guilty of contributory negligence was a question for the jury, under proper instructions.* It should not be said that defendant could not anticipate the wrong complained of. If it negligently set out a fire which endangered property, it knew that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condition. It was, as we view it, the efficient cause of the injury. *That injury may result from actual contact with the fire or from overexertion, and in either case is a proximate result."* See also Rajnowski v. Detroit, B. C. & A. R. Co. and McKenna v. Baessler, supra.

Again, in the case of Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368, we find the following: "The cases which sustain the position of the appellant we think are wrong in principle, and opposed to the weight of authority. *One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages.* It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant." And in Berg v. Great Northern R. Co. supra, the court also says: "Referring first to the second question, we are of opinion that, leaving out of consideration for the present the question of plaintiff's contributory negligence, there was no intervention of another independent agency inflicting the injury, to break the causal connection between the negligent act of the defendant and the injuries suffered by the plaintiffs. It may be true that if the plaintiffs had remained where they

were when they discovered the fire approaching, and made no effort to save the stacks, they would not have been injured. But, assuming that they acted with reasonable prudence and care, plaintiffs' effort to save the property was a mere condition, and not the cause of these injuries. *In making reasonable efforts for that purpose, they would be doing not only what the law authorized, but what their duty to the defendant required; and if, in doing this, they sustained injury, the defendant, which was responsible for the fire, would be liable.* . . . This doctrine has been held and applied under so great a variety of circumstances that we shall only cite two cases in which it has been applied to 'fire cases' like the present. Liming v. Illinois C. R. Co. 81 Iowa, 246, 47 N. W. 66; Rajnowski v. Detroit, B. C. & A. R. Co. 74 Mich. 20, 41 N. W. 847, and 78 Mich. 681, 44 N. W. 335. We have confined the decision to the particular facts of this case, but do not wish to be understood as holding that the rule would be different had plaintiffs attempted to save the property of another." See also Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 609. Again in the case of Glanz v. Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575. Mr. Justice Deemer says: "In either case [that is, whether the plaintiff's injuries were occasioned by physical contact with the fire or by overexertion in attempting to extinguish it and save his property] the injury was the result of the fire, unless the party injured was doing a negligent or reckless act in attempting to extinguish the fire. Whether or not he was guilty of contributory negligence was a question for the jury, under proper instructions. It should not be said that defendant could not anticipate the wrong complained of. If it negligently set out a fire which endangered property, it know that the owner was bound to make all reasonable efforts to save himself from harm; and if, in the exercise of reasonable care in the performance of this duty, he received an injury, the original fault of the defendant is something more than a condition. It was, as we view it, the efficient cause of the injury. That injury may result from actual contact with the fire or from overexertion, and in either case is a proximate result."

In the case at bar the instructions are not incorporated in the record, and are not before us. We must presume, therefore, that they were correct and applicable to the case on trial, and that the questions of fright

and contributory negligence were adequately and properly submitted to the jury.

We must presume, indeed, that some such instructions were given as were given in the case of Glanz v. Chicago, M. & St. P. R. Co. supra. Concerning these instructions the Iowa court said: "The court instructed, in effect, that, if defendant was negligent in setting out the fire, it would be liable to the plaintiff for any such personal injuries received by her as were the natural and direct result of her exertions in trying to extinguish the fire and save her property, to which she did not by her own negligence contribute; and on the question of contributory negligence gave the following: 'In respect to the question of whether the plaintiff was or was not guilty of negligence which contributed to her alleged injuries, you are instructed that the plaintiff had the right to make such reasonable exertions for the protection of her property as a reasonable prudent person would have done under like circumstances. But if she exerted herself to a greater extent or more violently than an ordinarily prudent person would have done under like circumstances, and her injuries, if any, resulted from such exertions, then, even though she acted in good faith, or under the belief that what she did was necessary, she cannot recover for such injuries, if any, to her health. In determining whether the plaintiff was or was not guilty of negligence that contributed to the alleged injury to her health, you would not be justified in finding that she was free from any negligence that contributed to her injuries, if any, from the facts alone (if they be facts) that the danger to her property was great, or appeared to be great, and that she acted in good faith, in an honest purpose to prevent the spread of the fire, and thus protect her property from destruction or injury, for her motive or conduct, however honest or well intended, cannot be made the basis of a recovery, if, as a matter of fact, she did not act as a reasonably prudent person would have acted under like circumstances. In determining this question, however, you should take all the facts and circumstances concerning the fire, and the acts of the plaintiff as disclosed by the evidence, into consideration.' "

But counsel contends that there is no evidence of any injury which was occasioned by such overexertion, but evidence of injuries which were the result of fright alone, and that the law is well established that damages for fright alone without accompanying physical injury

cannot be recovered. We do not so read the evidence, however, and, though fright might have entered into the question, there is sufficient evidence to go to the jury on the question as to whether the physical exertions were or were not responsible for at least a part of the injury. One certainly cannot escape liability because an injury which he has occasioned has been increased by his own act, even though he might not be liable if such other act were taken by itself. Dr. Peake certainly testified that the work which plaintiff did at the fire, and the strain which she underwent, were in his opinion the cause of her present condition. He testified that he found "rigidity of the muscles along the spine, not more on one side than on the other," and in answer to the question: "Does such a condition of the muscles arise from fright?" answered, "No."

Counsel also ingeniously argues that no damages can be recovered for fright alone, and therefore not for the result of fright, and that as plaintiff admits that it was the fear of the fire that made her work as hard as she did, no recovery can be had. This argument, however, hardly appeals to us. Of course, she was afraid of the fire, and, of course, it was the fear of the fire and the destruction that it would create that induced her to work to suppress it and to save her property. Such fear, however, is the impelling cause in every such attempt. Fortunately for the progress of the human race, we, as a rule, are not jellyfish, but human beings who are gifted with nerves and with feelings, and the law must be administered upon this assumption.

The fact is that defendant's theory that the injuries sustained by the plaintiff were the result of fright, and of fright alone, seems to us to be based upon conjecture rather than upon the testimony. Outside of the fact, indeed, that plaintiff testifies that she lies awake at night thinking and scared of the fire, there is practically no evidence of any injuries except those which are the direct result of the strain and the exertion, and it is very natural for a person who is awakened at night by physical pain caused by overexertion during a fire to think of the fire during the periods of her wakefulness. It is true that there is evidence that plaintiff is in a nervous condition, but a nervous condition can arise from physical injuries just as much as from mental. These facts, we believe, will be apparent from an examination of the record. It will also, we believe, be apparent that the plaintiff did no

more than an ordinary woman left alone with a young daughter on the prairie would do under the circumstances in order to protect her home against destruction by fire.

Her testimony is in effect as follows:

All at once I looked up to the hills and I seen smoke coming down in the fields. It was about 12 o'clock. We had a quarter section of land. We had a little frame house and granary and chicken coop and barn. I and my daughter and husband live in that house. When I first discovered the fire my daughter was looking for her cows. It was coming from the southwest, and kept on coming to the northeast until it got up to my husband's farm, where I was living. I went home after I saw the fire, and then went to doing some work to save some of the things before the fire got too close to the buildings. I first went to take the washtubs outside near the house,—two of them I set out. I took two pails, each holds about 12 quarts of water, and I was trying to carry water right along to fill those tubs and fill some wooden pails that I set there. Next, I believe I tried to climb in the granary to get the sacks out and lay around to be handy if I got help to fight the fire. I think I carried my rocking chair down to the cow corral first. Then I went to take a bushel basket, took all my books and laid them in, took the things out of the writing desk, and the papers and coverings, then the clothes, and carried them down in the cow corral. I came right back and got clothes. I took my big dish pan, filled it up with groceries and carried it down, and then I went right along all the time carrying things down. I took some of my bedding, some clothing, my linens in the drawers I had in the bureaus, and my best clothes and my husband's clothes and his big coats and pants and shoes and anything I chanced to get, and put them into boxes and carried them down.

Q. You carried those down to the corral?

A. Yes.

Q. Who came, if anybody, to help you fight the fire that you remember of.

A. There didn't come anybody for a long time. The girl came home. At first I was alone carrying things; the fire was almost up to our place. I told her to go quick as she could on horseback and get some men from the threshing machine. She went right off and left me

alone again, and I didn't get any help until Mr. Keyes. He was the first one to come to the place, and Charlie McDermott and he was down by the well at first. Then I tried to take pails of water up and carry to them to fight the fire with, the fire was near the granary then and the chicken coop was almost on fire. I helped fight the fire. I carried some water for them. After that I carried more water up about the house. I walked up and I seen they had lots of water left and I didn't carry any more up. I took some other things up. I went down to the barn and let the colt out of the barn. There was a horse in the barn too, and I took her and tied her to the wagon by the house.

Q. Now, after Mr. Keyes came and helped with the fire, did they leave before the fire was all out?

A. Yes.

Q. And did you fight any fire yourself?

A. Yes. I was so afraid the barn would be on fire. The fire went around behind the barn. I looked and I seen there was nobody to fight it there. I didn't have water and so I took ground and threw on the fire to put it out along the lines, and I called the girls to come over with some water and help fight this fire. They brought water over. We took wet sacks and fought it with them. During the afternoon some of my husband's grain stacks burned up. I went up to the stacks and I felt so sorry; and there was lots of people that couldn't come to help fight it; and the wind come so hard that we couldn't save them. After the men went away and I had the fire out I tried to carry the things back in the house. I felt all played out. I felt awfully weak. Then they carried in my sewing machine, my girl and the other girl, and I helped them carry it over to the house, and I got such a pain in my hip, and I couldn't carry it any further, over there a little way; they had to carry it themselves. I carried some little things, some clothes and things like that, and bread and groceries. They helped me carry those other things in. I felt awfully weak; I was hardly able to walk any more. I was never sick of any sickness that I know of before this fire. There was some headaches once in a while. Sometimes had a cold. Never had a sick cough in the winter time, never as long as I lived on the farm. Before this fire I did gardening on the farm,—we always had a garden, and had my housework besides. I did the washing and attended to the milking. The first years I had to make butter

every week day before we had a cream separator. Since the fire I wasn't able to do hardly anything. I couldn't do the milking or make any garden. I feel sick all over my body. I feel so shaky, my nerves bother me, my head I couldn't move around at times, and I feel nervous and I couldn't hardly talk to anybody. My back feels weak all the time. My hip hurts too. This one (indicating left hip) I never had any of those pains before the fire. I was sick right the next Sunday; I wasn't able to be out at all. I got awfully sick to my head and had a sick headache. From that time down to the present, I have never felt all right again. I feel so weak and aching in my body. In the morning I couldn't dress. To lay on my back, I couldn't rest. I wake up in the night scared about the fire quite often. In the morning when I want to get up I was hardly able to dress myself or comb my hair. I wasn't able to move my arms. . . . I never feel all right. My nerves bother me in the head the most, and when I want to do anything I get sick to my back and shake, and I am not able to do anything. . . . When I first saw the fire coming I got two tubs out of the house. I put them on the east side of the house about 350 feet from the pump. Then I carried water up hill to fill them. It is down hill to the well. I carried water up and filled those tubs. I tried to pump water in that barrel so that they could take the water out of there. I had to carry water to put out the fire. The manure was burning around the barn by the corner, and there was lots of smoke and fire and it would burn right along, and I carried water to put that out, after the men were gone. The fire in the manure by the barn occurred after the men had gone. . . . The next day the grain stacks burned until 9 o'clock —it wasn't burned down. My girl tried to get the potatoes on the wagon, and Saturday night my man came home. I have not done any chores since the fire. I never was nervous in my head in my younger years. I never had any nervous troubles of any kind. Before the fire I never had any nervous or hysterical trouble.

Dr. Francis Peake also testifies in substance:

I told Mr. Wilson I couldn't do much for her without seeing and looking her over to see what the trouble was. Then she came to me. I found her very nervous and trembly and shaky, and complaining of her being "all played out" as she called it. I examined her to find

out where the trouble was. I examined her physically,—her heart and her lungs and back and limbs, giving her a good, thorough examination; and her kidneys and a urinary test. And I tested her reflexes and examined her back. She complained of her back more than anything else,—had headaches and backaches; and she was as I say nervous and weak and trembly and couldn't sleep nights,—said she didn't rest well. She said that she was all the time dreaming of fire and would wake up startled and excited in the night. I made the usual examination which I considered necessary for the treatment. After I made my diagnosis and came to the conclusion that she was suffering from a weakened state brought on by overexertion and nervous fright, or, as I would express it, the cause of this nervous state, her waking up in the night and dreaming and crying out of the fire, I knew it affected her nerves and nervous system, and that she had been through some ordeal. She then told me about this fire and about all that she did. I also questioned her about it. I then prescribed for her for the effects of the overstraining and overexertion, and I judged she had perhaps taken some cold after overexerting that had settled in her back and caused her to have backache,—which would be a natural condition resulting from such exposure. I gave her medicine for that condition and also a treatment or two at that time with the light, the electric lamp, for her back. . . . I found rigidity of the muscles along the spine, not more on one side than on the other. These treatments bring the heat in the muscles and release the tension of the muscles, and I gave her these treatments to overcome some of these conditions of the muscles in the back. She seemed to be suffering more through the back and up, and through the stomach, so that the stomach was easily upset on the least exertion,—in coming to town she would get all upset and would be sick for a day or two. Once she was sick for three days when she came to see me, just in getting down here. I treated her that way at different times. She was down here most every month but one. At one time I had her here four weeks under treatment to relieve these conditions of the back. She complained of headaches and trouble of that kind,—would be sick two or three days at a time. Not exactly a sick headache, but a nervous headache. She has been under treatment the biggest share of the time since, and she has been taking what I prescribed for the stomach conditions, for those conditions brought on,

or that brought on the headaches, as much as she could, and for the backaches. My opinion is that she is permanently injured.

Q. In your opinion, are those injuries due to the exertions that she put forth at the time of this fire in question?

A. I think that it could be the cause of it all right. Assuming that the statements are true given by her on the witness stand as to not being disabled before, and having been more or less disabled at all times since, *in my opinion the work that she did and the strain she underwent in that fire would be the cause of her present condition.*

There is, it is true, evidence in the record, and furnished by two doctors who were called by the defendant, that the plaintiff, when examined by them, had no signs of injury other than that she was in a more or less nervous condition. The case, however, was tried to a jury, and, even if this evidence be given the fullest credence, the fact nevertheless remains that competent testimony was introduced by the plaintiff tending to show serious injuries which were occasioned by the overexertion at the fire, and such being the case, the question as to the injuries and their cause was for the jury, and not for the court, to pass upon. The evidence of the plaintiff, also, to our mind shows a necessary and natural effort to extinguish the fire, and such an effort as any woman who had her home and buildings to protect would naturally put forth, and would be reasonably called upon to put forth under the circumstances which confronted her. It was her duty to do what she reasonably could to reduce the damages, and it is idle to say that she was merely the wife of the fee owner of the land. Not only was her *home* and her immediate personal property in danger, but she was the person in control, and there can be no question that, if she had refrained from making the very efforts which are now sought to be imputed as negligence against her, their omission would have been imputed as contributory negligence to her husband, and urged as a defense to any action which he might have brought for the destruction of his grain and buildings. "Where an injured party finds that a wrong has been perpetrated on him," says the author of 13 Cyc. 71, "he should use all reasonable means to arrest the loss. He cannot stand idly by and permit the loss to increase and then hold the wrongdoer liable for the loss which he might have prevented. It is only incumbent upon him, how-

ever, to use reasonable exertion and reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case. The application of this rule sometimes has the effect of enhancing the damages rather than reducing them, but where a reasonable and bona fide attempt has been made on the part of the plaintiff to reduce the damages or provide for his own safety in case of personal injury, it does not relieve the defendant from a full recovery of the damages sustained." Even if the wife did not own the property in fee, she had the right to live with her children in the house and on the farm, and it cannot be said that one may start a fire and drive tenants and their families out of buildings, and not merely destroy their immediate personal property and clothing, but drive them out into the open and fire devastated prairie without being guilty of a tort against them. Nor can it be said that it is lack of ordinary care for a woman under such circumstances to try to save her home and the provisions of her family and her own and her children's clothing, to say nothing of the property which belongs to her and to her husband. The case is well summed up in Illinois C. R. Co. v. Siler, 229 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368, where a woman was burned while attempting to save her home from a similar conflagration, and where the courts said: "The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. Even though one's property has been negligently set on fire by another, the owner cannot permit it to be consumed without an effort to save it, and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. Toledo, P. & W. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57; Chicago & A. R. Co. v. Pennell, 94 Ill. 448. Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds

himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Everyone is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable, and to be liable therefor. In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. Dixon v. Scott, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. Chicago & A. R. Co. v. Pennell, supra; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285, 14 Am. Neg. Cas. 291; Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558, 68 N. E. 51. The rule as to what constitutes proximate cause was considered in the case of Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362, and it was said: 'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action.' In Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256, it is said: 'The question always is: Was there an unbroken connection between the wrongful act and the injury,—a

continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? . . . The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating, which produce the injury.' It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasioned by the burning of decedent. But this act was one of the intervening causes which the appellant with reasonable diligence might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening between the wrong and the injury, or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence. The case of Seale v. Gulf, C. & S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri court of appeals in Logan v. Wabash R. Co. 96 Mo. App. 461, 70 S. W. 734. In the case of Chattanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616, the injury resulted from 'an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence.' The court, while reversing the judgment against the defendant, said: 'The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances.' The cases which sustain the position of appellant we think are wrong in principle, and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer

whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. Berg v. Great Northern R. Co. 70 Minn. 272, 68 Am. St. Rep. 524, 73 N. W. 648; Liming v. Illinois C. R. Co. 81 Iowa, 246, 47 N. W. 66; Glanz v. Chicago, M. & St. P. R. Co. 119 Iowa, 611, 93 N. W. 575; Wasmer v. Delaware, L. & W. R. Co. 80 N. Y. 212, 36 Am. Rep. 608; Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239."

The rule is laid down by Judge Elliott in his work on Railroads, vol. 3, § 1247, where he says: "It sometimes happens that personal or other injuries aside from the mere burning of property are caused by fires set out by railway companies. In such cases, where the injuries are a direct and proximate result of the railway company's negligence, it will be liable to one who is free from contributory negligence for damages on account of such injuries. . . . Where loss of life is caused by a fire negligently set, without any contributory negligence on the part of the person bringing an action or his intestate, the company setting the fire may be liable, but where a person voluntarily exposes himself to danger and is injured by the fire, there can be no recovery." In the case at bar the risk was not voluntarily assumed, but was assumed in recognition of a duty which was owing to the railway company, and the failure to perform which would have given rise to the defense of contributory negligence. Whether the plaintiff went too far in her efforts, to an extent to which no reasonable person would go, so that her efforts merged into a voluntary incurring of the danger, was clearly a question for the jury to pass upon. We certainly cannot say, as a matter of law from our perusal of the record, that she did any more than one would be presumed or expected to do under the circumstances. A prairie fire is a thing that should be stamped out immediately, and is not to be trifled with.

We have carefully examined the cases cited by counsel for appellant. We find, however, that few, if any of them, are applicable to the case at bar. Some of them were cases where the person injured was a volunteer merely, upon whom no duty of reducing damages was placed. See Pike v. Grand Trunk R. Co. 39 Fed. 255. In the case at bar the

plaintiff was protecting her own home. Others are cases where the risk was recklessly encountered, and where the danger of injury was apparent. See Cook v. Johnston, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; Chattanooga Light & P. Co. v. Hodges, 109 Tenn. 331, 60 L.R.A. 459, 97 Am. St. Rep. 844, 70 S. W. 616. There is no evidence of recklessness in the case before us. Others still are cases where the court absolutely fails to distinguish between the element of anticipation when considering actionable negligence and the damages which may be recovered when that negligence exists and is actionable. See Chattanooga Light & P. Co. v. Hodges, supra; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; Seale v. Gulf, C. &. S. F. R. Co. 65 Tex. 274, 57 Am. Rep. 602; Logan v. Wabash R. Co. 96 Mo. App. 461, 70 S. W. 734; Cleveland, C. C. & St. L. R. Co. v. Lindsay, 109 Ill. App. 533.

Not only are these last mentioned cases opposed to the great weight of authority and absolutely untenable on principles of legal logic, but the statute of North Dakota expressly provides that one guilty of a tort shall be liable "for all the detriment proximately caused thereby, *whether it could have been anticipated or not.*" Section 7165, Compiled Laws of 1913.

The questions of negligence and contributory negligence and proximate cause which are presented by the case before us were for the jury, and not for this or the trial court, to pass upon, and the conclusions of that jury are binding upon us.

Counsel contends that the court erred in overruling defendant's objection to the following question and answer:

Tell us what you did in tracing where the fire started?

A. I went over to the track and I found great big cinders about the size of a hen's egg, sent out of the engine or else out of the smoke stack—

Mr. Conmy: We move to strike out the answer as not responsive, and incompetent, irrelevant, and immaterial, no foundation laid.

We really see no merit in this objection. A part, at least, of the answer, was responsive, competent, relevant, and material. The motion was directed to the whole answer, and it therefore should not have been sustained.

There is also clearly no merit in counsel's objection to the testimony of Mrs. Knutson, a neighbor, and to the ruling of the court during the following examination:

Q. Where were you when you first saw the fire?

A. At my home on Section Fourteen.

Q. In what direction from you was the fire when you first saw it?

A. It was southwest.

Q. And in reference to the Northern Pacific Railway Company railroad, where was it?

A. It was started near the track.

Mr. Conmy: We move to strike out the answer on the ground it is not responsive to the question and no foundation laid. (Motion denied.)

Q. Where was the fire when you first saw it?

A. Near the track.

Q. Which way was your home, the place where you lived, from where the fire was?

A. It is north and a little east.

Q. Did you see any more than one fire at that place?

A. No, sir.

Q. Do you know whether that fire came to the northeast and burned over part of your place, down toward the Wilson farm?

A. Yes, sir.

Q. They live on the same section you live on?

A. Yes.

A good deal is said in criticism of the answer, "near the track," but no objection seems to have been made to the question and the answer in this respect. The only exception taken was to the court's refusal to strike out the answer, "It started near the track," and the only objection in this case was that the answer was not responsive to the question and no foundation laid. The questions were: "In what direction from your place was the fire when you first saw it?" and, "With reference to the Northern Pacific Railway Company railroad, where was it?" It would seem to us that the answer was both responsive and that a foundation had been laid. The witness had testified that she had seen the fire; that part of it had burned over her own farm, and what she said in answer to the question, "With reference to the

Northern Pacific Company railroad, where was it?" her answer, "It started near the track," was certainly responsive. If she had answered, "The first indications of the fire that I saw were near the track," there could not possibly have been any objection. It appears to us, therefore, that the objection of counsel is merely technical.

Nor did the court commit reversible error in refusing to strike out the answer of the witness Keyes, when, in answer to the question, "Where did you first notice the smoke of this fire?" he said, "It appeared to me from where I was it was on the railroad track." The objection was made that the answer was merely the "opinion of the witness and a conclusion." It is true that afterwards in his testimony the witness stated that he was 2½ miles from the fire at this time, but this fact had not been proved at the time of the question, nor do we consider it controlling. The testimony was certainly competent as tending to show from what direction the fire came, and, of course, it was a conclusion. Every result of the use of the eyesight is as a matter of last analysis a deduction or a conclusion. If judgments were reversed for answers such as the one before us, none of them would stand. The direction from which the fire came was an important matter, as well as the fact that it was on the railroad track. In fact it was not necessary that it should have been started on the railroad track itself in order that the company be liable. The witness was merely testifying as to the direction from which the fire was coming and to the conclusions which he arrived at from his observation. If he had said, "The first indications of the smoke that I noticed were near a tall tree which stands on the corner of the section," the answer would certainly not have been objectionable. Why then should it have been objectionable when he used the railroad track as a means of description or location, rather than a tree or other landmark?

Nor do we see any merit in the contention that the court erred in sustaining the objection to the question propounded to the daughter of the plaintiff: "Were the relations of your mother and Mr. Wilson before this fire always satisfactory?" nor the refusal to allow the answer to the question propounded to the witness Lester: "Did Miss Florence Wilson ever tell you at your house that Richard Wilson came home drunk one night and drove her and her mother out of the house?" The objection was that no foundation had been laid either in point of

time or as to persons or as to place, and as not admissible under the pleadings in this case. It is sufficient, however, to say that the testimony sought to be elicited was purely hearsay, and could at the most have had but a remote connection with the case.

As far as the first question is concerned, surely no error was committed. The word "always" is far-reaching, and the materiality of the relationship of the parties during their whole married life is not apparent to us.

Nor do we find any error in the rulings of the court during the following examination of Dr. Gerrish:

Q. It has been your experience that a patient suffering such pain as would keep them from sleeping nights for a period extending over a year, you would be able to discover that?

A. I think I would. Yes.

Q. What would you expect to find in a patient suffering along that line?

Mr. Knauf: Objected to unless applying to the patient in question, whom the doctor says he has never seen. No proper foundation laid.

The Court: The question should be based upon a state of facts of some kind.

Q. A patient who states that she has not been able to sleep well nights; some nights has wakened up frequently, has wakened up and has been some two or three days at a time for a period extending over a year, would be in what condition after that period in your judgment?

Mr. Knauf: Objected to unless applying to the patient in question. No proper hypothesis for the testimony being given. Objection sustained.

What injury could possibly have been sustained from the rulings of the court in this matter it is difficult for us to see. There could only have been one answer and that would have been that she was in a nervous condition. Counsel says, "We offered testimony to show that her health was poor before the fire; that she had doctored for her health before the fire. The above testimony was offered to show the treatment the plaintiff received from her husband and the fact that he was a drunkard and abused her and drove her out of the house and kept her out. It would seem that treatment of this kind could have a tendency at least

to produce nervous trouble in a woman, and it was most relevant and material in that it had a tendency to show that possibly matters other than the fire were responsible for a part of the plaintiff's nervous condition." . All of this may be true, but what had the question to do with the causes of her lying awake nights? The question was not directed to what causes induced her to be in the condition which made her lie awake, but to what would be the result of her lying awake. Even if the question were unobjectionable on technical grounds, its relevancy hardly seems apparent to us.

The judgment of the District Court is affirmed.

STATE OF NORTH DAKOTA v. JOE LAFLAME.

(152 N. W. 810.)

Prohibition law — enforcement — deputy sheriff — executive officer.

1. Under § 10107, Comp. Laws 1913, for the purposes of enforcement of the prohibition law, a deputy sheriff is an executive officer of the state.

Immunity from arrest — payment of money for — to deputy sheriff — bribery — felony.

2. Payment of money to a deputy sheriff to procure immunity from future arrest for violation of the prohibition law constitutes giving a bribe, a felony.

Information — bribery — giving money with corrupt intention — charging clause — wilfully — unlawfully — feloniously.

3. The information did not charge the money to have been given with a corrupt intent, although it charged it to have been wilfully, unlawfully, and feloniously given. *Held*, the equivalent of an allegation that the money was given with corrupt intent.

Bribery — crime of — executive officer — money feloniously paid — immunity from arrest — not necessary to complete crime.

4. The crime of giving a bribe to an executive officer of the state was complete when money was feloniously paid to influence future official conduct with reference to a possible future violation of law. It is not necessary that the law be violated and the officer desist from arresting, as the crime is complete without the happening of such contingencies.

Note.—The authorities passing upon the question as to what constitutes bribery are reviewed in the notes in 97 Am. Dec. 711, and 116 Am. St. Rep. 38.

Instructions — corrupt intention — in payment of money to officer.

5. Instructions are complained of because the word "corrupt" was not used in defining the intent with which the money was paid the officer. The instructions are held sufficient.

Evidence — not before supreme court — instructions deemed sufficient.

6. Where the evidence is not before the supreme court, and instructions may or may not be erroneous, dependent upon whether within or without the scope of the proof, they will be deemed sufficient.

Opinion filed May 14, 1915.

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

Affirmed.

Geo. Cudhie and *C. E. Brace,* for appellant.

The law does not impose any duty on a deputy sheriff; it does not recognize him as an officer within himself. 9 Am. & Eng. Enc. Law, 369; Coltrain v. McCain, 14 N. C. (3 Dev. L.) 308, 24 Am. Dec. 256.

A deputy sheriff is not a state officer within the meaning of the Constitution. Russell v. Lawton, 14 Wis. 203, 80 Am. Dec. 769; State ex rel. Walker v. Bus, 135 Mo. 325, 33 L.R.A. 616, 36 S. W. 636; N. D. Const. § 173; Wilson v. Russell, 4 Dak. 376, 31 N. W. 645; Summerville v. Sorrenson, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938; Ditch v. Edwards, 26 Am. Dec. 414 and note, 2 Ill. 127.

A public officer is one who, by implication or express authority, has the right to exercise some portion of the sovereign power in making, executing, or administering the laws. Mechem, Pub. Off. §§ 1–9; State ex rel. Clyatt v. Hocker, 39 Fla. 477, 63 Am. St. Rep. 179, 22 So. 721; Eliason v. Coleman, 86 N. C. 235; High, Extr. Legal Rem. § 626; 4 Standard Enc. Proc. 569; State v. Pritchard, 107 N. C. 921, 12 S. E. 50; Sharp v. United States, 71 C. C. A. 258, 138 Fed. 878; People v. Emmons, 7 Cal. App. 685, 95 Pac. 1032; Higgins v. State, 157 Ind. 57, 60 N. E. 685; Com. v. Root, 96 Ky. 533, 29 S. W. 351; People v. Hammond, 132 Mich. 422, 93 N. W. 1084; State v. Graham, 96 Mo. 120, 8 S. W. 911.

Where corrupt intent is made an ingredient of the offense by statute, it is necessary, not only to charge, but to prove it. People v. Bilitzke, 174 Mich. 329, 140 N. W. 590; Comp. Laws 1913, §§ 9303, 10362.

The information must allege the particular facts necessary to bring

the case within the intent and meaning of the statute. State v. Howard, 66 Minn. 309, 34 L.R.A. 178, 61 Am. St. Rep. 403, 68 N. W. 1096; 5 Cyc. 1042, 1044; 3 Enc. Pl. & Pr. 698; Bishop, Directions & Forms, §§ 245–250; People v. Jackson, 191 N. Y. 293, 15 L.R.A.(N.S.) 1173, 14 Ann. Cas. 243, 84 N. E. 65.

An officer must be actively engaged in the legal performance of a duty as such at the time of the bribery or offer of the money. Moore v. State, 44 Tex. Crim. Rep. 159, 69 S. W. 521; Moseley v. State, 25 Tex. Crim. Rep. 515, 8 S. W. 652; Re Yee Gee, 83 Fed. 145; State v. Butler, 178 Mo. 272, 77 S. W. 560; United States v. Boyer, 85 Fed. 425; United States v. Gibson, 47 Fed. 833.

Henry J. Linde, Attorney General, and *Geo. P. Homnes,* State's Attorney, for respondent.

A public officer is defined, "as the right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or during the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public. Mechem, Pub. Off. § 1; 29 Cyc. 1364; 1 McClain, Crim. Law, § 646.

A deputy sheriff is a public officer. Comp. Laws 1913, §§ 833, 3521–3523, 10107; State ex rel. Wingate v. Valle, 41 Mo. 30; People ex rel. Throop v. Langdon, 40 Mich. 673; Rowland v. New York, 83 N. Y. 376; State ex rel. Cannon v. May, 106 Mo. 488, 17 S. W. 660; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; State v. Dierberger, 90 Mo. 369, 2 S. W. 286; 29 Cyc. 1395; Williamson v. Lake County, 17 S. D. 353, 96 N. W. 702; Florez v. State, 11 Tex. App. 102; Ex Parte Winters, — Okla. Crim. Rep. —, 51 L.R.A.(N.S.) 1087, 140 Pac. 164.

If the law applies to the one who accepts a bribe, under such state of facts, it is good as against the briber. State v. Duncan, 153 Ind. 320, 54 N. E. 1067; State v. McNally, 34 Me. 210, 56 Am. Dec. 650.

An executive officer is one whose duties are to cause the laws to be executed and obeyed. Petterson v. State, — Tex. Crim. Rep.—, 58 S. W. 100; People v. Salsbury, 134 Mich. 537, 96 N. W. 936.

The exact words of the statute defining a crime need not be used in charging its commission, but other words meaning the same thing may be used. Comp. Laws 1913, §§ 10692, 10693; 1 Bishop, Crim.

Proc. §§ 626–628; Com. v. Bean, 11 Cush. 414; State v. Howard, 66 Minn. 309, 34 L.R.A. 178, 61 Am. St. Rep. 403, 68 N. W. 1096.

The mere omission of the use of statutory terms will not render the charge in the information subject to objection, where equivalent terms are used. State v. Fooks, 29 Kan. 425; State v. McGaffin, 36 Kan. 320, 13 Pac. 560; United States v. Wilson, 29 Fed. 286; State v. Eames, 39 La. Ann. 986, 3 So. 93; Bishop, Directions & Forms, 245–250.

The corrupt intent must be alleged in the indictment. One or more of the words "wilfully," "feloniously," "corruptly," or "unlawfully" may be used. 4 Standard Enc. Proc. § 570; Sharp v. United States, 71 C. C. A. 258, 138 Fed. 878; People v. Emmons, 7 Cal. App. 685, 95 Pac. 1032; Higgins v. State, 157 Ind. 57, 60 N. E. 685; Com. v. Root, 96 Ky. 533, 29 S. W. 351; People v. Hammand, 132 Mich. 422, 93 N. W. 1084; State v. Graham, 96 Mo. 120, 8 S. W. 911; State v. Pritchard, 107 N. C. 921, 12 S. E. 50.

In bribery, the offense is complete when an offer or reward is made to influence the vote or action of the official. It need not be averred that the vote, if procured, would have produced the desired result, nor need authority to do the thing desired be alleged. State v. Ellis, 33 N. J. L. 102, 97 Am. Dec. 707; Shircliff v. State, 96 Ind. 369; Scoggins v. State, 18 Tex. App. 298; People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620; 4 R. C. L. §§ 13, 17, pp. 183, 187; Tillman v. State, 58 Fla. 113, 138 Am. St. Rep. 100, 50 So. 675, 19 Ann. Cas. 91.

Under some statutes, the contrary rule of pleading is required. 5 Cyc. 1043, 1044; Com. v. Lapham, 156 Mass. 480, 31 N. E. 638; Higgins v. State, 157 Ind. 57, 60 N. E. 685.

Goss, J. Defendant is charged with giving a bribe "to an executive officer of this state," one Henderson, "deputy sheriff," with intent to influence unlawfully "the said Henderson as deputy sheriff to protect the said Joseph LaFlame against arrest, and to refrain from arresting him, said Joseph LaFlame, . . . for selling intoxicating liquors as a beverage in violation of the laws of North Dakota, the said LaFlame then and there knowing that the said Henderson was then and there a duly appointed, qualified, and acting deputy sheriff of said county in

said state." The error alleged comes to this court on appeal from a judgment of conviction rendered pursuant to verdict and after overruling of a demurrer to the information. Defendant contends "that a deputy sheriff is not an executive officer of the state, he being in fact not an officer, but merely the deputy or agent of an officer, the sheriff. . . . That, in contemplation of law, the sheriff and his deputies are but one officer, and that attempts to influence the acts of the deputy are in law attempts to influence the acts of the sheriff himself, hence an attempt to bribe a deputy is an attempt to bribe the sheriff, and must be so pleaded." And appellant cites Wilson v. Russell, 4 Dak. 376, 31 N. W. 645, and Summerville v. Sorrenson, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938, holding that, to be valid, the acts of the deputy must be done in the name of the officer of whom he is a deputy.

It is unnecessary to pass upon what phases the case might present independent of § 10107, Comp. Laws 1913. It is there provided that "it shall be the duty of every sheriff, deputy sheriff, constable, mayor, marshall, police judge and police officer of any city or town having notice or knowledge of any violations of the provisions of this chapter to notify the state's attorney of the fact. . . . If any such officer shall fail to comply with the provisions of this section he shall upon conviction be fined . . . and such conviction shall be a forfeiture of the office held by such person. . . . For a failure or neglect of official duty in the enforcement of this chapter, any of the city or county officers herein referred to may be removed by civil action." The bribery charged consists in influencing by use of money a deputy sheriff to refrain from arresting a violator of our prohibition law. Section 10107 declares a deputy sheriff to be an officer clothed with an official duty, as such, to enforce that particular law, and subject to criminal prosecution, as well as removal from office, for failure or neglect to obey that statute. Charged with the duty, he possessed power to act as an officer and deputy sheriff with respect to such particular duty enjoined. All other questions are incidental or collateral. It is immaterial that a deputy must make his official return in the name of the office and the officer for whom he is deputy. Under this statute concerning this matter he is an officer of the state, with duties devolving upon him under the law, and occupies

an official status. Bribery can be committed by unlawfully influencing his official action.

The next ground of demurrer is that the information does not allege that the acts charged were done corruptly. It is charged that defendant did all said acts "wilfully, unlawfully, and feloniously," and did offer and give a bribe with an intent to influence official conduct, and to procure thereby his immunity from arrest for crime. Bribery is charged in the words of the statute. Section 9303, Comp. Laws 1913. It is true that, to constitute a bribe as defined by § 10362, Comp. Laws 1913, the money must be given or offered with a corrupt intent; and "corruptly" is also defined by § 10359. The statutes have a common-law origin though the penalty has been increased by statute. California has almost identical statutes. As the same contention here made was advanced in People v. Seeley, 137 Cal. 13, 69 Pac. 693, the following from that opinion is authority: "It is claimed by defendant that the information does not charge an offense for the reason that it does not allege that the agreement was made with corrupt intent. The information follows the language of the statute and is sufficient. It states that defendant unlawfully and feloniously asked and agreed to receive $200 upon the agreement that his vote, opinion, and action upon the matter of accepting a school building should be influenced thereby. The agreement to unlawfully and feloniously receive the money for the purpose of influencing his vote is equivalent, in the meaning of the statute, to corruptly agreeing to receive it for the purpose of influencing his vote. If his vote should be feloniously influenced by money it would be corruptly influenced." Under State v. Climie, 12 N. D. 33, 94 N. W. 574, 13 Am. Crim. Rep. 211, "an information is sufficient which sets out every ingredient of the offense defined by statute, and in the language of the statute." And in 4 Standard Encyclopedia of Procedure, 470, under "Bribery," it is stated: "The corrupt intent must be alleged in the indictment. It is customary to use one or more of the words, 'wilfully,' 'feloniously,' 'corruptly,' or 'unlawfully.'" And such is the holding in State v. Fordham, 13 N. D. 494, 101 N. W. 888, a prosecution for robbery. The information omitted the word "steal," charging that the defendant committed the crime of robbery by unlawfully, wrongfully, and feloniously taking and carrying away, together with the other essentials to constitute that crime, but a specific intent to

steal was not charged other than inferentially. The jury were not instructed that an intent to steal must be found before conviction for robbery could be had, and on a motion a new trial was granted because of such omission.

On appeal the sufficiency of the information was reviewed under an attack, as here, by demurrer. It was held that a new trial was properly granted for failing to inform the jury that the intent with which the property was forcibly taken was material. Also held that such instruction was not beyond the averments of the information, because with the statutory definition of the crime, together with the use of the word "felonious," and intent to steal was charged by implication. Such is but the reasoning of the California court in its conclusion that, "if his vote should be feloniously influenced by money, it would be corruptly influenced."

The third assignment of error based on the demurrer is that "the information does not allege that the alleged officer was doing or about to do some official act which the defendant bribed or attempted to bribe him not to do. In other words, there are no allegations showing that the alleged officer was performing or about to perform such lawful duty relative to which there was an attempt to bribe him, nor that defendant was doing or intending to do any unlawful act for which he was seeking protection." Most of this assignment is devoted to appellant's contention that a deputy sheriff cannot be an official to influence whose acts can constitute bribery. The contrary is the law under our prohibition statutes. The information is sufficiently specific, and not subject to question on this assignment. In the words of People v. Markham, 64 Cal. 157, 49 Am. Rep. 700, 30 Pac. 620: "If the party corruptly give or promise any gift or gratuity whatever, 'with intent to influence the act, vote, opinion, decision, or judgment' of any officer, whether executive, legislative, or judicial, on any matter, cause, or proceeding which may be then pending or may by law come or be brought before him in his official capacity, the crime is complete although the matter never should come before such officer." And again: "The scope of the definition of bribery is as broad as the duties of the officer who accepts the bribe. It is the duty of a police officer to arrest, with or without warrant according to circumstances, every person who violates § 330 of the Penal Code. If, therefore, he agreed, in consideration of money paid him,

not to arrest any person who should violate § 330, it would seem to the ordinary comprehension that he was bribed with respect to a matter which might be a subject of his official action." To constitute the asking or receiving of a bribe, it is not necessary that the officer fulfil his agreement and desist from arrest, or that the unlawful contingency arise under which he is to desist from arresting what would then be an offender against a criminal law. As held in People v. Markham, the crime is complete without the happening of such contingency. And what is true of accepting a bribe must be equally true as to the giving of one. It is immaterial therefore whether the officer was not performing or about to perform a duty of arresting for violation of the prohibition laws, or that the defendant had not in fact committed a violation of that law. The crime was complete when the offer was made feloniously or corruptly to influence official conduct with reference to a possible future violation of law, or to purchase future exemption from arrest with respect thereto. The information was not subject to these grounds of demurrer.

Error is assigned upon instructions, and duplicate argument presented to the assignments above urged to the overruling of the demurrer. These are leveled at the charge given that the deputy sheriff was an executive officer of the state. Another exception is that covered under the third assignment taken on demurrer. A further exception is taken because a specific instruction upon corrupt intent was not given. The court instructed that, to convict, the jury must find beyond a reasonable doubt "that defendant gave Henderson money, and that said money was so given with an intent on the part of defendant to influence Henderson so that he would refrain from arresting defendant and permit defendant to sell intoxicating liquors contrary to law." The jury convicted. No transcript of testimony accompanies the record. Presumably the instruction is within the scope of the proof, and the proof sufficient thereunder to establish guilt. Defendant makes no claim to the contrary, nor has he any basis for a claim of innocence without the transcript being here. If a situation can be conceived under which defendant could have given the officer money with intent to influence him not to arrest, but permit unlawful sales of intoxicating liquors, and still there be no corrupt intent present, it would certainly be so exceptional as to place upon the defendant the burden of pointing to proof

upon it. The practice of assigning error upon instructions without bringing up the testimony is not to be encouraged. It has already been condemned. State v. Woods, 24 N. D. 156, 139 N. W. 321. However, it appears that for reasons stated it was difficult, if not impossible, to procure a transcript of the evidence. But under State v. Woods, supra, where "the evidence is not before the supreme court, an instruction will not be held erroneous unless it is so under every possible view of the case, and that it will be presumed to be correct as applied to the evidence, unless abstractly wrong," the instruction may be as favorable as defendant could ask for, depending upon the proof. Applying this rule, it cannot be said that the instruction must be held erroneous.

The judgment therefore is affirmed.

CITIZENS STATE BANK OF RUGBY, a Corporation, v. F. M. IVERSON.

(153 N. W. 449.)

Deed — action to set aside — to establish trust in land — proof — burden of — bank — vice president — control.

1. Where an action is brought to set aside a deed and to establish a trust in the land which is conveyed thereby, the burden of proof is upon the plaintiff, and no such relief will be granted where the evidence tends to show that the land was purchased out of a bank deposit of the defendant, and by checks drawn thereon by her husband, which were credited to his account and then paid out of such account to the vendor, and where such husband had general authority from the defendant to invest her money for her use as he saw fit, and to draw checks on her account for that purpose; but where the evidence also tends to show that such husband was vice president of, and had almost entire control of, the bank, and prior to such purchase had without authority drawn checks upon said wife's account to cover up overdrafts of his own, and by such means had apparently, and according to the books of the bank, depleted such account so that if such checks were charged against it there was not sufficient money in the account to make the purchase.

Bank — general deposit in — not bailment fund — debt by bank to depositor.

2. A general deposit in a bank does not constitute a bailment or trust fund, but merely a debt which is due and owing by the bank to the depositor.

Opinion filed May 14, 1915. On petition for rehearing June 8, 1915.

Appeal from the District Court of Pierce County, *Burr*, J.

Action to determine adverse claims. Judgment for defendant. Plaintiff appeals.

Affirmed.

Albert E. Coger, for appellant.

Iverson was the managing officer of the bank, in fact, the sole management thereof rested with him. As to the funds of the bank, he was a trustee. He occupied a fiduciary relation so far as the bank's funds were concerned. Rev. Codes 1905, §§ 5712–5715, 5718, 9282, 9206, 4657, 9277, 4822, 5706, 5711, 5710, 5724, Comp. Laws 1913, §§ 6281–6284, 6287, 10011, 9931, 5172, 10006, 5365, 6275, 6280, 6279, 6293.

The beneficial owner is allowed to follow his equitable property in the hands of third persons. 3 Pom. Eq. Jur. § 981.

Where one occupying such a position buys land with trust funds, and takes title in his own name without any declaration of a trust, a trust at once arises in favor of the original *cestui que trust* or other beneficiary. 1 Pom. Eq. Jur. § 422; 2 Pom. Eq. Jur. § 587; 3 Pom. Eq. Jur. § 1409; p. 2024, note 1.

Mr. Iverson intended that Mrs. Iverson should get the land which he had purchased with trust funds. Shearer v. Barnes, 118 Minn. 179, 136 N. W. 861.

Unless it appear that Mrs. Iverson is a bona fide purchaser of the Mygland land, she can have no interest therein. 2 Pom. Eq. Jur. §§ 738, 745, 746.

One who at the time of his purchase, advances a new consideration, surrenders some security, or does some other act which leaves him in a worse position if his purchase is set aside, and purchases in the honest belief that his vendor had a right to sell, and without notice of any kind of any adverse rights, claims, interest, or equity of others in and to the property sold, is a bona fide purchaser. 5 Cyc. 719; 2 Pom. Eq. Jur. § 751.

A pre-existing indebtedness which is neither discharged nor extended does not constitute the basis for a bona fide purchase. There must be a present valuable consideration. 2 Pom. Eq. Jur. § 748; Porter v. Andrus, 10 N. D. 561, 88 N. W. 567; Adams v. Vanderbeck, 148 Ind. 92, 62 Am. St. Rep. 497, 45 N. E. 645, 47 N. E. 24; Sipley v. Wass, 49 N. J. Eq. 463, 24 Atl. 233, 23 Am. & Eng. Enc. Law, p. 491. p. 491.

While a third person shall not be punished for the fraud of another, yet he shall not avail himself of it. Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698; 17 N. E. 496; Niblack v. Cosler, 74 Fed. 1000; First Nat. Bank v. New Milford, 36 Conn. 93; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; Gunster v. Scranton Illuminating H. & P. Co. 181 Pa. 357, 59 Am. St. Rep. 650, 37 Atl. 550; Allen v. South Boston R. Co. 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; Loring v. Brodie, 134 Mass. 468; Platt v. Birmingham Axle Co. 41 Conn. 255; First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186.

It is true that where the party elects to accept the fruits of a transaction he will be held estopped to claim both the fruits and the property from which the same are derived. After accepting the benefits of a transaction a party will not be permitted to repudiate it. Morris v. Ewing, 8 N. D. 103, 76 N. W. 1047; Russell v. Waterloo Threshing Mach. Co. 17 N. D. 248, 116 N. W. 611.

A principal must assume the obligation if he wishes to accept the benefits of an unauthorized contract of his agent. St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 29 L.R.A. 63, 58 Am. St. Rep. 468, 64 N. W. 3; Andrews v. Robertson, 111 Wis. 334, 54 L.R.A. 673, 87 Am. St. Rep. 870, 87 N. W. 190; Anderson v. First Nat. Bank, 4 N. D. 192, 59 N. W. 1029; Johnson Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429.

A principal is always liable for a fraud committed by an agent in the course of his employment, when the fraud is for the benefit of the principal. Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, 34 N. E. 779; Jarvis v. Manhattan Beach Co. 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; Nicols v. Bruns, 5 Dak. 28, 37 N. W. 754; Bennett v. Judson, 21 N. Y. 238; Elwell v. Chamberlin, 31 N. Y. 611; Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476; Peebles v. Patapsco Guano Co. 77 N. C. 233, 24 Am. Rep. 447; Haskell v. Starbird, 152 Mass. 117, 23 Am. St. Rep. 809, 25 N. E. 14; Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940, 82 Mich. 336, 21 Am. St. Rep. 563, 47 N. W. 328; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Wolfe v. Pugh, 101 Ind. 293; Rhoda v. Annis,

75 Me. 17; 46 Am. Rep. 354; Smalley v. Morris, 157 Pa. 349, 27 Atl. 734; Mechem, Agency, § 739; Comp. Laws 1913, § 3973; Eberts v. Selover, 44 Mich. 519, 38 Am. Rep. 278, 7 N. W. 225; McClure Bros. v. Briggs, 58 Vt. 82, 56 Am. Rep. 557, 2 Atl. 583; Mercier v. Copelan, 73 Ga. 636; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 637; Joslin v. Miller, 14 Neb. 91, 15 N. W. 214; Kickland v. Menasha Wooden Ware Co. 68 Wis. 40, 60 Am. Rep. 831, 31 N. W. 471; McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 614; Honaker v. Board of Education, 42 W. Va. 170, 32 L.R.A. 413, 57 Am. St. Rep. 847, 24 S. E. 544; Zehnder v. Stark, 248 Mo. 39, 154 S. W. 92; Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 344.

A person who has the benefit of his agent's contract must take it *cum onere.* Laughlin v. Excelsior Power Mfg. Co. 153 Mo. App. 508, 134 S. W. 116; Union Bank & T. Co. v. Long Pole Lumber Co. 70 W. Va. 558, 41 L.R.A.(N.S.) 663, 74 S. E. 674; D. Sullivan & Co. v. Ramsey, — Tex. Civ. App. —, 155 S. W. 580.

Where the conveyance is a voluntary one, it will be set aside even if the grantee is innocent of the fraud. Hitchcock v. Kiely, 41 Conn. 611; McKenna v. Crowley, 16 R. I. 364, 17 Atl. 354; Partelo v. Harris, 26 Conn. 483; Christian v. Greenwood, 23 Ark. 258, 79 Am. Dec. 104; Hamilton v. Staples, 34 Conn. 316; 2 Pom. Eq. Jur. 1st ed. § 909; Trumbull v. Hewitt, 65 Conn. 60, 31 Atl. 495.

Torson & Wenzel and *H. B. Senn* (*Engerud, Holt, & Frame,* of counsel), for respondent.

The money deposited did not remain the property of the depositors, but became the property of the bank; the account represented a debt to Mrs. Iverson and Mr. Lockwood, payable to them or their order, on demand. Shuman v. Citizens' State Bank, 27 N. D. 599, L.R.A. 1915A, 728, 147 N. W. 388.

The cashier of the bank participated in and knew all of the facts and circumstances, and knew that the transactions were illegal and fictitious. There is no possible pretext for the bank to claim the transactions were within the apparent scope of Mr. Iverson's agency for Mrs. Iverson. Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496.

And Mrs. Iverson is not chargeable with notice of such acts, or with liability therefor. Mechem, Agency, 2d ed. § 1831 and cases cited in notes; Warren v. Dixon, 74 N. H. 355, 68 Atl. 193; Henry v. Allen, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355; Allen v. South Boston R. Co. 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

The bank has no claim either against Mrs. Iverson or the land in question, because she had no notice, nor is she chargeable with notice, of Iverson's alleged wrongs. Rev. Codes 1905, § 5782, Comp. Laws 1913, § 6350; Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Hood v. Fahnestock, 8 Watts. 489, 34 Am. Dec. 489; Bracken v. Miller, 4 Watts & S. 102; 31 Cyc. 1587, et seq, 1595; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Bigelow, Fr. § 239; First Nat. Bank v. German American Ins. Co. 23 N. D. 139, 38 L.R.A.(N.S.) 213, 134 N. W. 873; Mechem Agency, §§ 718, 723, et seq; Hummel v. Bank of Monroe, 75 Iowa 689, 37 N. W. 954; Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341; Allen v. South Boston R. Co. 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

He who voluntarily, and with knowledge of the facts, accepts the benefit of an act purporting to have been done on his account by his agent, thereby ratifies it and makes it his own as though he had authorized it in the beginning. Mechem, Agency, 2d ed. §§ 345, 434.

The alleged embezzlement of the bank's funds was not an act, and did not purport to be an act, done by Iverson as agent for Mrs. Iverson. Mechem, Agency, (2d ed.) §§ 376–478; Shuman v. Steinel, 129 Wis. 422, 7 L.R.A.(N.S.) 1048, 116 Am. St. Rep. 961, 109 N. W. 74, 9 Ann. Cas. 1064; Meiners v. Munson, 53 Ind. 138; Mitchell v. Minnesota Ins. Co. 48 Minn. 278, 51 N. W. 608; Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 Pac. 902; Ilfeld v. Ziegler, 40 Colo. 401, 91 Pac. 825; Richardson v. Payne, 114 Mass. 429; Linn v. Alameda Min. & Mill. Co. 17 Idaho, 45, 104 Pac. 668; Wycoff, Seaman & Benedict v. Davis, 127 Iowa, 399, 103 N. W. 349; Fish & H. Co. v. New England Homestake Co. 27 S. D. 221, 130 N. W. 841; Ferris v. Snow, 130 Mich. 254, 90 N. W. 850.

Mrs. Iverson never had any knowledge of the alleged fact that the bank's funds had been used to pay for the land. Mechem, Agency, §§ 393–409; Wheeler v. Northwestern Sleigh Co. 39 Fed. 347.

A ratification of an unauthorized contract, to be effectual and binding upon the one sought to be bound as principal, must be shown to have been made by him with full knowledge of all material facts connected with the transaction. Ætna Ins. Co. v. Northwestern Iron Co. 21 Wis. 458; Baldwin v. Burrows, 47 N. Y. 199; Smith v. Tracy, 36 N. Y. 79; Case v. Hammond Packing Co. 105 Mo. App. 168, 79 S. W. 733; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Roberts v. Rumley, 58 Iowa, 301, 12 N. W. 323; Eggleston v. Mason, 84 Iowa, 630, 51 N. W. 1; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Manning v. Gasharie, 27 Ind. 399; John Gund Brewing Co. v. Tourtelotte, 108 Minn. 71, 29 L.R.A.(N.S.) 210, 121 N. W. 417; Eckart v. Roehm, 43 Minn. 271, 45 N. W. 443; Mechem, Agency, § 437; Gulick v. Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Railroad Nat. Bank v. Lowell, 109 Mass. 214; Foote v. Cotting, 195 Mass. 55, 15 L.R.A.(N.S.) 693, 80 N. E. 600; Craft v. South Boston R. Co. 150 Mass. 207, 5 L.R.A. 641, 22 N. E. 920; Henry v. Wilkes, 37 N. Y. 562; Arey v. Hall, 81 Me. 17, 10 Am. St. Rep. 232, 115 Ill. 138, 16 Atl. 302; Proctor v. Tows, 115 Ill. 138, 3 N. E. 569; First Nat. Bank v. Oberne, 121 Ill. 25, 7 N. E. 85; Fay v. Slaughter, 194 Ill. 157, 56 L.R.A. 564, 88 Am. St. Rep. 148, 62 N. E. 592; Spooner v. Thompson, 48 Vt. 259; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Pennsylvania D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543.

Mrs. Iverson is not liable either by ratification, because she did not know of the facts, or by constructive notice of her agent's acts, because obtaining money from third persons was within the scope of the authority she had intrusted to him. Bennett v. Judson, 21 N. Y. 238; Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A. (N.S.) 567, 127 N. W. 522; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Smith v. Tracy, 36 N. Y. 79; Craft v. South Boston R. Co. 150 Mass. 207, 5 L.R.A. 641, 22 N. E. 920; Wheeler v. Northwestern Sleigh Co. 39 Fed. 347.

No trust in relation to real property is valid, unless created or declared by a written instrument subscribed by the trustee, or by his agent thereto authorized in writing, or by a writing under which the trustee claims the estate, or by operation of law. Rev. Codes 1905; §§ 4816, 4821,

4822, 5706, 5710, 5711, 5407, Comp. Laws 1913, §§ 5359, 5364, 5365, 6275, 6279, 6280, 5963; Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047.

Mere part payment of the purchase price and use and occupation do not constitute part performance when the occupation is afterwards abandoned. Miller v. Ball, 64 N. Y. 286; Wright v. Raftree, 181 Ill. 464, 54 N. E. 998; Burns v. Daggett, 141 Mass. 368, 6 N. E. 727; Wisconsin & M. R. Co. v. McKenna, 139 Mich. 43, 102 N. W. 281; Howes v. Barmon, 11 Idaho, 64, 69 L.R.A. 568, 114 Am. St. Rep. 255, 81 Pac. 48; Short v. Northern Pacific Elevator Co. 1 N. D. 159, 45 N. W. 706; Rounseville v. Paulson, 19 N. D. 466, 126 N. W. 221; Tiffany & B. Trusts, p. 28; 2 Story, Eq. Jur. 12th ed. §§ 1201, 1202.

As a resulting or implied trust is in such cases a mere matter of presumption, it may be rebutted by the other circumstances established in evidence, and even by parol proofs, which satisfactorily contradict it. 1 Lewin, Trusts, 8th Am. ed.; 3 Pom. Eq. Jur. §§ 1040 et seq.

To create a resulting trust the trust must come into existence at the very moment the title vests in the grantee. White v. Carpenter, 2 Paige, 238; Rogers v. Murray, 3 Edw. Ch. 398; Forsyth v. Clark, 3 Wend. 637; Steere v. Steere, 5 Johns Ch. 19, 9 Am. Dec. 256; Niver v. Crane, 98 N. Y. 47; Fickett v. Durham, 109 Mass. 419; Davis v. Wetherell, 11 Allen, 20, note; Cutler v. Tuttle, 19 N. J. Eq. 562; Tunnard v. Littell, 23 N. J. Eq. 267; Whitley v. Ogle, 47 N. J. Eq. 67, 20 Atl. 284; Merrill v. Hussey, 101 Me. 439, 64 Atl. 819; Pinnock v. Clough, 16 Vt. 506, 42 Am. Dec. 521; Westerfield v. Kimmer, 82 Ind. 369; Kelly v. Johnson, 28 Mo. 251; Nixon's Appeal, 63 Pa. 282; Fleming v. McHale, 47 Ill. 287; Clark v. Timmons, — Tenn. —, 39 S. W. 535; Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98; Olcott v. Bynum, 17 Wall. 44, 21 L. ed. 570; Hickson v. Culbert, 19 S. D. 207, 102 N. W. 774.

Trusts cannot be created by doubtful or uncertain inferences. The evidence must be clear and convincing. 3 Pom. Eq. Jur. § 1040.

The Barnes Case, from Minnesota, cited by counsel, has no bearing on this case. The positions of the parties are wholly unlike. Mrs. Iverson has not wronged plaintiff bank or used its money, and she is not responsible for Iverson's alleged wrongs. Dalrymple v. Security Loan & T. Co. 9 N. D. 306, 83 N. W. 245; 1 Pom. Eq. Jur. § 155; 3 Pom. Eq. Jur. §§ 1043, 1044, p. 2009; Miller v. Shelburn, 15 N. D.

182, 107 N. W. 51; Cummings v. Duncan, 22 N. D. 534, 134 N. W. 712, Ann. Cas. 1914B, 976; Rolfe v. Gregory, 4 DeG. J. & S. 579, 5 New Reports, 257, 34 L. J. Ch. N. S. 274, 11 Jur. N. S. 98, 12 L. T. N. S. 162, 13 Week. Rep. 355.

In constructive trusts the statute of limitations begins to run at the very moment the trust comes into being. Knox v. Gye, L. R. 5 H. L. 675, 42 L. J. Ch. N. S. 234; Wilson v. Louisville Trust Co. 102 Ky. 522, 44 S. W. 121; Brynjolfson v. Dagner, 15 N. D. 337, 125 Am. St. Rep. 595, 109 N. W. 320; Nash v. Northwest Land Co. 15 N. D. 574, 108 N. W. 792; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032.

A constructive trust is not an estate in land. Plaintiff must allege and prove an estate in the land to maintain this action. Larson v. Christianson, 14 N. D. 476, 106 N. W. 51.

Iverson was not a witness. He could not be without his wife's consent. Hence there was no refusal to permit him to testify. Rev. Codes 1905, § 7253, Comp. Laws 1913, § 7871.

No adverse inference is permissible from such condition. National German-American Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363; French v. Deane, 19 Colo. 504, 24 L.R.A. 387, 36 Pac. 609.

Bruce, J. This action is in the form of the statutory action to determine adverse claims, the plaintiff alleging that it has an equitable "estate and interest in the land in question." It is really an action to follow trust money which it is claimed was embezzled, into real estate, and to quiet the possession of that real estate in the plaintiff, and to recover for the use of that land during the time it was detained. It involves 560 acres of land in Pierce county, North Dakota. The trial court found for the defendant and a judgment was entered quieting the title in her. From that judgment this appeal is taken and a trial *de novo* is asked.

In 1908, the land was owned by one Andrew Mygland, and on the 17th day of October, 1908, Andrew Mygland conveyed the same by warranty deed to the defendant, Mrs. F. M. Iverson, in consideration of the sum of $11,000, less certain mortgages which the purchaser assumed. At the time of this conveyance, one A. M. Iverson, the husband of the defendant, F. M. Iverson, was the vice president and managing officer of

the Citizens State Bank of Rugby. He was practically in complete control. He and his wife, the defendant, F. M. Iverson, and her father, J. H. Lockwood, and three other persons, were stockholders. The board of directors seems to have taken but little interest in the concern, and A. M. Iverson, the vice president, controlled the bank largely to suit himself. The capital stock of the bank was $10,000. The defendant, F. M. Iverson, carried a personal account in the bank. Her husband, A. M. Iverson, also had an account. There was also another account in the bank in which the defendant, Mrs. F. M. Iverson, had an interest. This account was known as the "elevator sales account." In it Mrs. Iverson had a joint one-half interest with her father, J. H. Lockwood, the funds in the account being the amount realized from the sale of elevator property in Rugby.

The contention of the plaintiff is that A. M. Iverson, the vice president of the Citizens State Bank, embezzled the money of the bank, delivered it to Andrew Mygland, and received therefor a deed to the 560 acres running to his wife, F. M. Iverson. There is no pretense or claim, however, that Mrs. Iverson had any knowledge of the embezzlement.

The theory of the defense is that Mr. A. M. Iverson was his wife's general agent, and was vested with general authority to make such investments as he deemed advisable out of the elevator sales account, and to draw upon the account and to disburse it for this purpose, and that he had invested her money, which he drew from the elevator account for that purpose, in the land in question. A counter theory of the plaintiff, however, is that before such attempted withdrawal, if any there was, the fund had been exhausted.

The elevator account covered a period of nearly four years, beginning with August 20th, 1907, and ending with September 30, 1911, at which later time it was balanced and completely exhausted. According to the books of the bank, the balance on hand on October 8th, 1908, the time of the alleged purchase, was $6,361.83. The alleged purchase was made on October 8th, 1908. Five hundred dollars of the purchase price of the land in question was paid on October 8th, and the balance of $5,989.95 on October 17th, 1908. On October 17th, the balance was $6,417.33, and on October 19th, a deposit in the interim of $55.75 having been made, the balance was $6,473.08. After the date of the alleged purchase, four checks appear to have been drawn: one to W. D. McClintock

on December 22, 1908, for $4,290; one on June 23, 1909, to A. M. Iverson, for $2,000; one on December 5, 1910, to the Citizens State Bank, for $600; and one on September 30, 1911, to J. H. Lockwood, for $44.15. The books do not show any withdrawal from the elevator sales account from the 22d day of September, 1908, to the 23d day of June, 1909, except the withdrawal on December 22, 1908, of $4,290, in the form of a check to W. D. McClintock. Mrs. Iverson testifies that "Mr. Iverson had charge of my business, and he also had charge of the elevator sales account, and if he wished to take money from the elevator sales account and put in his account, and then take money out of his account, it was satisfactory to me." Every dollar of the purchase price of the land was paid on October 17, 1908, except the $500 which was paid on October 8th. The payments were made by A. M. Iverson's personal check for $500, A. M. Iverson's personal check for $2,819.95, and by $2,970 in cash, which was taken from the cash drawer of the bank by the said Iverson, and for which a cash slip or memorandum seems to have been left. An examination of Mr. A. M. Iverson's account shows that on September 22d a check of $2,500 on the elevator sales account was deposited to his credit, and though it shows that on October 9th a check of $500 was paid on the Mygland tract, his account was, after the payment of that check, overdrawn to the extent of $981.09, and after he had paid, on October 17th, the other check on the land for $2,819.95, and taken credit on his own account for a $2,500 note which he took on the trade, his overdraft was $1,314.64.

However, a little closer examination of the evidence also tends to show that on October 8th there was actually in the bank to the credit of the elevator sales account, one half of which belonged to the wife, the sum of $13,474.98, and on October 17th when the trade was consummated, the sum of $13,530.48. It shows that on July 12, 1908, there was a credit of $12,862.38, one half of which, namely, $6,431.19, belonged to Mrs. Iverson; that on July 13, 1908, the husband, A. M. Iverson, apparently embezzled $4,500 from the cash drawer, and to cover up the shortage Mr. Cassidy, the cashier, presumably at the direction of Mr. Iverson, made out a check for $4,500 on the elevator sales account, making it appear on the books of the bank that such money had been paid to the husband; that on September 18th, there was another deposit of $113.15, and on September 22d another memorandum check fraud-

ulently made out for $2,500 and credited to the account of Mr. Iverson. The result of these entries was to make it appear that the owners of the elevator sales account had withdrawn and paid to Mr. Iverson checks to the amount of $7,000; one for $4,500 on July 17th, one for $2,500 on September 22d; and that on September 22d there was left only $5,975.33 due from the bank to the owners of the elevator sales accounts, when such was not the case, the withdrawal having been made by an officer of the bank fraudulently and for his own use.

It is argued by the defendant from all of this, and we believe correctly, that these were merely false entries on the books made to conceal Mr. Iverson's misappropriations of the bank's funds which were in his custody and control as the managing officer of that bank; that there was no misappropriation of Mrs. Iverson's money; that the money that was misappropriated was the bank's money; that all that Mrs. Iverson had was an open account in the bank which represented an amount due to her from the bank, which was payable on demand, and that if at the time of the payment on the trade with Mygland she had in the bank a credit sufficient to cover the amount of the purchase, and if she really authorized her husband, as her agent, to make the trade and spend her money, and to draw on her account therefor, it could not be said that in payment of the purchase price of the land in question the bank's funds were embezzled; as the prior embezzlements, or rather the manipulations of the books, had been made to cover up embezzlements of the bank's funds, and not of the elevator sales accounts, and being unauthorized by Mrs. Iverson, and being made by an officer of the bank and conjointly with his *alter ego,* who was her agent, and in fraud of her, and the obligation of the bank to her being that of a debtor, and not of a custodian or bailee, she was not bound thereby.

Not only is Mrs. Iverson's testimony clear and undisputed that she had no knowledge of these fraudulent transactions, but this fact is conceded by the appellant. Her testimony also is positive that she had given her husband permission to invest her money as he saw fit, and that she authorized the purchase of the Mygland land for $7,000. The same is true of her father, J. H. Lockwood, who appears to have had only a half interest in the elevator sales account. He testifies that he told Iverson that "if there were any good deals in land he might use the money for that purpose." He testified that he was entirely ignorant of

the fraudulent entries made by Iverson; that "he heard, when talking about the purchase of the Mygland tract, that his daughter was to have had the land;" that, though president of the bank, he took absolutely no part in its management.

Under the facts of the case, and under the concession that both Mrs. Iverson and her father were absolutely ignorant of the fraudulent manipulation, and in view of the further fact that the cashier of the bank, Mr. Cassidy, took a greater or lesser hand in the fraudulent manipulations and must have known that some of them at least were irregular, we can see no reason in law or in equity why the defendant wife is not in the position of any other depositor in the bank, and why the fraud of her husband should be imputed to her. We held in the case of Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A. (N.S.) 567, 127 N. W. 522, that "in case the treasurer of an elevator company, also acting as cashier of a bank in which the elevator company has money on deposit, and authorized to draw checks in the name of the elevator company upon its bank account for the purpose of paying debts and obligations of the elevator company, misappropriates funds of the bank, and for the purpose of covering up a shortage in the bank's funds until such time as he expects to be able to replace the same, draws checks of the elevator company payable to the bank and charges these checks against the elevator company on the books of the bank, without intention to transfer funds from one corporation to the other, but only for the purpose of temporarily concealing his defalcation, such checks create no liability in favor of the bank against the elevator company." We further held that "in case the cashier of the bank, having misappropriated funds of the bank or become in some manner indebted thereto as treasurer of the elevator company, draws checks upon it payable to the bank and uses the sum to pay his personal indebtedness to the bank, such checks, by their form, of themselves, operate as notice to the bank of the misappropriation of the funds of the elevator company, and the bank after accepting them with such notice cannot predicate upon them a claim of liability against the elevator company." We further held that "a banking institution is not authorized to pay out funds intrusted to it on deposit to a person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate and divert the fund received to his own uses when paid over,

and in case such payment is made the amount so paid may be recovered at the suit of the depositor." We further held in regard to notice that "in case the cashier of a banking institution who has the entire management, control, and conduct of its affiairs and stands as sole representative of the bank in all transactions relating to the receipt and disbursement of the funds of depositors, who, while so acting, draws checks of an elevator company of which he is treasurer payable to the bank, presents such checks as treasurer to himself as cashier, takes the sum of money paid over thereon, and misappropriates it, the bank for which he is acting will be held to knowledge of his fraudulent purpose at the time of presenting the checks, and cannot base thereon a claim of liability in its favor against the elevator company." This case seems to be conclusive of the one at bar. See also Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496.

There was therefore no embezzlement of Mrs. Iverson's money, but of that of the bank itself, and such being the case, and A. M. Iverson, as her agent, being authorized to make the purchase and to charge her account with the amount thereof, and there being at the time sufficient money in the elevator sales account to meet such charge, there is no reason why a defendant should now be dispossessed or be made to yield up the land.

The theory of counsel for appellant is based largely upon the fact that A. M. Iverson, the vice president of the bank, was his wife's agent; that Mrs. Iverson had no actual knowledge of the state of her account, and that there is no proof that the $4,500 and $2,500 withdrawals were not used for her, and that by refusing to allow her husband to testify she precluded the plaintiff from showing what had actually been done with her money. Whether the husband could have been required to testify or not we do not decide, and refer merely to § 740(758), vol. 4, Jones on Evidence. If he could not, the objection of the wife would not raise any presumption against her. See § 739 (757), vol. 4, Jones on Evidence. No assignment of error, however, is based upon the court's ruling in this respect, and the matter is not mentioned in the brief. The case therefore stands in this position: Plaintiff brings an action to set aside a deed which is otherwise regular, and to declare a trust. The record shows conclusively that at least a part of defendant's deposit went into that land. It shows that her deposit covered the

entire purchase price, unless two prior withdrawals from her account were withdrawn by her authority. These are shown to have been credited to her husband's account, and if they were not paid upon the land, no other disposition is shown. Can it be said that there is proof in the record sufficient to set the deed aside or on which to base the trust? It is true that much has been said of the defendant's statement on cross-examination that "Mr. Iverson had charge of my business and he had charge also of the elevator sales account, and if he wished to take money from the elevator sales account and put it in his account and then take money out of his account, it was satisfactory to me." This statement, however, was made in connection with purchases or expenditures made by Mr. Iverson for the benefit of his wife, and not for his own personal use.

The question was asked and answered in connection with taxes which were paid by Mr. Iverson's personal check, and the whole testimony is as follows:

Q. I will show you "exhibit J," the tax receipt, and ask you in what manner it was paid.

A. In what manner the taxes were paid, you mean?

Q. Yes, that is, did you pay them personally?

A. Mr. Iverson tended to all my business.

Q. And have you any check or voucher for the payment of those taxes?

A. I think not I think.

Q. That is, I want to ascertain whether the payment was made and charged to your account, or whether it was made and charged to the account of A. M. Iverson.

A. I do not know whether it was charged to his account or to mine. Mr. Iverson had charge of my business and he had charge also of the elevator sales account, and if he wished to take money from the elevator sales account and put it in his account and then take money out of his account, it was satisfactory to me.

This statement in nowise shows any authority to A. M. Iverson to credit money to his account and to pay it out for any other purpose but on investments made and expenses incurred for his wife in such investments alone. 2 C. J. 644.

The mistake of counsel for appellant consists in an erroneous application to the case at bar of a well established principle of agency. He cites and relies upon Mechem on Agency, 2d ed., where the author in § 1839, vol. 2, says: "Where such an agent attempts dealings between his two principals (both not having consented thereto) either may, in accordance with well settled rules, repudiate the dealings. If, however, either one, instead of repudiating, elects to affirm the transaction and seeks to acquire or retain a benefit from it after knowledge of the facts, he must take the benefit subject to the means by which it was acquired. This is frequently exemplified in the cases already cited in which such an agent for his own purposes abstracts from one principal and attempts to convey to the other,—neither one being represented by any other agent; if the latter principal claims the benefit of the act, he must take it subject to his agent's knowledge. If A, being the agent of X and also of Y, and being indebted to Y, abstracts bonds from X and receives them for Y as security for that debt, then, though when he attempts to transfer them he may be acting as agent for X, yet when he attempts to receive them and acquire title to them he is acting as agent for Y, Y did not act in person; no one else than A acted for him; if Y had obtained any title he obtained it through A, and he must be charged with the knowledge his agent had at the time." The trouble with the case at bar is that the transactions are not the same and are in nowise necessarily related.

The husband had a general authority to draw checks on the elevator sales account for the purpose of investment. This the bank must be presumed to have known as he was its managing officer. He had no authority to commit a fraud upon the bank, or upon his wife and Lockwood, the owners of the elevator sales account, and to make charges against said account in order to cover up his embezzlements or overdrafts. The payments made by him on the land, therefore, from the elevator sales account, were payments which were made under authority and from a fund which could not be said to have been depleted by reason of checks which were wrongfully drawn on such account, and without authority from his wife, either express or implied, but in violation of his trust as an officer of the bank. The section from Mechem on Agency in no way applies, for the wife has in no manner ratified the unlawful acts. What she has ratified has merely been the

use of her money in the purchase of the land, and the ratification of the use of her money in the purchase of the land and the charging to her account of the checks drawn therefor in noway ratifies separate and distinct transactions which would involve the charging against such account of other amounts which were not chargeable against the same, and which was done by her husband, not as her agent, but in fraud of her and in fraud of the bank. The relationship between a bank and a depositor is that of debtor and creditor merely. The bank was not the custodian of the funds of, but owed the defendant wife the sum of her deposit. Against this amount she expressly or impliedly authorized, or at any rate ratified, the expenditure of the money necessary to purchase the land. The money was paid and she ratified, and had the right to ratify, the transaction. In doing this she authorized the setting off against her credit of the amount which was paid on the purchase price of the land. She authorized and ratified nothing more.

The fraudulent entries transferring certain funds from the elevator sales account to the account of A. M. Iverson did not constitute an embezzlement of Mrs. Iverson's money, but of that of the bank itself. The bank owed the defendant on that account the same amount of money after, as before, the fraudulent entries were made. Such being the case, and A. M. Iverson, as the defendant's agent, being authorized to make the purchase and to charge her account with the amount thereof, and there being at the time in the bank, and actually belonging to the elevator sales account, sufficient money to meet that charge, there is no equitable ground upon which defendant may now be dispossessed or made to yield up the land, on the theory that she has paid no consideration therefor. The bank's funds used in the purchase of the land have simply served to liquidate so much of an indebtedness owing by the bank to the defendant.

The judgment of the District Court is affirmed.

CHRISTIANSON, J., being disqualified, did not participate. HON. CHARLES M. COOLEY, Judge of the First Judicial District, sat in his stead.

GOSS, J. (concurring). Cashier Iverson embezzled $7,000 from the plaintiff bank. He then appropriated sufficient of a $14,000 elevator

sales account to replace the funds embezzled. This he did by checking against that account in favor of the bank and charging the same upon its books. Half of the elevator sales account belonged to his wife. He was her general agent to invest her funds so deposited. Her funds were thus diverted in breach of his trust, and to make good a shortage with the bank, of which fact it was charged with notice. To make good his trust to the wife, who was ignorant of his diversion of her funds, he then overdrew his own account with the bank to buy with other funds this farm. He then in part recouped the bank by having it discount a promissory note he procured in the land deal. The bank received the amount and benefit of this note. The bank now seeks to subject the land to a resulting trust in its favor, claiming that its wrongfully diverted funds purchased the farm, and that she as owner is by operation of law a trustee of title for it.

Before it can recover it must establish that its money, and not that of its depositor, the grantee, was used. The test as to that is whether the depositor immediately upon the diversion of her deposit could have recovered it of the bank receiving it. The bank, charged with notice of the shortage by embezzlement of it by its cashier, cannot retain the money unless it was the husband's or unless he was authorized by her to use it as his to replace the funds embezzled. The bank is charged with knowledge of its receipt, and that it received it by virtue of a check on the account of one of its depositors. The whole transaction was within its presumed knowledge. The money did not belong to Iverson. Of that fact it had imputed knowledge. Being charged with knowledge of the source from whence it came, it must establish that the diverter of the deposit had authority so to do and to make the application of it as was made. The burden of proof is upon it to establish this. Otherwise it would be obligated to respond in money to the depositor's demand for her funds. As a defense it is shown that at the most but a general authority was in the husband to invest the wife's funds on deposit. From this no authority to dissipate the deposit in repaying his criminal obligation to the bank can or should be inferred, as such would be as much without the scope of his authority to invest as it would be different from an investment. The foregoing is my conclusion from the evidence and an investigation of authorities. Concur in affirming the judgment.

On Petition for Rehearing.

BRUCE, J. A petition has been filed in which it is claimed that A. M. Iverson had not overdrawn his account at the time of the drawing of the $4,500 and the $2,500 checks on the elevator sales account, nor were the checks drawn in favor of the bank, and it is therefore claimed that the money was not used for the benefit of the bank and that the case is therefore distinguishable from that of Emerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N. W. 522. We do not, however, so understand the evidence. From our examination of the abstract and of the exhibits, we are satisfied that on July 13th, the time of the drawing of the $4,500 check, there was not only an overdraft of $2,916.19, but that A. M. Iverson was indebted to the bank for $4,500 which he had taken from the cash and had evidently been juggling with for nearly a month. In our opinion it was immaterial whether the charges were wrongfully made against the wife's account in order to cover up an overdraft, or to cover up an embezzlement of money from the cash drawer, although they appear to have been made for both purposes.

Again plaintiff is in error in regard to the question of the overdraft at the time of the drawing of the $2,500 check. He only gives us in his printed brief the account of A. M. Iverson as it appears from September 22d and thereafter. The entries on September 22d show checks of $110.95 and a deposit of $2,500 (evidently the check on the elevator sales account) and a balance of $622.90. In order that there might be that balance, however, the $2,500 check had to be deposited for the books show that prior to the 22d, and prior to the deposit of the $2,500 check, there was an overdraft of $1,766.15.

The petition for a rehearing is denied.

R. AYLMER v. O. O. ADAMS.

(153 N. W. 419.)

New trial — motion for — newly discovered evidence — judicial discretion of court — appellate court — interference by — abuse must appear.

1. A motion for a new trial on the ground of newly discovered evidence is

addressed to the sound judicial discretion of the trial court, and the appellate court will not interfere unless manifest abuse of such discretion is shown.

Trial court — discretion — new trial.

2. In the instant case it is held that this court cannot say that the trial court manifestly abused its discretion in granting a new trial.

Opinion filed April 15, 1915. On petition for rehearing May 18, 1915.

From an order for a new trial of the District Court of Ward County, *Leighton,* J.

Plaintiff appeals.

Affirmed.

Nestos & Carroll, for appellant.

The showing made on motion for new trial on the ground of newly discovered evidence should be viewed with suspicion and closely scrutinized, and such motion should be granted only when due diligence is shown by the moving party, and it should also appear that the alleged new evidence would or ought to bring a different result before another jury. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Evans v. Parrott, 26 Ark. 600; Camp Mfg. Co. v. Parker, 121 Fed. 195; Caller v. Shields, 2 Stew. & P. (Ala.) 417; Johnson v. Offut, 2 MacArth, 168; Griggs v. Gear, 8 Ill. 2; Rowan v. First Nat. Bank, 112 Ill. App. 434; Lancaster v. Springer, 126 Ill. App. 140; Karsten v. Winkelman, 126 Ill. App. 418; Schaefer v. Wunderle, 154 Ill. 577, 39 N. E. 623; Cole v. Littledale, 164 Ill. 630, 45 N. E. 969; Carneal v. Wilson, 3 Litt. (Ky.) 90; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Hollingsworth v. M'Donald, 2 Harr. & J. 230, 3 Am. Dec. 545; Burch v. Scott, 1 Gill & J. 393; Hodges v. Mullikin, 1 Bland, Ch. 503; Stockley v. Stockley, 93 Mich. 307, 53 N. W. 523; Vaughan v. Cutrer, 49 Miss. 782; Watkinson, v. Watkinson, 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 Ann. Cas. 326; Wiser v. Blachly, 2 Johns, Ch. 488; Traphagen v. Voorhees, 45 N. J. Eq. 41, 16 Atl. 198; Kennedy's Estate, 15 Pa. Co. Ct. 494; Conrad v. Conrad, 9 Phila. 510; Proudfit v. Picket, 7 Coldw. 563; Frazer v. Sypert, 5 Sneed, 100; Young v. Henderson, 4 Hayw. (Tenn.) 189; Hill v. Bowyer, 18 Gratt. 364; Campbell v. Campbell, 22 Gratt. 649; Whitten v. Saunders, 75 Va. 563; Kern v. Wyatt, 89 Va. 885, 17 S. E. 549; Heermans v. Montague, 2 Va. Dec. 6, 20 S. E. 899; Baker v. Watts, 101 Va. 702, 44 S. E. 929; Amiss v. McGinnis, 12

W. Va. 371; Long v. Granberry, 2 Tenn. Ch. 85; Ricker v. Powell, 100 U. S. 104, 25 L. ed. 527; Diamond Drill & Mach. Co. v. Kelley Bros. 138 Fed. 833; Poole v. Nixon, 9 Pet. 770, appx. 9 L. ed. 305, Fed. Cas. No. 11,270; Gould v. Tancred, 2 Atk. 533.

It should also appear that such evidence could not have been discovered before by the use of due diligence. Story Eq. Pl. 10th ed. § 414; Dexter v. Arnold, 5 Mason, 312, Fed. Cas. No. 3,856; Hughes v. Jones, 2 Md. Ch. 289; Perkins v. Partridge, 30 N. J. Eq. 559; Young v. Keighly, 16 Ves. Jr. 348; Hitch v. Fenby, 4 Md. Ch. 190; Adler v. Van Kirk Land & Constr. Co. 114 Ala. 551, 62 Am. St. Rep. 133, 21 So. 490; Wiser v. Blachly, 2 Johns. Ch. 488; Nichols v. Nichols, 8 W. Va. 187.

This rule not only applies to the party moving, but also to his attorneys and agents, since notice to either is notice to the party. Norris v. LeNeve, 3 Atk. 26; Stockley v. Stockley, 93 Mich. 307, 53 N. W. 523; Morrison v. Carey, 129 Ind. 277, 28 N. E. 697.

Deficiency of proof is not ground for a new trial; neither will a new trial be granted to permit a witness to testify to facts forgotten or overlooked, or to which his attention was not called. Goose River Bank v. Gilmore, 3 N. D. 191, 54 N. W. 1032; 29 Cyc. 896–898, 907, 989 et seq.; Burson v. Dosser, 1 Heisk. 763; Smith v. Rucker, 95 Ark. 517, 30 L.R.A.(N.S.) 1030, 129 S. W. 1079; State v. Stowe, 3 Wash. 206, 14 L.R.A. 906, 28 Pac. 337.

A new trial will not be granted on new evidence which is merely impeaching in character. Brennan v. Goodfellow, — Iowa, —, 96 N. W. 962; Traphagen v. Voorhees, 45 N. J. Eq. 41, 16 Atl. 198; Boyden v. Reed, 55 Ill. 458; Adamski v. Wieczorek, 93 Ill. App. 357; Karsten v. Winkelman, 126 Ill. App. 418; Dixon v. Graham, 16 Iowa, 310; Foy v. Foy, 25 Miss. 207; Kern v. Wyatt, 89 Va. 885, 17 S. E. 549.

Or for merely showing subornation of perjury of witnesses. Society of Shakers v. Watson, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; 2 Enc. Pl. & Pr. 580; Story Eq. Pl. §§ 414 and 418; Evans v. Parrott, 26 Ark. 600.

Palda, Aaker & Greene and *I. M. Oseth,* for respondent.

The question of jurisdiction is nowhere discussed or urged in the appellant's brief, and is therefore taken to be abandoned. Foster

County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663; Kelly v. Pierce, 16 N. D. 234, 12 L.R.A.(N.S.) 180, 112 N. W. 995; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; State v. Wright, 20 N. D. 216, 126 N. W. 1023, Ann. Cas. 1912C, 795.

The supreme court gains jurisdiction of an appeal only when the record and appeal papers are filed with the clerk thereof. Stierlen v. Stierlen, 8 N. D. 297, 78 N. W. 990.

In a motion for a new trial on the ground of newly discovered evidence, the test is whether or not such newly discovered evidence ought to change the result on another trial before another jury, and that it in all reasonable probability would bring such results. The mere fact that it is cumulative is immaterial. Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; Wilson v. Seaman, 15 S. D. 103, 87 N. W. 577.

The presumption is that the determination of these questions by the trial court was correct unless it is otherwise clearly shown. Hall v. The Emily Banning, 33 Cal. 522, and cases cited; People v. Sutton, 73 Cal. 243, 15 Pac. 86; Longley v. Daly, 1 S. D. 258, 46 N. W. 247; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Gaines v. White, 1 S. D. 434, 47 N. W. 524.

The alleged new evidence will be taken as true unless clearly contradicted. Re McClellan, 21 S. D. 209, 111 N. W. 540.

False swearing may be ground for new trial, especially where such matters are very material and such fact is clearly established. O'Hara v. Brooklyn Heights R. Co. 102 App. Div. 398, 92 N. Y. Supp. 777; Chapman v. Delaware, L. & W. R. Co. 102 App. Div. 176, 92 N. Y. Supp. 304.

CHRISTIANSON, J. This is an appeal from an order of the district court of Ward county granting a new trial for newly discovered evidence. The case was tried to a jury and a verdict returned in favor of the plaintiff for $1,785.46. Judgment was entered pursuant to the verdict on March 14, 1913. Several affidavits were submitted in support of the motion for new trial. The newly discovered evidence is set forth in the affidavitt of McKenzie St. Clair, a witness who testified in behalf of the plaintiff upon the trial of the action. This affidavit is

as follows: "McKenzie St. Clair, being first duly sworn, deposes and says that he resides at Minneapolis, Minnesota, and that he is acquainted with the plaintiff and the defendant in the above-entitled action; that he remembers the transaction in his office in Minneapolis, Minnesota, at the time the plaintiff and defendant were both in his office at the time the purported note was alleged to have been signed by O. O. Adams, and that he is the identical party whose name appears as witness on said 'Exhibit A;' that plaintiff, R. Aylmer, at the time mentioned, had desk room in affiant's office; that a few days prior to the purported date of the purported note, 'Exhibit A, both the plaintiff and defendant were in affiant's office, and went from there to Iowa for the purpose of completing a trade of some land for some horses, and that on or about the date of said 'Exhibit A' they had some conversation in affiant's office, but so far as this affiant overheard the conversation between the plaintiff and defendant, there was no note mentioned at this time, either by the plaintiff or defendant, but after they had been in conversation for a short time the plaintiff laid the paper 'Exhibit A on affiant's desk, and asked him to sign same; that when the paper was laid on affiant's desk he took up his pen and signed his name; that he did not notice, and does not now know, whether the name of O. O. Adams was signed on said paper at the time he signed his name thereto; that during the time the plaintiff and defendant were in his office he saw the defendant, O. O. Adams, sign one paper, and that he did not see him sign any other paper, and that he did not at that time sign more than one paper; that on that date affiant had been around the city of Minneapolis quite a good deal, and had, at that time, drank considerable liquor, and was not in a position to observe closely, and because of his condition he signed 'Exhibit A' without knowing whether the name of some other person was signed thereto at that time; that after signing his name to said paper he got up and left the office and left the paper lying on his desk; that affiant is not physically strong, and that liquor has the effect of making him very careless and destroys his power of observation, and when in that condition from drink, he is liable to and does do things without thought and without the proper precaution, and very often to his own material and serious detriment, and that in such condition at one time a bill of sale was presented to him for signature, and without observing what it was because of his condition from drink, he

signed said instrument and thereby disposed of $300 worth of property without consideration, and which he did not in any way intend to sell; that in a conversation with the plaintiff, R. Aylmer, because of the fact that the defendant, Adams, was going to Minneapolis to complete for him a trade in which this affiant was interested, affiant asked Aylmer regarding this man Adams, and whether or not he was acquainted with him, to which plaintiff replied that very few men were better acquainted than he and Adams, and that at one time, he, Aylmer, had charge of Adams's business, and that Adams was in the habit of handing him his check book, and he, Aylmer, drew checks and signed Adams's name thereto; that at the time 'Exhibit A' was dated, the plaintiff and defendant had returned from Iowa, and affiant asked them in regard to the trade, and they told affiant that the trade had been made, and affiant was observing as far as he possibly could what took place in the office at that time, because he was interested as agent in the completion of the trade of the land for the horses, and that he watched to see what papers were signed, and that his observations along that line were as carefully made as possible, and that at such time O. O. Adams signed his name but once.

"That an examination of the 'Exhibit A' shows that the word 'eight,' which was printed in said blank, was erased, and the word "six" written therein in ink, and affiant does not know whether said change was on the paper at the time he is alleged to have signed his name on said purported instrument or not; that affiant saw the contract made between the defendant and E. D. Garner relative to the trade of land for horses, and that under said contract there was to be nothing completed until the following March, and that there was nothing in said contract making it necessary for the execution of 'Exhibit A,' or any other notes, at the time said note 'Exhibit A' is dated.

"That reference is made to the paper hereto attached marked 'Exhibit A,' which purports to be the photograph of said alleged note, 'Exhibit A' used in said action.

"Affiant further states that the facts herein stated were not stated by him prior to the said trial, nor prior to the time he gave his deposition in Minneapolis; that prior to giving his deposition for said action, he had not since talked with either Mr. Adams or with the attorneys for Mr. Adams, and that in giving his deposition he referred to those

things only about which he had been interrogated, and that since said trial he has had a conversation with the attorneys for the defendant, and during said conversation for the first time told the facts stated in this affidavit."

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and the appellate court will not interfere unless manifest abuse of such discretion is shown. And the appellate court is more reluctant to interfere in a case where a new trial has been granted than where it has been denied. This rule is so well settled and elementary that it is unnecessary to cite any authority in support thereof. In fact, appellant's counsel concedes that the sole question for determination on this appeal is whether or not the trial court grossly abused its discretion in ordering the new trial. No statement of the case was settled, hence, there is no opportunity for this court to ascertain what testimony was produced upon the trial of the action, with the exception of the testimony of St. Clair and two other witnesses, which was taken by deposition. The trial judge, however, had both seen and heard the witnesses, and was familiar with their testimony. He was also familiar with all the proceedings had in the action, and while it is somewhat difficult for this court to see that the proposed additional change in the testimony of the witness St. Clair is of sufficient importance to warrant a new trial, or that the defendant acted with the required degree of diligence, still these matters were presented to the trial court for determination, and he was in better position to decide these questions than in this court. This case has been tried but one time. A different rule might apply if there had been more than one trial. Under all the circumstances we do not feel justified in saying that the trial court manifestly abused its discretion in granting a new trial, and the order appealed from is therefore affirmed.

On Petition for Rehearing. (Filed May 18, 1915.)

CHRISTIANSON, J. An able and exhaustive petition for rehearing has been field herein, wherein it is earnestly argued that the former opinion is erroneous for the reason that a new trial is granted on the ground of newly discovered evidence which is cumulative and impeach-

ing in character. The reasoning adopted in the petition is based on the erroneous assumption that this court has granted a new trial in this case. That question was presented to and decided by the trial court. The question presented to this court is not whether a new trial should be granted or denied,—but whether or not the trial court abused its judicial discretion in ordering a new trial. "A test of what is within the discretion of a court has been suggested by the question. May the court properly decide the point either way? If not, then there is no discretion to exercise. If there is no latitude for the exercise of the power, it cannot be said that the power is discretionary. The only limitation upon the exercise of discretionary power is that it must not be abused." Hayne, New Trial & App. § 289, p. 1650.

And the appellate court will uphold the ruling of the trial court granting a new trial on a discretionary ground when it would have refused to disturb the decision of that court had a new trial been denied; and will sustain such order even though the trial court would have been justified in reaching a different conclusion, and although the appellate court might deem a different conclusion the better one. Braithwaite v. Aiken, 2 N. D. 57, 62, 63, 49 N. W. 419; People v. Goldsworthy, 130 Cal. 600, 62 Pac. 1074. See also St. Anthony & D. Elevator Co. v. Martineau, ante, 425, 153 N. W. 416.

"The rule has always been, whether the discretionary act was authorized by judicial precedent or by act of legislature, that an exercise of discretion on the part of the trial court would be disturbed only for an abuse thereof. It is therefore important to know when discretion has been abused. This is not always easy to determine, but the task is greatly simplified when it is remembered that the discretion referred to is legal, and never arbitrary. There must be a legal ground or excuse for every act of the court, and not a mere arbitrary exercise of power by the will of the individual who happens to occupy the position of judge. Not only must there be a legal ground or excuse in support of the exercise of discretionary power, but there must be some fact or reason against same, otherwise there would be no basis for an exercise of discretion. Moreover, the discretion of the court must always be exercised in behalf of justice and fair dealing in the abstract, and manifestly must not be contrary to the principles of justice, or productive of hardship and inconvenience. If this should be the case

there would be, in the language of the authorities, an abuse of discretion, and the appellate court would reverse the judgment or order. This is not a very precise rule; but when interpreted by the light of the circumstances of each case, it is of practical value, and prevails in all courts where the common law is the rule of decision." Hayne, New Trial & App. § 289.

"While it may be diffcult to define exactly what is meant by abuse of judicial discretion, and whatever it may imply as to the disposition and motives of the judge, it is fairly deducible from the cases that one of its essential attributes is that it must plainly appear to effect injustice." Clavey v. Lord, 87 Cal. 413, 25 Pac. 493.

The statute provides that a new trial may be granted, among otners, on the ground of "newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." It is conceded that a motion based on this ground is addressed to the sound judicial discretion of the trial court. The discretion vested in a trial court in the determination of such motions is based on the theory "that the judge who tries a case, having the parties, their witnesses and counsel, before him, with opportunity to observe their demeanor and conduct during the trial, and note all incidents occurring during its progress likely to affect the result thereof, is better qualified to judge whether a fair trial has been had and sustantial justice done than the appellant tribunal."

It will be observed that the statute prescribes the general conditions under which newly discovered evidence may constitute a ground for a new trial. In the construction of this or similar provisions, certain general rules have been formulated, among which may be found the ones contended for by counsel in the petition for rehearing herein. Although it is generally conceded that no arbitrary or inflexible rule can be laid down, but that the question of whether or not the trial court's discretion in granting or denying a new trial was properly exercised will largely depend on the peculiar circumstances of each case. In a discussion of this proposition it is said in Bayles on New Trials and Appeals, 2d ed. p. 574: "Motions for a new trial upon the ground of newly discovered evidence are not governed by any well defined rules, but depend in a great degree upon the peculiar circum-

stances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end. Barrett v. Third Ave. R. Co. 45 N. Y. 632; Glassford v. Lewis, 82 Hun, 46, 31 N. Y. Supp. 162. The discretion to be exercised is legal, and not arbitrary. Carpenter v. Coe, 67 Barb. 411; Platt v. Munroe, 34 Barb. 291.

In cases falling within the principles laid down by the authorities, the courts will follow the established rules. But these rules are not of such universal application as to be decisive of every case however much it may differ in circumstances from every other. No arbitrary rule can be laid down which will determine in every case whether a party exercised reasonable diligence in procuring evidence for the trial, nor whether the evidence which the party desires to offer on a new trial would be likely to change the result, nor whether he has used due diligence in making his motion." See also Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690.

In Spelling on New Trial and Appellate Practice, it is said: "Although, in every extended discussion of the subject of newly discovered evidence, and in a large percentage of decisions involving it, the terms 'cumulative' and 'merely cumulative' occur, yet only a thorough and painstaking study of cases and a free resort to the true reasons underlying the decisions are required to convince the mind that these terms are inappropriate and confusing when used determinatively on this branch of law. It has been in several cases declared, as the result of many other decisions, that new evidence possessing sufficient probative force to render a different result on retrial probable cannot be merely cumulative. . . . Few, if any, modern cases can be cited in which a new trial was held improperly granted by trial courts on newly discovered evidence possessing the above-mentioned force and qualities, merely because it was cumulative. . . . All corroborative evidence is cumulative, but not all cumulative evidence is corroborative. All relevant, competent, and material newly discovered evidence is comulative, but if it be of sufficient probative materiality and force to change the result upon retrial, it is not 'merely cumulative'." Spelling, New Trial & App. Pr. § 225.

"In several cases, and with unbroken uniformity in recent cases, the

supreme court of California has taken care to qualify the rule against granting new trials on cumulative new evidence with a proviso equivalent to a strong assertion to the effect that if the probability of a different result upon retrial were present, the rule would not be operative. In the most recent case involving the question, after quoting from the statute the requisites there prescribed, the court remarked: 'Where these requisites occur they constitute sufficient grounds for a new trial, and no others can be required. Hence, the rule so often reiterated by the courts, that a new trial should not be granted where the evidence is merely cumulative, must be regarded (in this state), not as an independent rule, additional to those established by the provisions of § 657 of the Code, but as a mere application of those rules.' The courts of other states have gone much further in the same direction. In New York the question of whether the new evidence is cumulative is expressly and completely subordinated to the question whether, if admitted, it would probably produce a different result upon a retrial. And it was held that the fact that newly discovered evidence is cumulative is not necessarily an objection to granting a motion based thereon for a new trial, where the issue is close and the evidence sharply conflicting. And in Kentucky, a view is taken which is the substantial equivalent of the New York rule. It is there held that where the new evidence goes to the foundation of plaintiff's claim, it cannot be considered as merely cumulative. The court in a Pennsylvania case gives clear expression of a safe rule for all cases, as follows: . If the new evidence is stronger and more direct upon the same vital point than that produced at the trial, though of the same character, it would have a natural tendency to produce a different result, and would not be cumulative in the sense which justifies its exclusion. If, on the other hand, the evidence already introduced be the stronger and more direct, and of the same character, then the new evidence would be cumulative without any probability of a different result." Spelling, New Trial & App. Pr. § 226.

And in the case of Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 253, 91 N. W. 63, 12 Am. Neg. Rep. 619, this court said: "A careful consideration of the plaintiff's affidavits discloses the fact that some of the newly discovered evidence would, if offered, be inadmissible under the rules of evidence; but, on the other hand, some of

the same would be admissible, and would be directly pertinent upon the issue of plaintiff's contributory negligence. But defendant's counsel claims that any evidence contained in plaintiff's affidavits which would be admissible at the trial, if offered, is cumulative in character, and hence cannot be considered when presented as newly discovered evidence, as a basis for an application for a new trial. This assumption of counsel rests upon the well established general rule that evidence which is cumulative merely cannot, when newly discovered, furnish a ground for a new trial. But with respect to the general rule invoked by counsel, it must be remembered that there is a recognized qualification of the same, which is as well supported by authority as the rule itself. The qualification or exception is this: Where the newly discovered evidence, if cumulative, is of such a nature as to be decisive of the result, it will not be rejected as a ground of new trial merely because it can be classified technically as cumulative evidence. . . .

"But we have reached the conclusion that under the facts of this case it is not the province of this court upon an appeal from the order of the trial court granting a new trial, to rule decisively either upon the weight of the newly discovered evidence, or to settle a somewhat dubious question as to whether some of such evidence falls within the rule or the exception to the rule relating to cumulative evidence. The order granting a new trial omits to state the grounds or reasons which operated upon the mind of the trial judge in making the order, and hence we are at liberty to consider all grounds upon which the application rested, and in doing so this court will take account of both the evidence offered at the trial and the newly discovered evidence.

An examination of the grounds of the application for the order appealed from will at once develop the fact that the trial court, in disposing of the problem presented upon the application, was not governed by fixed rules of law, and in the nature of the case could not be governed by any inflexible rule of law. When motions of this nature are presented to a court, they are classified as motions addressed to the discretion of the court. In considering the evidence adduced or that newly discovered, no fixed rules of law exist which could be decisive of the result of the investigation. Under such circumstances a margin of discretion is vested in trial courts, which permits them, with a view

to promoting the ends of justice, to weigh the evidence, and, within certain limitations, act upon their own judgment with reference to its weight and credibility. Nor in such cases will the court necessarily be governed by the fact that the verdict returned has the support of an apparent preponderance of the evidence. Unrighteous verdicts sometimes are supported by apparently substantial evidence, and to meet such exceptional cases the presiding judge, who sees and hears the witnesses, is vested with a discretion to vacate such verdicts and order a new trial in furtherance of justice. The rule that governs a court of review in this class of motions *i. e.*, those which appeal to judicial discretion,—does not apply to trial courts, and hence the trial court is not debarred from granting or refusing a new trial by the mere fact that the verdict rests upon substantial or conflicting evidence. Hayne, New Trial & App. § 97. This discretion, however, is neither capricious, arbitrary, nor unrestricted. It is, on the contrary, a reasonable discretion, to be exercised with great caution, and in cases of abuse the trial court will be reversed by the reviewing court in this class of cases. The duties devolving upon a court of review in this class of cases are to be distinguished from those which govern in trial courts. In the reviewing tribunal the weight and credibility of testimony will only be considered with a view to determine whether the order made in an inferior court, when acting within the domain of discretion, was or was not an abuse of discretion. See 14 Enc. Pl. & Pr. 930, 985, and cases in note 1; Taylor v. Scherpe & K. Architectural Co. 47 Mo. App. 257. The rule applicable here is analogous to that applied where a new trial is sought on the grounds of improper remarks made by counsel to a jury, *i. e.*, the granting or refusing the application is within the discretion of the trial court. See Waston v. St. Paul City R. Co. 42 Minn. 46, 43 N. W. 904, and Sunberg v. Babcock, 66 Iowa, 515, 24 N. W. 19. In the Federal courts, as at common law, all motions for a new trial are addressed to the discretion of the trial court, and its ruling cannot be reversed. See 14 Enc. Pl. & Pr. 955. As to the application of this rule to newly discovered evidence, see id. 982, note 3, and Hayne, New Trial & App. p. 250. See also the South Dakota cases cited in Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205. In the case at bar the order appealed from granted a new trial. Such orders, when based upon the

insufficiency of the evidence, are rarely reversed by a reviewing court, and never except upon grounds which are strong and cogent. The reason for discriminating in favor of such orders is that they are not decisive of the case, but, on the contrary, only open the way for a reinvestigation of the entire case upon its facts and merits."

It is also true that ordinarily a new trial will not be granted where the newly discovered evidence is merely impeaching in its character. But if the newly discovered evidence is of such character that the trial court is convinced that it would be unjust to permit the former verdict to stand, and that the newly discovered evidence is of such probative force and importance as to render a different result probable on a retrial, the fact that it has a tendency or effect to contradict or impeach witnesses who testified on the trial should not prevent its full consideration on the motion, or the granting of a new trial to allow its introduction.

In 29 Cyc. 918, it is said: "Ordinarily, a new trial will not be granted for newly discovered evidence to impeach a witness. Thus, evidence to show that a witness had made statements inconsistent with his testimony, or to contradict him on immaterial or collateral matters, is seldom ground for a new trial. But evidence of contradictory statements made by a witness on whose testimony a doubtful verdict was founded has sometimes been held sufficient cause for setting aside the verdict. Newly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial, and it is no objection to such allowance that the evidence may incidentally impeach a witness."

In Spelling on New Trial and Appellate Practice, § 227, this proposition is discussed in the following language: "If the newly discovered evidence would establish a material fact of sufficient probative importance to render a different result probable on a retrial, the fact that it has the tendency or effect to contradict or impeach witnesses who have testified on the trial should not prevent its full consideration on the motion, or the granting of a new trial to allow its introduction. The evidence should not on the motion be denied consideration under such conditions, any more than where evidence of equal importance is objected to as cumulative. The decisions involving impeaching, offered as newly discovered evidence, present about the

same inconsistencies, inaptitudes of expression, conflicts, drift, and tendency as on the subject of cumulative evidence so offered. The essence and ultimate result, however, support the proposition above stated. It is in entire harmony with the general rule that newly discovered evidence which is merely impeaching in character is not ground for a new trial. In a few cases orders granting new trials have been upheld without reference to the establishment of any new fact, merely because the testimony given at the trial was strongly, overwhelmingly, contradicted by that contained in the affidavits."

The statute prescribes the requisites for a motion based on this ground as follows: (1) The evidence must be newly discovered; (2) It must be material; (3) It must be such that the moving party could not with reasonable diligence have discovered and produced the same at the trial of the action. In order to be entitled to a new trial on this ground, the moving party must present to the trial court a showing sufficient to satisfy that court that the evidence has the three qualifications prescribed by the statute. But whether or not this is satisfactorily or sufficiently shown is primarily a question to be determined by, and resting in the sound judicial discretion of, the trial court, and subject to review by the appellate court only in cases where there has been a manifest abuse of such discretion.

The evidence must be newly discovered. In discussing this proposition it is said in Spelling on New Trial and Appellate Practice, § 207: "The additional evidence, to afford opportunity for the introduction of which a new trial is sought, must be newly discovered, by which expression is meant that it must have been discovered since the trial. If discovered before, or at the trial, and no continuance of the trial was applied for, an answer to the motion that no diligence is shown will be sufficient to defeat it, no matter what else may be shown. And since each party, and especially their counsel, are presumed to be familiar with the issues, and to know what proofs will be required to sustain his own allegations, or to meet and overthrow such as may be adduced in support of those against him, it is not enough to present a showing that he did not know, or did not discover, until since the trial the materiality of the evidence. It is the evidence itself, and not merely its materiality, which must appear to have been newly discovered. But it would be very difficult to state any rule or principle ap-

plicable to the subject of newly discovered evidence to which there are no exceptions; and it was held that this rule did not apply where there was no reason to suppose that evidence within the knowledge of the party was material. The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient."

The evidence must be material. This necessarily includes that the evidence must be competent and admissible. Spelling, New Trial & App. Pr. § 224. In determining the materiality and sufficiency of the evidence, it is frequently suggested that such evidence must be of such character that it will probably change the result upon a retrial. The reason for this is obvious. A new trial should not be granted as a mere empty ceremony. Hence, necessarily a trial court before granting a new trial should be satisfied that the former verdict was unjust, and that the newly discovered evidence, when weighed with the evidence received at the trial, will probably result in a different verdict upon the retrial. 14 Enc. Pl. & Pr. 792.

"The probability of a different result upon a retrial, often suggested as a test of the sufficiency in point of materiality and importance of alleged new evidence to warrant a new trial, is merely a guide for the courts in arriving at a conclusion as to whether, with the addition of the new evidence, the result ought to be different. A very slight addition of material competent and relevant testimony, or even the same evidence without addition, might produce a different result with a different, or even with the same, jury, upon a retrial. But the duty of deciding the motion rests primarily with the trial court, and the question whether a different result is probable is necessarily included in its decision. The general rule on the subject, the same being unquestionably correct as an abstract legal proposition, may be briefly stated thus: A new trial, where the motion is based upon newly discovered evidence, may be properly refused, if such evidence, being admitted, would not change the result. The same principle has been sometimes expressed in different language, but the meaning is usually that above conveyed. The foregoing expression is equivalent to saying that the motion should not be granted unless the court can see from the showing made that a different verdict will probably result from a

retrial with the new evidence added. In other words, in order to warrant a denial of the motion the court must be of the opinion that the admission of the new evidence would not cause a different result. It is also the equivalent of the rule as stated in other cases, namely, that if the newly discovered evidence fails to raise a reasonable presumption that if produced it would change the result, a new trial will not be granted, or that it might change the result.

"As in all cases where the matter rests almost absolutely within the discretion of individual men, no specific rule of any value, subordinate to and definitive of the leading rule, and applicable generally, can be laid down. But the following attempt to state a more specific rule is at least worth considering: Where the newly discovered evidence is not conclusive against the opposing party, and is reconcilable with either plaintiff's or defendant's theory of the case, and the verdict already returned would be abundantly supported by the evidence, with the proposed evidence added, it is proper to overrule the motion; otherwise, to grant it." Spelling, New Trial & App. Pr. § 221.

But in determining the sufficiency and materiality of the new evidence the court must weigh it with the evidence received at the trial. 14 Enc. Pl. & Pr. 792.

"In deciding upon the probability of a change in the result by adding newly discovered evidence, having ascertained that it is such as entitles it to consideration, the court will, if necessary, examine and consider the record on the trial. Accordingly, the court was held fully warranted in denying the motion in view of the testimony of eye-witnesses, to which the affidavit of the new witness merely opposed by testimony of a threat of the deceased against the defendant, convicted of manslaughter.

"The court will not only examine the general features of the case, but will examine the testimony of particular witnesses, in order to determine what consideration should be given to the new evidence." Spelling, New Trial & App. Pr. § 222.

It is also incumbent upon the movant to show diligence. Whether or not a sufficient showing of diligence has been made is a question of fact to be determined in the first instance by the trial court, and its decision is binding on the appellate court, and will not be reviewed except in case of an abuse of discretion on the part of the trial court.

"The question of diligence in preparing for trial, and of the lack of diligence as a bar to the motion on the ground of newly discovered evidence, like all questions resting upon facts to be presented upon affidavits, and to be considered in light of the course and environment of the trial, is peculiarly appropriate for final determination by the trial court; and its decision herein will not be interfered with except in case of abuse of discretion, or as the same idea is sometimes expressed, to prevent obvious injustice. It may be stated, as a general principle of law, that a new trial will not be granted on the ground of newly discovered evidence, if the evidence might have been discovered by reasonable diligence in time to have been produced at the trial." Spelling, New Trial & App. Pr. § 209.

But diligence is a relative term, incapable of exact definition, and depends essentially upon the particular circumstances of each case. Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511. And in determining the question of whether or not the moving party used due diligence, all the circumstances, including the situation of the parties and the witness who will give the newly discovered evidence, will be considered. Sturdy v. St. Charles Land & Cattle Co. 33 Mo. App. 44. And while it is true that the general tendency of the trial courts, with the full sanction of the appellate courts, seems to be toward strictness rather than laxity in the showing of diligence on the motion based on the ground of newly discovered evidence, still, "the courts have held the strict rule as to the showing of diligence inapplicable in certain cases, thus constituting exceptions to the rule, while in other instances, without expressly suspending its operation, have greatly relaxed its requirements to meet the peculiar hardships of such cases, and prevent what they considered a failure of justice." Spelling, New Trial & App. Pr. § 219. See also Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690.

The function of the courts is to dispense justice. And the fundamental question presented on a motion for new trial based on the ground of newly discovered evidence is whether or not substantial justice was done at the former trial. It is the duty of the parties to litigation to exercise due diligence in preparing and presenting their causes, and to produce to the court the best evidence within their power on the questions involved. The presumption is that the verdict

of a jury is right, but if the unsuccessful party discovers after trial new evidence which he could not with reasonable diligence have discovered and produced at the trial, of such character as to convince the court that an injustice has been done, and that a new trial probably will change the result, then a new trial should be granted. 14 Enc. Pl. & Pr. 790. A new trial on this ground is granted only in the interests of justice.

This action was upon a promissory note. It is conceded by both parties that the only question submitted to the jury was whether or not the note was genuine or a forgery. It is also, conceded that if the note was executed at all, it must have been at the time and place referred to in the affidavit of St. Clair. It, also, seems to be conceded that at the time and place the plaintiff and defendant entered into a certain contract of exchange, and that the only persons present at that time were the plaintiff and defendant and the witness St. Clair. It seems to be the contention of the plaintiff that at that time and place, the defendant signed not only the contract, but also the note involved in this suit; while the contention of the defendant seems to be that he signed the contract, but that he did not sign the note, and that his purported signature thereto is a forgery. As already stated in the former opinion, no statement of case has been prepared, and the testimony of the plaintiff and defendant on this question is not before us. We have no means of knowing what this testimony was, or to what extent the testimony of St. Clair corroborated or contradicted one or the other of these parties; or to what extent the newly discovered evidence will affect the testimony of these parties. This testimony is not before us.

The trial judge, however, not only heard this testimony, but saw the parties themselves as it was given. He also heard the testimony of the other witnesses, and the arguments of counsel. He was familiar with all the details of the trial, and, possessed of this peculiar knowledge, he said in effect that under all the circumstances in this case, the evidence was newly discovered; that the defendant could not with reasonable diligence have discovered and produced the same at the trial; and that when considered and weighed with the former testimony, it was material to the defendant to the degree that upon a retrial of the action a different result was probable. The presumption

is that an order granting a new trial is right. And the burden is upon the appellant to show that the ground urged and the showing made in support of such motion was insufficient, and to do this he must present a sufficient record for reviewing each ground of the motion. Davis v. Jacobson, 13 N. D. 430, 432, 101 N. W. 314.

In this case the appellant had the burden of showing that, under all the facts and circumstances in this case, the trial court manifestly abused its discretion in granting a new trial. We are all agreed that upon the record presented to us an abuse of discretion has not been shown. The discretion vested in the trial court should be exercised in the interests of justice. There is nothing to indicate that it was not so exercised in this case. The former decision will stand; a rehearing is denied.

MINOT GROCERY COMPANY, a Corporation v. FLATHEAD PRODUCE COMPANY, a Corporation.

(153 N. W. 284.)

Consignment of goods — sight draft for price — inspection of goods — opportunity to make — acceptance — findings.

1. Appellant consigned from Montana a carload of apples to respondent at Minot, which shipment was accompanied with a sight draft for the selling price. Respondent could not properly inspect such apples while in the car, and before it was permitted to unload the apples it was required to pay the sight draft, which it paid. When the fruit was unloaded respondent discovered, for the first time, that a large portion thereof was damaged, whereupon it wired appellant that it declined to accept the shipment, offering, however, to handle it on appellant's account. Appellant replied by mail, accepting such offer and instructing respondent to keep track of lot numbers and names on boxes and make full report. Such acceptance did not reach respondent for several days after the date of its telegram, and owing to the bad condition of the apples, and in order to minimize the loss, respondent proceeded to sell the same to the trade, which it did to the best advantage, sustaining a loss, however, of $255.51, to recover which respondent sues.

Held, that the evidence is sufficient to sustain the findings of the trial court in plaintiff's favor.

Sight draft — paying for — title transferred — right to rescind — upon full discovery of condition.

2. *Held*, further, that while the acts of paying the sight draft and unloading the shipment operated to transfer title of the apples to respondent, it had the right, upon discovering their damaged condition, to rescind its purchase by acting promptly as it did in sending the message.

Parties — subsequent contract — evidence sufficient to establish.

3. Evidence examined and *held* sufficient to establish a subsequent contract between the parties, whereby plaintiff was to act for defendant and on its account in the sale of such apples, and in the light of the uncontroverted facts plaintiff's failure to furnish a detailed report as requested is excusable, and will not operate to defeat a recovery.

Opinion filed May 18, 1915.

Appeal from District Court, Ward county, *K. E. Leighton*, J.

Action by Minot Grocery Company against the Flathead Produce Company. From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

Cowan & Adamson and *H. S. Blood*, for appellant.

The receipt of goods, will become an acceptance of them if, after their receipt, the buyer does not act with reference to them which he would not have any right to do if he were not the owner of them. Rock Island Plow Co. v. Meredith, 107 Iowa, 498, 78 N. W. 233; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608; Van Winkle v. Crowell, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. Rep. 18.

Bosard & Twiford, for respondent.

A finding by the court that each and all of the allegations of the complaint are true is sufficient as an adoption of such allegations by the court as its findings. Brynjolfson v. Thingvalla Twp. 8 N. D. 106, 77 N. W. 284.

Fisk, Ch. J. On or about September 3d, 1911, defendant and appellant, a foreign corporation engaged in selling fruit in carload lots on commission, consigned to the plaintiff company at Minot a carload of apples, and accompanying the shipping bill there was a bill of lading with slight draft attached providing that the consignee should have the right to inspect the shipment without the common carrier surrendering the bill of lading. When the shipment arrived in Minot

on September 6th, plaintiff inspected the car as well as it could, but it was unable to make a thorough inspection of certain of the apples which were contained in boxes, until after the car was entirely unloaded. In order to unload the car plaintiff was compelled to and did pay for the shipment, after which it removed the apples from the car to its warehouse, when it discovered that certain portions of the shipment, consisting of what is designated Transparent apples, were in bad condition, being over ripe when picked, and soft, spotted, and junkey. Thereupon the plaintiff wired defendant as follows: "Car is not satisfactory by any means. All our dealings with you led us to believe that we would receive good stock at these prices. Must have protection. Will handle car on your account. Answer quick."

In response to this, defendant left with the telegraph company at Kalispell a telegram, and mailed a carbon copy thereof to the plaintiff, reading as follows: "Take up draft on car. Draw on us for loss of stock. Keep track lot numbers and names on boxes. Make us full report. Expect fair dealing from you. Assure you the same in return." Defendant instructed the telegraph company to withhold sending such message until further orders, but plaintiff received through the mail the carbon copy on September 9th, being three days after the apples had been paid for and unloaded. In the meantime plaintiff had sold and consigned a portion of the shipment to the trade, and thereafter sold and disposed of the entire shipment, sustaining a loss of $255.51, which amount, with interest, it seeks to recover from the defendant.

The trial in the court below resulted in a judgment in plaintiff's favor for the full amount prayed for, and defendant has appealed therefrom, alleging three grounds for a reversal; the third and only ground argued in the brief and which we need notice is that the court erred in ordering judgment in plaintiff's favor.

As we understand appellant's contention, and the position taken in its brief is, that the plaintiff accepted the shipment after acquiring knowledge of the defective quality of the apples, by making sales thereof as aforesaid, and that it is precluded thereby from setting up the defective quality of the goods, and that under the testimony it has no cause of action. In other words, it contends that plaintiff must be treated as a purchaser of this consignment of apples, and not as a consignee to handle and dispose of the same on commission as defend-

ant's agent. This contention is no doubt predicated upon the theory that the rights of the parties became fixed on September 6th, when the plaintiff took up the bill of lading from the common carrier and unloaded and sold or consigned a portion of the shipment, that being prior to the receipt by plaintiff of defendant's carbon copy of the telegram aforesaid which was mailed at Kalispell on September 6th.

It is no doubt the law, as contended by appellant's counsel, that ordinarily the receipt of goods will operate as an acceptance of them if the vendee, after their receipt, does any act with reference to the goods which he would not have any right to do if he were not the owner of them. In other words, the exercise of acts of ownership therein is sufficient to establish an acceptance. Benjamin, Sales, 6th ed. § 703; Rock Island Plow Co. v. Meredith, 107 Iowa, 498, 78 N. W. 233.

In Brown v. Foster, 108 N. Y. 387, 15 N. E. 608, the court no doubt announces a correct rule in holding that where one seeks to reject an article as not in accordance with the contract of sale, he must do nothing, after discovering its true condition, inconsistent with the vendor's ownership of the property. See also Van Winkle v. Crowell, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. Rep. 18.

Counsel for appellant are no doubt correct in their statement that, owing to the election made by plaintiff's counsel at the trial to stand on the first cause of action alleged in the complaint, *viz.*, that the plaintiff did not purchase the apples, but received the same for sale on commission, plaintiff's recovery must stand or fall upon the sufficiency of the proof to sustain such theory of recovery.

Appellant's counsel strenuously insist that the recovery cannot be sustained upon the theory of a commission contract, because defendant's instructions to plaintiff in its telegram to keep track of the lot numbers and names on boxes, and make full report, were not complied with. But plaintiff's testimony is to the effect that such instructions could not be carried out for the reason that it had, prior to receiving the same, disposed of the apples which were defective.

In the light of these facts we are called upon to adjudicate the respective rights of these parties.

The testimony of the defendant discloses that it had knowledge that some of the apples were in poor condition at the time of the shipment.

In a letter written by defendant to plaintiff on October 10th, it, among other things, states: "There were 307 boxes of apples in this car which we would very much have preferred not to have shipped you, had there been any more stock available at that time. As the matter stands with us to-day, we have only one carload of early apples to get out of the valley, and this year some of them were not as good as they should have been, and we advised the growers of the fact when we accepted their goods for shipment, and we have since advised them of the trouble you had with the apples in this car, and they seemed disposed to accept a reasonable settlement on their goods. We are holding up payment to them until such time as we have agreed with you on a reasonable basis of settlement. Outside of these 307 boxes of apples, we feel that the car left here in first-class condition. . . . Of course, by putting in these 307 boxes of apples we ran our chances of having the whole car turned down, which was our first impression after receiving your wire, and when we wrote the message wording it as we did. We still insist that the matter is up to you, and if you will advise us what allowance you expect us to make on these 307 boxes of apples, and it is within reason at all, we will mail you a check for that amount promptly." The testimony also discloses that it afterwards mailed to the plaintiff a check for $76.75 as a refund by reason of damaged apples. This was, we think, a recognition and admission on defendant's part of its liability on the theory that the transaction was a commission deal.

There is no evidence that plaintiff knew that the defendant was merely acting as a commission broker in shipping these apples to it; nor is there any evidence that plaintiff sold and disposed of any of such fruit prior to sending its telegram to the defendant aforesaid, or before defendant had mailed the carbon copy of its reply message. The proof discloses that plaintiff furnished a report to the defendant on all the Transparent apples, which were all in poor condition. It would therefore seem that defendant was in a position to protect itself from loss for it certainly must have known, or at least should have known, from whom it received the damaged apples, and the fact that plaintiff did not keep track of the lot numbers and names of growers pursuant to instructions, which came too late, ought not to preclude a recovery. Had the defendant wired its answer to plaintiff's message

instead of sending it by mail, the situation would have been different. The plaintiff did what a reasonably prudent person would do under like circumstances, and the undisputed testimony discloses that it handled the consignment in the best possible way and with as little loss as possible. The situation called for prompt action as each hour's delay meant greater loss.

The depositing in the postoffice of defendant's reply to plaintiff's telegram was an acceptance of plaintiff's offer therein to handle the car on commission (9 Cyc. 295), and the testimony discloses that it did everything within its power to discharge its duty and prevent as much loss as possible in view of the damaged condition of the shipment.

We are agreed that the judgment of the District Court was correct and the same is accordingly affirmed.

CORNELIUS WILLIAMS v. J. P. BENEKE.

(153 N. W. 411.)

Instructions — warranty — how pleaded — how proved — counterclaim — pleadings control.

1. Instructions examined and *held* proper. Where the warranty proven is wider than that pleaded in the counterclaim, the pleadings govern the scope of the instructions.

Evidence — admission of — rulings.

2. Errors assigned on the admission of evidence are *held* not well taken.

Opinion filed May 25, 1915.

From a judgment of the District Court of Dunn County, *Crawford,* J., defendant appeals.

Affirmed.

T. F. Murtha, for appellant.

A general denial in any answer puts in issue all material facts, and plaintiff is required to make a prima facie case before anything is required of defendant. Plaintiff cannot take advantage of an admission in an answer, in form a general denial, without stating to the court his desire to do so. Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Dole v.

Burleigh, 1 Dak. 227, 46 N. W. 692; Humpfner v. D. M. Osborn & Co. 2 S. D. 310, 50 N. W. 88; Kirby v. Scanlan, 8 S. D. 623, 67 N. W. 828; Peterson v. Roberts County, 31 S. D. 439, 141 N. W. 368.

The true aim in construing every agreement, including that of warranty, is to reach the real intention of the parties. This is accomplished by taking, not what they afterward say was their intention, but what the words and language of the contract clearly imply. 35 Cyc. 376, and note 63, 388; Shaw v. Water Supply & Storage Co. 23 Colo. App. 110, 128 Pac. 480; Turlock Fruit-Juice Co. v. Pacific & Puget Sound Bottling Co. 71 Wash. 128, 127 Pac. 842; Swift & Co. v. Redhead, 147 Iowa, 94, 122 N. W. 140.

Warranties will be given a reasonable construction according to the obvious and usual import of the language used. 35 Cyc. 389, 412, 419, and note, 54, 421, 462; Curtis v. Northwestern Bedding Co. 121 Minn. 288, 141 N. W. 161; Minnesota Thresher Mfg. Co. v. Hanson, 3 N. D. 81, 54 N. W. 311; Paulson v. D. M. Osborne & Co. 35 Minn. 90, 27 N. W. 203; Kramer v. Messner, 101 Iowa, 88, 69 N. W. 1142; Dempster Mill Mfg. Co. v. Fitzwater, 6 Kan. App. 24, 49 Pac. 624.

Casey & Burgeson, for respondent.

A party who formally and explicitly admits by his pleading that which establishes plaintiff's right will not be suffered to deny its existence or to prove any set of facts inconsistent with that admission. 31 Cyc. 211; Gale v. Shillock, 4 Dak. 182, 29 N. W. 661; Ostland v. Porter, 4 Dak. 98, 25 N. W. 731; Myrick v. Bill, 3 Dak. 284, 17 N. W. 268; Paige v. Willet, 38 N. Y. 28; Lamberton v. Shannon, 13 Wash. 404, 43 Pac. 336.

Defects or omissions in evidence introduced by one party may be cured or supplied by evidence subsequently introduced by his adversary. 38 Cyc. 1432; Gale v. Shillock, 4 Dak. 182, 29 N. W. 661.

The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. American Soda Fountain Co. v. Hogue, 17 N. D. 375, 17 L.R.A. (N.S.) 1113, 116 N. W. 339.

Goss, J. This appeal is from a recovery on a note given for the purchase price of three disc drills. The defense was a general denial,

coupled with a counterclaim for damages, based upon breach of warranty. If the instructions are erroneous, reversal must follow, hence errors predicated on instructions will be first considered.

Appellant contends that the instructions are narrower than the breach of warranty pleaded. The warranty set forth is "that at the time of said sale the said sellers warranted to this defendant that said disc drills were suitable and adapted for and would do the work, to wit, the seeding of small grains upon all kinds of land; and that by and through said warranties the defendant was induced to purchase and give his note for said machines; that he purchased said machines for the purpose of seeding land in Dunn county, and this the sellers well knew, and warranted that said drills would perform the services for which defendant purchased them." The breach of warranty alleged is "that defendant immediately tried out said drills in the seeding of small grains, but that said drills did not work; that defendant immediately and in good faith gave said drills a thorough trial for the purpose for which they were purchased and in and about the service that they were warranted to perform, to wit, the seeding of small grain; but that said drills did not do such work; that is, they did not seed small grain; that this defendant immediately notified the sellers, and that they have failed to remedy the defects in said machines or make them work." The warranty, the breach thereof as pleaded, and the proof of both warranty and its breach, must be considered with the instructions, as the trial court could not instruct beyond the scope of the proof, even though within the pleadings; nor, on the contrary, could the proof of warranty or its breach supplement or extend the particular warranty and the breach thereof as pleaded.

Defendant's agent who purchased the drills for him testifies: "He (seller) stated that he would warrant the drills to seed wheat or any kind of grain," other than flax. And again, "He agreed they would seed as good as any horse drill made." Defendant then offered proof that they were not as good for his purposes as horse drills; were less flexible; much heavier; would clog; and that after using them in seeding some 40 acres he discarded them. It appears, however, that the machines were purchased for use only with an engine, and that defendant knew they were too heavy to be used in any other way. The testimony is in conflict as to any notification of breach of warranty, although

defendant claims such a notice was given. Concededly no rescission was attempted, or any redelivery of the drills made or offered. The note matured. Again the testimony is in conflict as to whether defendant waived any breach of warranty by his offers of settlement, by his obtaining extensions of time for payment. But as defendant was entitled to have the jury consider his defense from its widest possible standpoint as pleaded, everything will be disregarded except the scope of warranty alleged and proven, and instructions thereon. The written instructions read:

"The second consideration is to determine whether or not the sellers warranted the disc drills to seed small grain. If you find from the evidence that no such warranty was made, you need go no further, and will find your verdict in favor of the plaintiff.

"The burden is upon the defendant to establish the fact of a warranty by a fair preponderance of the evidence. . . . If you believe from the evidence that the sellers warranted said machines to seed small grain, then it will be necessary for you to go one step further and determine whether or not such machinery would, if handled properly, seed small grain. To entitle the defendant to anything under the counterclaim, he must establish by a fair preponderance of the evidence that the machinery was handled in a careful and skilful manner, suitable to handling such machinery, by a person capable of handling the same. The mere fact that it failed to do the work warranted when not handled skilfully is not sufficient to find in favor of the defendant. The jury must find that after a careful and considerate handling in a reasonable and careful manner it failed to do the work guaranteed, before such fact should be held a breach of the warranty. If you believe from the evidence that the machinery would seed small grain, then it complies with the warranty as set forth in the counterclaim.

"The mere fact that the discs were clogged and failed to act properly cannot be held a breach of the warranty. The only warranty alleged in the answer is that it would seed small grain, and if it complies with that particular condition of the warranty, it fulfils all the conditions as set forth in the amended answer, and the fact that the discs may have clogged should not be considered by you or taken as a breach of the warranty in this case.

"If you find by a fair preponderance of the evidence that the sellers

warranted the drill to seed small grain, and you further find by a fair preponderance of the evidence that after careful and skilful handling of said machinery it failed to seed small grain, then it will be necessary for you to determine the damage resulting to the defendant. In the pleadings in this case there is no warranty that it would seed small grain in as successful a manner as would horse-drawn machinery, but the warranty as set forth in the amended answer merely warrants that it would seed small grain; and if you believe from the evidence that it would seed small grain even though you believe there was a warranty, then it complies with all of the conditions of the warranty; but if you find from the evidence that there was a warranty that it would seed small grain, and after a careful and prudent trial of said machinery it failed to seed small grain, then it will be necessary to go one step further and determine the damages."

Defendant made no request for more particular instructions. Those given are within the scope of the warranty and breach thereof set forth in the counterclaim. Defendant's proof is of a warranty wider than the one he had pleaded, and entirely beyond the breach alleged in his pleading. The court properly eliminated the question of whether the machinery would do as good work as horse-drawn drills. No such warranty is pleaded, nor is any breach of such a warranty assigned in the pleading; and to have instructed otherwise, even though within the scope of the proof, would have been prejudicial error against plaintiff. There is ample foundation for the instruction upon the necessity for skilful handling of this machinery, as that is indirectly an issue, the plaintiff's proof disclosing that others used this drill successfully, one witness testifying to having seeded 1,300 acres one year, and 2,000 acres the next, with the same kind of machine, and that, too, since these machines were sold to defendant; and there is testimony tending to show the reasons why they would clog to be caused by improper adjustment or too wet ground. This matter was for the jury to determine under proper instructions. We assume the jury have found a breach of warranty from the small verdict. Under the instructions it fixed the value of the machines as the amount of the verdict.

The defendant assigns error in the reception in evidence of the note sued upon. The objection was "that it appears on the back of the note

that the same belongs to the P. & O. Plow Company, and we particularly urge upon the court the fact that there is no foundation laid nor showing that the defendant signed the note." Defendant evidently overlooks a paragraph of his answer wherein he admits "that defendant agreed to pay plaintiff therefor the sum of $525, and as evidence of such indebtedness the defendant made, executed, and delivered to said copartnership the promissory note described in the complaint." As to the ownership plaintiff produced the note on trial and testifies that, although it had been indorsed as collateral security, the debt secured had been paid before this suit was begun, and that the note had never left the possession of the payees. This proves ownership in plaintiff. Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Farmers' Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556. And this disposes of two other assignments urged to objections sustained to further cross-examination as to ownership. Such prior indorsement became immaterial under the testimony. The judgment is accordingly affirmed.

MICHAEL JABLONSKI and Tekla Jablonski v. D. P. PIESIK and D. Coutts and J. A. Wiech, as Sheriff of Stark County.

(153 N. W. 274.)

Publication of summons — affidavit for — summons — service of — action — parties to — judgment.

The affidavit for publication of summons is *held* insufficient and void, and that no service of summons was had upon defendant Piesik, who is held to be a necessary party to the action. The purported judgment rendered without service upon Piesik is a nullity, and is set aside and the cause remanded for further proceedings according to law.

Opinion filed May 25, 1915.

From a judgment the District Court of Dunn County, *Crawford*, J., defendants Coutts and Wiech appeal.

Reversed and remanded.

T. F. Murtha and *H. E. Haney*, for appellants.

Piesik was the holder of the notes and mortgage for the cancelation

of which this action was brought. He was a necessary party. 39 Cyc. 1396, (III).

Substituted service on Piesik by publication was attempted. It was void because of the insufficiency of the affidavit. The affidavit fails to give the said defendant's residence, nor does it show that such residence is unknown to the affiant. Such defects are jurisdictional. Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145.

The complaint does not state a cause of action. It does not show that the contract between Piesik and plaintiffs for the purchase of the land had been rescinded. They cannot retain the land, holding their contract of purchase in tact, and have the mortgage and notes canceled. 39 Cyc. 1396 (IV.), 1436 (IV.).

They must restore everything of value which they received under the contract. Moline Plow Co. v. Bostwick, 15 N. D. 658, 109 N. W. 923; Basye v. Paoloa Ref. Co. 79 Kan. 755, 25 L.R.A.(N.S.) 1302, 131 Am. St. Rep. 746, 101 Pac. 658, 39 Cyc. 1423, 1427, 1378 (b).

Neither can plaintiffs rescind while they are in default. Arnett v. Smith, 11 N. D. 55, 88 N. W. 1037; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549.

It was not necessary for Piesik to have the fee title until the time for performance of his contract with plaintiffs had arrived. 39 Cyc. 1410; Hanson v. Fox, 155 Cal. 106, 20 L.R.A.(N.S.) 338, 132 Am. St. Rep. 338, 99 Pac. 489; Golden Valley Land & Cattle Co. v. Johnstone, 25 N. D. 148, 141 N. W. 76.

To make the cancelation of the contract of any avail against the plaintiffs, service of the notice of cancelation was necessary. N. D. Comp. Laws 1913, §§ 8119–8122; Williams v. Corey, 21 N. D. 509, 131 N. W. 457, Ann. Cas. 1913 B, 731.

Plaintiffs have made no fair attempt to secure title to the land, and therefore they cannot maintain this action. 39 Cyc. 1436 (IV.), 1680, (G).

Evidence of the abandonment of a land purchase contract must be clear and unequivocal. There is no such evidence against Piesik. 39 Cyc. 1353, A 2.

Thomas H. Pugh, for respondents.

No one but the defendant or his proper representative can take advantage of defects in the service of process upon him. 3 Cyc. 240;

32 Cyc. 519; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310; B. F. Salzer Lumber Co. v. Lindemeier, 54 Colo. 491, 131 Pac. 442.

A distinction has been made between a necessary party and an indispensable party. Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308; Kendig v. Dean, 97 U. S. 423, 24 L. ed. 1061; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; 9 Enc. U. S. Sup. Ct. Rep. 40.

The contract between Sidenberg and Piesik was for a whole section. No court would compel Sidenberg to recognize a partial assignment of such entire contract so long as he had not acceded to the transaction, and had not knowingly received any part of the purchase price paid by Jablonski. 36 Cyc. 759, 760.

Plaintiffs had nothing belonging to Piesik to restore. 39 Cyc. 1354; Mahon v. Leech, 11 N. D. 181, 90 N. W. 807.

It was not necessary to make a tender of the value of the use and occupation, as this could be counterclaimed. Weitzel v. Leyson, 23 S. D. 367, 121 N. W. 868.

One may contract to sell land of which he is not the owner, and such contract is valid and binding provided the purchaser knows that his vendor is not the owner. 26 Am. & Eng. Enc. Law, 2d ed. 667.

Goss, J. The complaint avers that Piesik fraudulently represented himself to be the owner of a section of land which he agreed to sell plaintiffs for a consideration of $18,580, to be paid by purchase price mortgages upon the land sold and upon an additional 400-acre tract belonging to the plaintiffs. One of said mortgages given in purchase is for $1,500, and is upon said 400-acre tract only. That Piesik did not own, or have any right or authority to sell, said section, and defendants are defrauded to the amount of said mortgages and notes given in its purchase. That the said $1,500 mortgage has not been assigned, but stands of record in the name of Piesik as owner.

The complaint further alleges that an execution has been issued out of district court in an action wherein Coutts, defendant herein, was plaintiff, and defendant Piesik was defendant; and that said notes and mortgage for $1,500 have been levied upon under execution, and the sheriff, codefendant, has possession of said notes and mortgage, and is about to sell the same to enforce collection of said judgment of

Coutts against Piesik, and will do so unless enjoined. Judgment is asked that the note and mortgage be adjudged void, and be ordered canceled of record, and that Coutts and his codefendant, the sheriff, be directed to deliver up the notes and mortgage for cancelation, and that an injunction pending suit be issued against this transfer.

Piesik was attempted to be served by publication of summons. Such service is void. The affidavit for publication is insufficient; and also it was filed after the date of the first one of the six publications made of the summons.

The affidavit for publication of summons recites "that Piesik is not a resident of this state; that prior to the commencement of this suit, the defendant left this state, and upon information and belief affiant alleges that said defendant went to Canada; that the whereabouts of the defendant in Canada is unknown to this affiant or to the plaintiffs, of whom affiant has inquired; that the postoffice address of said defendant is unknown to affiant and to the plaintiffs herein." Defendants Coutts and the sheriff challenge the sufficiency of this affidavit as a basis for publication of summons. The statute requires the affidavit to state "the place of defendant's residence if known to the affiant, and if not known, stating that fact and further stating: 1. That the defendant is not a resident of this state." [Comp. Laws 1913, § 7428.] This affidavit contains the latter, but not the former, requisite. The affidavit states that the postoffice address of defendant is unknown. This court has already held in Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587, that such an affidavit is void, and does not comply with the above quoted statute. An unbroken line of holdings from the territorial times to the present is there cited that such an affidavit is a nullity, and that statutory requirements as to jurisdictional prerequisites on substituted service are strictly construed, and exact and literal compliance with the statute exacted, otherwise no jurisdiction is obtained. The statement in this affidavit concerning the whereabouts of the defendant is not a substantial compliance with the statute, in that the statute requires the affiant to disclose not the whereabouts, but the residence, of the defendant; but if it be conceded that the term "whereabouts" be the equivalent of the term "residence," this affidavit is equivocal. It reads, "affiant alleges that said defendant went to Canada, but that the

whereabouts of the defendant in Canada is unknown." The disclosure as to whereabouts is qualified and limited. Perjury could scarcely be predicated upon such a qualified affidavit, even though the affiant had information that the whereabouts of this defendant was elsewhere than in Canada. Affiant might know of the residence, or believe the residence of the defendant to be in an adjoining state and still truthfully make the qualified affidavit as to the defendant's whereabouts. The affidavit fails to comply with the jurisdictional requisites when measured by the terms of the statute. § 7428. The discussion in Atwood v. Tucker, supra, renders further comment needless. But the failure to file the affidavit until one day after the first publication of the summons leaves but five publications made, instead of six required by § 7429 to be made after the filing of the affidavit for publication. § 7428. This is so obvious as to need no citation of authority. There was no service of summons made upon defendant Piesik.

But respondent contends that even though no jurisdiction was obtained over the person of defendant Piesik, the case may proceed because he is not a necessary party to this action, and that he is the only person who can object on the grounds of want of jurisdiction. Both of these contentions are answered in the negative by the holding in Atwood v. Tucker, supra. It was there urged that a garnishee defendant could not raise a question of the jurisdiction of the principal defendant against whom a judgment apparently regular had been entered. That contention was overruled. Here a judgment creditor of a person not served with summons has a lien by execution upon the property of that person, and which lien this plaintiff would seek to devest by a judgment adjudging, as against such absent party, the notes to be void because of that person's fraud, because of a failure by him to pay any consideration therefor, but all this without the party in court, or jurisdiction over him. Piesik would not be bound by any such judgment rendered. Assume that it be determined as between plaintiffs and the defendant Coutts, that these notes held by Coutts on execution were given without any consideration and are void, and Coutts should be barred on the grounds from enforcing his property lien thereon. Nevertheless, Piesik might by action subsequently have a contrary determination and recover a judgment against plaintiffs holding the notes to be valid as given for an adequate consideration. To

hold with plaintiff would place a premium upon the procuring of necessary defendants to be absent for the benefit and profit of both the defendant and the plaintiff as well. If execution is stayed in this action, it is the equivalent of granting a forbearance or extension of time for payment to plaintiff, assuming that the notes are valid, and that must be presumed to be the fact until the contrary is adjudged. And likewise, staying execution would operate to relieve Piesik from having his property pay a valid judgment against him, and possibly permit his diversion of it or its withdrawal to his benefit and to the injury of Coutts. That Piesik is a necessary party is too clear for discussion. Without service of Piesik no valid judgment as sought for could be rendered.

From the discussion in the briefs and on oral argument, it appears that, in the determination of the merits as between plaintiff and Piesik, if that point should be reached, the validity of a contract of sale, oral or written, of one Sidenberg, will be necessarily of determination as an underlying requisite to an adjudication upon the validity of the attempted sale of the section by Piesik to plaintiff. In such case it may be that Sidenberg may also be a necessary party.

The judgment appealed from is in all things reversed and set aside, and the cause remanded for further proceedings according to law. No opinion is expressed on the sufficiency of the complaint, nor upon whether relief can be granted under the issues as framed. This holding is not to be deemed *res judicata* upon other than the questions of jurisdiction determined.

CARL WEIST v. FARMERS' STATE BANK OF BENTLEY, North Dakota, a Corporation.

(153 N. W. 283.)

Appeal — statement of case — motion to dismiss appeal — exhibits — certificate of judge — copies — index — typewritten — costs.

Respondent moves to strike out statement and dismiss this appeal because (1) the exhibits were not incorporated as a part of the transcript served and subsequently settled as the statement of the case. (2) Because the certificates

authenticating the exhibits were insufficient. (3) Because copies, instead of the original exhibits, were transmitted as a part of the appeal record, containing that the repeal of § 7058, Rev. Codes 1905, § 7655, Comp. Laws 1913, authorizing transmission of copies in lieu of the originals, requires the originals to now accompany the appeal record. (4) Because there is no sufficient index to the exhibits or statement of the case. (5) Because typewritten instead of printed briefs are filed, and the judgment for damages exceeds $300. (6) Because the appeal bond is alleged to be insufficient as to justification of sureties.

Held: On grounds set forth in the opinion, the motion to dismiss is denied. No costs allowed on the motion.

Opinion filed May 25, 1915.

J. K. Murray of Mott, for respondent.
V. H. Crane of Mott, for appellant.

Goss, J. Respondent has moved to strike the settled statement of the case, dismiss the appeal, and affirm the judgment. It is contended, first, that no complete transcript of the evidence was ever made, furnished, or served upon respondent. But the moving affidavits disclosed that a transcript of the oral testimony on the trial was transcribed and served presumably after the same was duly certified as correct, by the court stenographer. Respondent's objection really goes to the failure to have a copy of the exhibits included in such transcript. This is no ground for dismissal of an appeal. The 1913 practice act contemplates that a respondent shall challenge any inaccuracies in a proposed statement served and bring them to the attention of the judge at or before the time of settlement of the statement. Section 7655, Comp. Laws 1913, prescribes how exhibits not included in the transcript may be brought into and constituted a part of the statement and duly authenticated.

Respondent next contends that his motion should be granted because the original exhibits were never sufficiently identified by certificate of the district judge, nor were such exhibits incorporated into a statement of the case or filed or sent to the supreme court. As to authentication of exhibits the trial judge has certified that the many exhibits, as designated in his certificate by letter and number and attached thereto, "are the exhibits offered and received in evidence on the trial in the above-entitled action, and are hereby identified as the exhibits offered and received in evidence in the said action." There is also a certificate by the trial judge recertifying both the statement

and exhibits as correct transcript of all evidence and all proceedings had, including exhibits enumerated specifically by number and letter. This sufficiently and definitely authenticates the exhibits.

The second portion of respondent's objection goes to the fact that copies are forwarded on the appeal in lieu of the original exhibits retained in the district court. This is within the authority and discretion of the trial judge, though the statutory authority for substitution of copies, § 7058, Rev. Codes 1905, § 7655, Comp. Laws 1913, is expressly repealed by the 1913 practice act. The law contemplates that the original exhibits used in civil cases shall be certified and accompany the appeal record in the absence of some good reason for their retention in the trial court. It will be assumed, however, that such a reason exists where, as here, exhibits have been so retained. Where this has been done, and where respondent desires that the original exhibits be brought before the court on the appeal as on trial *de novo*, his remedy is not by a motion to dismiss the appeal, but by an application to the district court in the first instance for an order directing that the original exhibits be forwarded as a part of the appeal record. But where such an application has not been made, or if made has been refused, the party aggrieved may further pursue the matter by an application to this court for an order remanding the record to the lower court with directions that the original exhibits be certified and attached thereto and returned to the supreme court, authenticated as a part of the record on appeal.

Respondent urges that there is no sufficient index to the exhibits and the statement of the case, and urges dismissal on this ground. This is not well taken as it is apparent that appellant has made good faith endeavor at indexing.

Respondent moves to dismiss this appeal because typewritten instead of printed briefs are filed. The judgment was slightly in excess of $300 damages. Inasmuch, as respondent has also filed a typewritten brief, and the matter is not one requiring dismissal of the appeal, printed briefs will not be exacted. The matter should have been raised by a motion to strike out the brief. But typewritten briefs will be permitted in this case.

Respondent's final contention is that the appeal should be dismissed because the appeal bond is insufficient "in that the justification of the

sureties thereon does not state that the sureties are worth the sum of $1,500 over and above *all* their debts," and in property within the state of North Dakota. The word "all' is missing. It is true that § 7837, Comp. Laws 1913, requires a surety to justify in a certain sum "mentioned in such affidavits over and above *all* his debts and liabilities in property within this state not by law exempt from execution." The omission of the "all" does not change the meaning, and the justification as given is not defective. Nor is it subject to the objection that the justification does not state that the property of the surety is within the state of North Dakota. It concludes with the words "within this state." It is in the language of the statute and is sufficient. No other state could be meant. The motion to dismiss the appeal is in all things denied. But as these practice questions presented are important, and as yet not passed upon since the enactment of the 1913 practice act, and are somewhat debatable, no costs will be allowed the prevailing party on the decision of this motion.

MIKE HIGGINS v. O. J. RUED.

(153 N. W. 389.)

New trial — causes for — statute — exclusive.

1. The causes for which a new trial may be granted are specified in § 7660, Compiled Laws, 1913; and these causes are exclusive.

Court reporter — transcript of evidence — failure — inability — not ground.

2. The failure or inability of a court reporter to furnish the defeated party with a transcript of the evidence is no ground for a new trial.

Action — deemed pending — appeal — time for — jurisdiction.

3. Compiled Laws, § 7966, provide that an action is deemed pending from the time of its commencement until its final determination upon appeal, or the time for appeal has passed, unless the judgment is satisfied. And following Grove v. Morris, — N. D. —, it is *held* that, when the time for an appeal has expired, the action is terminated, and the trial court has no jurisdiction to hear a motion for a new trial.

Opinion filed May 26, 1915.

From an order of the District Court of Stutsman County denying a motion for new trial, *Coffey,* J., defendant appeals.

Dismissed.

Knauf & Knauf, of Jamestown, North Dakota, for defendant and appellant.

Buck & Jorgenson, of Jamestown, North Dakota, for plaintiff and respondent.

CHRISTIANSON, J. This action was tried in the district court of Stutsman county and resulted in a verdict in favor of the plaintiff. Judgment was entered pursuant to the verdict on June 26th, 1914, and notice of entry of such judgment was served upon the attorneys for the defendant on July 7, 1914. No appeal was taken therefrom, but on January 29, 1915, the defendant's attorneys served upon the attorneys for the plaintiff a notice of motion for a new trial. The motion came on for hearing pursuant to such notice on February 10, 1915; and at that time the plaintiff's attorneys filed written objections to the consideration thereof on the ground that more than six months had expired from the entry of judgment and the service of notice of such entry upon the defendant's attorneys; and that the trial court was without jurisdiction to entertain the same. The trial court made no specific ruling on such objections, but made an order on February 11, 1915, denying the motion for new trial; and the objections are referred to in such order as being among the papers on which it was based. The defendant perfected an appeal from such order on March 3, 1915.

The plaintiff has moved for a dismissal of the appeal on the ground that the defendant failed to move for a new trial, or take an appeal, until more than six months had elapsed from the date of the entry of judgment and the service of notice of entry thereof, upon the attorneys for the defendant. No other question has been raised by either party, but both seem agreed that the motion to dismiss property presents the only proposition on which a decision of this court is required.

It is undisputed that the defendant has never appealed from the judgment, and that the motion for a new trial was noticed to be heard more than six months after service of notice of entry of the judgment upon defendant's attorneys. Appellant's counsel contends that the failure to move for a new trial before this time was due to his inability to

obtain from the court reporter a transcript of the proceedings had at the trial, and that such inability is assigned as one of the grounds for a new trial. He therefore contends that this of itself furnished a sufficient reason for granting defendant's motion for a new trial, as he was prevented from moving within the statutory period. The causes which will justify a district court in granting a new trial are enumerated in § 7660 of the Compiled Laws 1913, and are as follows: ". . . 1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

"2. Misconduct of the jury. . . .

"3. Accident or surprise, which ordinary prudence could not have guarded against.

"4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

"5. Excessive damages appearing to have been given under the influence of passion or prejudice.

"6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

"7. Error in law occurring at the trial and excepted to by the party making the application."

The motion for a new trial made by the defendant in this case was based upon the grounds specified in ¶¶ 1, 3, 5, and 6 of the section of the statute quoted above; and the additional ground of the failure and inability of the court reporter to furnish a transcript of the proceedings had at the trial to the attorneys for the defendant, prior to January 7, 1915. While there are holdings to the contrary, the weight of authority sustains the view that the statutory enumeration of the grounds for new trials is exclusive, *i. e.*, that where the grounds for a new trial are specified by statute, such statutory enumeration is exclusive, and a new trial can be granted only for the causes prescribed by the statute. St. Louis, I. M. & S. R. Co. v. Lewis, 39 Okla. 677, 136 Pac. 396; Canning v. Fried, 48 Mont. 560, 139 Pac. 448; Wabash R. Co. v. Grate, 53 Ind. App. 583, 102 N. E. 155; Townley v. Adams, 118 Cal. 382, 50 Pac. 550. This view is in harmony with the rule of construction provided in the Code of Civil Procedure: *"The rule of the common law*

that statutes in derogation thereof are to be strictly construed has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates. . . ." Comp. Laws § 7321. And this view was adopted by this court in the case of McKenzie v. Bismarck Water Co. 6 N. D. 361, 374, 71 N. W. 608, wherein it was expressly held that "a district court is without authority to vacate its own judgments upon the merits, otherwise than in pursuance of statutory authority so to do." The failure of a court stenographer to furnish a transcript of the proceedings does not constitute a ground for a new trial under the statute; and, hence, could not be considered either by the trial court or this court as a cause for new trial. "The failure or inability of a court reporter to furnish the defeated party with a transcript of the evidence is no ground for a new trial." Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50. To the same effect see also Butts v. Anderson, 19 Okla. 367, 91 Pac. 906.

As no appeal was taken from the judgment, the action (under the provisions of § 7966, Comp. Laws 1913) remained pending in the district court until the time for appeal expired, *viz.*, until and including January 8th, 1915. After the time for appeal had expired, the action was no longer pending in the district court, and hence it necessarily follows that that court had no authority to entertain a motion for a new trial in a cause no longer pending therein.

Appellant's counsel concedes the soundness of the doctrine announced by this court in Grove v. Morris, —N. D.—, 151 N. W. 779, but contends that it does not apply in this case owing to the fact that the failure of the court reporter to furnish the transcript is made one of the grounds of the motion for a new trial. We have already discussed this question, and held that this does not constitute a cause for a new trial under the laws of this state. The various errors sought to be presented by the motion for a new trial could all have been reviewed in this court, without such motion, on appeal from the judgment. Appellant's counsel concedes that the trial court has no authority to extend the time in which an appeal might be taken from the judgment. Can a court do indirectly that which it is denied direct authority to do? The answer seems obvious. Appellant in effect sought to revive the right of appeal from the judgment after the same had ceased to exist. The motion for new trial was noticed for hearing and submitted after the time for appeal

from the judgment had expired; hence, we are not confronted with a situation wherein notice of motion for a new trial is served within the six-months period after the service of notice of entry of judgment, and brought on for hearing and submitted within that period, but decided by the court after the expiration thereof, and do not pass upon that question. "We have no hesitation, however, in saying that in a case like the present, where the notice is served after the expiration of the year (now six months), the trial court has lost jurisdiction." Ibid.

Respondent's motion is granted.

BISMARCK WATER SUPPLY COMPANY v. FRANK BARNES, as Sheriff of Burleigh County, et al.

(153 N. W. 454.)

Public policy — government — means of conducting — no restriction.

1. Public policy demands that no needless restriction be placed upon the securing of the necessary means for conducting the government.

Equity — injunction — taxes — collection — enforcement of — illegal — void — remedy at law.

2. As a general rule equity will not interfere by injunction with the enforcement or collection of a tax which is alleged to be illegal or void, merely because of its illegality, hardship, or irregularity, but, in addition thereto, facts must be shown to exist bringing the case within some recognized head of equity jurisprudence; otherwise the party aggrieved will be left to his remedy at law.

Personal property — distraint of, for taxes — injunction — general rule.

3. As a general rule equity will not enjoin the distraint of personal property for a tax.

Note.—As to injunction to restrain the collection of illegal taxes, see notes in 22 L.R.A. 699; 69 Am. Dec. 198; 49 Am. Rep. 287; 23 Am. Rep. 622, and 53 Am. Rep. 110.

As to injunction to prevent collection of tax on excessive assessment, see note in 16 L.R.A.(N.S.) 807.

As to injunction against enforcement of tax laws as affected by other remedies, see note in 8 L.R.A.(N.S.) 125.

Taxes — collection of — equity — reluctance to interfere — municipality.

4. Courts of equity are more reluctant to interfere with the collection of a state tax than with a tax levied by a municipality.

Injunction — legal remedy — available.

5. An injunction will not issue where legal remedies are, or have been, available.

Complaint — evidence — injunctive relief.

6. The complaint and evidence considered, and it is *held* that plaintiff is not entitled to injunctive relief.

Opinion filed May 27, 1915.

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

Affirmed.

Engerud, Holt, & Frame, for appellant.

The plaintiff is entitled to equitable remedy, or to injunction. The value of the personal property taken by the sheriff, as well as any damages suffered, cannot be ascertained and recovered in an action at law. Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; 5 Pom. Eq. Jur. §§ 359, 362.

Where such is the condition, or where the personal property is of such a character that irreparable injury will ensue, the rule is that resort may be had to equitable remedies. Bank of Kentucky v. Stone, 88 Fed. 383, affirmed in 174 U. S. 409, 43 L. ed. 1027, 19 Sup. Ct. Rep. 880; Schaffner v. Young, supra; Southern R. Co. v. Asheville, 69 Fed. 359; Wright v. Southwestern R. Co. 64 Ga. 786; Phelan v. Smith, 22 Wash. 397, 61 Pac. 31; Detroit v. Wayne Circuit Judge, 127 Mich. 604, 86 N. W. 1032; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903.

County boards of equalization have no jurisdiction to correct individual valuations made by city boards. First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; Minot v. Amundson, 22 N. D. 236, 133 N. W. 551.

No tender in such cases is necessary before bringing action. Northern P. R. Co. v. McGinnis, 4 N. D. 494, 61 N. W. 1032; Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386; Farrington v. New

England Invest. Co. 1 N. D. 102, 45 N. W. 191; Laws 1903, chap. 157; Rev. Codes 1905, §§ 1623 et seq., Comp. Laws 1913, § 2238.

The court has the right to require the payment of the taxes justly due within a reasonable time, as a condition of relief. Fenton v. Minnesota Title Ins. & Trust Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363; Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361; State Finance Co. v. Beck, 15 N. D. 380, 109 N. W. 357.

If suit were brought to cancel a specific invalid tax, then tender or offer to pay the valid part of the tax first would be necessary. Powers v. First Nat. Bank, 15 N. D. 466, 109 N. W. 361; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919.

The statute contemplates that the taxes when not invalid shall be reimposed and resale had. Roberts v. First Nat. Bank, 8 N. D. 513, 79 N. W. 1049; Laws 1903, chap. 158 (Rev. Codes 1905, §§ 1617, 1622, Comp. Laws 1913, §§ 2232, 2237).

No interest or penalty can be exacted. The requirement shall be to pay only to the extent that the taxes are valid. Laws 1903, chap. 157, § 4 (Rev. Codes 1905, § 1623, Comp. Laws 1913, § 2238); Const. § 174.

H. R. Berndt, State's Attorney, and *F. E. McCurdy* and *Geo. E. Wallace,* for respondent.

Where the reason for a rule does not exist, the rule itself is suspended. Injunction will not lie, and equity will not interfere, against a distraint of personal property for taxes, as a rule. Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; 5 Pom. Eq. Jur. § 359.

Courts are not instruments to review an assessment for taxes. George C. Bagley Elevator Co. v. Butler, 24 S. D. 429, 123 N. W. 866.

The value of property for taxation purposes is that fixed by the board of equalization. Dakota Loan & T. Co. v. Codington County, 9 S. D. 159, 68 N. W. 314.

There are no limitations on the legislative powers of the legislature except such as are imposed by the state and Federal Constitutions. Re Watson, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321.

A tax is defined to be a burden imposed by legislative authority to raise money for public purposes. Hanson v. Franklin, 19 N. D. 259, 123 N. W. 386.

The power to raise revenue by taxation is a necessary attribute of sovereignty. Re Lipschitz, 14 N. D. 622, 95 N. W. 157.

CHRISTIANSON, J. This is an action in equity brought to enjoin the defendant Barnes, who is the sheriff of Burleigh county, from enforcing a certain personal property tax levied against plaintiff's property situated in the city of Bismarck, in Burleigh county, for the years 1909 and 1910. The city of Bismarck and the county of Burleigh were also made parties defendant.

The suit was commenced on January 31, 1912, in the district court of Burleigh county. The plaintiff is a foreign corporation organized under the laws of the state of West Virginia, owning and operating the waterworks plant in the City of Bismarck, in Burleigh County, and as far as the pleadings and record in this case show, this is the only property of any kind owned by the plaintiff within the state of North Dakota.

The material allegations of the complaint are substantially as follows: "That the actual cost value of plaintiff's waterworks plant in Bismarck in the years 1909 and 1910 did not exceed the sum of $85,000. That in the year 1909 and ever since that time the municipal government of the city of Bismarck has been and now is vested in a board of five commissioners. That in the month of June, 1909, said board of city commissioners, sitting and acting as the board of equalization of assessments for said city, fixed the value of this plaintiff's said water supply plant, and assessed the same for the purpose of taxation at the sum of $40,500, and thereafter at the regular meeting of the state board of equalization of assessments for the state of North Dakota in said year, said state board increased the valuation and assessments of all property in the state 12½ per cent, thereby increasing this plaintiff's assessments to the sum of $45,562, and thereupon the annual tax levies for said year were made by the respective taxing officers for the respective purposes provided by law, the taxes for said year for all purposes were imposed and charged upon and against plaintiff's said property and computed and fixed on the basis of said assessment of $45,562, resulting in an aggregate tax in the sum of $2,237.09. That in the year 1910 said board of commissioners of the city of Bismarck in like manner valued and assessed said property for the purpose of taxation at the sum of $36,000, and the taxes for all purposes for said year 1910 were computed, imposed, and charged upon and against said property based on said valuation and assessment of $36,000, resulting in an aggregate tax of $1,926. That

notwithstanding the legal requirements that all property shall be assessed for taxation at its actual cash value, the uniform practice throughout all parts of the state of North Dakota always has been, and was in the year 1909 and 1910, to value taxable property at much less than its actual cash value; and said practice has been universally and uniformly followed and acquiesced in by all assessors, boards of equalization, and taxing officers throughout the entire state of North Dakota.

"That in the years 1909 and 1910 the city board of equalization of said city of Bismarck, as well as all other boards of equalization in Burleigh county, and in all other parts of the state, in fixing the assessed value of property for taxation adopted and used as the assessable value a value which was intended to represent approximately 25 per cent of the actual value of the property assessed; and the assessed value was computed by taking one fourth of the conservatively estimated actual value, as the assessed value.

"That in assessing and equalizing assessments of taxable property throughout the city of Bismarck in the years 1909 and 1910, said city board of equalization acted upon and applied the aforesaid practice of fixing the assessed value of property at approximately 25 per cent of its actual value as to all taxpayers, save and except as to this plaintiff. That with respect to this plaintiff's said establishment, said city board of equalization intentionally and arbitrarily departed from said general rule, and wilfully and unjustly assessed this plaintiff's property at a value representing approximately 50 per cent of its actual value, as said board then and there well knew; and this was done with the intent and for the purpose of fraudulently causing to be imposed upon this plaintiff a rate of taxation in excess of the rate of taxation imposed on other taxpayers in said city.

"That the just and true assessable value of said property in the years 1909 and 1910 was not to exceed the sum of $85,000, and the just and true amount of taxes that this plaintiff ought to pay for said respective years on said property is for 1909 not to exceed the sum of $1,200, and for 1910 not to exceed the sum of $900.

"That plaintiff did, on the 11th day of August, 1911, pay to the county treasurer of Burleigh county, in part payment of the 1910 taxes, the sum of $692.18, and is now ready and willing to pay, and hereby offers to pay, sums stated in ¶ VI. in this complaint (less the partial

payment last mentioned), or such other or different sum as this court may find to be justly due or owing for or on account of the taxes on said property for said respective years.

"That plaintiff has offered to pay to the county treasurer of Burleigh county the just amount of taxes due, but said county treasurer has refused and still refuses to accept any other or different sum than the full amount of said taxes as they appear charged on the tax lists, with interest and penalties.

"That the defendant Barnes, who is the sheriff of Burleigh county, has by virtue of his office as sheriff, and pursuant to the statute in such cases made and provided, made distraint upon and seized all this plaintiff's said property for the purpose of selling the same for the satisfaction of said pretended taxes, and asserts and claims that the aggregate sum due for such taxes, exclusive of his fees and costs, is the sum of $4,370.37, and will, unless restrained from so doing, sell and dispose of said property therefor, and wholly deprive this plaintiff thereof; and this plaintiff will be remediless in the premises.

"That inasmuch as part of said taxes is valid, and hence said sheriff may lawfully distrain and sell plaintiff's property therefor, this plaintiff cannot pay said taxes under protest and recover the same back from said sheriff; and inasmuch as in an action at law it cannot be determined how much of said taxes is justly due, plaintiff is wholly without remedy in an action at law, and is without remedy save in a court of equity."

Plaintiff's prayer for judgment is that the defendant sheriff be enjoined from further proceeding with said distraint of plaintiff's property, and be required to release the same until the final determination of this action; that the court ascertain and determine the just amount of taxes due, and that plaintiff be permitted to pay the same, and that thereupon the remainder of taxes in excess of the amount justly due be declared null and void and canceled of record; and that the defendants be forever enjoined from attempting to enforce the same. The defendants answered, alleging that the cash value of said plaintiff's property was not less than $175,000, and set forth in detail the facts showing that the property had been properly assessed on an equitable and just basis; and also alleged that the plaintiff's complaint did not set forth facts entitling the plaintiff to equitable relief. At the commencement of the action the district court issued a temporary injunctional order where-

by the defendant Barnes was restrained "from selling or attempting to sell the property of the plaintiff which he had distrained and seized under and by virtue of the claim for the alleged delinquent taxes due thereon for the years 1909 and 1910." This injunctional order remained in force during the pendency of the action. The cause was tried on its merits and final judgment rendered in favor of the defendant for a dismissal of the action. Plaintiff has appealed from the judgment and demanded a trial *de novo* in this court.

It will be noticed that the only objection made to the tax in the original complaint is that the city board of equalization fraudulently and arbitrarily placed an excessive and grossly disproportionate valuation on plaintiff's property. But after the cause had been noticed for trial, and prior to the trial, an amended complaint was served alleging as additional grounds that the taxes imposed on said property for state purposes for the year 1909 (consisting of certain items set forth in the complaint) aggregated in all 5 mills per dollar of the assessed value, or 1 mill in excess of the constitutional limit; and that the taxes imposed on said property for state purposes for the year 1910 were computed at the rate of $4\frac{2}{10}$ mills per dollar of the assessed value, or an excess of $\frac{2}{10}$ mill over the constitutional limit. At the time of the trial the plaintiff expressly waived the ground on which the action was originally commenced, to wit, that the valuation of plaintiff's property was fixed at an excessive rate; and for the purposes of this action it is conceded that such property was not overvalued, but that the same was assessed and equalized at approximately the same proportionate rate as the property of other taxpayers. The sole ground, therefore, on which plaintiff asks for equitable relief, is based upon the alleged excessive state levies for the years 1909 and 1910.

Plaintiff's contention regarding these taxes is stated in its brief as follows: "That the taxes charged against plaintiff were illegal and excessive in 1909 to the extent of $45.56, and in 1910 to the extent of $7.20; that the amount of taxes justly due was, for 1909, $2,191.53; for 1910, $1,918.80." In other words, plaintiff admits that the correct amount of taxes which it was justly beholden to pay was $4,110.33. The only allegations of fraud in the complaint relate to the action of the board of equalization of the city of Bismarck. As already stated, this part of the complaint was eliminated by the plaintiff at the trial in the

court below. It is conceded that the taxes levied for county, city, and school purposes are regular and valid. The partial payment of taxes alleged in the complaint consisted solely of certain water rents due to the plaintiff from the county of Burleigh, and applied by the county treasurer upon such taxes without the request of the plaintiff. Whether the county treasurer had authority to make such application, or whether the plaintiff can plead the same as a set-off against the tax, is not involved in this action, nor is there any evidence that the defendants sought to collect from the plaintiff any part of the tax alleged to have been so paid.

The sole question therefore presented to this court is whether or not an illegal excess of $52.76 in the state levies for the years 1909 and 1910, out of the total tax of $4,163.09, will entitle the plaintiff to have the collection of the tax enjoined. This question was considered by the Supreme Court of the United States in the case of Dows v. Chicago, 11 Wall. 108, 20 L. ed. 65, and in an opinion by Justice Field it was said: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interposition of a court of equity to enjoin its collection. The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public.

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizens whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud

upon the title of the complainant, before the aid of a court of equity can be invoked. In the cases where equity has interfered in the absence of these circumstances, it will be found upon examination that the question of jurisdiction was not raised, or was waived." The same rule was also announced by the supreme court of the territory of Dakota, in its decision in the case of Frost v. Flick, 1 Dak. 131, 46 N. W. 508, wherein it said: "It has been well said that courts of equity do not sit to reverse or correct errors and mistakes of law, and cannot attempt to prevent, any more than it will redress, all wrongs.

"It is no answer to say, let those whose duty it is to administer the revenue law do it with greater care, and do everything which the law requires just as it requires, and at the time specified, and be careful that they do no more than is required. We must take things as they are, and look at practical results. Chicago, B. & Q. R. Co. v. Frary, 22 Ill. 34.

"The doctrine seems well settled that equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities or errors in the assessment of the tax (or in the execution of the power conferred upon taxing officers, the remedy at law being deemed sufficient in such cases. High, Inj. 355; Macklot v. Davenport, 17 Iowa, 379; Warden v. Fond du Lac County, 14 Wis. 618.

"The cases in which courts of equity have exercised jurisdiction in matters of this character will be found to be confined almost exclusively to those wherein the tax itself is illegal or unauthorized,—not a legal tax assessed in an irregular manner (McClure v. Owens, 21 Iowa, 133); or where the property assessed is not subject to the tax (Illinois C. R. Co. v. McLean County, 17 Ill. 291); or where fraud has been practised by the taxing officers (Cleghorn v. Postlewaite, 43 Ill. 428). . . .

"It is laid down as a broad principle that in no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments. High, Inj. 362; Ritter v. Patch, 12 Cal. 298. If the tax is in itself a legal one, and the property on which it is levied subject to taxation, then it cannot be said that any such injury could result from its collection. It might financially embarrass the taxpayer, it might cast a cloud on his title, it

might absolutely bankrupt him, but would these be any reasons for the interference of a court of equity? Assuredly not, or the powers and process of such court would find ample employment. . . .

"It is a matter of indifference to the public interests, who pays the tax, or out of what kind of property it is made. But it is of the highest importance that it be paid, and that speedily, and with as little cost and expense to the public treasury as possible. A party occupies no very equitable ground, to say the least, who admits that land which he owns is chargeable with a tax, that such tax is just and legal, but that he will make the error or neglect of an officer his excuse for delaying or defeating its payment.

"The last article of personal property subject to taxation belonging to the poor man may be seized and sold for the satisfaction of the tax, and courts of equity in most cases could afford no relief, while the rich man, with his broad acres and money to fee attorneys, if permitted to take advantage of such quibbles and technicalities, might indefinitely postpone the discharge of his obligation, thereby throwing additional burdens on willing taxpayers, and embarrassing the public treasury."

The doctrine announced by the Supreme Court of the United States and the territorial supreme court was fully approved by this court in the case of Farrington v. New England Invest. Co. 1 N. D. 118, 45 N. W. 191. In that case this court said: "The general rule pertaining to the interference of equity with tax proceedings is stated by High, Inj. §§ 485, 486, as follows: 'It may be laid down as a general rule that equity will not interfere by injunction with the collection of a tax which is alleged to be illegal or void merely because of its illegality, hardship, or irregularity, but there must be some special circumstances attending the threatened injury to distinguish it from a mere trespass, and thus to bring the case within some recognized head of equity jurisprudence; otherwise the person aggrieved will be left to his remedy at law.' . . .

"Courts of equity should, in general, extend the strong arm of their preventive power to restrain the collection of a tax or annul tax proceedings only where the property sought to be taxed is exempt from taxation, or the tax itself is not warranted by law, or the persons assuming to assess and levy the same are without authority so to do, or where

the proper taxing officials have acted fraudulently; and, in addition, plaintiff must bring himself within some recognized rule of equity jurisprudence."

The rule laid down in the case of Farrington v. New England Invest. Co. was quoted with approval by this court in a number of subsequent decisions, and among others in the case of Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919, where the following general principle was announced: "Courts of equity should, in general, interfere to restrain the collection of a tax or annul tax proceedings *only* where it appears either that the property sought to be taxed is not subject to taxation, or the tax itself is not wholly authorized by law, or the taxes are assessed or levied by unauthorized persons, or the taxing officers have acted fraudulently, or the taxes have been unjustly levied, or the assessment made unjustly or without uniformity; *and the plaintiff must, in addition, bring himself within some recognized head of equity jurisprudence,* and must also tender or pay the taxes justly chargeable upon his property, before an injunction should issue to restrain the collection of the taxes, unless statutory provisions made such tender unnecessary." The two cases last cited involved real estate taxes, and hence the principles therein announced have even greater force when applied to personal taxes. Schaffner v. Young, 10 N. D. 245, 253, 86 N. W. 733.

It is conceded even by plaintiff's counsel that as a general rule "equity will not enjoin the distraint of personal property for a tax." But it is contended that this case furnishes an exception to the rule, for the reason that the property involved, although personal, "for all practical purposes, is in every essential particular like real estate," and also, "that the property, although personal, is of such character that the seizure and sale thereof will cause irreparable injury not ascertainable in money."

The rule is stated in Cooley on Taxation, 3d ed. p. 1415, as follows: "When a tax as assessed is only a personal charge against the party taxed, or against his personal property, it is difficult in most cases to suggest any ground of equitable jurisdiction. Presumptively the remedy at law is adequate. If the tax is illegal and the party makes payment, he is entitled to recover back the amount. The case does not differ in this regard from any other case in which a party is compelled to pay an illegal demand; the illegality alone affords no ground for

equitable interference, and the proceedings to enforce the tax by distress and sale can give none, as these only constitute an ordinary trespass. To this point the decisions are numerous. The exceptions to this rule, if any, must be of cases which are to be classed under the head of irreparable injury; as when the enforcement of a tax might destroy a valuable franchise, or might embarrass an assignee or receiver in the execution of his trust; or when property is levied upon which possesses a peculiar value to the owner beyond any possible market value it can have; and other like cases, where the recovery of damages would be inadequate redress. *A case would be exceptional, also, if under the law no remedy could be had to recover back moneys paid.*"

In High on Injunctions, 4th ed. § 505, it is said: "As regards the question of equitable relief against a tax which is levied upon or sought to be collected out of personal property, the better considered doctrine, and that supported by the clear weight of authority, is that equity will not interfere by injunction to restrain a levy upon or sale of personal property in satisfaction of a tax which is alleged to be illegal. Even in those states which have inclined to depart from the general doctrine denying relief in equity against an illegal tax, the courts, while contending for the jurisdiction in cases affecting the title to real estate, nevertheless refuse to interfere where only personal property is involved, and leave the parties aggrieved to their remedy at law." See also Pom. Eq. Jur. § 359.

In the case of Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260, being an action to set aside and perpetually enjoin the collection of certain taxes levied against the property of the Soo Railway Company, this court said: "The defendant contends that the plaintiff has not brought itself within any of the recognized principles of equity jurisprudence justifying it in passing by remedies at law and resorting to injunctional proceedings. A statement of the allegations of the complaint will show the basis of plaintiff's contention. The complaint alleges: . . .

" 'That this plaintiff is engaged in the business of operating a railway through said county, and connecting the places and people therein with eastern and western points, and is a common carrier of freight, express, and passengers into and out of said county, and all the property of plaintiff in said county is used in and about said business, and is

necessary for the proper conduct thereof; that if said property, or any thereof, is seized by said officers, such seizure and distraint would seriously hamper and cripple the said business, and would inflict great and irreparable injury, and would occasion a great multiplicity of suits, and occasion great and irreparable damage and annoyance to this plaintiff and the people of said county; that plaintiff has no adequate remedy in law in said matter, and has no remedies at law for the injuries which would follow such seizure and distraint of its property as aforesaid.' These allegations are statements of conclusions, and not of facts. It is not apparent therefrom, nor from the evidence, that irreparable injury or damage would follow the denial of the prayer for a permanent injunction. It is not shown how a multiplicity of suits would follow such refusal of equitable relief. . . . In an early case in this state the following rule was laid down by the supreme court, and has not been departed from: 'Courts of equity should, in general, extend the strong arm of their preventive power to restrain the collection of a tax or annul tax proceedings *only* where the property sought to be taxed is exempt from taxation, or the tax itself is not warranted by law, or the persons assuming to assess and levy the same are without authority to do so, or where the proper taxing officials have acted fraudulently; *and, in addition, plaintiff must bring himself within some recognized rule of equity jurisprudence.*' Farrington v. New England Invest. Co. 1 N. D. 118, 45 N. W. 191. The case cited related to taxes upon real estate, but the principles there announced apply with more force to collection of personal property taxes than to enforcement of real estate taxes. . . .

"The tax being a personal property tax, the complaint shows no facts which bring the action within any of the exceptions to the general rule that an injunction will not lie to prevent the collection of a personal property tax. The property taxed is not exempt. A constitutional law authorized its taxation, and gave the officers authority to tax it. No facts are pleaded or shown that can reasonably be said to show that there exists no remedy at law, or that irreparable damage will follow if the injunction be not granted. That an injunction will not be granted to restrain the collection of a personal property tax, except in certain cases, has recently been held by this court, and the great weight of authority favors such holding. Schaffner v. Young, 10 N. D. 245,

86 N. W. 733. The facts of the case at bar do not bring it within any of the exceptions to that rule. Neither the complaint nor the evidence shows any facts warranting a court of equity interfering with the collection of taxes on personal property. The plaintiff had an adequate remedy at law, and should have resorted to it, and could thereby have prevented a multiplicity of suits and any seizure of its property. St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator R. Co. v. Soucie), 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212." See also Union P. R. Co. v. Weld County, 133 C. C. A. 392, 217 Fed. 540.

In the case of Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, the tax involved was a county tax. In the instant case an attack is made upon a state tax, and hence a court of equity is even more reluctant to interfere than if it involved a tax levied by a municipality. Decker v. McGowan, 59 Ga. 805, and authorities cited. See also High, Inj. 4th ed. § 536. Practically every case cited by appellant involved taxes levied by municipalities upon property wholly exempt from such taxation; the entire tax involved was void at its inception, and an enforcement thereof threatened the franchise,—the very existence of the corporation itself,—with destruction. It seems obvious that these cases cannot be considered authority under the facts in this case.

Appellant's counsel cite the case of First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836, as an example of a case in this court where the illegal part of a personal property tax was enjoined. An examination of the record in that case shows that an injunction was not asked therein. That was an equitable action to cancel a certain resolution or order of the board of county commissioners of Cass county. No question was presented as to the propriety of the remedy; but the real question in issue therein, *viz.*, the authority of the county board of equalization to raise the individual assessment of personal property after the same had been equalized by the city board of review,—was submitted and decided on its merits. The mere fact that this court in that case assumed jurisdiction, and decided the question thus presented, does not make that decision authority in support of other legal propositions incidentally involved, but withdrawn from the court's consideration by the parties thereto. Dows v. Chicago, 11 Wall. 108,

20 L. ed. 65. That decision, therefore, is authority only upon the questions therein decided, and does not overrule the decision of this court in Re First Nat. Bank, 25 N. D. 635, L.R.A.1915C, 386, 146 N. W. 1064, holding that the proper method of reviewing a decision of the board of county commissioners made while equalizing and correcting assessments, then pending before them and judicial in its character, is by appeal from such decision to the district court; neither is such decision authority in support of the contention that mere illegality of a tax is sufficient ground to warrant equitable interference. Neither of those questions were argued, considered, or decided in that case.

We are unable to see where the plaintiff herein is in a different position from that of any other taxpayer in the state. If a certain portion of the state levy was excessive and illegal, then the same proportion of the taxes of every taxpayer in the state was excessive and illegal. If plaintiff is entitled to injunctive relief, so is every taxpayer in this state. If the complaint in the case of Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260, fails to set forth allegations justifying equitable interference, it is difficult to see how it can be seriously contended that the facts in the case at bar present such cause. Surely the interference with the business of this plaintiff could cause no greater injury or hardship than the alleged threatened interference with the business of the railway company. In this case it is not averred or shown that the intervention of a court of equity is necessary to prevent a multiplicity of suits. On the contrary the probability, or even possibility, of a multiplicity of suits, is negatived by the facts in the case. Nor are any facts averred showing that the remedies provided by law are not entirely adequate; and there is certainly nothing to show that the enforcement of the tax will result in any irreparable injury to the plaintiff. The only possible injury suggested is that plaintiff might be compelled to pay a tax amounting to $4,163.09, of which sum two items aggregating $51.76 are illegal and invalid; and which if paid by the plaintiff under compulsion and under protest could be recovered back by it. Can it be seriously contended that this presents a cause justifying equitable interference? We are satisfied it does not. In considering a similar question, the supreme court of Michigan in the case of Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654, speaking through Judge Cooley, said: "The grounds

suggested, but not argued, as giving equitable jurisdiction in the case, are, *first,* that thereby a multiplicity of suits may be avoided; *second,* that otherwise the proceedings may ripen into a cloud upon the title to complainants' land; and, *third,* that irreparable injury is threatened to complainants in their business. As the tax is only personal, and as yet affects no real estate, and may never do so, the second ground calls for no consideration. The force of the third must rest in the fact that enforcing the tax may in some cases compel the suspension of business, because it is more than the person taxed can afford to pay. But if this consideration is sufficient to justify the transfer of a controversy from a court of law to a court of equity, then every controversy where money is demanded may be made the subject of equitable cognizance. To enforce against a dealer a promissory note may in some cases as effectually break up his business as to collect from him a tax of equal amount. This is not what is known to the law as irreparable injury. The courts have never recognized the consequences of the mere enforcement of a money demand as falling within that category."

The mere fact that the tax of the plaintiff may be larger than that of a majority of the taxpayers in the state does not give it any standing in a court of equity. As was said by the Supreme Court of the United States in "State Railroad Tax Cases," 92 U. S. 575, 614, 23 L. ed. 663, 674: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction."

At the time this action was commenced the defendant Barnes, as sheriff of Burleigh county, had already seized certain property belonging to the plaintiff. The plaintiff therefore had an adequate remedy at law by making payment of such taxes under protest, and bringing suit to recover the illegal excess. St. Anthony & D. Elevator Co. v. Bottineau County (St. Anthony & D. Elevator R. Co. v. Soucie), 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260; Chicago & N. W. R. Co. v. Rolfson, 23 S. D. 405, 122 N. W. 343; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733. See also authorities cited in

note, 45 Am. Dec. 164; 37 Cyc. 1174; Cooley, Taxn. 3d ed. pp. 1415, 1487. Plaintiff, also, in the first place, had the remedy of obtaining a review and by appropriate legal proceedings correcting the error committed by the state board of equalization. Sioux Falls Sav. Bank v. Minnehaha County, 29 S. D. 146, 135 N. W. 689, Ann. Cas. 1914D, 910; George C. Bagley Elevator Co. v. Butler, 24 S. D. 429, 123 N. W. 866; Spelling, Exr. Relief, § 1967; Cooley, Taxn. 3d ed. p. 1407; 37 Cyc. 1120; see also State ex rel. Lenhart v. Hanna, 28 N. D. 583, 149 N. W. 573. If plaintiff had applied to the courts in proper time for a review and correction of the error made by the state board of equalization, then the result would have been to obtain equality for all the taxpayers in the state. If plaintiff's prayer in this case is granted, it will be placed, not on an equal basis with other taxpayers in the state, but on a more favorable basis. Plaintiff could doubtless, also, have paid the amount of the legal tax and made application to the county commissioners, under the provisions of § 2165, Compiled Laws, for abatement of the illegal excess. But it did nothing except to bring this action. It is elementary that a court of equity will not grant injunctive relief unless it is shown that no adequate legal remedy exists. Sioux Falls Sav. Bank v. Minnehaha County, 29 S. D. 146, 168, 135 N. W. 689, Ann. Cas. 1914D, 910; George C. Bagley Elevator Co. v. Butler, 24 S. D. 429, 434, 123 N. W. 866; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; 22 Cyc. 775. Such showing has not been made in this case. On the contrary the legal remedies seem entirely adequate; and no reason has been shown to exist which would justify this court in restraining the collection of a tax. It follows that the judgment of the District Court is right, and must be affirmed. It is so ordered.

STATE OF NORTH DAKOTA EX REL. THOMAS G. AHERN v. T. G. ANDERS, Anton Sadowsky, and Frank Anderson, as the County Commissioners of the County of Dunn in the State of North Dakota, and as the Board of County Commissioners of the County of Dunn in the State of North Dakota.

(152 N. W. 801.)

Counties — organization of — laws — amendments — county seat — removal — relocation.

1. Following Miller v. Norton, 22 N. D. 196, it is held that the Revised Statutes of 1895 were new legislation, a change from old to new, and not a continuation of the old with amendments. Chapter 21, Political Code of 1877, has therefore been repealed, and is now superseded by chapter 42, Political Code, being §§ 3191–3244, Comp. Laws 1913. Dunn county was organized under the later law, and an election held under § 3233, Comp. Laws 1913, to determine whether the county seat should be removed from Manning to Dunn Center, is one for the *removal*, and not *relocation*, of said county seat.

Counties — unorganized territory — elections — county seat.

2. There is no provision for a location election in counties created from unorganized territory. But conceding, for argument only, that an election might have been held to relocate the county seat of Dunn county in 1914, the election in question cannot be now changed into one of that nature.

Opinion filed May 10, 1915. Rehearing denied June 1, 1915.

Appeal from the District Court of Dunn County, dismissing a writ of mandamus against the County Commissioners, *Crawford*, J.

Affirmed.

Alf O. Nelson, A. S. Boe and *Thos. H. Pugh,* for relator.

Article four (4) of chapter forty-two (42) of the Political Code is a removal statute, and not a relocation statute. Miller v. Norton, 22 N. D. 196, 132 N. W. 1080.

The Constitution preserved in force all territorial laws not repugnant to its provisions. Schedule to Const. § 2.

Repeals by implication are not favored. There must be a positive repugnancy between the provisions of the new laws and those of the old laws. Sargent County v. Sweetman, 29 N. D. 256, 150 N. W. 876, and cases cited.

The selection of a permanent county seat in place of a temporary one is not a removal, and such change is not subject to constitutional restrictions upon removals. 7 Am. & Eng. Enc. Law, 1015; Atty. Gen. v. Board of Canvassers, 64 Mich. 607, 31 N. W. 539; Doan v. Logan County, 3 Idaho, 38, 26 Pac. 167.

No county seat was ever established for Dunn County. Hence the removal statute cannot govern. Doan v. Logan County, 3 Idaho, 38, 26 Pac. 167.

W. A. Carns and *W. F. Burnett,* for respondents.

Courts will look at the effect and consequence in construing a doubtful or ambiguous statute, and will discard any construction which leads to unreasonable, foolish, or absurd consequences. Brown County v. Aberdeen, 4 Dak. 402, 31 N. W. 735; Lawrence County v. Meade County, 6 S. D. 528, 62 N. W. 131.

Unless wholly unavoidable, a construction of a statute will not be adopted that assumes an intention on the part of the legislature to do absurd, unjust, or useless things. Lawrence County v. Meade County, supra.

A statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first. Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Note in 4 L.R.A. 310; Note in 1 L.R.A. 362; State v. Cooper, 18 N. D. 583, 120 N. W. 878; First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; United States v. Claflin, 97 U. S. 546, 24 L. ed. 1082; Code of 1877, Chap. XXI. § 6.

Where one statute is formed from another, some parts being omitted, the parts omitted are to be considered as annulled. Clay County v. Chickasaw County, 64 Miss. 534, 1 So. 753; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; Crowell v. Jaqua, 114 Ind. 246, 15 N. E. 242.

The Revised Codes of 1895 was new legislation. It was a change from old to new, and not a continuation of the old with amendments. Miller v. Norton, 22 N. D. 196, 132 N. W. 1080.

BURKE, J. The county of Dunn was organized January 17, 1908, by proclamation of the governor, who, at said time, named Manning as the temporary county seat, under § 3, chapter 63, Sess. Laws 1907,

now known as § 3193, Comp. Laws 1913. Thereafter the government of the county was conducted at said place, the county owning a plat of ground upon which was located a courthouse, which was destroyed by fire about the 19th of January, 1914. Since this date, rooms have been rented for the use of said county offices. About the 6th day of August, 1914, a petition for the removal of the county seat from Manning to Dunn Center was submitted to the board of county commissioners, and acting thereunder an election was designated to be held upon the 3d day of November, 1914. A canvass of the vote showed that Dunn Center had received 876 votes and Manning 507. The county commissioners thereupon decided that the said proposition had not carried by a two-thirds vote as required by § 3236, Comp. Laws 1913. This action is a writ of mandamus directed to such county commissioners seeking to compel them to certify Dunn Center the permanent county seat. Relators contend that Manning is only the temporary county seat; that the governor was only given the authority under § 3193 to designate the location of the county seat until the voters themselves had permanently located the same by a majority vote. It is their further contention that § 6, chapter 21, of the Political Code of 1877, is still in force and effect in this state (although not found in any of the laws after 1885), and thereunder the voters themselves have the right at the first general election at which county officers are chosen, to select and locate a permanent county seat.

(1) We will first discuss the question of the law under which the election of 1914 was held. We will not in this opinion set forth all of the various enactments of the territorial and state legislatures of this commonwealth, as the same has been done in Miller v. Norton, 22 N. D. 196, 132 N. W. 1080. Anyone interested in the subject will find the same exhaustively treated in such opinion.

In such opinion, it is said: "The Revised Codes of 1895 was new legislation. It was a change from old to new, and not a continuation of the old with amendments." From said opinion we further quote: "The complete change in the statute generally, from that existing prior to 1895, is strongly indicative of legislative intent to depart from existing law and procedure. This is strengthened when we find the entire new law was borrowed in all its unusual and peculiar features

from a sister state, and the former law supplanted thereby expressly repealed."

This view is also sustained by the following cases: Brown County v. Aberdeen, 4 Dak. 402, 31 N. W. 735; Lawrence County v. Meade County, 6 S. D. 528, 62 N. W. 131; Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Notes in 4 L.R.A. 310, 1 L.R.A. 362; State v. Cooper, 18 N. D. 583, 120 N. W. 878; First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; Crowell v. Jaqua, 114 Ind. 246, 15 N. E. 242. It is our conclusion, therefore, that chapter 21, Political Code 1877, has been long since repealed.

The election in dispute, therefore, was held under § 3233, Comp. Laws 1913, being § 2358, Rev. Codes 1895, amended by chapter 59, Sess. Laws 1907, and was an act for the *removal,* and not for the *relocation,* of said county seat. This is in harmony with Miller v. Norton, supra, wherein it is said: "In discussing the question involved in this opinion, we have designated our present statute as a removal, as distinguished from a relocation, statute. We have used these terms advisedly." Such being the case, Dunn Center must have received two-thirds of the vote cast to be entitled under the statute to the relief sought in this proceeding.

(2) Upon oral argument, relator for the first time insisted that, even conceding the repeal of chapter 21 of the Political Code of 1877, the voters of Dunn county had an inherent right to locate their own county seat by an *election,* and that they were not afforded this opportunity under the provisions of § 3193, Comp. Laws 1913. They reason further that having this inherent right to an election for the purpose of locating the county seat, that the election held in November, 1914, though in form a removal election, should be treated by this court as though it had been held for the relocation of the county seat. We do not believe this contention has any merit. The Constitution of North Dakota, §§ 166–173, bears evidence of the intent that the legislature should not thereafter create any counties or locate the county seat by special acts of their own, which had been the practice prior to that time. As a substitute for legislative creation, it was provided that the legislature should enact laws under which the people of the different counties might organize. Section 167 reads: "The

legislative assembly shall provide by general law for organizing new counties, locating the county seats thereof temporarily, and changing county lines. . . ." Section 169: "The legislative assembly shall provide, by general law, for changing county seats in organized counties, but it shall have no power to remove the county seat of any organized county." The legislature is thus commanded to provide laws whereunder the people of the county may organize the same. The legislature, in obedience to this mandate, has enacted § 3193, Comp. Laws 1913, which applies to territory which is for the first time being organized into counties, and reads: "Upon the granting of the petition for the organization of such county and within thirty days thereafter, the governor is empowered and it is hereby made his duty by written order to locate a temporary county seat therein *at such place as the greatest number of bona fide residents of such county shall designate by petition.* . . ." It has also provided at § 3208, Comp. Laws 1913, for new counties which are created by a division of an old county, which section reads: "The county commissioners of such county shall have power temporarily to fix the county seat and such location shall remain the county seat until the first general election thereafter when the qualified voters of such county are empowered to vote for and select the place of the county seat by ballot as provided by law. . . ."

Whether the legislature believed that new and unorganized territory which is about to be formed into a county has certain distinctions from old territory which is already settled up with full election machinery and the towns permanently located, we can only surmise, but that such a difference does exist is apparent in this case, where the county seat in the first place was named before any railroad was built, and now finds itself 12 miles inland. In any event, the legislature has seen fit to allow counties organized by division of an old county, to locate their county seat by *election* at the first general election held thereafter, while in the case of new territory to be formed into a county, no provision is made for such election, but the county seat is temporarily named by petition.

The relator contends that the legislature inadvertently failed to provide for the holding of an election for the location of county seats in counties created from unorganized territory. The respondents, on the

other hand, contend that such provision was intentionally omitted, and that the legislature intended to substitute a petition to the governor for such election. It is useless for us to speculate upon the reasons or motives which actuated the legislature in repealing the former law and enacting the present legislation on the subject. The duty of this court is to interpret, and not to make, laws. And we are all agreed that there is now no provision made under the laws of this state for such election, and this being so, it is self-evident that this court cannot by judicial fiat supply such legislation. If the present legislation on the subject is deemed inadequate, it can only be remedied by legislative action.

There is, moreover, another reason why relator may not prevail in this action. Even if his contentions were correct, and the voters of Dunn county had the right in the fall of 1914 to an election to determine the permanent county seat, the plainest principles of justice require that all towns of said county should have been given equal opportunity to become candidates thereat. By petitioning for a removal election, Dunn Center under such law eliminated all other candidates for the county seat, and only Dunn Center and Manning had their names printed upon the ballot. It would be a great injustice to other towns if, after such an election between Manning and Dunn Center, this court should, six months later, hold that such election was really a location election. Either one of these reasons necessitates a dismissal of the writ. The judgment of the trial court is in all things affirmed.

ANNA MARTIN, formerly Anna Volk, v. EDWARD L. YAGER et al. (Edward L. Yager, appellant alone).

(153 N. W. 286.)

Deceased entryman — widow of — husband's residence — completed by widow — patent — mortgage — joined in by both — personal promise by widow to pay — estoppel — foreclosure — purchaser under.

1. The widow of a deceased entryman who takes advantage of the provisions

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Note.—As to the effect of covenants of married women and their estoppel by deed or mortgage, see notes in 22 L.R.A. 779, and 28 Am. Rep. 374.

of U. S. Rev. Stat. §§ 2291, 2301, 6 Fed. Stat. Anno. 292, 317, Comp. Stat. 1913, §§ 4532, 4589, and completes her husband's residence and obtains a patent from the government, but who, during the lifetime of her husband, joined with him in a mortgage on the land in question in which she personally promised to pay the debt secured, and executed personal covenants of seisin and quiet possession, is estopped by such covenants from asserting her after-acquired title in an action brought by her to determine adverse claims and to quiet title as against the purchaser under the foreclosure of said mortgage.

On Petition for Rehearing.

Foreclosure by advertisement — notice published — excessive amount stated in — validity of sale — not affected — fraud — injury.

2. Claiming in the notice of foreclosure by publication more than is due on the mortgage will not affect the validity of the sale, unless it appears that it was done with a fraudulent purpose, or that it has resulted in actual injury to the mortgagor.

Opinion filed February 17, 1915. On petition for rehearing June 2, 1915.

Appeal from the District Court of Pierce County, *Burr*, J.

Action to determine adverse claims to real estate. Judgment for plaintiff. Defendant appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action to quiet title and to determine adverse claims to real estate. Michael Volk filed on a quarter section of government land. Thereafter he and his wife (the plaintiff, Anna Martin, formerly Anna Volk) gave a mortgage on the land to secure certain notes signed by Michael Volk alone, and which represented his personal indebtedness alone. The mortgage, however, was signed and acknowledged by both husband and wife, and contained both a joint promise to pay the indebtedness which it secured and a joint covenant of quiet possession. Volk died before proving up or earning the right to a patent. Thereupon his wife, Anna Volk, completed the term of residence required, and proved up upon the land and received her patent under the provisions of §§ 2291, 2301, U. S. Rev. Stat., 6 Fed. Stat. Anno. 292, 317, Comp. Stat. 1913, §§ 4532, 4589, § 32, Circular No. 10, of the Department of the Interior.

A little over a year after such final proof by her, the mortgage was foreclosed by one George Dickey, to whom it had been assigned during the lifetime of the deceased entryman, and the premises were bid in by the said Dickey, and later the sheriff's certificate was assigned to the defendant and appellant, Edward Yager, and a sheriff's deed issued to him. Later this action was brought by Anna Martin, formerly Anna Volk, to determine adverse claims and to quiet title as against said mortgage, and a judgment was entered in her favor, from which the defendant has appealed and asks for a trial *de novo*.

Torger Sinness and *Middaugh, Cuthbert, Smythe, & Hunt,* for appellant.

Title acquired by the mortgagor subsequently to the execution of the mortgage inures to the mortgagee as security for the debt, in like manner as if acquired before the execution. Rev. Codes 1905, § 615; Comp. Laws 1913, § 958; Civ. Code 1877, § 1727, subsec. 2; U. S. Rev. Stat. § 2291, Comp. Stat. 1913, § 4532.

A mortgagor is estopped from asserting the invalidity of his mortgage through lack of title, contrary to the covenants of the mortgage contract. Rev. Codes 1905, § 6155; Comp. Laws 1913, § 6731; Sommers v. Wagner, 21 N. D. 531, 131 N. W. 797; Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394; Clark v. Baker, 14 Cal. 612, 76 Am. Dec. 449.

The fact that title subsequently comes from the United States makes no difference. It is the voluntary contract of the party in executing the mortgage that prevails. Kirkaldie v. Larrabee, 31 Cal. 455, 89 Am. Dec. 205; Clark v. Baker, 14 Cal. 630, 76 Am. Dec. 449; Orr v. Stewart, 67 Cal. 275, 7 Pac. 693; Christy v. Dana, 42 Cal. 174; Camp v. Grider, 62 Cal. 20; Vallejo Land Asso. v. Viera, 48 Cal. 572.

A homesteader may make a valid mortgage on the land while it is yet owned by the government, and his title subsequently acquired inures to the mortgagee as security for the debt. Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 401; 2 Herman, Estoppel, § 895, p. 1018.

Either husband or wife may enter into any engagement with the other, or with any other person, respecting property, which the other

might enter into if unmarried. Colonial & U. S. Mortg. Co. v. Stevens, 3 N. D. 265, 55 N. W. 578.

H. B. Senn, for respondent.

Where a homestead entryman files on a government homestead, and after such filing he and wife execute a mortgage on such land, and thereafter such entryman dies before making final proof and before earning the right to patent, and the widow completes the residence and makes proof and receives patent in her own name, the mortgage is not a valid instrument. Marley v. Sturkert, 62 Neb. 163, 89 Am. St. Rep. 749, 86 N. W. 1056; Bergstrom v. Svenson, Ann. Cas. 1912C, 699, note.

Such a mortgage is ineffectual to constitute a lien as against those who, under the public land laws, had fulfilled the requirements of the law and obtained patent. Cheney v. White, 5 Neb. 261, 25 Am. Rep. 487; Webster v. Bowman, 25 Fed. 889; Rogers v. Clemmans, 26 Kan. 522; Schoolfield v. Houle, 13 Colo. 394, 22 Pac. 781; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Gjerstadengen v. VanDuzen, 7 N. D. 613, 66 Am. St. Rep. 679, 76 N. W. 233; 32 Cyc. 1076, note 36; Herbert v. Brown, 65 Fed. 2; 26 Am. & Eng. Enc. Law, 411, note 7.

A person may make a valid mortgage on public land if he thereafter makes proof and obtains patent. Bull v. Shaw, 48 Cal. 455; Rogers v. Minneapolis Threshing Mach. Co. 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; Stewart v. Powers, 98 Cal. 514, 33 Pac. 487; Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; Freese v. Rusk, 54 Kan. 274, 38 Pac. 255; McCune v. Essig, 199 U. S. 382, 50 L. ed. 237, 26 Sup. Ct. Rep. 78; U. S. Rev. Stat. §§ 2291 and 2292; Comp. Stat. 1913, §§ 4532, 4543.

Heirs take as new entryman. Bernier v. Bernier, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

Upon the death of an entryman, his rights cease. His heirs are given a mere preference as new homesteaders. Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Aspey v. Barry, 13 S. D. 220, 83 N. W. 91; Gould v. Tucker, 20 S. D. 226, 105 N. W. 624; Bergstrom v. Svenson, 20 N. D. 55, 126 N. W. 497, Ann. Cas. 1912C, 694; Shiver v. United States, 159 U. S. 491, 40 L. ed. 231, 16 Sup. Ct. Rep. 54; Campbell v. Wade, 132 U. S. 34, 33 L. ed. 240, 10 Sup.

Ct. Rep. 9; Wagstaff v. Collins, 38 C. C. A. 19, 97 Fed. 3; Frisbie v. Whiting, 9 Wall. 187, 19 L. ed. 668.

Those who are given such preference right perform the conditions not as successors in interest, but as grantees or donees of the government. Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424; Gonzales v. French, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102; Anderson v. Carkins, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; Hall v. Russell, 101 U. S. 503, 25 L. ed. 829; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; Wittenbrock v. Wheadon, 128 Cal. 150, 79 Am. St. Rep. 32, 60 Pac. 664; Towner v. Rodegeb, 33 Wash. 153, 99 Am. St. Rep. 936, 74 Pac. 50; Dawson v. Mayall, 45 Minn. 408, 48 N. W. 12; Gjerstadengen v. VanDuzen, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233; Hershberger v. Blewett, 55 Fed. 177; 26 Am. & Eng. Enc. Law, 255.

At the time Anna Martin (Volk) signed the mortgage with her husband, she merely released her possible homestead right in the land. She did not become a surety for the husband. Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677; Roberts v. Roberts, 10 N. D. 531, 88 N. W. 289; Kuhnert v. Conrad, 6 N. D. 215, 69 N. W. 185; Helgebye v. Dammen, 13 N. D. 167, 100 N. W. 245; 21 Cyc. 543; Yerkes v. Hadley, 5 Dak. 324, 2 L.R.A. 363, 40 N. W. 340.

Bruce, J. (after stating the facts as above). There can be no doubt that, under the common law rule and in the absence of a married woman's act such as we have in North Dakota, the covenants of the wife would be merely deemed a waiver of her homestead interest, and that the wife would not be estopped from asserting her after-acquired title.

This rule, however, is based upon the old common-law theory of the contractual incapacity of a married woman. Griner v. Butler, 61 Ind. 362, 366, 28 Am. Rep. 675; Blain v. Harrison, 11 Ill. 384; Knight v. Thayer, 125 Mass. 25.

It can have no application in a state like North Dakota, where that incapacity has been entirely removed by the statute, and a married woman has the same contractual ability as a *feme sole* or as her husband himself. Griner v. Butler, 61 Ind. 362, 366, 28 Am. Rep. 675; Guertin v. Mombleau, 144 Ill. 32, 33 N. E. 49; Knight v. Thayer,

125 Mass. 25; Zimmerman v. Robinson, 114 N. C. 39, 19 S. E. 102; Yerkes v. Hadley, 5 Dak. 324; 2 L.R.A. 363, 40 N. W. 340; Hill v. West, 8 Ohio, 225, 31 Am. Dec. 442; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394; § 6155, Rev. Codes 1905, § 6731, Comp. Laws 1913.

The act of this state provides that "either husband or wife may enter into *any engagement* or transaction with the other *or with any other person* respecting property which the other might *if unmarried.* The wife, after marriage, has, with respect *to property . . . the same liabilities as before marriage,* and in all actions by or against her she shall sue and be sued in her own name." Section 4411, Compiled Laws of 1913. In the mortgage before us the wife not merely agreed to pay the debt (though she did not sign the notes), but she made express covenants of quiet enjoyment. The mortgage, indeed, can well be held to have been given in contemplation of just such a contingency as that before us. In it "the said Michael Volk and Anna Volk, his wife, further covenant, and agree to and with the said party of the first part, his heirs, executors, administrators, and assigns, to pay said sum of money above specified at the time and in the manner above mentioned." The mortgage in question further recites that both of said parties "are lawfully seised of the said premises, and that they have good right to convey the same; that the same are free from all encumbrances; that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same, and that the said parties of the first part will warrant and defend the title to the same against all lawful claims."

We can see no reason why, in a court of equity at any rate, these covenants should not be held to be binding. We held, it is true, in the case of Martyn v. Olson, 28 N. D. 317, 148 N. W. 834, that the heirs of a deceased entryman who completed the proof after the death of such entryman took, not as heirs, but as donees or purchasers of the land, and that they could not be required to pay a mortgage which was given by the entryman during his lifetime. In that case, however, the heirs had nothing to do with the original loan, and had agreed to pay no sum or sums of money whatever; nor had they entered into any covenants of warranty or of quiet possession. They took from the government as new purchasers or donees, and not as heirs, and

though the original mortgage may have contained covenants of warranty and of quiet possession which nominally bound the heirs as well as the mortgagors, such covenants had not been personally entered into by them, and even if they ran with the land, ceased when the title in the mortgagors became extinguished and reinvested in the government.

In the case at bar, however, we have a proceeding in equity where the plaintiff seeks to have the title quieted in her. At the threshold she is not merely met by a covenant made by her ancestor which was extinguished when the title was reinvested in the government, but by a personal promise and covenant which she herself made. Surely the maxims apply that "he who seeks equity must do equity," and that "he who comes into a court of equity must come with clean hands." Can she, in a court of equity, seek to quiet title in herself when she herself has promised to quiet and defend that title in the defendant? We hold that she cannot.

Not only is this holding in conformity with the principles of equitable jurisprudence, but it is, we believe, in accordance with a sound public policy. There is every reason to believe that the credit was extended in the case at bar on the assumption that, even if the husband died before final proof, his wife, if she completed his entry, would live by his contract. The necessity of giving mortgages before the time of final proof is a fact, and not a theory among us. Even the Federal government has yielded to this fact. It first held that no such mortgage was valid. It and the courts subsequently held that such mortgages were enforceable provided that the entryman proved up before his death, and the title became vested when such proof was made. See Martyn v. Olson, supra; Adam v. McClintock, 21 N. D. 483, 131 N. W. 394; Weber v. Laidler, 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 401. They did this because of the exigencies of the situation, and not that the entryman might be injured and defrauded, but that he might be able to obtain credit, without which he would often lose the results of all of his labor and sacrifices. They, in short, took cognizance of the fact that dry seasons and failures of crops have been only too common; that the entryman must live during his period of residence and proof, and that unless such entryman can get credit from the local merchants and banks by giving some measure of security

and obtain the household necessities and machinery during the dry years, hardship and loss will often result. The rule which it announced is, we believe, not only equitable, but salutary and necessary. It is unreasonable to expect that the local merchants and banks will extend credit without some measure of security. The mortgage to be obtained is at the most unsatisfactory, for if the entryman dies before the making of final proof, it will in most instances become void, and can be saved only by the wife completing the proof, if perchance she is bound thereby. Why should not the creditor, as a condition to making the loan or extending the credit, require an assurance by the wife that she will protect the mortgage, and why should not that assurance be held to have been given and to be enforceable where the wife, by the express terms of the mortgage, not merely agrees to pay the debt, but covenants and agrees to uphold the conveyance?

In speaking generally on the subject of the right of a wife to assert an after-acquired title, against the covenants of a prior conveyance, the supreme court of Minnesota in the case of Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379, says: "The question here presented is whether the defendant Fredericke, who expressly joined in the covenants in the mortgage to plaintiff, is bound thereby; for if she is liable thereon, or is estopped thereby, as if she had not been under coverture, the conveyance to her inured to the benefit of the plaintiff by virtue of her covenant, and its mortgage is operative as a valid subsisting lien upon the land, as against her and her assignee, Herman Zellmer. It is hardly necessary to refer to the nature of a married woman's disability at the common law. She was not bound by her contracts or covenants, and was not estopped thereby from setting up an after-acquired title. It was competent for the legislature to emancipate her from such disability, and enable her to obligate herself as if unmarried. The question here involved turns upon the construction of the statute of this state touching the rights and liabilities of married women. Prior to the act of 1869, chap. 56, the statute had secured to them their separate estate, real and personal, with the rents, profits, and income thereof. But she could not dispose thereof without the consent of her husband; and her general common-law disability to make contracts remained. Pub. Stat. 1858, chap. 61, § 106, p. 571; Revision 1866, Gen. Stat. chap. 69, p. 499; and chap. 40, p. 328, § 2;

Carpenter v. Leonard, 5 Minn. 163, Gil. 119; Tullis v. Fridley, 9 Minn. 81, Gil. 68. But the provisions of the Laws of 1869 (chapters 56, 57) were radical and sweeping, and were intended, in respect to her contracts, to invest a married woman not merely with the right to contract in respect to her separate property, but with all the rights and liabilities of a *feme sole,* save only as expressly excepted or reserved by the same statute. It was evidently the intention of the legislature to define clearly the nature and extent of such rights and liabilities. Kingsley v. Gilman, 15 Minn. 61, Gil. 40; Northwestern Mut. L. Ins. Co. v. Allis, 23 Minn. 337. This statute does not, of course, have any reference to the domestic relations, or affect the rules of evidence, or the duty of the husband to provide for his family, though the wife might obligate herself for such purpose. Flynn v. Messenger, 28 Minn. 209, 41 Am. Rep. 279, 9 N. W. 759. In Northwestern Mut. L. Ins. Co. v. Allis, supra, the wife had mortgaged her separate real property to secure a debt of her husband, which was evidenced by their joint note. The mortgage was not only held valid, but she was held personally liable for the deficiency upon foreclosure by action. It was contended that she was not liable because of the provisions of § 3, which exempted her from the debts of her husband; but the court says (page 341): 'To give this effect to the section would be to allow inference and conjecture to qualify and restrict the meaning of the clear and precise language of the act removing the wife's common-law disability to contract. Section 2 provides that "any married woman shall be capable of making any contract, either by parol or under seal, which she might make if unmarried, and shall be bound thereby." Then follow clearly expressed exceptions to her power to contract without her husband, relating only to her real estate. Section 4 expressly retains the common-law disabilities of husband and wife to contract with each other relative to the real estate of either. . . . "But in relation to all other subjects either may be constituted the agent of the other, or contract each with the other, as fully as if the relation of husband and wife did not exist." ' No doubt, the defendant in that case would have been bound upon her covenants in the mortgage as well as her husband, and a covenant of warranty would have passed an after-acquired title. Knight v. Thayer, 125 Mass. 27; Bigelow, Estoppel, 5th ed. 406, 407; Kenworthy v. Sawyer, 125 Mass.

28; Goodnow v. Hill, 125 Mass. 587. In the case at bar the defendant Fredericke, as to the payee, the plaintiff, made the debt her own by signing the note. She joined in the mortgage of the quarter section containing the homestead, to secure this debt. She also joined in the covenants therein, including the covenant of warranty. It is contended, however, that she is not bound by the covenants in the mortgage, because she must be presumed to have joined in the mortgage solely for the purpose of releasing the homestead or dower interest in the land; and it is claimed that the authorities in other states, particularly Illinois, support this contention. But no consistent general rule can well be formulated under the varying statutes of the different states on the subject, in connection with local statutes regulating the conveyance of real estate. It is true, the wife's signature was necessary to pass a perfect title; but she was under no disability whatever in the matter of the execution of a deed with covenants, or the acknowledgment thereof. Though described as wife, her acknowledgment, under the statute, is that of a *feme sole*. Her husband was insolvent, and her covenants would afford additional security to the plaintiff. She was legally competent to enter into such covenants, and upon the face of the deed appears to have done so. For all the purposes thereof it was her contract; and it seems to us it would be a strained and unreasonable construction to give the deed the limited effect contended for it. When a deed on its face purports to convey a restricted or partial interest in land, the covenants, though general, will be limited to such interest. Sweet v. Brown, 12 Met. 177, 45 Am. Dec. 243. But where a deed assumes to convey the land, and the covenants are unrestricted, it is difficult to see how the court can limit or apportion its application, if it gives any effect to it at all. Here (to repeat), it will be observed, the covenant reads: 'And the said Julius Zellmer and Riecke Zellmer, his wife, parties of the first part, do covenant . . . that the said parties of the first part will warrant and defend the title to the said premises against all lawful claims.' Dower is in the nature of an encumbrance. Is the covenant of the wife operative to estop her as against a claim of dower subsequently arising, or does the deed simply release her present right, and is the covenant of both operative as to the legal title and estate of which the husband is seised, or does her covenant, if it is operative at all, relate merely to her statutory interests

as wife? In view of her capacity to bind herself by her covenants, if operative at all, we are of the opinion that the covenant referred to must be construed in its natural and broader, and not in the restricted, sense. In construing a similar statute in Massachusetts, the court say: 'The provision in the act that nothing therein shall authorize her to convey property to, or make contracts with, her husband, is evidently not intended to impose any new restriction on her capacity, but merely to affirm the common-law rule, so far as the husband is the other party to the contract or grant; but does not prevent both of them from binding themselves by a joint promise to a third person.' Major v. Holmes, 124 Mass. 108. The acts of 1875 and 1876, superseding dower and making provisions in lieu thereof, place the husband and wife substantially on the same footing as respects rights in the real property of each other. Construed in connection with the homestead law, and the act concerning married women of 1869, the case stands thus: In whichever one the title to the homestead may be, neither can convey the same without the other. The wife's signature is necessary to the deed of other lands belonging to the husband, in order to pass a clear title; and the husband must join in all conveyances of the wife's lands. In Iowa they have a statute (Code, § 1937) in respect to liability upon covenants in such deeds, which is as follows: 'In cases where either the husband or wife joins in a conveyance of real property owned by the other, the husband or wife so joining shall not be bound by the covenants of such conveyance unless it is expressly so stated on the face thereof.' We have no such saving clause in our statute. Whether there ought to be is a matter addressed to the legislature, rather than to the courts. In the absence of it, to attempt to place a limited construction upon such deeds, contrary to the fair and natural signification of the language used, is not warranted by the statute or supported by sound reason. Mortgages frequently contain other express covenants than those relating to the title; as, for example, in this instance, to pay the debt or to pay taxes. Shall a married woman be bound by such covenants, and exempt from liability for the others? If she joins in all, there can be no reason why she should not be personlly liable in all alike, since she is capable of so binding herself; and, if she is so liable, they must operate by way of estoppel. The courts are careful and conservative in the construction of statutes of this character, which are in derogation

of the common law; but they cannot make exceptions and limitations which the statute does not warrant."

We are not unmindful of the case of Snoddy v. Leavitt, 105 Ind. 357, 5 N. E. 13, and of other cases decided under statutes similar to that passed upon in that case. It is to be noticed, however, that in Indiana the statute merely removed the wife's contractual disability in relation to her own separate estate. It did not, as does that of North Dakota, remove her contractual disabilities altogether, and place her upon the same footing as if she were unmarried, and as her husband himself.

Nor, too, are we unmindful of the cases of Roberts v. Roberts, 10 N. D. 531, 88 N. W. 289, and Omlie v. O'Toole, 16 N. D. 126, 112 N. W. 677, in which this court held that the covenant to pay the debt contained in the body of the mortgage which was executed on the husband's land, and which covenants were signed by the wife as well as the husband, did not make the wife a surety to the debt, so that payments made by the husband without the wife's knowledge would fail to prevent the running of the statute of limitations and defeat a foreclosure of the mortgage after the original period had run. We are also aware that in the former case the court stated that the mortgage "was a waiver of the wife's homestead rights simply." In that case, however, the court did not pass upon any covenants of title or quiet possession, and was considering the question of the statute of limitations merely. So, too, it was not a case where the plaintiff was coming into a court of equity seeking relief, but one in which she had been brought into a court of equity by the mortgagee.

The judgment of the District Court is reversed, and the cause is remanded with directions to enter judgment quieting the title to the land in controversy in the defendant, Edward L. Yager.

On Petition for Rehearing.

BRUCE, J. The only doubt we have entertained after reading the petition for rehearing in this case is whether the fact that the mortgage was foreclosed for more than was in fact due gives to the plaintiff any rights in the premises. We are satisfied, however, that the mistake, and the evidence shows it to have been a bona fide mistake, gives no

such rights. The law seems to be well established that "claiming in the notice more than is due on the mortgage will not affect the validity of the sale, unless it appears that it was done with a fraudulent purpose, or that it has resulted in actual injury to the mortgagor." Bowers v. Hechtman, 45 Minn. 238, 47 N. W. 792; Huyck v. Graham, 82 Mich. 353, 46 N. W. 781; Ramsey v. Merriam, 6 Minn. 168, Gil. 104; Menard v. Crowe, 20 Minn. 448, Gil. 402; Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 552; Cook v. Foster, 96 Mich. 610, 55 N. W. 1019; Jones, Mortg. § 1855; Millard v. Truax, 47 Mich. 251, 10 N. W. 358; 27 Cyc. 1469; Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

There is no such proof in the case at bar, nor do we find any record at any time of any attempt or offer of the plaintiff to redeem from the mortgage. The mistake, indeed, was first brought to the attention of the court by the attorneys for the defendant, and there is no claim that the excess amount, which was only $127.82, in any way interfered with the bidding at the sale, or kept bidders therefrom, or in any way prejudiced the interests of the plaintiff.

The petition for a rehearing is denied.

J. N. FOX v. NELS NELSON.

(153 N. W. 395.)

Redemption — subsequent lien holder — mortgage — foreclosure — remedial — benefit of creditors — to prevent sacrifice of debtor's property.

1. Sections 7755 and 7756, Compiled Laws of 1913, which relate to the redemption by subsequent lien holders from the foreclosure of mortgages, are remedial in their nature, and are intended not only for the benefit of the creditors holding a lien subsequent to the lien in process of foreclosure, but also to make the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice.

Subsequent lienor — redemption — notice of — duplicate filed with register of deeds — other lien — notice of claim to — filing of — further redemption — not required to pay other lien without notice.

2. Where a subsequent lienor redeems from a mortgage under §§ 7755 and 7756, Compiled Laws of 1913, and fails to file a duplicate of his notice of redemption with the register of deeds of the county, and a notice of another lien which he may happen to have against the property, as prescribed by § 7756, Compiled Laws of 1913, a person having a still subsequent mortgage or lien may redeem from such prior redemptioner within sixty days after the period of one year has elapsed since the foreclosure, and without the payment of the other lien so claimed by the prior redemptioner.

Opinion filed April 27, 1915. Rehearing denied June 3, 1915.

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

Action of subsequent lien holder to redeem from the redemption of a lien holder. Judgment for defendant. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action to redeem real estate from a mortgage sale which was made on the 29th day of July, 1911, and from the defendant, as a redemptioner, who redeemed from such sale on or about the 10th day of June, 1912. It appears that the title to the land was originally in E. W. Mattern, and that on the 8th day of November, 1906, Mattern and his wife mortgaged the land in question to one E. A. Thayer for $1,200; that this mortgage was assigned to Mary M. Brackett, and was foreclosed by the said Mary M. Brackett, and a sheriff's certificate delivered to her on the 29th day of July, 1911; that prior thereto, and on the 10th day of January, 1908, the said Mattern and his wife executed another mortgage to Simmons & Bodmer for $418, and on the 25th day of August, 1908, still another mortgage for $1,926.34 to the Advance Thresher Company, a corporation; that later, and on the 11th day of June, 1912, the Simmons & Bodmer mortgage was assigned to the defendant, Nels Nelson, and later, on the 25th day of July, 1912, the Advance Thresher Company mortgage was assigned to him also.

As the owner of the Simmons & Bodmer second mortgage, the defendant, Nels Nelson, irregularly redeemed from the foreclosure of

the 29th of July, 1911, on the 10th day of June, 1912, at which time the record title to the land was in the plaintiff, J. N. Fox, by virtue of a quitclaim deed to the said Fox which was given by the original owner, Mattern and his wife, on the 30th day of January, 1912, and during the year of redemption. No duplicate of the notice of such redemption was filed with the register of deeds of the county, as is required by § 7142, Rev. Codes, 1905, § 7756, Compiled Laws of 1913; nor was any notice filed of the taxes and liens which were paid or acquired by the redemptioner, that is to say, of the Advance Thresher Company mortgage. There is also much dispute in the testimony as to whether at this time this later mortgage had not been fully paid. Later, and on the 10th day of September, 1912, the plaintiff and appellant, J. N. Fox, the grantee in the quitclaim deed before mentioned, sought to redeem from the defendant, Nels Nelson, claiming such deed to be in fact a mortgage, and tendering the said Nelson the sum of $2,300 in currency, which was the amount of the Thayer mortgage with interest and the Simmons & Bodmer mortgage with interest. The said Fox also delivered to the sheriff at such time his notice of redemption, and filed a duplicate thereof with the register of deeds. This tender, however, did not include the amount of the Advance Thresher Company mortgage, which Nelson had bought in subsequent to his redemption. The defendant, Nelson, refused to accept such tender, assigning as his sole reason for such refusal that the amount tendered did not include the Advance Thresher Company mortgage. The record is silent as to whether the notice of redemption was served upon the sheriff, except that it is drawn as a notice both to that officer and to Nelson, the redemptioner, and no question was raised by Nelson on the redemption sought to be made from him as to the method or manner of redemption, if defective. Counsel also have taken it for granted on this appeal that, in so far as the manner of redemption was concerned, it was in accordance with the statute, as the brief of appellant so states it to have been, and the brief of respondent does not contradict the fact of the legality of the redemption, except that it was too late and made by a party not a qualified redemptioner, and that it did not include the Advance Thresher Company mortgage. On the 12th day of December, 1912, the plaintiff commenced this action, which the trial court adjudged should be dismissed, and from

which judgment the plaintiff has appealed and has asked for a trial *de novo*.

Grace & Bryans, for appellant.

A party having an equitable mortgage in form of an absolute conveyance of land may redeem as a creditor having a lien, without having first a judicial determination of the conveyance or transfer into mortgage. Rev. Codes 1905, §§ 7139, 7753, Comp. Laws 1913; Scheibel v. Anderson, 77 Minn. 54, 77 Am. St. Rep. 664, 79 N. W. 594; Leland v. Morrison, 92 S. C. 501, 75 S. E. 889, Ann. Cas. 1914B, 349; Murphy v. Murphy, 141 Cal. 471, 75 Pac. 60; 27 Cyc. 1847, 1861; Horn v. Indianapolis Nat. Bank, 21 Am. St. Rep. 247, note; Spackman v. Gross, 25 S. D. 244, 126 N. W. 389.

The time of redemption right begins to run from the date of the filing of the prior notice of redemption in the office of the register of deeds. A further redemptioner may redeem at any time within sixty days from filing of such notice. Brady v. Gilman, 96 Minn. 234, 1 L.R.A.(N.S.) 835, 113 Am. St. Rep. 622, 104 N. W. 897; Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467; Tincom v. Lewis, 21 Minn. 132; 27 Cyc. 1833.

Redemption statutes are liberally construed. 27 Cyc. 1800; 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.

A person contesting the right of redemption in another must show that he is prejudiced or injured in some manner, or redemption will be allowed. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702.

L. F. Clausen, for respondent.

Plaintiff, by his representations to the defendant in regard to his deed and his interest in said land, and not placing on record any instrument showing what he now claims to be his interest therein, misled defendant, and he is estopped to claim that his deed was really a mortgage. 27 Cyc. 1024; 16 Cyc. 722, 785.

The failure of defendant to file notice of redemption in the office of the register of deeds is a mere irregularity, advantage of which can be taken only by a redemptioner. Wilson v. Hayes, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

Actual notice takes the place of the record notice, and plaintiff had

such actual notice. N. D. Codes 1905, § 5042, Comp. Laws 1913, § 5598; McGhee v. Wells, 57 S. C. 280, 76 Am. St. Rep. 567, 35 S. E. 529; 10 Current Law, 1024.

No objection to the redemption can be made by a third person whose own right of redemption has been lost, or who does not attempt to redeem himself within proper time. 27 Cyc. 1835; Stocker v. Puckett, 17 S. D. 267, 96 N. W. 91.

Bruce, J. (after stating the facts as above). The questions to be determined in this case are: (1) Whether the quitclaim deed from E. W. Mattern and wife was in fact a mortgage; (2) if so, whether one who accepts a quitclaim deed can, for the purpose of redemption, claim it to be a mortgage; (3) whether the defendant had slept on his rights and was precluded from redeeming; (4) whether the failure of the defendant to file a notice of redemption, as provided in § 7142, Rev. Codes 1905, § 7756, Compiled Laws of 1913, extended the time in which the plaintiff, or a second redemptioner, was entitled to redeem beyond the year of the time of redemption, if the plaintiff occupied the position of a redemptioner instead of an owner; (5) whether, under the proof, the Advance Thresher Company mortgage, purchased by the defendant subsequent to his redemption, had not been paid prior to such purchase by the original mortgagor, Mattern; (6) whether, by failing to file the notice of the assignment of the Advance Thresher Company mortgage to him, the defendant did not forfeit his right to demand the payment thereof at the time of the attempted redemption by the plaintiff.

We must start with the promise that the North Dakota redemption statute "is remedial in its nature, and is intended, not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed." 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; 27 Cyc. 1800. Also that mortgaged real estate which is transferred to a subsequent purchaser with recorded notice of encumbrances becomes "in equity a primary fund for the payment of the mortgage debt." Colonial &

U. S. Mortg. Co. v. Flemington, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931.

The rule has now become an established rule of property in this state, and should not be abrogated by this court. It cannot be claimed to be other than just and equitable. The decisions of this court are both retroactive and prospective in their nature, and any alteration or change of the rule on our part might greatly endanger titles and legitimate property interests. Such being the case, and, as the plaintiff, Fox, was in fact a lien holder and entitled to the rights of such, this right included the statutory right of redemption from a prior redemptioner within sixty days, even though this period extended beyond a year from the time of the original foreclosure. We say this because it is undisputed that the quitclaim deed in this case was in fact a mortgage, and the law seems to be well established that the rights of the holder of a deed which is in fact a mortgage are as far as the right to redeem is concerned, the same as if the instrument under which he claims were in express terms a mortgage, and that no prior adjudication of such fact is necessary. Scheibel v. Anderson, 77 Minn. 54, 77 Am. St. Rep. 664, 79 N. W. 594.

We must remember that the statute in regard to redemptions is not only for the benefit of the lien holder, but also for the benefit of the mortgagor, and that the policy of the law and of the statute seems to be to give every encouragement to subsequent lien holders to redeem, and this as much for the benefit of the debtor as of the lien holder. Under the provisions of §§ 7755 and 7756 of the Compiled Laws of 1913, §§ 7141 and 7142, Rev. Codes 1905, the plaintiff was not required to redeem from the defendant, Nelson, within the year, since Nelson had not within said yearly period perfected his redemption by filing the duplicate notice thereof with the register of deeds, as required by § 7756 of the Compiled Laws of 1913.

"The notice to be filed by a redemptioner," says the supreme court of South Dakota in construing a similar statute, "is for the benefit of the person filing it, as its filing is the *beginning of a brief period of limitation* of which he may take advantage as against other redemptioners. But under this statute the redemption and the filing of the notice of redemption are distinct acts. As against the person from

whom redemption is made, no notice is necessary. The notice is only operative and necessary as against other redemptioners, and their right to redeem *can be barred only by filing the notice of redemption* as required by the statute. The failure to file the notice of redemption does not render the redemption itself irregular or illegal. *It merely leaves the rights of other redemptioners unaffected.* It does not extend the limitations of sixty days, because that period begins only when the notice is filed." Spackman v. Gross, 25 S. D. 244, 126 N. W. 389. This rule is subject, of course, to the further condition that, as the first redemption, although irregular, was made within the year, the period of redemption could only be extended sixty days from the end of the year, and the plaintiff would be required to redeem within that period or not at all.

We can, indeed, see no foundation for the contention that whether the notice is filed or not, the redemption of a subsequent lien holder must be made within the year from the original foreclosure. The statute expressly provides that "if the property is so redeemed by a redemptioner another redemptioner may, *even after the expiration of one year from the day of sale,* redeem from such last redemptioner; provided, the redemption is made within sixty days after such last redemption." [Comp. Laws 1913, § 7755.] We have before us merely a redemptioner who is allowed by the grace of the statute to redeem. He is given a brief statute of limitations as against still other redemptioners, and such persons are given a still further period in which to redeem, and this, not for the benefit of the redemptioners merely, but of the original debtor, and in furtherance of the theory that the real estate shall be looked upon as a trust fund for the payment of the mortgagor's debts. Nor is there any merit in the contention that the plaintiff is estopped from redeeming because, prior to the subsequent redemption by the defendant, he may have said that he had no intention of redeeming. Even if he made such a statement, the original mortgagor and debtor should not be deprived in equity of his accruing advantage from having the notice filed and subsequent lien holders given the power and the opportunity to resort to and extend the uses of the mortgaged property, and to thus relieve him of his personal indebtedness and liability. So, too, the defendant in this case is not in any way prejudiced in so far as his claim or security is concerned,

but merely, if at all, in his rights as a speculator, and in such a court of equity is but little concerned. If he receives the amount of his claim with statutory 12 per cent interest, it is all that he can reasonably demand. He is a redemptioner, and not a purchaser, and he is not supposed to be a speculator. Styles v. Dickey, 22 N. D. 515, 134 N. W. 702. It is also to be noticed that no objection was made by the defendant, Nelson, to the redemption by the plaintiff, Fox, on the ground that it was too late, but merely on the ground that Fox refused to pay the amount of the alleged lien of the Advance Thresher Company mortgage. In his answer in the case before us the defendant states that all he wants is the money due him, and this statement is confirmed by counsel in his brief. "Further answering the complaint," the answer says, "defendant states that he has no objection to the plaintiff redeeming, and that he is perfectly willing that he do so, provided that he shall pay to the defendant all sums due to him by the said Mattern, and necessary to make such redemption."

We, too, are well satisfied that whether the Thresher Company mortgage had been paid or not (and from our perusal of the evidence we think it was), it was not incumbent upon the plaintiff to pay the same at the time of his attempted redemption. At that time, and as far as we know up to the present time, no duplicate notice of redemption was or has been filed by the defendant, Nelson. Section 7142, Rev. Codes 1905, being § 7756, Compiled Laws of 1913, provides that "written notice of redemption must be given to the sheriff and a duplicate filed with the register of deeds of the county, and if any taxes or assessments are paid by the redemptioner or if he has or acquires any lien other than that upon which the redemption is made, notice thereof must in like manner be given to the sheriff and filed with the register of deeds; *and if such notice is not filed, the property may be redeemed without paying such tax, assessment or lien.*" It will be noticed that in the latter part of the section we have just quoted there is an express provision that where no such notice is filed the payment of no other than the original debt sought to be redeemed from is necessary. It is also to be noticed that the provision relating to notice of the acquirement of subsequent liens is separate and distinct from the notice of redemption which must be filed in order to effect a regular statutory redemption. We may also add that after a careful examination of the

record we come to the conclusion that the Advance Thresher Company mortgage was in fact paid. The witness Mattern, the original mortgagor, testified positively to this fact, and the defendant, Nelson, though in the position of one who is seeking to assert a lien, singularly fails in disproving the fact. Though a business man, maintaining a machinery business and a retail store, he is unable to produce any records or books except the notes on which he claims to have indorsed all of the payments, but admits himself of having failed to indorse at least one payment. He admits that the original mortgagor, Mattern, knew of the facts and of the payments, and that at any rate, if he, Mattern, had kept any books, they would have been conclusive of the question. He admits that collections were made, not only by himself, but by the agents of the threshing machine company. He admits that numerous threshing machine accounts against farmers were turned over to him for collection. Receipts for payments to nearly half of the amount of the mortgage were produced over what he claims were paid thereon. Added to all this is the fact that he failed to file a duplicate notice of the redemption with the register of deeds of the subsequent lien which he claims to have purchased, and which he now claims not to have been fully paid.

The judgment of the District Court is reversed, and the cause is remanded with directions to enter judgment allowing the plaintiff to redeem said premises within sixty days from the filing of the remittitur in the District Court, upon the paying to the clerk of the District Court for the defendant the sum of $2,300, less taxable costs herein on trial and on appeal, which amount was tendered to the defendant by the said plaintiff on the 10th day of December, 1912, and the judgment and decree herein will further satisfy and cancel of record the mortgage and notes of the said Mattern to the said Advance Thresher Company.

CHRISTIANSON, J. (dissenting). I cannot agree to the conclusion reached by my associates in this case. In my opinion the majority opinion does violence to well-settled legal principles, utterly ignores prior decisions of this court, which have become rules of property in this state, and places a misconstruction upon the governing statutes so radical in character as to amount to a judicial amendment. The de-

cision, also, while apparently based on equitable considerations, is not only legally unsound, but manifestly unjust and inequitable to the defendant in this case.

This action was tried to the court without a jury. The defendant prevailed in the court below, and plaintiff appeals. The case comes here for trial *de novo*. This fact should be kept carefully in mind. Plaintiff has asked this court to retry this case, and it is self-evident that, in order to recover, he must plead and prove such facts as will warrant a judgment in his favor; and that if the evidence in the record fails to establish such facts, that then he cannot recover. The material facts are not in dispute. On November 8, 1906, Edward W. Mattern and his wife gave a mortgage on the land involved herein, to one E. A. Thayer, to secure the sum of $1,200. This mortgage was afterwards assigned to one Mary M. Brackett. This mortgage was foreclosed by advertisement, and on July 29, 1911, the premises covered thereby purchased by Mary M. Brackett at such foreclosure sale. The mortgage so foreclosed was the first lien on the premises. On January 10, 1908, Mr. Mattern and wife also gave a second mortgage to Simmons & Bodmer to secure the sum of $418, and on August 25, 1908, they gave a third mortgage to the Advance Thresher Company, to secure the sum of $1,926.34. The defendant, Nels Nelson, was a guarantor on the notes secured by the Advance Thresher Company's mortgage, and the testimony in the case is in conflict as to how much remains unpaid of this mortgage, *although the trial court made a finding that the mortgage was not paid.* The second mortgage to Simmons & Bodmer was afterwards assigned to the defendant, Nelson, and on June 10, 1912, he redeemed from the foreclosure under the first mortgage by serving notice of redemption and at the same time paying the amount of the foreclosure certificate with interest to the sheriff of Renville county, who thereupon issued a certificate of redemption to Nelson. A duplicate of the notice served on the sheriff, however, was not filed in the office of the register of deeds. No objection, however, was made to this irregularity by the sheriff or by Mary M. Brackett, but she accepted the money paid by the defendant, as redemptioner, and in every respect recognized the validity of the redemption, and this has never been questioned by anyone except the plaintiff in this action. On January 30, 1912, Mattern and his wife conveyed the

premises involved to the plaintiff, Fox, by a quitclaim deed in the usual and ordinary form for a purported consideration of $1, and other good and valuable consideration; and this deed was recorded in the office of the register of deeds of Renville county on February 20, 1912. The mortgage to the Advance Thresher Company was also assigned to Nelson prior to the time that the plaintiff, Fox, attempted to redeem, as hereinafter set forth. The plaintiff, Fox, and Mattern both testified that the quitclaim deed was not intended as an absolute conveyance, but was only intended as a mortgage for the purpose of securing certain indebtedness owing by Mattern to the Kenmare National Bank, aggregating in all $526.15. This indebtedness was afterwards, on May 8, 1912, renewed in the form of a note signed by Mattern and wife, payable to Fox. It is conceded, however, that no defeasance clause of any kind was contained in the deed, and no instrument of any kind, either executed or recorded, showing or tending to show that the quitclaim deed from Mattern and wife to Fox was intended only as a mortgage; and the trial court, among others, made the following finding in regard to the quitclaim deed: "That the said quitclaim deed, given by Edward W. Mattern and Edith F. Mattern to J. N. Fox, the plaintiff, on the 30th day of January, 1912, was recorded in the office of the register of deeds in and for Renville county, North Dakota, on the 20th day of February, 1912, in Book 3 of Deeds, at page 73; that no defeasance or other instrument in writing has ever been recorded in the office of the said register of deeds, showing that the said quitclaim deed was intended as a mortgage, or showing that the said deed was not intended to be an absolute conveyance and transfer of said property; that the defendant relied implicitly upon the records, and reposed trust and confidence on the strength of said absolute deed, as well as statements made to him by the plaintiff, that he was the owner of said property." This finding of the trial court is sustained by the undisputed evidence, as there is no testimony of any kind proving or tending to prove that the defendant, Nelson, had any knowledge or notice of any kind that the quitclaim deed from Mattern and wife to Fox was intended as a mortgage; while, on the contrary, there is positive testimony to the effect that Fox told Nelson that he was the owner of the land. There is no question but that Fox had actual knowledge of the foreclosure in question when he received the

quitclaim deed, and that negotiations in regard to an adjustment of the claims of the respective parties were had between the defendant, Nelson, and one Thronson, the cashier of the Kenmare National Bank, of which the plaintiff, Fox, is president, as well as between Fox and Nelson personally. On September 12, 1912, the defendant, Nelson, applied to the sheriff of Renville county for, and received, a sheriff's deed for the property. About that time the plaintiff, Fox, sought to make a redemption from Nelson. The record fails to show positively the date on which redemption was attempted, although it is alleged in the complaint that such redemption was attempted to be made on September 10, 1912, and this is probably the correct date. Fox at that time tendered Nelson the sum of $2,300, the same being the amount then computed to be due upon the foreclosure certificate and the second mortgage to Simmons & Bodmer, assigned to and held by the defendant, Nelson. Nelson refused to accept the tender, but had repeatedly prior thereto offered to release or assign all his claims in the property, and was willing to do so even after the period of redemption had expired, provided that Fox in addition would pay the amount Nelson claimed to be due on the mortgage of the Advance Thresher Company, amounting to about $1,100, which Fox refused to do. Thereafter, on September 14, 1912, Fox filed a duplicate of this notice of redemption with the register of deeds of Renville county. This action was commenced September 12, 1912. So far as the record shows no proceedings, except those above recited, were taken by Fox before this action was commenced. There is no allegation in the complaint, and no proof that notice was served on the sheriff of Renville county, or that any money was paid or tendered to the sheriff; nor is it contended that the tender made to Nelson was kept good by a deposit as provided by law.

The only references in the complaint to the redemption attempted to be made by the plaintiff in this case are the following clauses, *viz.*: . . . "That the said plaintiff has tendered in gold coin of the United States the sum necessary to make such redemption to the said defendant, Nels Nelson, but he refuses to accept the same," and "that the plaintiff has served upon said defendant a notice of his intention to redeem, and filed a copy of such notice with the register of deeds of Renville county, North Dakota."

Some mention is made in the majority opinion of the alleged fact

that Nelson based his refusal to accept the money only upon the insufficiency of the amount tendered to make redemption. The only testimony in the record as to what was said and done at the time plaintiff attempted to redeem and the money was tendered to Nelson is as follows:

The plaintiff, Fox, testified.

Q. At the time that you tried to make such redemption did you tender to the defendant, Nelson, the sum stated in plaintiff's Exhibit 3?

A. Yes.

Q. Did he refuse to accept the same?

A. Yes, sir.

And the defendant, Nelson, testified as follows:

Fox, Cole, and Thronson came over to my place of business in Kenmare and said they were going to redeem that farm. At that time they tendered me about $2,300 for the purpose of redeeming.

Q. What did you say to him?

A. I said I would not accept it unless they paid up my Advance mortgage, too.

Q. They would not pay that?

A. They refused to do that.

Among the defenses set forth in the answer are: (1) That plaintiff did not redeem from defendant within sixty days after the date of the redemption made by the defendant; (2) that on or about June 12, 1912, and at various times thereafter, plaintiff stated to defendant that he (the plaintiff) was the owner of the land, and always led defendant to believe that the deed held by the plaintiff was an absolute conveyance, and that plaintiff represented to the defendant that he was the owner of the land; that defendant relied on these statements, and for that reason made no redemption under the mortgage assigned to him by the Advance Thresher Company.

The majority opinion rests almost wholly upon the decision of the supreme court of South Dakota in the case of Spackman v. Gross, 25 S. D. 244, 126 N. W. 389. The laws of South Dakota relative to

redemptions, construed in the case of Spackman v. Gross, are identical with the laws which existed in North Dakota prior to 1897. The principal changes in the redemption laws of this state were made by the legislature in 1897, and were doubtless caused by the decision of this court in the case of State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692, decided November 24, 1896, wherein it was held that a redemptioner was in all instances required to redeem within sixty days after the last preceding redemption, although a year had not then expired from the day of sale, or he would lose his right to redeem. At the session of the legislature immediately following the promulgation of the decision in State ex rel. Brooks Bros. v. O'Connor, the laws of this state relative to redemptions were materially changed. Section 5542 of the Revised Codes, in force at the time of the decision in the case of State ex rel. Brooks Bros. v. O'Connor, is as follows: "If property is so redeemed by a redemptioner, another redemptioner may within sixty days after the last redemption again redeem it from the last redemptioner on paying the sum paid on such last redemption with like interest thereon in addition as provided by the preceding section and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him with like interest on such amount and, in addition, the amount of any liens held by said last redemptioner prior to his own with interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption with interest at the same rate as provided for the first redemption in § 5541 in addition and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest." This section as amended by the legislature in 1897 reads as follows: "If the property is so redeemed by a redemptioner, another redemptioner may, *even after the expiration of one year from the day of sale, redeem from such last redemptioner; provided, the redemption is made within sixty days after such last redemption. This sixty-day limita-*

tion does not apply to any redemption made within one year after the sale by whomsoever or from whomsoever such redemption is made; but all persons entitled to redeem shall in all cases have the entire period of one year from the day of sale in which to redeem. A redemptioner in redeeming from another redemptioner must pay the sum paid on such last redemption with like interest thereon in addition as provided by the preceding section and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount and, in addition, the amount of any liens held by said last redemptioner prior to his own with interest; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption with interest at the same rate as provided for the first redemption in § 7754 in addition and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest." Section 7755, Comp. Laws, 1913. Section 5543 of the 1895 Rev. Codes reads as follows: "Written notice of redemption must be given to the sheriff and a duplicate filed with the register of deeds of the county, and if any taxes or assessments are paid by the redemptioner or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the register of deeds; *and if such notice is not filed, the property may be redeemed without paying such tax, assessment or lien.*" This section has not been amended, and is § 7756 of the Comp. Laws of 1913. Section 5544 of the 1895 Rev. Codes reads as follows: "If no redemption is made within one year after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed and no other redemption has been made *and notice thereof given* and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem

the property." But this section was amended by the legislature in 1897 to read as follows: "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 and it shall be the duty of the sheriff to execute and deliver such deed immediately after the time for redemption has in each case expired." [Comp. Laws 1913, § 7757.] Section 5545 of the Rev. Codes of 1895 reads as follows: "If the debtor redeems, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeems, the effect of the sale is terminated and he is restored to his estate. Upon a redemption by the debtor the person to whom the payment is made must execute and deliver to him a certificate of redemption acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale." This section was amended by the legislature in 1897 to read as follows: "*In no case shall the debtor be required to pay more to effect a redemption than the purchase price with 12 per cent interest from the . . . date of payment, notwithstanding the fact that he seeks to redeem from a redemptioner.* If the debtor redeems, the effect of the sale is terminated and he is restored to his state. Upon a redemption by the debtor the person to whom the payment is made must execute and deliver to him a certificate of redemption acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the register of deeds of the county in which the property is situated, and the register of deeds must note the record thereof in the margin of the record of the certificate of sale. *In case the debtor redeems from a redemptioner who has to effect his redemption paid liens on the property, other than for taxes or assessments, the redemptioner shall be subrogated to all the rights of the former holders of such liens, and the filing of written notice of such redemptions as required by § 7756 shall constitute notice of the rights of such redemptioner in and to all the liens so held by him as equitable assignee as fully as if formal written assignments thereof had been recorded. All the statutes relat-*

ing to redemptions from execution sales shall govern sales on mortgage foreclosure and these provisions shall apply to all sales hereafter made." Section 7758, Comp. Laws 1913.

Section 5541 of the Rev. Codes of 1895 is the same as § 7754 of the Comp. Laws of 1913, and § 5854 of the Rev. Codes of 1895 is the same as § 8085 of the Comp. Laws of 1913. It will be observed that both of these sections expressly limit the time within which redemption may be made to one year, but these sections, of course, must be construed in connection with the amendatory acts of the legislature.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature, and every statute must be construed with reference to the object intended to be accomplished by it. And in order to ascertain this object it is proper to consider the occasion and necessity of its enactment, the defects or evils in the former law, and the remedy provided by the new one. The act of the legislature of this state in 1897, as already stated, followed the decision of this court in State ex rel. Brooks Bros. v. O'Connor, and the obvious purpose of the legislative enactment, as appears from the language thereof, was to change the law of this state as interpreted by that decision, and in every instance give a whole year to the debtor and every redemptioner in which to make a redemption, and to eliminate the provision existing in the former law, limiting the time in which a redemptioner might redeem from a prior redemptioner to sixty days. And in order to prevent any redemptioner from being taken by surprise, it was further provided that in every instance the redemptioner should have at least sixty days in which to redeem from a prior redemptioner. The purpose of this amendment is apparent; (1) to give every person entitled to redeem a full year in which to do so, and (2) in the event a redemptioner came in on the last day or within the last few days prior to the expiration of the year prepared to make his redemption, and found that some other redemptioner had redeemed shortly before, the additional sixty days would give the person so seeking to redeem ample time in which to prepare new papers and in general do everything that would be necessary to effect his redemption. It will be observed that under the provisions of § 5544 of the 1895 Rev. Codes, it was made a condition precedent to the issuance of a deed not only that redemption be made, and that the sixty-days limi-

tation thereafter expired, but that *notice thereof be given.* This was expressly eliminated by the legislature in its amendment to this section in 1897. Hence, it is apparent that the legislature deemed this provision unnecessary or inapplicable under the law as amended. And while no change was made in § 5543, Rev. Codes 1895, still the language contained in the amendment of § 5545 of the 1895 Rev. Codes clearly shows that the legislature by its reference to § 5543 intended that the filing of notices therein required shall be for the benefit of the redemptioner rather than any other person. The supreme court of this state, in 1901, had an opportunity to construe the present laws of this state relative to redemption in the case of McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281, and therein it was squarely held that under the laws of this state the question of whether or not a redemption was regularly or irregularly made could only be raised by the holder of the certificate of foreclosure sale. In that case the court says: "Concededly, the plaintiff paid to the holder and owner of the sheriff's certificates the amount required to make redemption, and such payments were made for that purpose. *It might be conceded that the owners of the sheriff's certificates could have successfully challenged plaintiff's right to redeem on the ground now urged, but they did not see fit to do so. On the contrary, they accepted and retained the redemption money, and by so doing waived any question as to his right to redeem which may have existed, and thereby validated the redemption, and clothed plaintiff with their statutory right under the sheriff's certificate.* 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 11th Ave. 81 N. Y. 436. In 3 Freeman on Executions, 3d ed. § 317, that author states 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 such redemption money, from denying the validity of the redemption.' *It is also well settled that 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 and 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.' Carver v. Howard, supra. In this case it makes no difference to the defendant whether the rights evidenced by the sheriff's certificates were owned by the original purchasers or by the plaintiff, McDonald. He could redeem from the plaintiff as well as from the original purchasers, and it did not add anything to the amount required to free his premises from the lien; and by failing to redeem his rights in the real estate were lost. Blair v. Chamblin, 39 Ill. 521, 89 Am. Dec. 322; Hervey v. Krost, 116 Ind. 268, 19 N. E. 125; Massey v. Westcott, 40 Ill. 160; McClure v. Engelhardt, 17 Ill. 47. The most valuable right secured by the statute to a purchaser at a real estate mortgage foreclosure sale is the right to demand and receive a sheriff's deed to the premises purchased in case there is no redemption. This right, as we have seen, passed from the purchasers at the foreclosure sale to this plaintiff by his redemption, and when he received the sheriff's deeds upon which he now relies he acquired just what the sheriff's certificates authorized the original purchasers to obtain." McDonald v. Beatty, 10 N. D. 517, 518, 88 N. W. 281. In the case at bar it is conceded that the plaintiff, Fox, made no attempt to redeem within the year of redemption, and it is likewise conceded that he made no attempt to redeem within sixty days after the date of the redemption by the defendant, Nelson. It is obvious that the plaintiff is placed in no worse position by the fact that Nelson redeemed. If Nelson had not redeemed, Mary M. Brackett, the owner of the sheriff's certificate of purchase, would have been entitled to a deed on and after July 30, 1912. It is conceded that if Nelson had taken an assignment of the certificate from Mary M. Brackett, plaintiff would not be entitled to redeem. The redemption by Nelson operated as an assignment of the certificate of foreclosure sale to him. Whether or not Nelson was entitled to such assignment, or to make such redemption, was purely a matter between him and Mary M. Brackett, the holder of the certificate. I believe that the rule laid down in the case of McDonald v. Beatty is entirely sound, and should be adhered to. The correctness of that rule has never been questioned, and although the legislature of this state has held six

sessions since that decision was made, no legislation has been enacted to limit or qualify the laws then in force, as construed by this court in that decision. This, of itself, is persuasive evidence that the construction placed thereon was in accordance with the legislative intent. The principle therein laid down has also become a rule of property in this state.

The legislature of this state has by law given every person a whole year in which to exercise the right of redemption, and under certain conditions an additional sixty-day period is provided. And in order to provide that all persons should have not only constructive but actual notice of foreclosures, the legislature in 1909 enacted a law (§ 8095, Comp. Laws) making it the duty of the register of deeds to notify the record owner and all subsequent mortgagees within ten days after the filing of the sheriff's certificate and notice of publication in the register of deeds' office. It would therefore seem that the present laws are adequate to protect the interests of all parties. If, however, they are not, the remedy is with the legislature, and not with the court, and in no event does it justify or warrant this court in performing the functions of the legislature, and by judicial fiat amend the statutes of this state, as the majority do in this case.

As already stated, the majority opinion rests upon the decision of the supreme court of South Dakota in the case of Spackman v. Gross, 25 S. D. 244, 126 N. W. 389. The laws of South Dakota relative to redemptions, and construed in that opinion, are identical in every respect with the redemption laws of this state as they existed prior to their amendment by the legislature in 1897. In the case of Spackman v. Gross, the mortgage was foreclosed on December 29, 1906, and on January 29, 1907, about a month after the foreclosure, Spackman redeemed under a subsequent mortgage. The duplicate of the notice of redemption was not filed in the office of the register of deeds, but recorded at length. On December 28, 1907, one year, less one day, from the date of the foreclosure sale, another mortgagee, named Johnson, holding a mortgage subsequent to Spackman, sought to make redemption, and the supreme court of South Dakota held that the recording of the notice of redemption did not constitute a compliance with the statute, and that for that reason the sixty-day limitation did not apply, and says: "Johnson had the right to redeem *at any time within the*

year of redemption, unless such right became barred by the filing of the notice of redemption and the expiration of the sixty-day limitation." As already stated, the laws construed by the South Dakota court were identical with the laws of this state as construed in the case of State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692. Under the decision of the South Dakota court in Spackman v. Gross, it is merely held that, in the absence of the filing of the notice of redemption, the subsequent mortgagee *might redeem at any time within the year.* It is not contended in that decision that the failure to file such notice would give more than one year in which to make such redemption. Nor is it contended that the plaintiff in this case would be entitled to redeem under the laws as they existed in this state prior to the amendments adopted by the legislature in 1897. Therefore, if the plaintiff is entitled to redeem at all, it must be by reason of the amendments so adopted, above set forth. It is unquestioned that the amendments of the legislature were adopted as a direct result of the decision of this court in construing the then existing laws in the case of State ex rel. Brooks Bros. v. O'Connor. They were enacted to obviate the condition then existing. The obvious intent was to eliminate the sixty-day limitation during the year of redemption, and to provide every person entitled to redeem a full year in which to do so. And in order that no interest might be jeopardized by unexpected redemptions immediately prior to the expiration of the year of redemption, the legislature further provided that a redemptioner should in all instances be allowed sixty days in which to redeem from a prior redemptioner. It is also clear that on principle the case of Spackman v. Gross is not authority in support of appellant's contentions in this matter. In that case, under the law, Johnson had a whole year in which to redeem, unless this period was cut off by the redemption of Spackman. In the case at bar it is conceded that Fox has no standing as a redemptioner, unless his time in which to redeem was extended by the redemption made by the defendant, Nelson. Fox says in one breath, "You redeemed and thereby extended the time in which I might redeem," and says in the next breath, "But your redemption was irregular,—you failed to file a duplicate of your notice of redemption; therefore the statute limiting the time in which I must redeem from you does not apply to me. I will accept the benefit of your redemption,

but I will not accept its burdens." Fox predicates his own redemption on that of Nelson. It would seem obvious that he cannot assert this redemption to be good for one purpose, and bad for another.

Section 7756 of the Compiled Laws provides that "written notice of redemption must be given to the sheriff," and § 8086, Comp. Laws provides that "notice of redemption may be given to the officer or person making the sale." There is no allegation in the complaint, and absolutely no evidence that Fox paid or tendered any money to, or served any notice upon, the sheriff of Renville county, who was also the person making the sale, but the only thing which Fox did was to serve a notice upon the defendant, Nelson, and tender him certain moneys, and then, *two days after the commencement of this action,* file a duplicate of the notice so served with the register of deeds. Hence, it is apparent that plaintiff did not seek to avail himself of the method provided by statute, by making payment to the sheriff, but sought to extinguish the obligation by making payment to the then holder of the certificate of purchase. While the law permits payment to be made either to the sheriff or to the holder of the certificate, still payment to one of these parties is an absolute essential prerequisite to a redemption. And under our laws a method is provided for the payment of an obligation, even though the person authorized to receive payment refuses to accept,—namely, by tender and deposit in the manner provided by law. So the plaintiff could, if he desired, pay the moneys required to make redemption to the defendant, Nelson, and such payment would extinguish defendant's claim (conceding that Fox was entitled to redeem). Fox, however, did not pay, but merely tendered payment. In this case it is not contended by plaintiff, either in the pleadings or in the proof, that the tender was kept good; in fact this is negatived by the very allegations in the complaint. The tender did not pay the debt. Neither did it devest the title of the defendant, Nelson, as the owner and holder, by operation of law, of the certificate of purchase.

This question was squarely passed on by the supreme court of Minnesota in the case of Dunn v. Hunt, 63 Minn. 484, 65 N. W. 948, wherein that court said: "We apprehend that no case can be found where a tender was essential to or the foundation of an action, and where it was held that the tender was effectual unless kept good. *Equity is no less strict than the law in this respect.* In this case, plain-

tiff's right to redeem is predicated wholly on the tender; for, confessedly, but for that his right to redeem has expired, after foreclosure of the mortgage, whereby plaintiff's interest in the property had become merely a right of redemption, the refusal of the tender did not *per se* devest the defendant of his interest, or revest a clear title in the plaintiff. Care must be taken to distinguish the case from those where the rights of the plaintiff were not dependent upon a tender, the tender being only important as bearing on the question of interest and costs. Here the tender was the very foundation upon which plaintiff's right of action depended. Hence, not having been kept good, it is ineffectual for any purpose, and plaintiff stands to-day precisely as if no tender had ever been made." The same proposition was also considered by this court in the case of Brown v. Smith, 13 N. D. 580, 586, 102 N. W. 171, and in considering the same the court said: "There is no proof in the record that the plaintiff deposited the money tendered for redemption in a bank of good repute, payable to defendants. The appellant assigns this defect of proof as a ground for reversal, and we think the point is well taken. *The statute imposes on the redemptioner the obligation to pay the amount required to redeem as a condition precedent to the acquirement of any right to the property sold. It was incumbent on the plaintiff, therefore, to show that the obligation which the statute imposed on him had been extinguished.* Section 3814, Rev. Codes 1899, provides: 'An obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute, and notice thereof is given to the creditor.' Section 3818 provides: 'An obligation for the delivery of money . . . is not discharged by an offer of performance, nor any of its incidents affected, unless the thing offered, if money, is deposited as provided in § 3814. . . .' The respondent argues that, inasmuch as the stipulated facts show that a tender was made, it must be presumed that the offer of the money was followed by a proper deposit, in the absence of a denial of such deposit by the defendant. That argument is based on the erroneous assumption that the act of tender, under our statutes, includes the deposit of the money. The Civil Code has not changed the definition of the term 'tender.' The term still means what it always meant,—an offer of performance. *The Code*

has substituted the requirement of deposit of the thing tendered, at the risk of the creditor, in place of the common-law requirement that a tender must be kept good by a readiness to pay and payment into court. The Code has also made this further innovation on the common law with respect to the effect of a tender,—that a *mere tender of the debt is no longer sufficient, as at common law, to extinguish a mortgage or pledge of property, but, to have that effect, the tender must be kept good by a deposit of the thing tendered, subject to the order of the creditor.* Section 3814, quoted above, provides that, in the absence of a deposit, an obligation is not discharged, 'nor any of its incidents affected,' by a mere offer of performance. In harmony with this rule, we find that § 4693, relating to the redemption of liens, provides that, if the amount secured requires the delivery of money, an offer to pay must be followed by a deposit of the money, as prescribed in § 3814."

It is conceded that Mattern could not redeem unless he did so within one year after the date of the sale. And it must likewise be conceded that if the plaintiff, Fox, is merely the purchaser of the equity of redemption, that then he can have no greater right to redeem than did Mattern. The plaintiff, however, claimed that, as a matter of fact, his deed was only a mortgage; but the trial court found that the plaintiff had represented to the defendant that he was the owner of the property, and this fact is undisputed under the evidence in this case.

The defendant, Nelson, testified with reference thereto as follows:

Q. And, Mr. Nelson, did you during all this time, both before you made your redemption and afterwards, rely fully upon that statement both of Mr. Fox and Mr. Thronson, that Mr. Fox was the owner of that land?

A. I did.

Q. And it was on the full reliance on that that you went ahead and made your redemption?

A. Yes.

Q. And tried to make settlement with Mr. Fox?

A. Yes, sir.

Q. When did you first learn that Mr. Fox claimed to hold this deed as a mortgage?

A. Sometime in September.

Q. That same year?
A. 1912, yes.
Q. That was after the expiration of the year?
A. Yes, sir.

And his testimony is not denied either by Fox or any other witness for the plaintiff. It is therefore clearly established in this case that Fox held himself out to be the owner not only on the records, but by actual statements to Nelson induced him to believe that Fox claimed as owner, and not as mortgagee. Nelson acted in absolute reliance upon the fact that Fox claimed as owner; and it is undisputed that the first time that Fox indicated to Nelson that he claimed as mortgagee was on September 10, 1912, when he attempted to redeem. Nelson was therefore misled by these statements, and Fox should not at this time be permitted to assume a contrary position. It is axiomatic that "one must not change his purpose to the injury of another." When Nelson redeemed, he believed Fox to be the owner. Under all rules of equity, Fox should be compelled to adhere to the position which he had assumed, *viz.,* that of the owner of the premises. 16 Cyc. 722; 27 Cyc. 1033, note 83; see also McVay v. Tousley, 20 S. D. 258, 129 Am. St. Rep. 927, 105 N. W. 932; McVay v. Bridgman, 21 S. D. 374, 112 N. W. 1138; Bigelow, Estoppel, p. 732.

The majority opinion, after quoting with approval certain language used by the South Dakota court in Spackman v. Gross, proceeds to qualify and limit the application thereof. In fact the very limitation sought to be placed thereon is in direct conflict with reasoning advanced by the South Dakota court in the language quoted. The South Dakota court was at least consistent in its language and logic, and contented itself with an interpretation of the statutes under consideration. The majority of this court is neither consistent nor logical, but bases its conclusions upon certain language used by that court, the very essence of which it repudiates; and, then, to obviate to some extent the chaos which is likely to result and the uncertainty created in all land titles in this state based on irregular redemptions, proceeds to legislate in the most flagrant manner possible. The very limitation added is, of course, *dicta,* as it is not necessary to a determination of the issues involved herein. And it is rather strange for a court which substitutes

its judgment for that of the legislature, and disregards, and, in effect overrules, two prior decisions of this court, to seek to limit, by *dicta,* the natural and necessary consequences of the doctrine promulgated by its opinion. Do the majority members believe that their *dicta* has greater force, and in the future will be deemed more binding upon the courts of this state, than the unanimous decisions of this court in McDonald v. Beatty and Brown v. Smith, which they refuse to follow? The *dicta* seeking to limit the effect of the decision is an absurdity in itself, and a repudiation of the very authority on which the majority opinion is based. The South Dakota court said: "The notice is only operative and necessary as against other redemptioners, and their right to redeem *can be barred only by filing the notice of the redemption* as required by the statute. The failure to file the notice of redemption does not render the redemption itself irregular or illegal. *It merely leaves the rights of other redemptioners unaffected.* It does not extend the limitations of sixty days, because *that period begins only when the notice is filed.*" If the majority opinion is correct, it must be for the reasons advanced by the South Dakota court,—it has nothing else on which to stand.

The South Dakota court was consistent both in its language and reasoning,—it did not resort to judicial legislation,—and the result reached by that court was logical. That court said: The statute provides that the notice of redemption must be filed in the register of deeds' office. The first redemptioner failed to do this; therefore the rights of other redemptioners are *unaffected,* and they stand in the same position as though the first redemption had never been made. If this reasoning is applied to the case at bar, it will lead, not to the conclusion reached by the majority in this case, but to one entirely different. If Fox's rights were *unaffected,* they necessarily remained the same as though Nelson had never redeemed; and if so Fox had a year in which to redeem,—no more and no less. The majority members of this court say in one sentence that unless the notice of redemption is filed, that the rights of subsequent redemptioners are unaffected; and in the next sentence deny the first proposition, and say that the rights of subsequent redemptions are (favorably) affected, as the time in which subsequent redemptioners are required to redeem *does not commence to run until the notice is filed, i. e.,* that a subsequent redemptioner has a period of

sixty days *after the notice is filed* in which to redeem; and then, in order to provide a fitting conclusion to their logical deduction, they go on to say that this right, which was *unaffected* by the first redemption, and this period, which has never commenced to run, will nevertheless expire at the end of one year and sixty days after the date of the sale.

The majority opinion cites 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; Colonial & U. S. Mortg. Co. v. Flemington, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929, and Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931, and intimates that some rule of property has been established by these cases which is involved in the case at bar. An examination of these decisions will show that by no possible means of reasoning could any principle decided in those cases, or any rule of property established thereby, be involved or determined in this case. "A 'rule of property' is a 'settled legal principle governing the ownership and devolution of property.' This principle can be settled only by the supreme court of the state, and its utterances, in cases pending before it involving the title to property, construing statutes or constitutional provisions, have the effect of establishing a rule of property *to the extent only that the particular* statute or constitutional provision was in that case involved, or necessarily considered and determined by the court in the case then pending before it." Yazoo & M. Valley R. Co. v. Adams, 81 Miss. 90, 32 So. 937; see also Black's Law Dict. 34 Cyc. 1821; 24 Am. & Eng. Enc. Law, 1011. The propositions involved in the three cases cited are radically different from the one involved in this case. Neither the principles nor the particular statute involved in this case was in any manner considered, directly or indirectly, in the cases cited. And to say that this case is governed by any rule of property established by this court in those decisions is wholly untenable, and an entire misconception of what is meant by the term "a rule of property." An entirely different condition exists, however, with reference to the cases of McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281, and Brown v. Smith, 13 N. D. 580, 102 N. W. 171. Those two cases passed upon and directly decided two of the very principles which are involved in this case, and, hence, those decisions are clearly rules of property which are entirely ignored by the decision of the majority in this case. And

while the questions presented and determined in North Dakota Horse & Cattle Co. v. Serumgard were entirely different from those presented in the instant case, still the principle announced by this court in McDonald v. Beatty was in no manner receded from; but on the contrary, in the latter case, we find the following language from McDonald v. Beatty, quoted with approval: *"It is also well settled that the holder of the sheriff's certificate and the person redeeming are the only persons concerned in the regularity of the redemption."* This principle is repudiated by the majority in this case.

This is not an action wherein the benefit of the redemption law is invoked by an owner to save his property; but where a man of affairs —the president of a bank—stands idly by, and when he finds that Nelson has failed to file an affidavit of the amount due on the Advance Thresher Company's mortgage, sees a good speculation in the deal, and so tries to come in and redeem. Under the decision of the majority, Nelson is penalized for relying on the statements made to him by Fox, and precluded from realizing anything on the amount still due on the Advance Thresher Company's mortgage. He is deprived of a valuable, vested property right, by one who has no standing either in a court of law or equity,—by a speculator who has failed to either allege or prove any facts entitling him to recover. The majority decision in my opinion is a most dangerous precedent. It in effect overrules two prior decisions of this court, which have become rules of property in this state; and upsets the settled law of this state upon a subject of vital importance. It will tend to make titles based on redemptions unsafe and undesirable, because there are doubtless many redemptions wherein similar irregularities have occurred, and expensive and vexatious litigation may follow. I respectfully decline to subscribe to the logic, legal principles or equitable doctrine adopted by the majority. In my opinion the decision is indefensible from every possible standpoint. I am authorized to say that Chief Justice Fisk fully concurs in my views.

Goss, J. (concurring). I fully concur in the main opinion. My purpose is to discuss the dissent. This case comes here for trial *de novo*. But the pleadings and contentions presented below and here must largely shape our retrial. Doubtless the dissenting members

could have tried the case more closely, and in proper season could have presented questions wholly unthought of, because foreign to the theory of the case until found in their dissent. This applies to much that has been given great importance by them. Appellant has assumed that on September 10th Fox redeemed regularly and in strict accord with the statute, provided (1) he was a redemptioner, (2) his redemption was in time, and (3) if he could redeem without payment to Nelson of the Thresher Company mortgage, which mortgage Fox refused to pay on the ground that it was fully paid. These are the questions presented by appellant's complaint and the briefs. It is then necessary to determine the status of Fox, whether he is a redemptioner, or but in the shoes of the original owner mortgagor; and if he is a redemptioner, whether his attempted redemption, which the parties have treated as otherwise sufficient, was in time. The rights of Fox, whether he be a mortgagor or redemptioner, attached during the running of the year of redemption on the foreclosure of the first mortgage, during which period he took his quitclaim deed, so that it ill becomes the dissent to question the application of 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, to this case, as not announcing a rule of property here controlling. Were it not for that decision, squarely holding that a mortgage given during the year of redemption places the mortgagee in the position of a redemptioner, instead of constituting him but an assignee of and on the footing of the mortgagor, the dissent would undoubtedly strenuously contend that Fox could not be a redemptioner. Thus, the holding in 17 N. D. 466, is but adopted and applied as establishing that Fox can be a redemptioner, if in legal contemplation he is to be regarded as the mortgagee of the owner, rather than the owner. By what course of reasoning the application of the Serumgard Case to this case could be avoided or denied, as not a rule of property directly applicable, is beyond my conception, when the rule of law it declares establishes the very status of Fox to be that of a redemptioner. Under this decision, coupled with that of Scheibel v. Anderson, 77 Minn. 54, 77 Am. St. Rep. 664, 79 N. W. 594, on all fours (this transfer being admittedly a security transaction only between the owner and Fox), the plaintiff is a redemptioner notwithstanding he is holder of the paper title. It is noticeable that the dissent cites no authority upon these propositions.

Judging from the industry, as well as the ingenuity, displayed in the dissent, it can be assumed there is none to be found to the contrary, and that the principles announced by Scheibel v. Anderson are settled law, as are those also declared in the Serumgard Case. There can seem to be no escape from the direct and necessary application of the principles and the reasoning of these cases. An estoppel is hinted at in the dissent. If Fox must be regarded as a mortgagee and redemptioner, this is indeed a novel proposition. Can a redemptioner be estopped from exercising his right of redemption, forsooth because, not a lawyer, he made a misstatement concerning the tenure of his holding, the legal effect of what in law constituted his mortgage? This is upon the assumption that "it is axiomatic that one must not change his purposes to the injury of another. When Nelson redeemed he believed Fox to be the owner," quoting from the dissent. This elemental basic principle of estoppel is unquestionably the law, but how can it apply in the absence of an injury to Nelson? Did not Fox tender him the full amount (aside from the thresher mortgage, claimed paid and referred to later) necessary to redeem? Appellant's brief and the dissent admits he did. Fox stands ready still to pay that statutory amount to effect a statutory redemption. He tenders the same amount for redemption that any mortgagee subsequent to Nelson would have paid. He tenders all the statute requires to be paid to effect a redemption. Manifestly, no injury could result to Nelson simply from any such statements. Descent of title to Fox for full statutory value paid, if the redemption is otherwise legal, can work no injury. This prevention of a forfeiture of title to Nelson is no legal injury. The dissent fallaciously assumes an injury upon which to ground an estoppel.

Was the attempted redemption otherwise sufficient in time, omitting from consideration the validity of the thresher mortgage? Half the dissent is devoted to a statement of the statutes. It is not the first labor that has brought forth a mouse as its progeny. And that as the basis for erroneous reasoning consists in an assumption, pure and simple, that in the 1897 amendment to § 5544, Rev. Codes 1895, the filing of written notice of redemption with the register of deeds was dispensed with because the identical provisions concerning notice were not carried forward into § 5544, as re-enacted by chap. 121, Sess. Laws of 1897. Section 5544 required notice of redemption by the words "and notice

thereof given," as set out in the dissent, but § 5543, Rev. Codes 1895, now § 7756, Comp. Laws 1913, specifying "the record of redemption," was left untouched by the 1897 amendment, wherein was amended §§ 5542–5545, but leaving the statute as to the required record of redemption as it then existed, and as it still exists. By § 5543, "written notice of redemption must be given to the sheriff and a duplicate filed with the register of deeds of the county, and if any taxes or assessments are paid by the redemptioner or if he has or acquires any lien other than that upon which the redemption was made, *notice thereof* must *in like manner* be given to the *sheriff* and filed with the register of deeds; and if such notice is not filed the property may be redeemed without paying such tax, assessment or lien." This statute contemplates the giving and the filing of two different kinds of notices *viz.*, the written notice of redemption, and a second and subsequent notice that the redemptioner has paid taxes or holds other liens. To whom are such notices intended to be given? The dissent would infer to parties antecedent in the chain of title, and not to subsequent lien holders, as was Fox. Such would be giving notice to persons not then interested in the property, parties already paid off. The only notice the statute can contemplate is notice to subsequent lienors to the redemptioner, *i. e.*, those who may by conforming to the law succeed to the interest and status of the present redemptioner. With this statute standing unaltered, requiring the redemptioner to file his written notice of redemption, the legislature, in the 1897 amendment, changed with reference thereto § 5544, Rev. Codes 1895, to read: "If the property is not redeemed *according to law* [meaning according to § 5543 and other statutes], the purchaser or his assignee *or the redemptioner,* as the case may be, is entitled to a sheriff's deed of the property, and it shall be the duty of the sheriff to execute and deliver such deed immediately after the time for redemption *has in each case expired.*" [§ 7757, Comp. Laws 1913.] The amendment was made with reference to a law specifically requiring notice by filing, and the mere omission to again require it is because it was both unnecessary and was already required. So, if it be conceded that under the law before the 1897 amendment, the giving of notice was necessary by filing thereof, it certainly was equally necessary after such amendment, and is yet. And this the dissent admits by saying, "It will be observed that under the provisions

of § 5544, Rev. Codes 1895, it was made a condition precedent to the issuance of a deed, not only that redemption be made and that the sixty-days limitation thereafter expired, but that *notice thereof be given.*" Concerning this notice requirement, the dissent also says: "This was expressly eliminated by the legislature in its amendment to this section in 1897. Hence, it is apparent that the legislature deemed this provision unnecessary or *inapplicable* under the law as amended." From what can it be said that it is inapplicable? This conclusion is on its face erroneous. The dissent must have appreciated this, and would avoid the results of application of the ordinary rules of statutory construction by a befogging discussion of § 5545, concerning rights of and applicable to, not *redemptioners from redemptioners,* but of a *debtor redeeming from a redemptioner.* Concerning this, our present § 7758, Comp. Laws 1913, the dissent avers that the same "clearly shows that the legislature, by its reference to § 5543, intended that the filing of notice therein required shall be for the benefit of the redemptioner rather than any other person." The reference in § 5545, Rev. Codes 1899, to § 5543, Rev. Codes 1899, to notice, is, "and the filing of written notices of such redemptions as required by § 5543 shall constitute notice of the rights of such redemptioner in and to all the liens so held by him as equitable assignee, as fully as if formal written assignments thereof had been recorded," is not to redemptions by one redemptioner from another redemptioner, and can be no aid to a construction of the statutes solely governing redemptioners, with which we are now concerned. The discussion of and copious extracts from McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281, is wholly foreign to all issues in this case. With it we have no quarrel, unless we should hold that Fox is an owner claiming the right to redeem under § 7758, not a redemptioner. But the law as declared in the Serumgard Case fixes his status to be that of a redemptioner.

It is true that the purpose of the 1897 amendment was to obviate the effect of State ex rel. Brooks Bros. v. O'Connor, 6 N. D. 285, 69 N. W. 692, under which holding, where a redemptioner redeemed from the purchaser soon after the sale, for instance, within a month from the sale, a would-be subsequent redemptioner must redeem within sixty day from the first redemption made, even though it be nine months before the year from sale, or be shorn of his right to redeem at all. The

first purpose of the statute was to grant to lien holders and possible subsequent redemptioners, as well the right enjoyed by debtors, the right to redeem from such a redemption at any time within the year from sale. Section 7756, with the first proviso, is apparently confusing. It grants the right of the debtor to redeem at any time within one year, and under its terms where, as here, a redemptioner has redeemed within the year, but less than sixty days from the expiration of the year of redemption so-called, subsequent redemptioners may nevertheless redeem, even after the year from sale so long as they redeem within sixty days from the date when the redemptioner from whom they seek to redeem effected his redemption. Thus arises the question of how second or subsequent redemptioners, occupying the relation of Fox to Nelson, may know the date upon which their immediately prior redemptioner redeemed, or in other words the date at which commenced their sixty-day short period for redemption. Must Fox accept the mere word of Nelson as to when Nelson redeemed? Had Nelson the right to give his written notice of redemption to the sheriff, have his redemption money accepted (and thereby confirm his own redemption, though irregular under McDonald v. Beatty, 10 N. D. 511, 88 N. W. 281), but fail to file his *duplicate notice of redemption* with the register of deeds, and thus entirely suppress notice to Fox and all subsequent lien holders of the fact that he has redeemed at all? Or, again, may he thus suppress the notice *required* by the statute *to be of record,* and then, because Fox did not mistakenly tender or pay to the purchaser the amount necessary to redeem in ignorance of any redemption made, and this within the year, lose his right of redemption when, had Nelson but placed his certificate of record, as required by statute, all would have been plain, and constructive notice imputed, and Fox would have known that he had six weeks only beyond the year from the sale within which to redeem from Nelson. Not only the dissent, but the respondent, admits that, had Fox been some three days earlier with his tender, he would have been within the sixty-day period from the time of Nelson's redemption, and within his rights as to time, and could have compelled redemption so far as time limit is concerned, even though a month and a year after the sale. In other words, does the statute requiring a duplicate notice of redemption to be filed to fix time limitations as of the date of filing mean what it says, or instead can it be

disregarded and notice suppressed and the party suppressing it still be enabled to plead his own failure, however deliberate, to comply with law and defeat a redemption otherwise legal? Spackman v. Gross, 25 S. D. 244, 126 N. W. 389, announces the principle that the filing of the redemptioner's notice of redemption sets in motion a sixty-day period of limitation against subsequent redemptioners. True, when it was announced, the law stood as declared in State ex rel. Brooks Bros. v. O'Connor, and when subsequent redemptioners did not have the balance of the year from the sale or sixty days from redemption, within which to redeem from prior redemptioners; but that is wholly beside the case. The principle nevertheless applies; whether the sixty-day limitation started by the filing shall commence within the year or extend beyond the year has nothing to do with the principle *that only the filing of the notice starts the statutory sixty-day limitation period running.* What is said in the dissent to avoid the force of this principle seems but to emphasize its soundness, because of a manifest inability to avoid both its reason and applicability. Fox had a right to redeem within the year. The statute informed him that. If he or some lienor prior to him did not redeem at the expiration of one year, he would be shorn of all rights, and the property would be the certificate holder's, or some redemptioner who had redeemed more than sixty days prior to the expiration of one year from the sale. He also had the right to know what prior mortgagee had redeemed, and when and from whom he had redeemed. He had a right to rely on the mandate of the statute requiring such redemption, in order to be a redemption imputing notice thereof to him that the same should be filed with the register of deeds, that he might consult it. And until it was so filed it was not constructive notice to him. With actual notice we are not concerned under the proof. Fox had the right to consult the records and rely on them throughout the year of redemption. After the expiration of the year from sale he learns that a redemption has been made, with no notice thereof filed. He was not charged therefore with constructive notice of that redemption. Upon learning of the redemption made and after the expiration of the year, but within sixty days from the expiration of the year from sale, he learns of it. He was bound to know that no redemption within the year can extend the period beyond sixty days after the year. The law charges him with

that notice. Failure to file did not during the year and before the expiration of it set the sixty-day limitation statute in motion. He was granted the right through the failure to file to take the year. But the expiring of the year limit automatically imputed notice of whether or not a redemption had been made, and that, if one was effected, the limitation was in motion within which he must redeem, if at all. If he had the right to redeem at all upon discovery after expiration of one year from sale that a redemption had extended the time beyond the year, but that no sixty-day statute had been set in motion by filing of notice of redemption, he had the full sixty days after the year in which to redeem. No other limitation can apply. The two limitations —year and sixty days—must and do apply. He must be allowed to redeem within that sixty days. This is but giving force to statutory requirements in accordance with precedent and common sense. To do less would permit an unscrupulous redemptioner, desirous of sacrificing the property mortgaged by forfeiting the same to himself, to suppress the very notice that the statute requires to be filed, and put a premium upon his own lawlessness by awarding him the fruits of his violation of plain statute. And this too in a court of equity! And the dissent charges the majority with judicial legislation because equitable principles are thus administered in conservation of the fund, the mortgagor's property, and indirectly applied upon the mortgagor's debts, and in prevention of a forfeiture sought by one claiming his rights because of his own success in suppression of notice, coupled with his fraudulent act in demanding payment the second time of a $2,000 mortgage once paid. Title to this property was worth upwards of $5,000. He would forfeit it to himself for $2,300, refusing that amount from Fox. This language is used advisedly. It appears, and that without challenge too, in the dissent, that Nelson has claimed as unpaid a mortgage aggregating over $2,000, which he knew was fully paid and should have been satisfied of record. He was the agent of the Advance Thresher Company with both actual and imputed knowledge of the facts of payment. He sets up this bogus paper claim, and says in effect, when the full amount of his debt with 12 per cent was tendered him, as well as pleads in his answer, "If you will pay me this further amount that is not owing me, you may redeem." The dissent would characterize Fox as a speculator with Nelson, "penalized

for relying on the statements made to him by Fox, and precluded from realizing anything on the amount still due on the Advance Thresher Company's mortgage;" and "deprived of a valuable vested property right by one who has no standing, either in a court of law or equity,—by a speculator who has failed either to allege or prove any facts entitling him to recover." A seeming exaggeration wholly beside the proof. His valuable right was a "right" to a "forfeiture," a sacrifice of someone's property on a pretense.

In the dissent is found another untenable doctrine, not advanced by respondent, but born in the ingenuity of the writer of the dissent. It would apply the law of tender governing law actions to equity suits, and disregard the doctrine of equitable tender. Offer in the pleadings to do equity entitles petitioner to relief, if otherwise equity should intervene. 16 Cyc. 141. Brown v. Smith, 13 N. D. 580, 102 N. W. 171, is cited in the dissent as applicable. That was an action to recover possession of personalty. It was tried and a verdict directed, and on appeal a new trial was ordered. A law appeal with a law judgment awarded. The case before us is not one of an attempted discharge of an obligation by payment, and the rules relative to tender thereunder cannot apply. It is a distinct branch of equitable jurisprudence. Pom. Eq. Jur. § 8. As stated in the dissent, "the tender did not *pay* the *debt.*" Equity will still pay Nelson his debt and grant Fox his right to redeem. The question is whether equity will allow subrogation after a statutory tender for redemption purposes has been made. Our redemption statutes do not require that a redemptioner shall lose his equitable rights unless he keeps good his tender by deposit, as on discharge of an obligation. The equitable right accrues immediately upon tender made, and may be enforced. Payment into court as a condition for granting of equitable relief may be compelled instead. In equity the money is deemed in court. The decree will care for that. In my opinion the dissent is in all things unsound.

CHRISTIANSON, J. (further dissenting). Since the foregoing dissent was prepared, a concurring opinion has been written by Justice Goss for the conceded purpose of discussing the dissenting opinion. This procedure is, to say the least, somewhat anomalous, as I believe the books will be searched in vain for another instance where a majority

has found it necessary to defend its decision, and I sincerely hope that this procedure will not be deemed a precedent to be followed by this court in the future. This extraordinary proceeding is of itself an admission of the weakness of the conclusions reached by the majority members, and a confession on their part that their former opinion needs defense. I shall not attempt to go into any extended discussion of the concurring opinion, as the opinion itself is a sufficient refutation of its contents; and I would not enter into any discussion thereof whatever, were it not for the fact that some new and novel propositions are asserted therein.

The concurring opinion expresses its approval of the case of McDonald v. Beatty, cited in the dissenting opinion, and disclaims any intention to overrule the holding in that case. It is inconceivable how this can be seriously asserted. The principle announced in McDonald v. Beatty was *that a junior or subsequent redemptioner could in no manner question the regularity of a redemption, but that the only person who could successfully question the regularity thereof was the holder of the certificate of purchase.* The doctrine promulgated by the majority in this case is directly to the contrary, still it is asserted by Justice Goss that McDonald v. Beatty is not departed from.

The discussion in the concurring opinion of the present laws in this state regarding redemptions, and the so-called statute of limitations formerly existing in this state, identical with that construed by the supreme court of South Dakota in the case of Spackman v. Gross, indicates not only failure to distinguish the difference existing between the statutes in question, but also a failure to comprehend between the different principles which are involved in the two cases. Under the law construed in Spackman v. Gross, the rights of two classes were involved; first, those of the holder of the certificate; and second, those of subsequent redemptioners, because in the absence of a redemption any person (entitled to do so) might redeem within one year from the date of sale, but a redemption reduced the period in which a subsequent redemptioner might redeem to sixty days after such former redemption was made. Therefore, a redemption made during the year of redemption would limit and restrict the rights of other redemptioners. Under the laws now existing in this state a redemption can in no manner adversely affect the rights of a subsequent redemptioner. Un-

der no circumstances is the period of redemption limited or restricted by such redemption,—and under certain circumstances the period may be extended; hence, a radically different condition exists. There was a reason for holding as was done by the South Dakota court, that where a party insists upon invoking a short time statute of limitations, and depriving another of a right which he otherwise would have had, that then the party seeking to invoke the statute must show a strict compliance with the terms thereof; but under the present laws of this state that condition does not exist,—and cannot exist as the rights of a subsequent redemptioner cannot possibly be limited or restricted by a former redemption; hence, it is perfectly logical to hold as was done by this court in McDonald v. Beatty, that a subsequent redemptioner is not concerned in, and cannot question, the regularity of a former redemption, and that the only persons concerned are the redemptioner and the holder of the certificate of purchase. In the case of Spackman v. Gross, Johnson's right to redeem still existed, unless it had been terminated by the prior redemption made by Spackman. In the present case exactly the contrary condition exists,—Fox concededly has no right to redeem unless he predicates such right on the redemption formerly made by Nelson. The contentions of the two parties are diametrically opposite.

The concurring opinion, in discussing the question of estoppel, presents this remarkable proposition: "Can a redemptioner be estopped from exercising his right of redemption, forsooth, because not a lawyer, he made a misstatement concerning the tenure of his holding, the legal effect of what in law constituted his mortgage?" The very assertion that Fox, the president of a National Bank, did not know the difference between a case where he had actual ownership of land, and others where he held it as security for payment of debts due him or his bank, is so absurd that it requires no answer. It is also asserted that Nelson suffered no injury. This is equally untenable. It should be remembered that Nelson owned all the encumbrances against the land, and that if Fox held as owner, then it was not necessary for Nelson to file any affidavit of the various liens he held, as a redemption by Fox as owner would merely constitute payment of the foreclosure certificate. The trial court found that the Advance Thresher Company's mortgage had not been paid, and I am satisfied that this finding is

entirely sustained by the evidence, although the testimony on this feature of the case is in such condition that it is impossible for anyone to determine the exact amount remaining unpaid; but Nelson contends that the amount is somewhere about $1,100. This amount Nelson is precluded from recovering. The trial court found it unnecessary to determine the amount due on this mortgage, as it held that Fox was not entitled to redeem. If the majority desired to do equity, they should at least return the case to the district court and permit the amount due on this mortgage to be determined, and compel Fox to pay this as a part of his redemption. The concurring opinion says that this property was worth upwards of $5,000. There is absolutely no testimony as to the value of the property in the record; hence, this is a mere conjecture on the part of the writer of the concurring opinion, and not based upon any evidence in the case.

The concurring opinion also intimates that an unscrupulous redemptioner might suppress the notice of redemption, and intentionally withhold it from record. How could it possibly injure a subsequent redemptioner? Such redemptioner would have at least as long a time in which to redeem as though the former redemption had not been made. And the law has prescribed exactly what he must pay to effect a redemption, and has designated the sheriff of the county as the agent for the person entitled to receive the redemption money. This argument in the concurring opinion is so fallacious that a mere statement of the proposition demonstrates its unsoundness. And in this case it is undisputed that Fox had actual notice of the redemption made by Nelson.

The concurring opinion speaks of an "unscrupulous redemptioner," and a "forfeiture," and refers to other matters which can have no application in this case. The only rights forfeited in this case are those of Nelson. Under the holding of the majority, Fox is given an opportunity to redeem if he sees fit to do so; but if for some reason he does not care to redeem, there is no way whereby the defendant can compel him to do so. Plaintiff has not placed one cent where defendant can get it. The decree is one-sided. The option is given to the plaintiff. Not only is this true, but Fox is also relieved from the payment of interest. It is conceded that he has never deposited the money in a bank for the use of the defendant, nor paid the same into court, and yet the majority says, not only that plaintiff shall be

permitted to redeem, but that, although he has had the use and benefit of the money at all times, still plaintiff shall not be required to pay interest. It should be remembered that under the theory of the plaintiff, the amount required to redeem in this case was not uncertain, but consisted of a definite and fixed amount which he claims to have tendered; hence, even under the common law requirement referred to in Brown v. Smith, 13 N. D. 580, 102 N. W. 171, and contended for by Justice Goss in his concurring opinion, plaintiff should be required to pay interest. Shank v. Groff, 45 W. Va. 543, 32 S. E. 248; Shields v. Lozear, 22 N. J. Eq. 447; Daughdrill v. Sweeney, 41 Ala. 310; Clark v. Neumann, 56 Neb. 374, 76 N. W. 892.

The concurring opinion also criticizes the citation of Brown v. Smith, supra, in the dissenting opinion, and says that that case was an action at law. It will be observed, however, that the holding in that case is based solely upon a construction of the statutes of this state relative to the sufficiency of a tender to effect a redemption from a chattel foreclosure sale. Will it be contended that a statute means one thing in an action at law, and another in an equitable action? A court of equity is not superior to law, but is a creature of the law, and just as much subject to and bound by the laws of this state as a court of law. One of the maxims of equity is that "equity follows the law."

I am compelled to adhere to the views expressed in my former dissent, as well as those expressed above, in all of which Chief Justice Fisk fully concurs.

IDA B. HEALY v. THE BISMARCK BANK, a Corporation, and Frank Barnes, as Sheriff of Burleigh County, North Dakota.

(153 N. W. 392.)

Homestead laws — widows — children — deceased persons — homestead interest.

1. The homestead laws of North Dakota were made for the protection of

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Note.—As to whether the continuance of the family is a condition of the continuance of the homestead, where its existence is a condition of the inception of the homestead, see note in 16 L.R.A.(N.S.) 111.

the widows of deceased persons as well as for that of their children, and if such a widow had once had a homestead interest during the lifetime of her husband, such interest will not be devested upon the death of her husband merely because she happens to have no children, or because her children have grown up and no longer need her care and support.

Homestead — title to property claimed as — name of wife — name of husband.

2. It is immaterial under the statutes of North Dakota whether the title to the property which is used as a homestead is in the name of the wife or in that of the husband, and property which was held in the name of the wife, but which was occupied as a home, may be claimed by the wife after the death of the husband.

Homestead laws — liberally construed — family — protection of.

3. The homestead provisions of the Code are liberally construed as being intended for the protection and preservation of the family as a whole, including the wife.

Homestead — abandonment — occupied by widow — after death of husband — house rented — room reserved — furniture stored — intention and acts.

4. A homestead will not be deemed to have been abandoned where a widow has occupied the same exclusively for ten years after the death of her husband, and until her children have married or became able to take care of themselves, and who, since that time and for a period of two years, has rented the house on a month to month lease, and has spent her time visiting with her children, but has nevertheless retained a room in said house in which her furniture has been stored, and which, though crowded, she has herself occupied from time to time between the visits to her children, and has always intended to retain as a homestead.

Opinion filed June 3, 1915.

Appeal from the District Court of Burleigh County, *Nuessle,* J. Action to avoid the lien of a judgment and to enjoin the execution thereof. Judgment for plaintiff. Defendants appeal.

Modified and Affirmed.

Newton, Dullam & Young, for appellants.

Respondent never filed any declaration of homestead as to the land involved. She owned the fee title. No family was with her, and she occupied only a room in the house, at intervals, the property being rented out by the month to strangers. The homestead laws are not

for the benefit of individuals, but for the family as a whole. Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684; First International Bank v. Lee, 25 N. D. 203, 141 N. W. 716; 15 Am. & Eng. Enc. Law, 2d ed. 526; Rev. Codes 1905, § 5072, Comp. Laws 1913, § 5628.

Plaintiff does not claim this property as her homestead, as coming to her through the death of her husband. Rev. Codes 1905, § 8087, Comp. Laws 1913, § 8723.

The plaintiff was not the head of a family. Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

The homestead exemption is a privilege, rather than an estate. It is for the family, and is made free from the burden which rests upon other property for this reason. The exemption is given to enable the owner to meet the burden of support of the family. If there is no family, there is no such burden. Herrin v. Brown, 44 Fla. 782, 103 Am. St. Rep. 182, 33 So. 522; Calhoun v. McLendon, 42 Ga. 405; Hall v. Matthews, 68 Ga. 490; Cooper v. Cooper, 24 Ohio St. 488; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Santa Cruz Bank v. Cooper, 56 Cal. 339; Waples, Homestead & Exemption, pp. 88 et seq; Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145; Fullerton v. Sherrill, 114 Iowa, 511, 87 N. W. 419; Stanley v. Snyder, 43 Ark. 429.

The plaintiff, in any event, had abandoned the property as a homestead, if one ever existed. Klemmens v. First Nat. Bank, 22 N. D. 304, 133 N. W. 1044.

Miller & Zuger, for respondent.

The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws exempting from forged sale to heads of families, a homestead. Const. § 208; Rev. Codes 1905, § 5049, Comp. Laws 1913, § 5605.

The homestead right extends to the surviving husband or wife. Rev. Codes 1905, § 8087, Comp. Laws 1913, § 8723.

The intent of the law is to continue the exemption for the benefit of the surviving family after the death of the owner. The right is also extended to the wife or minor children. Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684; Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684.

The right is not personal to anyone; it is a family right. First International Bank v. Lee, 25 N. D. 197, 141 N. W. 716.

The existence of a family is necessary to the inception of a homestead right, but not to the continuance thereof. Once the right exists, it continues until devested in the manner provided by statute, which in this state can be only by death, voluntarily alienation, or abandonment. Palmer v. Sawyer, 74 Neb. 108, 103 N. W. 1089, 12 Ann. Cas. 715; Dorrington v. Myers, 11 Neb. 388, 9 N. W. 556; Galligher v. Smiley, 28 Neb. 189, 26 Am. St. Rep. 319, 44 N. W. 187; Stults v. Sale, 92 Ky. 5, 13 L.R.A. 743, 36 Am. St. Rep. 575, 17 S. W. 148.

The original owner has the same right as the survivor. The same right exists as to his own property as is given to him in his wife's property after her death. Blum v. Gaines, 57 Tex. 119.

The law does not withdraw from the widow her right, and the shield that protected her in the lifetime of her husband, upon his death. Holmes v. Holmes, 27 Okla. 140, 30 L.R.A.(N.S.) 920, 111 Pac. 220, overruling Betts v. Mills, 8 Okla. 351, 58 Pac. 957.

Any other construction would render the survivor who has been deprived of the family by accident or disease, or for some other reason over which he had no control, liable to be instantly turned out of his homestead by his creditors. Beckmann v. Meyer, 75 Mo. 333.

After a homestead estate has once been acquired under the statute, it continues in the original owner so long as he occupies it as his homestead, although he may have ceased to be a housekeeper for a family, and will be extinguished only in some one of the ways mentioned in the statute. Weaver v. First Nat. Bank, 76 Kan. 540, 16 L.R.A.(N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; Ellinger v. Thomas, 64 Kan. 180, 67 Pac. 529.

Where a woman who rents her homestead, but reserves and retains one room in which she stores her furniture, and occupies the same at her convenience, there is no abandonment. Cross v. Benson, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558; Rosenberger v. Hawker, 127 Iowa, 521, 103 N. W. 781.

BRUCE, J. The only question in this case is whether the plaintiff, Ida B. Healy, had, at the time of the levy of the execution, a homestead interest in a certain house and lot in the city of Bismarck.

The only testimony upon the question is given by herself, and is as follows: I am the widow of Anderson Healy and the plaintiff in this action. We were married in 1882, in Nova Scotia. I came to Bismarck in 1883, where we first resided in a rented house on Ninth street. In 1896 we became the owners of lot 8, block 55, Northern Pacific Addition to the city of Bismarck, title to which was taken in my name. At that time we, or either of us, did not own any other property in the city of Bismarck or state of North Dakota. The purpose of purchasing said premises was to have a home. There were no buildings on the premises at the time we purchased the same. In 1896 and the spring of 1897 we built a dwelling house on said premises and moved into it about March, 1897. At that time neither my husband nor I owned any other real property. We occupied the premises generally and continuously from 1897 to 1901, until the death of my husband, the 27th day of June, 1901. He died at our home, described in the complaint. We had two children. I have never married again. Since the death of my husband I have lived at and in the property described in the complaint. No one other than my children have lived with me in said premises since the death of my husband, except in the two years last past, during which time Mr. Staley has lived there. Before that I lived there right along. Mr. Staley has lived in the house the last two years. There was no lease—just rented it from month to month. He has not rented any other premises. I have one large room that I withheld for myself. My furniture is in the room I spoke of,—my home. I have never sold the premises.

Q. Now, where have you been or resided during the last two years, or such part of the time as you have been away from Bismarck?

A. I visited with my mother for three or four months in Nova Scotia, and since that time I have been nearly all of the time with my daughter, Mrs. Rittgers, at Jamestown, going back and forth to Bismarck. There was about six months after I came back from Nova Scotia that I was right here in Bismarck, and was in my room most of the time.

Q. Has your residence with your daughter at Jamestown been in the shape of visits or otherwise?

A. I was visiting most of the time. It was not my intention at any time to abandon my home in Bismarck. I have not at any time

since the death of my husband had any other home than this home at Bismarck. I have not at this time any other home. My son, Ernest Healy, is not married. He is twenty-nine in August. I do not know for what indebtedness the notes were given by myself and my husband. As I remember it, it was for stock at the store, the little grocery store. I couldn't say, though, just what it was. I have really forgotten. We had a small store.

Q. Do you know whether it was for the purchase price of the lots or not?

A. I do not know whether it was or not.

Q. Mrs. Healy, don't you know what these notes were given for?

A. No, I can't say. I don't know what they were given for.

Q. Do you know the date of the notes?

A. I don't. I occupied the house on lot 8 until about two years ago. I did some private boarding there. I stored my furniture in the northwest room usptairs. The room is about 8 or 10 by 11 or 12. I have dressers, rugs, chairs, tables, beds, just about what I had in my house. Nearly all, excepting a few pieces that I sold out of my parlor. I would think there were probably three beds. I would not be just sure. None of them are set up at the present time. I have a dining room table, and then I have a kitchen table, and about three small tables, just little tea stands that I had in the bedrooms for the boarders. There are three dressers. I would not know how many chairs, because I had some kitchen chairs and some dining room chairs. Perhaps all together there would be eleven or twelve. I had no reason for counting them. I just kept getting them as I had to, and couldn't say for certain. Some rocking chairs, I couldn't say just how many. Just a few common dishes, perhaps half a dozen ordinary books. I have three rugs there. No carpets. I have one of those little gasolene stoves in my room. The room is pretty well occupied with the furniture that is stored there. Pretty well filled up. None of the furniture is packed up ready for shipment and never has been. None is crated. I have some bedding just thrown loosely on some chairs. I have cooking utensils in the room. I have all the little things to put on the stove and so on. In fact, I have most everything of my cooking utensils in that room that I had in my kitchen, because I took them out of Mrs. Staley's way. They are the things I used while I was keeping the premises. I

have been away quite a good part of the time since I rented the house to Mrs. Staley. Most of the time, aside from the time I spent in Nova Scotia, has been spent at Jamestown. There was about six months after I returned from Nova Scotia that I was here in Bismarck.

Q. Where did you reside while you were in Bismarck?

A. Ernest had a couple of rooms. He was working for H. L. Reade, of the Union Mercantile Company. He was working for the Union Mercantile Company while I was here. His rooms were in the little building near the Union Mercantile,—I think about five or six blocks south of the premises I formerly lived in.

Q. And you stayed in those rooms during those six months that you were in Bismarck?

A. No, about three months. Then I went to Jamestown with my daughter, Mrs. Harry Rittgers. Mrs. Rittgers has been married about two years. She lived with me until she was married two years ago, and helped me keeping the boarders, a very little, as she was always in school. She was married before. She was first married in the year 1906, and then she married the second time in 1911. She made her home with me until she was first married in 1906.

Q. Now, isn't it a fact, Mrs. Healy, that you have, since you have been in Jamestown, spent some of your time keeping house with Ernest?

A. I have in rooms that were furnished—Mr. and Mrs. Rittgers's rooms—while they were at Grand Forks. Ernest and I kept house. I cooked his meals for him in their rooms. Ernest has been employed at Jamestown for sometime. He is not married. He is twenty-nine years old. I was in Bismarck probably a little more than three months during the last two years. I was in Nova Scotia about between three and four months, beginning two years ago this last June. I then returned to Bismarck. I was here a little more than three months. That was the time I occupied the rooms that Ernest had. I went to Jamestown shortly after that when I got my arrangements made. I have been there since, off and on. I am here in Bismarck about every two months. When I am here I stay sometimes three to four days and have been here a week. I come down here to visit friends and to look after my home and so on,—collect my rents here and look after repairs. I

sometimes stay with friends when I come to town, and sometimes I stay right in my room at Mr. Staley's,—at my home.

Q. At those times you have stayed in a room furnished by Mr. Staley?

A. Not always. I stayed in my room most of the time until last winter, when it was not heated, and I stayed there and slept in a room downstairs because they did not want me to go up there in the cold. I have not a couch nor a cot in my room. I have not at any time during the past two years had a cot or a couch in there. I had a small bed. Mr. Staley pays $30 a month. When I went to Jamestown and kept house for Ernest I did not take any of my furniture with me. I did not take any bedding or articles of furniture. I did not purchase the lots from the Bank of Bismarck. I did not borrow any money from the Bismarck Bank for which these notes were given. It was not a debt of mine. I know that the lots were paid for at the time I built the house. Mr. Rhud built the house and he furnished the lumber. Grambs Brothers furnished the plumbing. None of the material in connection with the building was furnished by the Bismarck Bank and none of the labor. It is certainly my intention to continue to reside in Bismarck and on these premises.

Q. You say, Mrs. Healy, that you once in a while have stayed in this room in this house?

A. Yes.

Q. These different times since have been since this suit was started, haven't they, Mrs. Healy, last spring?

A. No, I would not think so because that would be during last winter.

Q. How often have you stayed there?

A. When I came back from Nova Scotia I was there, and then two different times since. One of these times is not my present trip here. I am not staying there now because I do not think it would be very comfortable or convenient for my daughter. I am with a friend. I can get the different dates as to the other two times if it is necessary. I will look it up. In 1907, when I conveyed lot 7 to Ernest, he was working at the Union Mercantile Company, paying his way. At that time my daughter was married and lived with her husband. It has never at any time been my intention to abandon my home in Bismarck and make my home at any other place.

The homestead rights in North Dakota differ in many respects from those in other states. The principal statutes upon the subject are as follows: Section 5605, Compiled Laws of 1913: "The homestead of every head of a family residing in this state, not exceeding in value $5,000, and if within a town plat, not exceeding 2 acres in extent, and if not within a town plat, not exceeding in the aggregate more than 160 acres, and consisting of a dwelling house in which the homestead claimant resides and all its appurtenances and the land on which the same is situated shall be exempt from judgment lien and from execution or forced sale except as provided in this chapter." Section 5606, Compiled Laws of 1913: "If the homestead claimant is married the homestead may be selected from the separate property of the husband, or with the consent of the wife, from her separate property. When the homestead claimant is not married, but is the head of a family, within the meaning of § 5626, the homestead may be selected from any of his or her property; provided, that the homestead so selected must in no case embrace different lots or tracts of land unless they are contiguous." Section 5626, Comp. Laws 1913, provides: "The phrase 'head of a family' as used in this chapter includes within its meaning: 1. The husband or wife when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this chapter. 2. Every person who has residing on the premises with him or her and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth or adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." Section 5627, Comp. Laws 1913, provides: "Upon the death of a person in whom the title to real property constituting a homestead as defined in this chapter is vested a homestead estate in such real property shall survive, descend and be distributed to the persons and in the order following: 1. To the surviving husband or wife for life; or, 2. There being no surviving husband or wife, to the decedent's minor child or children until the youngest attains majority; or, 3. The sur-

viving husband or wife dying before, then thereafter to the decedent's minor child or children until the youngest attains majority."

Section 8723, Compiled Laws of 1913, provides: "Upon the death of either husband or wife the survivor, so long as he or she do not again marry, may continue to possess and occupy the whole homestead, and upon the death of both husband and wife the children may continue to possess and occupy the same until otherwise disposed of according to law. Such homestead, as defined in § 5605 of the Civil Code, must be ascertained and set apart as hereinafter prescribed upon the selection of the person or persons entitled to possession thereof, and shall not be subject to the payment of any debt or liability contracted by or existing against the husband or wife or either of them previous to or at the time of the death of such husband or wife."

It seems quite clear from these statutes that the homestead laws were made for the protection of the widow whether she has children to support or not, and that if the property was once a homestead, such widow will not lose her interest therein merely because her children have grown up, or she does not happen to have any. It also seems to be immaterial whether the fee to the homestead during the lifetime of the husband and wife was in the husband or in the wife. In construing these identical statutes, the supreme court of South Dakota in the case of Wells v. Sweeney, 16 S. D. 489, 102 Am. St. Rep. 713, 94 N. W. 394, said: "So far as the rights of the surviving husband, wife, or minor children to occupy the property as a homestead are concerned, it is not material in which party the legal title is vested, and hence, if there are heirs of the party holding the legal title, they will not be entitled to a partition of the property during the lifetime of the surviving husband or wife or minor children who actually possess and occupy the premises as a homestead."

In the case of Dieter v. Fraine, 20 N. D. 484, 128 N. W. 684, we held that the homestead provisions of this state should be liberally construed, and that the exemption which is declared in favor of the head of the family is in a representative capacity, and is intended not for the benefit of the individual, but for the protection and the preservation of the home, and for the benefit of the family as a whole, and that such exemption is not presumed to be waived by a failure to expressly claim it. In the case of Calmer v. Calmer, 15 N. D. 120, 106 N. W. 684, we

said: "The intent of the law to continue the exemption for the benefit of the surviving family after the death of the owner of the homestead is too clear for question. . . . The exemption right is not only continued after the death of the family head, but is enlarged so as to possess all the attributes of an estate in the property *for the benefit of the widow* or minor children, superior not only to the rights of the creditors, but also to the rights of the legal heirs or devisees. The legislature, it is true, has not provided any specific method of procedure by which to adjust the respective rights of the widow and the creditors of a decedent's estate in case such adjustment becomes necessary. Where the right is clear, however, it will not fail for want of a remedy." In the case of First International Bank v. Lee, 25 N. D. 197, 141 N. W. 716, we said: "The law does not look upon the right to exemptions as a personal right of the husband, or even as being given to the husband at all. It is a family right, rather than a personal right."

There can be no question that the property in controversy was the homestead of Mr. and Mrs. Healy during the life of the husband, and it is immaterial whether the title was in her name or not. The statute expressly provides that such homestead can be selected from the separate estate of the wife. Section 5606. The evidence, too, seems to show that though the title to the property was taken in the name of the wife, it was paid for out of the savings of both parties. The house at any rate was the only home of the husband and wife, and has been the plaintiff's only home since the death of her husband. It was their homestead at the time the debt to the bank was incurred. After the death of her husband, in 1901, the wife occupied and lived in the house with her children for at least ten years, and did not even rent a portion of it until within two years of the time of the trial, and then only upon a month to month lease which reserved to her a room for her own use. During a portion of these ten years, she kept boarders in the house and supported her daughter while the latter was going to school. Section 8723, Compiled Laws of 1913, which provides that upon the death of either husband or wife, the survivor, so long as not again married, may continue to possess and occupy the whole homestead, and upon the death of both husband and wife, the children may continue to possess and occupy the same "until otherwise disposed of according to law," makes it clear that it was the intention of the law that the protection should be fur-

nished to the wife and widow as well as to the children of a married man.

There can be no doubt that if the title had been in the husband the interests of the wife would have been protected. "Why," says the supreme court of Kentucky, "should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally at least with the former? Is the party to be worsted because he owns the property? Can any reason be given why the same right should not exist as to his own property as is given to him in his wife's property after her death?" Stults v. Sale, 92 Ky. 5, 13 L.R.A. 743, 36 Am. St. Rep. 575, 17 S. W. 148. If this is true where the title is in the husband, how much more should it be true where the title is in the wife. It could never have been the policy of the legislature and of the law that the homestead of the wife shall be protected during the life of her husband and that when he dies that protection shall be taken away. "It would turn into mockery the constitutional provision prepared against the days of her adversity, to say that her husband's creditors may enter as soon as the hearse has left the door." Cross v. Benson, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558. "The beneficent purpose of both statutes," says the supreme court of Oklahoma, "is to preserve and protect the home in the possession and enjoyment of not only the head of the family but *all* the members thereof. . . . It seems to us that it would be a construction strained and foreign to the spirit of the statute, to hold that it was intended, so long as the husband, who may by labor support his wife, to protect the wife against the misfortune of being deprived of her home to satisfy the debts of the husband, who has perhaps suffered a business failure or financial loss; but when the hour of death comes, with its sorrow and the expenses that sickness and death entail upon the family, the law will then withdraw from her the shield that protected her in her home while her husband lived, and let the accumulated misfortunes or improvidences of the husband that the law has withheld until the dark hour of his death be then visited upon her. This would indeed be converting that which was intended for a shield into a sword." Holmes v. Holmes, 27 Okla. 140, 30 L.R.A.(N.S.) 920, 111 Pac. 220, overruling Betts v. Mills, 8 Okla. 351, 58 Pac. 957.

Nor do we believe that the fact that the children of the plaintiff have now grown up, and perhaps no longer need her support and no longer

need the home, in any way, alters the case. The homestead was for the protection of the family, and not only does § 8723, Compiled Laws of 1913, provide for the possession of homesteads by widows and widowers, but it is plain that it was the intention of the law that the wife should be looked upon as a constitutent part of the family.

We hold, in short, with the supreme court of Kansas, that after the homestead estate has once been acquired under the statute, it continues in the original owner so long as he occupies the homestead premises, although he may have ceased to be a housekeeper for a family, and will only become extinct in some of the modes mentioned in the statute, of which ceasing to be a housekeeper for a family is not one. Weaver v. First Nat. Bank, 76 Kan. 540, 16 L.R.A.(N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; Ellinger v. Thomas, 64 Kan. 180, 67 Pac. 529; Beckmann v. Meyer, 75 Mo. 333.

We think, too, there is no merit in respondent's contention that the homestead has been abandoned. The plaintiff never at any time relinquished the control of the house. She merely rented it month by month. She reserved a room in the house, even though it was occupied as a whole by tenants. She was simply doing what nine out of ten widows whose children have grown up would do, that is, reserving the central homestead and the right to return thereto as a shelter against adversity and as a permanent home, but, relieving the monotony and loneliness of life by visiting her children and friends as occasion offered. Such acts do not constitute an abandonment of a homestead. See Rosenberger v. Hawker, 127 Iowa, 521, 103 N. W. 781.

Although the judgment of the district court should, in all material essentials, be affirmed, the injunction which was issued should be modified so that, instead of being perpetual, it should be limited to the time during which the premises continue to be a homestead.

With the modification suggested the judgment of the District Court is affirmed. The costs and expenses of this appeal, however, will be borne by the appellant.

J. A. STOCKTON v. MALCOLM TURNER, Archie J. Gorthy, J. M. Caldwell, and J. Lindberg.

(153 N. W. 275.)

Written instruments — note — mortgage — legal inception — delivery — intention of parties.

1. As a general rule, a written instrument such as a promissory note or a mortgage has no legal inception or valid existence until it has been delivered in accordance with the intention of the parties.

Note — mortgage — makers — title — delivery — acts amounting to.

2. The makers of a note and mortgage cannot by subsequent conduct or instructions affect or devest title, if, at the time of the execution of the note and mortgage, they have performed acts amounting to a delivery.

Evidence — mortgage and notes — delivery.

3. Evidence examined, and *held* that the note and mortgage were delivered to the plaintiff.

Evidence — consideration.

4. Evidence examined, and it is *held* that all the defendants received full consideration for the note and mortgage involved in this action.

Opinion filed May 11, 1915. Rehearing denied June 7, 1915.

From a judgment of the District Court of Foster County, *Nuessle,* Special J., defendants appeal.

Affirmed.

A. C. Lacy and *John Carmody,* for appellants.

Every contract on a negotiable instrument is incomplete and revokable until delivery of the instrument for the purpose of giving it effect. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679; Ayres v. Milroy, 53 Mo. 516, 14 Am. Rep. 465; 16 Cyc. 578, 579; Pepper v. State, 22 Ind. 399, 85 Am. Dec. 430; Dixon v. Bristol Sav. Bank, 102 Ga. 461, 66 Am. St. Rep. 193, 31 N. E. 96; Miller v. Sears, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589; Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66; Riggs v. Trees, 120 Ind. 402, 5 L.R.A. 696, 22 N. E. 254; Clements v. Hood, 57 Ala. 459; Hamill v. Thompson, 3 Colo. 518, 14 Mor. Min. Rep. 696; Hansford v. Freeman, 99 Ga. 376, 27 S. E. 706; Mays v. Shields, 117 Ga. 814, 45 S. E. 68; Daniels v. Gower, 54 Iowa, 319, 3 N. W. 424, 6 N.

W. 525; Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311; Davis v. Kneale, 103 Mich. 323, 61 N. W. 508; Hoit v. McIntire, 50 Minn. 466, 52 N. W. 918; Matteson v. Smith, 61 Neb. 761, 86 N. W. 472; United States v. Payette Lumber & Mfg. Co. 198 Fed. 881; Boswell v. Pannell, — Tex. Civ. App. —, 146 S. W. 233; Carpenter v. Carpenter, 141 Wis. 544, 124 N. W. 488.

There was no meeting of minds as to the amounts that were due under exhibit 1. It is the requisite of all contracts that the minds of the contracting parties must meet and consent to the same thing and at the same moment of time. Newlin v. Prevo, 90 Ill. App. 515; Peerless Glass Co. v. Pacific Crockery & Tinware Co. 121 Cal. 641, 54 Pac. 101; Wagner v. Egleston, 49 Mich. 218, 13 N. W. 522; Board of Trade v. DeBruyn, 138 Mich. 187, 101 N. W. 262; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Sutter v. Raeder, 149 Mo. 297, 50 S. W. 813; Brophy v. Idaho Produce & Provision Co. 31 Mont. 279, 78 Pac. 493; Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; McGavock v. Morton, 57 Neb. 385, 77 N. W. 785; Columbus, H. Valley & T. R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Foshier v. Fetzer, 154 Iowa, 147, 134 N. W. 556; Jules Levy & Bro. v. A. Mautz & Co. 16 Cal. App. 666, 117 Pac. 936; Cunningham Mfg. Co. v. Rotograph Co. 30 App. D. C. 524, 15 L.R.A.(N.S.) 368, 13 Ann. Cas. 1147; Luckey v. St. Louis & S. F. R. Co. 133 Mo. App. 589, 113 S. W. 703; Miller v. Sharp, 52 Ind. App. 11, 100 N. E. 108; Elks v. North State L. Ins. Co. 159 N. C. 619, 75 S. E. 808.

Edward P. Kelly, for respondent.

Formal delivery of a deed to the grantee in person is unnecessary. If the grantor in the deed intends, when executing it, to be understood as delivering it, that is sufficient. The intention of the party is the controlling element. Walker v. Walker, 42 Ill. 311, 89 Am. Dec. 445; Rushin v. Shields, 11 Ga. 636, 56 Am. Dec. 436; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147.

Leaving a deed duly acknowledged, signed, and sealed in the possession of the officer who takes the acknowledgment, without the grantor doing or saying anything to qualify the delivery, is not a mere delivery in escrow. Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478; Lady Superior of Cong. Nunnery v. McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184; Doe ex dem. Newlin v. Osborne, 49 N. C. (4 Jones,

L.) 157, 67 Am. Dec. 269; Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510.

The unauthorized delivery of a deed may be ratified by the grantor, as by an acceptance of the consideration from the grantee. Van Amringe v. Morton, 4 Whart. 382, 34 Am. Dec. 517.

Where parties agree upon the general terms of a contract, they are bound by it, although their understanding of its terms is not precisely the same. Neufville v. Stuart, 1 Hill, Eq. 159.

Whether the minds of the parties met is a question of fact. Thurston v. Thornton, 1 Cush. 89; Winchester v. Howard, 97 Mass. 304, 93 Am. Dec. 93.

Whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe he was assenting to the terms of the other party, and upon such honest belief such persons contract in reference thereto, he will be bound by such conduct. Phillip v. Gallant, 62 N. Y. 256; Smith v. Hughes, L. R. 6 Q. B. 597, 40 L. J. Q. B. N. S. 221, 25 L. T. N. S. 329, 19 Week. Rep. 1059.

CHRISTIANSON, J. This is an action for the foreclosure of a real estate mortgage upon certain lands in Foster county. The mortgage bears date February 10, 1912, and secures the payment of a note dated on the same day in the sum of $2,883.75, bearing 7 per cent interest. The mortgage was signed by all four defendants named in the title of this action, and the note was signed by the defendants Turner and Caldwell, and payment thereof guaranteed by the defendants Gorthy and Lindberg.

The complaint is in the usual form. The answer admits the execution of the note and mortgage, but alleges that the same were never delivered to the plaintiff, but were placed in the Stutsman County Bank at Courtney, North Dakota, to be delivered to the plaintiff only when certain things should be done by one Coffey, the agent of the plaintiff. It is further alleged that these things were never done, and that the Stutsman County Bank never had authority to deliver the note and mortgage, and that for that reason they were as a matter of fact never delivered to the plaintiff; and, also, that certain payments were made by the defendants, and that the note and mortgage involved in this action are for a larger sum than that which defendants owed

to plaintiff at the time the note and mortgage were executed. The plaintiff obtained a judgment in the district court, and the defendants appeal, and ask for trial *de novo* in this court. A considerable portion of the material facts are not in dispute, but there is some conflict in the testimony on certain incidental questions.

The note and mortgage involved in this action were given as partial payment upon the balance due on a certain contract, or contracts, for the sale of land in Foster county. On April 12, 1909, one William Jones sold a certain 360-acre tract of land in Foster county to the four defendants named in the title of this action, for the agreed price of $10,800. At the time of the sale the defendants paid $2,000 in cash, leaving a balance of $8,800 remaining unpaid on the contract, payable as follows: $1,800 on December 24, 1909; $1,000 on December 24, 1910; and $6,000 on December 24, 1911. Such deferred payments were evidenced by promissory notes drawing 7 per cent interest, payable on the 24th of December of each year. This contract was offered in evidence on the trial of the action as Exhibit "1," and will be so denominated in our consideration thereof in this opinion. On the 16th day of August, 1910, William Jones, the vendor in Exhibit "1," purchased a 320-acre tract of land from the plaintiff for the agreed price of $12,680. The contract between the plaintiff, Stockton, and Jones, was also offered in evidence upon the trial as Exhibit "E," and will be considered under this designation. Jones at that time assigned to the plaintiff, Stockton, the contract, Exhibit "1," together with the notes mentioned therein, as collateral security for the payments due from Jones to Stockton. The only payments made upon Exhibit "1" and the notes therein described prior to the time of the assignment to the plaintiff, Stockton, were the first payment of $2,000, and $1,362.20 paid to Jones on December 24, 1909.

The defendants, thereafter, also made the following payments to Judge Coffey, who at that time was a practising attorney at Courtney, and represented the plaintiff in this action, to wit, $128.40 on September 8, 1910; $852 on December 24, 1910; $800 on July 24, 1911. These were all the payments made until April, 1912. On or about February or March, 1912, the whole balance of the purchase price under Exhibit "1," including the final payment of $6,000 was past due; and some of the payments under Exhibit "E" were also past due.

According to the computation of the defendants' attorneys, furnished in a supplemental brief filed in this court, there was on the 6th day of April, 1912, due upon Exhibit "1" and the notes covered thereby, a total sum of $7,851.93. Shortly prior to this time the plaintiff's agent, Coffey, was appointed judge of the fifth judicial district in this state, and found it necessary to remove his residence from Courtney to Jamestown, and he thereupon made several efforts to get the defendants together to make a settlement of their equitable interests in the contracts. Prior to this time the defendant Archie J. Gorthy had acquired from William Jones the interest of Jones in the contract, Exhibit "E," and the premises covered thereby. It appears that during February or March, 1912, at the time these negotiations were had, it was suggested by Coffey that these defendants obtain loans on the various lands covered by these contracts for the purpose of paying off encumbrances then outstanding against these lands, and that the balance of the money, if any, realized from such loans, be paid over to Mrs. Stockton to apply upon the balance due her. Judge Coffey testifies that he also suggested that they give a second mortgage upon one of the tracts and obtain some additional money to be paid to Mrs. Stockton, and that she take a second mortgage on the other tract for whatever balance might remain due her. At this stage of the proceedings, Mr. Nichols, president of the Stutsman County Bank at Courtney, was called in by the parties.

It was thereupon agreed that Judge Coffey should procure a deed from Jones for the land described in Exhibit "1," and a deed from the plaintiff, Stockton, for the land described in Exhibit "E." As the defendant Lindberg was living in Montana, it was agreed that for the sake of convenience in executing the mortgage loan papers, the deed from Jones for the land covered by Exhibit "1" was to run to Caldwell and Turner only. This was satisfactory to all the parties, and the deed was so taken, although all four defendants named in the title of this action were apparently still equally interested in and owners of the contract and the land described therein. The defendant Gorthy alone had any interest in the lands covered by Exhibit "E." So, the deed for that tract was, of course, to be executed to him as grantee. Nichols agreed that he would procure loans upon the lands in the amounts which he subsequently did. Judge Coffey procured the deeds

for the respective tracts as agreed upon, and delivered the same to Mr. Nichols. Nichols, also, proceeded to obtain the loans on the lands in question, and placed a first mortgage loan for $4,600, signed by Turner and Caldwell, against the land described in Exhibit "1," and a first mortgage loan for $5,000, and a second mortgage for $3,900, both signed by Gorthy alone, against the land described in Exhibit "E." Nichols was given general authority to go ahead, not only to close the loans, but to disburse the proceeds thereof. It being understood that he was first to pay off certain prior encumbrances against the lands, and pay the balance of the proceeds over to the plaintiff to apply on her claim. It is undisputed that Nichols paid off prior liens and claims against the lands covered by Exhibit "1," aggregating $4,215.12, which would leave a balance of only $384.88 of the proceeds of the first mortgage loan placed against these premises.

As already stated, a first mortgage for $5,000, and a second mortgage for $3,900, both executed by Gorthy, were placed against the lands covered by Exhibit "E." Nichols paid off prior encumbrances against this land aggregating $4,421, which leaves a surplus of $4,479, realized from the mortgages against the lands covered by Exhibit "E." There was therefore a total surplus of $4,863.88, realized from these three mortgage loans, after deducting the amounts utilized in paying off the prior encumbrances against all the lands. The proceeds realized from all these three mortgages were deposited by Nichols in his bank in a special account denominated the Caldwell-Turner loan account. Nichols drew checks against this account first in paying off the different mortgages, and next in making payments to the plaintiff. He also speaks of advancing moneys at different times.

During the negotiations for an adjustment between Judge Coffey and the defendants, it was agreed that the defendants Turner and Caldwell were to execute a note and second mortgage to the plaintiff, Stockton, upon the lands described in Exhibit "1." Thus far there is no substantial conflict in the testimony. But at this point a dispute arises, which is the reason for this lawsuit. The defendants Turner and Caldwell contend that they were to execute a note and mortgage only for the balance due on Exhibit "1," while Judge Coffey claims that they were to execute a note and mortgage for the amount remaining due to the plaintiff under Exhibit "E."

The defendants also claim that they executed the note and mortgage involved in this case under the belief that the same represented the amount remaining due on Exhibit "1." And they further claim that at the time of the execution of the note and mortgage, the contract, Exhibit "1," was not available, but that Judge Coffey agreed to forward the same from Jamestown, where it was kept among his papers, to Mr. Nichols, and that if any mistake was made in the amount that he would correct it. This is denied by Judge Coffey, who claims that he was not present at the time the note and mortgage were executed, but that he called Mr. Nichols on the telephone and gave him the amounts and dates of the various payments made on the contracts, and in this he is corroborated by Mr. Nichols. It is undisputed that the note and mortgage were drawn by Mr. Nichols, and that he made the computation of the amount remaining due before preparing the same. It is also claimed by the defendants that the note and mortgage involved in this action were delivered to Mr. Nichols conditionally, and that he was authorized to deliver them to Judge Coffey only when Judge Coffey had delivered to him the contract showing the payments made thereon, so that Mr. Nichols could ascertain definitely if the note and mortgage were for the correct amount.

It is doubtless true, as defendants' counsel contend, that a promissory note and mortgage do not become effective until delivered. See §§ 5891 and 6901, Compiled Laws, and First State Bank v. Kelly, ante, 84, 152 N. W. 125. But it is equally true that a delivery having been made, the maker of a note or the mortgagor in a mortgage cannot by subsequent acts or conduct limit the effect of the former delivery. "It is unquestionable law that a deed cannot be made an escrow by any other declarations than are made at the time of signing and executing the instrument. This is so held, in effect, in Souverbye v. Arden, 1 Johns. Ch. 240, where it is ruled, as has been already said, that the declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of a condition annexed to it, to be effectual, must be made at the time of executing it. It is the duty of the grantor, as the chancellor truly says, to speak then, and declare his intentions, if any he has, inconsistent with the natural and necessary result of the solemnity.

"The general principle of law is that the formal act of signing,

sealing, and delivery is the perfection and consummation of the deed; and it lies with the grantor to prove clearly that the appearances were not consistent with the truth. The presumption is against him, and the task is on him to destroy that presumption by clear and positive proof that there was no delivery, and that it was so understood at the time." Blight v. Schenck, 10 Pa. 285, 51 Am. Dec. 478. See also Lady Superior of Cong. Nunnery v. McNamara, 3 Barb. Ch. 375, 49 Am. Dec. 184; Doe ex dem. Newlin v. Osborne, 49 N. C. (4 Jones, L.) 157, 67 Am. Dec. 269.

We are satisfied from the evidence in this case that the note and mortgage involved in this action were executed and delivered to Nichols unconditionally for the purpose of transmitting the same to the plaintiff, and that the instructions on the part of the defendants, attempting to limit the effect of such delivery, were not given until some days subsequent to their execution and delivery. We do not believe that even the testimony of the defendants, taken as a whole, will sustain the contention of the defendants. The testimony of Nichols is to the effect that the defendant Turner came in a couple days after the note and mortgage had been executed, claiming that the amount was not correct.

The defendant Turner, on direct examination, testified in regard to this matter as follows:

Q. I will ask you whether or not you had any conversation with Mr. Nichols within a day or two after you had signed the note and mortgage, instructing him not to deliver the note and mortgage?

A. It was in the fall.

Q. What did you tell him?

A. Me and Mr. Caldwell went in there and instructed him not to deliver the note and mortgage.

And the defendant Caldwell testified as follows: "I told Mr. Nichols not to deliver the note or mortgage until it was satisfactory to all parties concerned, and I told him this some time afterwards, along late in the summer or in the fall some time, I cannot tell you the dates." It appears, therefore, that at the time the note and mortgage were executed, no conditions were attached to their delivery, but this was

an afterthought on the part of the defendants. As these defendants executed the note and mortgage and delivered them to Mr. Nichols for transmission to Judge Coffey, it seems clear that the defendants, after having executed and delivered the notes and mortgage in the manner agreed upon, cannot by subsequent instructions limit the effect of their former acts and be permitted to change an absolute delivery to a mere delivery in escrow. We are satisfied that the findings of the trial court in favor of the plaintiff in this action, that the note and mortgage were executed and delivered to the plaintiff, are sustained by the preponderance of the evidence in the case.

Nor do we think there is any merit in the contention of the defendants that they were induced to execute a note and mortgage for an excessive amount. And as we view the evidence, it is immaterial whether the defendants believed that they were executing a note and mortgage in settlement of the balance due on Exhibit "1," or the balance due on Exhibit "E," as the note and mortgage involved in this action would not in any event exceed the amount which was due to the plaintiff under Exhibit "1." The only payment made to the plaintiff, Stockton, by the defendants, aside from those already enumerated, was a payment for $200 made on June 12, 1912. On June 24, 1912, the defendants Turner and Caldwell executed and delivered the note and mortgage involved in this action. Thereafter Nichols made the following payments to the plaintiff: $2,000 on July 21, 1912, and $2,553.93, on August 5, 1912.

Nichols's testimony in regard to these payments, in response to questions propounded by the trial judge, is as follows:

Q. Mr. Nichols, you have testified as to the payment of $2,000 made the 25th of July, 1912?

A. Yes, sir.

Q. And the payment of $2,553.93 made August 5th, 1912?

A. Yes, sir.

Q. Where did that money come from?

A. It came out of real estate loans. They had an account, the Turner-Caldwell loan account, and we charged it all up to that account.

Q. *Now, the proceeds of what loans were turned into that account?*

A. *The first three mortgages, on this Jones and Turner-Caldwell land and on the Stockton land.*

Q. You turned the proceeds of the loans on the land that is described in Exhibit "1" and the proceeds of the loan on the land described in Exhibit "E" into the same account, and called it the Turner-Caldwell loan account?

A. Yes, sir; then there was also a second mortgage signed by A. J. Gorthy for something like $3,900, that was turned into that account too.

As already stated, it is conceded by the defendants' own counsel that, on the 6th day of April, 1912, the defendants were indebted to the plaintiff on Exhibit "1," and the notes described therein, in the total sum of $7,851.93, or $3,251.93 more than was realized from the first mortgage loan of $4,600. So far as the evidence in this case shows, the only thing which the defendants did in the way of raising money to pay off this indebtedness was by means of the mortgages placed on the lands; and there is also some testimony which indicates that the $200 paid on June 12, 1912, were the proceeds of a personal note given by Turner and Caldwell to the bank. Although, on the other hand, Nichols and Coffey testify that this was an advancement made by the bank. If the defendants be given credit for the proceeds of the first mortgage for $4,600 and the $200 payment, there would still remain a balance due on Exhibit "1" after the application of these payments, exceeding $3,000. There is not one word of testimony in the record to show that the defendants Caldwell and Turner contributed one cent of money in any other manner than that above indicated. Defendants' own counsel contend that the $2,000 payment made by Nichols on July 21, 1912, must have been derived from some other source, as the loans made by Gorthy had not been completed at that time. In order for us to sustain this contention we would have to absolutely disregard the testimony of Nichols, and we would have to so find without one word of testimony to sustain our findings. It seems self-evident that if the defendants Caldwell and Turner had contributed $2,000 or any part thereof, testimony to this effect would have been produced. It may be observed that, so far as the $200 payment is concerned, that considerable testimony was offered to show that this was derived, not from the proceeds of the loans, but from a personal note given by Turner and Caldwell to the bank, and, if they

had procured any other money in any other way than from the mortgages, doubtless testimony would have been produced to show this fact. It is rather singular that all four defendants answered jointly, and also took a joint appeal from the judgment, and still the sole argument for a reversal of the judgment is predicated on the theory that the defendant Gorthy alone should pay a large part of the indebtedness evidenced by the note and mortgage involved in this action. There is absolutely no contention on the part of any of the defendants that the amount of such note and mortgage is not the correct amount due to the plaintiff under Exhibit "E;" the only contention being on the part of the defendants Caldwell, Turner, and Lindberg, that they had no interest in the premises described in Exhibit "E," but that this was the individual transaction of Gorthy, and that the amount is greater than they owed on the contract, Exhibit "1." We are satisfied that these defendants are mistaken in this contention. And under the evidence in this case, all four defendants were doubtless indebted to the plaintiff under Exhibit "1," and the notes described therein, for at least the amount of the note and mortgage involved in this action.

The plaintiff has parted with title to her lands, and released her security. All this has passed to the defendants. She is only seeking payment for that which she has already conveyed.

The judgment rendered by the trial court was right, and is affirmed.

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APPEAL AND ERROR—continued.

Decisions Appealable.

Record on Appeal.

See also infra, 16.

1. While transactions between relatives or persons sustaining fiduciary relations will be closely scrutinized to see that no wrong is done, yet fraud, generally, is never presumed. The law presumes that all men are fair and honest, that their dealings are in good faith, and without intention to cheat, hinder, delay, or defraud others. *Held* that under the evidence in this case no fraud was shown. Krause v. Krause, 54.

Meeting of Minds.

2. To prove an express contract, one claiming thereunder must produce satisfactory evidence showing a meeting of the minds of the contracting parties as to the essential elements of such alleged agreement. If an implied contract is claimed, such a state of dealings must be shown that the law would imply such agreement. *Held:* The proofs in this case fall far short of what the plainest rules of evidence require. Krause v. Krause, 54.

Construction.

3. The first and main rule for the construction of contracts is that the intent of the parties as expressed in the words they have used must govern. Harney v. Wirtz, 292.
4. Time is never considered as of the essence of a contract unless by its terms expressly so provided. Sunshine Cloak & Suit Co. v. Roquette Bros. 143.
5. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. Harney v. Wirtz, 292.
6. The whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping interpret the others; but, however broad may be the terms of the contract, it extends only to those things concerning which it appears that the parties intended to contract. Harney v. Wirtz, 292.
7. Particular clauses of a contract are subordinate to its general intent; and words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties, are to be rejected. Harney v. Wirtz, 292.
8. The secret intention of the parties, if different from the expressed intention, will not prevail, as the law books to what the parties said as expressing their real intention. Harney v. Wirtz, 292.

Security for Costs.

2. Where a nonresident plaintiff fails to furnish security for costs as required by §§ 7812 and 7814, Compiled Laws of 1913, it is not error for the trial court to refuse to dismiss the action for such reason on a motion being made at the opening of the trial, and without other notice, though it would be error to refuse to enter an order, if asked for, ordering a dismissal of the case if such security were not furnished within a reasonable time to be fixed by the court, and for a continuance until such time. Bergh v. Wyman Farm Land & Loan Co. 158.

COUNTIES.

Removal of County Seat.

1. Following Miller v. Norton, 22 N. D. 196, it is held that the Revised Statutes of 1895 were new legislation, a change from old to new, and not a continuation of the old with amendments. Chapter 21, Political Code of 1877, has therefore been repealed, and is now superseded by chapter 42, Political Code, being §§ 3191–3244, Comp. Laws 1913. Dunn county was organized under the later law, and an election held under § 3233, Comp. Laws 1913, to determine whether the county seat should be removed from Manning to Dunn Center, is one for the *removal*, and not *relocation*, of said county seat. State ex rel. Ahern v. Anders, 572.
2. There is no provision for a location election in counties created from unorganized territory. But conceding, for argument only, that an election might have been held to relocate the county seat of Dunn county in 1914, the election in question cannot be now changed into one of that nature. State ex rel. Ahern v. Anders, 572.

Officers.

3. Under the provisions of § 172 of the Constitution, the legislature is empowered to fix the term of office of county commissioners. O'Laughlin v. Carlson, 213.

CRIMINAL LAW—continued.

REVIEW ON APPEAL.

4. Where the evidence is not before the supreme court, and instructions may or may not be erroneous, dependent upon whether within or without the scope of the proof, they will be deemed sufficient. State v. La Flame, 489.

CROPPERS.

Lien of thresher against grain grown by, see Liens, 4–7.

CROSS-EXAMINATION.

Of witness, see Witnesses, 2, 3.

CURING ERRORS. See Appeal and Error, 30, 31, 36.

DAMAGES.

PERSONAL INJURIES.

Right to recover for damages sustained in attempt to reduce damages, see Negligence, 1.

1. For a breach of an obligation not arising from contract, and except when otherwise provided by the Code of North Dakota, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. See § 7165, Comp. Laws 1913. Wilson v. Northern P. R. Co. 456.
2. Though as a rule damages which are occasioned by fright alone cannot be recovered in a tort action without proof of a physical injury, the mere fact that a person may have been frightened by fire, and that such fright may have had some influence in inducing her to fight against it, does not preclude a recovery for injury sustained in such attempt, where the exertion put forth was the exertion that a reasonably prudent person would have put forth under like circumstances. Wilson v. Northern P. R. Co. 456.
3. In a tort action damages can be recovered for injuries which proximately follow from the wrongful act, whether such injuries were or could have been anticipated or not. Wilson v. Northern P. R. Co. 456.

DEBT LIMIT. See Limitation of Indebtedness.

EVIDENCE—continued.

PRESUMPTIONS AND BURDEN OF PROOF.

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Presumption in favor of constitutionality of statute, see Constitutional Law, 2.
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As to regularity of taking of depositions, see Depositions, 2.
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See also infra, 14.

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Curing errors in admission by striking out, see Appeal and Error, 30, 31.
Curing errors in exclusion of evidence, see Appeal and Error, 36.
In action to set aside sheriff's deed, see Execution, 2.

2. An admission contained in defendant's answer in a former suit of the amount owing by him to plaintiff, and a tender of such sum to plaintiff, although afterwards withdrawn, is competent testimony in plaintiff's behalf. Horton v. Emerson, 258.

DOCUMENTARY EVIDENCE.

3. The storage tickets and stub thereof constitute one original instrument. The scale book ticket and stub likewise constitute one original exhibit. Said tickets and stubs, being properly identified and mutilations explained, were properly received in evidence. Farmers' Co-op. Elevator Co. v. Medhus, 251.

OPINION EVIDENCE.

Striking out of, see supra, 3.

4. One Reiser, witness for defendant, was asked certain questions relative to plaintiff's mental condition. Same were properly excluded because the witness had not shown himself competent to testify. Dowd v. McGinnity, 308.

INJURY TO ANIMALS ON.

1. Defendant was driving along a public highway in an automobile when he met a herd of cattle owned by the plaintiff. A heifer was injured through collision with the automobile. Evidence and instructions examined and, *held*:—That the trial court was correct in excluding testimony as to the speed of the automobile at a distance so far from the accident that it could not have any effect thereon. Armann v. Caswell, 406.
2. Certain instructions of the court construing § 2617, Comp. Laws, 1913, examined and *held* to be without error. The question of whether or not the cattle were running at large within the meaning of such section was properly submitted to the jury, and there was sufficient testimony to justify their finding against plaintiff. Armann v. Caswell, 406.
3. Instruction of the court as to the duty of the defendant in the premises examined and found free from error. Armann v. Caswell, 406.
4. Under the facts in this case the trial court would not have been justified in instructing the jury that defendant was negligent as a matter of law.

HOMESTEAD.

Mortgage of.

1. A mortgage on a homestead of a married man, in order to be valid must be both executed and acknowledged by the wife. Rasmussen v. Stone, 451.

Rights of Surviving Wife.

2. The homestead laws of North Dakota were made for the protection of the widows of deceased persons as well as for that of their children, and if such a widow had once had a homestead interest during the lifetime of her husband, such interest will not be devested upon the death of her husband merely because she happens to have no children, or because her children have grown up and no longer need her care and support. Healy v. Bismarck Bank, 628.
3. It is immaterial under the statutes of North Dakota whether the title to the property which is used as a homestead is in the name of the wife or in that of the husband, and property which was held in the name of the wife, but which was occupied as a home, may be claimed by the wife after the death of the husband. Healy v. Bismarck Bank, 628.
4. The homestead provisions of the Code are liberally construed as being intended for the protection and preservation of the family as a whole, including the wife. Healy v. Bismarck Bank, 628.
5. A homestead will not be deemed to have been abandoned where a widow has occupied the same exclusively for ten years after the death of her husband, and until her children have married or became able to take care of themselves, and who, since that time and for a period of two years, has rented the house on a month to month lease, and has spent her time visiting with her children, but has nevertheless retained a room in said house in which her furniture has been stored, and which, though crowded, she has herself occupied from time to time between the visits to her children, and has always intended to retain as a homestead. Healy v. Bismarck Bank, 628.

HUSBAND AND WIFE.

Judgment non Obstante Veredicto.

1. The laws of this state authorize a judgment notwithstanding the verdict only in cases where it is clear upon the whole record that the moving party is, as a matter of law, entitled to judgment on the merits. First State Bank v. Kelly, 84.
2. It is not sufficient to warrant such judgment that the evidence was such that the trial court ought to have granted either a motion for a directed verdict, or a new trial on the ground of insufficiency of the evidence to sustain the verdict, but it must, also, appear that there is no reasonable probability that the defects in or objections to the proof necessary to support the verdict may be remedied upon another trial. First State Bank v. Kelly, 84.
3. Such judgment is not warranted on the ground merely that the evidence was variant from and inadmissible under the allegations of the defendant's answer, but it must further appear that no amendment of the answer can properly be made making such testimony competent. First State Bank v. Kelly, 84.

Collateral Attack.

4. A judgment entered pursuant to findings of fact, conclusions of law, and an order for judgment, which were not filed until after the expiration of the term of office of the judge who made them, is not for such reason void, but at the most is merely irregular, and can be challenged only by a direct attack. St. Anthony & D. Elevator Co. v. Martineau, 425.

Conclusiveness.

5. A judgment in defendant's favor in a former action based on the contract and for a foreclosure of a mechanic's lien is not *res judicata* in the case at bar, for numerous reasons stated at length in the opinion. Horton v. Emerson, 258.

MORTGAGES DISTINGUISHED FROM OTHER TRANSACTIONS.

1. L. executed to H. a chattel mortgage upon the crop grown during the year 1904 on certain described real estate owned by the mortgagor. The granting clause was of "all the crops of every kind and description including hay," etc. Following the description of the real estate on which the crops were to be grown was the following statement: "And it is mutually covenanted and agreed that this mortgage is a charge and lien on said real estate until said debt hereby secured is paid, and said lien may be foreclosed in the same manner as other mortgages on real estate." The instrument was expressly named a chattel mortgage both at the top and on the back thereof. The habendum covered only the "personal property aforesaid," and all the provisions relating to the care and custody of the property, conditions of default, power of sale, and the sale, were confined to the personal property. *Held*, that the instrument did not constitute a mortgage on real estate, but constituted only a chattel mortgage. Harney v. Wirtz, 292.

CONSIDERATION.

2. Evidence examined, and it is *held* that all the defendants received full consideration for the note and mortgage involved in this action. Stockton v. Turner, 641.

DESCRIPTION OF LAND.

3. The erroneous insertion in a mortgage of the name of an adjoining county

Refreshing Recollection.

1. The testimony of the agent, after refreshing his memory from the tickets, was properly received under the circumstances of this case. Farmers' Co-op. Elevator Co. v. Medhus, 251.

Cross-Examination.

2. Error was committed in refusing to permit plaintiff to be examined as to whether he made statements to persons named, at times and places shown, that the alleged slanderous statements did him no injury. Remington v. Geiszler, 346.
3. The truth or falsity of the alleged slanderous statements turned on whether a promissory note given by defendant to one C., but drawn by Remington in his office in the presence of defendant, C., and the stenographer of plaintiff, Amanda Nelson, when drawn, contained an interest-bearing clause. Defendant claimed it was to bear no interest. It was negotiated, and, when presented to defendant, contained a provision calling for interest at 12 per cent. The alleged slander consisted of statements made by defendant accusing Remington of having changed the note after its delivery by insertion of the words, "interest at 12 per cent." The jury by their verdict found Remington had not altered it. Amanda Nelson was called as a witness of plaintiff, and testified to having seen defendant sign the note