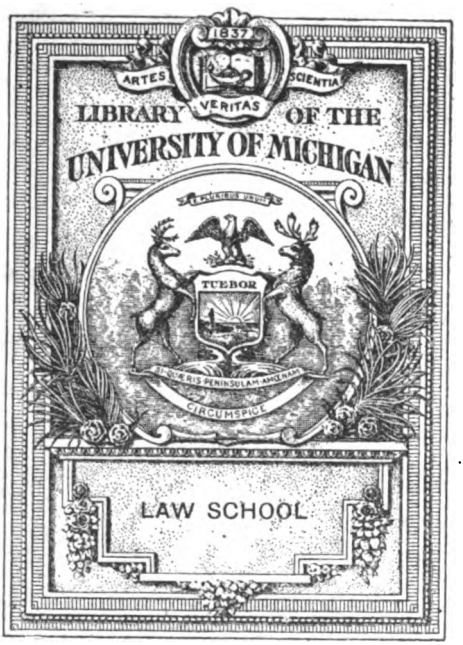

REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

December 11, 1920 to May 2, 1921.

JOSEPH COGHLAN
REPORTER

VOLUME 47

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1923.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. A. M. CHRISTIANSON, Chief Justice.
HON. LUTHER E. BIRDZELL, Judge.
HON. RICHARD H. GRACE, Judge.
HON. JAMES E. ROBINSON, Judge.[1]
HON. HARRISON A. BRONSON, Judge.

JOSEPH COGHLAN, Reporter.
J. H. NEWTON, Clerk.

[1] Became Chief Justice, Jan. 1st, 1921.

PRESENT JUDGES OF THE DISTRICT COURTS.

District No. One,
HON. CHARLES M. COOLEY.
HON. M. J. ENGLERT.
HON. A. T. COLE.

District No. Three,
HON. FRANK P. ALLEN.
[1]HON. FRED J. GRAHAM.
[2]HON. GEO. M. MCKENNA.

District No. Five,
[1]HON. FRANK FISK.
[1]HON. K. E. LEIGHTON.
[2]HON. GEO. H. MOELLRING.
[2]HON. JOHN C. LOWE.

District No. Two,
HON. CHARLES W. BUTTZ.
HON. A. G. BURR.
HON. W. J. KNEESHAW.

District No. Four,
HON. W. L. NUESSLE.
HON. J. A. COFFEY.

District No. Six,
HON. FRANK T. LEMBKE.
[1]HON. W. C. CRAWFORD.
[1]HON. JAMES M. HANLEY.
[2]HON. THOMAS H. PUGH.
[2]HON. HARRY L. BERRY.

OFFICERS OF THE BAR ASSOCIATION.

HON. CHARLES A. POLLOCK, President, Fargo, N. D.
HON. WILLIAM G. OWEN, Vice President, Williston, N. D.
HON. JOHN E. GREENE, Secretary and Treasurer, Minot, N. D.

[1]Term expired January 1, 1921.
[2]Term began January 1, 1921.

CASES REPORTED IN THIS VOLUME.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

F

G

H

I

J

K

L

M

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

KASPER SCHANTZ, as Administrator of the Estate of Raphael Schantz, Appellant, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Respondent.

(180 N. W. 517.)

Master and servant — special interrogatories and general verdict held not inconsistent.

1. In an action for personal injuries, under the Federal Employers' Liability Act, a general verdict was returned in favor of plaintiff for $7,500. Special interrogatories were submitted to the jury, some of which were answered. The court on motion ordered judgment in favor of defendant, on answers made to special interrogatories. *Held*, that this was error, there being no inconsistencies between the answers to the special interrogatories and the general verdict.

NOTE.—Authorities holding that a servant's obedience to orders in attempting to perform dangerous work with knowledge of the situation did not amount to an assumption of risk, if he did not know of or fully appreciate the danger, are collated in a note in 4 L.R.A.(N.S.) 838, on attempting dangerous work in obedience to orders, without fully appreciating the danger.

On servant's assumption of risk in obeying orders to perform obviously dangerous work, see note in 4 L.R.A.(N.S.) 830.

Master and servant — knowledge of and appreciation of danger essential to assumption of risk.

2. One of the defenses pleaded was assumption of risk. It is *held*, in the circumstances of this case, in order to show assumption of risk, it must be established by a preponderance of the evidence, that the servant had knowledge of and appreciated the danger incident to the act in the course of his employment about to be performed, from which the injury resulted.

Master and servant — no assumption of risk in obeying command involving danger.

3. Where the master orders and commands the servant to do an act involving extraordinary danger, the servant is justified in obeying the command, and, by so doing, does not assume the risk. In such case, the risk is taken by the master.

Appeal and error — no necessity for preparation of statement of case when error appears on face of judgment roll.

4. In this case, it was not necessary to prepare and present a statement of the case, in order for this court to pass upon the assignments of error, as error appears upon the face of the judgment roll. It shows there was no inconsistencies between the answers to the special interrogatories and the general verdict.

Opinion filed December 11, 1920.

Appeal from judgment of the District Court of Morton County, North Dakota, Honorable *W. C. Crawford,* Judge.

Reversed and remanded, with directions to enter judgment upon general verdict in favor of plaintiff.

Jacobsen & Murray, for appellant.

"A general verdict and special findings should be reconciled, if possible, and no specific finding should overthrow the general verdict unless entirely inconsistent and irreconcilable thereto." Drouillard v. Southern P. Co. (Cal.) 172 Pac. 405; Wyldes v. Patterson, 31 N. D. 382, 153 N. W. 631; Cowan v. Mpls. St. P. & S. S. M. R. Co. 172 N. W. 322.

"A servant only assumes those risks of which he is aware and appreciates." Umstad v. Colgate Elevator Co. 18 N. D. 309; Gila Valley C. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521.

W. F. Burnett and *Young, Conmy & Young,* for respondent.

"A servant assumes the ordinary risks and dangers of his employment and the extraordinary risks and dangers which he knows and

appreciates." Chicago, B. & Q. R. Co. v. Shalstrom, 195 Fed. 729, 115 C. C. A. 515, 45 L.R.A.(N.S.) 387, and cases there cited; Union P. R. Co. v. Marone, 246 Fed. 924.

Where a servant knows and appreciates the danger of the act which he undertakes, he does not any the less assume the risk of injury, or become chargeable with contributory negligence, as the case may be, because he undertakes it under the direction of the master's representative. Gorman v. Des Moines Brick Mfg. Co. 99 Iowa, 264, 68 N. W. 674; Kean v. Detroit Copper & Brass Rolling Mills (Mich.) 33 N. W. 400; Toomey v. Eureka Iron & Steel Works (Mich.) 50 N. W. 850; Manson v. G. N. R. Co. 31 N. D. 643; Cook v. N. P. R. Co. 32 N. D. 340; Vanevery v. Soo (N. D.) 171 N. W. 610.

GRACE, J. This appeal is from a judgment in favor of defendant, dismissing the action, upon a general verdict in favor of the plaintiff, in connection with which verdict special interrogatories were returned.

The complaint states an action against the defendant for personal injuries, under the Federal Employers' Liability Act, U. S. Comp. Stat. §§ 8657–8665. A general verdict was returned in favor of the plaintiff for $7,500. The only question involved in this appeal is whether the special findings destroyed the general verdict.

The following are the special interrogatories and the answers, where answer was made:

Question 1: Did Raphael Schantz know, or should he, in the exercise of reasonable care, have known, that he might be injured if he attempted to catch the moving freight train?

Answer: He should have known.

Question 2: Did the father and mother of Raphael Schantz suffer any actual, pecuniary or money loss because of Raphael's death?

Answer: ———

Question 3: If you answer the preceding question in the affirmative, what is the amount of that loss?

Answer: ———

Question 4: Was the proximate or real cause of Raphael Schantz's death the injury received at Harmon?

Answer: No.

Question 5: What is the damage suffered because of pain and suffering endured by Raphael Schantz?

Answer: $7,500.

Question 6: Was the injury received by Raphael Schantz, at Harmon, an accident for which no one in particular is to blame?

Answer: No.

Subsequent to the return of the general verdict, the defendant made a motion for judgment on the special questions answered by the jury. The court granted the motion, and ordered judgment in favor of the defendant for a dismissal of the action on its merits, and for costs and disbursements, and judgment was entered accordingly.

The order for judgment and judgment is based upon the summons, complaint, answer, general verdict, special interrogatories, motion for judgment by the defendant, based upon the special interrogatories, and motion for judgment by the plaintiff, for judgment on the general verdict.

The complaint, after alleging the corporate character of defendant, and that it was engaged in interstate commerce at the times mentioned in the complaint, contains, in substance, the following allegations:

That by reason of the premises it became the duty of said defendant, its agents, servants, and section foremen, to give the plaintiff's intestate, Raphael Schantz, who was a minor of sixteen years of age, and who was inexperienced and did not appreciate the danger, due warning of the dangerous incident of said employment; that it became the duty of the defendant and its servants to furnish the plaintiff's intestate a safe and suitable motor car to carry him to and from different points of work; that it became the defendant's duty to slow down and stop its trains for the said deceased to get on when it sought to carry the deceased and the rest of the crew on its trains from and to points of work; that it became the duty of the defendant's section foreman, to wit, Peter Barron, to give proper and safe orders to the said deceased, and to properly and safely supervise the carrying and the method of carrying the deceased to and from points of work; that it became the duty of the defendant, its agents, and servants, to commit no act or to omit to do any act which would, could, or might injure the deceased; that it was the duty of the defendant and its servants to

use due care towards the deceased, and properly provide for his safety and welfare while engaged in said employment.

That on said 26th day of April, 1916, while the said defendant, with its said servants, including the deceased, was engaged in interstate commerce as aforementioned, and while the said deceased was acting as such servant and in the lawful performance of his duties as aforesaid, the said deceased, together with the rest of the crew, were returning from work to the town of Mandan, and were riding on said gasolene motor car provided and furnished by the defendant for carrying said section crew as aforesaid; that said gasolene motor car was wholly unsuitable for the purpose for which it was used, as it was old, worn out, and defective; that there was a large crew riding thereon; that it was overloaded with tools; that such overloading was done at the orders and command of the foreman of the defendant's company; that by reason thereof said motor car failed to run and became stalled at a certain point on said road near the town of Harmon, North Dakota; that at said time there was one of the defendant's freight trains, which had customarily been used for carrying the defendant's crew to Mandan, running on said branch road towards Mandan; that the said defendant's foreman informed the deceased, together with the rest of the crew, that he would go up the track towards the coming train and flag it, thereby causing it to slow down, and commanded, ordered, and directed the deceased, together with the rest of the crew, to catch the said coming freight train and ride upon it into Mandan; that the deceased and other members of the crew suggested to the said foreman that said train was running too fast for them to catch; that the said foreman thereupon assured the deceased that it was not coming too fast, that he could catch it easily without any danger; that the said foreman thereupon walked up the track a short distance toward the coming train and pretended and attempted to flag same; that while said train was passing the deceased and the rest of the crew at a high rate of speed, the deceased, together with the rest of the crew, pursuant to said command and order of the said foreman, and being then and there lawfully performing his duties engaging in interstate commerce with the defendant, attempted to catch and get on said train; that while so attempting, and while the deceased was using due care and being free from fault, he was thrown under the wheels of said moving

train, thereby crushing and mangling his leg, fracturing and bruising other parts of his body, head and abdomen, and thereby injuring vital internal organs of his body, and thereby tearing loose the flesh and muscles of his legs, which would make and did make the deceased a permanent cripple and invalid.

That the said injuries were caused wholly by the defective appliances, tools, and equipment of the defendant, and the neglect of the defendant and its servants as aforesaid, among other things, in this, that the motor car for carrying the men was unsafe and not a proper or safe machine for its purpose designed; that it was a dangerous method to require section men and the deceased to catch and jump upon a moving freight train as a means of being carried to and from their points of work; that the said foreman was negligent and careless in ordering and commanding the deceased to catch and get on a fast moving train, the deceased being then and there a youth, inexperienced, and not appreciating the danger of the act; that said foreman carelessly and negligently failed to give the proper signal to the train crew of the moving train to stop or slow down so as to make it safe for the deceased to get on; that the train crew of said moving train carelessly and negligently failed to stop or slow down for the deceased to get on, the said train crew knowing that the deceased and the rest of the section crew were contemplating to catch such freight; that said foreman was careless and negligent in assuring the deceased that it was safe to catch such moving train, and further in assuring the said deceased that said train was not moving at a fast rate of speed; that all of the negligence of the defendant aforementioned contributed to the said injuries.

That by reason thereof the deceased was made sick, sore, and lame, and suffered terrible physical and mental pain, and was confined to the hospital under the care of a physician continuously until on or about the 20th day of August, 1916, when the said Raphael Schantz, deceased, died; that the said deceased, at the time of the injuries, was sixteen years of age, in good health, strong mentally and physically, and had been for years previous engaged in performing manual labor and capable of earning about $75 per month; that the deceased if he had lived, would never have been able to perform any kind of labor thereafter, or earn any money, on account of such injuries; that said

deceased has suffered damages in all by reason thereof in the sum of fifteen thousand dollars ($15,000) and at the time of his death did have a valid claim against the said defendant in said sum for said injuries; that the said deceased left no surviving wife or children; that he was unmarried and had no issue whatsoever; that he did leave surviving him his parents, to wit; Kasper Schantz, his father, and Mary Anna Schantz, his mother; that he also left surviving him his brothers and sisters, being seven in number; that said parents reside in the city of Mandan, North Dakota, and that they were at all times hereinmentioned citizens of the United States.

Then follows an allegation that the deceased was, at the time of his injuries, employed by the defendant and engaged in interstate commerce. The foregoing constitutes plaintiff's first cause of action. The complaint sets forth a second cause of action, based upon the loss of services of the deceased to his parents, who are alleged to be unable to support themselves by reason of being in feeble health, and that they were dependent upon Raphael Schantz for their living, and by reason of his death claimed damages in the sum of $10,000.

The answer denies that Raphael Schantz was in its employ as a section laborer on April 25, 1915, but alleges that he was in its employ on April 18, 1916, and was injured on that date. It denies that he was engaged in interstate commerce when injured, or that he was injured through the negligence of the defendant or the section foreman, and alleges that he was injured through his own fault and negligence, which contributed to his injury.

This case has heretofore been before this court. See Schantz v. Northern P. R. Co. 42 N. D. 377, 173 N. W. 556. In that case, the trial court directed a verdict in favor of the defendant, and judgment was entered thereon. On appeal to this court, the judgment was reversed. It was there, in effect, held that, for the assumption of risk to be available to the defendant, it should be pleaded, and that the question of assumption of risk was one for the consideration of the jury. The case was remanded for a new trial. The case was tried upon the same pleadings that were in the former case.

Prior to the retrial the defendant made a motion to amend its answer. The amended answer is substantially the same as the original, with the exception that it contains an allegation that Raphael

Schantz was injured because of one of the ordinary and usual risks of the business in which he was engaged, and because of a risk which he appreciated and assumed.

It appears that the motion and proposed amended answer were served upon Jacobson and Murray, attorneys for the plaintiff, on August 22, 1919. It appears, by affidavit of Connelly, attorney for the defendant, that he received the motion papers from Watson, Young, & Conmy, prior to September 15, 1919, and that he thereafter turned them over to J. M. Hanley, Judge; and it further appears that when the motion papers were delivered to the said judge, that he advised the affiant that J. K. Murray, attorney for the plaintiff, had advised him over the telephone that he could not be present on the 15th day of September, 1919, when the motion was set to be heard. He never did appear before said court in regard to said motion. The motion was not heard nor determined before the trial, which was on or about January 15, 1920. The motion was granted and amendment of the answer permitted by an order of the court dated February 17, 1920. In the court's order, allowing the amendment, it is stated that the action was tried on the issues presented in the amended answer.

Under § 7482, Comp. Laws 1913, the trial court has power to allow amendment, either before or after judgment, in furtherance of justice and on such terms as may be proper. We will assume, in the further discussion of the matters here involved, that the amended answer was properly allowed.

The general verdict returned by the jury was as follows: "We, the jury, impaneled and sworn to try the above-entitled action, do find for the plaintiff and against the defendant, and assess his damages at the sum of $7,500. Jarris Estrop, Foreman."

Section 7632, Comp. Laws 1913, provides: The verdict of a jury is either general or special. (1) A general verdict is that by which they pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. Section 7633 provides: The court may also direct the jury, if they render a general verdict, to find in writing upon any particular questions of fact, and further states that, when the special findings of fact are inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly.

A general verdict pronounces upon all or any of the issues. The issues referred to in § 7632 are issues of fact. Under § 7605, the issue of fact arises upon material allegation in the complaint, controverted by the answer, or upon new matter in the answer not requiring reply, or controverted by reply; and upon new matter in the reply, unless an issue of law is joined thereon.

Under § 7508, issues of fact, where for the recovery of money, must be tried by the jury unless it is waived as therein provided. The question is then presented, What are the issues of fact in this case? Those must be determined from the pleadings. An inspection of them will disclose many issues of that character, which were all, with the exceptions to be hereinafter noted, determined in favor of the plaintiff, by the general verdict.

The general verdict determined that Raphael Schantz was inexperienced and did not appreciate the danger incident to said employment; that it was the duty of the defendant to slow down and stop its train for Raphael Schantz, the deceased, when it sought to carry the deceased and the rest of the crew on its trains from and to points of work; that it was the duty of the defendant's section foreman, Peter Barron, to give proper and safe orders to Raphael Schantz, and to properly and safely supervise the carrying and the method of carrying him to and from points of work; that Raphael Schantz was engaged in interstate commerce at the time he received his injury; that Peter Barron, the section foreman, informed Raphael Schantz that he would flag the train and cause it to slow down, and that he commanded, ordered, and directed Raphael Schantz and the rest of the crew to catch the freight train and ride upon it to Mandan; that Raphael Schantz and the members of the crew suggested that the train was running too fast; that the foreman assured Raphael Schantz it was not coming too fast, and that he could catch it easily without any danger; that Raphael Schantz, pursuant to the command and order of the foreman, attempted to catch and get on the train, and while so attempting, and while he was using due care, and being free from fault, he was thrown under the wheels of the moving train, his leg mangled and fractured, and his body otherwise bruised, and his vital organs injured, and he was made sick, sore, and lame, and suffered terrible

physical and mental pain, and was confined to the hospital until the 20th day of August, 1916, when he died.

The general verdict determined that the defendant was negligent and careless in the manner alleged in the complaint, and that such negligence contributed to the injuries. It determined in favor of plaintiff every material allegation of the complaint controverted by the answer, resulting in an issue of fact, including Raphael Schantz's knowledge and appreciation, if any, of his danger, and his assumption of risk, except in so far as any of said issues were determined by the special questions submitted to the jury.

The answer to question 1, supra, does not show that Raphael Schantz had any knowledge of his danger. The answer is not that he knew, but that he should have known, in the exercise of reasonable care, of his danger, and that he might be injured if he attempted to catch the moving freight train. What he should have known, and what he actually did know, are two entirely separate and distinct matters. There is no special question asked and answered, showing that he knew and appreciated his danger. Hence, it must follow that the general verdict determined that he neither knew nor appreciated his danger. Until it affirmatively appears that he both knew of and appreciated his danger, it cannot be said that he assumed the risk. Yuha v. Minneapolis, St. P. & S. Ste. M. R. Co. 42 N. D. 179, 171 N. W. 855; Martin v. Hill, 66 Wash. 433, 119 Pac. 849; Kansas City, M. & O. R. Co. v. Roe, — Okla. —, 180 Pac. 371; Lyons v. New Albany, 54 Ind. App. 416, 103 N. E. 20; Chesapeake & O. R. Co. v. De Atley, 241 U. S. 313–316, 60 L. ed. 1019–1021, 36 Sup. Ct. Rep. 564; Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L. ed. 521, 34 Sup. Ct. Rep. 229; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; Umsted v. Colgate Farmers Elevator Co. 18 N. D. 318, 122 N. W. 390.

Ordinarily, in cases where the master has given no positive command or order to the servant, to perform an act in the course of employment, and where the defense of assumption of risk is a proper one, the question of assumption of risk is one of fact for the jury. But, as we shall see, this is not true where the master has given a

positive order or command to the servant, to do an act in the course of the employment, involving more than ordinary danger.

It will be observed that the complaint alleges that the section foreman commanded, ordered, and directed Raphael Schantz, together with the rest of the crew, to catch the freight train and ride upon it into Mandan; that Raphael Schantz and the other members of the crew suggested to the foreman that the train was running too fast for them to catch; that the foreman assured Raphael that it was not coming too fast and that he could easily catch it without any danger.

By the general denial, this became an issue of fact, and the general verdict resolved it in favor of plaintiff's intestate.

Aside from the question of the deceased's extreme minority, and considering the matter as though deceased were a person of maturity, we think the principle is clear that there is no assumption of risk, in the circumstances of this case, where the master, through another acting under his authority, gives an order, incident to the work, to a servant under his control and direction, which the servant obeys. The risk in such case is taken exclusively by the master.

Cook v. St. Paul, M. & M. R. Co. 34 Minn. 45, 24 N. W. 311, 16 Am. Neg. Cas. 247; Strong v. Iowa C. R. Co. 94 Iowa, 380, 62 N. W. 799; Louisville, H. & St. L. R. Co. v. Armstrong, 137 Ky. 146, 125 S. W. 276; Schlavick v. Friedman-Shelby Shoe Co. 157 Mo. App. 83, 137 S. W. 79; Swanson v. Union Stock Yards Co. 89 Neb. 361, 131 N. W. 594; Sherman v. Texas & N. O. R. Co. 99 Tex. 571, 91 S. W. 561; Johnson v. Motor Shingles Co. 50 Wash. 154, 96 Pac. 962; Dalton v. Ogden Gas Co. 126 Ill. App. 502; Mattoon City R. Co. v. Graham, 138 Ill. App. 70, 234 Ill. 483, 84 N. E. 1070, 14 Ann. Cas. 853; Shirk v. Chicago & E. I. R. Co. 140 Ill. App. 22; Wells & F. Co. v. Kapacznyski, 218 Ill. 149, 75 N. E. 751; Koofos v. Great Northern R. Co. 41 N. D. 176, 170 N. W. 861.

Respondent contends that the burden is on plaintiff to show there was error in directing the entry of judgment in defendant's favor; and that this cannot be done unless there is a settled statement of the case, which here has not been presented, and, hence, the testimony is not before the court. We think, however, in this case the error appears upon the judgment roll. There is no inconsistency between the answers

to the special interrogatories and the general verdict. Hence, it was error to enter judgment upon the special questions.

Under § 7632, supra, the general verdict pronounces upon all or any of the issues. The issues are formed by the pleadings. An inspection thereof will disclose the issues. Such issues are, by the general verdict, decided in favor of the plaintiff or defendant, as the case may be, excepting only such of them as are decided upon special interrogatories.

Under our statute, and as a general principle of law, we think it must be plain "that a general verdict upon issues and evidence properly submitted must be presumed to have decided every fact or deduction therefrom essential to support it, while the special finding must be limited to and controlled by its specific terms. The general verdict must be understood as establishing the truth of every material averment of the complaint, except in so far as such averments are contradicted or modified by the answers to the interrogatories.

"In determining whether the special findings are inconsistent with the general verdict, so that the latter must be held to be controlled by the former, the court is not permitted to regard the evidence introduced on the trial. Ordinarily resort can be had only to the findings and verdict and to the pleadings. The question to be decided is not whether, in the light of the evidence adduced, the general verdict is inconsistent with the facts found, the remedy in case of such inconsistency being a new trial, but whether, accepting the facts found within the issues as verities, there is irreconcilable conflict between them and the general verdict." See Clementson Special Verdict, pp. 134–136.

The damages recovered are upon plaintiff's first cause of action. Special interrogatory No. 5 and the answer thereto clearly show this to be true. The general verdict must have been given likewise. No damages were recovered upon the second cause of action. There is no inconsistency between the answers to the special interrogatories and the general verdict. The judgment should have been entered upon the general verdict, and defendant's motion for judgment upon the special questions and answers should have been denied.

The judgment appealed from is reversed. The case is remanded

to the trial court, with directions to enter a judgment upon the general verdict in favor of plaintiff.

The appellant is entitled to his costs and disbursements on appeal.

BRONSON, J. I concur in the result.

BIRDZELL, J. (specially concurring). In its final analysis the case of the respondent rests upon the validity of the proposition asserted in one sentence in respondent's brief. It is said:

". . . If he [Schantz] should have known of the danger, then he took his chances in doing the work in the manner ordered, and cannot recover."

If the answer to the first interrogatory be construed as placing the servant in the same situation he would have occupied had he actually known of the danger, would the knowledge of the dangers attending his act in attempting to board the moving train be sufficient to preclude recovery where he was, in fact, ordered to board the train, his age and inexperience considered? There is no finding in answer to any special interrogatory as to whether he was justified in complying with the master's order, or whether he acted reasonably or unreasonably in so doing. The finding is directed solely to the question of knowledge. The respondent's proposition is faulty in that it ignores the qualifying effect of the master's order. Where a servant acts in response to an order or command, he may be justified in carrying out the order even though it exposes him to a peril of which he is aware. 4 Labatt, Mast. & S. 2d ed. pp. 3933–3935. And it is only where the danger is so apparent that a reasonably prudent person in his situation and *with his knowledge* would not have obeyed the command that the master is exonerated from liability. The rule as to the qualifying effect of an order is especially applicable where the master and the servant are not upon the same footing by reason of the immaturity of the latter. Where the servant acts in obedience to an order, the questions of assumption of the risk of apparent dangers and of contributory negligence are ordinarily questions of fact to be determined by a jury under the circumstances of the particular case. Hennessy v. Ginsberg, 45 N. D. 229, 180 N. W. 796. In the instant case, on the record before this court as shown by the main opinion herein, these issues must be

deemed to have been decided, under the general verdict, in favor of the plaintiff, and in the absence of an inconsistent finding in a special interrogatory it was error to enter judgment for the defendant. For these reasons I concur in the reversal.

ROBINSON, J. (dissenting). In this case I dissent. The case is now before the court on a second appeal, which is from a judgment on a special verdict. The appellant does not present the evidence, but on the former appeal it appeared that deceased was in the employ of defendant as a section laborer, and that he met with a fatal accident by attempting to get onto a fast moving freight train. As the train approached the station, where it did not stop, the section foreman said to the deceased that he might catch onto the train in case it slowed up. He was not ordered to catch onto the moving train, as the opinion assumes. The foreman had no right or authority to give such an order, and he did not give it. It was not in the line of his business. The train did not slow up. The deceased had no orders to get onto it. All that is said concerning a servant obeying the orders of his master is foreign to this case. But it is said that under the general verdict the court should assume to be true certain averments which it knows to be false, that is, the alleged orders given by the foreman and his authority to give such orders which did not pertain to his duty as a section foreman. Now, if the court should hold that the section foreman had an authority by virtue of his employment to direct those under him to risk their lives in catching onto fast moving trains, then the court should remand the case for a new trial and a special finding as to whether or not the foreman gave any such orders. Such a verdict should not be sustained on any refined technicality, when it is based on a presumption which the court knows to be untrue.

CHRISTIANSON, Ch. J. (concurring specially). When this case was here on a former appeal, I was of the opinion that the trial court properly instructed the jury to return a verdict in favor of the defendant. See Schantz v. Northern P. R. Co. 42 N. D. 377, 173 N. W. 558. Time has not altered the views which I then entertained and expressed. These views, however, were not shared by a majority of this court. They believed that under the evidence the question of negli-

gence and assumption of risk were for the jury. Hence, that was the decision of this court. And that decision, right or wrong, became the law of the case. Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; 4 C. J. 1093 et seq.

In respondent's brief on this appeal it is asserted that "the record testimony shows Raphael Schantz made two attempts to catch the moving train before he was hurt, and was thrown off each time;" that "the record shows that there was no assurance of safety by Barron," and, also, "that there was no order to catch the train,—nothing more than permission to do so." These assertions, however, have nothing to support them, for the evidence is not before us. We have only the judgment roll proper, and from this it appears that the case was submitted to the jury for a general verdict; that in connection with the general verdict, the jury was directed to make answer in writing to certain special interrogatories; that the jury returned a general verdict in favor of the plaintiff for $7,500, and made answers to five different interrogatories. It also appears that the defendant moved for, and that the trial court rendered, judgment in favor of the defendant upon the special findings of the jury.

The sole question presented on this appeal is whether the finding of the jury that Raphael Schantz, in the exercise of reasonable care, should have known that he might be injured if he attempted to catch the moving freight train, was so variant from and contrary to the general verdict that, if the answer to the special interrogatory is true, it would follow as a conclusion of law that the general verdict is unwarranted. 38 Cyc. 1927 et. seq. "Special findings are inconsistent with the general verdict when they as a matter of law authorize a different judgment from that which the verdict will authorize." And "special findings so inconsistent with and antagonistic to the general verdict as to be absolutely irreconcilable with it control the general verdict, and a judgment *non obstante* must be given according to the special findings." 38 Cyc. 1927. But to control the general verdict the facts found by the jury in answer to the special interrogatories must be so "clearly antagonistic to it as to be absolutely irreconcilable, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues, so that both the general verdict and the special findings cannot stand." 38 Cyc. 1929, 1930.

"No presumption will be indulged in favor of answers of the jury to special interrogatories as against the general verdict; but, on the contrary, every reasonable intendment in favor of the general verdict should be indulged, and all parts of the verdict are to be reconciled in support thereof if it can reasonably be done." 38 Cyc. 1928, 1929. While a special verdict will be construed most strongly against the party upon whom rests the burden of proof, a special finding received without objection will be construed most strongly against the party in whose favor it is found. 38 Cyc. 1930. On the record before us in this case, therefore, we must assume that the evidence adduced was sufficient to justify findings, and that the jury did in fact find in favor of the plaintiff upon every material issue of fact raised by the pleadings,—excepting alone the question of fact covered by finding above referred to. And the question presented here is whether the facts found by the jury in such finding are such that it would follow therefrom as a matter of law that the plaintiff is not entitled to recover, even though all the other issues of fact raised by the pleadings in the case were found in his favor.

The defendant contends that the finding establishes, as a matter of law, that Raphael Schantz assumed the risk of the injuries, I do not believe that the finding may be so construed. I do not believe that this finding establishes anything more, or any other or different condition, than that indisputably established by the evidence upon the former appeal. And, in view of the decision then made by this court, I agree with Mr. Justice Birdzell that even though the facts were as found by the jury in such special finding, it would still be a question for the jury,—in view of all the circumstances alleged in the complaint, including the youth of the deceased, and the order given by the foreman,—to say whether the deceased assumed the risk of the injuries. I disagree, however, with what is said in the principal opinion written by Mr. Justice Grace, and in paragraph 3 of the syllabus, upon this matter. I do not believe that it follows in all cases that "where the master orders and commands the servant to do an act involving extraordinary danger, the servant is justified in obeying the command, and by so doing does not assume the risk;" and that "in such case, the risk is taken by the master." I believe that where the servant acts in obedience to an order, as a general rule, it is for the jury to say whether

the servant assumed the risk. 4 Labatt, Mast. & S. 2d ed. p. 3927; Hennessy v. Ginsberg, 46 N. D. 229, 180 N. W. 796. There are cases, however, wherein the evidence shows that the danger is one so thoroughly known to and appreciated by the servant; or where the danger to be encountered is at once so obvious and serious that a person, situated as the servant was, necessarily must have known and appreciated the danger. In such cases,—where the evidence is such that reasonable men in the exercise of reason and judgment can reach only one conclusion,—the question of a command is not of itself sufficient to make the question of assumption of risk one of fact for the jury.

JOSEPH ANDRIEUX, Respondent, v. E. H. KAEDING, Appellant.

(181 N. W. 59.)

Fraud — evidence of deceit in sale of mining stock held sufficient.

1. Defendant sold plaintiff certain corporate stock of the Bessemer Iron Mining Company, and, during the negotiations for the sale thereof, represented to him that the property of said company contained large deposits of manganese ore, and made several other material representations concerning the property and its value, upon which plaintiff relied. The property as a mining proposition proved to be worthless.

Plaintiff brought an action, on the grounds of fraud and deceit, to recover $3,000, the amount which he had paid for the stock, and the verdict was in his favor for that amount and interest.

Held, that there is substantial evidence to support the verdict.

Evidence — fraud — trial — instructions approved — evidence held admissible — rule of damages stated — nondirection not reversible error.

2. *Held*, that the court did not err in excluding or receiving certain evidence, nor in its rulings upon certain objections and motions, nor in the giving of certain instructions.

Fraud — investigation by purchaser of mining stock held not to preclude recovery for deceit.

3. Where the property is of such character, or is so situated, that it cannot be examined, as in this case, where the property was alleged to consist of large and valuable deposits of iron ore, to which no shaft had been sunk, and where no exploration records were presented to the party desiring to investigate the property, showing the actual condition existing, a visit to the property, for

the purpose of inspection, by one about to purchase stock therein, would not preclude him from relying upon the representations theretofore made as to the conditions and value of the property, it appearing that such investigation could convey no knowledge.

Opinion filed December 14, 1920.

Appeal from an order of the District Court of Bottineau County, denying defendant's motion to set aside and vacate the judgment and grant a new trial; Honorable *W. J. Kneeshaw,* Judge.

Judgment affirmed.

T. D. Sheehan, and *Miller, Zuger & Tillotson* (*John Ott,* of counsel), for appellant.

The evidence is insufficient to sustain the verdict.

"Proof of fraud must be by clear and convincing evidence and evidenced by facts inconsistent with an honest purpose." Reitsch v. McCarty (N. D.) 160 N. W. 694.

"Proof of fraud must be by clear and convincing evidence beyond reasonable controversy." Richards v. Millard (Wis.) 131 N. W. 365.

"In an actionable fraud, one of the essential elements to maintain an action is actual or constructive intent to deceive." Milwaukee Worsted Mill v. Wilson (Wis.) 147 N. W. 1068; Humphrey v. Merriman (Minn.) 20 N. W. 138.

"Where purchaser makes as full an investigation as he chooses, he cannot thereafter recover on the ground that he relied upon misrepresentations of the vendor." Roper v. Noll (S. D.) 143 N. W. 130; Moses v. Katzenburger, 84 Ala. 95; Anderson v. McPike, 80 Mo. 293; Development Co. v. Silva, 125 U. S. 247; Farnsworth v. Duffner, 142 U. S. 431; 1 Bigelow, Fraud, 87.

J. J. Weeks and *W. H. Adams,* for respondent.

One who buys property has a right implicitly to rely upon the representations of the seller. Guild v. More, 32 N. D. 469; Fargo Gas & Coke Co. v. Co. 4 N. D. 219.

When a certain theory as to the measure of damages or the amount of recovery is accepted or acted upon by the parties in the trial court as the proper one, it must be adhered to on appeal, whether it is correct or not. 3 C. J. 377; Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, Harris v. Van Vranken, 32 N. D. 238; Peterson v. Conlen, 18

N. D. 205; Movius v. Propper, 23 N. D. 452; Lunn v. Seby, 2 N. D. 420.

GRACE, J. This action is one to recover the sum of $3,000, paid to Bessemer Iron Mining Company, while relying upon false and fraudulent representations of defendant, relative to the amount and value of iron ore deposits in certain property, known as the Bessemer Iron Mining Company, a corporation, part of the corporate stock of which was purchased by plaintiff.

The material facts are as follows:

The Crow Wing Iron Company was the owner of the north ½ of the southeast ¼ of section 6, township 46, range 29, Crow Wing county, state of Minnesota. The land is in the vicinity where iron ore is found and produced. The Crow Wing Iron Company drilled this property in the year 1911. It does not appear that anything more was done with the property until 1917, when the same was leased to the Bessemer Iron Mining Company, of which one Rydberg was an officer.

The latter company, in 1917, did more drilling on the land. In June of that year the defendant, with other parties, were taken to see the property. Negotiations continued between Rydberg and those parties until October, 1917, when the defendant and other parties of Minneapolis were again taken to see the property. At this time the drilling was finished and some buildings had been constructed, and a shaft was being sunk in the vicinity where some of the drilling had been done. Northeast of this mine, about a mile and a quarter, was the Fay mine, where the shaft had been completed, and from which ore was about to be taken.

Surrounding the Fay mine are other mines, including the Farrell and the Merritt mines, some of which were producing what is denominated manganiferous or manganese ore. Not long after this, the parties from Minneapolis made a contract with the Bessemer people, claimed to be similar to the one into which plaintiff and his associates entered, the only difference claimed was the amount in the first payment, which was less than that provided in the contract which plaintiff signed.

It is claimed that defendant and one Michael paid their first pay-

ment of $500, but the other parties did not make their payments, and the contract was canceled.

In the late fall, in October or November, the defendant met one Vikan of Bottineau, in Minneapolis, and they had some conversation with reference to this mining proposition. Kaeding desired him to bring the matter before parties of Bottineau, with the view of interesting them in the proposition.

Vikan did talk with some parties at Bottineau, and Mr. Smithson went to Minneapolis, made some investigation of the property and conditions, and wrote Vikan thereafter; and sometime after January 9, 1918, after Smithson had talked with defendant, and had some conversation with reference to the latter going to Bottineau, to raise the money for the purpose of sinking a shaft, he did go to Bottineau, and on about the 16th day of January entered into a certain contract. After this contract was signed, one Moline, a contractor, was selected by the parties to take charge of the sinking of the shaft.

After this, and before any money was paid, and at the request of defendant, plaintiff and three other parties to the contract went to the location of the mine for the purpose of investigating the same. They also went to Duluth and had some talk with the manager of the Fay mine, and on the 23d day of January went to Minneapolis, and entered into the contract upon which this action is based, which superseded the contract of January 16th.

The Bessemer Iron Mining Company had a mining lease from the Crow Wing Iron Company, on the land above described. On the 4th day of January, 1918, the former entered into a contract with the defendant and one Michael, whereby it agreed to issue and sell to them, or such other parties as became interested with them, 170,000 shares of the capital stock of that corporation, for the sum of $30,000. That company, according to recital in the contract, theretofore had issued and sold, for promotion and development purposes, 167,915 shares of its capital stock.

The purpose declared in the contract for selling 170,000 shares of stock was the sinking and constructing on the land a shaft, which was to be 100 feet deep, if necessary, and 6 feet wide and 12 feet long, and this for a proper exploration of the property.

Under the contract, the shaft was to be constructed under the joint

direction of all the parties to that contract. The contract contained this further provision: "In consideration of all the covenants of the party of the first part, herein contained, it is further agreed by all of the parties to this contract, that if merchantable ore shall be found upon the property above described, by the sinking of said shaft, in such quantities and quality as to warrant the mining thereof, then said parties of the second part, and said persons selected by said second parties, to become interested with them, may, upon their option, pay to said party of the first part the difference between the total amount of money advanced by said parties of the second part, and those to be hereafter interested with them, as herein contemplated, for the construction of said shaft, in the sum of $30,000, and that, then, thereupon there shall be issued to said parties of the second part, and those to become interested with them, as herein contemplated, 170,000 shares of the capital stock of said party of the first part, divided between the parties of the second part, as their several interests shall appear, according to the amount advanced by each of them."

If, upon the completion of said shaft, merchantable ore in sufficient quantity and quality to warrant the mining thereof shall not be found upon said property, then and thereupon it is agreed by and between the said parties that said party of the first part shall issue to said party to the second part, and divided equally among them, and those interested with them, such shares of the capital stock of the party of the first part as will be paid for by the total amount of money advanced by said parties of the second part, and those interested with them, for the construction of said shaft, at the rate of $30,000 for 170,000 shares.

This contract was signed on the part of the Bessemer Iron Mining Company, by Rydberg, president, and Donahue, secretary, and by Kaeding and Michael, as the other contracting parties. This contract was incorporated into and made a part of the contract involved in this suit, and is executed by Kaeding and Michael, as parties of the first part, and Joseph Andrieux, of Bottineau, and seven other prominent men of that city, engaged, largely, either in the banking or mercantile business, as parties of the second part. The contract provided that upon signing thereof, each of the parties of the second part should pay into the treasury of the Bessemer Iron Mining Company the sum of $1,000, and thereupon there should be issued to him a certificate of

stock of that company, in the sum of $5,000; that on the 1st day of March, 1918, each of the second parties should pay into the treasury the further sum of $500, and a further certificate of stock should be issued to each in the sum of $2,500; and that thereafter the second parties would each pay into the treasury of the corporation, as the same might be required for development purposes, and for the purpose of putting the mining project in operation, such further sums until each had paid into the treasury the total sum of $3,000.

The contract recites that it was understood by the parties to it that the first parties had theretofore paid into the treasury the sum of $2,000 each, and that, after each of the second parties had paid in the sum of $2,000 each, the first parties would pay in the further sum of $1,000 each, as the same might be required in the furtherance of the mining project.

The second parties further stipulated to pay Kaeding the sum of $800 on the 1st day of April, 1918, in consideration of services rendered by him, and money expended in the furtherance of the business of said corporation, and in consideration of legal services theretofore performed, or to be performed, by one Thomas D. Schall, for the corporation, in connection with the business affairs thereof, each of the parties of the second part mutually agreed that from the shares of stock issued to them, they would transfer 300 shares to Schall, or a total of 3,000 shares.

The plaintiff, as per contract, paid for the stock the sum of $3,000. He paid $1,000 on January 25, 1918, $1,000 on March 1, 1918, and $1,000 on March 15, 1918. In his complaint, plaintiff alleges that defendant, in order to induce him to buy the corporate stock, and pay the sum of $3,000 therefor, and with intent to deceive and defraud plaintiff, falsely and fraudulently represented to him, and to the seven other persons to whom he sold said corporate stock, with the intent that they convey such representations to plaintiff, that the debts of said corporation did not amount to more than $4,000 at most; that the said corporation was the owner of a valuable iron mine, which mine contained manganese ore in paying quantities; that the ore in said mine had been tested and found to contain manganese ore in paying quantities; that ore of the kind and quality contained in said mine was worth from $16 to $28 per ton; that the said mine contained as good

manganese ore in as paying quantities as another mine in the same vicinity, which was known as the Fay mine, which contained manganese ore in paying quantities; all of which representations the defendant falsely and fraudulently asserted to be true, although he did not believe them to be true, and although he had no reasonable ground for believing them to be true.

Plaintiff alleges that he relied upon the representations aforesaid, and was induced thereby to join with several other persons in entering into the contract; that the debts of the corporation at the time of entering into the contract amounted to more than $10,000; that the corporation was not the owner of a valuable iron mine; that the mine did not contain manganese ore in paying quantities; that the ore found in the mine was worth nothing, and could be mined only at a loss; that the mine did not contain as good manganese ore as the Fay mine, nor in such paying quantities; that the mine and the corporate stock of the corporation was worthless.

The answer denies the fraudulent representations, or that plaintiff relied upon them, and pleads and relies upon the contract; and alleges that, at the time plaintiff invested his money in the shares of the Bessemer Iron Mining Company, he had made full investigation of the property of the Bessemer Iron Mining Company, and of the possibilities of it, and that it was upon a personal investigation made by him, prior to the signing of the contract and the time he invested his money in the shares, that he was induced to sign the contract to buy the shares. It pleads the $800 which the contract specifies should be paid Kaeding, as a counterclaim. The case was tried to a jury, and verdict returned in plaintiff's favor for $3,000 and interest.

As there are several of the exhibits designated by the same letter, in order to avoid confusion, it is well to explain the exhibits.

The defendant, during the negotiations for the sale of the stock, had and exhibited to plaintiff, and those associated with him, what purported to be a blueprint or map of the Bessemer mining property. At the trial, this was identified as exhibit "A." In the depositions of Ostrand, Vibert, and Wolfe it is identified as exhibit "D."

Besides the above exhibit, there are three blueprints, marked exhibits "A," "B," and "C." These are the original blueprints made for the Crow Wing Iron Company, in 1911, and were in the office of

the Crow Wing Iron Company, at Cloquet, Minnesota, all the time Kaeding was interested in the Bessemer mine.

Two other exhibits are also designated "B" and "C." These are samples of ore taken from the Fay mine, and which the defendant had with him, and exhibited to the plaintiff and his associates at the time of the negotiations for the sale of the stock.

Exhibit "1" is the contract of January 16th. There is also another exhibit "D," which is the contract of January 25th. Exhibit "E" is the report of engineer Wolfe. Exhibit "F" consists of several sheets of blueprint, of cross sections to which reference is made in the testimony of Wolfe.

Exhibit "2" is a letter from Smithson to Vikan, both of whom were parties to the contract.

The defendant has assigned a very large number of errors, thirty-three of which are urged, seven of which are based upon alleged error of the court in giving certain instructions. Fifteen are based upon error claimed to have been committed by the trial court in the reception or exclusion of certain evidence or in its ruling upon objections and motions made during the course of the trial. In eleven, it is contended the evidence is insufficient to support the verdict.

The giving of the following instructions are assigned as error: (1) "As regards the allegations of fraud and misrepresentation charged in this case by the plaintiff, in his declaration filed in this case, the court instructs the jury that to entitle the plaintiff to recover damages in this case the jury must believe, from all the evidence, that the alleged misrepresentations were, in fact, made by the defendant, or some other duly authorized person, and that such representations were false when made; and, further, the jury must believe from the evidence that they were such representations as a man of ordinary prudence would rely upon, and that the plaintiff did, in fact, rely upon such statements, and was induced thereby to purchase the stock in question in this suit, and to execute the contract complained of in this action, and has thereby been damaged. Otherwise, the verdict must be for the defendant."

The correctness of this instruction is challenged on the ground that it is erroneous and misleading, in that it fails to distinguish between representations concerning matters that could only have been expres-

sions of opinion, as distinguished from representations of existing facts susceptible of knowledge. There was no error in the instruction. The evidence clearly shows that the representations were not the expressions of opinion, but of matters claimed to exist as facts, and expressed in such a manner as to warrant the plaintiff in believing that defendant had full knowledge of the facts he represented to be true and to exist.

The subject of fraudulent representations will be more fully analyzed later in the opinion.

(2) "The court instructs the jury that any wilful misrepresentation of a material fact, made with the design to deceive another, and to induce him to enter into a trade he would not otherwise make, will enable the party who has been overreached to annul the contract; and it makes no difference whether the party making the misrepresentation knew it to be false, or whether he was ignorant of the facts stated, provided the matter stated was material to the party making the statement, and stated it as true when, in fact, he had no apparently good reason for believing it to be true, and when the other party, under the circumstances shown by the evidence, was reasonably justified in relying upon the statement and did rely upon it in making the trade, and was deceived and injured thereby."

The defendant claims this instruction is erroneous and misleading in that it is rather in conformity with the equity rule in an action brought for the cancelation of a contract for fraudulent representations, than one where there is an affirmance of the contract and an action for damages.

We think defendant's reasoning is not sound, in this, that the court did not, nor did it intend to, apply the principle of law to which defendant refers. This action is neither for the cancelation of a contract, nor is it one where the contract has been affirmed and then an action maintained for damages for fraud. It is an action for damages for deceit. The complaint states that kind of action.

Section 5943, Comp. Laws 1913, provides: "One who wilfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damages which he thereby suffers. Section 5944. Deceit defined. A deceit within the meaning of the last section is either: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true. (2) The assertion as a

fact of that which is not true by one who has no reasonable ground for believing it to be true. (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or, a promise made without any intention of performing."

The instruction defines the proper legal principles applicable to the issues, and in conformity with the statutory definition of deceit and of damages therefor.

The rule of damages in cases like this is that fixed by statute, supra; to wit, the amount of damage suffered by reason of the deceit; and in this case, in view of the allegations of the complaint, it would be no more than the amount of money plaintiff paid for the stock, and the interest thereon from the time of payment.

Perhaps the instruction was not in the best form, but we are certain it was not prejudicial. It was, to a large extent, a statement of our statutory definition of deceit.

(3) "When two or more persons combine to conspire by false representations or other fraudulent acts to cheat and defraud another, all of said persons participating in said fraud are liable to the person defrauded, whether they receive any benefit from the fraud or not."

Defendant contends that this instruction introduces a new element in the case, to wit, that of conspiracy; that it had a tendency to permit the jury to speculate as to whether or not some conspiracy may not have existed between defendant and Rydberg. The language of the instruction states a general principle of law applicable to the facts in it stated. We think there is nothing in the instruction to introduce a new element or a false issue, or that it would cause speculation by the jury in the regard claimed by defendant.

The principal thought in the instruction related to fraud, and not to conspiracy. We think the court was not in error in giving the instruction, but if it could, by any stretch of imagination, be deemed error, it was error without prejudice.

(4) "Now, gentlemen of the jury, there has been some evidence here, as to statements made by and the opinion of Smithson and others, and the court instructs that anything that Smithson or Vikan or any of these fellows may have written, or anything they may have said, or knowledge they obtained, not in the presence of this plaintiff, and

which had not been brought home to him, or which he had not been informed of, are not binding upon the plaintiff in any event. The other parties in this transaction are not suing. It is this plaintiff, Mr. Andrieux, who is bringing this action, and the question is as to what representations were made to him at that time, and whether he relied upon them, and whether they were true. And therefore any letter Mr. Smithson may have written—it not being shown that the plaintiff, Andrieux, knew anything about it at all—is not binding upon him. We are not trying the case of the other parties. We are trying the case of this plaintiff, Andrieux, against the defendant. Those bankers and other men are not in this case at all. They are not suing. It is the plaintiff, Andrieux, who is suing."

The instruction taken as a whole, we think, was a correct statement of the nonadmissibility of statements by, and conversations between, other parties, not made or had in the presence of the plaintiff. It is not shown that plaintiff heard such or that he knew thereof, nor was it shown that he had knowledge of any letters written by Smithson to Vikan, or other letters, if any, between other of the parties, and certainly it must follow that none of the same was binding on him.

Exhibit "2" was a letter written by Smithson to Vikan. It was excluded as evidence, and, we think, properly so; for it does not appear by any competent proof that the plaintiff ever knew of the contents of it. The representations and statements claimed to be facts, or statements expressed in such language and in such manner and circumstances, by the defendant at Bottineau, during the negotiations there with plaintiff and his Bottineau associates, and at Minneapolis when the final contract was executed, and prior to the execution thereof, in the presence of plaintiff and his Bottineau associates, or some of them, were proper and competent evidence, relative to the issue of fraud and of its admissibility, there is not the least doubt. The instruction was only a caution to the jury to consider proper and competent evidence, and to disregard that which was clearly hearsay.

Further objection is made to the instructions, in that it is claimed that the court laid down many abstract propositions of law that had no application to the issues involved, and which were confusing and misleading to the jury; and that the charge failed to instruct the jury as to the law relative to actionable or nonactionable representations.

As to the first objection, there is not the least merit. As to the second, if the representations were false and plaintiff relied on them, and he was deceived thereby, to his injury, and this was the theory upon which the case was tried and submitted to the jury, then the representations were clearly actionable, and the charge, as a whole, defined the law in that regard quite clearly.

It was not necessary for the court to further elucidate the subject by defining nonactionable representations. The court's duty was to define principles of law applicable to the issues. It performed that duty in a most competent and erudite manner; and further, in a civil case, nondirection, unless it amounts to misdirection, is not reversible error. Huber v. Zeiszler, 37 N. D. 556, 164 N. W. 131.

Had the defendant desired further instructions, he should have prepared them in writing, and presented them to the court at a proper time. Not having done so, he is not in position to complain, provided the court has, in its charge to the jury, so amply defined the law applicable to the issues as to fairly cover them; in other words, unless the charge is so devoid of the correct principles of law applicable to the issues that it amounts to misdirection, it should, where there is no requests for further instructions, generally be held to be sufficient.

We will now consider the errors assigned, which are urged, based upon the court's rulings in the reception or exclusion of evidence, and its rulings upon objections and motions. Specification 7 of errors of law.

Ostrand was a mining engineer, of good professional qualifications, and plaintiff's witness. He was asked the following question, to which objection was interposed and overruled:

Q. State, from the examination of that map, exhibit "D," and from your knowledge and experience as a mining engineer, if you know of any purpose for which that map might be used.

By Mr. Sheehan: Defendant objects on the grounds of its being immaterial and purely speculative, and asking the witness to go into the field of conjecture.

A. To mislead.

In his deposition, Ostrand testified, with reference to exhibit "D" (the same as the blueprint, exhibit "A," used in negotiating sale of

stock), in reply to a question wherein he was asked to state, of his own knowledge as a mining engineer, and from the drill records and cross sections on that map, what, if anything, would be the value of the property shown on the blueprint. His answer was that no information is shown on that map to give a basis on which to give an estimate. He was then asked the following question:

Q. Showing the index to ore bodies shown on that map, and referring to map, I will ask you to state if you know of any such formation existing on the Cayuna range, in Crow Wing county, Minnesota, as is shown on that map, plaintiff's exhibit "D."

A. No.

He also stated that the map was of no value except to show the location of property.

As we view this testimony, it is quite material. The map was an instrumentality of deception, except that it might show location of the property. It was of no utility except to use to mislead and deceive as to the true condition which there existed.

This witness shows that the formation shown on this map is not in conformity with any known formation on the range.

J. F. Wolfe, a graduate of the College of Engineering of the University of Wisconsin, and who had an advanced professional degree of Engineer of Mines from that University, and whose course of study embraces engineering and geology of the Lake Superior iron district, and who was from 1908 to 1918 employed as a mining engineer and geologist by the Oliver Iron Mining Company, a mining branch of the United States Steel Corporation, and whose work embraced the Vermilion, Mesaba, and Cayuna ranges of Minnesota, and other ranges, and who was engaged in practice of consulting mining engineering at Duluth and Crosby, testified in reference to exhibit "D," in his opinion the exploration records of this property (Bessemer) did not warrant the making of such a drawing, representing a body of the manganiferous ore on the property; and that, in his opinion, it was drawn from the imagination of the author, without sufficient positive, documentary information, or at the direction of someone employing him; and that, in his opinion, it was made to induce those not familiar with mining properties, or records of mining explorations, to believe that a large

and valuable body of manganese or manganiferous iron ore existed on the property of the Bessemer Iron Mining Company.

Certainly, this evidence was of a high probative value, where the issue is fraud. Exhibit "D" was an instrumentality utilized in the consummation thereof.

Error No. 23: Error is assigned by receiving in evidence, over defendant's objection, exhibits "A," "B," and "C," upon the principal ground that they did not show, or purport to show, the condition of the property as to exploration and development at the time of this transaction.

Fred D. Vibert resides at Cloquet, Minnesota. He was the publisher of a newspaper and was state senator. His testimony is substantially to the following effect: He was connected with the Crow Wing Iron Company, as secretary and director, and that such corporation explored the property in question in 1911; that he preserved the drillings and they were kept at Crosby until the drilling was done, and then were shipped to Cloquet and kept in his office; that these drillings and cuttings were the same as were examined by J. F. Wolfe in his office, in April, 1918; that the chemical analysis of the cuttings and drillings was made by C. J. O'Connell, and that his analysis showed there was some manganiferous ore there, but, as to the quantity, he was not in position to say. He identified the exhibits objected to, "A," "B," and "C," as true.

The witness's testimony shows that he participated in the drilling of the property, by going to Crosby at least once, and sometimes twice, each week while the work was going on, and he was familiar with the detail results of the drilling and explorations done by the Crow Wing Iron Company, on this property.

The defendant claims these exhibits were inadmissible, in that there is a lack of evidence showing the truth or correctness of the matters which those exhibits purport to show; that the party's evidence, who made the analysis of the ore, is not before the court, and that, hence, there is no evidence to show that the figures on exhibits "A," "B," and "C," correspond with the results obtained by the party who made the analysis.

The witness, however, was an officer of the Crow Wing Iron Company, and his testimony is to the effect that those exhibits were true.

At the time of the drilling and exploration by the Crow Wing Iron Company, in 1911, these exhibits were made. There does not appear to be any motive shown why that company should have prepared, by its experts, fallacious blueprints or maps of its drillings and explorations.

The witness was an officer of the company and was in position to have knowledge of the correctness of these exhibits. It is true that upon these exhibits is set forth, in figures or words, a great deal of technical matter, to which, if the witness's attention had been directed, he perhaps could not have qualified as to his actual knowledge of those matters; but he could know, and perhaps did know, at the time the maps were made, that they disclosed the truth, and perhaps it was for this reason that the Crow Wing Iron Company never developed the property.

We think, for the purposes for which the exhibits were introduced in this case, *viz.*, that they showed the true condition of this property in 1911 sufficiently to demonstrate that exhibit "D" was so fictitious and misleading in its entirety, and so misrepresents the actual condition of the property, that it could have been prepared and used for no real purpose other than to deceive as to the true condition which actually existed in the property at the time it was drawn and used in the sale of the stock.

There is testimony showing that the drilling records could not be interpreted by a mining engineer as showing, or proving up, a body of manganese or manganiferous iron ore to exist on the property. We think there was no reversible error in admitting in evidence these exhibits.

Error No. 24 is based upon the reception in evidence of exhibit "E," the report made on this property to the plaintiff and his associates, by J. F. Wolfe, mining engineer.

The objection to the exhibit is that it is based upon information which Wolfe received from the exploration records "A," "B," and "C," and upon conditions which existed in 1911, and not those which existed in 1917.

The report discloses that the property was explored prior to 1914 by the Crow Wing Iron Company, of which one Vibert was an officer. At that time, forty-seven holes were drilled on the property, by Oster-

burg Diamond Drilling Company; that complete samples were kept and stored in ten sample boxes, which samples were taken every 5 feet in ore material.

Analyses were made for iron, phosphorous, and manganese. Special analysis was made of hard ore cores obtained in diamond drilling. Records were made and kept in quite good form of this exploration work; that the property was taken over in 1917 by the Bessemer Iron Mining Company, and that seven additional holes were drilled; that a shaft was started near the last hole drilled; that some of the earlier holes, near the shaft location, showed some fairly high manganese analysis; that there is enough of manganese showing in drill holes 27 and 34, perhaps, to induce one so inclined to take a gambling chance on finding more or better ore in mine workings than is indicated by the drillings.

After a full discussion of many other matters, the report concludes that no body of manganiferous ore of high enough grade and large enough quantity is indicated by the drill records and samples, as existing on this property; that the body of sandy, washable iron ore which does exist is too narrow, too intermixed with rock, and too irregular to be mined by open pit methods; that the commercial analysis shows that the washable ore cannot be mined, concentrated, and sold at a profit, if mined by underground methods.

We think there was no error in admitting the exhibit. The report was made by a mining engineer of unquestioned ability and experience. It was based upon knowledge acquired from exploration records of the Crow Wing Iron Company, and other information acquired by Wolfe, as shown by his report.

The same sources of information existed during the time Kaeding was engaged in his negotiations with reference to this property. He must have known of what had been done, and of the exploration records, or, at least, he must be held to have known; and where the issues are such as are in this case, we think there was sufficient foundation laid, taking into consideration the exploration records and the expert and scientific knowledge of Wolfe, to warrant the reception in evidence of this exhibit.

Error is based upon the admission of exhibit "F." This is several sheets of blueprints, containing figures purporting to show a chemical

analysis of ore coming from this property. The blueprints were made by Wolfe. The chemical analysis was not made by Wolfe. He does show that the cores and cuttings were examined in the office of Vibert, an officer of the Crow Wing Iron Company. He had made a thorough examination in that regard, in making the report, exhibit "E." He had very extensive knowledge in mining engineering and geology; and considering his wide knowledge of the subject, and his sources of information, and his examination of the exploration records of the Crow Wing Iron Company, we think there was sufficient foundation shown relative to exhibit "F" to permit its introduction as some evidence bearing upon the issues involved here.

The court did not err in denying defendant's motion to instruct the jury to return a verdict in favor of defendant. We cannot further continue a *seriatim* discussion of the errors of law assigned.

We have examined every error of law assigned, based upon the exclusion or reception of evidence and rulings on motions, and hold that the court committed no prejudicial, reversible error in any of its rulings.

We have remaining only the question of the eleven assignments of error, based on the insufficiency of the evidence to sustain the verdict. In disposing of those, it will be only necessary to determine if there is any substantial evidence to support the verdict. If there is, then the judgment must be affirmed.

The principal representations have been set forth in the early part of this opinion, important among which are those to the effect that the corporation was owner of a valuable iron mine, which contained manganese in paying quantities, which had been tested and was of the value of from $16 to $28 per ton, and that the mine contained as good manganese ore, and in as paying quantities, as the Fay mine.

The evidence shows, quite conclusively, that these representations were not the mere expressions of opinion, but, on the contrary, it clearly appears that such expressions and statements were made as expressions of fact. The representations and expressions were made at Bettineau to plaintiff and his associates there, and to him and some of them at Minneapolis, at the time of the signing of the final contract.

The representations made to all who were present on those occasions

must be deemed to be of the same effect as to each present, as it made to each individually.

We cannot set forth all the evidence, showing what those representations and statements were, but will set forth sufficient, so as to leave no doubt as to the character and meaning of them.

Ferguson testified: "He said he [Kaeding] had all the dope right here, and he showed us a map, similar to this [exhibit 'A'–'D']. There is a vein of ore, he says, which runs according to the drill map here [the light streak]. He showed us that some places they had not gone through it and had gone as far as 340 or 350 feet. With reference to samples 'B' and 'C' [samples of ore from Fay mine] he said one little piece, something like that, and he said if he could get very much of that, we would all be millionaires in a short time. He said it was rare stuff, and only found in small pockets. The other, he said, was just fair ore, if I remember right, and it runs from 8 to 10 to 28 or 30 dollars a ton, according to the amount of manganese it contained. He said this particular mine contained large quantities of ore, similar to that large exhibit [exhibit 'C']; he said the drilling showed it. He said the property had been drilled and it showed up good."

This witness further testified: "I think the map showed that some place here [referring to the statement of defendant that in one place they had drilled to a depth of 350 feet and had not gone through the ore], this drill hole here, No. 24, shows 345 feet, and he said they had not reached the bottom of it then."

Part of the plaintiff Andrieux's testimony, in substance, is as follows: Defendant told him he had been looking over the property since June, 1917; that when he first went to the property, there was no road to it; that he had bought 170,000 shares for $30,000, which gave him and his partner, Michael, a controlling interest; that the shaft had been started, and that drillings had been done to explore the property, to see what was there. He got to the ore and showed us the drillings. He got a map (exhibit "A"), showing the drillings, that he said showed a body of iron ore there on that property; showed us where the body of solid ore was, a body of manganese ore, so many feet wide and so many feet deep. The blue print was supposed to show it. He mentioned at one place, they had gone as far as 350 feet and they had not gone through the ore, had not been able to reach the bottom of the ore.

He pointed out this part here (indicating on map) showing over a half mile of ore field, and he pointed to this color (light color) as showing manganese; that he said that the holes, as represented in the map, had been drilled and that every 5 feet of it, when they were drilling it, had been tested, and had proven of good quality of manganese ore; then explained to us what manganese ore was. (Witness identifying exhibits "B" and "C," specimens of ore.) He said that (exhibit "B") was almost pure manganese, the best manganese that could be found, almost pure; that exhibit "C" was more common, and this was the thing that was found on this property, and was selling from 16 to 28 dollars a ton, and that these exhibits came from the Fay mine, which was about a mile and a half from this property; that the ore in that mine was mostly like exhibit "C," but that now and then finding some of this exhibit "B" in pockets; and that the Bessemer Iron Mining Company was on the same vein as the Fay mine, and was of the same quality of ore.

There is abundance of testimony that the statements and representations made by defendant were made as his own positive statement of facts, made as though it were something he knew himself. The plaintiff testified that those statements were not made to him as upon the authority of Rydberg.

In Minneapolis, at the time the contract was consummated, and prior to the signing thereof, at a meeting at which defendant, Rydberg, Vikan, Moline, and the plaintiff were present, plaintiff asked Rydberg, "Wasn't this property that we looked over drilled by the Crow Wing Iron Company?" And he said, "Yes;" and plaintiff said, "Do you have the drilling records and test records of those explorations taken by those people?" and he said "Yes, we have." Plaintiff asked Rydberg where the drillings and test records of the Crow Wing Iron Company were, and he said at Duluth; and Kaeding says, "Yes, we have all that. They are all right; everything is all right." Plaintiff testified that he relied upon all the representations and statements.

It is entirely unnecessary to pursue an analysis of the testimony in this regard any further. It is abundant to show the representations by defendant, as claimed by plaintiff. The evidence is quite sufficient to show that such representations were false, and that plaintiff was deceived thereby. His damages are conclusively proven.

Of course, plaintiff's testimony, and that of his witnesses, is generally contradicted by the defendant's evidence, but the credibility of the witnesses, and the weight to be given their testimony, is exclusively for the jury. Its verdict is in favor of plaintiff, and that verdict is amply sustained by substantial evidence.

It is defendant's contention that plaintiff had full opportunity to examine the property before he made the final contract. It is true that plaintiff and several of his associates did go down to the property for the purpose of examining it, but, on account of the character of the property, and the fact that the shaft was only down a few feet, there was nothing for plaintiff to see but a hole in the ground. The condition of the property at that time, as shown to exist by the testimony, was such that plaintiff could not, however searching his examination might be, discover anything which would aid him in determining the value of the property. In these circumstances, he waived none of his rights by his visit of inspection to the property.

We do not find it necessary to discuss the representation relative to the amount of debts to the Bessemer Iron Mining Company at the time of the sale of the stock.

It is clear the judgment is right and should be affirmed. It is affirmed. Respondent is entitled to his costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. I concur in result.

BIRDZELL, J. (concurring). I concur in an affirmance of the judgment. Upon an examination of the record I am of the opinion that there are but two questions presented which merit the serious consideration of the court. The first arises upon the rulings of the court admitting exhibits A, B, C, E, and F. The first three exhibits consist of test sheets purporting to show the results of a test of the property in question made long prior to the transactions involved in this case, and E and F consist of a report of an engineer employed by the Bessemer Iron Mining Company and its accompanying blueprints. Exhibits E and F are based partly upon the test sheets A, B, and C.

The second is the question as to whether or not the plaintiff pleaded and proved the proper measure of damages.

The appellant complains of the admission of the exhibits on the ground that they contain data, such as chemical analyses, without any authentication or proof that the data relate to the samples of ore taken from this property, and without any proof that the analyses are correct. Also that they purport, as a whole, to show the condition of the property as of a time long prior to the transaction in question, and are at best merely extrajudicial statements of unknown persons who compiled the exhibits, and are inadmissible for these reasons. The record discloses that the objections made did not clearly present to the trial court for ruling the question of their inadmissibility on all the grounds now urged. In fact, when exhibits A, B, and C were offered, the attorney for the defendant specifically stated that he had no objection. Later, however, he asked permission to interpose an objection; which he did, and the court overruled it as the exhibits had already been admitted. Furthermore, exhibits A, B, and C were identified by Vibert as records of exploration of the Crow Wing Iron Company, showing locations of drilling holes and chemical analyses of drillings and cuttings. It therefore appears that there was extant, and apparently available to the defendant, these sources of information relative to the condition of the property. The exhibits would thus have a bearing in determining whether his statements had been recklessly made. The engineer Wolfe, who made exhibit E, accompanied by exhibit F, did not rely exclusively upon the exhibits A, B, and C, as he made a personal examination of the property. He testified as an expert, and there was neither a general objection made to the admission of his report, exhibit E, nor was it objected to on the ground of its being hearsay. It was simply objected to on the ground that there was no proper identification of the matters that the witness took into consideration in preparing his report, and that it was based upon conditions developed in 1911. The evidence shows that the samples which Wolfe took into consideration had been carefully kept and were identified, and there is no reason to suppose that the mineral character of the property had changed between 1911 and 1917. A further consideration will suffice to demonstrate that any error there might have been in connection with the admission of these exhibits is negligible, for the evidence shows

that the property had been abandoned as a mining property. The plaintiffs were induced to buy stock solely on account of the supposed utility of this property for mining purposes. The defendant is shown to have substantially admitted, in certain proceedings in Minnesota concerning the liquidation of the corporation, that the property was worthless for mining purposes; so, conceding that the exhibits contained hearsay statements that should not have been permitted to go to the jury, the error was nonprejudicial. Furthermore, the exhibits were important as bearing upon the weight of Wolfe's deposition, and were proper to be considered for that purpose; and it would have been difficult, if not impossible, to have segregated the hearsay statements from the remainder.

On the question of damages I am satisfied that no error was committed. In the complaint plaintiff alleged the false representations, and then charged that the "mine was worthless and the corporate stock of said corporation worthless;" and in alleging his damage stated that he had been "damaged in the sum of $3,000, paid by him for said corporate stock." The complaint would have been good without setting forth the particulars in which the plaintiff was damaged. Guild v. More, 32 N. D. 432, 155 N. W. 41. The evidence showed that the property was worthless as a mining property and that the stock was worthless. In the light of this proof it is immaterial whether the action of the plaintiff be considered as founded upon a rescission of the contract or upon its affirmance, as in either event he would be entitled to recover the amount paid. Furthermore, no objection was made by the defendant that the complaint did not allege the proper measure of damages, nor was the question raised during the trial upon the admission of evidence. The defendant, therefore, cannot predicate error on the measure of damages adopted at the trial.

CHRISTIANSON, Ch. J., concurs.

FRED E. DAVIS, Respondent, v. HENRY JOERKE, Gottfried Heinrich, and Emmanuel Schock, Appellants.

(181 N. W. 68.)

Evidence — evidence admissible to determine capacity in which uncertain contract was signed.

1. Where the form of a simple written contract for the payment of money is such that it may reasonably be said to be uncertain as to the capacity in which the individuals signing it intended to be bound, the name of their principal being disclosed in the body of the contract, evidence of the transaction is admissible for the purpose of determining whether or not it is the individual obligation of the persons signing or the obligation of the disclosed principal.

Corporations — where uncertain whether parties acted as principals or as agents, direction of verdict for plaintiff held error.

2. Where there is an issue as to the capacity in which the defendants contracted,—that is, as to whether they contracted as principals or as agents for a disclosed principal; where the written contract is ambiguous, and there is conflicting testimony as to the prior negotiations and agreements relating to the capacity in which it was intended the defendants should be bound, it was error for the trial court to direct a verdict in favor of the plaintiff.

Corporations — when corporation not liable for promoters' contract stated.

3. Where individuals interested in the project of forming a corporation entered into a contract with a stock subscription solicitor to pay him a commission for work done, the corporation, when formed, in the absence of assumption in some manner, is not liable on the contract, and neither are the individuals liable if the solicitor relied exclusively upon the corporation to be formed.

Corporations — directors of proposed corporation may be liable to promoter, if organization abandoned.

4. If directors in a proposed corporation purport to bind it, in advance of its organization, for legitimate promotion expenses, and undertake to answer for the assumption of the obligation by the corporation, they may be held

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NOTE.—The rule is well established, in the absence of ratification or adoption, or charter or statutory provision imposing liability, that a corporation is not bound by contracts made by its promoters before its creation, as will be seen by an examination of the notes in 26 L.R.A. 544, and 50 L.R.A.(N.S.) 979, on liability of corporation on contracts of promoters.

On personal liability of one who signs a contract by adding words indicating representative capacity, to his signature, see note in 42 L.R.A.(N.S.) 1.

personally liable if they abandon the plan of organization and prevent the assumption of the obligation by the corporation.

Opinion filed December 16, 1920.

Appeal from the District Court of McIntosh County, Honorable *F. J. Graham,* Judge.

Reversed and remanded.

Statement of facts by BIRDZELL, J. This is an action upon a contract to pay money as follows:

Agreement.

Ashley, N. D. Oct. 14, 1919.

We the undersigned president and members of the board of directors of the Farmers' State Bank, Ashley, N. D., do hereby promise and agree to pay F. M. Mitchell of Bismarck, N. D., the sum of $1,610 for value received, without interest at the time the secretary of state of North Dakota issues a charter to the above-named bank.

Henry Joerke, President.
Gottfried Heinrich, Director.
Emmanuel Schock, Director.

Witnesses:
W. L. Johnson,
Fred E. Davis.

The contract was assigned by Mitchell to the plaintiff. At the conclusion of the trial, a verdict was directed in favor of the plaintiff for the full amount stipulated to be paid, upon which judgment was entered. The appeal is from the judgment and from an order denying the defendants' motion for a new trial.

The facts are as follows: During the late summer or early fall 1919, F. M. Mitchell interested a number of persons in the vicinity of Ashley, North Dakota, in a project of starting a new bank. He spent about a month in the locality, and personally solicited various individuals to purchase stock. In this work he was assisted somewhat by some of the defendants in the action. Where successful in his solicitations, he took notes for the amount subscribed. The plan was to organize a bank of $20,000 capital to be known as the Farmers' State Bank. The stock

was to be sold at 125 so that the bank might start with a surplus and undivided profits account of $3,000, and it is claimed that $10 per share was to be allowed Mitchell as compensation for his work and organization expenses. Mitchell had an arrangement with the plaintiff, Davis, whereby part of the organization work was to be done by the latter. A meeting of the subscribers was held in Ashley on October 11, 1919, at which the defendants and two others were elected directors of the proposed bank. There is testimony to the effect that at the time the organization meeting was held some 161 shares had been subscribed, and that an arrangement was made whereby the remaining shares would be allotted to those who had subscribed previously, with the understanding, however, that nothing should be allowed to Mitchell upon such shares for organization expenses. At the time of this meeting the subscribers' notes were in the possession of Mitchell. On October 14th, Davis and Mitchell called the defendants together apparently for the purpose of making a settlement of Mitchell's claim for commissions or promotion expenses. They went to the Ashley State Bank, where Davis dictated, and the three defendants signed, the contract upon which this suit is brought. A receipt showing the change in the possession of the securities amounting to $25,000, held for the stock of the new bank, was also drawn up and signed by the Ashley State Bank, by Johnson, its cashier. This receipt was also assigned by Mitchell to the plaintiff. The receipt, omitting the list of notes and securities reads as follows:

Ashley, N. D., Oct. 14, 1919.

Received of F. M. Mitchell, Bismarck, N. D., the following described notes to be held in escrow until such time as a charter has been issued to the Farmers' State Bank, Ashley, N. D., at which time the undersigned bank agrees to pay to said F. M. Mitchell the sum of $1,610 after first deducting the sum of $50 which is to be paid to Gott. Heinrich, and the further sum of $40 which is to be paid to E. M. Schock. . . .

Ashley State Bank, Ashley, N. D.
By W. L. Johnson,
Cashier.

For a valuable consideration I hereby assign and transfer to Fred E. Davis the within instrument and the instruments thereto attached.

F. M. Mitchell.

Articles of incorporation of the Farmers' State Bank were executed by the defendants and two others on October 13, 1919. These were accompanied by a certificate of the defendant Joerke as president of the Farmers' State Bank that the capital stock of $20,000 was paid up. The articles were filed with the secretary of state on October 16, 1919, and the charter was delivered on the same day to the state examiner, but the preliminary examination required by law was never made and the charter was never delivered by the examiner to the Farmers' State Bank. On November 13th a special meeting of the board of directors was held, at which all of the defendants were present, and it was resolved to employ counsel for the purpose of bringing or defending a suit founded on the claim in question; also to notify the Ashley State Bank not to deliver to Mitchell or his assigns the subscription notes, "as this bank has repudiated the claim of said F. M. Mitchell and his assigns against the bank for the said claim against the bank for the sale of said stock."

At a meeting of the directors on December 2d, a resolution was carried to the effect that the president be given authority to reject any and all applications for stock in the bank, and that the president and cashier be given authority to meet the directors of the First National Bank of Ashley to bargain for the purchase of that bank, and be authorized to close the deal for such purchase at not more than $55,000. At later meetings of the directors and stockholders, arrangements were made to increase the subscriptions to the stock of the Farmers' State Bank in order to purchase the First National Bank. At the stockholders' meeting a motion was unanimously carried that meetings held by and under the name of the Farmers' State Bank be discontinued, and that the meetings and transactions be by virtue of the stockholders of the First National Bank of Ashley; and it was declared that the organization would be known thereafter as the First National Bank of Ashley. The notes were practically all paid and the proceeds deposited in the Ashley State Bank in the name of Henry Joerke, agent, and in his testimony he states that he was agent for the Farmers' State Bank.

J. H. Wishek and *W. S. Lauder,* for appellants.

Here was on the face of the note itself, in view of the way it was drawn and signed, ample to put anyone upon inquiry as to the charac-

ter in which the defendants signed. Chatham Nat. Bank v. Gardner, 31 Pa. Super. Ct. 135; Crandall v. Rollins (N. Y.) 82 N. Y. Supp. 317; Wilmoth v. Hensel, 151 Pa. 200, 31 Am. St. Rep. 738.

Where one signs as agent of another, the prima facie presumption is that the words are merely *descriptio personæ,* and therefore that the one so signing is personally bound; yet it may be shown in an action between the original parties that it was not so intended. 3 R. C. L. p. 1095.

Where an offer of proof is made and overruled it will be presumed that the party making the offer could, if permitted, have proved the facts as set forth in the offer. Larson v. Russell (N. D.) 176 N. W. 1013; Dickinson v. Burke, 8 N. D. 118.

Cameron & Wattam, for respondents.

One who executed a promissory note or other instrument in the name of another, assuming to be his agent but having in fact no authority for that purpose, is himself bound as principal. Palmer v. Stephan, 1 Denio, 471; Dusenbury v. Ellis, 3 Johns. Cas. 70, 2 Am. Dec. 144; Rawlings v. Robson, 70 Ga. 595; Byars v. Dorres, 20 Mo. 284; Weare v. Grove, 44 N. H. 196; Roberts v. Button, 14 Vt. 195.

Where a note recited, "We, as trustees" of a named church "for and in behalf of the church, promise to pay," and was signed by persons designated as the trustees of such church, and the note failed to bind the church because of absence of authority to execute it, the trustees signing are personally held on the note. Dennison v. Austin, 15 Wis. 335; Brunswick-Balke Collender Co. v. Boutell, 45 Minn. 21.

It is not competent for the signer of a note not made in the name of his principal to show that anyone other than himself was liable thereon. National German American Bank v. Lang, 2 N. D. 66.

Parol evidence is not admissible to vary the terms of a written agreement. Johnson v. Kindred State Bank, 12 N. D. 336; Harney v. Wirtz, 30 N. D. 292; Reitsch v. McCarty, 35 N. D. 555.

BIRDZELL, J. (after stating the facts). The principal error complained of is the direction of the verdict in favor of the plaintiff. It is contended that the contract in question is ambiguous in that it does not clearly appear whether the defendants who are sued individually, undertook an individual liability or whether they undertook to bind

the corporation of which they were respectively president and directors. At the trial considerable evidence was admitted going to establish the understanding of the parties in this respect. It was the contention of both Davis and Mitchell, who were present at the meeting when the instrument was drafted and signed, that they were interested only in obtaining the signatures of the defendants rather than the whole board of directors, because they knew the defendants to be personally responsible. They testified that they stated this in substance to the parties at the time the contract was signed. On the other hand, the testimony offered by the defendants is that a majority of the directors were requested to sign so as to bind the corporation by their action in so far as the corporation could be bound at the time; that they expressly refused to become personally liable for the obligation; that all parties understood that the corporation had not yet come into existence; and that the only liability intended to be evidenced by the contract was whatever liability the corporation would later assume. After admitting this testimony the trial court apparently came to the conclusion that it was inadmissible; that the contract on its face was not ambiguous and bound the defendants personally; and for that reason the verdict was directed. We are of the opinion, however, that the instrument is ambiguous in that it does not clearly appear whether the defendants undertook to bind the corporation or whether they contracted personally, using the description of president and director as mere words *descriptio personæ*. The authorities dealing with this question are in almost hopeless confusion, and we need not discuss them at length. On one hand there are those which emphasize the parol-evidence rule to the point of attempting to extract from every written instrument the intention of the parties without aid from extrinsic sources. In the extreme applications of this rule by such authorities, contracts are construed as binding the individuals in instances where it is quite apparent that the actual intention of the parties was to bind a corporate principal. This, because the individuals had not adopted a form of signature showing beyond question the intent to sign the corporate name. On the other hand, there are those authorities which relax the parol evidence rule upon the slightest showing of uncertainty in the capacity in which those whose names appear are intended to be bound. In view of these conflicting authorities, par-

ticularly with respect to negotiable instruments, a provision was inserted in the Negotiable Instruments Law in the hope of measurably reconciling the conflict and producing more uniformity in the decisions. The section reads:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability." Under this statute the *form of the signature* is not necessarily controlling, but the *contents* of the instrument are to be examined to ascertain whether the agent appears to sign for or on behalf of a principal, and if he has used words describing himself as an agent without disclosing the principal he is not exempt from personal liability, but if he does disclose the principal, as in the instant case, he is not liable provided it was the intention to bind the principal. If there can fairly and reasonably be said to be uncertainty regarding this intention it is open to inquiry *aliunde* to render it certain, especially between immediate parties. The parol-evidence rule has received even a more rigid construction in the case of negotiable instruments than as applied to contracts generally. As this statute evidences a tendency to relax the rule somewhat with regard to negotiable instruments, there is all the more reason why it should not be rigidly applied to ordinary contracts. This is the tendency of the recent authorities. 3 R. C. L. p. 1095, says:

"It is better in these cases, however, to hold that the signature is ambiguous, and hence subject to explanation by extrinsic evidence; and this is the modern view. According to sounder doctrine while, where one signs as an agent of another, the prima facie presumption is that the words are merely *descriptio personæ*, and therefore that the one so signing is personally bound; yet it may be shown in an action between the original parties that it was not so intended, and that, in fact, the real intention was to bind the principal whose name was disclosed in the signature of his agent, or who was well known by the payee to be the real party to be bound." Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738. See also note and cases cited therein, 42 L.R.A.(N.S.) 6.

We are of the opinion that there is sufficient uncertainty manifested

on the face of the contract in question to admit evidence of the transaction, and that the conflicting testimony relating to the capacity in which the defendants' contracted formed a question of fact, which should have been submitted to the jury.

In view of the fact that there must be a new trial of the action, another question is presented upon the record that requires consideration. Upon such conflicting evidence as appeared upon the former trial, the jury will be called upon to determine what the true contract of the parties was, and even if it should be determined that the defendants contracted in a representative capacity, the further question would arise as to whether or not they might still be personally liable, in view of the subsequent transactions. As appears in the statement of facts above, those purporting to act for the bank repudiated this obligation as the obligation of the bank, and the stockholders have apparently determined not to complete the organization of the Farmers' State Bank, but to continue their organization as the First National Bank of Ashley. The question as to whether or not the defendants rendered themselves personally liable to the plaintiff by reason of their participation in this action of the stockholders, is one that is not free of difficulty.

It is elementary that a corporation is not liable upon contracts entered into by its promoters. Before the corporation comes into existence, it can have no representative, and no one is capable of acting for it. Those interested in promoting it may nevertheless contemplate the ultimate payment by the corporation of the legitimate promotion expenses. But the corporation does not become liable for such expenses, in the absence of a subsequent undertaking in some form. In the instant case the record is in an uncertain state as to the capacity in which Mitchell was originally employed, if he was employed, to undertake the work he did. It does not appear, however, that he was employed by these defendants acting together. Neither does it appear as to whether or not he was acting as the agent of each individual stockholder for the purpose of bringing about the organization of the corporation. Possibly he had an understanding with the individual stockholders for his commission, and that it was included in the subscription notes. If such were the arrangement these defendants, acting with knowledge thereof, in attempting to put their own notes be-

yond the reach of Mitchell and abandoning the original plan of incorporation, would each be severably liable to him or his assignee for the amount so included in the notes given by them. The record leaves it equally uncertain as to whether there was any undertaking, express or implied, that these defendants would co-operate to secure the completion of the organization. These are questions of fact upon which the ultimate liability of the defendants in this action may depend. They must be determined by the jury from all the evidence bearing upon the transaction. The jury, in short, must find what the actual contract relations were.

While some of the evidence has either a direct or circumstantial bearing upon some of these questions, we are satisfied that it cannot be said that they must be resolved one way or the other as a matter of law; for reasonable inferences either way may be drawn from some of the testimony. If, for instance, the jury should believe the version of the transaction as testified to by the defendants, they might also reasonably infer that Mitchell was content to take the risk of the ultimate organization of the corporation; knowing, as he must have known, the desire of the stockholders, whom he had personally solicited. In this event, it could not be said that there was any undertaking on the part of the defendants to secure the organization of the corporation, nor would they be precluded from exercising their judgment, in conjunction with the other stockholders, as to the desirability of completing the organization. Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 30 S. W. 163; Landman v. Entwistle, 21 L. J. Exch. N. S. 208, 7 Exch. 632, 155 Eng. Reprint, 1101; Fletcher, Cyc. Corp. § 158. On the other hand, if these parties undertook to answer for the assumption of this obligation by the corporation and then joined in a plan to frustrate its assumption, they have, of course, repudiated their obligation, and are liable. Roberts Mfg. Co. v. Schlick, 62 Minn. 332, 64 N. W. 826; 14 C. J. § 313.

It follows from what has been said that the judgment and order appealed from must be reversed and the cause remanded for a new trial. It is so ordered.

CHRISTIANSON, Ch. J., and BRONSON, and GRACE, JJ., concur.

ROBINSON, J. (concurring specially.) The plaintiff sues on a document as follows:

Ashley, N. D., Oct. 14, 1919.

We, the undersigned, president and members of the board of directors of the Farmers' State Bank, Ashley, N. D., do hereby promise and agree to pay F. M. Mitchell of Bismarck, N. D., the sum of $1,610 for value received, without interest at the time the secretary of state of North Dakota issues a charter to the above-named bank.

Henry Joerke, President.
Gottfried Heinrich, Director.
Emmanuel Schock, Director.

Witnesses:
E. E. Johnson,
Fred E. Davis.

On the back of the document it is written:

I hereby assign and transfer to Fred E. Davis all my rights, title, and interest in and to the within instrument.

F. M. Mitchell.

Defendants, by answer, aver that the document was made without any consideration. The court directed a verdict for the plaintiff, and appellants aver that there is no evidence to sustain the verdict.

As it appears, Mr. Mitchell was a promoter, and to secure the organization of a bank at Ashley, North Dakota, he did induce several persons to subscribe for bank stock to the amount of $16,100, agreeing to pay for the same $125 a share, and that each subscription included 10 per cent for his promotion. He did preside at an organization meeting held by the stock subscribers, and he then delivered the subscription papers to defendant Joerke, who had been elected president of the bank. Davis was present, dictated the document in question and the assignment to himself. There is no claim that either of the defendants employed Mr. Mitchell or Davis to secure the subscriptions or to promote the organization of the bank. No services were rendered for or at the request of either of the defendants. The subscription papers

were not payable to Joerke or to either of the defendants. The papers were turned over to the Ashley State Bank to be held in escrow until the issue of a charter to the Farmers' State Bank of Ashley. The bank gave a receipt for the same to F. M. Mitchell, and at the foot of the receipt there is written an assignment to Fred E. Davis. On the argument of the case counsel for plaintiff was requested to point out evidence of any consideration for the promise to pay $1,610. They failed to do so. An examination of the record does not disclose any consideration for the promise. The defendants did not hire either Mitchell or Davis to perform any services, either for themselves or the bank, or for any person. When defendants signed the paper they were under no legal obligation to pay anything to Mitchell or to Davis. Hence the promise to pay is void for want of consideration. Furthermore, it appears that in obtaining the promise to pay and in obtaining the subscriptions, Mitchell and Davis were dealing with illiterate Germans, who did not understand the promotion game or the English language. Otherwise, it is hard to conceive how any one of the subscribers would have promised to pay 10 per cent for inducing him to subscribe for stock when he was perfectly free to subscribe without paying any commission. As the pleadings and the proof wholly fail to show any cause of action against the defendants, the judgment should be reversed and new trial granted.

H. C. WERNER, Respondent, v. UNITED STATES RAILWAY ADMINISTRATION, W. D. Hines, Director General, and Northern Pacific Railway Company, a Corporation, Appellants.

(181 N. W. 80.)

Carriers — carrier of stock may be liable ex delicto notwithstanding shipping contract.

In an action against a carrier for negligence in caring for cattle shipped

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Note.—On the question of statutory duties of carriers of live stock with reference to care of stock during transportation, see note in 44 L.R.A. 449.

On duty of carrier of live stock as to feeding and watering stock during transportation, see notes in 43 Am. St. Rep. 446. and 63 Am. St. Rep. 554.

over its line, where the defense was based upon the terms of a shipping contract, it is *held:*

1. The carrier may be held liable for negligence in an action *ex delicto;* and there is no failure of proof where there is sufficient evidence to prove breach of duty, and no substantial ground of error where it appears that the carrier was given the benefit of the valid and applicable limitations in the shipping contract.

Carriers — carrier not relieved of reasonable care as to feeding, etc., by contract provision for attendants.

2. Where the carrier knows that no one is accompanying live stock carried by it, it owes the duty of exercising reasonable care in feeding, watering, and shipping; and it is not relieved of that duty by a provision in the contract to the effect that the shipper will furnish one or more attendants.

Carriers — instruction held not to warrant finding for plaintiff on ground of delay alone.

3. For reasons stated in the opinion, it is held that the instructions to the jury were proper.

Appeal and error — judgment reduced by value of animal not dying as result of negligence.

4. The evidence being insufficient to show that the death of an animal occurring a few days after arrival at destination, due to disease, was proximately caused by any negligence of the carrier, and the value of the animal being established by undisputed evidence, the judgment is reduced to the extent of the value of the animal, and, as so reduced, affirmed.

Opinion filed December 24, 1920. Rehearing denied January 11, 1921.

Appeal from judgment of District Court of Sixth Judicial District, *Lembke,* J.

Affirmed.

Young, Conmy, & Young, for appellants.

In computing delay of shipment of cattle, due consideration must be made of the stops for feed, water, and rest. St. Louis, I. M. & S. R. Co. v. Carlisle (Tex. Civ. App.) 78 S. W. 553; Hickey v. Chicago, B. & Q. R. Co. (Mo. App.) 160 S. W. 24; Johnston v. Chicago, B. & Q. R. Co. (Neb.) 97 N. W. 482; Cleve v. Chicago, B. & Q. R. Co. (Neb.) 108 N. W. 982.

Even where delay is shown, it must be proved by the plaintiff that the delay was negligent, to sustain a recovery. Clark v. St. Joseph & G. I. R. Co. (Mo. App.) 122 S. W. 318; McDowell v. Missouri P. R. Co. (Mo. App.) 152 S. W. 435.

It must be shown, either directly or inferentially, that the delay resulted from negligence of the carrier, or its agents and servants. Patterson v. Chicago & A. R. Co. (Mo. App.) 182 S. W. 1034; Teller & Smith v. Chicago, B. & Q. R. Co. (Iowa) 120 N. W. 672; Cunning-

"It is better in these cases, however, to hold that the signature is ham v. Chicago & A. R. Co. (Mo. App.) 182 S. W. 1033.

Where plaintiff alleges negligence in one respect, he cannot recover on proof of negligence in another respect. Ausk v. Great Northern R. Co. 10 N. D. 215; Texas & P. R. Co. v. Stephens, 86 S. W. 933; Gulf, C. & S. F. R. Co. v. Wiegert (Tex.) 87 S. W. 191; Texas & P. R. Co. v. Stewart, 43 Tex. Civ. App. 399, 96 S. W. 106; Moore v. Baltimore & O. R. Co. (Va.) 48 S. E. 887; Ecton v. Chicago, B. & Q. R. Co. (Mo.) 102 S. W. 575; Barr v. Quincy, O. & K. C. R. Co. 138 Mo. App. 471, 120 S. W. 111; Burgher v. Wabash R. Co. 139 Mo. App. 62, 120 S. W. 673.

"Where the only cause of action declared on in the petition was defendant railroad's negligent failure to transport plaintiff's hogs promptly, plaintiff could not recover for injuries to the hogs while being loaded or unloaded by defendant's employees." Hunter v. St. Louis Southwestern R. Co. (Mo. App.) 126 S. W. 254; Stone v. Chicago, R. I. & P. R. Co. 149 Iowa, 240, 128 N. W. 354; Willson v. Northern P. R. Co. 111 Minn. 370, 127 N. W. 4.

"A carrier, not being an insurer of a shipment of live stock against increased risks necessary to the transportation, is not liable, unless negligent, for injuries to the stock." Ft. Worth & D. C. R. Co. v. Berry (Tex.) 170 S. W. 125; St. Louis Southwestern R. Co. v. Lewellen Bros. (Tex.) 116 S. W. 116.

"It is generally not commendable practice, in stating the issues to the jury, to quote at large from the pleadings. It may, and frequently does, mislead or prejudice the jury, so as to require a reversal." Spieler v. Lincoln Traction Co. (Neb.) 171 N. W. 896; Hanna v. Hanna, (Neb.) 176 N. W. 732; Swanson v. Allen (Iowa) 79 N. W. 132; Baker v. Drake (Tex.) 185 S. W. 879; Branthover v. Monarch Elev. Co. 33 N. D. 454; Elliott Supply Co. v. Green, 35 N. D. 641; Nupen v. Pearce, 235 Fed. 497; Iverson v. Look (S. D.) 143 N. W. 332.

John Moses and *Nuchols & Kelsch*, for respondent.

A motion for a directed verdict in favor of the defendants for dismis-

sal of the action is properly denied where the evidence is conflicting, and where there is some evidence from which the jury can make a finding of damages in favor of the plaintiff. Swallow v. First State Bank, 35 N. D. 608; Horton v. Wright, 36 N. D. 622.

If the verdict of the jury is supported by substantial evidence then it must stand. Acton v. Fargo Street R. Co. 20 N. D. 444 and authority cited.

BIRDZELL, J. On December 3, 1917, Slimmer & Thomas, a commission firm doing business at South St. Paul, Minnesota, delivered to the defendant for shipment to the plaintiff at Hazen, North Dakota, forty-one head of young steers. The car containing the cattle left St. Paul at 11:05 P. M. on December 3d, and arrived at Hazen at 3:15 P. M., December 7th. When they arrived at Hazen some of them had their horns broken, one had a broken leg, which necessitated killing it, and it is claimed that the whole of them had been damaged considerably in transit by reason of rough handling and lack of food and water. A few days after their arrival one died of pneumonia or fever. This action is to recover damages for the alleged negligence of the defendants in the care and shipment of the stock. In the trial court the plaintiff recovered a verdict of $277, with interest and costs, making a judgment of $352.91.

The negligence upon which the action is predicated is alleged in the complaint as follows:

"That the said carload of steers so loaded in the cars at South St. Paul, Minnesota, on the 3d day of December, 1917, arrived at Hazen, North Dakota, on the 7th day of December, 1917, being a running time of approximately ninety-six hours.

"That the said defendant, its agents and servants, not regarding its duty regarding the carriage of the said forty-one head of steers, so carelessly and negligently carried and transported the said forty-one head of steers, that the same were unreasonably delayed in transit, and suffered greatly from privations and exposure.

"That the said running time of ninety-six hours is altogether unreasonable, and that the said defendant was negligent in not shipping the carload of stock with greater despatch.

"That the said carload of stock was not properly taken care of in transit, and that on arrival at Hazen, North Dakota, it was found that

one steer had a leg broken in the car, and was sold by the agent of the Northern Pacific Railway Company at Hazen, North Dakota, to the plaintiff's damage in the sum of $41."

It is first claimed by the appellant that the action should have been dismissed for failure of proof on defendant's motion made during the trial. It is said that the action is based on the common-law liability of the carrier, and the evidence showed that the cattle were shipped under a contract containing certain valid limitations of the common-law liability. From this it is argued that any liability of the carrier arising out of this shipment is governed by the contract, and action cannot be maintained without showing a breach of the contract. The case of Cooke v. Northern P. R. Co. 22 N. D. 272, 133 N. W. 303, is relied upon. This contention is without merit. The defendants in their answer pleaded the contract; and the court, in instructing the jury, gave the defendants the full benefit of its provisions by casting upon the plaintiff the burden of proving negligence as well as compliance with the terms of the contract generally. The fact that a special contract is entered into covering a shipment does not altogether eliminate the duty which the carrier owes as custodian and shipper, for the violation of which it may be answerable in an action *ex delicto*. See Morrell v. Northern P. R. Co. 46 N. D. 535, 179 N. W. 922.

The appellant relies upon the fourth stipulation in the shipping contract, which recites that the shipper will unload, care for, and feed the stock while in possession of the carrier, and furnish one or more attendants, and that in case of failure so to do the carrier, in performing these duties, shall be considered as representing the shipper. Upon the back of this contract, in the space where the agent is required to insert the names of persons entitled to transportation under its provisions, it bears a stamp as follows: "No attendant in charge." This indicates that the carrier knew at the time the contract was made that no one was to accompany the stock, and where the carrier has this knowledge the provision of the contract above referred to does not relieve it of liability for negligence in caring for the stock. Morrell v. Northern P. R. Co. supra; Sailer v. United States Administration, post, 126, 181 N. W. 57.

The testimony shows that the cattle were in good shipping condition when delivered to the carrier, and that they were in poor condition upon arrival at destination. The defendant's agent at Hazen and

other witnesses noted their poor condition. The evidence leaves little doubt as to the cause of the damage, and the jury's verdict is conclusive. The record shows that the cattle were fed but a small quantity of hay en route. While there is little or no evidence to show unreasonable delay in transit, the evidence does show that the cattle were on the road four days, and it also shows that an insufficient quantity of feed was given them to properly sustain strength for that period. The time covered by the transportation may be considered important only as bearing upon the care that they had during that period. It is claimed that the trial court erred in instructing the jury that they might render a verdict for the plaintiff if they found from the evidence that the cattle were delayed. That is not the instruction. The instruction was that if the cattle were "delayed and were improperly fed for an unreasonable time," the plaintiff might recover, etc. Under this instruction the jury would not have been warranted in finding a verdict for the plaintiff on the ground of delay alone. We are of the opinion that it is a proper instruction under the evidence.

The evidence, however, fails to show that the death of the steer that died of pneumonia or fever a few days after arriving was proximately caused by any negligence of the carrier. We are of the opinion that the evidence is insufficient to sustain the verdict in so far as it includes recovery for this animal. The evidence shows the value of this steer to have been $41. See Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324. The judgment must be reduced in this amount.

It appears that the judgment appealed from is against both the Director General and the railroad company. When the contract was made and the shipment moved the railroad was not under Federal control. Thus, there appears to be no reason why judgment should be entered against the railroad administration. Therefore, the judgment against the United States Railroad Administration, Walker D. Hines, Director General, is reversed, and the judgment against the Northern Pacific Railway Company, reduced in the sum of $41, as above indicated, is affirmed. Neither party will recover costs on this appeal.

CHRISTIANSON, Ch. J., and ROBINSON, and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

MIKE WENZEL, Respondent, v. THOMAS TAYLOR, Appellant.

(180 N. W. 807.)

Public lands — postdated lease cannot retroactively grant term already expired conveying title to crop previously harvested.

A lease cannot by the device of postdating be made to operate retroactively, so as to grant a term that has already expired, and convey title to a crop of hay that had been previously harvested and stacked upon the land.

Opinion filed December 24, 1920. Rehearing denied January 11, 1921.

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

C. S. Buck, for appellant.

When the lease explicitly provides that the landlord may treat it as void on a breach of a condition by the tenant, his election to do so dissolves the relation between him and his tenant. Miller v. Havens, 16 N. W. 865; Schwoebel v. Fugina, 14 N. D. 375; 24 Cyc. 1347, 1350.

S. E. Ellsworth, for respondent.

An estate in real property other than an estate at will or for a term not exceeding one year can be transferred only by operation of law or by an instrument in writing, subscribed by the party disposing of the same or by his agent thereunto authorized by writing. Comp. Laws 1913, § 5511; Fuller v. Board of University & School Lands, 21 N. D. 216, 129 N. W. 1029.

The state, by failing to act upon a ground of forfeiture which, if it existed, should have been known in 1918, by demanding of plaintiff the rental for the ensuing year, and by giving him to believe until February, 1920, that it did not expect to exercise an option to cancel the lease, has conclusively waived its right to such forfeiture. Ferguson v. Talcott, 7 N. D. 182, 73 N. W. 205; Timmins v. Russell, 13 N. D. 487, 99 N. W. 48; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Hanson v. Hanson Hardware Co. 23 N. D. 169, 135 N. W. 766.

The relation of landlord and tenant may be defined in general terms as that which arises from a contract by which one person occupies the property of another with his permission and in subordination to his

rights. 24 Cyc. 876, 882; Mpls. Iron Store Co. v. Branum, 36 N. D. 385, 162 N. W. 543.

A tenant in undisturbed possession of the demised premises is estopped to deny the title of his landlord, as such title of the landlord existed in him at the time of the creation or the inception of the tenancy, before a surrender of possession to the landlord. 24 Cyc. 935–937; Ricketson v. Gallighan (Wis.) 62 N. W. 87; Pappe v. Traut (Okla.) 41 Pac. 397; Bartlett v. Robinson (Neb.) 72 N. W. 1053; Lindsay v. R. Co. (Minn.) 13 N. W. 191.

Where the grass was severed from the realty before the confirmation of the sale, the title to the grass did not pass to the purchaser of the land. Yeazel v. White (Neb.) 58 N. W. 1020; Phillips v. Keysaw (Okla.) 56 Pac. 695.

BIRDZELL, J. Action to enjoin the defendant from removing hay from the northwest quarter of section 32, township 139, range 66, in Stutsman county. The plaintiff claimed one half the hay harvested upon the land in 1919. The judgment of the lower court found him to be the owner of one third thereof or 40 tons, and enjoined the defendant from interfering with plaintiff's ownership, possession, and right of removal. From this judgment defendant appeals.

In April, 1918, the plaintiff, Wenzel, was the successful bidder at a public sale of school-land rentals in Stutsman county, and there was demised to him for the term of five years the northwest quarter of section 32, township 139, range 66, for the sum of $85, payable in annual instalments of $17 each. A lease evidencing this demise was duly executed. The plaintiff paid the first year's rental in cash at about the time the lease was issued, and subsequently, in the month of July, 1918, entered into an oral agreement with one Greenstein, by the terms of which Greenstein was permitted to go upon the land and cut and remove the hay for the season of 1918 for a consideration of $55 paid to Wenzel. Later that year the plaintiff received a notice from the office of the state land commissioner dated December 1st, notifying him that the 1919 rental would be due on January 1, 1919, and unless paid by January 31st, the lease would be canceled without further notice. Plaintiff paid the rental on January 15, 1919, obtaining the receipt of the county treasurer of Stutsman county. Under date

of February 1, 1919, the plaintiff was notified by the public land commissioner that at a meeting of the board of university and school lands, held on January 30th, a resolution had been passed canceling the lease. In July of 1919 the defendant solicited of the plaintiff the privilege of taking off the hay crop for that year upon shares, and after some negotiations an oral agreement was made between the plaintiff and defendant whereby the latter was to harvest the crop and put it in stacks, receiving two thirds as his own. The defendant harvested the crop and stacked it upon the land, and during the following winter, about February 1, 1920, when the plaintiff claimed his portion, the defendant set up a claim based upon a subsequent lease from the board of university and school lands.

It seems that complaint was made during the summer of 1918 to the board that the plaintiff had sublet the land during 1918 in violation of a provision of the school-land lease, and that it was on account of this complaint that the lease was later canceled by the board. As a result of some correspondence initiated by the public land commissioner with this defendant in November, 1919, and some time after the hay had been harvested, the defendant was apprised that Wenzel's lease had been canceled, and that he should not pay anyone for a lease on the land except the county treasurer. As a result of this correspondence the defendant paid $75 to the county treasurer, and later, about January 28, 1920, the defendant's payment was accepted by the land commissioner as rental for 1919 and a lease was made to him. The defendant claims that this lease was retroactive on the hay crop of 1919, and gave him title to the whole of it. The plaintiff at all times resisted the action of the board of university and school lands in canceling his lease without notice after he had paid the rental for the year 1919.

We think the case is clear, and it requires little or no discussion to demonstrate the correctness of the judgment appealed from. The defendant put up the hay under a contract with the plaintiff which recognized the plaintiff's right to one third of it. The plaintiff had paid his rent for that year in response to a notice sent out after complaint had been made to the board giving the facts which were later made the basis of the cancelation. The lease to the defendant, which was not

made until January, 1920, could not demise a term that had already expired so as to convey title to the crop that had been harvested and thus converted into personalty. The judgment appealed from is affirmed.

MAGDALENA FUCHS, Respondent, v. ROBERT LEHMAN, Appellant.

(181 N. W. 85.)

Vendor and purchaser — evidence held to sustain judgment for price paid on reconveyance to vendor.

1. In an action to recover $3,000, which sum, it is alleged, the defendant agreed to pay for the interest of the plaintiff and her husband in certain real and personal property which they transferred to him, it is *held* that the trial court did not err in refusing to order a new trial on the ground of insufficiency of the evidence to justify the verdict.

Appeal and error — vendor and purchaser — error in excluding evidence held cured by subsequent admission; motive for retransfer held admissible in action for payments made.

2. For reasons stated in the opinion it is *held* that certain rulings on the admission and exclusion of evidence were nonprejudicial.

Trial — instructions must be construed as a whole.

3. The court's instructions must be considered and construed as a whole.

Trial — instruction that plaintiff must prove "justness" of claim held proper.

4. Certain instructions considered, and, for reasons stated in the opinion, held to be nonprejudicial.

Opinion filed December 24, 1920.

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

Defendant appeals from the judgment and from an order denying a new trial.

Affirmed.

Simpson & Mackoff and *B. M. Rigler,* for appellant.

The court erred in sustaining plaintiff's objection to the question put to Samuel Fuchs by the defendant as to the reason why he gave

the place back. The defendant had a right to ask this question for the purpose of laying a foundation for impeachment. 2 Elliott, § 971; State v. Hazlett, 14 N. D. 490; Taugher v. N. P. R. Co. 21 N. D. 111.

Thos. H. Pugh and *Otto Thress,* for respondent.

If there is in the case substantial evidence on which the jury's verdict may rest, the court will not disturb this verdict, although the evidence may be conflicting. The rule is well settled in this state. Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648; Senn v. Steffan, 37 N. D. 491, 164 N. W. 102; Richel v. Sherman, 34 N. D. 298, 158 N. W. 266.

The presiding judge saw the witnesses, heard the testimony, and is in a position to judge as to the right of the jury to believe one side or the other, and, generally, in such cases, the ruling of the lower court will not be disturbed on appeal. Hager v. Clark, 35 N. D. 591, 161 N. W. 280; Blackorby v. Ginther, 34 N. D. 248, 158 N. W. 354; Walker v. Laubscher (Iowa) 162 N. W. 780; Tarczek v. C. & M. R. Co. (Wis.) 156 N. W. 473; Branthover v. Monarch Elev. Co. (N. D.) 173 N. W. 455.

The witness cannot properly be cross-examined as to statements irrelevant or collateral to the matter in issue, either with a view to eliciting from him an admission of the variance or laying a foundation for proof thereof. 7 Enc. Ev. 80.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover $3,000, which she claims the defendant agreed to pay to her and to Sam Fuchs, her husband, in consideration of certain property which they conveyed to him. In her complaint she alleges the agreement on the part of the defendant to make such payment, and the conveyance by herself and her husband of the property for which such payment was to be made. She further avers the assignment to her by the husband of his cause of action.

The evidence shows that in May, 1919, the defendant sold to the plaintiff and Sam Fuchs, her husband, a farm consisting of two quarter sections of land, located near Richardton, in Stark county, in this state, together with certain horses, cattle, and machinery on said farm. One of the quarters was conveyed to the plaintiff, and the other to her husband. There was paid to the defendant, $3,000 in cash,—$1,000

to apply on the quarter section conveyed to the plaintiff and $2,000 to apply on the quarter section conveyed to her husband. The balance of the consideration was evidenced by twenty promissory notes, aggregating $19,500. In June, 1919, negotiations were had between the defendant and plaintiff's husband which resulted in a reconveyance by the plaintiff and her husband to the defendant of such lands, and a resale and redelivery to the defendant of the personal property. It is undisputed that plaintiff and her husband, on or about June 25, 1919, executed, acknowledged, and delivered deeds conveying such real property to the defendant; that he, on or about June 25, 1919, entered into possession of the realty, and received into his possession the personalty, and since that time has been, and now is, the owner of said real and personal property.

It also appears from the evidence, that the defendant returned to the plaintiff and her husband, the twenty promissory notes which they had executed and delivered to the defendant at the time they purchased the land and personal property from him. The sole question involved in this action is whether the defendant, as a consideration for the reconveyance to him, agreed to pay back to the plaintiff and her husband the $3,000 which he received at the time he sold and conveyed this property to them. The plaintiff's husband testified positively that this was the agreement. The defendant, on the other hand, testified with equal positiveness, that the agreement was that he would surrender to the plaintiff's husband the twenty promissory notes, and that this was the only consideration he was to pay for the reconveyance of the property. Several witnesses were called (all such witnesses being relatives of the parties to the controversy), who testified in regard to the question at issue. Sam Fuchs was in some things corroborated by his wife, the plaintiff; and in other things, by his brother, Chris. A greater number of witnesses, however, testified, in favor of the defendant's version of the transaction. The jury returned a verdict in favor of the plaintiff for $3,000 and interest from June 25, 1919. The defendand moved for a new trial on the ground of errors of law occurring at the trial, and duly excepted to; insufficiency of the evidence to justify the verdict; excessive damages appearing to have been given under the influence of passion or prejudice; and newly discovered evidence. The

motion for a new trial was denied, and the defendant appealed from the judgment and from the order denying a new trial.

The first and main contention of the appellant is that the evidence is insufficient to justify the verdict. It is argued that the evidence as adduced by the defendant was of greater probative force than that adduced by the plaintiff; that defendant's version was more reasonable than plaintiff's version, and also that defendant's version was supported by the testimony of a greater number of witnesses. This argument, however, ignores the fundamental rule that in this case all questions of fact were for the jury; and that it was for the jury to pass upon the credibility of witnesses and the weight to be given to their testimony. The jury believed the plaintiff's version of the transaction. This they had a right to do. It was for the jury to say what the truth was. They determined that plaintiff's version was the true one. The trial judge, who saw and heard the witnesses, refused to disturb the verdict. In determining whether the verdict should be set aside on the ground of insufficiency of the evidence, the trial court exercised a discretionary power, and his ruling should not be interfered with unless this court can say that he abused his discretion. We are all agreed that no abuse of discretion appears here.

The next contention of the appellant is that the trial court erred in sustaining an objection to the following question propounded to plaintiff's husband, while he was under cross-examination:

"Q. Now, on June 25th, the crops on the land were burned up, weren't they, by the hot winds?"

It is wholly unnecessary to determine whether the ruling was or was not erroneous, for the record discloses that the court subsequently changed its ruling, and permitted testimony to be offered as to the condition of the crops at the time the plaintiff and her husband made conveyance to the defendant. Hence the error, if any, in the original ruling was clearly cured.

It is next contended that the court erred in sustaining an objection to the following question propounded to the plaintiff's husband, Sam Fuchs, while he was under cross-examination:

"Q. Didn't you tell Val Brown there at that time that the reason that you gave the place back to Robert was because you thought it was too much for you to pay for it?"

This question related to a certain conversation claimed to have taken place between Sam Fuchs and Val Brown, on the latter's farm, in September, 1919. The record shows that on recross-examination defendant's counsel was permitted to go into the alleged conversation at length. Sam Fuchs was then asked if he did not, in such conversation at Val Brown's place, some time in September, 1919, tell Brown that before giving the place back to the defendant, he (Sam Fuchs) asked the defendant for the $3,000, but that defendant refused to give it back. Sam Fuchs answered that he had such conversation with and made such statement to Val Brown before the deal was made, *i. e.*, before June 25, 1919, but denied that he had any such conversation with him subsequent to that time. Val Brown was called as a witness for the defendant, and testified that Sam Fuchs was at his place in September, 1919; and that at that time and place, Sam Fuchs said to him (Brown) that before giving the place back to the defendant, he (Fuchs) asked "Robert for his $3,000 he had paid him, and that Robert refused to give it back to him." The materiality of the question to which the objection was sustained was certainly not apparent at the time it was asked. As soon as it was disclosed to the court that the statements claimed to have been made by Fuchs were material and against his and the plaintiff's interests, the court permitted the entire conversation to be shown. No restrictions were placed upon the examination of either Sam Fuchs or Val Brown, as to what was said during the conversation after the materiality thereof became apparent.

Error is also assigned upon the ruling of the court in permitting the following question to be propounded to plaintiff's father, Wald:

"Q. Did you at any time between May 19, 1919, and June 25, 1919, threaten to take Sam's wife away from him unless he gave up the land to Lehman?"

In our opinion the assignment is wholly without merit. It was the contention of the defendant—and several of his witnesses testified—that at the time the negotiations between Sam Fuchs and the defendant were had, on June 25, 1919, Sam Fuchs said that he would lose his wife unless he gave up the land; that his father-in-law threatened to and would take his (Fuchs's) wife away from him if he kept, and remained upon, the land. The defendant contended that this was one of the main reasons why Sam Fuchs desired to turn the property back

to the defendant. In these circumstances it was manifestly proper for the plaintiff to prove that the condition, or motive, asserted by the defendant, did not exist.

It is next contended that the court erred in instructing the jury thus: "The plaintiff has brought this action and the burden of proof is upon the plaintiff to show by a preponderance of the evidence the justness of her claim before she can recover. That is the law in every civil case, and that the party who maintains, who sets up and alleges the fact, the burden of proof is upon them. A party coming into a court of justice must satisfy the jury, by what is termed a fair preponderance of the evidence, as to the justness of her claim."

It is not apparent to us that the instruction is misleading even if it is considered abstractly. The term "just" may apply to law as well as ethics. In certain cases it denotes that which is right and fair according to positive law. Funk & W. New Standard Dict. Justness is defined by the Century Dictionary: 1. The quality or state of being just, equitable, or right; *conformity to truth* or justice; *lawfulness;* rightfulness; honorableness. 2. Conformity to fact or rule; correctness; exactness; accuracy. It is elementary that instructions must be considered as a whole. In this case the trial judge defined the term preponderance of evidence with much care. He also instructed the jury: "Unless the plaintiff has shown you throughout the entire case the correctness of her story to such an extent that it outweighs the proof of the defendant she cannot recover." We find no reason for believing that the defendant was prejudiced by the instruction complained of.

The contention that the verdict was excessive is clearly untenable. The plaintiff was either entitled to the verdict which was returned, or nothing at all.

No claim is made in this court that the defendant was entitled to a new trial on the ground of newly discovered evidence.

It follows from what has been said that the judgment and order must be affirmed. It is so ordered.

ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, J. (concurring specially). A consideration of the matters

presented upon this appeal leads to the conclusion that the verdict of the jury is sustained by substantial evidence; that the court did not err in any of its rulings regarding the reception or exclusion of evidence, nor in its rulings upon objections.

It is clear the damages were not excessive, nor is there anything in the record to indicate that the jury were influenced by passion or prejudice.

JACOB SALEWSKI, Appellant, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Respondent.

(181 N. W. 72.)

Railroads — frightening horse by ordinary switching operations not actionable.

1. A railroad company is not liable for injuries resulting from horses becoming frightened at a railroad crossing by the sight of a locomotive engaged in switching; and which locomotive was then moving in the usual and ordinary manner, and was attended only by the noises incident to the usual and ordinary operation of locomotive.

Railroads — findings held not to show negligence in frightening horse.

2. For reasons stated in the opinion, it is *held* that the jury, by their answers in the special verdict, found that defendant was free from actionable negligence.

Appeal and error — error as to failure to instruct and to submit interrogatories as to contributory negligence held immaterial in view of verdict of no negligence.

3. In an action for personal injuries, errors predicated on failure to give requested instructions and to submit requested interrogatories bearing on the question of contributory negligence become immaterial where the special verdict shows that the jury found the defendant not guilty of negligence.

NOTE.—On liability of railroad company operating trains or cars longitudinally along public street for frightening horses by blowing off of steam or causing other noise, see note in 49 L.R.A.(N.S.) 677.

On sufficiency of general allegations of railroad's negligence by frightening horses, see note in 59 L.R.A. 230.

Appeal and error — discretion of court in denying new trial not disturbed.

4. For reasons stated in the opinion it is *held* that the trial court did not err in denying a new trial.

Opinion filed December 31, 1920. Rehearing denied January 18, 1921.

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

Plaintiff appeals from the judgment and from an order denying a new trial.

Affirmed.

Knauf & Knauf, for appellant.

In submitting a case on special issues, it is necessary that all the issues should be found by the jury, and the court should by its charge explain the law upon any issue, where it is necessary for a thorough understanding of the question by the jury. Merzbacker v. State, 36 S. W. 308; Baxter v. R. Co. 80 N. W. 644; Schrunk v. St. Joseph, 97 N. W. 947.

The lower court should have given the instructions necessary to inform the jury as to the issues, rules for considering the testimony, the burden of proof, and to make the jury clearly understand its duty. L. N. A. & C. R. Co. v. Frawley, 9 N. E. 594; Mauch v. Hartford, 87 N. W. 816; Burns v. Co. 19 N. W. 380.

The issue should have been submitted directly, tersely, and in some form. It was not. The failure was prejudicial and erroneous. McGowan v. R. Co. 64 N. W. 891; Byington v. City, 88 N. W. 26; Dohman v. Ins. Co. 71 N. W. 69; Andrews v. R. Co. 71 N. W. 372; Kreutzer v. R. Co. 40 N. W. 657; Klatt v. Lbr. Co. 66 N. W. 791.

The negligence of a third person contributing to the injury, which would not have occurred but for the defendant's negligence, cannot be imputed to the plaintiff. Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Chambers v. R. Co. (N. D.) 163 N. W. 824; City v. Botzek, 94 C. C. A. 563, 169 Fed. 121; Union Pacific R. Co. v. Lapsley, 51 Fed. 174, 2 C. C. A. 149, 152, 16 L.R.A. 800; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652.

A special verdict should be limited to the case made by the pleadings, should find all the facts proven under the issues, and should not embody statements of conclusions of law or fact. A finding that one of the parties has been guilty of negligence has often been held by this court

to be a mere statement of conclusion. Railway Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Railway Co. v. Spencer, 98 Ind. 186; Railway Co. v. Bush, 101 Ind. 582; Connor v. R. Co. 105 Ind. 62, 4 N. E. 411; Railway Co. v. Balch, 105 Ind. 93, 4 N. E. 288; Railway Co. v. Frawley, 110 Ind. 18, 9 N. E. 594.

Judgment reversed with directions to grant a new trial. C. St. L. & P. R. Co. v. Burger, 24 N. E. 981.

Lee Combs and *S. E. Ellsworth* (*John L. Erdall* and *John E. Palmer,* of counsel), for respondent.

"If the party fails to base or make the motion upon the basis authorized in the statute, he is held to have abandoned his motion for a new trial upon the grounds declared." King v. Hanson, 13 N. D. 85, 99 N. W. 1085.

The whole system of new trial seems to be based upon the theory that certain proceedings must be taken by the party applying for such new trial, and that, if these proceedings are omitted, his motion for a new trial fails. White v. Sacramento County, 72 Cal. 475, 14 Pac. 87; Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388.

No error can be predicated upon the ruling of the court in denying the motion for a new trial, for the reason that, since no statement had been settled and allowed, there was nothing before the court to support such motion. Simmons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Sulton v. Simmons, 100 Cal. 576, 35 Pac. 158; Keating v. Kennedy (Cal.) 138 Pac. 118.

In a special verdict it is the duty of the jury to find the facts only while the trial judge determines their legal effect. 38 Cyc. 1774; Morrison v. Lee, 13 N. D. 591, 102 N. W. 223; Swallow v. First State Bank, 35 N. D. 608, 161 N. W. 207; Russell v. Meyer, 7 N. D. 335, 75 N. W. 262; Guild v. More, 32 N. D. 474, 155 N. W. 44; Collins v. Mineral Point & N. Y. R. Co. (Wis.) 117 N. W. 1014; Cooper v. Ins. Co. (Wis.) 71 N. W. 606; Byington v. Merrill (Wis.) 88 N. W. 26.

"The purpose of a special verdict is to obtain separate findings on material, controverted issues, and questions are properly refused which submit to the jury every matter on which witnesses differ in the course of the trial. Ward v. Chicago, M. & St. P. R. Co. (Wis.) 78 N. W. 442.

A railroad company is not liable for injuries resulting from horses becoming frightened on a highway, at the sight of its engines, or the noises necessarily incident to the operation thereof. Walters v. Chicago, M. & St. P. R. Co. (Wis.) 80 N. W. 451; Abbot v. Kalbus (Wis.) 43 N. W. 367; Dotson v. Michigan C. R. Co. (Mich.) 153 N. W. 1066.

A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. Railroad Co. v. Roberts (Neb.) 91 N. W. 707; Hendricks v. Fremont, E. & M. V. R. Co. (Neb.) 93 N. W. 141; Dewey v. Chicago, M. & St. P. R. Co. 75 N. W. 75.

The law is well settled that a railway company is not liable for the consequences of such noises on or in the vicinity of public streets, made by its locomotives or trains, as are incident to the operation thereof. Walters v. C. M. & St. P. R. Co. 104 Wis. 251, 80 N. W. 451; Dewey v. C. M. & St. P. R. Co. 99 Wis. 457, 75 N. W. 74; Cahoon v. C. & N. W. R. Co. 85 Wis. 572, 55 N. W. 900; Crowley v. Chicago, St. P. M. & O. R. Co. (Wis.) 99 N. W. 1017.

Where one person is driving with another for the mutual pleasure of both, with opportunity to see and equal ability to appreciate the danger, and is in fact looking out for herself, but makes no effort to avoid the danger, such person is chargeable with the want of care which results in injury. Bush v. Union P. R. Co. (Kan.) 64 Pac. 624; Willfong v. Omaha & St. L. R. Co. (Iowa) 90 N. W. 358.

CHRISTIANSON, Ch. J. In this action, the plaintiff seeks to recover damages for the death of his wife, which he alleges was occasioned by the negligence of the defendant. It is averred in the complaint, and the evidence shows, that the plaintiff's wife, Tina Salewski, on June 27, 1917, was riding in a buggy which was being drawn by a single horse along Fourth avenue, in the village of Courtenay. The horse was being driven by a niece of the deceased. As they were about to cross the railroad tracks of the defendant in that village, the horse became frightened at a locomotive, so that it suddenly turned and threw the plaintiff's wife from the buggy and caused her serious injuries, from which injuries, it is alleged, that she died about two and one-half years later. The specific charge of negligence in the complaint is that the

defendant had permitted sheds, buildings, and coal sheds to be constructed adjacent to and adjoining the railway track on the west side of Fourth avenue, in said village of Courtenay, "so that it was impossible for the said Tina Salewski or the said Hannah Bartkowski to see the north railway track lying immediately to the right and on the westerly side of said Fourth avenue, which said track crosses the said Fourth avenue in an easterly and westerly direction; and that owing to the aforesaid premises and the aforesaid conditions, all of which were negligently permitted, kept, and maintained by the said defendant and its tenants, and by reason of the said railway track being negligently permitted to be built and maintained immediately adjacent to and within 4 feet of said buildings, and as the said Hannah Bartkowski and Tina Salewski were riding along in a buggy drawn by said horse, in a southerly direction toward, and were about to enter upon and cross the said railway tracks aforesaid, and on the northerly side thereof, suddenly and *without warning and with great negligence* and without ringing any bell, and without blowing any whistle, and without giving any sign or signal, and without keeping or maintaining any gate at said crossing, and without keeping any flagman or having any flagman or switchman thereat, the agents of the said defendant company negligently, suddenly, and without warning whatsoever, carelessly and negligently pushed and moved its cars and engine with great speed and without any noise or warning, down upon the said avenue and crossing from a westerly direction, on said sidetrack and house track immediately adjacent to the said buildings, shed, and lumberyard, and suddenly and negligently scared the horse hitched to and drawing the said buggy in which the said Tina Salewski was riding, so that the horse suddenly turned and threw the said Tina Salewski from the said buggy, greatly and permanently injuring her shoulder, arm, back, and abdomen, nerves and spine, and caused her great pain and injuries and suffering, all through the negligence and want of proper and ordinary care on the part of the defendant, in its building and permitting the said buildings, sheds, lumber, and material to be placed and piled so close to its track and the said Fourth avenue, in said village of Courtenay, and its sudden pushing and shoving of said cars and engine belonging to said defendant with great negligence and without warning to the said Tina Salewski or said Hannah Bartkowski, and by reason

of its failure to give some warning sign of the approach of its engine and cars upon said railway track and crossing, and by reason of its failure to properly protect and guard pedestrians and travelers upon said highway, street, and avenue, from injury by its engine and cars." The defendant by its answer placed in issue all the material allegations of the complaint, except the allegations relating to the corporate capacity of and the ownership by the defendant of the railroad in question. The answer also averred affirmatively that the injuries of the deceased, if any, were occasioned by her own negligence and by the negligence of the person who was driving the horse.

At the close of the testimony, a request was made for a special verdict. The court submitted the case accordingly to the jury for a special verdict upon twenty-five questions. No general verdict was returned. The court gave instructions to the jury wherein it defined the terms, "negligence," "approximate cause," and "contributory negligence."

The questions and answers embodied in the special verdict are as follows:

Question 1: Was the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, a corporation, organized and doing a general railway business of North Dakota in 1917, and was said company on the 27th day of June, 1917, operating a local freight train and doing switching in the village of Courtenay and across Fourth Avenue?

Answer: Yes.

Question 2: On the said 27th day of June, 1917, were Hannah Bartkowski and Tina Salewski riding in a buggy, drawn by a single horse on Fourth avenue, in Courtenay, North Dakota, and approaching the crossing of said railway company on said Fourth avenue?

Answer: Yes.

Question 3: Did said railway company have three separate tracks running through the village of Courtenay, across Fourth avenue, on the 27th day of June, 1917, and was the north track of said railway company known as the house track?

Answer: Yes.

Question 4: On the 27th day of June, 1917, in the village of Courtenay, on Fourth avenue, north of the house track of said railway company, did the horse attached to said buggy become frightened, and did an accident occur?

Answer: Yes.

Question 5: If you answer the above question "Yes" then I will ask you at what distance on Fourth avenue, north of the crossing on the house track, did the horse become frightened and the accident take place?

Answer: Thirty-five feet.

Question 6: Did Tina Salewski sustain injuries by reason of any accident, at or about that time and place?

Answer: Yes.

Question 7: At the time of such accident, if any occurred, was the said railway company's engine and train, approaching Fourth avenue at the crossing of the railroad on the house track?

Answer: Yes.

Question 8: At what rate of speed was said engine and train approaching and coming upon said crossing?

Answer: Six miles an hour.

Question 9: Was the bell being rung or the whistle blown?

Answer: Yes.

Question 10: At the time said engine was approaching the crossing, did one of the train crew, one Louis Larson, appear on the said railway crossing of Fourth avenue, warning Tina Salewski and Hannah Bartkowski to stop in the street north of said crossing?

Answer: No.

Question 11: Did said Louis Larson go north across said tracks, in front of the engine, entering upon Fourth avenue, warning Tina Salewski and Hannah Bartkowski of danger?

Answer: Yes.

Question 12: Did Tina Salewski and Hannah at the time they were driving down Fourth avenue approaching said house track look east and west for approaching trains?

Answer: Yes.

Question 13: What fencing, wood, or brick, if any, were there on the east of the coal shed and the intersection of Fourth avenue and the house track?

Answer: Part of old fence, one pile of brick, one pile of wood.

Question 14: Did Tina Salewski see, or could she by looking have

seen, the engine approach said crossing prior to the time the accident happened?

Answer: No.

Question 15: Did the coal sheds, fencing wood, or brick, if any there were, prevent Tina Salewski and Hannah Bartkowski from seeing the engine approach?

Answer: Yes.

Question 16: Could said Tina Salewski and Hannah Bartkowski, by the exercise of reasonable and ordinary care, have seen or heard the engine approaching, and have stopped their horse and prevented the accident?

Answer: No.

Question 17: Was said railway company negligent at this time and place in handling and operating its railway engine and train?

Answer: Yes.

Question 18: If you answer the foregoing question "Yes," then was such negligence the proximate cause of the injury which said Tina Salewski received?

Answer: Yes.

Question 19: Was Tina Salewski herself negligent in her manner of *driving* towards said railway engine and crossing or by failing to look and listen for the train?

Answer: Yes.

Question 20: If you answer the foregoing question "Yes," then did such negligence contribute to her own injury?

Answer: Yes.

Question 21: Was the injury the result of a pure accident for which no one was to blame?

Answer: Yes.

Question 22: What is the reasonable value of the medical services in taking care of and treating said Tina Salewski?

Answer: Fifteen hundred dollars.

Question 23: Did Tina Salewski die on the 19th day of October, 1919?

Answer: Yes.

Question 24: Was the injury received by her, if any, on the 27th day of June, 1917, the proximate cause of her death?

Answer: Yes.

Question 25: What is the value of the household services of Tina Salewski, of which Jacob Salewski has been deprived by reason of her death?

Answer: Fifty dollars a month.

Upon such special verdict, the trial court entered a judgment in favor of the defendant. Thereafter, plaintiff moved for a new trial upon the grounds of errors of law occurring at the trial; failure of the evidence to justify the answers to questions 19, 20, and 21; and refusal to submit certain requested interrogatories and to give certain requested instructions. The trial court made an order denying a new trial, and the plaintiff has appealed from the judgment and from the order denying his new trial.

The respondent contends that the proceedings upon the motion for a new trial were fatally defective; and that in contemplation of law no motion for a new trial was ever made. It seems that the trial court entertained somewhat similar views, for in his memorandum opinion denying the motion for a new trial he said: "I therefore deny the motion for a new trial upon the ground that proper steps have not been taken . . . to bring the errors assigned to the attention of the court in the manner provided by statute, for review."

The trial court did not, however, rest its decision upon this ground alone. He further said: "It is clear from the special verdict that the jury deliberately intended to find that the plaintiff was guilty of contributory negligence, in this action, and to defeat the plaintiff's right of recovery, and in this respect I am in full accord with the finding and determination of the jury. Whatever discretion I have to exercise in this case is exercised against granting a new trial, upon the ground that I believe the plaintiff is not entitled to a recovery in this action, upon the evidence submitted to the jury."

We do not find it necessary to determine whether the trial court was correct or incorrect in its views as to the procedural questions, for we are entirely satisfied that the order denying a new trial should be affirmed on its merits.

There was square conflict in the evidence as to what distance from the railroad track the accident occurred. The plaintiff's witness Hannah Bartkowski testified that the accident occurred some 8 or 10 feet

from the crossing. Other witnesses who testified for plaintiff placed the distance at from 15 to 20 feet. The witnesses who testified for the defendant claimed that the distance was considerably greater. The jury found (in answer to the 5th interrogatory) that the accident occurred 35 feet from the crossing.

There was also a square conflict in the evidence as to whether the bell on the locomotive was being rung at the time of the accident, and shortly prior thereto. There were many witnesses who testified on the part of the defendant that it was being rung, and some testified on the part of plaintiff that they did not hear it; and that they would have heard it if it was being rung. There was absolutely no evidence to the effect that the whistle was blown at any time while switching was being done; and there is positive testimony to the effect that the whistle was not blown at the time of the accident or shortly prior thereto. In view of the evidence there can be no room for doubt but that the jury, in their answer to the ninth interrogatory, must have found that the bell was being rung as testified to by defendant's witnesses.

The ninth interrogatory really contained two questions:

(a) Was the bell rung?

(b) Was the whistle blown?

As a general rule, a question for a special verdict should not be framed in the alternative or disjunctive. It should be plain, single, and direct. A violation of this rule may introduce into the verdict an element of uncertainty. Thus if in this case the defendant had contended that the locomotive gave signal of its approach to the crossing in question, both by blowing the whistle and by ringing the bell, and the plaintiff had contended that neither signal was given, then of course it might have been possible that some of the jurors might have found that the bell was being rung, but that the whistle was not blown, while others might have found that the whistle was blown, but the bell was not being rung. But that is not the condition here. In this case there was absolutely no evidence and no contention that the whistle was blown as the locomotive approached the crossing. Whatever evidence there was on this question was all to the contrary. If the question had been divided into two parts, the jurors, as reasonable men, could not possibly have said that the whistle was blown. The great preponderance of the evidence, however, was to the effect that the bell was being

rung; and there can be no room for doubt but that is what the jury found, and intended to find, in their answer to the ninth interrogation.

The evidence adduced on the part of the defendant was to the effect that one of the brakemen on the train, one Louis Larson, was stationed at the crossing while the switching was going on. The evidence adduced by the plaintiff was to the contrary. Larson testified: "I stopped in here somewhere (indicating on a certain map) between the passing track and the house track. To the east of the center of the avenue, I saw a bay horse driving up the road. Driving towards me from the north on Fourth avenue. There were two women in the rig. I stood on the crossing for the purpose of protecting it, while the train was working. That was part of my duty.

Q. What did you do, if anything, while flagging the crossing there, when you saw that train start to move over the crossing east?

A. I held up my hand like this [indicating] for them to stop, because I seen they were getting too close to make the crossing. . . .

Q. What did you do after holding up your hand?

A. I stood there for a minute.

Q. A second or two, you mean?

A. Yes, and the engine came up to the crossing, a little closer, and I saw the horse start to turn, and I ran over ahead of the engine.

Q. You ran over where?

A. To the north side.

It will be noted that the court submitted two questions relating to the warning claimed to have been given by Larson, *viz.*, questions 10 and 11. A number of witnesses testified with reference to whether such warning was given and as to where Larson was at the time it was given. One witness testified that Larson made two attempts to stop the approaching rig. Apparently the court was of the opinion that the evidence required the submission of two separate questions upon this phase of the case. The jury answered the first one in the negative and the second one in the affirmative. It will be noted that the affirmative answer to the 11th interrogatory is in accord with the testimony of the witness Larson. The tenth interrogatory asked the jury if "at the time said engine was approaching the crossing, did . . . one Louis Larson, *appear* on the said railway crossing of Fourth avenue, warning

Tina Salewski and Hannah Bartkowski to stop in the street north of said crossing?" The jury could not well have answered this question in the affirmative if they believed the testimony of Larson; for according to Larson's testimony he did not come forth into view from a distance or from a place or state of concealment (Funk & W. New Standard Dict.) "at the time said engine was approaching the crossing; ' but was then, and had for some time been, stationed at a certain point between the passing track and the house track. Nor according to his testimony did he give any directions to the two women as to where they should stop. He merely gave them the usual signal with his hand, warning them of the approaching train. We see no reason for holding that the answers to the two interrogatories are inconsistent. Intelligent men would not have been likely to have answered the 11th interrogatory in the affirmative, if they had believed that Larson was not in fact stationed at the crossing, and had not in fact given the warning he claimed to have given, and gone over the track ahead of the approaching locomotive as he testified that he did.

Hence, we have this situation established by the findings of the jury. The plaintiff and the deceased came driving from the north towards the railroad crossing. An engine of the defendant, which was ringing a bell, approached the crossing at the rate of 6 miles per hour; a brakeman signaled them by holding up his hand; the horse became frightened at the engine, and started to turn, with the result that the deceased fell out of the buggy and was injured. This occurred 35 feet away from the track. In connection with these findings it is permissive to consider the facts which are uncontroverted. Swallow v. First State Bank, 35 N. D. 608, 616, 161 N. W. 207. There is no dispute as to how the accident occurred. There is no claim that the engine collided with the horse and buggy. The claim is, and the evidence shows, that the horse became frightened at the engine, and started to turn towards the east; that the driver, Hannah Bartkowski, dropped the reins and jumped out; that the buggy was not overturned, but that it was tilted, and the deceased fell out. The driver, Hannah Bartkowski, when called as a witness for the plaintiff, testified: I went up to the Piper-Howe Lumber Company, "and got some trimming for the house, and then I turned around and went back south again; didn't go faster than a slow trot, and there was a man driving in front of me on a lumber wagon, well,

a little ways ahead, and I was driving just the slow trot, looking west as far as I could look and east, and a couple of times looked straight ahead, and I couldn't see or hear anything, and all at once that farmer waved at me in front of me, and I stopped the horse just immediately the train came by, and *the horse got scared and turned towards the east and I jumped out,* and my aunt was thrown out."

There is no contention that the engine made any undue noise, or that there was anything unusual about it or its operation whatsoever.

It is essential that railroads be operated. And "as a general rule the principle is uncontroverted that a railroad company is not liable for the frightening of animals, where such a result ensues from the ordinary use, movement, or situation of its cars, locomotives, or trains. This proposition, of course, implies that it has a lawful right to make all such noises as are necessarily connected with the proper transaction of its business, such as the blowing of a whistle by a locomotive engine, or the emission of steam, where the engine is propelled by it, and such act is a necessary incident to its use. The general rule applies whether the frightening occurs at a railroad crossing or on an adjoining highway, as, generally speaking, the duty of keeping a lookout and of giving warning is limited to the track and public crossing. Necessarily the duty of a railroad company towards the drivers of horses on adjoining highways must be limited in its scope to harmonize it with other duties imposed by the rules of the statutory and the common law. Trains must be run on schedule and at high speed, crossing signals must be given, and it is the duty of an engineer to keep a lookout for crossings. All the perils occasioned to the wayside traveler by noises and sights necessarily produced in running trains in the country on schedule are things that the traveler must guard against, not perils that the operators of trains must watch for and prevent. So, no liability attaches where injury results to a horse from becoming frightened by the giving of the usual signals as required by law, or by the rules of the railroad in the ordinary operation of the train. The law, however, imposes on a railroad company the duty of operating trains relatively to adjacent highways so as not unnecessarily to interfere with the rights of individuals traveling such highways, or to endanger such travelers by unusual and unnecessary noises and if it does anything unusual or

unnecessary which would naturally be calculated to frighten ordinarily well-broken and gentle horses, it may be held liable."

In Dewey v. Chicago, M. & St. P. R. Co. 99 Wis. 455, 75 N. W. 74, 4 Am. Neg. Rep. 92, the supreme court of Wisconsin said: "They [the railroad company's servants] had a right to move the engine in pursuit of defendant's business in which they were engaged, and without responsibility on defendant's part for the consequences of any of the ordinary noises which the operation of the engine caused, or such incidents as the ordinary escape of smoke and steam. If such were not the case, railway companies would be greatly embarrassed in the performance of the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam, or any unusual noise, or anything not ordinarily attendant upon the usual movements of a locomotive. That where injuries result from the frightening of horses by the sight of moving cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, there is no liability on the part of the railway company, is firmly established and recognized as the law. Abbot v. Kalbus, 74 Wis. 504, 43 N. W. 367; Cahoon v. Chicago & N. W. R. Co. 85 Wis. 570, 55 N. W. 900; Flaherty v. Harrison, 98 Wis. 559, 74 N. W. 360; Elliott, Railroads, § 1264, and numerous cases cited. See also Walters v. Chicago, M. & St. P. R. Co. 104 Wis. 251, 80 N. W. 451, 6 Am. Neg. Rep. 737; Hendricks v. Fremont, E. & M. Valley R. Co. 67 Neb. 120, 93 N. W. 141; Crowley v. Chicago, St. P. M. & O. R. Co. 122 Wis. 287, 99 N. W. 1017; Chicago, B. & Q. R. Co. v. Roberts, 3 Neb. (Unof.) 425, 91 N. W. 707; Dotson v. Michigan C. R. Co. 187 Mich. 650, 153 N. W. 1065.

Under the facts in this case, as established by the uncontroverted evidence, and the findings of the jury, we are of the opinion that plaintiff is not entitled to recover. In order to warrant a recovery for the plaintiff, he must show, and the special verdict together with the uncontroverted facts, must establish, that the defendant was guilty of negligence, and that such negligence was the proximate cause of the injury for which compensation is sought. This court has ruled that "the failure of a special verdict to find upon any material fact in issue is equivalent to a finding against the party upon whom the burden of proof rests to establish such fact." Boulger v. Northern P. R. Co. 41

N. D. 316, 171 N. W. 632. Here it is not a case of failure to find in favor of the party having the burden of proof, but a case where the specific facts have been found against him. And while it is true the jury, in answer to the 17th interrogatory, said that the defendant was negligent at the time and place in handling and operating its railway engine, the answer to the interrogatories covering the specific facts are to the contrary. "Positive findings as to material facts which are conclusive of the controversy overcome those which are merely incidental." Boulger v. Northern P. R. Co. supra. And we have failed to find any evidence tending to show that there was anything out of the ordinary in the operation and handling of the engine,—certainly there is no evidence that any undue or unusual noises were made. The proximate cause of the injury was the fright of the horse. That fright was not, under the facts as found by the jury, caused by anything unusual or unnecessary done by the defendant in the operation of its engine. Inasmuch as the jury in effect found that the injury was not occasioned by defendant's negligence, the errors assigned by appellant upon the failure of the trial court to give certain instructions and submit certain interrogatories bearing on the question of contributory negligence become immaterial. Deisenrieter v. Krause-Merkel Malting Co. 92 Wis. 164, 66 N. W. 112.

Appellant contends that under the rule laid down in Nygaard v. Northern P. R. Co. 46 N. D. 1, 178 N. W. 961, he was entitled to a new trial. In that case the trial court granted a new trial on the ground that it believed it should have given more explicit instructions on certain phases of the case. In affirming that decision a majority of this court held that the trial court "exercised a discretionary right in granting a new trial, and did not abuse its discretion in so doing." It has been said: "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." Hayne, New Tr. & App. Rev. ed. p. 1650. This principle was recognized in the decision in the Nygaard Case. For in the majority opinion it was said: "If . . . the trial court should have denied the motion for a new trial, the contentions of the appellant might be considered well taken, and the order of

the trial court, in such event, should probably not be disturbed." 178 N. W. 963. In this case the trial judge exercised his discretion against the plaintiff. He was of the opinion that the ends of justice would be best subserved by denying a new trial. On the record before us we see no reason for saying that the trial court was in error in ruling as it did. On the contrary, we are inclined to the view that the ruling was entirely correct.

The judgment and order must be affirmed. It is so ordered.

ROBINSON and BIRDZELL, JJ. concur.

BRONSON, J. I dissent. The majority opinion, with a partial recitation of the facts in the record, demonstrates its own error. It is quite necessary to protest concerning the manner in which this case was submitted to the jury for a special verdict upon interrogatories, and concerning the evident mistrial that has resulted by reason thereof. It is necessary again to protest against the evident recognition given by the majority opinion to the propriety of interrogatories framed and submitted to the jury as they were in this case. The majority opinion has set forth these interrogatories in full. On their face, in connection with the record, they demonstrate that issues of law were submitted to the jury and issues of fact in reality reserved for the court. That, in a manner, the jury became the judge of the law, and the court, of the facts, thereby directly interfering and disturbing the constitutional and statutory functions of both the court and the jury. In this case, the majority opinion states that the trial court exercised its discretion against the plaintiff, and therefore the plaintiff cannot complain. Nevertheless, the trial court denied a new trial upon grounds of procedure, and for the further specific reason that the deceased was guilty of contributory negligence as found by the jury. The majority opinion abandons, apparently, both of these grounds, so asserted by the trial court as reasons for denying a new trial, and bases its holding upon the ground that the jury found that the defendant was not negligent. By such reasoning does it assert that the discretion of the trial court should not be disturbed?

Then, again, the jury, in an answer to the direct question so propounded, found that the defendant was negligent. Perhaps the major-

ity opinion so states, like Antony spoke at the funeral of Julius Cæsar, that "Brutus was an honorable man." No quarrel is to be had with the authorities cited in the majority opinion. The pertinent point is the method of their application. It may not be doubted that, if the defendant, through the failure to exercise reasonable care at the time of this accident, frightened the horse and proximately occasioned the injuries and resultant death of the deceased, it is liable; and, *vice versa,* if the injuries resulted through the fright of the horse upon the sight of the moving locomotive through the usual noises or incidents of its ordinary operation without defendant's negligence, it is not liable. In the case at bar the locomotive of defendant's freight train was engaged in switching at a local town. The freight train was standing on the main track, at or near one of the crossings involved. There were three different tracks crossing the highway involved, in rather close proximity. The locomotive, at the time of the accident, was proceeding on a so-termed house track towards the highway. Its view by the traveler on such highway was excluded by a coal shed, fencing and piles of wood and brick, and by another building. At that time the deceased was riding in a buggy towards this crossing upon the highway. The horse was then being driven by another person. It was 35 feet from the crossing when the accident occurred. At that time it was the duty of the defendant to give a warning of the approach of the locomotive, by blowing the whistle or ringing the bell. This was a statutory duty. Comp. Laws 1913, § 4642. And, regardless of the statute, it was its duty, in any event, to give notice of the approach of the locomotive at all points of known or reasonably apprehended danger. Coulter v. Great Northern R. Co. 5 N. D. 568, 578, 67 N. W. 1056. It was its duty to keep a proper lookout to avoid inflicting injury. Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22. It was also its duty in this case to flag this crossing. The defendant's brakeman, Louis Larson, testified that it was a part of his duty while the train was working to flag the crossing, and he stood there for the purpose of protecting the crossing. It was also its duty to refrain from creating and continuing the usual noises incident to the ordinary operations of its service, if in the exercise of reasonable care and ordinary prudence, it might thereby avoid fright in a horse and consequent injuries to a traveler upon the highway. 33 Cyc. 936; Carraher v. San Francisco

Bridge Co. 100 Cal. 177, 34 Pac. 828; Williams v. Chicago, B. & Q. R. Co. 78 Neb. 695, 14 L.R.A.(N.S.) 1224, 111 N. W. 596, 113 N. W. 791; Louisville & N. R. Co. v. Penrod, 24 Ky. L. Rep. 50, 66 S. W. 1012. The driver, a witness for the plaintiff, testified that this brakeman was not there at the crossing when she started down the road to the crossing; other witnesses similarly testified; she never saw the brakeman before that she knew of; that after she and the deceased got hurt some man asked them if they were hurt; she would not recognize the man. She testified that just previously at the lumber yard (this is about 200 feet distance from the crossing) she got some molding. She then turned around and went towards the south on a slow trot; there was a farmer driving in front on a lumber wagon; all at once the farmer, ahead, waved. She stopped the horse. Immediately, the train went by; the horse got scared and turned; she jumped out, her aunt was thrown out and the horse ran away. Just previously the farmer, his horses, and wagon, escaped the engine close to him by slapping the lines, the horses jumping, jerking to the side of the track, and going on. The brakeman, in addition to the testimony stated in the majority opinion, further testified that he was the rear brakeman on the freight train; the train stopped east of this street after he unloaded and loaded freight; he walked around the train to look over hot boxes. During this time the other brakeman had uncoupled the engine and some cars, and pulled over upon the house track (where this accident occurred). That he was about five minutes unloading the freight and six to eight minutes walking around the train; that after he got through looking over the train he stopped right on this crossing, between the passing track and the house track; that the engine was then east of this house track. It was backed up west of the crossing to spot some cars; this was their second trip on the house track. He remained where he was; that he was watching the engine and looking up the road; that there were some wagons going across the track while he was standing there; he did not see this witness, the farmer, coming along with the wagon; he saw a rig with the two women in it some 200 feet, or such a matter, north of this north track (the house track); that he held up his hand for them to stop because he saw that they were getting too close to make the crossing; that he saw the horse start to

turn, and he ran over ahead of the engine to the north side, and that he crossed the house track ahead of the engine to see what had happened. That the rig then was some 50 or 60 feet from the center of the north track.

It is rather difficult to discover the harmony that the majority opinion finds in the jury's answers to interrogatories Nos. 10 and 11. It attempts to harmonize such answers because, forsooth, the jury would not have found that Larson went north across the track in front of the engine, warning the two women of danger if they had believed that he was not in fact stationed at the crossing, and had not in fact given the warning he claimed to have given. It arrives at harmony accordingly by the finding as a *fact,* that this engine was ringing the bell as it approached the crossing at the rate of 6 miles per hour; that the brakeman did signal the women by holding up his hand (presumably in time to avoid the accident); that the horse then became frightened at the engine and started to turn, with the result that the deceased fell out of the buggy and was injured. The opinion underscores the word "appear" in the 10th interrogatory, and gives to it, by definitive meaning, a status like unto the vision of Banquo's ghost. In question 10, the jury directly and incontrovertibly stated and found that this brakeman, when the engine was approaching the crossing, did not *appear* on such crossing warning the women to stop in the street north of such crossing. In question 11 the jury found that this brakeman did go north across said *tracks* (tracks in the plural) in front of the engine, entering upon Fourth avenue, warning the women of danger. The brakeman did testify that he went north of the tracks as hereinbefore recited, but the question is, *When?* The answer, perhaps, might be, "Not until the women and the horse were in a position of danger and at a time when *acts* of *aid,* not of *warning,* were necessary.

Assuredly, if the interrogatories can be made consistent it may not be upon the theory asserted in the majority opinion. Again, the majority opinion upholds the affirmative answer of the jury to the 9th question, "Was the bell being rung or the whistle blown?" It disapproves of the submission of such question in the alternative or disjunctive, but condones the offense in this case by showing that there was no evidence of the whistle being blown, and, therefore, the answer of the jury must have concerned the bell. Even so, the vice of the

question is not alone therein. It was the duty of the defendant to keep a lookout and give warning of its approach, by the ringing of the bell, if such warning was proper, prior to the approach, as a warning to the occupant, and not, after the approach, as an occasion of fright for the horse.

The pertinent question was, in this regard, and the one necessary to be answered by the jury, "When was the bell being rung?" and, "To what extent prior to the approach upon the crossing?" From such premises, the majority opinion deduces the conclusion that the jury found no negligence on the part of the defendant. The elements of negligence, if any, in this record are failure to exercise reasonable care concerning lookout, warning, and flagging. It is manifest that the jury, by the questions propounded, did not find upon the questions, as issuable facts, whether or not the defendant exercised due care in these respects. The fact that the engine did not make undue noise, or that there was nothing unusual in its incidental and ordinary operation, did not absolve it from care in respect to the matters mentioned. See cases cited, supra. The brakeman, through his own testimony, apparently left his post as flagman after discovering the horse and women in difficulty, without any attempt to flag or stop the engine. But the error in the questions submitted are to be further discussed. The jury found, pursuant to interrogatory 17, that the defendant was negligent, at this time and place, in handling its railway and train. This was a question of law for the court. This question was improperly submitted to the jury. The majority opinion recognizes this by disregarding the answer of the jury in that respect, and by controlling and superseding such answer through the other specific findings made by the jury. In interrogatories 19 and 20 the jury found that the deceased was negligent in her manner of driving toward the engine and crossing, or, by failing to look and listen for the train, and in interrogatory 20, that such negligence contributed to her own injury. Interrogatory 19 is a double question. No one can tell whether the deceased was held guilty of negligence in *her manner of driving* or in her *failing to look and listen* for the train. Furthermore, the evidence is undisputed that the deceased was not driving the horse; and so, the trial court denied the motion for a new trial upon the ground that the deceased was guilty of contributory negligence although, in interroga-

tory 16, the jury found that the women, by the exercise of reasonable care and ordinary care, could not have seen or heard the engine approaching, and have stopped their horse and prevented the accident. Perhaps, this is not "confusion worse confused," but, at least, it has some of the elements of it. Perhaps, the trial court did, and possibly, the majority opinion may by reasoning similar to that applied to questions No. 10, 11, and 17, harmonize the apparent contributory negligence found in questions 19 and 20 and the absence of it in question 16. This court has repeatedly held that, pursuant to the statute, the special verdict must present conclusion of evidence as established by the evidence, and not the evidence to prove it; that the questions for a special verdict should be plain, single, and direct; that they should contain only the ultimate conclusions of facts in controversy. Nygaard v. Northern P. R. Co. 46 N. D. 1, 178 N. W. 961, and cases cited. Comp. Laws 1913, § 7632. As this court has heretofore held, questions should not be submitted that call for conclusions of law. Nygaard v. Northern P. R. Co. supra. It is apparent that the questions submitted do violence both to the statute and the repeated holdings of this court. They have served, as is apparent in this case, to mislead and confuse the jury; to submit to the jury an issue of law and plainly, as has been observed, to submit to the court an issue of fact. For it is evident that the trial court, particularly, this court in its majority opinion, determines the facts in this record, by interpretation, and after such interpretation, by answering the interrogatories submitted to the jury, and in direct opposition to the jury's direct findings upon questions of law submitted to it. The evident result is a mistrial. It may be that this is a close case, and that the right of plaintiff's recovery is a close question both of law and of fact. However that may be, close cases are those which give rise to acts of injustice, and close cases upon the law and the fact are particularly entitled to a fair and legal trial. It has not been accorded, in my opinion, in this case, and a new trial should be granted by reason thereof.

GRACE, J. (dissenting). I concur in the dissenting opinion of Mr. Justice Bronson, in this case. I concur in the greater part, but not in all, of the reasoning therein contained.

On Petition for Rehearing filed January 18, 1921.

PER CURIAM. Plaintiff has filed a petition for rehearing. The petition is largely a reargument of the cause. It is asserted that the ninth interrogatory was double and misleading. In the former opinion we considered this question, and arrived at the conclusion that, in view of the evidence in this case, the jury could not have been misled by the form of the question. As we stated in that opinion: "In this case there was absolutely no evidence and no contention that the whistle was blown as the locomotive approached the crossing." It is not contended that this statement is incorrect, but it is asserted that there was evidence to the effect that the locomotive blew the whistle when the train came into the village (some twenty minutes before the accident occurred), and that the jury might have had this in mind. We do not believe that this contention is at all tenable. The two preceding interrogatories clearly indicated both the time and the place to which the inquiry was restricted. The three interrogatories were as follows:

"7. At the time of such accident, if any occurred, was the railway company's engine and train, approaching Fourth avenue at the crossing of the railroad on the house track?

"8. At what rate of speed was said engine and train approaching and coming upon said crossing?

"9. Was the bell being rung or the whistle blown?"

These three interrogatories follow each other in logical order. The first two fix the time and place to which the inquiry is directed. The time is specifically stated to be, "at the time of such accident." The seventh and eighth interrogatory together inquire as to the rate of speed of the train, as it approached the Fourth avenue crossing at the time the accident occurred. The ninth interrogatory asks if the whistle was blown or the bell rung. Manifestly it referred to the same time and incident referred to in the previous questions. It is inconceivable that intelligent men could have understood it otherwise. Nor is there, under the evidence, any reason to doubt that the jury so understood the interrogatory; and that they must have found that the bell was rung for the requisite distance from the crossing. The evidence relating to the ringing of the bell was as follows:

Hannah Bartkowski, the driver, testified that she did not hear the bell. One Nowatzck, a witness for the plaintiff, testified also that he did not hear the bell. Opposed to this negative testimony the defendant introduced the testimony of the engineer and fireman, three brakemen, a farmer, two laborers, and the manager of a local lumberyard.

According to the testimony of the engineer and the fireman the locomotive was equipped with a device whereby, by turning a little valve, the bell was put in action, and would continue to ring until the valve was turned off. They further testified that the bell was rung continuously during the entire time they were engaged in switching. The testimony to the effect that the bell was rung during all the time they were engaged in switching was corroborated by the three brakemen. One Mohler, local manager of the Rogers Lumber Company, testified that at and immediately prior to the accident he was in a place where he could observe the crossing and the approach to it on the north side of the railway tracks; that he observed the brakeman warning the women by holding up his hand when they were more than 60 feet away from the crossing; that the brakeman made two attempts to stop them; that when the rig was more than 60 feet away from the track, Mohler observed that the bell was ringing. One Mansfield, a farmer living southwest of Courtenay, testified that at the time the accident occurred he was standing on Foshold's corner, about 100 feet south of the main track; that he observed the rig containing the two women approaching from the north; that he saw the brakeman warn them; that for sometime before he could see the locomotive he heard the bell ringing. One Ryan, a resident of Courtenay, who said he was a common laborer, testified that he was on his way to work; that he was coming down on the west side of main street going north (on the south side of the track); that as he was going down the street and opposite the Fire-hall (situated some 50 feet south of the main track); he heard the bell ringing, although he could not see the locomotive. He further testified: "When I got right about down to here, just between the passing track and the main line, I looked over here then, and the engine was just a little to the west of the coal shed, west of the east end, I should say. I had time to cross, and went across, and just as I got across the track out of the way, I heard somebody holler off to one side, and I turned and I seen a man raise his hand, doing that way [indicating];

it was one of the trainmen, but I don't know which." He further testified that during all of this time he heard the bell ringing. Somewhat similar testimony was given by one Wright, who also stated that his occupation was that of a common laborer.

It will be noted that, so far as there was any controversy relating to the ringing of the bell, it was whether the bell was being rung at all. As already stated two witnesses for the plaintiff testified that they did not hear the bell, and several witnesses testified for the defendant that the bell rang not only at the time of the accident, but for a considerable length of time prior thereto. If the witnesses for the defendant told the truth the bell was unquestionably rung as prescribed by the statute. If the facts were as the negative testimony adduced by the plaintiff tended to prove, then the bell did not ring at all. In answering, as they did, the jury must have believed the testimony of defendant's witnesses.

The other propositions advanced in the petition for rehearing were all considered at the time the former decision was promulgated. A majority of the court were of the opinion that, under the facts found by the jury, there was no actionable negligence on the part of the defendant; hence, the errors predicated upon requested instructions and proposed interrogatories bearing on the question of contributory negligence were deemed immaterial. A careful reconsideration of the case has not altered the views of the majority. And not a single authority has been found which we deem inconsistent with these views. Most of the cases which have been called to our attention are cases like Coulter v. Great Northern R. Co. 5 N. D. 568, 67 N. W. 1046, and Rober v. Northern P. R. Co. 25 N. D. 394, 142 N. W. 22, wherein some party was actually run over by train at a crossing. That, of course, is not the condition here. Here there is no contention that there was any collision.

We adhere to the former opinion. Rehearing denied.

BIRDZELL and ROBINSON, JJ., concur.

FLORENCE E. KITTEL, Appellant, v. MAURICE C. STRAUS et al., Respondents.

(181 N. W. 628.)

Homestead — wife entitled to cancelation of mortgage where purpose for which it was given fails.

In an action to cancel a mortgage as a cloud on plaintiff's title to homestead property, where it appeared that the plaintiff joined with her husband in the mortgage, which she understood to have been given as security for the performance, by her husband and another, of certain contract obligations, and where the obligees in that contract, discovering fraud on the part of plaintiff's husband sufficient to justify rescission thereof, promptly rescinded and repudiated it, but retained the mortgage under a prior agreement with the husband that he would give such a mortgage as security for a pre-existing debt, it is *held:*

1. Where a wife joins in a mortgage upon a homestead, with the understanding that it is to be used for a specific purpose, and where the purpose fails and the rights of innocent third parties have not attached or been prejudiced, the wife has an equitable right to have the mortgage canceled as a lien upon the homestead.

Opinion filed December 27, 1920. Rehearing denied February 7, 1921.

Appeal from the District Court of Cass County, *A. T. Cole,* J.
Reversed and remanded.
Engerud, Divet, Holt, and *Frame,* for appellant.
Lawrence & Murphy, for respondents.

Statement of facts by BIRDZELL, J. Two actions were by stipulation consolidated and tried as one. One is an action by Florence Kittel, mortgagor, against Straus and others, to cancel a mortgage executed by her on December 2, 1915, running to the First National Bank of Casselton, mortgagee, and to remove the same as a cloud upon her title to the property therein described. The other is an action by the First National Bank of Casselton against Richard C. Kittel and Florence Kittel, his wife, to foreclose the same mortgage. Separate findings, conclusions, and judgments were entered in the two cases, and separate appeals were taken to this court. The parties have stipulated that the

appeal in the foreclosure action shall abide the result of the appeal in the action to remove cloud. The important facts are substantially as follows:

For sometime prior to the execution of the mortgage in question Richard C. Kittel had been president of the First National Bank of Casselton and W. F. Kittel, his brother, had been cashier. It appears that during the summer of 1915 it became known to the National Bank Examiner and to the directors of the bank that the bank was carrying among its assets considerable bad paper. This matter had been discussed somewhat, and had become a matter of negotiation between Richard Kittel and the directors, and between the directors and the Comptroller of the Currency. Kittel, from time to time, assured the directors that he would make good all the bad paper, and the directors in turn made representations to the Comptroller of the Currency that they would see that the bank was rendered in unobjectionable condition by the end of the year. By the latter part of November, 1915, the directors had concerned themselves seriously as to the condition of the bank. Conversations were held between them and with Kittel at various times, looking toward the making of a definite arrangement whereby they would relieve the bank of the objectionable paper and Kittel indemnify them by his own obligation supported by collateral in the shape, principally, of stocks and bonds. These negotiations took on definite form at meetings held November 27th and 28th, and December 2d and 3d.

Among the bad paper that had been under discussion prior to November 27th was an unsecured promissory note of Richard C. Kittel for $5,000, dated October 1, 1913, and payable on demand. The directors, at Kittel's request, had made no reference to this note in their prior resolutions concerning the bad paper, but it seems nevertheless to have been condemned by them. During some of their earlier meetings, also, Kittel had turned over to Straus some forty shares of his stock in the First National Bank as collateral to the obligations the directors were assuming with reference to some of the bad loans for which Kittel recognized that he should be held responsible. Some of the directors testify, and we shall assume it to be a fact, that during these earlier negotiations it was understood that Kittel would secure his $5,000 note by giving a mortgage upon his residence prop-

erty for $6,000; that the difference between his note, with the accrued interest, and the new obligation of $6,000, should be credited to his account in the bank, upon which he would be permitted to draw cash in payment of traveling expenses in his future operations in the real estate business. R. C. Kittel resigned as director and president of the bank on November 28th, and Straus succeeded him as president. W. F. Kittel resigned as cashier on November 29th, and his resignation was immediately accepted by Straus.

It seems that no definite arrangement for the future conduct of the business of the bank resulted from the meeting of November 27th and 28th, other than the change in management, but on the afternoon of December 2d a meeting was held, attended by the Kittels and a number of the directors, and by one Tenner, who was acting as attorney for the directors. In the interim there had been an examination of the bank by two persons from Minneapolis, and from this examination it appeared that Kittel's shortage was in the neighborhood of $75,000. This meeting continued until about 3 o'clock in the morning of December 3d. Late at night on December 2d, W. F. Kittel went from this meeting to the residence of Richard C. Kittel for the purpose of securing the signature of Florence E. Kittel to the mortgage in question. The mortgage was executed, and upon his return it was placed among the papers that were the subject-matter of the negotiations. When the meeting finally adjourned, a contract had been entered into between Straus, Johnson, Gray, Dittmer, Ford, and Runck, who were members of the board of directors, as parties of the first part, and Richard and William Kittel as parties of the second part.

This agreement provided, in substance, that the parties of the first part would take over the bank; also some objectionable bonds previously held in its assets; and reimburse the bank for all paper which the National Bank Examiner ordered taken out, together with all existing liabilities, discrepancies, and differences in reconcilements; and that they would continue to operate the bank. The parties of the second part agreed to repurchase the objectionable bonds by January 1, 1916, with interest, and by January 15th to purchase certain objectionable notes to which reference had previously been made on the minutes, and on or before December 1, 1916, to pay all losses, liabilities, and discrepancies which the first parties might be called upon

to pay under the agreement. As security for the performance of their obligations, the Kittels agreed to turn over 283 shares of stock in the bank, 815 shares of stock in the Northern Trading Company, 18 shares in the Casselton Realty Company, 3 shares in the Frank Lynch Company, 8 shares in the Farmers State Bank of Towner, $60,000 of the bonds of the Northern Trading Company, *"and a mortgage executed by the said R. C. Kittel and his wife, upon their residence property in Casselton* and the vacant lots across from the same for $6,000." A few days later it was discovered that Kittel's shortage was a great deal larger than the parties had anticipated, amounting eventually to $240,000. A resolution of insolvency was passed on December 6th, and the bank examiner, C. H. Anhier, was placed in charge. At Anhier's request Kittel subsequently executed, as of December 2, 1915, a $6,000 note payable December 2, 1916. This was treated as a renewal note of Kittel's $5,000 note. It was attached to that note and was later entered in the books of the bank as an asset. The mortgage was recorded on December 27th. On January 10, 1916, the directors who had signed the agreement of December 2d served upon the Kittels a notice of cancelation and rescission of the agreement, in which it was stated that the parties rescinding "offer and tender to you all matters and things received or tendered to them by you under this agreement." Kittel never drew the cash representing the difference between the mortgage and his old note, but nearly all of the balance was used with his consent to take up an overdraft of the Northern Trading Company. In other ways, as in directing changes to be made in the loss payable clauses of the insurance policies upon the property, for instance, Kittel recognized the rights of the bank under the mortgage.

BIRDZELL, J. (after stating the facts as above): The sole question for our consideration upon this appeal is the validity of the mortgage referred to in the above statement as a lien upon the homestead of Richard and Florence Kittel. There is no question but what the mortgage given is the one referred to in the contract of December 3d, and there is nothing to show that Florence Kittel knew of any other consideration for the mortgage than such as was stated in that contract. The only testimony in the record concerning the circumstances of the execution of the mortgage by her is that of W. F. Kittel, who took it

to her for execution and took her acknowledgment. He testified by deposition as follows:

"I took the mortgage to her and told her that a new contract was being entered into with the directors of the bank, by which they agreed to continue to operate the business of the bank, in which they agreed to remove any assets of the bank objectionable to the department. . . . I explained to her the terms of the contract and the fact that it was drawn to take care of any liability of my brother and myself to the bank, and that the mortgage was required by the directors to guarantee the fulfilment of the contract by my brother and myself."

Even if this testimony be considered of doubtful credence in view of the witness's fraud and deception as an officer of the bank, for which he was later convicted in the Federal court for violation of § 5209, U. S. Comp. Stat., it can scarcely be disregarded entirely in view of the fact that it is so fully corroborated by the reference to the mortgage and the purpose for which the security was given as contained in the contract of December 3d. In this state of the record we cannot find that Florence Kittel executed this mortgage for any purpose other than that stated in the testimony of William F. Kittel and in the contract. The mortgage, in its effect upon the homestead, will therefore have to stand or fall in the light of its execution for this purpose as affected by the subsequent transactions regarding the contract.

It is true that Kittel further testified that Mrs. Kittel would only consent to a delivery of the mortgage upon condition that the directors would not prosecute her husband, and that he communicated this condition to the directors. If the performance of such a condition be regarded as the consideration for the mortgage, it is obvious that it would be illegal as compounding a felony, and the entire mortgage would be void. If, on the other hand, it should be regarded merely as a condition affecting delivery, the condition is not operative after delivery to the grantee (Comp. Laws 1913, § 5497); and the question of the consideration for the mortgage is still open to inquiry. Of course it is not the law—and neither party to this proceeding contends that it is—that the consideration for a mortgage cannot be inquired into after delivery to the grantee or mortgagee. The majority of the court does not hold the consideration to be illegal, nor does it give effect to any condition upon which the mortgage was delivered.

The bank held this mortgage but a few days before it was ascertained that it would be impossible to carry out the contract. In the meantime neither the bank nor the directors had assumed any new obligation in reliance upon the mortgage, nor had either in any way altered their position. At most, according to the bank's contentions, it had taken the mortgage as security for a debt long past due, and it was not until after the bank had closed that the excess was applied to wipe out the overdraft of the third party, with Kittel's consent. The contract under which Florence Kittel understood that the mortgage was being given was soon rescinded, so far as the directors of the bank were able to rescind it, except for their failure to return the mortgage in question, and, possibly, some of the shares of stock which had been originally pledged with Straus. They refused to recognize it further as having any binding effect. Could they thus rescind the contract, and, as against Florence Kittel, leave the mortgage in possession of the bank as security for Kittel's pre-existing debt?

We have no good reason to doubt that, prior to the execution of the contract of December 3d, there was an understanding between Richard Kittel and some of the directors of the bank that he would mortgage his residence property to secure his past-due note. This is the testimony of Straus and some of the other directors. But there is no evidence that Florence Kittel was ever made aware of this promise, and neither is there any evidence from which we would be justified in saying that she executed the mortgage, intrusting it to her husband to use as general security in any way he should see fit. On the contrary, the evidence discloses that she understood the nature of the arrangement that was being made on December 2d and 3d. But she was not a party to that contract, and was in no way responsible for the fraud of her husband which occasioned its rescission and cancelation. She had the undoubted right to determine the conditions and terms upon which she would convey the homestead. The statute requiring a conveyance of a homestead to be executed and acknowledged by both husband and wife does not spend its force in exacting a mere formal act. It implies that either shall have power to give or withhold consent entirely, or to attach any condition that might be effective if the separate property of a grantor alone were involved. We are of the opinion that the record in the instant case clearly shows that the mortgage was

executed by Florence E. Kittel to be used as security for the performance of the specific contract of December 3d, and that when this contract was abandoned she had the same right to secure the release of the mortgage that she would have had if she had pledged her own property for a similar purpose. See Gammon v. Wright, 31 Ill. App. 353, 358; Johnson v. Callaway, — Tex. Civ. App. —, 87 S. W. 178, s. c. (Dashiell v. Johnson, 99 Tex. 546, 91 S. W. 1085); 13 R. C. L. 630.

While it might at first blush seem but equitable to allow the bank to foreclose the mortgage upon the homestead, as it was voluntarily executed and secures but a small part of the indebtedness of the officer whose conduct was responsible for so large a loss, it is evident to a majority of the court that it cannot be permitted in the instant case without trenching upon the policy of the law with respect to the homestead estate. To permit a mortgage to be enforced as against the homestead estate where it has been obtained for one purpose and is being applied to another, and where the rights of no innocent third party have attached but remain *in statu quo*, would be to establish a precedent that would deprive the homestead estate of the protection which the Constitution and the statutes have sought to accord to it.

It follows from what has been said that the mortgage is of no effect as a lien upon the homestead of Richard and Florence Kittel. In so far, however, as it creates a lien upon any property of Richard Kittel exclusive of the homestead estate, it is valid, as he had agreed to secure the specific obligation and recognized the mortgage as such security subsequent to the contract of December 3d. This lien was not defeated by the subsequent conveyance of the residence property from Richard Kittel to his wife. The judgment appealed from is reversed and the cause remanded, with directions to enter judgment in accordance with the foregoing opinion. The appellant will recover costs.

CHRISTIANSON, Ch. J., and BIRDZELL and GRACE, JJ., concur.

BRONSON, J. I dissent. The majority opinion holds invalid the mortgage involved, only so far as the same affects the homestead rights of the plaintiff. The majority opinion sustains the mortgage as a lien upon the property not within the homestead estate. It therefore upholds the testimony and contentions of the defendants and the findings and conclusions of the trial court to the effect that this mortgage was

given by the husband of the plaintiff to secure an indebtedness of $5,000, and interest, owing by the husband to the bank, and for advances to be made, covering traveling expenses or other incidental matters, and that such mortgage was not given as collateral in connection with the making of exhibit 100, which was afterwards repudiated between the directors of the bank and the husband. At the time this mortgage was executed, the property so mortgaged stood in the name of the husband. The majority opinion, further, is practically based entirely upon the testimony of one W. F. Kittel concerning the circumstances of the execution of the mortgage by the plaintiff, and upon the asserted fact that there was nothing to show that the plaintiff knew of any other consideration for the mortgage than such as was stated and in that contract. It is to be noted that the plaintiff in this case did not testify and no reason is asserted in the record for the absence of her testimony. The trial court prepared extensive findings and also an extensive memorandum opinion showing that he had given this case very careful and considerate attention. The trial court has found that this mortgage was executed by the plaintiff as the result of representations made to her by her husband and his brother, W. F. Kittel, in connection with their business with the defendant bank; that she did not seek any interview with any of the members of that bank, or any explanation with reference to the execution of this mortgage, or make any statement with reference to any restrictions as to its use and purposes; that she knew that her husband had been the head of that bank for a long time and had managed its affairs, and therefore must have known the relations and financial matters to be calculated and considered in making a settlement between the bank and her husband; that the execution of this mortgage was for the accommodation and use of her husband at his solicitation and the solicitation of this W. F. Kittel; that, both in reason and law, she constituted her husband her agent to use this mortgage for the purposes he deemed best in dealing with the bank. The trial court further found that the value of the homestead consisting of four lots, being a part of the premises mortgaged, was $8,000, or $3,000 in excess of the homestead limitation of $5,000. It is to be noted that the record discloses that this bank was wrecked and went into the hands of a receiver by reason of acts of default of the plaintiff's husband and his brother; that this husband

pleaded guilty to making false entries and misapplication of funds under the Federal Statutes, and was sentenced to the Federal Penitentiary and at the time of this trial was on parole; that the testimony of this brother W. F. Kittel was taken in the Federal Penitentiary, at Leavenworth, where he was then confined under sentence for violating the banking laws, and that there is testimony in the record to the effect that he was discharged from the bank when discovered in acts of forgery.

The majority opinion, however, have not stated the real reason why the plaintiff signed this mortgage. It has *not* stated the testimony of this Kittel, which recites the *reason* why she signed this mortgage. Only that part of the testimony has been quoted by the majority opinion which contains Kittel's statement to the plaintiff, and not her statement to him. This testimony demonstrates, conclusively, the serious error in which the majority opinion has fallen in stating that the testimony, as quoted in the majority opinion, was the basis of her reason for signing the mortgage.

This testimony is as follows:

Q. You then returned the mortgage, as I understand it, back to your brother at the bank?

A. She objected at first to signing it.

Q. Did she finally sign it?

A. She said she would not sign it unless there was a clause embodied in it to the effect that there would be no prosecution of my brother and myself.

Q. That clause was in the contract?

A. No, but I told her that such a clause, in my opinion, could not be inserted in the mortgage. She would only agree to sign the mortgage and deliver it to me with the understanding that it was not to be delivered to the directors of the bank unless they agreed that there should be no prosecution of my brother and myself. She was very insistent upon this point, and at the time that I took the mortgage into the meeting of the directors and Mr. Tenner, I stated that the mortgage was delivered with this understanding, and that it should be returned to her if there was any prosecution of myself or my brother.

In this connection it is to be noted that, in the course of the proceedings of the bank's directors and in trying to make an adjustment of the

bank's affairs so that it might continue, it was represented and made to appear that the defalcations were something like $75,000. Later, however, this amount was discovered to be over $200,000, by reason whereof this bank went into the hands of a receiver. This testimony of the brother, therefore, concerning this demand of the plaintiff, upon which ground alone she consented to the signing and delivery of the mortgage is important because it demonstrates her knowledge of her husband's and her brother-in-law's doings in connection with the bank. It demonstrates further a familiarity of knowledge of the transactions of such parties. It is to be noted, further, that Kittel in his testimony testified that he took this mortgage and delivered it at the meeting of the directors, with this understanding that it should be returned to the plaintiff if there was any prosecution of himself or plaintiff's husband.

I am unable to find any testimony that this plaintiff signed this mortgage, and so agreed to sign for the reason that it was made as collateral to this contract between her husband, and the directors of the bank. Accordingly, the record, upon the testimony of this brother, discloses that the only understanding which the plaintiff had was for a conditional delivery of the mortgage based upon nonprosecution for crimes involved. It is rather difficult, therefore, to understand the holding of the majority opinion that this mortgage was executed by the plaintiff for the purpose of being collateral to this contract. Exhibit 100. The majority opinion does state that they cannot find that the plaintiff executed this mortgage for any other purpose than that stated in the testimony of this brother. That purpose, as stated in the majority opinion, is not the purpose as disclosed by the evidence of this brother and contained in his deposition. The majority opinion further states that if this testimony of the brother is of doubtful credence in view of his conviction, it is fully corroborated by reference to the mortgage and the purpose for which the security was given. It is difficult to understand what corroboration may thus be inferred when the mortgage itself speaks of a definite indebtedness and a definite note, and when the majority opinion otherwise finds the mortgage to be valid as security for this very indebtedness thus described in the mortgage. The majority opinion accordingly demonstrates the correctness of the trial court's findings, viewed in connection with the evidence above

stated herein. It is further evident that the testimony of this brother served as a self-serving declaration in favor of the plaintiff, who was not a witness, and who did not present herself to give testimony in this case. The majority opinion further practically states that it is only equitable to permit the foreclosure of this mortgage upon a homestead, but it cannot permit such to be done without intrenching upon the policy of the law concerning homestead estates. This is an action in equity; principles of equity should apply to the plaintiff as well as to her husband and this brother. Their actions should be scrutinized closely just as they were very closely scrutinized in a very recent case in Wisconsin, where the plaintiff was seeking to retain title conveyed by her husband and was there claiming to be a bona fide purchaser. See Spangler v. Kittel, 172 Wis. 583, 179 N. W. 759. It is not asserted in this record that any fraud, duress, or improper influence was exerted upon the plaintiff. This mortgage was delivered, as found by the trial court, and, as found by this majority opinion, to secure the indebtedness described in that mortgage. The mortgage as an instrument became valid only upon delivery. Stockton v. Turner, 30 N. D. 641, 153 N. W. 275.

It is well settled by statute and decisions that a mortgage cannot be delivered to the mortgagee conditionally. Comp. Laws 1913, § 5497; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362. This mortgage, upon its delivery, accordingly, took effect absolutely, discharged from the parol conditions upon which delivery was made. Upon this record, and pursuant to the findings of the trial court, also as sustained in the majority opinion, at least with respect to the property other than the homestead estate, it is further manifestly inequitable to permit this plaintiff, who, possessed of and chargeable with knowledge of her husband's and brother-in-law's transactions, asserted only one reason as a condition in the signing of this mortgage, to rescind her signature to the mortgage and to defeat the just claim of the bank. Upon principles of both equity and law the plaintiff is not entitled to prevail. The judgment in all things should be affirmed.

BRONSON and ROBINSON, JJ., concur.

ROBINSON, J. (dissenting). On December 2, 1915, R. C. Kittel and

Florence, his wife, made to the First National Bank of Casselton a mortgage on seven lots in Casselton to secure $6,000, with interest at 8 per cent, according to one promissory note. Also, to secure any and all advances made to or on behalf of the mortgagors by the mortgagee; also, to secure any other present and future indebtedness of said mortgagors to the mortgagee. A few hours after the making of the mortgage R. C. Kittle and his brother made, with five directors of the bank, a written contract—exhibit 100. The contract recites that performance of its conditions by the Kittel brothers is secured by a lot of stocks and bonds and a mortgage made by R. C. Kittel and his wife for $6,000. On January 7, 1916, the directors who signed the contract individually, signed and served a notice of rescission and cancelation on the Kittel brothers. The notice, if true, shows that the contract was obtained by gross fraud. In November, 1916, Richard Kittel having first conveyed the seven lots to his wife, she commenced this action to cancel the mortgage because of the rescission. The bank commenced an action to foreclose the mortgage. The two actions were properly consolidated for trial as one action, and in each a judgment was entered in favor of the bank.

The findings of fact and conclusions of law cover twenty-five pages; the testimony, five hundred pages. The memorandum of the trial judge giving the reasons for his decision appears quite conclusive, and in it he cites forty decisions. Any attempt to recite or state the evidence would be of no avail. It is known to the parties and their attorneys, and strangers care nothing for it.

The basis of the complaint by Florence Kittel is that the mortgage was made only as security for the performance of the contract which the directors repudiated, and that after the delivery of the mortgage it was altered by inserting words and figures to make it appear as security for the promissory note of $6,000. Now the mortgage is in due and proper form. It shows no interlineations, erasures, alterations, or marks of suspicion. It makes no reference to the contract in question. It is made to secure $6,000 and interest according to one promissory note. The signatures of Richard Kittel and Florence Kittel are in a clear businesslike handwriting. The acknowledgment is by W. F. Kittel, a notary public. The plaintiff signed the mortgage for the use and benefit of her husband, and on such representations as he made to her.

She did not sign at the request of the defendants or on any representation made by them. Indeed, she never exchanged a word with any of them in regard to the mortgage. It was made to secure $6,000 promissory note given in renewal of a $5,000 note, and interest at 8 per cent. The note was long past due, and it was made by Richard Kittel to the bank, and Kittel had repeatedly promised to secure the same. When the mortgage was made, Kittel had just been forced to resign as president and director of the bank. He had confessed to defalcations of $75,000, but the correct amount was $240,000. Now, it seems by this action that Mr. Kittel and his wife are well disposed to defeat the mortgage security and thereby add to the defalcations $6,000, and interest. As a result of the Kittel defalcations the bank went into the hands of a receiver, and, to redeem it, the directors had to pay $240,000. Such being the facts, it seems a little nervy to ask a court of justice to set aside the mortgage. The judgment is so clearly just and right it needs no support from any elaboration or argument.

J. R. WATKINS MEDICAL COMPANY, a Corporation, Appellant, v. F. G. PAYNE and C. O. Greenley, Respondents.

(180 N. W. 968.)

Guaranty — alteration of contract by changing amount of liability releases securities.

1. The plaintiff is engaged in manufacturing certain medicines, extracts, etc., which it sells at wholesale price to those with whom it contracts, limiting the party, in making sales, to a specific territory. It made a contract with one R. C. Hill, who had theretofore had other contracts with it. The contract contained a provision to pay indebtedness arising under former contracts. At the time defendants signed it, the amount of past indebtedness was not inserted in it. There was a blank space in the contract, where it could be inserted. These defendants signed the contract, as sureties. After the execution and delivery of the contract, without their knowledge or consent, the amount of the old debt was filled in the blank by the plaintiff.

Held, that this was a material alteration of the instrument, and operated to release defendants from all liability under it.

Guaranty — signature by sureties held not to estop them from denying liability as to amount inserted without their knowledge.

2. It is further *held*, in such circumstances, the signing thereof, by defendants, without the statement of the amount of past indebtedness in the blank, did not authorize the plaintiff thereafter to insert it, and plaintiff having done so, the defendants are not estopped to deny their liability on the contract.

Pleading — under statute defendant may plead and prove inconsistent defenses.

3. Under the provisions of subdivision 2 of § 7449, Comp. Laws 1913, a defendant may plead, and offer proof of, inconsistent defenses.

Opinion filed December 28, 1920. Rehearing denied January 11, 1921.

Appeal from separate judgments of the District Court of Sargent County, *F. J. Graham*, J.

Judgments affirmed.

Ole S. Sem and *Tawney, Smith, & Tawney*, for appellant.

"The proof or admission of a signature of a party to an instrument is prima facie evidence that the instrument written over it is his act, and this prima facie evidence will stand as binding proof, unless the maker can rebut it by showing evidence that the alteration was made after delivery." Riley v. Riley, 9 N. D. 580, 84 N. W. 347; Wilson v. Hayes, 40 Minn. 531; Modie v. Breiland, 9 S. D. 506, 70 N. W. 637; Foley, etc., Co. v. Solomon (S. D.) 170 N. W. 639; Cosgrave v. Fanebust, 10 S. D. 213, 72 N. W. 469; Wicker v. Jones, 159 N. C. 102, 74 S. E. 801, Ann. Cas. 1914B, 1083; Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396; Hogen v. Merchants & Bankers Ins. Co. 81 Iowa, 330, 46 N. W. 1114; Magee v. Allison, 94 Iowa, 527, 63 N. W. 322; James v. Holdam, 142 Ky. 450, 134 S. W. 435; Dorsey v. Conrad, 49 Neb. 443, 68 N. W. 645.

If one signs an instrument containing blanks, he must be understood to intrust it to the person to whom it is so delivered, to be filled up properly, according to the agreement between the parties, and, when so filled, the instrument is as good as if originally executed in complete form. Merchants Nat. Bank v. Brastrup (N. D.) 168 N. W. 42; Porter v. Hardy, 10 N. D. 556, 88 N. W. 460; Re Tahite Co. L. R. 17 Eq. 273; Styles v. Scotland & Co. 22 N. D. 469, 134 N. W. 708; Montgomery v. Dresher, 90 Neb. 632, 38 L.R.A.(N.S.) 423, 134 N. W. 251.

Written contracts supersede oral negotiations. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its (subject) matter, which preceded or accompanied the execution of the instrument. Comp. Laws 1913, § 5889; Gilber Mfg. Co. v. Bryan (N. D.) 166 N. W. 805; J. R. Watkins Medical Co. v. Holloway (Mo.) 181 S. W. 602; Graham v. Savage, 110 Minn. 510; Armstrong v. Cavanaugh (Iowa) 166 N. W. 673; Vogt v. Schenbeck, 123 Wis. 491, 100 N. W. 820.

Where a party seeks to avoid an instrument on the ground of an alteration, he must make out his case by clear and convincing testimony. Merchants Nat. Bank v. Brastrup (N. D.) 168 N. W. 43; Riley v. Riley, 9 N. D. 508, 84 N. W. 347; Maldner v. Smith, 102 Wis. 30, 78 N. W. 141; Brunton v. Ditto, 51 Colo. 178, 117 Pac. 156; Graham v. Graham, 184 Mich. 638, 151 N. W. 596; Droge Elwater Co. v. W. P. Brown Co. (Iowa) 151 N. W. 1048.

Kvello & Adams, and *A. Leslie,* for respondents.

If, after a name is signed as surety, the name of a preceding surety should be erased without the knowledge or consent of the subsequent signer, then, as to him, his contract would be materially altered, and he would be released from liability thereon. Cass County v. American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Hagler v. State, 31 Neb. 144, 47 N. W. 692; Porter v. Hardy, 10 N. D. 551, 88 N. W. 458; Watkins Medical Co. v. Miller (S. D.) 168 N. W. 373.

The addition to the contract of the additional liability of $1,487.60, without the consent of the defendants, voids the contract. Koch Medical Tea Co. v. Poitras (N. D.) 161 N. W. 727.

The guarantors, by so signing, were not estopped to deny liability on the amount thereafter filled in without their consent. Ibid.

GRACE, J. This action is one by plaintiff to recover upon a bond claimed to have been signed by these defendants as sureties. The case was tried to the court and a jury. The verdict of the jury was in defendants' favor. Judgment was entered thereon, and from it the plaintiff appeals.

The material facts, briefly stated, are as follows: Plaintiff is a manufacturer of certain medicines, extracts, etc. It is a corporation.

Its principal place of business is at Winona, Minnesota. It sells its product at wholesale prices to those who will undertake the sale thereof, who are required to confine their sales to territory specified in a written contract, which sets forth the agreement of the parties in detail.

One contracting with plaintiff is required to canvass the territory allotted to him under the contract at least three times a year, at his own cost and expense, and is required to provide a team, wagon, and outfit. He is required to keep a record of all the goods disposed of by him, and to make weekly written reports of all sales and collections, and of the goods on hand and outstanding accounts. He is also required to pay the freight or express, if any. At the termination of the contract, he agrees to pay the amount remaining unpaid. He also had the privilege of paying for the goods in cash within ten days from the date of invoice, and receive a 3 per cent discount, provided that full payment for all goods previously purchased had then been made.

Sufficient has been stated to indicate the nature of the contract. The plaintiff entered into a contract of the character above indicated with one R. C. Hill, of the state of North Dakota. The territory in which Hill might sell plaintiff's product was Sargent county, North Dakota.

The date of the contract is December 1, 1916. It would appear that, before the time of this contract, Hill had been engaged in selling plaintiff's product, and thereby became indebted to it, in the sum of about $1,487.60. The contract contained a provision whereby Hill promised to pay the company the indebtedness due it at the date of the contract. The time of payment thereof was extended during the time of the contract, which terminated on the 1st day of March, 1918.

Under certain conditions, the company had the right to limit or discontinue the sales, and either party could terminate the written agreement upon giving the other notice in writing; and, in that event, any indebtedness owing the company became immediately due and payable. The contract was signed by the company and by R. C. Hill. Immediately following Hill's signature is the following:

"In consideration of $1 in hand paid by the J. R. Watkins Medical Company, the receipt whereof is hereby acknowledged and the execution of the foregoing agreement, which we have read or heard read and hereby assent to, and the sale and delivery by it to the party of the second part as vendee, of its medicines, extracts, and other articles, and

the extension of the time of payment of the indebtedness due from him to said company, as therein provided, we, the undersigned sureties, do hereby waive notice of acceptance of this agreement and diligence in bringing action against the second party, and jointly, severally, and unconditionally promise and guarantee the full and complete payment of said sum and indebtedness and for said medicines, extracts, and other articles, and of the prepaid freight, and express charges thereon, at the time and place, and in the manner in said agreement provided."

Plaintiff claims that the foregoing was signed by F. G. Payne and C. O. Greenley. The action is upon the contract, to recover of the defendants the sum of $1,724.03, $1,487.60 of which is claimed to be the past indebtedness of Hill, and $236.43, the amount remaining unpaid for certain merchandise purchased during the time the contract under consideration was in force.

Payne and Greenley interposed separate answers. Payne's answer, after a general denial, in substance, alleges that during May, 1917, Hill requested the defendant to sign the instrument, which he represented to be a statement showing that he made regular trips through that territory, selling the medicine of plaintiff; that, before the paper was signed by defendant, Hill represented that he was acting in behalf and at the request of the plaintiff, in securing signatures to said paper, and as its agent; that Hill represented to him that the paper signed contained no obligation on the part of the defendant, in any manner or form; that the defendant can read and write with difficulty; that the instrument signed by him contained no typewriting near the bottom, as shown in the contract, to wit, "Fourteen hundred eighty-seven and 60/100 dollars;" that the plaintiff, without the knowledge, procurement, or consent of the defendant, knowingly and fraudulently altered the paper signed by defendant, by inserting in the blank space referred to the following words, to wit: "Fourteen hundred eighty-seven and 60/100 dollars;" that the paper was wholly without consideration.

Greenley's answer, after a general denial, states that Hill came to him about December 1, 1916, asking him to sign an instrument in the form of a contract or bond, on the printed form of plaintiff. He sets forth substantially the same representations made by Hill as to agency, as are contained in the answer of Payne, the same statement of fact relative to the fraudulent insertion of the item of $1,487.60; and that

Hill represented to him, that the instrument he was asked to sign was for future advances from the plaintiff to him; and that when the contract was presented to him, it contained, as a first signer, the name of W. E. Hill, father of R. C. Hill, with whom defendant was well acquainted, and upon whose prior signature he relied, and was induced and influenced to sign because of it; that thereafter R. C. Hill returned to the defendant and requested the execution, by the defendant, of another instrument of the same general form as the one first signed, stating that the instrument formerly signed was not satisfactory to the company; that, relying upon defendant's belief that R. C. Hill was the agent of plaintiff, for the purpose of procuring signatures to the contract, defendant signed the second instrument as presented, which did not contain the typewriting near the bottom of the contract, "fourteen hundred eighty-seven and 60/100 dollars."

Then follows an allegation alleging the fraudulent alteration of the instrument, and the insertion of the item of fourteen hundred eighty-seven and 60/100 dollars; and further, that, at the time the second instrument was signed, the name of W. E. Hill was signed in the place left for the first signer, and that defendant was induced and influenced to sign as a second signer, by virtue of his reliance upon the financial standing and integrity of W. E. Hill; and that had his name not appeared on the bond or contract at the head of the place that he was asked to sign, he would not have signed the same. He denies that, at this time, Payne's name was on the instrument, and denies any consideration for the alleged contract.

Plaintiff interposed reply to each answer, among other things setting forth that the contract expressly provides that the contract may not be changed or modified in any respect, except in writing by the parties thereto; and that the contract provided that R. C. Hill had no power nor authority to incur any debt, obligation, or liability of any kind whatsoever, in the name of, or for, or on account of, the said company, etc.

The principal issues as to Payne are:

(1) Did he execute the contract upon which suit is maintained?

(2) If the indebtedness of $1,487.60 was not inserted in the agreement at the time the same was executed by him, was it inserted by the company, without authority, after its return to it?

As to Greenley, the issues are:

(1) Did R. C. Hill, in procuring Greenley to execute the contract, make statements and representations to the effect that W. E. Hill had signed as first surety; and that the contract was for future indebtedness and not for past?

(2) The same as No. 2, supra, of Payne's case.

Appellant has specified twenty-two errors. We have considered each of them, but will discuss only such as are of importance and necessary in reaching a determination of the questions presented in this appeal.

Payne's defenses, that he never signed the contract sued upon, and that the contract was altered in the manner above stated, are claimed by appellant to be inconsistent, and that for this reason the second defense is not available. In this contention appellant is in error.

Under the provisions of subdivision 2 of § 7449, Comp. Laws 1913, Payne could plead and offer proof of every defense he had to the contract, though such defenses might be inconsistent.

It is not difficult to discern that the statute is of much importance in the preservation of valuable rights to a defendant. To illustrate, the defendant in the present case may have been absolutely certain that he never signed the contract sued upon, but it might also appear that his name was signed to the contract, and that the signature was so similar in appearance to his genuine signature that it might be difficult to prove that the purported signature was not his; that there might be adduced such evidence as would lead the jury to believe that the signature attached to the instrument was his, though, in fact, it was not.

In such circumstances, we do not think that the defendant should be precluded from asserting any other defense he had to the contract, even though inconsistent with the defense that he had not signed the contract; for he was not liable if he never signed the contract; neither was he liable if it were found that he did sign the contract, if the contract were materially altered after it was signed, without the consent of defendant, and after it came under control of plaintiff. Certainly there was no error in permitting inconsistent defenses.

Error is assigned, by refusal to receive in evidence exhibit "1" (the contract upon which suit is brought) under the admissions, in the separate answer of Payne. In this, there was no error. Payne, in his answer, did not admit signing exhibit "1." He there states that Hill came to him and requested him to sign an instrument or paper. This

is far from admitting the execution of the alleged contract sought to be introduced in evidence, in the manner above stated.

It is true, he did sign an instrument, but the testimony shows this to have been Exhibit "2," which was signed by him in pencil, and that his signature was thereafter traced in ink by someone.

The company received this instrument, but was not satisfied with the manner in which it was executed, and detached the signatures from it and returned them to Hill, requesting him to have a new contract executed, the blank for which it inclosed him. This is the contract which is marked exhibit "1," and upon which the plaintiff seeks to recover, and which purports to be signed by Payne, and is admitted to have been signed by Greenley.

Payne's testimony is to the effect that he never signed this contract; that Hill never came back (meaning after the time the first contract was signed) and asked him to sign any other paper in connection with the Watkins Company petition or any other petition; that he was not there in the latter part of May or in the first part of June, asking him to sign the papers.

Opposed to this testimony are photographs of certain instruments introduced, containing the genuine signature of Payne, the purpose being to show that the signature thereon was the same as that on exhibit "1," which is claimed by plaintiff to be that of Payne.

Certain bankers compared Payne's genuine signature on these instruments, with that on the contract, and pronounced them as written by the same hand. Whether the signature to the contract was the signature of Payne was a question of fact for the jury, under all the evidence adduced in that regard.

The jury, by its general verdict, determined all the issues in the case in favor of Payne, and necessarily determined that he never signed exhibit "1." That there is substantial evidence in the record to sustain the verdict, there is not the least doubt.

Payne should be more familiar with, and know his signature with greater certainty than any other person. He knew he signed the first contract, which never became effective. He also should know, as a matter of fact, whether he did sign the second contract, and his testimony, to the effect that he did not, and that the signature thereon was not his, is substantial evidence in that regard; and according to his

testimony, Hill never saw him in the latter part of May or in the first part of June, when, as the evidence shows, the second contract was signed by parties other than Payne; and there is no other testimony showing that Hill did see him at that time. Hill was neither a party to this action nor a witness in the case. The relation of Payne and Greenley on the contract was that of surety.

Payne's further defense is to the effect that the contract was materially altered by the insertion of the item of $1,487.60.

The plaintiff claims there is no alteration of the contract. It contained a printed provision as follows:

"The party of the second part (Hill) hereby promises to pay said company, at Winona, Minn., during the term of this agreement, the indebtedness now due it, for goods and other articles sold and delivered to him, as vendee, f. o. b. cars at its regular places of shipment, payment of which is hereby extended during said term. The parties hereto, for the purpose of settling and determining the amount now due, hereby mutually agree that the said indebtedness now due company is the sum of ———— dollars, which sum the second party agrees to pay, and payment of which is extended, as above provided. And it is further mutually agreed that either of the parties hereto may terminate this agreement at any time by giving the other party notice thereof in writing by mail, and any indebtedness then owing from said second party to said company shall thereupon be and become immediately due and payable."

It is claimed the contract having provided for the payment of the indebtedness, that insertion of the sum of the indebtedness, by the plaintiff, after the execution of the contract and delivery of it, would not constitute an alteration of it.

We are of the opinion, upon consideration of the language of the contract above quoted, that it did not amount to a contract to pay an undetermined or unknown amount of indebtedness from Hill to the plaintiff, and that to give effect thereto, it was necessary to insert the specific amount of such indebtedness.

It is true the language is: "The parties hereto, for the purpose of settling and determining the amount now due, hereby mutually agree, etc.," but, in the circumstances here, this would really mean nothing,

unless the blank, at the time the contract was signed, was filled in, with the amount of indebtedness then determined to be due.

There is competent evidence, substantial in quantity, to show that, in the contract Payne signed, and at the time he signed it, the amount of the indebtedness, in the sum of $1,487.60, was not inserted therein.

He testified that Hill represented that what he wanted him to sign was a petition showing that he made three trips a year; that Hill read part of it to him. Payne, at the trial, in answer to a question, said: "I asked him if there was any money in any form in that (meaning what he termed a petition) and if there was, I would not have anything to do with it, and he said there was not anything in there. He said, 'I have read it to you.' " Payne has little education. He stopped attending school at the age of thirteen years, and he was then in the third grade.

On cross-examination, he testified:

Q. Did you scrutinize this contract sufficiently close to see that this typewriting "fourteen hundred eighty-seven and 60/100 dollars" was not typewritten in there?

A. Yes, sir.

Later in the cross-examination, he was asked the following question:

Q. You cannot say for sure whether that amount was typewritten in there?

A. Yes, sir. It was not there. I looked to see if there was any money written in.

There is some other testimony having some weight in this regard, but it is not necessary to refer to it. Sufficient has been said to show that appellant's claim, that Payne's defense in this regard has no support in the evidence, is absolutely without any merit.

The jury having returned a verdict in favor of each defendant, and the same being supported by substantial evidence, it must be held that the jury determined, by its general verdict, that the words "fourteen hundred eighty-seven and 60/100 dollars" were not in the contract signed by Payne, at the time he signed it, nor in the contracts admittedly signed by Greenley.

It would seem to follow that the insertion of the amount must have occurred after the return of the contract to plaintiff, and that the same

was made by plaintiff or someone acting under his direction or authority.

The insertion of the amount of the indebtedness, in the blank space, by plaintiff, or its agents, after the same had been returned to it, or after defendants signed, was a material alteration of the contract, the legal effect of which was to release defendant from all obligation under it. See § 5940, Comp. Laws 1913.

That the alteration of the contract, in the manner above shown, was a material one, and extinguished the executory obligations contained in it, in favor of plaintiff, the defendants never having consented thereto. See Porter v. Hardy, 10 N. D. 551, 88 N. W. 458.

The filling in of the blank, in the manner as shown by the evidence, was a material alteration of the instrument. J. R. Watkins Medical Co. v. Miller, 40 S. D. 505, 168 N. W. 373; Dr. Koch Medical Tea Co. v. Poitras, 36 N. D. 144, 161 N. W. 727. This case is clearly distinguishable from that of Merchants' Nat. Bank v. Brastrup, 39 N. D. 619, 168 N. W. 42.

What has been said with reference to the legal effect of the material alteration of the contract applies, in the proceeding, against each defendant.

A further reason why Greenley should be wholly discharged from the contract is that when he first signed it, it was on the strength that the name of W. E. Hill appeared as the first surety. R. C. Hill had represented to him that his father would first be responsible on the bond, before there would be any liability on his part.

It would seem, from the evidence, that Greenley knew that W. E. Hill was of some financial worth, and that he relied upon his being first surety. This was also true at the time of signing of the second bond or contract. His testimony shows that he signed each time in pencil. The contract appears with the name of Payne as first surety and Greenley as second surety.

Greenley having a verdict, the jury must have determined that each time Greenley signed the bond the name of W. E. Hill appeared as first surety, and that it was upon the strength of that that he signed the bond.

There is no need to refer to all the evidence in this regard. Suffice it to say there is substantial evidence to sustain the verdict.

Where one signs his name as surety, after the name of a preceding

surety, whose name is erased without his knowledge or consent, it constitutes a material alteration of his contract, which operates to release him from liability. Cass County v. American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Hagler v. State, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692.

There is substantial evidence to show that the $1,487.60 was not in any of the contracts at the time they were signed by either of the defendants. The testimony conclusively shows that the above amount was written in the contracts in the plaintiff's office.

The verdict of the jury being in defendants' favor, it must have necessarily decided that the sum above mentioned was not in the contracts when signed by defendants, and that it was thereafter inserted by the plaintiff, without any authority from the defendants to do so.

A stenographer in the employ of plaintiff testifies, in substance, that she did all the typing, where the same appears on the contracts.

We think the contract must be considered as an entire, and not a severable, one. It was all one contract and indivisible. The material alteration of it destroyed it entirely. Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78.

After a full consideration of the case, we are fully satisfied there is no error in the admission or exclusion of evidence, nor in the ruling upon objections, nor in the giving of instructions, nor in the refusal to give special instructions, requested by the plaintiff. There is substantial evidence to sustain the verdict in favor of each defendant.

The judgments appealed from are affirmed. Respondents are entitled to their costs and disbursements on appeal.

R. S. BROOKINGS, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

(180 N. W. 972.)

Trial — instruction in action for killing of live stock held erroneous, assuming and singling out facts.

In an action to recover of a railway company the value of a certain stallion killed at a crossing by one of the railway company's train, the fireman on a

train which went over the place where the stallion was killed, at or about the time he was killed, testified that the train on which he was such fireman struck a horse at that time and place, that he kept a lookout on the side of the track where the horse went upon the track; that the horse was not visible from where the engineer was seated keeping a lookout; that the engineer had died before the action was commenced. The plaintiff testified that the stallion went out of the pasture where he was kept between 2 o'clock P. M., and dark on November 9, 1912. That plaintiff went down to the crossing in the evening of November 9, 1912, but saw nothing of the stallion; that he went there again in the morning of November 10, 1912, and saw blood, hair, and portions of the entrails on the west end of the planks in the crossing, and that from there to a distance some 150–200 feet west of the crossing, where the mangled body of the stallion lay, there were marks showing that the stallion had been dragged by the train. There was no evidence, and no contention, that any other horse had been killed or injured at that particular time and place.

It is *held* that the trial court erred in instructing the jury:

1. That, even though they found that the defendant was not negligent in the operation of the train that struck the horse concerning which the fireman testified, they might find that the horse had been killed by some other train, concerning which defendant had offered no explanation.

Railroads — instruction on lookout erroneous.

2. That it was the particular duty of the engineer to keep a lookout for live stock.

Trial — instruction to find full value shown held erroneous.

3. That in event they found for the plaintiff, they must return a verdict for the full amount demanded by the plaintiff.

Opinion filed December 28, 1920.

From a judgment of the District Court of Stark County, *Lembke, J.*, defendant appeals.

Reversed and remanded for a new trial.

W. F. Burnett and *Young, Conmy, & Young,* for appellant.

In a case of this kind negligence proximately causing the loss must be shown. And where the killing is explained, plaintiff's case gets no support in the statutory presumption. Corbett v. G. N. R. Co. 19 N. D. 456, 125 N. W. 1054; Stoeber v. Soo (N. D.) 168 N. W. 562.

Proximate cause was not mentioned, and the jury simply found for the plaintiff on general principles. Under the holdings of this court the judgment should not be permitted to stand. Stoeber v. Soo R. Co.

supra; Anderson v. Soo (N. D.) 123 N. W. 28; Corbett v. G. N. R. Co. 28 N. D. 136; Duneau v. G. N. R. Co. 17 N. D. 610, 118 N. W. 826.

Defendant's employees, in operating its train, were not required to keep a lookout for trespassing stock. Bostwick v. R. Co. 2 N. D. 450, 51 N. W. 781; Hodgins v. R. Co. 3 N. D. 389, 56 N. W. 139; O'Leary v. Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919; Wright v. M. St. P. & S. S. M. R. Co. 12 N. D. 163.

S. E. Ellsworth, for respondent.

"The killing or damaging of any horses, cattle, or other stock by the cars or locomotive along a railroad shall be prima facie evidence of carelessness and negligence on the part of the corporation." Comp. Laws 1913, § 4644.

"Generally the corporation operating a railway train and its employees possess the only information relating to negligence in operating the train, and this is why the burden is taken from the plaintiff, after proving the ownership and the killing, and placed upon the defendant." Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054.

"The questions of negligence and contributory negligence are, where there is any material conflict in the testimony, questions of fact for the jury, rather than the court, to pass on." Corbett v. Great Northern R. Co. 29 N. D. 136, 148 N. W. 4.

"The duty of a railway company and its employees in case of stock trespassing upon its right of way is to exercise ordinary care not to injure it after it is discovered to be in a place of danger." McDonell v. Soo Line, 17 N. D. 606, 118 N. W. 819.

CHRISTIANSON, Ch. J. This is an action to recover damages for the loss of a certain stallion. In his complaint, the plaintiff alleges: That the defendant at all times mentioned in the complaint operated a line of railway through and across the county of Stark; that on November 9, 1912, the plaintiff was the owner and in full possession and control of a pure-blooded Percheron stallion, Prince Albert, registered No. 65,485, age about three years, and of the value of $2,000.

"That on the 9th day of November, A. D., 1912, while said stallion, Prince Albert, belonging to plaintiff as aforesaid, was rightfully and properly upon a public crossing over the railroad track of said defendant

and upon grounds included in a public highway, near said station of Richardton, county and state aforesaid, the agents and employees of defendant, operating a train upon said railway, approached said crossing at a high rate of speed without blowing the whistle or ringing the bell upon the engine of said train, or giving any of the signals required by law; and, knowing that said stallion was upon said crossing and in a position of peril from said approaching train, negligently, carelessly, and wilfully caused said train to run upon, against, and over said stallion, thereby injuring and wounding him so that shortly thereafter he died. That by reason of the facts aforesaid, and by negligent and wilful act of the servants, agents, and employees of said defendant in operating said train upon said tracks as aforesaid, without fault on his part, plaintiff has sustained damage and injury in the sum of $2,000." The answer denied generally the allegations of the complaint; and denied specifically that the stallion was of the value alleged in the complaint. The answer further denied that the stallion was injured by reason of the negligence of the defendant or its servants, and alleged the fact to be that the stallion was injured because of plaintiff's own negligence. The case was tried to a jury, verdict was returned in favor of the plaintiff for the full amount demanded in the complaint. Judgment was entered pursuant to the verdict, and defendant has appealed from such judgment.

Plaintiff offered evidence showing that he owned the stallion in controversy, and that he kept him at his ranch, some 2½ miles east of Richardton, in Stark county in this state; that the buildings on plaintiff's ranch, and a pasture adjacent thereto consisting of about 250 acres, lay on the north side of the defendant's line of railway; that such pasture lay in two sections; that the plaintiff had placed a gate where the fence running along the south side of such pasture intersected the section line, said gate being about a quarter of a mile directly north of the crossing at which the stallion was killed. Plaintiff testified that about 2:00 o'clock in the afternoon on November 9, 1912, he went to Richardton; that at the time he left, he observed that the stallion was in the pasture. In going to Richardton, the plaintiff went through the gate, which he says that he closed after passing through it. According to his testimony he returned "about dark." When asked to tell the time, he says, "He supposed [he returned home] between 5 and 6

o'clock." On his return he found the gate open, and, on arriving at the barn, he found only "part of the bunch of horses that the stallion was running with there." He thereupon went down to the crossing but found no horses there. He found some of the horses at a point between the crossing and the stable and drove those horses back toward the barn. He says that there was no snow on the ground; that it was not stormy, but that he thinks it was a little cloudy.

The following questions and answers are quoted from his direct examination.

Q. Did you go over the crossing to the south?

A. Yes, I went over to the crossing; I don't know as I went over the crossing.

Q. Did you find him anywhere?

A. I didn't see any evidence of him at all.

Q. Did you make such search as you could in the condition as to light?

A. Yes, sir. I didn't search very much because I didn't see the horse or the body of it at the crossing. I didn't suppose he was there.

Q. You looked about did you, looked about as long as you could?

A. I looked about the crossing. I didn't find the horse. I didn't look very much because I thought perhaps I was mistaken; that the horse was still maybe at home, and I went back to the stable.

Q. When you went back was he there?

A. No, sir.

Q. You took the other horses back with you?

A. Yes, sir, what I found.

Plaintiff further testified that he went to the crossing in question the next morning and saw "blood, hair, entrails, and everything else on the crossing and west of the crossing;" that there was blood upon the planks of the crossing; that those marks extended from a point on, and about 5 or 6 feet from the west end of the crossing until a considerable distance (about 150–200 feet) west of the crossing, where he found the dead body of the stallion; that at that time the section crew of the defendant was engaged in digging a hole in the ground in which to bury the body. Plaintiff's testimony further shows that east of the crossing at which the animal was killed, the railway tracks extend in a straight line for a

distance of about 3,200 feet; that beyond that point there is a slight curve toward the north for a distance of about 630 feet.

The defendant's witness, Hunke, testified that he was a fireman on defendant's train No. 5; that this train passed over the crossing in question, about midnight, on the night that plaintiff's stallion was killed; that the engineer in charge of the train is now dead; that the train hit a horse on the crossing in question, on that particular night; that as the train approached the crossing, he (Hunke) was on the bench keeping a lookout ahead; that the headlight was in good order and focused directly on the track ahead, but that the light would illuminate so as to make objects visible for a distance of about 100 feet on each side of the track; that as they approached the crossing, they were traveling at between 40 and 50 miles an hour; that he was seated so that he could and did keep a lookout on the south side of the track; that shortly before reaching the crossing some horses moved onto the track; that the train was then only a short distance away, and that it was impossible to stop the train after seeing the horses; that the engineer could not have seen the horses as they came on to the track, from where he was seated,—he being seated on the north side of the cab; that the train hit one of the horses; that this was evidenced by the rumbling of the wheels passing over the body of the horse, as well as by the stench which arose from the entrails and blood of the horse, coming in contact with the hot pipes or the front of the engine; that the bell was not rung, but that the whistle was blown for the crossing.

Plaintiff also introduced evidence that at the time of the accident the defendant operated four west-bound passenger trains, No. 3, which passed through Richardton about 1:30 in the afternoon; No. 5, which passed through there about midnight; No. 1, which passed through there about 1:30 A. M.; and No. 7, which passed through there at about 5:15 P. M.; that there also was a fast freight which went through there during the night, and that usually there were other west-bound freights during the night.

On this appeal defendant asserts that the plaintiff has failed to establish actionable negligence on the part of the defendant. While the case is a close one, we are not prepared to hold as a matter of law that the defendant overcame the statutory presumption of negligence (Comp.

Laws 1913, § 4644) raised by the fact that the horse was killed by defendant's train.

The defendant next contends that the court erred in its instructions to the jury. This contention, we believe, is well founded and must be sustained. The court instructed the jury in part thus: "Now, gentlemen of the jury, in this case we have the railroad coming in here and denying that they are liable. Then, the railroad comes in here and sets up an explanation with reference to one train only, and that is No. 7. Now, under the evidence of this case there are two trains that have passed this crossing between 5 o'clock and midnight the same afternoon and night. There is no evidence before you as to which train actually killed the horse; the horse that stood on the track was never identified by either the plaintiff or the defendant. The case stands this way. Supposing that the railroad company has established to your satisfaction a good and valid excuse for the killing of the horse by train No. 7—no, by train No. 5, that still would leave train No. 7, which arrives at Richardton at 5:15 P. M. uncontradicted. The question is left open there as to whether, perhaps, No. 5 may not have killed the horse; and it is up to you, jurymen, to find as to whether No. 5 has killed the horse or not from the evidence introduced in this case."

Later in his instructions the court said: "The court further instructs the jury that the law is that when a man proves that he owns live stock, and that it was killed upon the track of the railroad company, the law raises the presumption of negligence as against the railroad company, and when there is no showing to the contrary, no explanation on the part of the railroad company, then the man is entitled to recover. Gentlemen of the jury, this is applicable especially to train No. 7 . . . ."

Plaintiff contends that these instructions were correct under the rule announced by this court in Wright v. Minneapolis, St. P. & S. Ste. M. R. Co. 12 N. D. 159, 96 N. W. 324, and Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 462, 123 N. W. 281. In our opinion these cases readily distinguish themselves from the case at bar. In the Wright Case, the plaintiff introduced evidence showing that he owned two cows which had been killed by some train belonging to the Soo Railway Company. The defendant introduced evidence by the engineer of

the east-going passenger train which passed the place where the cattle were killed, on the morning of the day when they were killed. The court held that the testimony adduced by the defendant overcame the statutory presumption of negligence, and entitled the railway company to discharge as to this part of the plaintiff's claim. The testimony of the engineer and fireman related to the killing of one cow only, and the circumstances surrounding the death of the other cow were such as to indicate that that cow could not have been killed by that train, but must have been killed by a train moving in an opposite direction. Hence, there was no evidence whatever on the part of the defendant to overcome the statutory presumption of negligence as to the train which must have killed the second cow, and the court held that the verdict must be sustained as to the second cow for this reason. The portion of the opinion in the Wright Case dealing with this particular phase of the case is as follows: "Defendant, to overcome the prima facie case so made by its adversary, introduced as witnesses the engineer and fireman of the passenger train No. 108, which passed the place where these cattle were killed, going east on the morning of March 2, 1901. The testimony of these witnesses disclosed the killing of one only of the cows by this train, but under circumstances which, in the judgment of the trial court, fully overcame the statutory presumption of negligence, and entitled the defendant to a discharge as to this part of plaintiff's demand. Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co. 3 N. D. 382, 56 N. W. 139. The remittitur of $30, ordered by the trial court on the motion for a new trial, was for the value of this cow. As to the second cow included in the verdict, the evidence was such as to indicate that it was killed by a train going west, and therefore could not have been killed by passenger train No. 108, which killed the first one. This second cow was found dead near the track, about 2 rods west of the highway crossing. From a point about 25 rods east of this crossing there were footmarks for 7 or 8 rods, where 'the cow had made great leaps along the track;' also evidence indicating that she had been dragged west along the track 15 rods, leaving marks of blood, hair, horns, and hide on the track, to the point near which the broken and bruised body was found. This evidence is not reconcilable with the theory that the cow was killed by a train moving in an easterly direction. The jury must have found, as they had a right to do if they be-

lieve this evidence, that this cow was killed by some other train, and not by passenger train No. 108. Defendant offered no evidence to meet this condition of the proof. The statutory presumption of negligence from the killing of this cow by defendant's train was not overcome, and is sufficient to sustain the verdict for her value." 12 N. D. 162.

In the Anderson Case the defendant defended on the theory "that it did not injure the horse;" and in the supreme court it strenuously argued that there was no evidence "to warrant the jury in finding that the defendant inflicted the injury which resulted in the killing of the horse." 18 N. D. 465. The railway company in that case called as its witnesses the engineer and fireman of a certain train which passed over the place where the horse was injured. These witnesses testified that they discovered the injured horse lying in the ditch alongside the railroad track, and that they notified the station agent to send someone back to look after it. According to their testimony, however, the train which they operated did not injure the horse at all. Hence, we have this situation,—the horse was found under such circumstances that the only reasonable inference was that it had been injured by a passing train. The statute raised the presumption that the injury was occasioned by the negligence of the railroad company. If the testimony of the engineer and brakeman was true, the fact would still remain that the horse had been injured by a train belonging to the defendant in that case, and no evidence was adduced as to the such other trains. The court, also, held that the circumstances in the case were in direct conflict with the testimony of the trainmen, and that the jury might well have concluded that the train which they operated injured the horse. The court said: "The circumstances surrounding the injury to this horse are such that the jury may have found that they clearly indicated the injury of the animal by a train, and, while not equally as clear, we think strongly point toward the train in question, notwithstanding the testimony of the trainmen. The jury may well have found that the condition of the animal could be explained in no other manner, and that the testimony of the engineer and fireman was false."

In this case the situation is wholly different from that which existed in the Wright and Anderson Cases. In this case, the defendant does not deny that one of its trains killed the horse at the time and place where plaintiff's horse was found dead the next morning. And there

is not even the slightest intimation in the proof that more than one horse was killed at that time and place. The plaintiff,—who lives close to where the horse was killed,—according to his testimony, went down to the crossing between 7 and 8 o'clock on the morning of November 10th, and he then observed the blood, hair, and entrails on the west end of the crossing, and that from that place to the point where the mangled body of his stallion lay. Similar substances were found on the rails and ties. The same condition was testified to by one Mottershead, another witness called by the plaintiff, who was there and saw the horse being buried by the section crew on the morning of November 10th. The evidence will be searched in vain for even an intimation that any other horse was injured or killed at that particular crossing on that particular night. It will also be noted that the court, in its instructions, singles out train No. 7, as the one which might have killed the horse. According to the evidence offered by plaintiff this train was due to arrive at Richardton at 5:15 P. M. Hence, of course, it would pass the place where the stallion was killed some time earlier. It will be noted that the court says: "There is no evidence before you as to which train actually killed the horse." He further states that the horse which stood on the track has never been identified by either the plaintiff or the defendant. Of course, it goes without saying that the engineer and fireman of a train going at between 40 and 50 miles an hour cannot identify an animal with great particularity. If the instruction given in this case is correct, it would doubtless be correct in every case in which an animal is killed by a train, especially during the nighttime. It will also be noted that the court singled out the hours between 5:00 in the afternoon and midnight. According to plaintiff's testimony, he arrived at his home on his return from Richardson about dark, and according to his "supposition" the time was between 5:00 and 6:00 o'clock. After returning home he walked from his place down to the crossing. The instruction related to a matter which the defendant could not, under any reasonable view, have anticipated would be injected into the lawsuit. It not only assumed a state of facts for which there was no basis in the evidence, but, in instructing with reference to the statutory presumption of negligence, the trial court singled out train No. 7, and suggested to the jury that the statutory presumption was particularly applicable thereto. In this state a trial court has no right to comment

on facts, or express an opinion on the weight of the evidence. The inference to be drawn from the facts in evidence are for the jury. And it is a general rule that a misstatement of the evidence on a material fact to the prejudice of the party complaining is reversible error. In any view of the case, we are of the opinion that the giving of this instruction constituted reversible error.

The court also instructed the jury thus: "The court instructs the jury that it was the duty of the defendant's engineer to keep a lookout for stock upon its tracks, and to use ordinary care to avoid injury to stock after they had been discovered or after he might have discovered them by use of ordinary care and diligence." We also believe that this instruction was erroneous. In this case the engineer was dead. The action was not brought until between five and six years after the horse was killed, and in the meantime the engineer had died, so it was impossible for the defendant to produce his testimony. It will be noted that the court in its instruction places the duty to keep a lookout upon the *"engineer."* By the very nature of things there may be situations wherein it will be practically impossible for the engineer to keep a lookout on both sides. An examination of various reported cases disclosed that in many of them the fireman as well as the engineer was keeping a lookout at the time and place where an accident occurred. It is the duty of the defendant to keep a lookout at a crossing, but it is beyond the province of the court to say that this duty must be performed by any particular person.

The court, also, instructed the jury: "If you find from the evidence that the plaintiff is entitled to a verdict, he is entitled to the full amount, with interest from the date of killing." (Later the court changed the instruction so as to make the allowance of interest discretionary, but permitted the rest of the instruction to stand as given.)

In our opinion, this instruction should not have been given. It is true defendant offered no evidence as to the value of the stallion. Plaintiff, however, had the burden of showing its value. To establish such value he introduced the testimony of himself and two other witnesses, Mottershead and Davis.

On this phase of the case, plaintiff testified on his direct examination thus:

Q. Now, Mr. Brookings, from your knowledge as you have stated

it of the qualities of breeding of this stallion, your knowledge of the market value of horses of that class in this locality, the fact that you were the owner of this horse and of his sire and dam, can you state the value of the animal on the 9th day of November, 1912?

A. I think I could.

He further testified that the horse at that time was of the value of at least $2,000. The witness Mottershead testified that the value of the horse was "*about* $2,000."

The witness Davis testified thus:

Q. What was his value?

A. Oh, I think around $2,000.

Q. About $2,000?

A. Yes, sir.

We are of the opinion that under this evidence the question of value should have been submitted to the jury, and that it was error for the trial court to instruct that, in event they found for the plaintiff, they must fix the value of the horse at the full amount demanded in the complaint, *viz.;* $2,000. See Chamberlayne, Ev. §§ 2172 *et seq.;* Shuman v. Rund, 35 N. D. 384, 160 N. W. 507.

It follows from what has been said that the judgment must be reversed and the cause remanded for a new trial. We find it unnecessary to consider the other errors assigned, as it is not likely that they will arise upon another trial.

Reversed and remanded for a new trial.

BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

GRACE, J. (specially concurring). I concur in the reversal of the judgment and in the remanding of the cause for a new trial.

Under the evidence in this case, the value of the horse was exclusively a question of fact for the jury. The instruction given, to the effect that if the jury found from the evidence that plaintiff is entitled to a verdict, that he is entitled to the full amount, is clearly erroneous. It was an invasion, by the court, of the province of the jury. The full amount referred to in the instruction was the value of the stallion, as alleged in the complaint.

BANGS, BERRY, & CARSON, a Foreign Corporation, Respondent, v. J. J. NICHOLS, E. T. Williams, Leonard Retterath, Scandinavian American State Bank of Van Hook, North Dakota, a Corporation, and Farmers State Bank of Sanish, North Dakota, a Corporation, and E. E. Balsukot, Appellants.

(181 N. W. 87.)

Chattel mortgages — Frauds, Statute of — evidence held to sustain judgment of foreclosure by action; sale of part of mortgaged herd gives right to foreclose; verbal agreement extending time of payment of note held within Statute of Frauds.

Plaintiff, as assignee of mortgagee, commenced foreclosure by advertisement of a certain chattel mortgage, which was restrained by order of court, after which foreclosure by action was had, resulting in a judgment of foreclosure. Under the evidence it is *held*, the judgment is right.

Opinion filed December 30, 1920.

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

Judgment affirmed.

John E. Greene, for appellants.

McGee & Goss, for respondent.

The court has repeatedly held that the appellant cannot try his lawsuit on one theory in the trial court, and appeal and attempt to try it on another theory in the supreme court. Lynn v. Seby, 29 N. D. 420; Harris v. Van Vranken (N. D.) 155 N. W. 72; Peterson v. Conlan, 18 N. D. 205, 119 N. W. 367; Movius v. Propper, 22 N. D. 452, 136 N. W. 942; Petree v. Wyman, 159 N. W. 616.

GRACE, J. This action is one to foreclose a certain chattel mortgage covering certain stock. From a judgment in plaintiff's favor defendants appeal.

The material facts are as follows:

About the 2d day of July, 1918, defendant Nichols purchased from Retterath & Williams, 167 head of young steers and heifers, for $9,639.

Prior to the time of said sale, Retterath & Williams had purchased

the same stock from plaintiff for $9,220.75. Nichols executed his promissory note, payable to Retterath and Williams, for the purchase price of the stock, and secured it by a chattel mortgage on all of the stock, and agreed to give a first mortgage in the sum of $1,000, on a certain quarter section of land, as additional security, which he never did.

The note matured on about January 2, 1919, when Nichols gave a renewal note, which, including the accrued interest on the original note, amounted to $10,072, bearing interest at the rate of 9 per cent per annum. It was due July 2, 1919. The two notes and chattel mortgage, prior to maturity, were assigned to plaintiff by Retterath and Williams. On July 2d, Nichols wrote to plaintiff to ascertain if it were not agreeable to hold the property longer.

A short time thereafter Carson, one of the officials of plaintiff corporation, called upon Nichols and required of him to pay the note, which was not done, and plaintiff commenced foreclosure of the chattel mortgage by advertisement. Nichols turned the cattle over to it. Later, plaintiff, by an order of the district court, was restrained from proceeding with the foreclosure by advertisement. It proceeded then to foreclose by action, procured a warrant of seizure, and took possession of the stock thereunder. The defendant Nichols then rebonded, the amount of the bond being $24,000.

It is the claim of defendant Nichols that, at the time of the purchase of the stock, from Retterath and Williams, it was agreed between them, that he should have two years in which to pay for the stock, but that, in order to comply with certain bank regulations of a bank at South St. Paul, it was necessary to have the indebtedness mature at the expiration of six months, when a renewal note would be executed, for which the note and chattel mortgage, first executed, should remain as security, and by continued renewals the matter to be carried until the expiration of the time alleged to have been agreed upon, as claimed by defendant Nichols.

Plaintiff denies any such agreement and, as a further defense to it, pleads the Statutes of Frauds. In addition to this, plaintiff claims the conditions of the mortgage were violated, by reason of Nichols selling some of the stock, without its written consent. It is undisputed that Nichols, in violation of the provisions of the mortgage, did sell one bull,

and that he sold to some Indians one heifer, which died while calving

The case is before this court for trial *de novo*. Nichols's testimony is to the effect that he was to have two years in which to pay for the cattle, while that of Retterath and Williams is that he was to have eighteen months. In any event, it would seem that the time which Nichols claims he was to have in which to pay for the cattle has now expired. All that is involved in this case at this time is the matter of costs, which amount to approximately $700.

We are of the opinion there was a default in the mortgage at the time it was attempted to be foreclosed, for the reason that Nichols had sold part of the stock. The sale of the bull, without the written or verbal consent of the plaintiff, and other sales, as shown by the evidence, was sufficient to constitute a breach of the conditions of the chattel mortgage, and authorize plaintiff to foreclose the mortgage. There was no written consent to such sales, and the evidence is insufficient to show a verbal one.

There is some evidence which tends to show that plaintiff had knowledge of the alleged agreement relative to the time of payment, claimed to have been entered into by Nichols with Retterath and Williams. We are of the opinion, however, that such evidence is not sufficient to show a different agreement than that represented by the notes and chattel mortgage; and further, we think the agreement, if any, was of no effect and was within the statute of frauds.

As we view the matter, at the time foreclosure proceedings were commenced, the notes secured by the chattel mortgage were due, and no payment thereof having been made, of the amount claimed to be due thereon, plaintiff had a legal right to foreclose the chattel mortgage, pursuant to law.

We can discover nothing in this case which will entitle defendant Nichols to any relief, nor do we see any reason why he should escape the payment of the costs of the litigation. Plaintiff had a legal right to foreclose the mortgage. The conditions authorizing the foreclosure had become operative. He was entitled to a judgment of foreclosure. A judgment of that character was entered by the trial court. It should be and is affirmed.

Respondent is entitled to the costs and disbursements on appeal.

ROBINSON, and BRONSON, JJ.

CHRISTIANSON, Ch. J. (concurring). The sole contention of the appellants is that there was a verbal agreement that the defendant Nichols should have two years in which to pay for the cattle, and that the note which he gave in payment thereof should be renewed every six months until the expiration of the two-year period. As stated in the opinion prepared by Mr. Justice Grace,—at the time this action was commenced, the renewal note taken by the plaintiff was past due; and there was, according to the terms of the note and the chattel mortgage, default in the payment of the indebtedness secured by the mortgage. There was also default in the conditions of the mortgage by reason of the sale of at least one head of stock covered by the mortgage.

I agree with Mr. Justice Grace that the evidence adduced by the defendant "is not sufficient to show a different agreement than that represented by the notes and chattel mortgage." Apparently a similar conclusion was reached by the trial judge, for he found "that default exists in the terms and conditions of said chattel mortgage in this,—that the indebtedness, the payment of which is secured by said chattel mortgage, is past due and wholly unpaid, and the defendant J. J. Nichols has sold and disposed of a portion of the property described in said chattel mortgage." I concur in an affirmance of the judgment.

JACOB SAILER, Respondent, v. UNITED STATES RAILWAY ADMINISTRATION, W. D. Hines, Director General, and Northern Pacific Railway Company, a Corporation, Appellants.

(181 N. W. 57.)

Carriers — carrier assuming care of stock for which shipper was to provide attendant was liable for negligence.

In an action against a carrier for damages sustained in a live-stock shipment, where there is evidence in the record that milch cows were shipped in good condition, and where, although shipment was made under a live-stock

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NOTE.—On the question of statutory duties of carriers of live stock with reference to care of stock during transportation, see note in 44 L.R.A. 449.

On duty of carrier of live stock as to feeding and watering stock during transportation, see notes in 43 Am. St. Rep. 446, and 63 Am. St. Rep. 554.

contract which provided for an attendant to accompany the cows, nevertheless there is evidence in the record from which the jury might find that the company became aware that the cows were not attended, and thereupon furnished feed, care, and attention to such cows, it is *held*, pursuant to the findings of the jury, that the carrier thereupon assumed a duty and was liable for its negligence in the performance thereof.

Opinion filed December 31, 1920. Rehearing denied January 18, 1921.

Action in District Court, Mercer County, *Lembke,* J., to recover damages upon a live-stock shipment.

Judgment affirmed as to the Director General, and dismissed as to the Railway Company.

Young, Conmy, & Young, for appellants.

The court erred in refusing to dismiss the action as to Northern Pacific Railway Company. McGrath v. Northern P. R. Co. (N. D.) 177 N. W. 383.

In computing delay of shipment of cattle, due consideration must be made of the stops for feed, water, and rest. St. Louis, I. M. & S. R. Co. v. Carlisle (Tex. Civ. App.) 78 S. W. 553; Hickey v. Chicago, B. & Q. R. Co. (Mo. App.) 160 S. W. 24.

For the plaintiff to recover there must be proof of delay. Johnston v. Chicago, B. & Q. R. Co. (Neb.) 97 N. W. 482; Clevex v. Chicago, B. & Q. R. Co. (Neb.) 108 N. W. 982.

There must be proof that the delay was negligent. Clark v. St. Joseph & G. I. R. Co. (Mo. App.) 122 S. W. 318; McDowell v. Missouri P. R. Co. (Mo. App.) 152 S. W. 435.

The court must submit, on his own motion, all the issues raised in the trial. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Owen v. Owen, 22 Iowa, 270; Forzen v. Hurd, 20 N. D. 42, 120 N. W. 224; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Putnam v. Prouty, 24 N. D. 530; Sackett v. Stone (Ga.) 41 S. E. 564; Dikeman v. Arnold (Mich.) 40 N. W. 42; Chicago, R. O. & P. R. Co. v. Buskstaff (Neb.) 91 N. W. 426; Boyd v. St. Louis Transit Co. (Mo.) 83 S. W. 287.

Where there are two theories, the court must submit both. Cerrillos Coal R. Co. v. Descrant (N. M.) 49 Pac. 807; McCarty v. Houston & T. C. R. Co. (Tex.) 54 S. W. 421.

John Moses and *Norton & Kelsch,* for respondent.

ROBINSON, J. On May 16, 1919, plaintiff shipped over the Northern Pacific Railway from South St. Paul to Hazen, North Dakota, thirty-one head of cows in good condition. Five days afterwards, when the animals arrived at Hazen, their condition was terrible to behold. They were nearly starved, many of them were unable to walk or to eat. Six of them died within a few days. Five cows had calves prematurely, of which some died in the car and the others died within a few days. At Hazen a veterinary was called and tried to milk the cows that had calved, but the milk had dried up and turned to putrid matter and the cows had a high fever. The calves had not sucked them and they had not been milked. The value of the animals that survived was greatly reduced, and the jury gave plaintiff a verdict for damages, $850, with interest from May 21, 1919. Plaintiff paid freight charges, $110.26.

To quote and book the evidence would serve only to waste time and add to the tax burdens. The parties have their copies and strangers have no interest in the matter.

The counsel does insist that there is no evidence of negligence on the part of the carrier, but there is positive evidence to show the good condition of the animals at the time and place of shipment and showing their pitiful condition on arrival at Hazen. It shows beyond question that the carrier was guilty of very gross negligence and want of care, and even cruelty to the animals. It shows damages in excess of the verdict. The testimony is entirely convincing and the verdict is very moderate. Hence the long string of objections, exceptions, and errors assigned do merit no consideration.

In this case there was no express contract between the plaintiff and the Director General. In the shipping bill the carrier named is the Northern Pacific Railway Company, not the Director General, who had taken control of the railway. Hence the judgment must be corrected by striking out the name of the Northern Pacific Railway Company, both in the title of the action and in the body of the judgment wherever the same occurs. There will be no judgment either against the Northern Pacific Railway Company or in its favor, and as thus corrected, the judgment is affirmed, with costs in favor of the plaintiff.

Corrected and affirmed.

GRACE, J. I concur in the result.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment as to the Director General and for its dismissal as to the railway company. I am of the opinion that the record presents questions of fact for the jury concerning the negligence of the carrier in failing to give proper care and protection to the milch cows shipped. There is evidence in the record that these cows, when shipped, were in good condition. Although shipment was made under a live-stock contract which provided for an attendant to accompany the cows, nevertheless, there is evidence in the record from which the jury might find that the company became aware that the cows were not attended, and furnished feed, care, and attention even to the extent of services furnished and charged in assisting one of the cows when giving birth to a calf. The carrier thereupon assumed a duty and was liable for its negligence in the performance thereof. See Morrell v. Northern P. R. Co. 46 N. D. 535, 179 N. W. 922; Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 608, 55 L.R.A. 289, 85 N. W. 832; Chicago, B. & Q. R. Co. v. Slattery, 76 Neb. 721, 124 Am. St. Rep. 825, 107 N. W. 1045, 20 Am. Neg. Rep. 405; Millam v. Southern R. Co. 58 S. C. 247, 36 S. E. 571; Spalding v. Chicago, B. & Q. R. Co. 101 Mo. App. 225, 73 S. W. 274; McGrath v. Northern P. R. Co. L.R.A.1915D, 644, and note (121 Minn. 258, 141 N. W. 164); Trout v. Gulf, C. & S. F. R. Co. — Tex. Civ. App. —, 111 S. W. 222; 10 C. J. 97. Although more complete instructions might have been given upon the issues, I am of the opinion that the prime question of the carrier's negligence was fairly tried and submitted to the jury, and that no prejudicial error exists in the record, with respect to the carrier held.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

On Petition for Rehearing, Filed January 18, 1921.

PER CURIAM. Upon a petition for rehearing the carrier complains that there is no evidence of negligence on the part of the carrier concerning this shipment of live stock. That the failure to milk the cows was not negligence. In this regard there is evidence in the record of inspection by the switch foreman of the carrier when the stock was

shipped, and of further inspection by the railway employees at every stop as this carload of stock proceeded en route. There is evidence in the record to charge carrier with knowledge that this carload of stock was unaccompanied by an attendant. There is further evidence in the record that the carrier did give care and attention to the stock, even to the extent of taking care of one of the cows while it was delivering a calf. For these services it made and collected a charge therefor. As heretofore stated, we are of the opinion that this assumption of care and duty under the circumstances created a duty for which the carrier was liable for its negligence. When the carrier became aware of natural propensities of the cows, in their then present condition, and it undertook, as the evidence discloses, to provide care and aid the acts of nature, it thereupon assumed a duty extending beyond the mere acts of feeding and watering, which were then only some of the personal demands of the cattle. Manifestly, if the natural propensities had been given an opportunity to act naturally, milking might not have been required at all. The artificial conditions that existed after the carrier became aware of the conditions of the cattle were conditions of the carrier's own creation, and were conditions that could be ameliorated by the carrier's care and attention. It sought so to do, and the measure of this care and attention in that regard, upon this record, was a question of fact for the jury.

Again, the carrier complains because the issue of plaintiff's negligence was not submitted to the jury, for the reason that the carrier did not know and were not informed covering the conditions of the cows when shipped, and, further, that the jury were not given an opportunity to pass upon the question whether the injury was occasioned through the natural propensities and physical condition of the cattle or through the negligence of the carrier. Prejudicial error did not occur by reason of the failure of the trial court to submit such issue to the jury. The evidence discloses without contradiction that the cows were in good condition when loaded. The carrier, after it became aware of the condition of the cattle, may not excuse its lack of care and attention thereto because of the failure of the plaintiff to notify the carrier concerning the character of the shipment. See Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 608, 55 L.R.A. 289, 291, 85 N. W. 832; 10 C. J. 97. Complaint is also made that the trial court prejudicially charged the

jury that the plaintiff might recover for the unreasonable delay in transportation, whereas as a matter of law there is no show of unreasonable delay in the record. Under the circumstances in this case the element of time in transportation was an element likewise that concerned the care and attention requisite for these cattle after the carrier became aware of their condition. Furthermore, the carrier read into the record a stipulation concerning the time of transportation wherein, pursuant to the stipulation, an error of twelve hours was made apparently by stating the time of departure as being 9:05 A. M. instead of the correct time, 9:05 P. M. Even though this may have been a clerical error for the reason that the foreman of the stockyard at Dilworth testified that on this day the carload was reloaded at Dilworth at 7:15 P. M., and presumably they left that evening instead of at the prior time, to wit, 9:05 A. M., nevertheless neither the court nor the jury were advised of the error, and assuredly the carrier is not in a position to complain of prejudicial error by reason of its own voluntary act in introducing an erroneous computation of the time of the transportation which contained therein an apparent issue of unreasonable delay in the time of actual transportation. The trial court likewise did not err prejudicially, as the carrier claims, in permitting the introduction of evidence showing that these cattle were bought for sale on the market as milch cows. The questions thereupon were in the nature of preliminary questions, and the answers thereto did not constitute prejudicial error. The petition for rehearing is denied.

CHRISTIANSON, Ch. J., and BRONSON, ROBINSON, and BIRDZELL, JJ., concur.

ADDIE McKEEN, Respondent, v. NELS IVERSON, Appellant.

(180 N. W. 805.)

Carriers — death — finding for guest in automobile on issues of negligence and contributory negligence warranted — three thousand dollars held not excessive for killing of husband.

The plaintiff is the widow of Sig McKeen, deceased. He was a guest in a car owned and driven by defendant. The car turned over and killed McKeen, and, as the jury found, the proximate cause of his death was the reckless driving of the car by defendant. The verdict, $3,000, is moderate and in accordance with the evidence.

Opinion filed January 4, 1921.

Appeal from judgment of District Court of Renville County; Honorable *C. W. Buttz,* J.

Affirmed.

Bradford & Nash, for appellant.

If the deceased acquiesced or participated in a use of intoxicating liquor resulting in defendant's incapacity to safely operate the car, plaintiff cannot recover. Lynn v. Goodwin, 170 Cal. 112, L.R.A. 1915E, 588, 148 Pac. 927; Powell v. Berry, 145 Ga. 696, L.R.A. 1917A, 306, 89 S. E. 753.

A guest may be held negligent who consents to stay in an automobile after dark without light on an unfamiliar road. Rebillard v. Minneapolis, etc. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503; Kearney v. Fitzgerald, 43 Iowa, 580; Engleken v. Hilger, 43 Iowa, 563; McDonald v. Casey, 84 Mich. 505, 47 N. W. 1104; Ronsencrantz

NOTE.—The general rule is that the negligence of a driver of an automobile who is intoxicated is not imputable to a passenger so as to bar the latter's right of recovery, yet one who rides with the driver of an automobile, with knowledge that the driver is drunk, is guilty of independent negligence apart from the driver's negligence, and cannot recover from the driver of another automobile, or the driver of the car in which he was riding, by reason of the intoxicated driver's negligence, as will be seen by an examination of a note in L.R.A.1917A, 314, on intoxication of person operating automobile.

On excessive or inadequate damages for personal injuries resulting in death, see comprehensive note in L.R.A.1916C, 820.

v. Shoemaker, 60 Mich. 4, 26 N. W. 794; Elliott v. Barry, 34 Hun, 129.

Notwithstanding the fact that the negligence of the driver will not be imputed to the passenger, yet it is necessary that the passenger himself exercise ordinary care. Lake Shore etc. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; Flanagan v. New York C. etc. R. Co. 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 66 N. E. 1108; Galveston etc. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

No recovery can be had where the passenger acquiesced or participated in the negligent acts of the driver. Colorado, etc. R. Co. v. Thomas, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801; Illinois C. R. Co. v. McLeod, 78 Mass. 334, 52 L.R.A. 954, 84 Am. St. Rep. 630, 29 So 76.

E. R. Sinkler and *J. E. Bryans,* for respondent.

In order to raise the question of contributory negligence it is necessary that that defense which is an affirmative should be pleaded. Carr v. R. Co. 16 N. D. 217; Ouverson v. Grafton, 5 N. D. 281; 5 Pl. & Pr. 12.

ROBINSON, J. The complaint avers that plaintiff is the widow of Sig McKeen on whom she depended for support; that she is the administratrix of his estate; that in July, 1917, McKeen was a guest of defendant in an automobile owned and driven by him; that by the gross negligence of defendant the automobile turned over and killed McKeen. The jury found a special verdict on which judgment was given against defendant for $3,000. The verdict finds that McKeen was a guest in defendant's car when it overturned; that defendant was intoxicated and his intoxication contributed to the overturning of the car. The speed of the car, when making a turn on the road shortly before the accident was 30 miles an hour, and it was 15 miles at the time of the accident, and the speed contributed to the overturning of the car. Defendant was intoxicated and McKeen knew it.

Questions submitted to jury:

Q. Did McKeen know or have reason to believe there was danger in riding in the car?

A. No.

Q. If he had reason to believe there was danger, did he have time and opportunity, without danger, to get out of the car?

A. No.

Q. In driving the car did defendant use ordinary care?

A. No.

Q. What was the proximate cause of the accident?

A. Reckless driving by defendant.

Q. In what sum has the plaintiff been damaged?

A. $3,000.

The defense is that the deceased was guilty of contributory negligence. At the time of the accident defendant was driving a high-power car in which the deceased and the several others were all "gloriously drunk together."

Ira Pellett testifies: They crossed a bridge and then defendant commenced to speed.

Q. Did anybody try to get out of the car shortly after you crossed the bridge?

A. Yes, sir. Mr. Johnson was hollering: "For God's sake stop and let me out of this car," and Sig McKeen said: "Take me back. I don't want to go like this." Defendant did not stop. He speeded up a little. He kept increasing the speed all the time after he started down the road.

Q. How fast was the car going as it approached within 100 or 200 feet of the turn?

A. Why from 35 to 45 miles.

The testimony covers 420 pages. There is considerable conflict. Yet the verdict is well sustained. McKeen came to his death by means of reckless driving and gross neglect of defendant, and six others narrowly escaped death. Defendant can urge no defense only that he was drunk, and deceased knew it, and in getting into the automobile deceased was guilty of negligence. However, the jury finds that Sig McKeen did not know or have reason to believe that there was danger in riding on the car. The fact that a person is more or less intoxicated does not indicate that he will act the part of a madman. McKeen seeing five or six other persons on the car would naturally conclude that they were not all so foolish as to go on a car

where there was a great and apparent danger. Then he might well conclude, as the fact is, that a man who is intoxicated must know it, and that he should be the more careful in driving a car with six or seven guests.

By statute every person is responsible, not only for his wilful acts, but also for an injury occasioned to another by the want of ordinary care in the management of his property or person, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself. Now in this case it will not be contended that the deceased wilfully brought the injury upon himself or that he was guilty of more negligence than the several other persons on the car. It is true the guests were all more or less under the influence of liquor, but their condition was neither the direct nor proximate cause of the car turning over on them. As the jury found, the proximate cause of the accident was the reckless driving by defendant, and the reckless driving was not in any manner caused by the condition of deceased.

It is urged plaintiff cannot recover if the deceased participated in the use of intoxicating liquor which resulted in defendant's incapacity to operate the car. But the evidence does not show, and there is no presumption or finding, that the defendant had not capacity to safely operate the car. The accident resulted not from the lack of capacity, but from the lack of care and a desire to do a dare-devil stunt and to frighten the guests. They cried for him to stop

> But the more they cried, Whoa!
> More he said, Let her go!
> And the good car went faster and faster.

The verdict is moderate and in accordance with the testimony. Affirmed.

GRACE, J., disqualified, did not participate.

BRONSON, J. (specially concurring). I concur in the affirmance of the judgment. The record discloses that this case was fairly tried and fairly submitted to the jury for a special verdict. The trial court submitted the proposed interrogatories to both parties for their sug-

gestions and amendments. Both parties were satisfied with the interrogatories as proposed and submitted to the jury. Both parties, likewise, were satisfied with the instructions given by the trial court to the jury.

I am satisfied that the questions of the negligence of the defendant and of the deceased were questions of fact for the jury; that the findings as made by the jury have support in the evidence and warrant the judgment rendered by the trial court.

CHRISTIANSON, Ch. J. (concurring specially). In the trial court the defendant contended that he was not intoxicated at the time the accident occurred. In this court the claim is made that, under the facts as found in the special verdict, the intoxication of the defendant was the basal element of the negligence which occasioned the death of plaintiff's husband, and that the deceased was guilty of such negligence as precludes a recovery. It is true the jury found that defendant was intoxicated, and that the deceased knew that he was intoxicated at the time the "car left the Chautauqua Park for the ballgrounds on the day of the accident." But they, also, found that he did not "know or have reason to believe there was any danger in riding in the car" and that he had no "time or opportunity, without danger, to get out of the car." They further found that "the proximate,—the direct,—cause" of the accident was "reckless driving on the part of the defendant." It is true they found that this reckless driving occurred while he (defendant) was intoxicated, and that he lost control of the car "while making the turn in the road." But I do not believe that it follows as a matter of law from these facts that defendant is relieved from liability. As I construe the special verdict it finds that the injury was occasioned by defendant's negligence, and that the deceased was not negligent. I concur in an affirmance of the judgment appealed from.

BIRDZELL, J., concurs.

WILLIAM B. MORGAN and George Schas, Respondents, v. H. B. JENSON, Appellant.

(181 N. W. 89.)

Adverse possession — evidence as to encroachments, etc., held to show visible and notorious possession.

Plaintiffs, the record owners of a certain city lot, brought an action against defendant to determine adverse claims with reference thereto. Defendant set forth his adverse claims, whereby he claimed title, by reason of certain encroachments on the north 18½ inches of the lot, and further claimed that he and his predecessors had been in possession thereof, under claim of title or claim of right, for twenty years or more. The nature, extent, and duration of the encroachments are shown by the evidence.

The judgment of the trial court was in favor of plaintiff. For reasons stated in the opinion, it is held, the judgment is right and is sustained by the evidence.

Opinion filed January 4, 1921.

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

Trial *de novo* demanded by defendant and appellant.

Judgment affirmed.

Pierce, Tenneson & Cupler, for appellant.

"When it shall appear that there has been actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied and no other shall be deemed to have been held adversely." Comp. Laws 1913, §§ 7362, 7368, 7369.

If there is a privity between successive occupants holding adversely to the true title continuously, the successive period of occupation may be united or tacked to each other to make up the time of adverse hold-

NOTE.—The authorities are unanimous in requiring adverse possession to be continuous and uninterrupted for the entire statutory period before anything is gained by it, as will be seen by an examination of the cases in note in 15 L.R.A. (N.S.) 1202, on unbroken continuity as essential element in adverse possession.

On necessity and requisites of continuity of adverse possession, see notes in 13 Am. Dec. 185, and 331.

ing prescribed by the statute as against such title. 2 C. J. § 66, p. 82; Comp. Laws 1913, § 7362; Streeter J. Co. v. Frederickson, 11 N. D. 300; Nash v. Northwest Land Co. 15 N. D. 566; Martin v. O'Brien (N. D.) 173 N. W. 809.

Payment of taxes not essential to acquire title by adverse possession. Power v. Kitching, 10 N. D. 254.

The twenty-year statute is more than a statute of repose. Martin v. O'Brien, supra; Steinway v. Brown, 38 N. D. 611.

To render possession hostile, there need be no ill-will, malevolence, or desire to injure. 2 C. J. 122; Ballard v. Hanson (Neb.) 51 N. W. 295.

Barnett & Richardson, for respondents.

Defendant is not entitled to claim the right to tack the possession of Faley to any portion of lot 19, which was not included in Faley's deed to the defendant. Wilhelm v. Herron (Mich.) 178 N. W. 769; Graeven v. Devies, 31 N. W. 915; Lake Shore R. Co. v. Sterling (Mich.) 155 N. W. 383; Maher v. Brown (Ill.) 56 N. E. 181; Messer v. Society (Cal.) 84 Pac. 837.

It is the knowledge, either actual or imputable, of the possession of his lands by another, claiming to own them bona fide and openly, that affects the legal owner thereof. Buttz v. Hames (N. D.) 156 N. W. 547; Jones v. Weaver (Tex.) 122 S. W. 621; O'Boyle v. Kelly (Pa.) 94 Atl. 448.

GRACE, J. This is an action to determine adverse claims to certain real property. A statement of the material facts will present the issue to be determined.

Plaintiff claims ownership and title to all of lot 19 in block 3, of Keeney & Devitt's addition to Fargo. The defendant claims title to all of lot 18, in the same block, which adjoins lot 19 on the north. He also claims title and ownership to the north 18½ inches extending east and west, the entire length of lot 19, and this, on the theory that he and his predecessors have continued to occupy, adversely to plaintiff, this tract, for more than twenty years prior to the commencement of this action.

Lot 18 is in the northwest corner of lot 3, and is bounded on the north by First Avenue North, and on the west by Fourth street. In

width, north and south, each lot is 28 feet, and 150 feet in length east and west.

Plaintiff's chain of title to lot 19 is as follows: The title thereto was conveyed on June 20, 1877, to Mary A. Ball. On November 6, 1912, by a final decree in her estate, to Wilbur F. Ball. On June 14, 1913, by final decree in the estate of Wilbur F. Ball, to Grace Ball Wheelock, William F. Ball and John G. Ball. Subsequently, William Ball acquired the interest of Grace Ball Wheelock and John G. Ball.

September, 1913, William B. Morgan purchased lot 19 from William Ball, under contract for deed, and about a year later received conveyance thereof, by deed, from William Ball, which is Exhibit "1."

In the latter part of 1919, Morgan sold lot 19, under contract for deed, to plaintiff, George Schas. There has never been any buildings on lot 19. It has always been vacant and unoccupied. All taxes thereon have been paid by the plaintiffs and their predecessors. The defendant has never paid any taxes thereon.

The chain of title of lot 18 is as follows: On December 7, 1893, John Faley acquired title to lot 18. He conveyed it to the defendant on May 18, 1903, who has continued to own, occupy, and control it and the buildings thereon continuously since that time. There are five buildings now on lot 18, have been on it since 1893 and 1894.

Building No. 1 faces on Fourth street. There was a house built where this house now stands, by a Mrs. Brown, who owned the lot prior to the time it was acquired by John Faley. This house was burned in a fire of 1893, and another house built after the fire, in the same location, in 1893. The foundation wall of the bay window extended over the boundary line about 6½ inches, and the eaves and roof of that window extended over the line about 18½ inches, on lot 19.

Building No. 2 is a coal and wood shed, used in connection with this dwelling house, and extends on lot 19 about 10 inches at the base line, and about 15 inches at the roof.

Back of this there is another dwelling house, facing north, fronting on First Avenue North. It was placed there in 1894. The south line of this building, at the foundation, extends on lot 19 10½ inches, and at the eaves and roof 15 inches. In connection with this dwelling, and to the east of it, is an outhouse or store room, which, at its foundation, extends on lot 19 11 inches, and 15 inches at the eaves and roof.

To the east of the latter building is a frame building, facing north on First avenue. It extends, at its base, on lot 19 about 8¼ inches, at the eaves and roof about 12 inches. The buildings are not on a straight line, east and west, on plaintiff's lot. Some extend over on lot 19 more than others.

The parties to this action do not agree upon the exact distance each building is over on the lot. But, for the purposes of this case, it will be assumed that the distance the buildings are over on lot 19 is substantially as above stated. The houses are occupied at least part, and perhaps most, of the time for residential purposes.

The only specification of error is a request for a retrial of the entire case in this court, upon this appeal. Plaintiff has full record title to all of lot 19, and defendant to all of lot 18.

Under the provisions of § 7365, Comp. Laws 1913, plaintiff is presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to such legal title, unless it appears that the lot in question has been held and possessed adversely to such legal title for twenty years before the commencement of this action.

Section 7368, Comp. Laws, provides: "When it shall appear there has been an actual continued occupation of premises under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied and no other shall be deemed to have been held adversely."

Section 7369, Comp. Laws, provides:

"For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only.

"(1) When it had been protected by a substantial inclosure.

"(2) When it has been usually cultivated or improved."

Under our statutes there are two ways of asserting title by adverse possession.

(1) That the occupant or those under whom he claims entered into possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, or upon a decree or

judgment of a competent court, as provided in § 7367, Comp. Laws 1913.

(2) Where the occupation is under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, as provided in §§ 7368, 7369, supra.

As we view defendant's contention, it is a claim of title by adverse possession, resting upon the assertion that he and his predecessors have been in open, notorious, continuous, and exclusive possession of the parcel of land in dispute for a period of twenty years or more.

We think it manifest that the burden is on one claiming title by adverse possession to prove his assertions, with reference to the elements of his claim, by clear and convincing evidence, and that the statutes of adverse possession should be strictly construed.

It is clear from the evidence that defendant's actual possession, when limited to his personal possession, is not of such length of time as to place him in position to claim adversely to the plaintiff. The defendant has been in possession of the premises only since 1903. It is only when he tacks the possession of Faley to his that he may be said to have placed himself in such position that he can claim a right to assert claim of title adversely to plaintiff. If he may not properly tack Faley's possession to his, then his claim of title by adverse possession would fail.

In short, unless there is competent evidence to show that he succeeded to Faley's claim to the disputed strip, he would not be in position, as a matter of law, to tack Faley's claim of title and possession to his. The first knowledge that the defendant had that Faley claimed title to the disputed tract, and the only competent evidence of the first time Faley did claim title to this strip, was when the defendant purchased from him lot 18, in 1903.

Assuming the testimony shows that Faley so claimed at that time, and that he then so informed the defendant, in the face of what subsequently transpired in defendant's purchase of lot 18 from Faley, can it be said Faley transferred any of his claim of title or right to the disputed strip, to the defendant? It appears that Faley deeded to Jenson only lot 18, and nothing more. By that deed he did not convey any claim of title or right to the disputed strip, though defendant admits that Faley at that time told him that a portion of the buildings were on lo 19 and that he claimed to own the land on lot 19, upon which such

buildings were located, but, by the deed, he did not convey the disputed strip. He conveyed lot 18 only, which was 28 feet wide and 150 feet in length. It must be clear that, if Faley had acquired any title or claim of right to the disputed strip, he did not convey it to defendant by his deed.

The rule would seem to be that evidence of adverse possession is to be construed strictly, and every presumption is to be made in favor of the true owner. We think this is really the meaning of our statutes in regard to adverse possession, and such was the rule laid down in the case of Sydnor v. Palmer, 29 Wis. 252; Wilhelm v. Herron, 211 Mich. 339, 178 N. W. 769; Vicksburg, S. & P. R. Co. v. Le Rosen, 52 La. Ann 192, 26 S. W. 854; Messer v. Hibernia Sav. & Loan Soc. 149 Cal. 122, 84 Pac. 837.

Faley, when he sold defendant lot 18, ceased his possession of the disputed strip. He made no attempt to convey it to the defendant. The possession of it must have reverted to the true owner, who retains title of it unless it has been divested by the adverse possession of the defendant since he purchased lot 18, and entered into possession of that lot under his deed, and into possession of the disputed strip, by occupying the same, but without any right, under the deed, to do so.

There is no evidence of a parol agreement between Faley and the defendant, whereby the possessory right of Faley, if any, to the disputed strip, is transferred to the defendant. Hence, there was no privity of estate between Faley and the defendant, the successive parties in possession. In these circumstances, defendant could not tack the possession of Faley to that of his, so as to constitute a single, continuous possession. Defendant's occupancy was for approximately seventeen years only, while the statute requires occupancy for a period of twenty years before one, claiming title by adverse possession, can be heard to assert the claim of title against the true owner. Hence defendant did not hold adversely to plaintiff and his predecessors for the time required by our statute, supra. In what the writer has above stated with reference to tacking, he is speaking for himself only.

If we are correct in what we have above stated, we could well conclude the opinion at this point. However, appellant has laid much stress on additional points and we will briefly refer to them. It is incumbent upon defendant to prove, not only that his possession has been

for the statutory period, but also that it has been open, i. e., visible.

To prove this, defendant offered evidence, in detail, of the character of the buildings above mentioned. The plaintiff characterizes all the buildings as shacks. From the evidence as to the character of the buildings, we think the word "shacks," as its meaning is commonly understood, is as expressive a term as could be used to convey an idea of the real character of all the buildings, with the exception, perhaps, of the story and a half or two story dwelling, fronting on Fourth street, which is a little more substantial than the remainder of the buildings. But, as we view the evidence, none of the buildings, including the large building furthest west, are of substantial and permanent nature, sufficient to call the attention of the owner of the record title, that an encroachment was taking place upon his property.

It is not a case where a large, substantial, expensive, permanent building has been partially constructed upon an encroachment on the land of the adjoining record owner, under which buildings there has been constructed an expensive foundation, and large and expensive basements, etc.

An encroachment of this character could be said to be open, visible, or notorious, so as to generally be sufficient to attract the attention to owner of the property upon which such encroachment has been made.

The evidence also shows, that no part of the large dwelling encroaches upon lot 19, except the bay window, the foundation of which is over on lot 19 a few inches, and the roof thereof was over a few inches more than the foundation. Otherwise, the whole of this building is on lot 18.

Such an encroachment certainly could not be said to be sufficient to attract the attention of, or be visible to, the owner of the record title of lot 19, and all of the buildings, in the condition they were, were insufficient for that purpose.

The only remaining matter that needs any consideration relates to the claim of appellant, that plaintiffs and their predecessors had actual notice of defendant's claim of title to the disputed strip, and his endeavor to prove such actual notice, by certain conversations and claims had with, and made to, one Fred Ball, who it is maintained was the agent of the then record owner, who the defendant endeavored to show was Wilbur F. Ball, father of Fred Ball. These conversations were claimed to have been had about 1904.

Plaintiff claims Mary A. Ball and Wilbur F. Ball were both living at that time, and that Mary A. Ball was then the record owner of lot 19. Necessarily, if at that time she was the record owner, any conversation, in the respect mentioned, had with Fred Ball, the alleged agent of the father, would be no notice to Mary A. Ball.

It is not very clear from the record, when Mary A. Ball died. It does appear that by final decree in her estate, on November 6, 1912, title to lot 19 was transferred to Wilbur F. Ball. We think it could be reasonably inferred from this that she was living in 1904, the time of the alleged conversation. We think such evidence, in these circumstances, was wholly incompetent, as showing Mary A. Ball had actual notice.

But if it were assumed that Wilbur F. Ball was the record owner at the time of the alleged conversation, and that Fred Ball was, in some capacity, his agent, it does not appear from the evidence in what capacity Fred Ball was acting as an agent, other than a general statement that he was looking after the property. Such a general statement does not show that, if he were such agent, he had any authority to look after any matters affecting the title of the property.

But, further than this, we think it is a general rule that agency cannot be established by the declaration of the agent only. We do not think there is sufficient evidence in the record to show an agency, or to show that Fred Ball had any authority to represent his father, or anyone else, with reference to matters affecting lot 19. We think his evidence was wholly incompetent, and, therefore, inadmissible to prove any of the issues in this case, and we so hold.

The issues here involved have been ably presented to this court by eminent counsel on either side. The authorities on the subject of adverse possession have been extensively collated in their respective lucid and able briefs. The appellant, however, must fail in the accomplishment of the purpose for which this action was brought, and this, by weakness and failure of proof of material facts necessary to sustain his contention, not the least among which is the character of the buildings, as above described. There is also an insufficiency of evidence, amounting to failure of proof, to show occupation and possession, under claim of title and claim of right, for a period of twenty years or more, as required by statute, and, lastly, the failure of appellant to show any

actual notice thereof to the record owner of the property during that time, other than the actual notice to Morgan just before the commencement of this action, which avails nothing.

We think the evidence is insufficient, and that the proof fails to show visible, notorious, continuous, and exclusive possession of the parcel of land in dispute, in the appellant, for the time required by the statute, and hence, he has acquired no title thereto by his alleged adverse possession.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

ROBINSON, J., concurs.

BRONSON, J. I concur in result.

CHRISTIANSON, Ch. J. (concurring specially.) I concur in an affirmance of the judgment on the ground that the possession of the defendant and his grantor was not of such character as to indicate any assertion by either of them of claim of ownership to any portion of lot No. 19. See Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390, 1 R. C. L. pp. 692, 705.

I disagree with what is said in the majority opinion on the question of tacking. As I understand the law, all that is necessary to privity between successive occupants of property, and in regard thereto, is that one receive his possession from the other by some act of the other or by operation of law. 1 R. C. L. p. 718. All that the law requires is a continuous adverse possession for the full statutory period. The continuity of the original possession may be effected by any conveyance or understanding the purpose of which is to transfer to another the rights and the possession of the adverse claimant, when accompanied by an actual delivery of possession. And, "where the owner of a tract of land occupies other property, adjacent thereto, by adverse possession, it is not material that in selling the whole the land claimed by adverse possession is not described in the conveyance." If it is the intention of the grantor to transfer and of the grantee to take the whole of the property, and possession of the whole is actually delivered, the continuity of the adverse possession is not broken, and the doctrine of tacking is

applicable. 1 R. C. L. pp. 719, 720; Wishart v. McKnight, 178 Mass. 356, 86 Am. St. Rep. 486, 59 N. E. 1028; Clithero v. Fenner, 122 Wis. 356, 106 Am. St. Rep. 978, 99 N. W. 1027; St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339; Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 525.

BIRDZELL, J., concurs.

ALBERT ROBERTS, Respondent, v. CHARLES E. TAYLOR et al, Appellants.

(181 N. W. 622.)

Navigable waters — "navigability in fact" test as to whether inland lake is public water.

1. In determining the status of an inland lake in this state, as public or private waters, the test of "navigability in fact" is applied.

Navigable waters — "navigability in fact" defined.

2. This test is not confined to a capacity for use in commerce of a pecuniary value, but may be extended to capacity for use for purposes of navigation for pleasure, public convenience, and enjoyment.

Navigable waters — state possesses title to bed of public waters.

3. The state, in its sovereign right, possesses the title to the bed of public waters within this state.

Navigable waters — public land — state owns island within government school section.

4. The state, in its proprietary right, owns an island existing in public waters located within a school section, which has been ceded by the Federal government to the state.

Navigable waters — Sweetwater lake held navigable.

5. Sweetwater lake, extending some 6 miles in length and in width 2 miles in places, with clear and deep water, meandered by the United States Govern-

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NOTE.—The question as to what waters are navigable is discussed in a note in 42 L.R.A. 305.

On general tests by which the navigability of waters is determined in the United States, see notes in 126 Am. St. Rep. 717, and 131 Am. St. Rep. 757.

On the question as to what are navigable waters in the United States, see note in 22 L. ed. U. S. 391.

mental survey in 1883, and since that time used by the public for boating and hunting, and capable of being navigated for such and other purposes, is navigable.

Navigable waters — riparian owners held to receive no title from Federal government to bed of navigable inland lake.

6. The plaintiff and the defendant, riparian owners by virtue of grants from the Federal government and from the state to lands abutting upon such lake, received no title to the bed of the adjacent lake. and only the rights of riparian owners upon navigable waters.

Navigable waters — state held interested in rights to bed of inland navigable lake—reliction must be considered in determining rights of riparian owners to bed of inland lake.

7. The state, as well as the parties, are interested in the accessions that have occurred to the respective tracts of land through the recession of the lake waters, and the portion to be allotted to each is determinable upon principles of reliction.

Opinion filed January 4, 1921. Rehearing denied January 14, 1921.

Action in District Court, Ramsey County, *Kneeshaw,* J., to determine adverse claims concerning the land of a lake bed.

The defendants have appealed from a judgment in favor of the plaintiff and demand a trial *de novo.*

Reversed and a new trial granted with directions to notify the state.

Chas. A. & Chas. M. Pollock, for appellants.

"The true test therefore, to be applied in such cases is, whether the stream is inherently and in its nature capable of being used for the purpose of commerce, for the floating of vessels, boats, rafts and logs." Moore v. Sanborn, 2 Mich. 520; Brown v. Chadbourne, 31 Me. 9; Lamprey v. State, 18 L.R.A. 678, 53 N. W. 1143.

Water must control riparian rights. Lamprey v. State, supra.

"The mere assertion of a claim unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded." Mackall v. Casilear, 137 U. S. 556, 34 L. ed. 780.

Flynn & Traynor and *Edward Engerud,* for respondent.

"Water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes. This rule is not

only the one which prevails in nearly all of the states in this country but was also the rule under the civil law. 29 Cyc. 289.

"The stream must be navigable for some useful purpose, and as trade or agriculture, rather than for mere pleasure." Giddings v. Rogalewski (Mich.) 158 N. W. 951; 29 Cyc. 292.

"While the courts will take judicial notice of the navigability of all tide-water and particular rivers of the country on which navigation is conducted as a matter of common knowledge, the question whether or not a stream is navigable is ordinarily a question of fact, the burden of establishing which rests upon the party affirming it." Harrison v. Fite, 148 Fed. 781; 29 Cyc. 293.

"The burden of proof rests upon him who asserts the existence of the public servitude." Leihy v. Lumber Co. (Wis.) 5 N. W. 471.

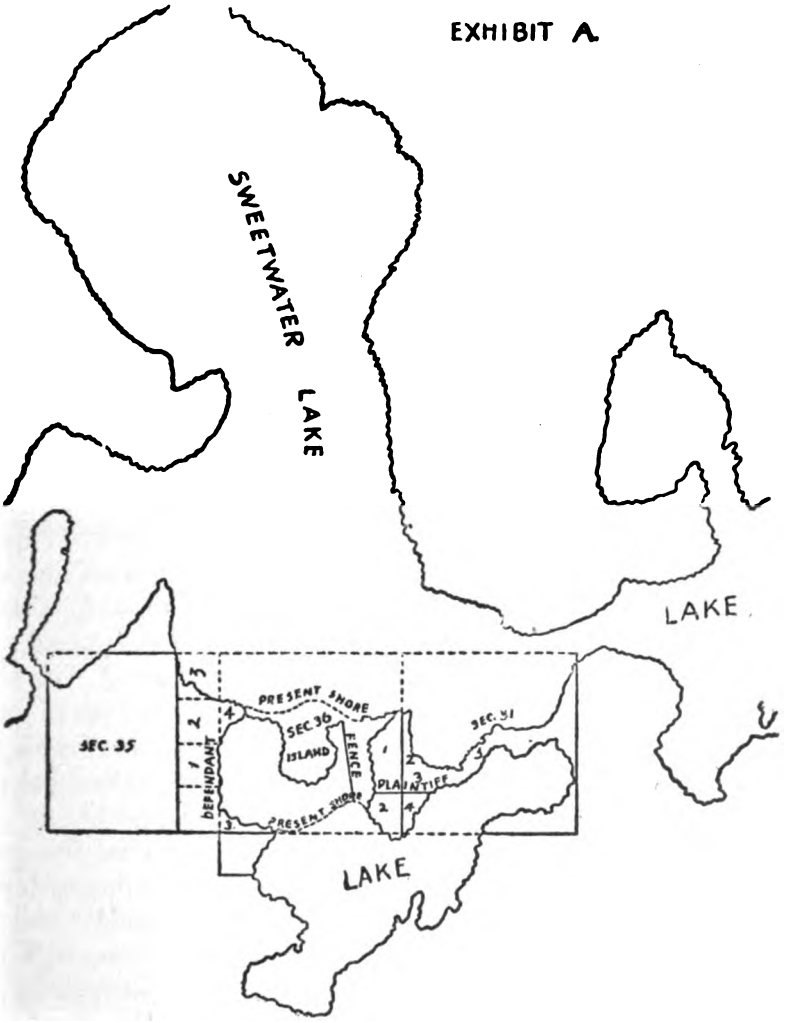
The meander lines drawn by the Government surveyors were not the boundary lines of the fractional lots shown on the Government survey of section 36.

On this point the authorities are all agreed. Brignall v. Hannah, 34 N. D. 174; Producers Oil Co. v. Hanson, 238 U. S. 329; Harden v. Jordan, 140 U. S. 371, 35 L. ed. 428; Brignall v. Hannah, 34 N. D. 174.

The official surveys made by the Government are not open to collateral attack in an action at law between private parties. 90 N. W. 972; 197 U. S. 512, 49 L. ed. 860.

Bronson, J. *Statement.* This is an action to determine adverse claims concerning land of a lake bed. The lands involved abut upon Sweetwater lake in Ramsey county and were meandered by the United States Governmental survey in 1883. The bed of this lake in controversy is located in section 36, a school section and contains upwards of 400 acres. Exhibit A, attached, is a rough plat of a portion of the lake. It shows the lands of the parties adjacent to the controverted lake bed, and also, roughly, a constructed fence, and the present shore lines of the North and South lake after recession of the waters. The plaintiff is the owner of lots 1 and 2 in section 36, comprising some 58 acres, upon title deraigned from the state of North Dakota; also, of lots 2, 3, 4 and 5 in section 31, adjoining, comprising about 56 acres, upon title deraigned from the United States. The defendant is the

owner of lots 3 and 4 in section 36, comprising about 17 acres, upon title deraigned, respectively, from the state of North Dakota and the



United States; also, of lots 1, 2, a portion of lot 3, and the S.E. ¼ of S.E.¼ in section 35, comprising about 118 acres, upon title deraigned from the United States. The defendant is also the owner of 120 acres to the west of his lands above described. The plaintiff homesteaded

the land in section 31 in 1889 and 1890. He bought his lands in section 36 in 1901. The defendant became the owner of his lands in 1905. The plaintiff asserts in his complaint that he is the rightful owner of that half of the lake bed involved, adjacent to his land, to be determined by a line to be drawn equally distant between the meander lines of the ancient shore line. The defendant answers that he is the rightful owner of the lake bed involved adjacent to his land up to the fence designated in exhibit "A." That the lake was and is a navigable lake; that upon principles of reliction, through the gradual recession of the waters, he acquired such ownership up to the fence; that, furthermore, this fence has been constructed and maintained for a period of over thirty years, with the knowledge of the parties and the grantors: that the defendant has been adversely in possession of the lands claimed during the statutory period, and that, upon principles of estoppel applicable, with respect to the maintenance of the fence and the purchase of the lands, the plaintiff cannot dispute the title of the defendant thereto. The other defendants are claimant mortgagees.

Trial was had in August, 1919. The trial court found that the plaintiff was the owner of the bed of the lake as claimed by him. Pursuant thereto, judgment was entered. In a memorandum decision, the trial judge stated that he did not pass upon the questions of navigability of the lake nor the questions of estoppel in the record. The defendant has appealed from the judgment and demands a trial *de novo*. The additional facts necessary to be stated are substantially as follows:

Sweetwater lake is a large lake some 6 or more miles in length and some 2 miles in width at some places. It is fed from waters that proceed from arms of the lake and from a coulee to the northeast. The size of the lake has gradually changed during the past thirty-five years. In 1883, there existed one entire lake from the north to the south over section 36, excepting an island located towards the middle and the north of section 36. All the witnesses agree that this island, with timber and growing trees thereon, has always there existed since 1883. No witness testified that this island ever was inundated. Gradually, through the years, in the improvement and development of the country, a recession of the waters has occurred. The land in section 36, theretofore under water, became more and more dry land. There continued, however, in this section channels through which the waters

flowed from the north to the south. Most of the witnesses placed these channels more in the location where the fence was erected. A few witnesses testified that water flowed to the west of the fence from north to south. Gradually, a shore line was established, along the north side of section 36, and also along the south side of section 36. The witnesses have designated the lake to the south as the south lake or Storman lake and the lake to the north as Sweetwater lake. Some of the witnesses have stated that there were three lakes: Sweetwater lake to the north, Middle lake on section 36 south and west of the island, and the south lake. The trial judge, with the attorneys, visited the lake. The result of his inspection is made a part of this record. He entered section 36 from the east and went west upon plaintiff's land. He examined the lake to the north and east as far as the eye could reach. He stated that a few rods from the shore line the water was filled with growing weeds; that beyond those weeds there was one vast expanse of water stretching north and west, north and east; that the lake to the eastward was about 1 mile wide and looking to the west and north there was water as far as could be seen, all as more fully indicated by the government surveys thereof. The plaintiff testified that he knew this land since 1883; that then when the government survey was made water was running so that he could not get to the island from the east side and he was shut'off likewise from the west side. He remembered once of wading across on the west side. That about that time there was a hunting lodge on the island; that he does not think he ever waded across then; that there was water at that time in a circle (around the east to the west) where the fence was; that gradually through the years the bed has become dry land; that he first saw this fence there as early as 1883 or 1884; that it has since remained there down to the present time.

One Lohnes, a veteran of the early days, having come up the Missouri as a soldier in 1867, testified he bought lots 1 and 2 in section 36 from the state and assigned his contract to the plaintiff; that at one time he was the owner of the defendant's land; that he and one Belgaard built this fence; that there was water along the entire length of it; that the water seemed to gradually dry up towards the fence; that he had also claimed the land west of the fence to be a part of the defendant's (then his) land; that he had an agreement with the plaintiff, when he made a bid concerning the school land later sold to the plain-

tiff, that this fence should be their dividing line. That when the fence was built there was water all through excepting what was called the island. He used this land for pasturing. Other witnesses gave testimony of hunting and boating on this lake and over this land during the years from the time of the survey. They hunted ducks in boats that were used on the north lake, thence to the land and around and upon the island. Another witness testified that, in 1883, the entire lake was one solid bed of water excepting the island; that this little island was always covered with timber ever since he could remember. That in early days one could not wade very far into the north lake until he got into deep water; that he has hunted over this land after ducks and saw long stretches of water from the northeast to the southeast upon this section 36. Many years ago the south lake became somewhat dry and later it filled up again. During the year when the trial was had this land involved in section 36 was planted into crops of flax, wheat, and barley, as to the greater portion thereof. In the patent from the state of North Dakota covering the land granted there appears the following: "Reserving and excepting from the portion of this grant all rights and privileges vested in the state of North Dakota under the provisions of the Constitution and laws of said state." Upon this appeal the defendant contends that the lake is navigable; that, as a riparian owner, the defendant is entitled upon principles of reliction to the land involved adjacent to his land up to the fence; that he established, furthermore, title by adverse possession, laches, and estoppel.

The plaintiff contends that the lake is non-navigable; that the adjacent riparian owners each take to the center of the lake in section 36 upon the method of determination stated in his pleading and as found by the trial court. That the existence of the island may be disregarded for the reason that it was not shown in the governmental survey and that such survey cannot be collaterally attacked.

Decision.—It is essential to first determine whether the waters of the lake involved are to be deemed public or private waters. This is for determination by this state in accordance with its policy and law. Brignall v. Hannah, 34 N. D. 174, 184, 157 N. W. 1042; St. Anthony Falls Water Power Co. v. St. Paul Waters Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; 1 Lewis, Em. Dom. 3d ed. § 92; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541,

53 N. W. 739. In making such determination the test of navigability is applied.

It may not be doubted that in this state such test is a test of navigability in fact borrowed from both civil-law and common-law principles in contradistinction to the so-termed "tidal test" of the common law. See 1 Farnham, Waters, § 23; 1 Lewis, Em. Dom. 3d ed. § 91; Bissell v. Olson, 26 N. D. 60, 66, 143 N. W. 340; Justinian Inst. bk. 2, title 1. Ware, Roman Water Law, §§ 41, 74, 76; Palmer v. Mulligan, 3 Caines, 307, 2 Am. Dec. 270. There are no tidal waters within this state. Assuredly, therefore, if any public waters there are they must so exist upon such test or pursuant to direct declaration of the law. In the Constitution of this state it is stated. "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigation, and manufacturing purposes." N. D. Const. § 210. This is a declaration concerning public waters. See Bigelow v. Draper, 6 N. D. 152, 162, 163, 69 N. W. 570. The statutes have given recognition to this constitutional policy. Section 5352, Comp. Laws 1913, prescribes "except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways." Section 5475, Comp. Laws 1913, provides: "Islands and accumulations of land formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary." These disclose affirmatively a declaration of ownership in the beds of navigable waters. In the instant case there are two prime questions involved: The character of the waters and the ownership of the bed involved. In this case, the contest is not between a riparian owner and one seeking to assert the right of navigation as a public right upon the lake or to establish an asserted use as a public use for which the lake waters show a capacity therefor. The question here involved is presented between parties both seeking to exclude any public use or public right in the open waters or the lake bed of the section involved, and to fix the status thereof as wholly private. In this regard, in this state, a lake is differentiated from a watercourse only in that it is simply an enlarged watercourse wherein the waters may flow or a basin wherein the waters are quiescent.

The plaintiff would confine the application of the test of "navigability in fact," to waters that are capable of some commerce of pecuniary value as distinguished from boating or for pleasure, and would impose upon the defendant the burden of establishing such capacity in fact for public use. The public status of waters and of their beds in this state are not to be determined as between parties in this case by the test of use for commerce of a pecuniary value and by proof of a then existing use for such purpose in order that the public status may be preserved and the state title to the bed retained. A public use may not be confined entirely within a use for trade purposes alone. A use, public in its character, may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes or pleasure purposes. There is a growing recognition that the utilities of nature, so far as public use are concerned, are not always to be measured by the sign of the dollar. Purposes of pleasure, public convenience, and enjoyment may be public as well as purposes of trade. Navigation may as surely exist in the former as in the latter. See Lamprey v. State, supra; Flisrand v. Madson, 35 S. D. 457, 465, 152 N. W. 796; West Roxbury v. Stoddard, 7 Allen, 158, 171; notes in 126 Am. St. Rep. 718, 131 Am. St. Rep. 758; and 42 L.R.A. 316; 1 Lewis, Em. Dom. 3d ed. § 91.

The proof of the status is rather a proof of capacity than one of then existent use. If the waters involved are capable of a proper public use in the environment where situated and to which they are or may be made subservient, it is sufficient. See Bissell v. Olson, 26 N. D. 60, 67, 143 N. W. 340; Moore v. Sanborne, 2 Mich. 519, 59 Am. Dec. 209; 1 Farnham, Waters, § 26; 1 Lewis, Em. Dom. 3d ed. § 91. It is therefore apparent that, pursuant to constitutional and statutory provisions and state policy, the title of the bed of the lake involved, if deemed public waters, was and is in the state of North Dakota, whether considered in its jus publicum or jus privatum. Were and are the waters of Sweetwater lake to be deemed public waters? In 1883, it was a large lake; it is now a large lake; it has a vast expanse of water extending many miles to the north and south and extensive in width. It is not a pond nor a marsh; it has both clear and apparently deep water extending for miles; it has been used for hunting and for boating by the public. There is no showing in the

record that this is a shallow lake or properly to be used only for private purposes. The meandered governmental survey demonstrates the lake to be a large permanent body of water. It is supplied with water from tributaries that extend to the north and to the east. For over thirty-five years this lake has existed except as, in the improvement of the country, recession has occurred in its shore lines. The trial court has observed there are no weeds except on the shore line and as he viewed the water there was one vast expanse thereof stretching to the north and the west, as far as the eye could reach, and as indicated by the governmental survey. Assuredly this record admits of the finding that such waters have capacity for public use. They are therefore to be deemed upon this record public waters navigable in character.

In 1883 the land of the parties and the bed of the lake were then the property of the United States. Then the land adjacent to the lake was surveyed by our Federal government. The surveyors meandered the surveyed land describing its course and amounts, pursuant to Federal methods of survey, along this lake. The lake was then navigable. By inadvertence, apparently, the surveyors did not note the island then existing. It then was timbered. It must have been of considerable extent. Upon plaintiff's maps submitted it comprises many acres. When this state was admitted into the Union, the title and ownership to all of section 36, both that of the island and of the bed of the lake, passed to the state, both as school land and by reason of state sovereignty. Enabling Act, § 10. See Donnelly v. United States, 228 U. S. 243, 262, 57 L. ed. 820, 828, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913E, 710. The plaintiff's rights as riparian owner are based upon his title received from the state to lots 1 and 2 in section 36. The defendant's rights are likewise so based, concerning lots 3 and 4 in block 36; otherwise, as to the remaining riparian land, upon title received from the Federal government. The grant made by the state to the parties did not convey to them the island nor any part of the bed of the lake. The state expressly reserved its rights under the Constitutional laws of this state. The parties secured such rights as they were entitled to have as riparian owners upon public waters: The patent from the Federal government to the defendant likewise conveyed no title to the island nor to the bed of such navigable waters.

He secured with such patent likewise only his riparian rights. Manifestly the island, ever since its acquisition, has been and is the property of the state. See § 5475, Comp. Laws 1913; Flisrand v. Madson, 35 S. D. 457, 471, 152 N. W. 796. There remains therefore for consideration the rights of the parties as riparian owners upon land, formerly the bed of navigable waters, which has been freed from its public status and has become land in fact. As riparian owners, the parties were entitled to receive these additions, the alluvion so termed, to riparian land which accumulates through processes of accretion or reliction. Such additions become a part of the original tract. Comp. Laws 1913, § 5473; Heald v. Yumisko, 7 N. D. 422, 427, 75 N. W. 807; Brignall v. Hannah, 34 N. D. 174, 185, 157 N. W. 1042; Flisrand v. Madson, 35 S. D. 457, 464, 152 N. W. 796. Likewise, upon the same principles, the state, as owner of the island and a riparian owner, was entitled to the accession properly accruing to the island. The state is not a party to this action. It is necessary that it be a party or that its rights be considered in order to determine the relative proportions as well as the facts concerning the land properly to be apportioned to each upon principles of reliction. The facts necessary for such determination are not presented in this record except in a general way. It is quite proper that an opportunity be given for particular proof in this regard. It is evident upon the determination as made in this opinion that the contentions concerning adverse possession, laches, and estoppel are without merit.

It is ordered that the judgment be reversed, and a new trial granted, and that the Attorney General of this state be notified so that the state may become a party or otherwise protect its interests as it may desire or deem expedient.

ROBINSON, GRACE, and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (concurring specially). I agree with what is said in the opinion prepared by Mr. Justice Bronson to the effect that the "test of navigability" is capacity of use for navigation rather than actual use for such purpose. (Of course, where the surrounding country is settled, the fact that a body of water has not been so used may be a circumstance to be considered with other evidence to determine

whether the body of water is in fact navigable.) I also agree that the state, in its sovereign right, possesses title to the beds of public waters in this state; also that as a general rule islands formed in such waters, belong to the state.

From the evidence submitted in this case, I am rather inclined to the belief that the lake in question is a navigable one. However, in view of a new trial, I believe that that question should be left open so that the parties might introduce such additional evidence bearing on this question as they might desire to offer. I also agree that the evidence adduced discloses a condition of facts with reference to the island which makes it necessary that the state be made a party to the litigation; but I am not prepared to say that the island unquestionably belongs to the state. The question of its ownership should be determined only after the contending parties (as well as the state) have had an opportunity to introduce evidence and present arguments bearing on this question.

WESTERN ELECTRIC COMPANY, a Corporation, Appellant, v. CITY OF JAMESTOWN, a Municipal Corporation, Respondent.

(181 N. W. 363.)

Electricity — contract for current held renewed by practical construction.

1. In an action by a public service corporation to recover for electric current furnished a city, where, pursuant to a contract for one year, made in 1912, the corporation has furnished electric current for street lighting from

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NOTE.—Cases passing upon the question as to the power to regulate rates as affected by charter or franchise provisions or by contract are presented in notes in L.R.A.1915C, pp. 261, 282, and 287, on right to change rates of public service corporation fixed by franchise or charter.

For cases passing upon the general question of power of municipality apart from contract to regulate the rates to be charged by public service corporations, see notes in 33 L.R.A.(N.S.) 759, and 43 L.R.A.(N.S.) 994.

On privilege of using streets as a contract, within constitutional provision against impairment of obligation of contract, see note in 50 L.R.A. 142.

On the question of jurisdiction of public utilities commission over rates as limited by constitutional or statutory power of municipality to regulate utilities, see note in L.R.A.1918D, 315.

year to year and has accepted payment at the rate stipulated in such contract, although in 1914 the city council adopted a resolution canceling such contract, and where, in February, 1918, the corporation gave notice of an increased or surcharge rate of 10 per cent upon the theretofore existing rate and continued to furnish such current for such purpose to the city without the city accepting or agreeing to pay such increased rate, and continued thereafter to receive payment for the current furnished under the contract rate stipulated, it is *held* that the original contract was continued and renewed by practical construction through the acts and conduct of the parties, and that the corporation is not entitled to recover the increased or surcharged rate.

Electricity — company held not entitled to more than franchise rate—Public Utilities Act held not to affect rates for electric current under franchise.

2. In such action by a public service corporation to recover from a city for electric current furnished in operating city water pumps, where in the franchise to the corporation granted in 1902 it was provided that the corporation should pump water into the standpipe which the city has not located at the rate of $2.50 per 100,000 gallons, and where pursuant thereto until 1910 it furnished such power by means of a steam pump and thereafter, when the city had changed its wells and pumps, furnished electric current for their operation for a period of eight years, all at the rate stipulated in the franchise and at which rate it received payment, and where since August 1, 1918, it has furnished current and has sought to charge the city at the current rate charged to private consumers, all with full notice that the city claimed such service at the prescribed franchise rate, it is *held:*

(a) That the corporation was obligated under the terms of its franchise to furnish such electric current at the agreed rate.

(b) And that the Public Utilities Act (Laws 1919, chap. 192), effective March 5, 1919, granting to the Board of Railroad Commissioners the power to regulate electric light rates, did not abrogate or affect the terms and consideration of the franchise granted in 1902.

Electricity — construction of franchise held to bar company from charging for electric current for city library.

3. In an action by such public service corporation to recover from a city the reasonable value of electric current furnished for a library and reading room, where a public library and reading room was maintained in a room of the city hall from 1910 to 1918 for which the corporation furnished electric current until 1914, without specific request therefor by the city, and without any bill being presented for payment of such current, and where, after presentation of a bill for such current furnished, the same was rejected by the city, and, without further negotiations, the corporation continued to furnish electricity up to the time of the commencement of this action, with knowledge that the city claimed that the corporation was obligated to furnish such elec-

tricity under its franchise, it is *held* that the parties by their acts and conduct have adopted a practical construction of the franchise, and that there existed no contract, either express or implied, to pay the corporation any money for the electric current so furnished.

Opinion filed January 4, 1921. Rehearing denied February 7, 1921.

Action in District Court, Stutsman County, *Nuessle*, J., to recover for electric current furnished for street lighting, for city water pumps, and for a library and reading room.

The defendant has appealed from a judgment of dismissal in favor of the city.

Affirmed.

S. E. Ellsworth, for appellant.

"To constitute a tenancy from month to month a special agreement to that effect may be made, or the tenancy may be implied from the manner in which the rent is paid. Thus a lease for an indefinite term, with monthly rent reserved, creates a tenancy from month to month." 24 Cyc. 1034; Blumenberg v. Myres (Cal.) 91 Am. Dec. 560; Oregon & W. R. Co. v. Vulcan Iron Works (Wash.) 106 Pac. 1120.

"A tenancy from month to month or year to year arises where no definite time is agreed upon and the rent is fixed at so much per year or month, as the case may be, and is terminable at the expiration of any period for which rent has been paid." Finch v. Moore, 50 Minn. 116, 52 N. W. 384; Thompson v. Baxter (Minn.) 119 N. W. 797; Douglass v. Seiferd, 41 N. Y. Supp. 290; Proskey v. Colonial Hotel Co. (Nev.) 133 Pac. 390.

"Where one of the parties to a contract, either before the time for performance or in the course of performance, makes performance or further performance by him impossible, the other party is discharged, and may sue at once for the breach, as in the case of renunciation of liability." 9 Cyc. 639.

"If the acts of one party to a contract be such as necessarily prevent the other from performing on his part, the party thus prevented from performing may abandon under the quantum meruit rule." Dubois v. Canal Co. 4 Wend. 285, id. 12 Wend. 334; Canal Co. v. Dubois, 15 Wend. 87; Merrill v. R. Co. 16 Wend. 586; 2 Parsons, Contr. 6th ed.

222; Spaulding v. Coeur D'Alene R. & Nav. Co. 51 Pac. 408; United Electric Light Co. v. East Pittsburgh (Pa.) 79 Atl. 232.

"One who voluntarily disables himself from performing specifically his contract becomes at once liable in damages." Bolles v. Sachs (Minn.) 33 N. W. 863.

"Contract was made in contemplation of the continued existence of a subject-matter which is after the making of the contract destroyed without the fault of either party; non-performance is excused." Levy v. Caledonian Ins. Co. (Cal.) 105 Pac. 598; Dare v. Spencer (Ind.) 5 Blackf. 49; Crabtree v. Messersmith, 19 Iowa, 179.

"Where municipal officials have discretionary power as to the conditions to be annexed to a franchise they have the authority subsequently to waive the conditions which they impose." Curtis, Electricity, § 225; Gathright v. H. M. Byllesby & Co. (Ky.) 157 S. W. 45.

F. J. Kneeland and *Thorp & Rittgers,* for respondents.

"Renewal for same term and wages presumed. When after the expiration of an agreement respecting the wages and the term of service the parties continue the relation of master and servant, they are presumed to have renewed the agreement for the same wages and term of service." Comp. Laws 1913, § 6137; Dickinson v. Norwegian Plow Co. 101 Wis. 157, 76 N. W. 1108; Kellog v. Citizens Ins. Co. 94 Wis. 554, 69 N. W. 362; Laughlin v. School Dist. 98 Mich. 523, 57 N. W. 571; Chamberlin v. Detroit Stove Works, 103 Mich. 124, 61 N. W. 532.

Contracting for a rate and service is one thing, and regulating rates is quite a different thing. Borth v. Co. (Mich.) 18 L.R.A.(N.S.) 1197; Illinois Bank v. City (U. S.) 34 L.R.A. 518; 4 McQuillin, pp. 3665, 3699, and cases cited.

This contract is valid, and cannot be affected by the utility law or by the power of the utility commission to regulate rates. Superior v. Co. (Wis.) 122 N. W. 1022; Tampico Farmers Mut. Teleph. Co. (Ill.) P.U.R.1915A, 24.

"The right of the state to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a franchise." Renwood v. Public Service Commission, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; State ex rel. Webster v.

Superior Ct. 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; Munreo v. Detroit, M. & T. Short Line R. Co. 187 Mich. 364, P.U.R.1915E, 325, 153 N. W. 669; Woodburn v. Public Service Commission (Or.) L.R.A.1917C, 105.

Statement.

BRONSON, J. This is an action to recover for electric current furnished the city. The action was tried to the court without a jury. The plaintiff has appealed from a judgment of dismissal in favor of the city. This same action, upon a demurrer to the complaint, was previously before this court. 43 N. D. 437, 175 N. W. 622. In its amended complaint the plaintiff seeks to recover for a first cause of action, the reasonable value of electric current furnished to the city for lighting its streets and public places between February 1, 1918 and July 31, 1918, amounting to $253; for a second cause of action the reasonable value of electric current furnished the city as power in the operation of city pumps, from August, 1918, to November, 1919, in amount $11,975.46; for a third cause of action the reasonable value of electric current furnished in lighting a public library and reading room in the city hall from December 28, 1908, to date, in amount $1,402.02.

The answer generally denies the complaint and alleges a written agreement for street lighting, and, pursuant thereto, the furnishing of electric current by the plaintiff; alleges a franchise granted to, and accepted by, the plaintiff by the terms of which plaintiff became bound to furnish to the city free electric current to its city hall and engine house without cost and also to pump water for the city at a certain specified rate, and, further, that pursuant to such ordinance the plaintiff has so furnished electric current in pumping water for the city and in furnishing electric light to a library room and reading room. It further alleges that no liability of the city was ever created by the city council as required by law, to pay the demand made for the electric current furnished.

The facts in the record necessary to be stated are substantially as follows:

In 1902 the city enacted an ordinance granting to the Jamestown Electric Light Company a franchise for a period of twenty-five years,

to use its streets for poles, wires, transmission of electricity, etc., in the operation of an electric light and power plant. The plaintiff is a successor in interest, and exercises its privileges as a public service corporation in the city pursuant to the terms of such ordinance. The ordinance provides that, during its life, the company shall furnish electric current to light the city hall and engine house of the city and the city offices therein without cost to the city, and also furnish free fire protection to the citizens and pump water into the standpipe which the city has now located, at a rate of $2.50 per 100,000 gallons. The ordinance also stipulated a maximum rate that shall not exceed 15 cents per K.W. during the life of the franchise for electricity furnished consumers, either public or private.

In 1912 a white way was established upon the streets of the city. In March, 1912, the plaintiff submitted to the city council a proposition to furnish current for lighting this white way, for a term of one year, upon a flat rate, which, subject to a slight modification agreed upon, was accepted by the city council. Thereafter current was furnished for this white way at the flat rate basis for which bills were rendered and paid by the city. In February, 1918, the plaintiff added a 10 per cent increase to be known as a surcharge to the street lighting rate. For six months, from February to July, 1918, this surcharge amounted to $253, the amount of plaintiff's first cause of action. The city council refused payment of such surcharge, although it has otherwise paid the regular flat rate which amount has been monthly received by the plaintiff. In January, 1914, it appears that the city council by an "aye" and "nay" vote upon a resolution, declared the contract made in March, 1912, to be canceled and annulled. Nevertheless thereafter the plaintiff continued to furnish electric current under the same arrangement as theretofore existed until the month of February, 1918. From 1902 to 1910 the plaintiff furnished power through the steam of its boilers for pumping water from a well located adjacent to its plant and was paid at the rate provided in the franchise. Then in 1910 the city made changes in its public water system. New wells were provided at some distance from the plant of the plaintiff. The pumps installed were designed to be operated by electric current. The plaintiff thereupon furnished the current, and for a period of over eight years furnished such current at the rate stipulated in the franchise, rendered bills there-

for, and received payment thereof. In 1918 plaintiff removed its plant to another location and installed a meter for the purpose of measuring the current supplied for pumping. It continued to furnish electric current to the city. It rendered bills from August, 1918, to November, 1919, monthly, showing the electricity so furnished and the rates therefor in accordance with its scheduled charge. The city refused to make payment excepting at the franchise rate. On March 5, 1919 the Public Utilities Act (Laws 1919, chap. 192) became effective and by operation of law, as plaintiff maintains, the rates fixed by plaintiff's schedule became the legal rates for this public utility within the defendant city. The amount so claimed for current furnished for pumping is the amount alleged in the second cause of action.

In 1908 the city constructed and occupied a city hall, a large brick building, consisting of three floors. On the second floor, a large room, some 30 by 40 feet in dimension, was fitted up as a public library and reading room. There, from December, 1908, until about December, 1918, such library and reading room was maintained and electric current for lighting this room, as well as the building, was furnished by the plaintiff. In the year 1914 the plaintiff furnished the city a statement for the current furnished as shown by a separate meter. The city refused payment on the ground that it was the duty of the plaintiff to furnish this current in accordance with the provisions of the ordinance. Again a claim was presented and rejected before the commencement of this action. The amount thereof constitutes the third cause of action.

Decision.

1. Electricity furnished for street lights. The plaintiff contends that the contract made in March, 1912, became almost immediately operative by reason of the use of lamps installed on "street hoods." That the resolution of the city council in June, 1914, canceling and annulling this contract, being unanimously adopted and entered upon the council proceedings was presumptively published in due course in the official newspaper and presumptively afforded formal notice thereof to the plaintiff; that the reasonable presumption is that the city assumed that the contract of March, 1912, had expired on March 1, 1913, and from that time had continued in force as a contract from month to

month; that in February, 1918, the plaintiff gave due notice to the city of a new surcharge rate of 10 per cent to be thereafter charged; that its manager had authority to fix such rates and the same are presumed to be reasonable; that the city accepted, from month to month for a period of six months, the current without any objection to the increased rate; that, in any event, as a matter of law, the contract of March, 1912, had expired, and there existed thereafter only a contract from month to month which was determinable by, and terminable at, the rental period of payment; that, furthermore, whether the contract was terminated by its own terms or by the act of the city on June 1, 1914, the parties were in the same position that they would have been if no contract had been made; that plaintiff supplied the current, the city accepted and paid for the commodity by the month with no definite agreement as to the terms; that after the notice of an increase was given by the plaintiff in February, 1918, the city, by accepting the commodity, became liable for the increased charge.

The city contends that the contract of March, 1912, became effective in October, 1912; that by the acts of the parties, the plaintiff furnishing current, the city receiving and paying for the same, at the contract rate, this agreement was renewed from year to year until and including the year of 1918; that the notice given by the plaintiff in February, 1918, of a surcharge increased rate did not operate to terminate the contract then existing, without the consent of the city; that the resolution of the city council in June, 1914, did not terminate the contract; that its abrogation was not accepted by the plaintiff; that the city did not consent to the surcharge; and that the plaintiff furnished current to the city so knowing.

The trial court found that the plaintiff commenced furnishing current under the March, 1912, contract on October 1, 1912; that the contract, by acts of the parties, was renewed from year to year and continued in force; that no notice of the cancelation of this contract was given by either of the parties until February, 1918, when the plaintiff notified the city of its surcharge rate; that thereafter the plaintiff rendered monthly bills for its services, based on the rate in the contract of 1912, with a 10 per cent surcharge added; that the city allowed such bills at the contract rate, rejected the surcharge, and the amounts thereof as allowed were paid to and accepted by the plaintiff. As a conclusion

of law, the trial court found that the plaintiff was obligated to furnish, and the defendant was entitled to receive, electric current under the rate provided in the agreement of 1912 from February 1, 1918, to July 31, 1918, for all of which payment had been made to the plaintiff.

Under this specific question we are of the opinion that the findings and conclusions above stated are proper. Although the contract of March, 1912, was for the term of one year, it could be renewed by implication of law, through the acts of the parties for another year. It was so renewed for the year 1913. Although the city council in June, 1914, did adopt a resolution terminating and canceling this contract, nevertheless it fully appears that the plaintiff neither consented to nor acted upon such resolution of termination and that the city itself did not thereafter treat such contract as if canceled. The acts of the parties from June 1, 1914, through and until February 1, 1918, recognized this contract of March, 1912, to be in force. Electricity was furnished by the plaintiff pursuant to its terms and the rates therein prescribed. Its service was accepted by the city and payment made therefor pursuant to the contract. The action of the city in adopting this resolution does not afford, in our opinion, any ground for a presumption that this contract was thereafter to be considered and determined to be merely a contract from month to month. No consent is shown in the record to such termination. The contract then to be terminated as it then existed required the consent of both parties. Comp. Laws 1913, § 5934. As it then existed it was a renewal contract for a year. The sole action of the city itself without the consent of the plaintiff did not serve to alter its character. See Taylor v. Lambertville, 43 N. J. Eq. 107, 10 Atl. 809. See Appleton Waterworks Co. v. Appleton, 132 Wis. 563, 113 N. W. 44. The parties continued to operate under this contract pursuant to its original terms in respect to the rates, the term, and the monthly period of payment. We are further of the opinion, in any event, that it is immaterial whether this contract became operative in March, 1912, or in October, 1912, or whether it be considered to have been renewed after its termination from year to year or from month to month.

On February 1, 1918, when the plaintiff gave notice of a surcharge rate, a contract then existed between the parties. Upon plaintiff's contention and showing, the contract, then existing, either was terminated

or was modified by plaintiff's demand so as to provide for a surcharge rate. It is manifest that the contract was not modified because the city did not accept nor agree to pay the surcharge rate. It is further manifest that the contract was not abrogated for the reason that the plaintiff, notwithstanding its demand for an increase, still continued to furnish electricity to the city, and to receive monthly pay therefor, pursuant to the terms of the contract. This clearly showed by the acts of the parties a continued performance under the terms of the contract. Upon this showing there exists no ground for the creation of an implied contract between the parties independent and in abrogation of the contract.

2. Electricity furnished for pumping. The plaintiff contends that, under the ordinance granting to it a franchise in 1902, it was willing to furnish steam power for pumping water from wells immediately adjoining its power plant at the rate prescribed in the ordinance; that the city, by reason of its changing in 1910 the location of the steam pumps and dispensing with steam power for pumping, made it impossible for the plaintiff to render the services contemplated by the franchise; that the acts of the city renounced and abrogated the contract for pumping made in the franchise of 1902; that the city, through its request that the plaintiff extend its wires to the pumping station and furnish electric current to operate the city pumps by electricity, impliedly entered into a new contract to pay the reasonable value of the current so furnished; that the act of the city in rendering impossible performance by the plaintiff of the contract of 1912 for pumping water precludes it now from asserting that the plaintiff is bound to furnish power for pumping such city water pursuant to the terms of the franchise.

The plaintiff further contends, concerning the electric current furnished for pumping since March 5, 1919, that, by legislative act, effective March 5, 1919, known as the Public Utilities Act (Laws 1919, chap. 192), the state, through powers conferred upon the board of railroad commissioners, assumed full regulations and control concerning rates and charges of all public utilities; that accordingly the plaintiff since that time was required to furnish electric current at rates which were just and reasonable to all persons or corporations and was prohibited from making any discrimination in rate charges; that at such time when the act became effective the scheduled rates of the plaintiff were then the legal rates in force; that therefore the charge of 6 cents per

K.W. to the city was a proper and legal charge for current so furnished after March 5, 1919; that the board of railroad commissioners by an opinion rendered July 7, 1920, approved these rates of the plaintiff. In this regard the plaintiff further contends that this Public Utilities Act took from the city the police power concerning the regulation of rates and served to supersede the contract rate provisions in this franchise of 1902; that the effect of the act was to instantly strike down and make unlawful any free supply of a public utility, or any supply charge at a low or discriminatory rate; that after March 5, 1919, the plaintiff would violate the state law by rendering service to the city or any service that was below a fair, just, and reasonable rate charge to any person or corporation for whom a like service was rendered.

On the other hand, the defendant contends that the franchise granted to the plaintiff in 1902 constituted a valid contract, except in so far as the same was invalidated for any purpose for the period subsequent to March 5, 1919, by the Public Utility Act; that, in making this franchise, the parties contemplated, and their acts subsequently demonstrated, that the franchise rate for pumping should apply to changed conditions that might occur, in the growth of the city, to the city water system, and to the location of the city's pumps, means of pumping, and the plaintiff's proximity thereto; that this is shown through the furnishing of electric current for power and receiving the franchise rate therefor, by the plaintiff, for a period of some eight years after the city changed the location of its wells in 1910, and, further, too, after the plaintiff had changed the location of its own electric light plant; that, by its acts, the plaintiff placed a practical construction upon this contract; that in August, 1918, for the first time, it made the demand that its arbitrary rate of 6 cents per K.W. be paid for the electric current furnished for pumping; that the city has tendered its warrants in full payment pursuant to the franchise rate.

Further, concerning the Public Utilities Act, the city contends that the act, even if applicable, does not apply to the period in controversy from August, 1918, to November, 1919, for the reason, that, until the state has taken action or directed to the contrary, in the exercise of its police power, the franchise provisions continue to exist valid between the parties; that, furthermore, in any event, the city had the authority and the right to receive this electric current at the rate prescribed in

the franchise, because it was a contract between the parties, and not the exercise of a rate regulatory power; that this prescribed rate was neither unreasonable nor discriminatory because it formed a part of the consideration for the privileges granted under the franchise, with which the Public Utilities Act did not in any manner seek to interfere.

In its findings the trial court found that for over eight years previous to August 1, 1918, the plaintiff furnished electric current for the city's pumps, located some six city blocks from plaintiff's plant, for which service it has rendered monthly bills at the franchise rate which were regularly allowed and paid by the city; that during such time it made no objection to pumping such water in such manner and at such price nor that it was not obligated so to do by the terms of the franchise; that, furthermore, until 1910, it had furnished power by means of a steam pump to pump water for the city from a well located very near plaintiff's electric plant; that since August 1, 1918, plaintiff rendered bills monthly to the city council for the payment of rates charged by it to its private consumers for electric current; that such bills were allowed by the city at the franchise rate and rejected as to the excess; that the plaintiff had full notice of the claim of the city to such services by the plaintiff at the prescribed franchise rate. As a conclusion of law the trial court determined that the plaintiff was legally obligated by the franchise and the contract made thereby to furnish electric current to the city's pumps at the franchise rate.

The contention of the parties in the findings of the trial court have been stated somewhat fully in order to present clearly a consideration of the issues. We are clearly of the opinion that the findings of the trial court are proper and sustained by the evidence; that its conclusions are correct. Upon the legal propositions presented, both counsel, with much ability, have discussed with numerous citations of authority the liability of the city for the current furnished under the altered conditions and in connection with the recently enacted Public Utilities Act. Strenuously has the plaintiff contended that the city, by changing the location of its pumps and the method of furnishing power thereto, had renounced the contract provisions of the franchise applicable thereto and had placed the plaintiff in a position where it could not perform in accordance with the provisions of the contract. We are clearly of the opinion that this contention upon this record cannot be sustained in

that regard. The findings of the trial court, found proper by this court, demonstrate that the parties by their acts and conduct have adopted a practical construction of the contract. 13 C. J. 546; State Trust Co. v. Duluth, 104 Fed. 633. The plaintiff is not in a position, therefore, to claim a different compensation for the service rendered from August, 1918, to November, 1919, unless the Public Utilities Act has changed or superseded this contract relation. This Public Utilities Act (Laws 1919, chap. 192) grants to the board of railroad commissioners regulatory rate-making powers over public utilities, such as the plaintiff. It does not deprive a city of its powers and privileges in creating or enforcing a franchise granted for the use of its streets or highways by a public utility. It does not pretend to grant the railroad commissioners the power to determine what shall be the consideration to be paid for the use or exercise in a city of the privilege of a franchise. The defendant city had the authority to grant or permit a franchise to the plaintiff for the use of its streets and highways and to regulate the use of the same. It still has that authority. Comp. Laws 1913, § 3599, (13–24). It is specifically reserved to a city, by the constitutional provision, which provides that no law shall be passed by the legislative assembly granting the right to construct and operate an electric light plant within any city without requiring its consent. N. D. Const. § 139. This right of franchise granted to the plaintiff in 1902 was a right of value, a right of property, and, validly, the subject of a legal contract. See note in 50 L.R.A. 142; Joyce, Franchises, §§ 25, 26; see Bismarck Gas Co. v. District Ct. 41 N. D. 385, 170 N. W. 878; Moorhead v. Union Light, Heat & P. Co. 255 Fed. 920; Public Service Electric Co. v. Public Utility Comrs. 88 N. J. L. 603, P.U.R.1916D, 107, 96 Atl. 1015; People v. O'Brien, 111 N. Y. 40, 2 L.R.A. 255, 260, 7 Am. St. Rep. 684, 18 N. E. 692; Ghee v. Northern Union Gas Co. 158 N. Y. 510, 53 N. E. 693; Pond, Public Utilities, § 114, 4 McQuillin, Mun. Corp. §§ 1617–1636.

The franchise so granted constituted a contract between the state, through the municipality representing the state by its permission, and the company. Ghee v. Northern Union Gas Co. 158 N. Y. 510, 53 N. E. 693; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 658, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; Russell v. Sebastian, 233 U. S. 204, 58 L. ed. 921, L.R.A.1918E, 882, 34

Sup. Ct. Rep. 517, Ann. Cas. 1914C, 1282; Pond, Public Utilities, §§ 78, 89, 92; 4 McQuillin Mun. Corp. § 1624. The city had the right to exact a charge for the use of its streets. St. Louis v. Western U. Teleg. Co. 184 U. S. 94, 97, 37 L. ed. 380, 383, 13 Sup. Ct. Rep. 485; or, as a consideration for the franchise. Independent School Dist. v. Le Mars City Water & Light Co. 131 Iowa, 19, 10 L.R.A.(N.S.) 859, 863, 107 N. W. 944.

The consideration for the exercise of this right might have been evidenced by the payment of a stipulated sum of money annually, or otherwise by the payment of a percentage of the gross or net revenues of the company earned in the city, or by doing certain service in and upon the streets or highways of the city and by furnishing as an equivalent, in lieu of money, a certain service of a certain commodity for the city's use. 5 McQuillin, Mun. Corp. § 1645; Mitchell v. Dakota Cent. Teleph. Co. 25 S. D. 409, 127 N. W. 582. This furnishing of a certain service or a certain commodity for the city's public use may not be termed a bargaining of the municipal or state police power concerning rates, in the absence of a restrictive or prohibitive constitutional or legislative provisions, but rather the *"quid pro quo"* of, or the consideration for, the exercise of the franchise.

Readily, upon the law of this state, may such cases as Kenosha v. Kenosha Home Teleph. Co. 149 Wis. 338, 135 N. W. 848, be distinguished by reason of the fact that in this state, the right to permit the exercise of a franchise in a city is directly reserved and preserved to a city by a constitutional provision. In the case cited it was held that the franchise was created by statutory authority subject to reasonable regulations under the police power; that the city in enacting an ordinance granting a franchise did not thereby create a contract because it had no consideration to give for such a contract; that therefore a provision thereunder for furnishing free telephones to a city was rendered ineffectual by a subsequent enacted public utilities statute making illegal such furnishing of telephones.

Likewise, upon the law and facts of this case, may a distinction be drawn concerning such cases as V. & S. Bottle Co. v. Mountain Gas Co. 261 Pa. 523, 104 Atl. 667; State Public Utilities Commission ex rel. Quincy R. Co. v. Quincy, 290 Ill. 360, P.U.R.1920B, 313, 125 N. E. 374; Ottumwa R. & Light Co. v. Ottumwa, — Iowa, —, 173 N. W.

270; Mill Creek Coal & Coke Co. v. Public Service Commission, 84 W. Va. 662, 7 A.L.R. 1081, 100 S. E. 557, cited by the plaintiff. See also notes in L.R.A.1915C, 264, and L.R.A.1918D, 315. These cases concern general or regulatory rate provisions in a franchise or contract to be charged the public. The case at bar concerns directly the validity of a contract provision for the payment of a consideration to the city for exercising the privileges of the franchise in the use of its streets. In the franchise of 1902 the plaintiff did agree to make payment for the exercise of this right or privilege by rendering a certain service for the city's use in which it included as found by the trial court, the electric current involved herein.

Presumably under the contract the service so rendered by the plaintiff is reasonably compensatory for the privilege so exercised by the plaintiff. And likewise the value of this franchise might reasonably and presumptively measure the difference between the amount of actual charge in fact made to and paid by the city and the amount of the reasonable charge for the service rendered. State v. Peninsular Teleph. Co. 73 Fla. 913, 10 A.L.R. 501, P.U.R.1917E, 453, 75 So. 201. The rate charged therefor under the contract cannot be termed in any event unreasonable or discriminatory.

It must appear, accordingly, that the right of the city in consenting to a franchise to contract for the consideration to be paid by a public utility for the exercise of the franchise is not to be confused with either the state or municipal police power to regulate public service rates or such public utility. Pond, Public Utilities, §§ 434, 436; 4 McQuillin, Mun. Corp. §§ 1733, 1736. It therefore follows that the franchise of 1902 concerning the electric service rendered to the city is operative, and to it the Public Utilities Act cited has no application.

3. Electric current furnished library and reading room. The plaintiff contends that continuously from December 28, 1902, to the commencement of this action the plaintiff furnished electric current to the public library and reading room in a building erected by the city to be used as a city hall; that the plaintiff was requested by the city to extend its wires to this room; that the city appropriated money by ordinance for lighting the streets and public places and for maintenance of the city hall including fuel, janitorial service, and incidental expenses during the period of time covered; that during such period this room was

used exclusively as a library and reading room and the public offices in the city hall were entirely separate and apart therefrom; that the city officers and members of the city council knew, during a period of ten years, that this room was used for purposes other than for city offices and was lighted by means of electricity furnished by plaintiff; that this electricity so furnished was not within the contract and the city is liable therefor as upon an implied contract.

The city contends that the electricity so furnished for this room was within the provisions of the contract between the parties; that the plaintiff should furnish electric current to light the city hall, and engine house of the city, and the offices therein without cost to the city. That the library board, a public board, was an agency or department of the city government. That, in any event, the furnishing of the electric current to this room by the plaintiff, without objection or demand for payment during the years operated as a practical construction of the contract between the parties; that no contract in fact was ever made between the parties other than the franchise contract to pay for such current and that no liability was ever incurred by the city upon an "aye" and "nay" vote of the city council as required by law.

In its findings the trial court determined that this library and reading room was located in the city hall of the city, erected in 1902; that the city permitted the public library there to be maintained governed by the board of education of the independent school district of the city and that during the time involved the room was under the charge and control of such library board. That no specific request was made by the city to furnish electric current for such room and that no bill therefor was ever presented, except one presented in the year 1914 for the electricity furnished up to that time; that this bill was rejected by the city; that, without further negotiation, the plaintiff continued to furnish electricity for this room up to the time of the action with knowledge on the part of the plaintiff that the city claimed it to be obligated under its contract to light such room free of charge as part of the city hall and offices therein. In its conclusions the trial court found that there existed no contract, either express or implied, or either in law or in fact, to pay the plaintiff any sum whatever for electric current furnished for lighting such library and reading room.

We are again of the opinion that the findings of the trial court are

proper and its conclusions correct. At considerable length the parties have discussed the question of the liability of the city upon an implied contract. This question is deemed immaterial in this case, and unnecessary to discuss for the reason that in our opinion, and as found by the trial court, the parties by their acts and conduct have adopted a practical construction of the franchise. It is not to be doubted that for years the plaintiff furnished this electricity for this room in the city hall without objection, and without any demand for compensation. For years apparently it recognized that this furnishing was included within the terms of its franchise with the city. Both parties so construed it; upon such construction both parties acted. In no manner does the record disclose any recognition of a liability on the part of the city for furnishing this contract otherwise than as prescribed by the provisions of the franchise. The judgment is in all things affirmed with costs to the respondent.

ROBINSON, GRACE, and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (concurring). I agree with my associates that the facts in this case do not entitle the plaintiff to recover upon any of his three causes of action. While the Public Utilities Act makes it "unlawful for any public utility corporation subject to the provisions of the act to make or give any undue or unreasonable preference or advantage to any particular person, firm, corporation, or locality, the same section (§ 16, of the Public Utilities Act) which contains this provision also provides: "Nothing in this act shall prohibit a public utility from entering into any reasonable agreement with its customers, consumers, or employees, or for [from] providing for a sliding scale of charges, unless the same is prohibited by the terms of the franchise or permit under which such utility is operated. No such agreement or sliding scale shall be lawful unless and until the same shall have been filed with and approved by the commissioners." Section 4 of the Public Utilities Act provides: "The commissioners shall have the power, after notice and hearing, to enforce, originate, establish, modify or adjust and promulgate tariffs, rates, joint rates, tolls and charges of all public utility corporations and whenever the commissioners shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in viola-

tion of the provisions of the Act, the Commissioners shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provision of law."

As found by the trial court, and by this court, the plaintiff and the defendant city had agreed upon certain rates; these rates were in existence when the Public Utilities Act became operative. There is no contention that the commissioners had adjudged the rates so agreed upon between the public utility and the city to be discriminatory; or that the commissioners have taken any action whatsoever regarding such rates. Hence, it seems to me that so far as this litigation is concerned the rights of the parties depend upon and are measured by their contracts. And I agree with my associates that the evidence justifies the conclusions drawn by the trial court as regards the contractual rights and obligations of the parties. I express no opinion as to whether the Public Utilities Act invests the commissioners with authority to change a rate which has been agreed upon between the public utility corporation and a city as regards compensation to be paid by the city itself (as contradistinguished from maximum rates fixed in the franchise to be charged customers generally) for service rendered to it; and which rate is stipulated in the franchises under which the public utility is operated. Nor do I express any opinion as to whether under § 139 of the state Constitution the legislature could confer upon a public utility commission the power to change or alter such rates.

OSCAR VOYEN et al., Contestants and Appellants, v. EAGLE SCHOOL DISTRICT OF RICHLAND COUNTY, STATE OF NORTH DAKOTA, a Corporation, et al., Contestees and Respondents.

(181 N. W. 82.)

Schools and school districts — contest of vote for construction of schoolhouse properly dismissed for insufficiency of notice.

In this case four electors of a school district gave notice to contest a vote

for the construction of a schoolhouse. The notice did not state sufficient grounds for a contest. It was not served in time, and the special method provided by statute for contesting a general election does not apply to this case. *Held*, the contest was properly dismissed.

Opinion filed January 4, 1921.

Appeal from District Court of Richland County; Honorable F. J. *Graham*, Judge.

Affirmed.

G. H. Korsvik, for appellant.

It follows that the election in question is governed by the laws regulating general elections and this naturally includes the statutory mode of contesting such elections. Nelson v. Gass, 27 N. D. 357; Kadlac v. Pavik, 9 N. D. 278, 83 N. W. 5.

In Minnesota, also, the statute regulating contests of general elections has been held applicable to the contest of municipal elections. 76 Minn. 55, 78 N. W. 865; Deepenbrock v. Gates, 35 Minn. 385, 23 N. W. 927; State v. Dowlan (Minn.) 24 N. W. 188.

"The meaning of such statutes, §§ 1184, 1185, Comp. Laws 1913, is not to be gathered from exact grammatical analysis and definition." Torgerson v. Golden Valley School Dist. 171 N. W. 626; Weiderholt v. Lisbon School Dist. 161 N. W. 809.

Forbes, Lounsbury, & Forbes, for respondents.

There is no law which authorizes the said pretended contest or gives the court jurisdiction to maintain such notice. 15 Cyc. 394, 397 and cases cited; 10 A. E. E. L. 816.

The notice and statement required to be served by the contestant on the contestee constitute the predicate upon which the power of the court is set in motion, and unless served within the time required by statute the court has no jurisdiction to hear and determine the contest. 15 Cyc. 399 and cases cited.

Robinson, J. On March 6, 1920, in Eagle school district, of Richland county, there was held an election to vote on the question of constructing a schoolhouse. A majority of four persons voted in favor of the construction. On April 9, 1920—thirty-four days after the election—appellants served a notice to contest the election. This is an ap-

peal from a judgment dismissing the contest on the ground that the law does not permit of the contest, and that the notice of contest was not served in time, that is, within twenty days after the election.

The grounds of contest are: (1) That the election was conducted in too small a room; (2) that no booths or compartments were prepared in which to mark the ballots; (3) that no railing was provided to separate the electors marking the ballots; (4) that by reason of such failure the electors were unable to prepare and mark their ballots secretly. The objections are all trivial. The election of a country school district is a kind of a family affair. The electors are few. They meet and freely discuss the affairs and take no pains to conceal their beliefs. The usual meeting place is a schoolhouse and the desks are used for marking ballots; but if there is no schoolhouse or church building, the election may be at the residence of some elector. In either case the construction of booths would be considered ridiculous.

The notice of contest was served under the statute providing for contesting a general election. Comp. Laws, § 1046. Obviously this statute does not apply to such a school district election, and under the statute the notice of contest must be served within twenty days after the election, and that was not done in this case. But appellant contends that under § 943 the time limit for serving such a notice of contest is forty days. Section 943 reads: "An action to contest the right of any person to any office or to annul and set aside such election may be commenced within forty days." But that section does not apply. A notice of contest is not the commencement of an action.

"An action is an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, or the redress or prevention of a wrong, or the punishment of a public offense." Section 7330. "Every other remedy is a special proceeding." Section 7331.

In any view of the case, the court was clearly right in dismissing the contest.

Judgment affirmed and case remanded forthwith.

CHRISTIANSON, Ch. J. (concurring specially). I agree with Mr. Justice Robinson that the notice of contest herein was not served in time. The election was held March 6, 1920, the notice of contest was served

April 9, 1920. Appellants assert that they are entitled to maintain this contest under the provisions of §§ 1046–1058, and 943, Compiled Laws 1913. Section 1046, supra, provides: "Any person claiming the right to hold an office, or any elector of the proper county desiring to contest the validity of an election or the right of any person declared duly elected to any office in such county, shall give notice thereof, in writing to the person whose election he intends to contest within twenty days after the canvass of the votes of such election, which notice shall be served in the same manner as a summons in a civil action." It is conceded that the notice of contest herein was not served within the time prescribed by § 1046, supra. But appellants contend that § 1046 has been amended, and that the time in which to serve notice of contest has been extended to forty days, by § 943, Comp. Laws 1913, which reads: "Any action to contest the right of any person declared elected to any office, or to annul and set aside such election, or to remove from or deprive any person of an office of which he is the incumbent for any offense mentioned in this article must, unless a different time be stated, be commenced within forty days (40) after the return of the election at which such offense was committed, unless the ground of the action or the proceeding is for illegal payment of money or other valuable things subsequent to the filing of the statements prescribed by this article, in which case the action or the proceeding may be commenced within forty (40) days after the discovery by the complainant of such illegal payment." It is true § 943 is a later enactment than § 1046, but from that it by no means follows that it operated as a repeal of any of the provisions of § 1046.

It is presumed that all laws are passed with a knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring. Lewis's Sutherland, Stat. Constr. 2d ed. § 267. "A later and an older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, when such seems to have been the legislative purpose." Lewis's Sutherland, Stat. Constr. 2d ed. § 247. An implied repeal on the ground of repugnancy will not result in any case unless both the object and the subject of the statutes are the same. 26

Am. & Eng. Enc. Law p. 727. "A subsequent statute which institutes new methods of proceeding does not, without negative words, repeal a former statute relative to procedure." Lewis's Sutherland, Stat. Constr. 2d ed. § 260.

Section 943, supra, was embodied in and a part of the Corrupt Practice Act of this state. It was not the purpose of that act to prescribe the procedure in election contests. The purpose of that act—(as stated in the title)—was "to secure the purity of elections, limit candidates' election expenses, to define, prevent and punish corrupt and illegal practices in nominations and elections, to provide for furnishing information to the electors; and to provide a penalty for the violation" thereof. It will be noted that section 943 by its terms is restricted to actions brought to contest, or to annul and vacate, elections for violations of the Corrupt Practice Act. It does not purport to relate to, or to affect or alter the procedure applicable in, election contests instituted under the provisions of §§ 1046–1058, Comp. Laws 1913. In my opinion a party desiring to institute a contest under the provisions of § 1046, must serve the notice of contest within the time fixed in that section. And the institution of the proceeding within the time so provided is an essential element of the right to maintain the proceeding at all. Walton v. Olson, 40 N. D. 571, 170 N. W. 110. It clearly appears that this proceeding was not instituted within the time prescribed, and hence the trial court properly ordered a dismissal.

I express no opinion as to whether the notice stated facts sufficient to constitute grounds for a contest; or as to whether an election for the construction of a school house is subject to contest.

Bronson and Birdzell, JJ., concur.

Grace, J. (concurring specially). I concur in the opinion of Mr. Justice Robinson, but, on the sole ground, that the notice to contest the election was not served in time.

IN THE MATTER OF THE APPLICATION AND HEARING BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, ENTITLED, CITY COMMISSION OF BISMARCK, NORTH DAKOTA, v. BISMARCK WATER SUPPLY COMPANY.

STATE OF NORTH DAKOTA EX REL. P. C. REMINGTON, et al., Petitioners, v. C. J. AANDAHL, et al., Respondents.

(181 N. W. 596.)

Courts — in original proceedings in Supreme Court, state is actual plaintiff.

1. In an original proceeding in the supreme court, the state is the actual plaintiff, and the relator is a mere incident.

Removal of causes — suit by state not removable unless based on Federal laws or treaties.

2. A suit by the state in one of its own courts cannot be removed to a Federal court, unless it is a suit arising under the Constitution or laws of the United States or treaties made under their authority.

Removal of causes — suit does not "arise under Federal Constitution or laws," unless construction of such laws is involved.

3. A suit cannot be said to be one arising under the Constitution or laws of the United States or treaties made under their authority until it has in some way been made to appear on the face of the record that some title, right, privilege or immunity, on which the recovery depends will be defeated by one construction thereof or sustained by an opposite construction.

Courts — case involving validity of order raising water rates held within original jurisdiction of Supreme Court.

4. A majority of the courts are of the opinion, and it is *held*, that the instant case (relating to and involving the validity of an order purported to have been made by the board of railroad commissioners granting the Bismarck Water Supply Company a 60 per cent increase in rates, and which order it is asserted by the relators was made contrary to and without authority of law) is one within the original jurisdiction of the Supreme Court.

Public service commissions — increase in rates of public utility may only be ordered after hearing.

5. Under the Public Utilities Act (Laws 1919, chap. 193), an increase in rates of a public utility can be ordered only after hearing had on that question.

In the instant case it is *held* that a rate increase is void because it was made without notice and hearing.

Opinion filed January 4, 1921.

Application for an original writ to set aside, and restrain the enforcement of a purported order or regulation of the Board of Railroad Commissioners ordering an increase in the rates of the Bismarck Water Supply Company.

Writ granted.

Newton, Dullam & Young, H. F. O'Hare, and *Lawrence & Murphy,* for petitioners.

The supreme court has original jurisdiction of this cause. State ex rel. Granvole v. Porter, 11 N. D. 309; State ex rel. Buttz v. Lindahl, 11 N. D. 320; State ex rel. Mitchell v. Lawson, 13 N. D. 420; State ex rel. Baker v. Hanna, 21 N. D. 570. Cases where exercised, as to state boards, commissions and tribunals. State v. Archibald, 5 N. D. 359; State ex rel. Birdzell v. Jorgenson, 25 N. D. 539; State ex rel. Baker v. Hanna, 31 N. D. 570; State ex rel. Linde v. Taylor, 33 N. D. 76; State v. Packard, 32 N. D. 301; State ex rel. Linde v. Packard, 35 N. D. 298; State ex rel. Langer v. Kositzky, 38 N. D. 616.

This court may act as a court of equity. It may take testimony. Re Sidle, 31 N. D. 405, 154 N. W. 277.

It may issue all necessary writs and all necessary orders to effectuate its jurisdiction as assumed. State v. Archibald, 5 N. D. 359, 66 N. W. 234; State v. Nuchols, 18 N. D. 233, 20 L.R.A.(N.S.) 413, 119 N. W. 632; State ex rel. Brick Corp. v. District Ct. 24 N. D. 28, 32, 138 N. W. 988; State v. Langer (N. D.) 177 N. W. 414.

The mere filing of a petition for the removal of a suit which is not removable does not work a transfer. To accomplish this the suit must be one that may be removed and the petition must show a right in the petitioner to demand the removal. Stone v. State, 117 U. S. 430, 29 L. ed. 962.

It perhaps is immaterial whether the action of the board of railroad commissioners was legislative or judicial. This court in the case of Re M. St. P. & S. St. M. R. Co. 30 N. D. 227, following the Federal cases to which we have called attention, holds that the board in establishing rates acts legislatively.

The following authorities sustain the right to invoke certiorari in a case where the remedy by appeal proves inadequate. State v. Guinotte, 156 Mo. 513, 50 L.R.A. 787, 57 S. W. 281; State v. Whatcom County, 74 Wash. 601, 134 Pac. 183; State v. King County Sup. Ct. 26 Wash. 278, 66 Pac. 385; United States Standard Voting Mach. Co. v. Hobson, 132 Iowa, 38, 7 L.R.A.(N.S.) 512, 109 N. W. 458; R. R. Co. v. Lamb, 60 Ind. App. 409, 110 N. E. 997.

Miller, Zuger & Tillotson and *Simpson & Mackoff* (*Butler, Mitchell & Doherty,* of counsel), for Bismarck Water Supply Company.

This cause is not one within the original jurisdiction of this court. State v. Packard, 32 N. D. 301, 155 N. W. 666; State v. Taylor, 33 N. D. 76, 156 N. W. 561; State v. Hall, 35 N. D. 34, 155 N. W. 281; State v. Packard, 35 N. D. 298, 160 N. W. 150; State v. Packard, 168 N. W. 673.

The controversy between the city of Bismarck and the Water Supply Company was prior to the commencement of this proceeding, duly removed to the United States District Court, and the courts of the state of North Dakota have no longer jurisdiction to consider it. Judicial Code of the U. S. Comp. Stat. § 1010; Upshur County v. Rich, 135 U. S. 467, 477; Delaware County v. Diebold Safe & Lock Co. 133 U. S. 473; Fuller v. Colfax County, 14 Fed. 179; C. M. & St. P. R. Co. v. Drainage Dist. Co. 253 Fed. 491; Waha-Lewiston L. & W. Co. v. Lewiston-Streetwater I. Co. 158 Fed. 137.

"If the cause is removable and the statute for its removal has been complied with, no order of the state court for its removal is necessary to confer jurisdiction on the court of the United States, and no refusal of such an order can prevent that jurisdiction from attaching." Kern v. Huidekoper, 103 U. S. 485; Marshall v. Holmes, 141 U. S. 589; Mannington v. Hocking Valley R. Co. 183 Fed. 133.

CHRISTIANSON, Ch. J. This is an application for an original writ to have reviewed and set aside and annulled as unlawful and in excess of jurisdiction a certain order made by the board of railroad commissioners of this state on or about October 2, 1920, whereby the said board of railroad commissioners granted an increase in rates to the Bismarck Water Supply Company. The petition alleges that the city of Bismarck is a municipal corporation having a population of about 7,000; that on

June 23, 1919, the city commission, by resolution duly adopted, made the following complaints against the service rendered by the Bismarck Water Supply Company:

"(1) Unsanitary condition of reservoirs.

"(2) Unprotected condition of reservoirs.

"(3) Insufficient fire and water protection, in this that there is only one water pump which may at any time break down and repairs are difficult to procure, thus endangering the property, health, and lives of the citizens of Bismarck.

"(4) Plant is insufficient to take care of supply and demands of service.

"(5) There is an unnecessary delay in extending water mains after demand is made therefor.

"(6) There is no filtration plant.

"(7) The mixing chamber is not in fit condition to insure a proper mixture of the chlorine used to purify the water.

"(8) The rates are excessive for home consumption, lawns and gardens.

"(9) The water is muddy and full of sediment."

That such resolution was filed with the board of railroad commissioners; that thereafter the Bismarck Water Supply Company filed an answer to the effect that it denied generally and specifically each and every charge so made by the city commission against the Bismarck Water Supply Company; that the issues thus framed were the only ones before the board of railroad commissioners to determine; that after hearing and taking of evidence the board of railroad commissioners on or about October 2, 1920, "wrongfully and unlawfully and in excess of their jurisdiction and foreign to the issues created at said hearing," did make and file an order wherein it granted the Bismarck Water Supply Company permission to increase its rates in amounts, aggregating approximately 60 per cent increases in existing rates. (The order also contained other provisions relating to the matter mentioned in the charges filed by the city commissioners); that subsequently the city commissioners appealed to the district court from the entire order and determination of the railroad commissioners; that a determination of such questions will require a considerable length of time and that in the meantime the unlawful rates and increases purported to be authorized

by the board of railroad commissioners will be put into effect; that there are approximately 1,400 users of waters, including the municipality and the state; that the relators are resident taxpayers of the city of Bismarck, and users of water furnished by the Bismarck Water Supply Company.

It is further averred in said petition that the board of railroad commissioners did not at any time during the progress of said hearing initiate or conduct any examination relating to the increase of rates; and that no notice of said proposed increase in rates was given as required by chapter 192, Laws 1919, or at all. It is further averred that the law under which the board of railroad commissioners purported to act is unconstitutional and void; and that the said board of railroad commissioners has no legal authority or power whatever to exercise any control over, or to act upon or grant rate increases to, any utilities except railroad and street car companies.

It is further averred in the petition, "that said board of railroad commissioners is proceeding to act under the said chapter 192, Laws of 1919, and is prescribing rates for and making orders with reference to public utilities doing business in every community of the state of North Dakota. That it is constantly and continuously making orders of the character herein described under circumstances and conditions similar to those existing in the proceeding instituted as hereinbefore alleged for the purpose of securing a reduction of rates charged by the Bismarck Water Supply Company and requiring certain other acts and things to be done. That in its said proceedings every municipality, community, and citizen of the state is interested and affected, and that by reason of the premises the acts of the commissioners under said chapter 192 affect the rates and privileges and franchises of this state. . . . That the matters herein involved are of great public interest and of public concern and involve questions affecting the sovereign rights of the state and of said boards and officers and the operation of said state statute, and are not local in character but will affect each and every municipality and community in the state of North Dakota and the rights of all the citizens of such municipalities and communities with reference to their rights as against the action of public utilities, and of the state board of railroad commissioners pretending to exercise power to increase rates thereof. That the state of North Dakota is a user of such water in its state institutions at Bismarck."

The respondent, Bismarck Water Supply Company, appeared specially, and so appearing, moved the court:

"(1) To dismiss the alternative writ issued in this cause and all proceedings herein and to vacate the restraining orders issued herein, on the ground that this court has no jurisdiction to entertain the petition, and on the further ground that this proceeding is not within the original jurisdiction of this court.

"(2) To dismiss all proceedings herein and to vacate the restraining orders issued in this cause as to the respondent, Bismarck Water Supply Company on the grounds that the controversy between the city of Bismarck and the Bismarck Water Supply Company was, at the time of the issuance of the order by this court, duly pending in the district court of Burleigh county upon an appeal taken by the city from the determination of the board of railroad commissioners; and that said Water Supply Company (which is a corporation organized under the laws of the state of West Virginia) had, prior to the filing of the petition in this court, requested that said cause be removed to the United States district court for the district of North Dakota, and submitted to, and filed for approval by, the district court a removal bond in due form."

The only question necessary to consider in connection with this motion is the first one raised. If this action is one within the original jurisdiction of the court, then it is an action by the state, and not an action by the individuals who appear as relators. The original jurisdiction is "reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of its people; the state uses it to punish or prevent wrongs to itself or to the whole people; the state is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit; he is a mere incident; he brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right." State ex rel. Linde v. Taylor, 33 N. D. 76, 84, L.R.A.1918B, 156, 156 N.

W. 561, Ann. Cas. 1918A, 583; State ex rel. Bolens v. Frear, 148 Wis. 456, 500, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147.

A suit by a state in one of its own courts cannot be removed to a Federal court, unless it is a suit arising under the Constitution or laws of the United States or treaties made under their authority. Germania Ins. Co. v. Wisconsin, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 260. And "a suit cannot be said to be one arising under the Constitution or laws of the United States until it has in some way been made to appear on the face of the record that 'some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.'" Ibid. The record in this case discloses that it does not arise under the Constitution or laws of the United States, or any treaty made under their authority. It arises under, and involves only a construction of, the constitution and laws of this state. So clearly the cause which it is sought to present to this court is not removable, provided it is one within the original jurisdiction of this court. Whether the controversy pending in the district court of Burleigh county between the city of Bismarck and the Bismarck Water Company is removable is not before us, and upon this question we express no opinion.

In connection with the objection to jurisdiction, it was also urged that under the provisions of the Public Utilities Act (Laws 1919, chap. 192), an appeal may be (and has been) taken from the determination of the board of railway commissioners, and that hence this court should in no event assume jurisdiction and determine the controversy attempted to be brought before it.

The question as to what causes are within the original jurisdiction of this court has been considered in many cases. No good purpose would be served by reviewing these cases here, and it would unduly lengthen this opinion to do so. The function and scope of the original jurisdiction was considered by this court quite fully, in State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408. See also State ex rel. Lemke v. Chicago & N. W. R. Co. 46 N. D. 313, 179 N. W. 383. The writer did not believe that this case was one within the original jurisdiction. Neither did he believe that the controversy so presented

was one within either the appellate or supervisory jurisdiction. In other words, the writer was of the opinion that in any view of the case it was, in the first instance, one for the determination of the district court. The writer, therefore, believed that the proceeding should be dismissed. These views, however, were not shared by a majority of the court. They were of the opinion that the cause presented is one within the original jurisdiction; and that this court ought to assume jurisdiction of the controversy as presented by the petition, and determine the validity of the order granting the increase in rates. Accordingly, the motion to dismiss the proceeding was denied and this case was set down for a hearing on the merits. Thereafter, the respondents, the Board of Railroad Commissioners and the Bismarck Water Supply Company, filed separate returns. The return of the Board of Railroad Commissioners is to the effect that the entire record in the matter in which the order complained of was made had been certified to the district court of Burleigh county. In the return, it is denied that the board has, in this case or any other case of similar nature, raised, lowered, or fixed rates for public utilities, or that it contemplates doing so in the future, without giving due notice of such intention as provided by chapter 192, Laws 1919, and after hearing therein. It is further averred that the decision of the board of railroad commissioners was made at a meeting of the board where all the members were present and that two of the members signed the order complained of, while the third member dissented therefrom.

In the return of the Water Supply Company, the jurisdictional questions, raised in the motion to dismiss, are again urged. It is admitted that the relators are taxpayers in the city of Bismarck and users of water therein. It is further admitted that the proceeding before the board of railroad commissioners was instituted upon the resolution set forth above and that the Water Supply Company filed the written answer hereinabove set forth. It is further averred that the board of railroad commissioners had full authority and power to ascertain the reasonableness of rates in said proceedings and to make the order which it did.

Upon the oral argument, the attorneys for the Bismarck Water Supply Company again pressed the jurisdictional objections; namely, that this is not a cause properly within the original jurisdiction of this

court; that a remedy by appeal is provided in the Public Utility Act; that review of the order can be had in that manner only; and that the writ prayed for does not entitle this court to review the validity of the increase in rates. These objections were all presented upon the argument on the motion to dismiss. There has been no change in the views of the different members of the court upon this question since the motion to dismiss was determined. The writer adheres to the views he then entertained and expressed. A majority of the court are of the opinion that this court has jurisdiction of the controversy and may and ought to determine the validity of the order increasing the rates.

This brings us to the merits of the controversy—whether the order made by the railroad commissioners purporting to increase rates of the Bismarck Water Supply Company was and is void as to persons affected thereby and not parties to the proceeding before the railroad commissioners.

It is conceded that the board of railroad commissioners has no power to regulate, control, or fix rates of the Water Company, except as such power is given by statute, for the Constitution does not profess to give the railroad commissioners any powers except such as "shall be prescribed by law." N. D. Const. § 83. Whatever power the board of railroad commissioners have to fix or change the rates of a public utility like the Water Supply Company is conferred by chapter 193, Laws 1919.

Sections 4 and 14 of the Act, provide: "The commissioners shall have the power, *after notice and hearing,* to enforce, originate, establish, modify or adjust and promulgate tariffs, rates, joint rates, tolls and charges of all public utility corporations and whenever the commissioners shall, after hearing, find any existing rates, tolls, tariffs, joint rates or schedules unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commissioners shall, by an order, fix reasonable rates, joint rates, tariffs, tolls, charges or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any provision of law." Section 4. "No change shall be made by any public utility in any tariffs, rates, joint rates, fares, tolls, schedules or classifications,

or service in force at the time this act takes effect, except after thirty days' notice to the commissioners, which notice shall plainly state the changes proposed, and, upon a showing before the commissioners and a finding by the commissioners that such increase is justified." Section 14.

The proceeding before the railroad commissioners was instituted under § 30 of the act which reads: "Complaint may be made by the commissioners of its own motion or by any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any fact or thing done or omitted to be done by any public utility, including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation of any provisions of law or of any order or rule of the commissioners. The commissioners shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof upon the complainant and the utility affected thereby not less than ten days before the time set for such hearing, unless the commissioners shall find that public necessity requires that such hearing be held at an earlier date, provided, that no complaint shall be entertained by the commissioners, except on its [their] own motion, as to the reasonableness of any rates or charges, of any heat, gas, electrical, water or telephone utility, unless the same be signed by the mayor, council, commission or other legislative body of the county, city, town or village, if any, within which the alleged violation occurred, or not less than fifteen consumers or purchasers or prospective consumers or purchasers of such heat, gas, electrical, water or telephone service."

The following section (31) provides: "At the time fixed for a hearing before the commissioners or a commissioner, or the time to which the same may have been continued, the complainant, and the utility or person complained of, and such corporations or persons as the commissioners may allow to intervene, shall be entitled to be heard and to introduce evidence."

The Public Utilities Act is replete with the requirement of notice and hearing. It recognized the right of interested parties to intervene

in hearings as to the reasonableness of rates instituted upon the complaint of city officials. The proceeding before the railroad commissioners under consideration here was instituted upon a written complaint filed by the officers of the city of Bismarck. The Water Supply Company denied the charges contained in the complaint. It asked for no affirmative relief. The issues before the board of railroad commissioners were those framed by the complaint and the answer. It is true the railroad commissioners might have instituted a proceeding on their own motion, but this they did not do. They did not intimate to the parties that they would attempt to adjudge except upon the issues presented to them. They purported to sit in judgment upon the proceeding which the contending parties presented. There was no demand for an increase in rates by the Water Supply Company. There was no reason why any party interested in water rates in the city of Bismarck should anticipate that the hearing before the railroad commissioners could or would result in an increase in rates. Certainly counsel for the Water Company had no idea that the hearing before the railroad commissioners might result in such increase. For in their brief, submitted to the railroad commission at the conclusion of the hearing (which brief has been certified to this court as a part of the record), they said: "Section 4 of the act in question gives the commission authority after hearing, if they find any existing rates or schedules to be unjust, unreasonable, insufficient, or unjustly discriminatory, to fix reasonable rates to be followed in the future. And if upon any hearing a public utility is asking to have its rates raised, above the maximum contained in its charter, such public utility shall furnish to the commission certain things enumerated in § 4. *That part of the section can have no application to the instant case because the respondent in this case at this hearing is not asking to have its rates raised.*"

As we construe the Public Utilities Act, rate increases cannot be ordered except after notice and hearing. And as we read the record certified to us there was neither notice nor hearing of a proceeding for an increase in rates here. Hence, the order granting such increase is void. See Beale & W. Railroad Rate Regulation, § 1143. See also Railroad Comrs. v. Oregon R. & Nav. Co. 17 Or. 65, 11 Am. St. Rep. 778, 19 Pac. 702.

On the oral argument it was contended that the railroad commission-

ers are authorized to make investigation for themselves and to obtain the necessary information to enable them to act in those matters wherein the Public Utilities Act gives them power to act. The record here does not show that the railroad commissioners initiated any proceeding on their own motion. They purported to be hearing a definite controversy which was being submitted to them. Nor do we believe that the act empowers the railroad commissioners to make findings and orders upon specific investigations without affording interested parties notice and hearing. On the contrary we believe that the act clearly contemplates that notice and hearing shall be afforded in all cases where it is sought to change existing rates. If construed otherwise, the statute would be of doubtful validity. United States v. Baltimore & O. S. W. R. Co. 226 U. S. 14, 20, 57 L. ed. 104, 107, 33 Sup. Ct. Rep. 5; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 525, 56 L. ed. 863, 868, 32 Sup. Ct. Rep. 535; Beale & W. Railroad Rate Regulation, § 1143.

It was also suggested on the oral argument that the railroad commissioners had authority to order an increase in rates if they found that to be necessary to enable the Water Supply Company to do some of the things which the city commissioners had asked that it be required to do. We do not believe this argument is sound. When in the determination of a matter submitted to a court it becomes apparent that, to make a full determination, other issues or parties are necessary, the court does not proceed to decide those matters in the absence of issues and parties, but requires issues to be formed and the proper parties to be brought in. While the board of railroad commissioners is an administrative body, it exercises quasi-judicial powers, and is subject to the requirement of due notice. If the board of railroad commissioners deemed it desirable, of their own motion, to take up and determine whether the rates of the Water Supply Company ought to be raised, it should have given notice and afforded hearing thereon before making a determination.

We express no opinion upon the questions actually involved in the proceeding initiated before the board of railroad commissioners upon the complaint of the city of Bismarck. That controversy is now pending in the district court of Burleigh county. But, for reasons already given, we are of the opinion that the question of an increase in rates

was not involved in the proceeding before the commissioners. No hearing has in fact been had before the railroad commissioners on that question; and in our judgment the order purporting to grant an increase in rates is null and void. And the writ of this court will issue restraining the respondents from enforcing the same.

ROBINSON, BRONSON, and GRACE, JJ., concur.

BIRDZELL, J. (concurring specially). My views on the question of the original jurisdiction of this court were fully expressed in the case of State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408, and they have undergone no change since that case was decided. In my opinion, under the showing made in the returns in this case, as well as that made upon the argument in support of the petition, this cause is not properly one within the original jurisdiction of this court. I am, therefore, out of accord with the majority opinion in so far as it decides this to be a proper case for the assumption of original jurisdiction. However, as in the case of State ex rel. Lofthus v. Langer, supra, I deem it my duty to say that, since the majority has decided in favor of the original jurisdiction, it is proper for every member of the court to express his views on the merits of the controversy. On the merits I can add nothing to the principal opinion. I concur in all that is said therein with reference to the validity of the order of the board of railroad commissioners.

ROBINSON, J. (concurring specially). This is an original application to review and cancel an order of the railroad commissioners adding 60 per cent to the water rates of the city of Bismarck.

Objection is made to the original jurisdiction of the court on the ground that the case does not present a matter of public concern, and on the ground that an attempt has been made to remove the matter to the Federal courts. But the case does not present a question arising under the Constitution or laws of the United States. It is not removable. The case does present a question of public concern, because the jurisdiction assumed by the railroad commissioners extends not merely to the city of Bismarck, but to all other cities of the state and affects the public welfare. This court does not assume original jurisdiction

or issue original writs as a matter of course. Before issuing an original writ and making an order for a stay of proceedings, the court does well consider and decide on the propriety of taking jurisdiction, and its decision is final.

The case presents only two questions: (1) Have the railroad commissioners any supervision over the affairs of cities or any right to decide on matters which do not pertain to railroads? (2) If the railroad commissioners have any jurisdiction to fix the water rates of a public utility above the maximum rates of its charter, did they have it in this particular case? There is no claim that the commission has any such power except under the Public Utility Act (Laws 1919, chap. 191). Section 4 provides: The commissioners shall have power, after notice and a hearing, to enforce, originate, establish, modify or adjust and promulgate tariffs, rates, tolls and charges of all public utility corporations. Also, that when any public utility corporation shall ask to have the rates raised above the maximum rates of its charter, it shall furnish the commission with data as follows: (1) The original cost of all its property; (2) the date of the acquisition of such property; (3) the amount of any money invested in the property; (4) the amount of stock outstanding; (5) blue prints showing the location and position of all mains, poles, lines, wires and all other property belonging to the company, and such like.

Now on the record there can be no just claim of any compliance or attempt to comply with § 4 of the act. The public utility company did not file with the commission any petition for an increase of rates. The commission did not give any notice of an application and a hearing for an increase of rates. The city did make application to the commission for an order to compel the utility company to render better service and did allege that in many respects the service rendered was defective, the water muddy and unfit for use. And after hearing on that petition, and on that only, the commission made the order in question. There was no petition for an increase in rates, no hearing or notice or any attempt to give notice in regard to the same. Hence, the order made by the commissioners is contrary to the first principles of law and it is void.

The further question is: Have railroad commissioners any supervision over the affairs of cities and a right to fix the water rates of a

public utility above maximum rates of its charter? The railroad commissioners are constitutional officers and it is hard to say on what principle they can be made beasts of burden. If the legislature may impose on them the duty of fixing rates and charges for public utilities, why not the duty of working six hours a day on the highways? We all know that if the commission do their duty they must, during the business hours of every day, give all their time to the consideration of railroad matters. We know that if the commissioners run around the country and give a large portion of their time—as they have been doing—to hearings in regard to rates, charges, and the conduct of public utility corporations they must neglect their duties as railroad commissioners. We know that a city is competent to contract with public utility companies in regard to rates that may be charged for services and when, as in this case, a city gives to a utility company a charter authorizing it to use the streets of the city and to put down and construct water mains on condition that it shall furnish water at a sum not to exceed a prescribed maximum rate, and that charter is accepted, it constitutes a contract between the city and the company, and the contract is protected against impairment by the Constitution of the United States. The legislature may not pass any law impairing the obligation of contracts and, of course, it may not authorize a commission to do what it is prohibited from doing.

Pursuant to § 130 of the Constitution, the legislature has by law provided for the organization of municipal corporations. Each city, by its council or commission, has power to control its own finances and property and has power to make internal improvements and to engage in any industry, enterprise, or business the same as a natural person. A city is a self-governing, corporate entity, and its contracts with public utility companies are not subject to review or modification by any railroad commission. A contract between a city and a public utility company is protected against impairment just as much as a contract between two natural persons. Hence the order for a 60 per cent increase of water rates is void.

Order reversed and cancelled.

C. B. BACH, as Guardian of the Person and Estate of Ariton Rotiluk, Respondent, v. SAM HARCHENKO and Kosmo Harchenko, Appellants.

(181 N. W. 84.)

Witnesses — testimony of one under guardianship as insane may disclose competency.

1. The testimony of a witness, then under guardianship as insane, may disclose his competency as a witness.

New trial — to take advantage of surprise as testimony of witness relief must be asked of trial court.

2. The discretion of the trial court in denying a new trial on the grounds of surprise because witnesses have testified differently at the trial than at another hearing will not be disturbed where the party claiming the surprise, and having knowledge at the trial of the discrepancy in the testimony, and a witness then available to show such discrepancy, did not call such matter to the attention of the trial court or make a motion for continuance.

Proceedings held without error.

3. In an action for assault and battery it is *held* that the trial court did not err in receiving the testimony of the plaintiff then under guardianship as an insane person; in refusing to grant a new trial upon grounds of surprise by reason of the plaintiff and his son testifying differently upon the trial than upon a former preliminary hearing; and, further, that a fair trial was had and instructions properly given.

Opinion filed January 10, 1921.

Action for assault and battery in District Court, Ward County, *Fisk*, J.

From an order denying new trial the defendants have appealed.

Affirmed.

John J. Coyle, for appellant.

Section 7660, Comp. Laws 1913, subd. 3, provides that a new trial may be granted for "accident or surprise which ordinary prudence could not have guarded against." McGinnity v. Case Threshing Mach. Co. 38 N. D. 288.

NOTE.—The question as to inconsistent testimony in another suit as grounds for new trial is discussed in a note in 42 L.R.A.(N.S.) 692.

A material variance in the testimony given upon the trial of a cause, from that given by the same witnesses at a former trial, is ground for a new trial, when discovered. Guth v. A. B. Bell (Iowa) 42 L.R.A. (N.S.) 692, and note.

Presumptions as to insanity. "Insanity, once established, is presumed to continue until the contrary is proved." 7 Enc. Ev. 462; Jones, Ev. §§ 59, 723; 1 Rice, Ev. 563; 22 Cyc. 1115.

Greenleaf & Wooledge, for respondent.

BRONSON, J. This is an action for assault and battery. The answers allege a counter assault and the use of force alone necessary in self-defense. The jury awarded a verdict of $750 to the plaintiff. The defendants have appealed from an order denying a new trial. The parties were farmers, neighbors, and friends for some eighteen or nineteen years. The alleged assault occurred upon the farm of the plaintiff in May, 1918, and arose over an adjustment of damages for trespassing cattle. Upon order of the court, after this action was instituted and after an adjudication of insanity and commitment of the plaintiff to an insane asylum, the guardian of his person and property was made a party. The defendant complains of the trial court's action in refusing to strike out the testimony of the plaintiff upon the ground of his insanity; in sustaining an objection to a question propounded upon the plaintiff's cross-examination directed towards his manufacture and use of intoxicating liquors; in improperly instructing the jury concerning the subject and rights of self-defense; and in denying a new trial upon the grounds of surprise.

The entire record has been reviewed. It is apparent therefrom that the defendants were accorded a fair trial without the existence of prejudicial error. No objection was made to plaintiff's testifying, until after his testimony had been received, and then, upon the ground that, being under guardianship as insane, the presumption was that his insanity continued and made him incompetent as a witness. No attempt was made by the defendants to test the competency of such witness. 40 Cyc. 2201. His testimony as given justified the trial court in determining his competency as a witness. It was entirely proper for the trial court to sustain objection to the question asked upon cross-examination to the effect that Rotieluk, during the year 1919, was manufac-

turing whisky on his place, and was selling it for $8 per quart there. It was not properly directed towards testing his credibility, nor the cause of his insanity.

The instruction of the trial court concerning the rights of the defendants in self-defense and their legal liability for acts of assault and battery were fairly given. It is unnecessary to recite these instructions in detail. Likewise the trial court did not err in refusing to grant a new trial on grounds of surprise. The affidavits in that regard submitted are to the effect that the plaintiff and also his son, upon a preliminary hearing before a justice of the peace, testified differently than at this trial. One of the parties making such showing was one of the attorneys for the defendant, present in court, and present upon the preliminary hearing. In no manner was this discrepancy in his testimony called to the attention of the trial court, and no application was made for a continuance. The showing was manifestly insufficient to award a new trial. The order is affirmed, with costs to the respondent.

ROBINSON, Ch. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

FRANK BILLINGS, Respondent, v. G. DOERING GRAIN COMPANY, a Copartnership or Sole Trader Composed of G. Doering, Appellant.

(181 N. W. 54.)

Accord and satisfaction — acceptance of warehouseman's check for balance due on wheat storage held not accord and satisfaction of unliquidated demand.

In an action against the warehouseman for an accounting, where it appeared

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NOTE.—For authorities passing on the question as to whether acceptance of remittance of part of an unliquidated or disputed claim, accompanied by a statement that it is "in full" or words of similar import, as assent to its receipt in full payment, see notes in 14 L.R.A.(N.S.) 443, and 27 L.R.A.(N.S.) 439.

On payment of a less sum than due, when enforceable as accord and satisfaction, see note in 64 Am. Dec. 138.

that the plaintiff, from time to time, had delivered wheat to the defendant for storage under an oral contract covering the storage rate and an agreement as to advances, and where storage receipts evidencing a different contract were not issued until long after the delivery of the wheat, and when issued were antedated; and where the defendant, pursuant to notice, had closed the storage account, sending the plaintiff a check for an amount which was insufficient to discharge its obligations under the storage tickets, the defendant receiving the check and cashing it without agreeing to accept it in full satisfaction, it is *held:*

1. Where there was no dispute as to the terms of the original oral contract of storage, as to the number of bushels or the amount of the cash advances, and the only basis for dispute arose out of antedated tickets providing for a different rate of storage than that previously agreed upon, the acceptance of a check purporting to represent the "balance due" does not amount to an accord and satisfaction of an unliquidated demand.

Accord and satisfaction — acceptance of check for balance due held not to establish agreement to receive it in full satisfaction, no consideration being stated.

2. The tender and acceptance of a check purporting to be for a "balance due," where no condition or statement of the consideration was written in the check, and where there was no prior disagreement or discussion as to the amount actually due, does not establish an agreement on the part of the creditor to receive the check in full satisfaction.

Accord and satisfaction — agreement and acceptance of consideration necessary to extinguish obligation under statute.

3. An obligation is not extinguished by an accord and satisfaction under §§ 5824 and 5827, Comp. Laws 1913, unless there be an *agreement* and an acceptance of the consideration thereof by the creditor.

Warehousemen — rights of person storing wheat under an accounting stated.

4. Where the plaintiff brought an action for an accounting for grain stored with the defendant, demanding money judgment, and it appears that the defendant had disposed of the grain soon after its delivery and had closed the storage account, the plaintiff has a right to an adjudication of the proper allowance for storage charges, interest on advances, and the price at which the defendant should be charged for the grain, and in these circumstances the fact that he did not demand the grain is immaterial.

Warehousemen — rights of person storing wheat under storage tickets giving option to demand grain at terminals or terminal bonded warehouse receipts stated.

5. Where the storage tickets gave the plaintiff a right to demand grain at the terminals or terminal bonded warehouse receipts, and where the local cash

buying was on the basis of future options, it was inequitable to credit the plaintiff on the basis of the future options instead of the higher cash price at the terminal market, where the defendant did not have the wheat on hand and was not required to buy wheat locally to fulfil its obligations under the storage tickets.

Opinion filed January 10, 1921.

Appeal from the District Court of Sheridan County, *W. L. Nuessle,* J.

Affirmed.

Aloys Wartner, for appellant.

Acceptance of the check admitted payment in full. Fuller v. Kemp, 138 N. Y. 23, 33 N. E. 1034; Creighton v. Gregory (Cal.) 75 Pac. 569; Barham v. Bank (Ark.) 27 L.R.A.(N.S.) 439; Keck v. Hotel (Iowa) 56 N. W. 438.

Such acceptance is a bar to a subsequent action for the balance, because he cannot accept the benefits of the error and reject the conditions. Nassoly v. Tomlinson, 146 N. Y. 326, 42 N. E. 715; McGregor v. Ware (Mo.) 87 S. W. 981; Beaver v. Porter (Iowa) 105 N. W. 346; Gribble v. Raymond, 109 N. Y. 242.

O. P. Jordal, for respondent.

"Mutual rescission implies that the minds of the parties met with a common desire and purpose to cancel the mutual obligation of the written contract." Arnett v. Smith, 11 N. D. 55.

In order to make an accord out of this the defendant will have to show either payment in full, based upon an actual agreement, or consideration for the accord. Canadian Fish Co. v. McShane, 80 Neb. 551, 114 N. W. 594; Eames Vacuum Brake Co. v. Porsser, 157 N. Y. 289, 51 N. E. 986.

Birdzell, J. This action was tried in the court below as an action in accounting. Judgment was entered in favor of the plaintiff for a total sum of $5,032.50. The defendant has appealed and demands a trial *de novo.*

Beginning in the fall of 1909, the plaintiff at various times delivered wheat to defendant's grain elevator at Goodrich, North Dakota. Between that fall and the fall of 1915, he had delivered a total of 8,159 bushels and 55 pounds. At the time of the first deliveries, plain-

tiff entered into an oral agreement with one Chris Doering, who was then managing the elevator, whereby he could store the grain in the elevator for not over 1½ cents per bushel a year, and, in case he needed to draw money on account, it would be advanced to him without interest. Thereafter the defendant advanced money to the plaintiff as follows: September 17, 1910, $2,000; November 25, 1912, $172.50; November 22, 1915, $500.

Some time in 1913, the exact time not appearing in the record, but presumably before the harvest, Chris Doering was succeeded as manager of the elevator by Julius Doering, who continued as manager during the remainder of the period involved in this accounting. Subsequent to the change in management, approximately 40 per cent of the grain involved in this accounting was delivered to the elevator for storage, without any change in the storage contract. No storage tickets were issued for the grain as delivered. On December 20, 1915, however, Julius Doering executed, and delivered to the plaintiff by mail, three antedated storage tickets. One was dated September 1, 1912, and called for 7,236 bushels, 25 pounds No. 1 wheat; one was dated July 17, 1913, and called for 527 bushels, 5 pounds No. 1 wheat, and the other was dated December 20, 1915, and called for 396 bushels, 25 pounds No. 3 wheat. Each ticket provided for storage at the legal rate, which exceeded the original contract rate, and the ticket for 7,236 bushels 25 pounds had indorsed across the face of it the total amount of cash previously advanced, as follows: "To Cash, $2,672.50." On July 25, 1917, defendant wrote the plaintiff as follows:

"This is to notify you that you must dispose of your stored wheat with us by the 10th of August. As the government is curbing all speculations they have shut off all trading in futures, and I will have to sell my futures which I have been carrying for you, together with the cash grain on hand, and can't buy it back.

"You will be charged full storage and interest on the money we have advanced you at 10 per cent, same as we are paying, and want you to bring in your weight tickets and storage tickets by above date and oblige

"Yours respectfully,
"J. R. Doering,
"Manager.

"P. S. In the event of not hearing from you, we will figure same up according to our records, and deposit same with the First National Bank here to your credit."

On the 10th of August, defendant wrote the plaintiff again as follows:

"Enclosed find our check for $9,267.70, which represents the balance due you after storage, money advanced, and interest on same has been deducted.

"Yours respectfully,
"J. R. Doering."

No statement of the plaintiff's account accompanied the letter transmitting the check, and the plaintiff testifies that he endeavored, without success, to see Doering before he cashed the check. The latter, however, testifies that he saw the plaintiff before the check was cashed, and they discussed the matters in dispute between them, and that plaintiff later deposited the check. At a subsequent meeting, however, something was said with reference to the inaccuracy of the account, and the defendant promised to check over the figures and see if they were correct, and, in case they were found to be incorrect, a check would be sent for any balance due the plaintiff. Accordingly, a check for $17.80, dated the 11th of September, 1917, was mailed to the plaintiff. He received it, but never cashed it. In the lower left-hand corner, in close proximity to the bold-faced type in which the name of the drawee bank was printed, and in very fine script, appears the following: "Bal. due him on wheat to date in elevator." The defendant explains this later check by the correction of an error in figuring dockage twice on a portion of the wheat.

In the defendant's statement of account which was exhibited to the plaintiff after the check had been sent, and which shows the processes by which the balance of $9,672.70 was arrived at, it appears that the defendant figured storage charges at the rate stated in the storage tickets from the time the wheat was originally stored, and 10 per cent interest on the money advanced from the time of the advancement to the date of the closing of the account; it credited the plaintiff with 7,763 bushels and 30 pounds of No. 1 wheat at $2.16 per bushel, and 396 bushels and 25 pounds of No. 3 wheat at $1.96 per bushel.

The trial court reduced the storage charges by applying the original contract rate for the period elapsing between the original storage and the date of the storage tickets, and the storage ticket rate from their date to the date of settlement. It also reduced the interest charges from 10 per cent, from the time the money was advanced, to 7 per cent, the legal rate, from the date borne by the storage ticket containing the indorsement of the amount of cash advanced; and, instead of charging the defendant with the cash value of the wheat on August 10, 1917, at $2.16 and $1.96 per bushel, it charged it at the rate of $2.47 for No. 1 and $2.27 for No. 3, after allowing 13 cents per bushel for handling and transportation.

The appellant urges two main contentions upon this appeal, first, that the conduct in relation to the settlement of August 10th and following amounted to an accord and satisfaction; second, if there was not an accord and satisfaction, it is urged that the plaintiff was paid in full for his wheat at the market price.

The evidence shows that the plaintiff was unable to read English script, and that he did not understand the contents of the defendant's letter of July 25th. It further appears that there never was any real dispute as to the quantity of grain delivered, neither are the terms of the original storage contract in dispute, nor is there any question raised concerning the amount of money advanced by the defendant to the plaintiff from time to time. The only basis for a dispute concerns the rate of storage and the rate of interest, and these are injected into the transaction by virtue of defendant's antedated storage tickets. Even if it be assumed that plaintiff fully appreciated the significance of the defendant's letter of July 25th, in which he was notified that the grain would have to be disposed of by August 10th, he would not be prepared to expect a controversy over anything except the interest on the money advanced; nor, in view of the postscript, was it necessary for him to do any further act in connection with the closing of his storage account, as he was advised that the balance would be placed to his credit in the bank. Notwithstanding Julius Doering's testimony to the contrary, we are of the opinion that everything that was done following the writing of this letter and the closing of the account was done without any discussion between the plaintiff and the defendant; so, it can scarcely be said that the receipt and deposit of the $9,267.70 check amounted to

an accord and satisfaction. There was not even a statement of the account accompanying the check, nor was there any statement that it was given in full settlement. The statement in fine writing on the small check for $17.80, that was never cashed, is certainly not sufficient, in the circumstances disclosed here, to apprise the plaintiff that it was given as a settlement in full, even if it had been cashed by him. In our opinion, the evidence falls far short of establishing an accord and satisfaction of an unliquidated claim. See 1 R. C. L. p. 197; Harrison v. Henderson, 100 Am. St. Rep. 386 note (67 Kan. 194, 62 L.R.A. 760, 72 Pac. 875).

The appellant relies upon § 5825, Comp. Laws 1913, which provides that an accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled; and upon § 5827, which provides that an acceptance by the creditor of the consideration of an accord extinguishes the obligation. These sections do not have the effect contended for in this case. The basis for an accord is an *"agreement,"* and there is lacking here evidence to show that the plaintiff agreed to accept less than he was entitled to receive. If there was no agreement, and we think it clear that there was none, there was no consideration received by the creditor which would extinguish the obligation.

The appellant's second contention is in the alternative. It is first claimed that the plaintiff has established no case for the recovery of money. This is based on the fact that the plaintiff has regarded the defendant as a warehouseman and has never demanded the grain. It is said that the defendant must be regarded as still holding the grain for the plaintiff. The alternative proposition is that, if the defendant be regarded as liable for the value of the grain, the plaintiff has received full value in the price allowed by the defendant in the August settlement. These contentions are without merit. This action was brought long after the defendant had disposed of the wheat and soon after it had closed the storage account, and in bringing it the plaintiff accepted the situation created by the defendant without adopting the defendant's figures. He demanded that there be an accounting that would show the number of bushels, the proper handling charges, the rate of interest on money advanced, and that he be awarded a money judgment for whatever balance would be owing to him on a proper ac-

counting. Furthermore, the defendant, having proceeded to close the storage account, is not in a position to contend that it should be kept open.

As to the price allowed for the grain, the record shows that cash wheat in the Minneapolis terminal market on August 10th was $2.60 for No. 1 and $2.40 for No. 3, and the only justification made in the record for the wide margin between cash wheat and the price allowed the plaintiff was that, owing to unstable market conditions prevailing at the time, due to the war and the intervention of the Federal government, there was in reality no cash market at Goodrich, and that grain could only be safely bought on the basis of September options. The evidence shows that the plaintiff's wheat had all been disposed of long prior to the prevalence of this condition,—in fact very soon after it was hauled in, and the storage tickets gave him a right to demand terminal bonded warehouse receipts or wheat at the terminals; so, inasmuch as the defendant in closing out the plaintiff's storage account was not required to buy wheat in Goodrich nor to sell on the Minneapolis market wheat it held at Goodrich (and it held none in fact), there is no apparent reason why the plaintiff should be made the victim of the unstable cash market. If the market conditions had so changed that future options no longer afforded the protection needed by the defendant against the obligations evidenced by these storage tickets, it should have been more prompt in terminating its warehouseman's relation, as it had the right to do. Comp. Laws 1913, § 6034. It is not equitable to visit the consequences of its failure so to do upon the plaintiff.

The judgment is in all things affirmed.

MERCER COUNTY, Respondent, v. CHRISTIAN SAILER, Appellant.

(181 N. W. 885.)

Highways — appellant from order establishing highway cannot attack same for irregularities in proceedings before commissioners, unless raised in notice of appeal.

In this case the board of county commissioners of Mercer county made an

order establishing a highway. The highway as laid out deviated from the section line, and ran across lands owned by the appellant, Sailer. Sailer took an appeal to the district court from the order of the county commissioners. In his notice of appeal he asserted: (1) That the highway should have been laid out along the section line, and that it was unnecessary to deviate therefrom; and (2) that, in event the highway is laid out according to the order of the county commissioners, he (appellant) will sustain damages in the sum of $2,000, while the county commissioners allowed only $150 for such damages. No claim was made in the notice of appeal or otherwise in the district court, that the proceedings before the county commissioners were irregular or invalid for jurisdictional or procedural reasons. It is *held:*

1. That appellant cannot be heard to say on this appeal that the order made by the county commissioners was invalid on account of irregularities in the proceedings before the county commissioners.

Appeal and error — verdict on damages conclusive where evidence was not transcribed.

2. That upon the record presented on this appeal the jury appears to have passed upon the questions raised by appellant in his notice of appeal, and to have determined such questions against the appellant.

Opinion filed January 20, 1921. Rehearing denied February 17, 1921.

Appeal from the District Court of Mercer County, *Lembke,* J.

Christian Sailer appeals from a judgment relating to the establishment of a highway.

Affirmed.

Thorstein Hyland, J. N. McCarter, and *W. L. Smith,* for appellant.

John Moses and *Charles L. Crum,* for respondent.

CHRISTIANSON, J. This controversy involves the establishment of a highway. The highway was laid out by an order of the board of county commissioners of Mercer county on September 2, 1919. The defendant, being the owner of a tract of land over which the highway was laid out, appealed to the district court from said order of the county commissioners. In the notice of appeal it is stated: "This appeal is taken from all of the proceedings had in said matter and each and every part of said proceedings, including the amount of damages allowed. The amount allowed being only the taxable valuation of said property, and no other damages, and that the appellant claims that the laying out of said highway across the above-described land is

unnecessary as the section line may be used, and the appellant claims further that should the highway be laid out according to the order of the commissioners he will suffer damages in the amount of $2,000, while the amount awarded by the commissioners will amount to about $150."

In the district court, the case was submitted to the jury for a special verdict.

The following questions and answers were embodied in such verdict:

1. Is it practical to build a road on the section line? No.

2. What would be the cost of constructing a serviceable road on the section line? Three thousand dollars.

3. What would be the actual value of the land taken for road purposes if it is laid out as attempted by the county commissioners? Fifty dollars per acre.

4. What would be the incidental damages to the owner's property, other than the value of the land, in case the road is laid out as attempted by county commissioners? No damages.

The record shows that the questions were prepared by one of the parties to the controversy, and submitted to the court; that the court submitted the questions to the other party, and that no objection whatever was made thereto. Upon the return of the verdict the court made an order for judgment, in which the special verdict was set forth; and in which it was further recited that the court "found and determined that the use to which the parcels of land hereinafter described are to be applied is a public use, authorized by law, and that the taking of said lands is necessary for such use." In such order for judgment it was in effect ordered and adjudged that a highway had been, and was thereby adjudged to be, established over the premises of the appellant; that an easement existed in and to the parcels of land so taken for highway purposes; and that the appellant, Christian Sailer, be awarded damages in the sum of $162.50 for the land taken.

Subsequently the appellant, Sailer, moved in the alternative for a new judgment notwithstanding the verdict, or for a new trial. The motion was denied. This appeal, however, is from the judgment alone.

On this appeal it is contended that the proceedings before the county commissioners were irregular and invalid because there was no petition for the establishment of the highway referred to in the judgment and in the order of the county commissioners; that the petition and notice of hearing thereof was not posted in the manner prescribed by law; that the order establishing the highway was not filed with the county auditor within the time prescribed by law; that no surveyor was employed to run levels and establish a grade line, and that no profile of a survey establishing such grade line was filed with the county auditor.

In our opinion these objections are all unavailing. The record shows that there was a petition presented, signed by the requisite number of qualified petitioners, asking for the establishment of a highway running north and south 1 mile between sections 22 and 23, township 146, range 85, in Mercer county. The petition is in the usual form. There is an affidavit showing that copies of the petition were posted on June 24, 1919, in three of the most public places in the vicinity of the aforesaid road. The notice of hearing on the petition is in the record, and is in the usual form, and gives the descriptions of the tracts of land through which the road will pass and the names of the occupants thereof. In such notice the matter is set for hearing on September 2, 1919, at 10 o'clock A. M. at the county auditor's office. There is an affidavit showing that copies of such notice were posted on August 22, 1919, at three of the most public places in Mercer county; to wit, one copy at the courthouse, one at the postoffice, and one at the village hall,—all in Stanton, the county seat of said county. It also appears that notice was sent to the appellant by registered mail. It further appears that the county commissioners employed a surveyor to survey and lay out the proposed road, and his report and a plat of the road and land adjacent thereto were made a part of the order establishing the highway. From such plat it appears that the greater portion of the section line runs through what, on the plat, is denominated in part low ground and in part slough. The road as laid out commences at the southern terminus designated in the petition, and follows the section line (the route designated in the petition) for a distance of some 45 rods and over; it then diverges in a westerly direction and goes on the west side of the slough and low ground (traversed by the

section line), and continues to so diverge until it intersects the section line running along the north side of said sections 22 and 23 at a point 533 feet west of where the section line running north and south between said sections 22 and 23 intersects said section line running along the north side of said sections; and from the said point of intersection due west to the northwest corner of section 22.

The board of county commissioners concededly had jurisdiction to receive and act upon a petition to lay out or alter a highway. Comp. Laws 1913, § 1921. And "whenever the expense of constructing a highway or any part thereof is to be borne by the county, the board of county commissioners thereof have the power to deviate from section and town lines, and condemn and purchase right of way from such highway, whenever, in their opinion, the cost of constructing and maintaining such highway shall be materially decreased, provided that the cost of obtaining such right of way shall be borne by the county." Comp. Laws 1913, § 1922. There is no doubt but that the petition presented in this case was sufficient, both as to form and as to the number and qualifications of signers. It is unnecessary to determine, and we express no opinion, as to whether a highway was or was not already established along the section line by virtue of the Federal grant of 1866, and the acceptance of such grant by the territorial legislature in 1871. See Koloen v. Pilot Mound Twp. 33 N. D. 529, 537, L.R.A. 1917A, 350, 157 N. W. 672. The board of county commissioners of Mercer county was concededly the only body which was vested with original jurisdiction to receive and act upon a petition for the opening, vacating, or changing of a highway in the territory involved in this controversy. Section 1924, Comp. Laws 1913, provides that the petitioners "shall cause a copy of their petition to be posted up in three of the most public places in the county or township having jurisdiction thereof, twenty days before any action is had in relation thereto." Section 1925 provides that, after receiving the petition, the board shall have thirty days in which to make out a notice of the date and place of meeting at which the petition will be heard, and that that notice shall be served and posted ten days before such hearing. Section 1926 provides: "The said board, upon being satisfied that the notices required in the preceding sections have been duly served, or that at least 70 per cent of the legal voters who are owners of lands have signed the

original petition and notice served personally or left at the abode of those who may have failed to sign original petition, proof of which shall be shown by affidavit, shall proceed to examine such proposed highway, and shall hear any reasons for or against the laying out, altering, or discontinuing the same, and decide upon the application as they deem proper."

Our statutes expressly authorize an appeal to the courts by "any person who shall feel himself aggrieved by any determination or award of damages made by the supervisors of any town or towns, or by the commissioners of any county, either in laying out, altering, or discontinuing, or in refusing to lay out, alter, or discontinue any highway." Where the amount of damages claimed exceeds $100, the appeal must be taken to the district court. Such appeal brings before the district court the propriety of the amount of damages and all matters referred to in the notice of appeal. Comp. Laws 1913, § 1938. On such appeal a trial *de novo* is allowed before the court and a jury. Williams v. Turner Twp. 15 S. D. 182, 87 N. W. 968; Morton County v. Forester, 40 N. D. 281, 168 N. W. 787. And it is prescribed that "the court or jury, as the case may be, shall reassess the damages, and make the verdict conform to the justice and facts in the case; but the rule for ascertaining and fixing such judgment shall be based upon the same principles as the supervisors or commissioners were required to adopt in originally determining the same." Comp. Laws 1913, § 1938. See also Miller v. Oakwood Twp. 9 N. D. 623, 84 N. W. 556; Morton County v. Forester, supra.

It is true notice of the hearing before the county commissioners was not served upon the appellant in the manner prescribed by the statute. But appellant never raised this question until after the matter had been tried and determined on the merits, not only by the board of county commissioners, but by the district court. He took an appeal from the determination of the board of county commissioners. In his notice of appeal he specified certain matters of which he complained. He complained of the route taken and the damages awarded. He might have both questions reviewed on such appeal. Semerad v. Dunn County, 35 N. D. 437, 446, 160 N. W. 857. He made no complaint whatever of irregularities in the proceedings of the county commissioners. He brought the controversy into the district court for determination, and

received a determination of the very matters which he, in his notice of appeal, asked to have determined. He tried the matter in the court below upon the theory that the board of county commissioners did have jurisdiction of the matter, and he sought to have correctness of their determination reviewed by the district court. In these circumstances we do not believe that he now can be heard to say that he was not afforded legal notice of the hearing before the county commissioners, or that the proceedings before that board were invalid because of irregularities. See La Duke v. Melin, 45 N. D. 349, 177 N. W. 673, 675, and authorities therein cited. See also William Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926; 37 Cyc. 13; 3 C. J. pp. 718 et seq.

Complaint is also made of the sufficiency of the verdict. As already stated, the record shows that all the questions in the special verdict were submitted to both parties at the time of the trial, and that no objection was made thereto by either side. The evidence has not been transcribed and presented to this court. We have no means of knowing what the evidence established, or what propositions were controverted. The notice of appeal indicates that appellant made two claims,—(1) that the highway should have been laid out along the section line, and that it was unnecessary to deviate therefrom; and (2) that, in event the highway is laid out according to the order of the county commissioners, appellant will sustain damages in the sum of $2,000, while the county commissioners allowed only $150 for such damages.

It seems that the jury, in their special verdict, found on these two questions. They found that it is not practical to build a road on the section line; that to construct a serviceable road there would cost at least $3,000; that the actual value of appellant's land taken for road purposes is $50 per acre, and that no other damages will be sustained by reason of such taking. We have no means of knowing what the evidence was. It may be that the undisputed evidence showed that it would cost very little to construct a highway along the route designated by the county commissioners. In view of the answers of the jury it must be assumed that the evidence showed that it would cost at least $3,000 to build a road on the section line which was at all serviceable; and that under all the circumstances it was not practical to build a road on the section line.

We find no error justifying a reversal of the judgment. It must be affirmed. It is so ordered.

ROBINSON, Ch. J., and BRONSON, and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

EDMUND DUBS, an Infant, by Rudolph Dubs, Guardian ad Litem, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, Appellant.

(181 N. W. 606.)

New trial — second motion for new trial cannot be based on any ground assigned in a previous motion which was denied.

In an action to recover damages for personal injuries, where the trial court denied a motion for new trial and entered judgment on a special verdict, from which judgment and the order denying the motion the plaintiff appealed, and where the plaintiff subsequently made a second motion for a new trial based upon the grounds formerly assigned, and, as an additional ground, the loss, without plaintiff's fault, of the stenographic notes of the court reporter, in response to which motion the trial court vacated the judgment and order previously entered and granted the new trial on the additional ground assigned, it is *held:*

1. Where, after motion for a new trial is denied, judgment is entered and a subsequent motion for a new trial is made, the ruling thereon cannot be based upon any ground assigned in the previous motion. The case of Davis v. Jacobson, 13 N. D. 430, is not applicable.

New trial — statutory grounds exclusive.

2. The grounds for a motion for a new trial stated in § 7660, Comp. Laws 1913, and the grounds upon which a new trial may be granted by the court upon its own motion as stated in § 7665, Comp. Laws 1913, are exclusive.

NOTE.—It is held that loss of the trial record, or of documents and evidence that are important for a proper decision of the suit, imposes the necessity of a new trial in order that the litigants may obtain full justice with respect to their controverted rights, as will be seen by an examination of notes in 25 L.R.A.(N.S.) 861, and L.R.A.1915B, 353, on disposition of appeal or motion for new trial, where, without fault of appellant, the record is lost or incomplete.

On inability to perfect record for appeal as grounds for new trial, see note in 13 A.L.R. 102.

Opinion filed January 20, 1921. Rehearing denied February 17, 1921.

Statement of facts by BIRDZELL, J. This is an appeal from an order granting a new trial. The order was made in the circumstances appearing in the following statement of facts:

In April, 1917, the plaintiff instituted this action as guardian ad litem of his son, who was injured in July, 1912, by being run over by one of the defendant's trains. The facts in connection with the accident are stated in a prior report of this case (Dubs v. Northern P. R. Co. 42 N. D. 124, 171 N. W. 888), and need not be repeated here. Upon that appeal a majority of this court was of the opinion that there was sufficient evidence upon which the jury might base a finding that the engineer saw the boy in time to avoid injuring him. The court, however, was of the opinion that the jury had not so found. In reversing the order granting judgment for the defendant *non obstante,* therefore, entry of judgment was not directed, but the case was remanded for further proceedings upon the motion for a new trial, and it was suggested that, in the event of a new trial, specific interrogatories should be submitted to the jury "upon the controlling questions of fact arising under the last clear chance doctrine." 42 N. D. 131. A new trial was subsequently ordered and the case submitted to the jury May 29, 1919, for a special verdict. In the special verdict the jury found as one fact that neither the engineers nor the fireman saw the boy on the track, in time, by the exercise of ordinary care, to stop the train and avoid injuring him. The defendant moved for a judgment on this verdict and the plaintiff moved for a new trial. On May 20, 1920, the plaintiff's motion for a new trial was denied and the court ordered judgment for the defendant on the verdict. On May 22, 1920, judgment was accordingly entered for the defendants. The plaintiff subsequently appealed from the judgment and from the order denying a new trial. The notice of appeal is dated July 9, 1920, the affidavit of mailing states that it was mailed July 31, 1920, and these, together with the undertaking, were filed in the office of the clerk on August 2, 1920. On July 13th, a second motion for a new trial was made upon the ground that the court reporter's short-hand notes of the proceedings taken at the trial were lost, and the plaintiff was consequently unable to perfect a statement of the case. Also on grounds of irregularity in

the proceedings, insufficiency of the evidence, and errors of law. This motion was made upon the affidavits of plaintiff's counsel, and the court reporter, the pleadings, special verdict, order for judgment, and the specifications of the insufficiency of the evidence, and errors of law which had been previously served and filed. The court granted this motion, and, on August 2d, signed an order revoking the previous order denying new trial and granted a new trial. It will be noted that the last order bears the same date as the filing of the appeal papers appealing from the judgment that is vacated by this order. In the order it was stated that it appeared to the court that the reporter's notes had been lost through the theft of his traveling bag; that it appeared impossible to substitute said shorthand notes or the testimony taken at the trial, instructions of the court, and other proceedings therein; that the plaintiff was unable to procure a transcript of the proceedings of the trial, and would be prevented from having the court's orders granting judgment and denying the motion for a new trial reviewed by the supreme court, and this without any fault or negligence on the part of the plaintiff and his attorneys. It was therefore ordered that the previous order denying plaintiff's motion for a new trial and the judgment dismissing the case be vacated and the plaintiff be granted a new trial. The order recites that it is based on the records and files in the action, and especially on the affidavit of Leo Broderick, Court Reporter, and states specifically that it is made on the ground of the loss of the shorthand notes and for the purpose of having the case reviewed by the supreme court.

Appeal from the District Court of Grant County, *J. M. Hanley,* J. Reversed.

Young, Conmy, & Young, for appellant.

The grounds for new trial specified in the statute are exclusive, and the court cannot grant a new trial for any ground not so specified. Amacher v. Johnson (Ind.) 91 N. E. 928; Cooley v. Kelley (Ind. App.) 96 N. E. 638; Jones v. Bryan (Ind. App.) 102 N. E. 153; St. Louis, I. M. & S. R. Co. v. Lewis (Okla.) 136 Pac. 396; First Nat. Bank v. Farmers State Guaranty Bank (Okla.) 161 Pac. 1063; Higgins v. Rued, 30 N. D. 551; McKenzie v. Bismarck Water Co. 6 N. D. 361.

The failure or inability of a court reporter to furnish a defeated party with a transcript of the evidence is no ground for a new trial. Higgins v. Rued, 30 N. D. 551; Golden Terra Min. Co. v. Smith, 2 Dak. 377; Peterson v. Lundquist (Minn.) 119 N. W. 50; Bucy v. Ardmore Brick & Tile Co. (Okla.) 160 Pac. 1126.

Jacobsen & Murray, for respondent.

As a matter of strict legal right, plaintiff is entitled to a new trial for that reason alone (inability to have case reviewed on account of loss of stenographic notes). Missouri Land Co. v. Hastad, 27 N. D. 597; Bruegger v. Cartier, 20 N. D. 72; Elliott v. State (Okla.) 113 Pac. 213; Tegler v. State, 107 Pac. 949.

Where a party has regularly taken exceptions in a cause, and has lost the benefit of them without fault of his own, a new trial may be granted. He has a right by law to the judgment of the higher court upon the decision by which he feels himself to be aggrieved, and a new trial may be his only remedy. Bailey v. United States (Okla.) 104 Pac. 917; Richardson v. State (Wyo.) 89 Pac. 1027.

The overwhelming weight of authority is that a motion for new trial may be reheard, vacated, or modified for any reasonable cause. 29 Cyc. 1028, ¶ 9; Re Smith (Mich.) 158 N. W. 148; Robinson v. Superior Ct. (Cal.) 154 Pac. 8.

BIRDZELL, J. (after stating the facts as above). The only specification of error on this appeal is the action of the court in vacating the order and judgment previously made and entered, and in granting a new trial. We are of the opinion that the court erred in the manner specified.

Without passing on the effect upon the jurisdiction of the trial court of the respondent's appeal from the judgment and the order denying a new trial, we are of the opinion that the strongest position he can occupy with respect to this order is that, after the first motion was denied and judgment entered, he might have moved for a new trial again upon an additional ground, such as newly discovered evidence, not embraced in his former motion. The ruling of the trial court on the former motion had become final, and, so far as that court was concerned, it could not be reviewed. Jones v. Frank, 62 Okla. 26, 161 Pac. 795; Luke v. Coleman, 38 Utah, 383, 113 Pac. 1023, Ann. Cas. 1913B, 483; Coyle v.

Seattle Electric Co. 31 Wash. 181, 71 Pac. 733. A trial judge cannot review its own rulings indefinitely after they have become embodied in judgments. If so, judgments would never become final and the limitation upon appeals would become ineffective. There would be no end to litigation. While the respondent relies upon the case of Davis v. Jacobson, 13 N. D. 430, 101 N. W. 304, in support of his contention that this court must consider the order appealed from as granting a new trial upon any ground which might support it, regardless of the fact that the trial judge stated specifically why it was granted, we are of the opinion that the rule of that case does not apply here; for, presumably, all grounds except the loss of the stenographic notes had been presented to the trial judge in the original motion, and at the time this second motion was made he was without power to reconsider the grounds ruled upon in deciding the first. The order appealed from must, therefore, stand or fall, depending upon the sufficiency of the ground assigned to support it; namely, the loss of the shorthand notes.

The second motion for new trial was not based upon any grounds recognized by the statute as a foundation for such a motion. Comp. Laws 1913, § 7660. Neither did it call to the attention of the trial court any ground which would have authorized it to grant a new trial upon its own motion. Comp. Laws 1913, § 7665. Even if the motion be regarded as an application for relief from a judgment on the ground of inadvertence or surprise under § 7483, Comp. Laws 1913, it is equally without statutory support, for the surprise or inadvertence involved in the loss of the shorthand notes in no way contributed to the entry of the judgment or affected the defense to the same.

It his been repeatedly held in this and other jurisdictions that the statutory grounds for motion for a new trial are exclusive. Higgins v. Rued, 30 N. D. 551, 153 N. W. 389, and cases therein cited; Baker v. Citizens' State Bank, — Okla. —, 177 Pac. 568; Stanton v. Chicago, B. & Q. R. Co. 25 Wyo. 138, 165 Pac. 993, 167 Pac. 709. And judgments cannot be vacated in district court except in pursuance of statory authority. McKenzie v. Bismarck Water Co. 6 N. D. 361, 71 N. W. 608.

The respondent, however, relies upon the doctrine sometimes asserted, to the effect that where a party, without his fault, is deprived of the right to have his case reviewed by a higher court through inability to

procure a transcript and a settled statement of the case, a new trial may properly be awarded. Much authority may be found in support of this rule. 20 R. C. L. 288; 12 Ann. Cas. 1056, note; 25 L.R.A.(N.S.) 860, note; L.R.A.1915B, 353, note. Among the principal cases supporting this doctrine are: State v. Bess, 31 La. Ann. 191; Borrowscale v. Bosworth, 98 Mass. 34; Crittenden v. Schermerhorn, 35 Mich. 370; State v. Reed, 67 Mo. 36; State ex rel. Downing v. Gaslin, 32 Neb. 291, 49 N. W. 353; Sanders v. Norris, 82 N. C. 243; Bailey v. United States, 3 Okla. Crim. Rep. 175, 25 L.R.A.(N.S.) 860, 104 Pac. 917; Tegler v. State, 3 Okla. Crim. Rep. 595, 139 Am. St. Rep. 976, 107 Pac. 949; Elliott v. State, 5 Okla. Crim. Rep. 63, 113 Pac. 213; Fire Asso. of Phila. v. McNerney, — Tex. Civ. App. —, 54 S. W. 1053; Nelson v. Marshall, 77 Vt. 44, 58 Atl. 793; Richardson v. State, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048; Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582. These authorities are of little assistance to us in determining this appeal; for, while an examination of them discloses that the principle has frequently been applied where invoked in a proper proceeding, it does not appear that the authorities have recognized the rule as being sufficiently potent to work an amendment of the statute governing motions for a new trial. Upon examination it will be found that the courts of Michigan, Missouri, North Carolina, Oklahoma, and Wyoming recognized the right and the power of an *appellate* court to grant a new trial where an appellant—particularly in criminal cases—is, without his fault, unable to submit a statement of the case or bill of exceptions. It will do this rather than affirm a judgment which, upon adequate review, might be found to be erroneous. It seems to be the rule, too, in the criminal court of appeals in Oklahoma, that the trial court may award a new trial on similar grounds (Elliott v. State, 5 Okla. Crim. Rep. 63, 113 Pac. 213), but the supreme court of that state has steadily adhered to the rule that the loss of stenographic notes is not a sufficient ground for a new trial. Butts v. Anderson, 19 Okla. 369, 91 Pac. 906; Whitely v. St. Louis, E. R. & W. R. Co. 29 Okla. 63, 116 Pac. 165; Farmers' & M. Bank v. Welborn, 32 Okla. 1, 121 Pac. 620; see also Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50. Also, that the statutory grounds for a new trial exclude all others. St. Louis, I. M. & S. R. Co. v. Lewis, 39 Okla. 677, 136 Pac. 396; First Nat. Bank v. Farmers' State Guaranty

Bank, 62 Okla. 30, 161 Pac. 1063; Baker v. Citizens' State Bank, — Okla. —, 177 Pac. 568. It further appears that the legislature of Oklahoma has amended the statute governing new trials in civil actions, by adding a paragraph to the effect that a new trial may be granted "when, without fault of complaining party, it becomes impossible to make case made." Okla. Rev. Laws 1910, § 5033. See Bucy v. Ardmore Brick & Tile Co. 61 Okla. 302, L.R.A.1917B, 1073, 160 Pac. 1126.

It will be found that some of the foregoing authorities also support an equitable action looking toward relief in the shape of a new trial, where the appellant, without his fault, will lose the benefit of review by the appellate court. And some support an application, initiated by summons, in the nature of an equitable action. Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491; Marshall v. Marshall, 7 Okla. 240, 54 Pac. 461; Whitely v. St. Louis, E. R. & W. R. Co. 29 Okla. 63, 116 Pac. 165. This remedy differs materially from a motion, and does not trench upon statutes enacted to govern and simplify procedure.

Support will also be found in the authorities hereinabove cited, for the proposition that a new trial may be granted by the trial court on the ground of inability to procure a statement of the case upon appeal in jurisdictions where the grounds for the motion are not restricted or stated in the statutes. This will be found to be true in England, District of Columbia (see Hume v. Bowie, supra), Massachusetts, Texas, Vermont, and perhaps other jurisdictions.

While recognizing to the fullest extent the salutary principle for which the respondent has so ably contended, we fail to see wherein it lends legal support to the action of the trial judge in ordering a new trial in response to a motion embodying no statutory grounds, or no ground appealing to the power he could exercise of his own motion. We find no occasion to qualify our previous expressions to the effect that the statutory grounds are exclusive. It follows that the order appealed from is erroneous, and it is reversed.

Robinson, Ch. J., and Christianson, J., concur.

Grace and Bronson, JJ., concur in the result.

RENALDO HUFFMAN, Appellant, v. BOARD OF SUPERVISORS OF THE TOWNSHIP OF WEST BAY, BENSON COUNTY, NORTH DAKOTA, Respondent.

(182 N. W. 459.)

Highways — highways held established on all section lines within Dakota territory where practicable.

1. Under U. S. Rev. Stat. § 2477, granting the right of way for highways over public lands not reserved for public use, and the act of the legislative assembly of Dakota territory (Laws 1871, chap. 33), declaring all section lines in the territory of Dakota to be public highways as far as practicable, public highways were located and established upon all section lines within the territory where it was practicable to construct highways.

Highways — highways as established on section lines held not surrendered by subsequent legislation.

2. The highways so established on section lines have not been vacated, nor have the rights of the public in such highways been surrendered, by any subsequent legislation.

Opinion filed January 22, 1921.

Appeal from the District Court of Benson County, *Buttz*, J.

Plaintiff appeals from a judgment holding that a highway has been established.

Affirmed.

Wardrope & Butterwick, for appellant.

This petition was not signed by six legal voters of West Bay township who own real estate in the vicinity of the road to be established. Under such circumstances the petition was not sufficient to clothe the board with jurisdiction to act. Bockoven v. Board of Supervisors (S. D.) 83 N. W. 335; Warne v. Baker, 35 Ill. 382; Highway Comrs. v. Ellwood, 193 Ill. 304; Hall v. McDonald, 171 Ind. 9; Thrall v. Gos-

NOTE.—That the Act of 1871, enacted by the territorial legislature of Dakota, declaring all section lines to be public highways as far as practicable, constituted an acceptance of the congressional grant of the right of way for the construction of highways over public lands, will be seen by an examination of the authorities collated in a note in L.R.A.1917A, 355, on necessity and sufficiency of acceptance of grant of right of way over public land for public highway.

nell, 28 Ind. App. 174; Wilson v. Twp. (Mich.) 49 N. W. 572; Johnson v. Clontarf (Minn.) 108 N. W. 521; State v. Otoe, 6 Neb. 129; Hyde Park v. County Comrs. 117 Mass. 416; Lesieur v. Custer County (Neb.) 85 N. W. 892; Meek v. Meade County (S. D.) 80 N. W. 182.

Section 1920, Comp. Laws 1913, specifies that section-line roads shall be opened to a width of 2 rods on each side of the section line. The board has no power to open a public highway along section lines of any other width. McGarry v. Runkell (Wis.) 94 N. W. 662; Shields v. Ross, 158 Ill. 214.

The order made by the board in this case was an order beyond its power to make, and has no validity in law, and is ineffectual for any purpose. Comp. Laws 1913, §§ 2046, 2047; 37 Cyc. 57; Shields v. Ross, supra.

Where no evidence is introduced in the appellate tribunal, the review proceeds on questions of law and jurisdiction, much in the same manner as in a writ of error. 26 Cyc. 816, and cases cited; Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Seiberling v. Mortinson, 10 S. D. 644, 75 N. W. 202; State v. Haverly (Neb.) 87 N. W. 959; Novotny v. Danforth, 9 S. D. 301, 68 N. W. 749, and cases cited; Jarmine v. Swanson (Neb.) 120 N. W. 437; 15 Standard Proc. 41, and cases cited.

Sinness & Duffy, for respondent.

It has frequently been held that, although the proceedings of a board relative to the establishing of a highway may be defective, the question can only be raised by someone affected by such defects. Bockoven v. Board of Supervisors (S. D.) 83 N. W. 335; 13 R. C. L. subject, Highways, § 46.

That courts will not entertain cases for the settlement of moot questions is also well established. 2 R. C. L. 169; 3 C. J. 357; 4 C. J. 575, and numerous cases cited; Re Kaeppler, 7 N. D. 307; State v. Albertson, 25 N. D. 206; School Dist. v. Thompson, 27 N. D. 459; Thompson v. Vold, 38 N. D. 569.

We believe the issue of whether or not section lines are public highways has been squarely determined in the following cases: Faxon v. Lallie Twp. 36 N. D. 634, 163 N. W. 531; Kolven v. Pilot Mound, 33 N. D. 529, L.R.A.1917A, 350, 157 N. W. 672; Wenberg v. Gibbs Twp. 31 N. D. 46, 153 N. W. 440.

The grant is accepted by the passage of a state law declaring that

the land for a specified width along all section lines shall be public highways, and all subsequent grantees of the government take subject to the rights thereby acquired. 13 R. C. L. subject, Highways, § 13; Wells v. Pennington County, 2 S. D. 1, 39 Am. St. Rep. 758; Lawrence v. Ewart, 21 S. D. 580, 114 N. W. 709; Lowe v. East Sioux Falls Quarry Co. 25 S. D. 393, 126 N. W. 609; Keen v. Fairview, 8 S. D. 553, 67 N. W. 623; Tholl v. Koles, 65 Kan. 802.

Per Curiam. On December 28, 1917, the board of supervisors of West Bay township in Benson county made an order laying out, establishing, and opening a highway "beginning at the common corner of sections 9, 10, 15, and 16 in township 153, north of range 67 west of the fifth principal meridian, and running due east along the section line between the said sections 10 and 15 to the place where said section line intersects the meander line bounding Devils Lake, such highway to be opened for a distance of 33 feet on either side of said section line from the said common corner of the four sections hereinbefore mentioned to the intersection of the section line aforesaid with the west boundary of the village of Minnewaukan, Benson county, North Dakota, and for a distance of 33 feet on the north side of said section line from the point of such intersection with the west boundary of Minnewaukan to the place of intersection of the said section line with the meander line aforesaid."

The appellant Huffman, who is the owner of the southwest quarter of section 10 and the west half and certain outlots in section 15, appealed from such order to the district court of said county, as provided by law. In his notice of appeal he asserted that the proceedings before the board of supervisors were invalid for certain alleged defects in the petition, and want of jurisdiction in the board to lay out that part of the highway which adjoined, and formed the boundary line of, the village of Minnewaukan.

Appellant did not, however, content himself by merely assailing the jurisdiction of the board of supervisors. In the notice of appeal he asked that, in event the objections to the jurisdiction were overruled," a trial of said cause be had anew in the district court. "(1) On the necessity of establishing such highway; (2) on the question of the abandonment of said highway; (3) on the question of damages sustained

by appellant; and as further grounds for appeal asks that, upon such trial, he be allowed damages in the sum of $1,000."

The trial court entered judgment: "That the strip of land extending for 2 rods on either side of the section line between sections 10 and 15 of township 153, north of range 67 west of the fifth principal meridian, in so far as the same is without the incorporated limits of the village of Minnewaukan, is now and since the year 1871 has been a public highway;" and directed that the proceeding be dismissed. This appeal is from such judgment.

On this appeal it is urged that the trial court erred in refusing to reverse the order of the board of supervisors. It is first contended that such order was invalid for the jurisdictional reasons above referred to. While these objections are referred to in the notice of appeal, the record before us does not show that they were in fact presented to the district court except in so far as the reference thereto in the notice of appeal presented them. And while the trial judge refers to these objections in his memorandum decision he refrains from ruling thereon. Of course if the jurisdictional objections had been well taken, there would have been no occasion to take evidence on the merits of the controversy. But a transcript of the proceedings had in the district court has been certified to this court, and it appears therefrom that the parties proceeded to trial and adduced evidence relating to the three questions on which a trial on the merits was requested without the appellant, Huffman, in any manner, either raising or reserving the jurisdictional objections. In these circumstances, it is somewhat doubtful if these objections can be urged now. It seems rather that these objections were waived (37 Cyc. 130), and that the parties elected to try the controversy on its merits. However, we find it unnecessary to determine whether these objections may be now urged; and, if so, whether there is any merit in them.

The evidence in this case shows that the greater portion of the section line in controversy was in actual use and traveled by the public generally as a highway for some nine or ten years. About eight or nine years ago, right of way for a highway was procured on the quarter line lying half a mile south of the section line involved here. The highway on the quarter line was a continuation of one of the streets in the village, and ran to the section line lying immediately west,—something less than

half a mile distant, which section line forms the western boundary line of the village. The highway on the quarter line was never laid out by any board having jurisdiction to so do, but it has been traveled by the public. Sometime after travel began over such quarter line, the then owner of the lands adjacent to the section line in controversy, here, in constructing a pasture, put a fence across the section line, and it has not since been traveled.

There is no contention that any proceedings were ever instituted before any board having jurisdiction to vacate the highway on the section line. Under the evidence there is no question but that it is entirely practicable to construct a highway on the section line in controversy.

It is true there is another road running out of the village of Minnewaukan only about one-half mile south of the road which is involved in this proceeding. But this former road connects with the section line running south from the common corner of sections 9, 10, 15, and 16; and the evidence shows that there is a hill on this section line, and that the result is that the grade is not as favorable for the hauling of loads over the former road as it will be over the road involved in this proceeding. Whatever difference of opinion may exist as to whether any proceedings are necessary to *open* a highway on a section line (and upon this we express no opinion), there can be no question but that no proceedings are necessary to *establish* a highway on a section line. In other words, we believe that the territorial legislature (Laws, Dakota Territory 1871, chap. 33), by accepting the Federal grant (U. S. Rev. Stat. § 2477, Comp. Stat. § 4919, 8 Fed. Stat. Anno. 2d. ed. p. 785) *established* a system of highways upon all the section lines in the state, as far as it is practicable to use them for highway purposes. See Wenberg v. Gibbs Twp. 31 N. D. 46, 153 N. W. 440; Koloen v. Pilot Mound Twp. 33 N. D. 529, L.R.A.1917A, 350, 157 N. W. 672; Faxon v. Lallie Civil Twp. 36 N. D. 634, 163 N. W. 531. The rights acquired by the acceptance of the Federal grant by the territorial legislature have not been surrendered by subsequent legislation. Faxon v. Lallie Civil Twp. supra. Hence, in so far as the order of the board of supervisors attempted to locate and establish a highway along the section line, their action was entirely superfluous. No action was necessary to locate or establish a highway, unless it became necessary to deviate from the section line. Inasmuch as it is undisputed that it is entirely practicable

to use the section line for highway purposes, a public highway was unquestionably located and established on such section line by virtue of the legislative acceptance of the Federal grant. The highway so established has never been vacated, and still exists. Hence, the appellant could in no manner be prejudiced by the action of the board of supervisors in so far as it attempted to *establish* a highway where one was already established.

In this case, the evidence shows that the highway had in fact been *opened* and utilized by the public generally for a period of some nine or ten years. During this time, the then owner of the land apparently made no objection whatever to the travel thereon. Apparently it was recognized by all as a public highway duly opened for travel. As already stated, it is conceded that the highway has never been vacated by any board having jurisdiction so to do. While a highway cannot be *established* or *created* by user for a less period than that prescribed by law as sufficient to create a highway by prescription (Burleigh County v. Rhud, 23 N. D. 362, 136 N. W. 1082; Koloen v. Pilot Mound Twp. 33 N. D. 529, L.R.A.1917A, 350, 157 N. W. 652), it does not follow that a highway which has been legally established may not be opened by public user for a sufficient length of time to impress it with the characteristics of a highway. It is a maxim of the common law,—"once a highway, always a highway."

Under the facts in this case, we believe that the trial court was right in concluding, as it did, that a highway had been established over the section line in controversy by virtue of the legislative acceptance of the Federal grant, and that such highway still exists.

Affirmed.

ROBINSON, Ch. J. (concurring specially). This case presents an appeal from an order opening a section line highway. By the statutes of the United States, and of this state, and by universal custom, the land for two rods on each side of a section line is a highway and the public have a right to use the same as a highway without any order opening it.

The question is so well settled there is no occasion for discussing it. Hence appellant had no right to fence or obstruct the section line highway, and the township supervisors had a right to open it without any petition.

Judgment affirmed.

RUSO FARMERS SUPPLY COMPANY, a Corporation, Appellant, v. P. J. JACOBSON and THE MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Garnishee.

(181 N. W. 370.)

Appeal and error — regularity of payment by garnishee under order of court held moot where no stay taken.

1. Plaintiff recovered judgment against defendant, and caused to be issued execution thereon. In aid of the execution, it caused garnishee summons to be served upon the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, which was indebted to the defendant in the sum of $375.96, as disclosed by its affidavit. For this amount defendant interposed a claim for exemptions, and also, interposed an answer to the same effect, in the garnishment proceedings, in the defense of the garnishee. The court made its order, allowing defendant his exemptions, and ordered the garnishee to pay the above sum of money to the defendant. No stay of the order was procured, and the garnishee paid the money to defendant, and subsequently plaintiff appealed from the order. *Held*, for reasons stated in the opinion, that the question of whether or not the garnishee was lawfully authorized to pay the money to the defendant has become moot.

Appeal and error — failure to serve notice of appeal on garnishee held dismissal of proceedings.

2. Upon appeal from the order, no notice thereof was served upon the garnishee. *Held*, that, in effect, this was a dismissal of the garnishment proceedings against it, and the appeal is dismissed.

Opinion filed January 22, 1921.

Appeal from an order of the County Court of Ransom County, *F. S. Thomas*, J.

Appeal dismissed.

Charles G. Bangert, for appellant.

Since exemption of property from creditor's process is purely statutory, there must be a strict compliance with the statute in order to obtain the benefits of the exemption provisions. Purcell v. Goldstein, 23 N. D. 257.

Curtis & Remington, for respondent.

The law denying exemptions is unconstitutional. **O'Leary v. Croghan** (S. D.) 173 N. W. 844.

Statutes similar to chapter 155, Laws 1915, have been held unconstitutional in the following cases: Coleman v. Balindi, 22 Minn. 147; Boffarding v. Mengelkook (Minn.) 152 N. W. 135; Burrows v. Brook (Mich.) 71 N. W. 460.

GRACE, J. This is an appeal from an order of the county court of Ransom county, allowing exemptions claimed by defendant. The material facts are substantially as follows:

Plaintiff is a corporation, engaged in the general merchandise business, consisting of dealing in groceries, clothing, and other family supplies.

The defendant became indebted to the Ruso Mercantile Company in the sum of $720.30, part of which was represented by a promissory note, and part by an open account for the purchase price of merchandise. That company assigned the note and account to the plaintiff herein, whose place of business is at Ruso, North Dakota. The defendant is an employee of the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company, a corporation engaged in operating a railroad.

Plaintiff obtained a judgment against the defendant for the amount above stated. It procured an execution to be issued upon the judgment, and, in addition thereto, served a garnishment summons upon the defendant and the garnishee. The latter filed its disclosure, admitting an indebtedness in favor of the defendant for the sum of $375.96. No other person made any claim to the money in the control and possession of the garnishee, other than the defendant. That money is the property of defendant, and he is entitled to receive the same, unless plaintiff is entitled to receive it by reason of the garnishment proceedings. The defendant filed a schedule of personal property, and claimed as exempt all the property there listed, including the $375.96. He is a married man and the head of a family. Due notice of the time and place was given of the hearing upon the claim of exemptions. The hearing was had, after which the court made the following order, allowing exemptions:

Order.

The matter entitled as aforesaid having come on for hearing on the

25th day of September, 1920, upon the application of the defendant to have set aside to him as exempt, property hereinafter described, and the court having requested that the matter be submitted upon affidavits, and both sides having accordingly served and filed their respective affidavits, and the court having fully considered the same and being fully satisfied, it is accordingly ordered that the following personal property of the defendant, to wit:

Household goods of the value of	$300
One Ford car, 1919 model, value	175
Cash in hands of garnishee and due to the defendant	375
Total	$850

be and the same is hereby set aside unto the defendant as exempt from process, and it is further ordered that the garnishment proceedings herein be dismissed, and that the garnishee do pay over to the defendant all sums due to him for any reason forthwith.

Dated at Lisbon, N. Dak., this 6th day of October, 1920.

(Signed) F. S. Thomas.

Judge of the County Court of Ransom County, N. Dak.

Before the appeal was taken from the order dismissing the garnishment proceedings, the garnishee paid the defendant the amount due him, in compliance with the order. Upon the taking of the appeal, the plaintiff did not take any steps to procure a stay of the order setting aside the exemptions and directing the garnishee to pay the money to defendant, and it was paid prior to the time of taking this appeal.

Section 7577, Comp. Laws 1913, provides: "In case the answer of the garnishee shall show indebtedness to the defendant, he may pay the amount thereof, less $3 for his costs to the officer having a warrant of attachment in the action, if any, or otherwise to the clerk of the court: or, if the garnishment is in aid of an execution, to the sheriff having the execution; and the officer to whom such payment is made shall give him a receipt specifying the facts, and such receipt shall be a complete discharge of all liability to any party for the amount so paid. If the answer discloses any money, credits, or other property, real or personal, in the possession or under the control of the garnishee, the officer having

a writ of attachment or an execution, if any, may levy upon the interest of the defendant in the same; *otherwise the garnishee shall hold the same until the order of the court thereon.*"

Section 7581, Comp. Laws provides, that the proceedings against the garnishee shall be deemed an action by the plaintiff against the garnishee and the defendant, as parties defendant, that all provisions of law relating to proceedings and civil actions at issue, and other matters specified in this section are applicable. This section was fully analyzed and construed in the case of Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555, where attention was directed to the point that the legislature expressly provided that a garnishment proceeding shall be deemed an action. The discussion in that case considers the law of garnishment in this state, and recognizes the nature of garnishment proceedings, as defined by 7581, supra.

Section 7580, Comp. Laws, provides: "The defendant may, in all cases by answer duly verified, defend the proceedings against any garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment."

The defendant in this case did make his claim for exemptions, and also interposed an answer in the garnishment proceedings. The garnishment proceedings being in aid of an execution, the trial court could determine the same at any time the same was brought on for hearing before it; for judgment in the principal action had theretofore been entered.

The garnishment proceedings came on to be heard. Defendant in his answer, defending the proceedings against the garnishee, set forth that the indebtedness of the garnishee is exempt from execution against such defendant, for the reason that he is a married man and the head of a family.

The court, by its order, found the money and other property mentioned therein were exempt. This was, in effect, a recovery of judgment in defendant's favor, or a dismissal of plaintiff's garnishment proceedings.

The court having made its order requiring the garnishee to pay the money to the defendant, and under § 7577, supra, and in the circumstances of this case, the garnishee having a right to do so, where au-

thorized by such an order, we are convinced that it was proper for the garnishee to comply with the order, and, upon doing so, it was fully discharged from further liability.

It would appear, therefore, that any question referring to further liability on the part of the garnishee, presented here, is moot. Had the plaintiff desired to prevent the payment of the money, it should have procured a stay of the order requiring the payment. It did not do this, and it would seem unreasonable, in the circumstances of this case, to punish the garnishee for its obedience to the valid order of the court.

As it appears to us, the appeal should be dismissed. Though the plaintiff has taken appeal from the order of the court allowing exemptions, no notice of that appeal was ever served upon the garnishee, so far as the record on this appeal shows.

As we have previously stated, the garnishee paid the money over to the defendant, by order of the court. Certainly, if the plaintiff intended to enforce further liability on the part of the garnishee, it should have been a party to this appeal, by which it is intended to accomplish that result. That has not been done, and the failure to do so is, in effect, a dismissal of the garnishment proceedings against the garnishee.

As we view this case, plaintiff sought by the garnishment proceedings to procure the $375.96 only, to be applied to the discharge of defendant's debt. In this, from what has above been stated, it has failed. It did not levy execution or other process upon any of the balance of defendant's property, and it makes no claim to any other property, excepting the money above mentioned. It must follow, therefore, that it is entitled to no relief.

There are no further material points in this appeal.

The appeal is dismissed. Respondent is entitled to costs and disbursements on appeal.

STUTSMAN COUNTY, a Public Corporation, Respondent, v. DAKOTA TRUST COMPANY, a Corporation, Appellant.

(181 N. W. 586.)

Depositaries — surety on bond liable for interest from time of demand at legal rate.

In an action upon a surety bond, where a bond was given to a county to secure the demand deposits of the county, with interest upon the average daily balances during each month at 3 per cent per annum, pursuant to the proposal of the bank, the county, after default of the bank, is entitled to recover interest upon the principal demand at the legal rate of 7 per cent per annum from the time of the demand made upon the surety until July 1, 1915, and thereafter at the rate of 6 per cent per annum.

Opinion filed January 24, 1921.

Appeal from judgment in favor of the plaintiff in District Court Stutsman County, *Coffey*, J.

Judgment modified and affirmed.

Statement.

BRONSON, J. This is an action upon a surety bond. The defendant has appealed from a judgment in favor of the plaintiff. The defendant terms this action a friendly lawsuit. A question of law alone is involved. This question was presented to this court heretofore by certification, but jurisdiction was declined by reason of the manner in which certification was made. See Stutsman County v. Dakota Trust Co. 45 N. D. 451, 178 N. W. 725. The facts are stipulated. Therefrom it appears that the Medina State Bank was the designated county depository of the plaintiff. The defendant furnished a surety bond to the plaintiff upon the condition that the bank should safely keep and repay, according to the provisions of §§ 2435 to 2437 inc., Rev. Codes 1905, any and all funds deposited with such bank, subject to draft on demand, together with interest thereon at the rates specified in the application or proposal to the bank.

The proposal of the bank made to and accepted by the county stated in writing that interest at the rate of 3 per cent per annum would be paid on the average daily balances during each month on the demand funds of such county deposited in such depository, with interest to be

paid monthly, and upon condition that such funds, with accrued interest, should be held subject to draft of the county at all times on demand. The bank became insolvent and passed into the hands of a receiver. It then had demand funds of the county on deposit amounting to $5,035.30. On January 30, 1914, notice of the bank's default and demand for payment of the funds involved was made upon the defendant. Subsequently, by dividends paid through the receiver, the principal demand was reduced to $3,035.30, not including items of interest. After the commencement of this action, the defendant tendered payment of the principal sum, with interest at 3 per cent per annum. This tender was refused.

The only question in dispute between the parties is the rate of interest which the county is entitled to recover upon the principal amount pursuant to the facts as stipulated. It is the contention of the defendant that it is liable only for the contract rate of interest stipulated by the Medina State Bank in its proposal to the county, to wit, 3 per cent per annum. That plaintiff's cause of action is not based upon a new obligation, but upon the very contract itself; that, pursuant to statute, § 6078, Comp. Laws 1913, the stipulated contract rate remains in force after breach of the contract; that pursuant to statute, § 6072, Comp. Laws 1913, the contract in question carried the same rate of interest after, as before, maturity. That, furthermore, pursuant to statute, § 6677, Comp. Laws 1913, the surety was not obligated beyond the express terms of the contract made.

On the other hand, the plaintiff contends that the obligation of the surety was as broad as that of its principal,—that upon failure of the bank to make payment pursuant to its contract, after demand, the depositary rate of interest no longer governed, and there then became due to the county the amount of the demand plus interest at the legal rate of 7 per cent per annum.

Lawrence & Murphy, for appellant.

"The Code law embraces the whole subject of interest and must control it." Chipman v. Dem (Cal.) 48 Pac. 618.

"A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach he cannot in any case be liable for more than the penalty." Comp. Laws 1913, § 6677.

Moneys after due bear interest at the same rate as before maturity,

and the statute rate of interest takes effect after the maturity of the obligation only in the event that there is no interest rate fixed in the contract to be paid either before or after maturity. Overton v. Belton (Tenn.) 24 Am. Rep. 373; Hubbard v. Callahan, 42 Conn. 534, 19 Am. Rep. 575; Hopkins v. Crittendon, 10 Tex. 189; Findley v. Hall, 12 Ohio, 610; Spencer v. Maxfield, 16 Wis. 178; Adams v. Way, 33 Conn. 431; Cornwall v. Sac County, 96 U. S. 61; Entrye v. McDaniel, 28 Ill. 203.

John W. Carr, for respondent.

"A surety is an insurer of the debt." Northern State Bank v. Bellamy, 19 N. D. 509, 125 N. W. 888.

"We are not unmindful of the fact that a paid surety or bonding company is treated rather as an insurer than a surety." Long v. American Surety Co. 23 N. D. 492, 137 N. W. 41.

"A surety is bound with the principal on the identical contract under which the liability of the principal accrues." 20 Cyc. 1400.

If a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor compensation in damages equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default." Empire State Surety Co. v. Lindenmeier, Ann. Cas. 1914C, 1189, 1192; 18 C. J. 593, ¶ 73.

BRONSON, J. (after stating the facts as above). It is evident that the bank under its contract was obligated to maintain, subject to demand, the county deposits, and to pay interest thereon monthly, on demand, upon the daily average balances, per month. The payment of interest on such daily balances was a mere incident to the main obligation to maintain these deposits of the county subject to demand. When the bank became insolvent, these demand deposits, including the accrued interest, no longer could be paid upon demand. There then arose a breach of the bond given by the defendant to the plaintiff, to wit, the engagement to insure the maintenance of such demand funds with the interest specified. In no manner can this engagement be termed a contract to pay interest at 3 per cent per annum upon demand deposits when they were not subject to be so termed. The contract rate concerns the payment of interest upon the fluctuating balance of demand deposits. A distinction may be drawn between a contract to pay money

only and the obligation to maintain demand funds and the payment of interest thereupon, pursuant to a fluctuating balance, while the same are maintained as demand funds. After they ceased to be available as demand deposits, the contract rate for the payment of interest upon a fluctuating balance did not then apply. See Central Bank & Trust Corp. v. State, 139 Ga. 54, 76 S. E. 589; Fidelity & D. Co. v. Wilkinson County, 109 Miss. 879, 69 So. 869; 18 C. J. 594. In a manner, the defendant was an insurer of this obligation on the part of the bank. Long v. American Surety Co. 23 N. D. 492, 504, 137 N. W. 41. The legal rate of interest is allowable by way of compensation as damages for breach of the contract. First Nat. Bank v. State Bank, 15 N. D. 594, 613, 109 N. W. 61; Comp. Laws 1913, §§ 7141, 7142. See 22 Cyc. 1523. The plaintiff was entitled to recover the legal rate of interest from the time of the demand made upon the surety. Dickinson v. White, 25 N. D. 523, 538, 49 L.R.A.(N.S.) 362, 143 N. W. 754. See note in Ann. Cas. 1916B, 1236, 1244. Until July 1, 1915, the legal rate of interest was 7 per cent per annum. Comp. Laws 1913, § 6072. Since that time the legal rate of interest has been 6 per cent per annum. Laws 1915, chap. 176. The trial court allowed interest at the rate of 7 per cent per annum from the time of the demand. In this regard we are of the opinion that the trial court erred. The plaintiff seeks to recover interest as damages, and not by reason of the contract. It is entitled accordingly to recover such legal interest pursuant to the statutory rate covering the respective periods involved, namely, interest at 7 per cent per annum upon the principal demand until July 1, 1915, and thereafter at 6 per cent per annum. See 22 Cyc. 1523; O'Brien v. Young, 95 N. Y. 428, 47 Am. Rep. 64. It is ordered that the judgment be modified accordingly, and, as so modified, that it be affirmed. Neither party will recover costs upon this appeal.

ROBINSON, Ch. J., and CHRISTIANSON and BIRDZELL, JJ. concur.

GRACE, J. (dissenting). The Medina State Bank, in pursuance of the provisions of article 11 of the Political Code, Comp. Laws 1913, was duly designated a depositary of the county funds of the county of Stutsman, and this, we presume, by reason of proceedings taken by the county commissioners, in pursuance of article 11, and the advertisement

by the county auditor, in the manner prescribed by law, for sealed proposals for the deposit of the funds of the county, and the proposal, by this bank, to act as depositary for the money of the county. It was agreed a compensation of 3 per cent per annum should be paid monthly by the bank, on the average daily balances. The above constituted a contract between the parties.

There never has been any modification of that contract. The liability of the defendant must be measured by the conditions of the bond, which it executed and delivered to secure the performance of the contract.

The county treasurer, in the manner prescribed by law, could issue his check against the county funds, and the funds in the bank were at all times subject to his check, issued in the discharge of his lawful duties.

By law, he can deposit the county money in such banks only as are lawfully designated county depositaries. The contract was in full force and effect at the time the bank became insolvent. The question before us is: Can the plaintiff, without the consent of the defendant, change the terms and conditions of the bond? And the question for this court is: Can it, by its decision, impair it, by changing materially its terms?

Section 6072, Comp. Laws 1913, provides, that all contracts shall bear the same rate of interest after they become due as before, unless it clearly appears therefrom that such was not the intention of the parties.

The conditions of the bond, so far as material here, are as follows:

"Whereas the Medina State Bank of Medina has made application, or is about to make application, or proposal, to the board of county commissioners of Stutsman county, to become one of its depositaries, under provisions of §§ 2435–2437 of the 1905 Revised Codes of North Dakota.

"Now, therefore, if the said bank is designated one of the depositaries of said county, under the provisions of said section, and shall safely keep and pay according to the letter and intent of said sections, any and all funds deposited with it, subject to draft on demand, *together with interest thereon, at the rate specified in said application, or proposal, then this obligation to be null and void, but otherwise to be and remain in full force and effect.*"

This action is brought to recover from the defendant, upon its lia-

bility on the bond. That is what determines the extent of its liability. It did not bind itself to become liable in any way, otherwise than as specified therein. Its liability would be an amount of money equal to the amount of the deposits of the county the bank failed to repay, together with interest, as specified in the bond, and not otherwise. The amount of the bond was $5,000, and the amount of the deposits which the bank failed to repay the county was $3,035.30. For this amount the bank was liable, together with interest, as specified in its bond.

The entire transaction between the county and the bank amounted, in fact and in law, to a loan by the county to the bank, of the money which remained on deposit in the bank each day, the amount thereof varying from day to day, all of which was contemplated by the contract, the bank to pay 3 per cent interest for the loan of such money, while it was on deposit.

The duty of the bank at all times was to pay the money on lawful check of the county treasurer, and the latter could, in a lawful manner, check out the whole account, or issue his check for the whole account, and demand that it be paid, and could redeposit it, as authorized by law, with another lawful depositary.

We will assume that a lawful demand was made upon the bank for the money on deposit, and the same was not paid. This would, no doubt, constitute a default in its contract, and it, and those liable with it, would become immediately liable for the amount on deposit at the time of the demand, together with interest thereon at the rate specified.

The defendant's liability, of course, would be upon the conditions specified in the bond. The decision of the majority, however, makes a new condition in the bond, by adding a different term therein, to wit, a new, different, and largely increased rate of interest. This is an impairment of the terms of it, nothing less.

In E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922 (the writer dissenting) those who now sign the majority opinion, with the exception of Justice Robinson, held that a remedy prescribed by the legislature for the cancelation of certain land contracts, different from the remedy which existed at the time of making the contract, was an impairment of the contract, though, in the remedy later prescribed, every property right of the owner seeking to cancel it was amply protected, and reasonable provision made for the enforcement of it.

In that case, § 8122, Comp. Laws 1913, as amended by chapter 180 of the Laws of 1915, and as again amended by chapter 151 of the Laws of 1917, were before this court for construction. Those sections relate to the time in which the vendee who is in default, in a contract for the purchase of land, may cure the default by performance after notice of cancelation is served upon him.

Section 8121, as amended by the 1915 Law, provided that the vendee should have thirty days in which to perform the conditions, or comply with the provisions upon which the default occurred, and, upon compliance, the contract would be reinstated.

The 1917 Law extended the time from thirty days to six months, and though no right of the vendor was taken from him thereby, and though the law related only to the remedy, and though it afforded a reasonable remedy and reasonable time in which to exercise it, this court held that the extension of the time to six months was an impairment of the vendor's contract.

There is no doubt but that construction of the law is erroneous, but it became the law of that case There is no doubt that the contract was not there impaired, for a reasonable remedy had been provided for its enforcement. (See decisions of United States cited there in the writer's dissenting opinion.) That is all that is required, and when such reasonable remedy is provided, no impairment of the contract results.

This case, however, is entirely different to that. Here, the contract, that is the bond, is impaired by a change of its very terms. The rate of interest specified in the application, or proposal, was 3 per cent.

The money having become due on demand, and the bank having detained the money thereafter, it was liable to pay interest, but only at 3 per cent.

Section 6070, Comp. Laws 1913: "Interest is the compensation allowed for the use, or forbearance, *or detention of money, or its equivalent.*" The money was detained by the bank, but that constituted only a default, making defendant liable for the amount so detained, with interest at the rate specified.

There is another view of this case that would seem material. Section 3322, Comp. Laws, prohibits the board of county commissioners from appointing any bank a depositary, offering to pay more than 3 per cent per annum on deposits subject to check.

Section 3323 requires that all funds of the county shall be deposited, in the name of the county, by the county treasurer, as soon as received, in the designated county depositary. If the rate provided for in the bond may be changed, what, then, is the measure of damage for interest, by reason of the county not receiving its money upon demand? Is it not the rate at which, under the law, it could redeposit the same with another county depositary, to wit, 3 per cent? We are so inclined to believe.

If the county treasurer, upon demand, had received the money from the bank, he was required, by § 3323, Comp. Laws, to redeposit the same in another depositary bank. In what way, then, so far as the record here shows, has the county lost any money by reason of the detention of the deposits here involved?

The highest legal rate of interest permitted to be received upon county deposits, subject to check, is not 7 per cent, nor 6 per cent, as stated in the majority opinion, but 3 per cent, as fixed by law.

The authority cited in the majority opinion is not in point; for we have the impression that, in those cases, there was not, as here, a special law, or special contract, fixing the rate of interest for the deposits in question.

The defendant, at all times since the commencement of suit, has been able, ready, and willing to perform the terms of its contract, and to pay the rate of interest on the deposits detained, as specified in its contract, which is also the highest rate permitted by law for deposits of that character. It should not be mulcted in damages for the excess rate of interest, nor should it be required to pay any costs in any court. For it duly offered to do all that its contract and the law required of it.

GUILFORD SCHOOL DISTRICT NO. 3, OF STUTSMAN COUNTY, STATE OF NORTH DAKOTA, a Political Corporation, Respondent, v. DAKOTA TRUST COMPANY, a Corporation, Appellant.

(181 N. W. 589.)

Surety on bond.

The same question of law being involved in this cause as has heretofore been

considered in Stutsman County v. Dakota Trust Co. ante, 228, the judgment herein is modified upon the principles of law considered and determined in such case.

Opinion filed January 24, 1921.

Action to recover on a surety bond in District Court, Stutsman County, *Coffey,* J.

Defendant has appealed from a judgment in favor of the plaintiff.

Judgment modified and affirmed.

Lawrence & Murphy, for appellant.

Moneys after due bear interest at the same rate as before maturity, and the statute rate of interest takes effect after the maturity of the obligation only in the event that there is no interest rate fixed in the contract, to be paid either before or after maturity. Overton v. Bolton (Tenn.) 24 Am. Rep. 373; Hubbard v. Calahan, 42 Conn. 534, 19 Am. Rep. 575; Hopkins v. Crittendon, 10 Tex. 189; Findley v. Hall, 12 Ohio, 610; Spencer v. Maxfield, 16 Wis. 178; Adams v. Way, 33 Conn. 431; Cornwall v. Sac County, 97 U. S. 61.

John W. Carr, for respondent.

The contract rate of interest governs until the surety is notified of default of the principal, and demand is made upon the surety for payment. Dickinson v. White, 23 N. D. 523, 143 N. W. 754; United States Fidelity & G. Co. v. Pensacola (Fla.) Ann. Cas. 1916B, 1236.

Per Curiam. This cause was heretofore before this court; 46 N. D. 307, 178 N. W. 727. The same question of law is involved in this case as has just been considered in Stutsman County v. Dakota Trust Co. ante, 228, 181 N. W. 586. The decision in that case governs in this case. It is accordingly ordered that the judgment be modified by the allowance of interest at 7 per cent per annum upon the principal demand until July 1, 1915, and thereafter at 6 per cent per annum, and, as so modified, that it be affirmed. Neither party will recover costs upon this appeal.

Robinson, Ch. J., and Bronson, Christianson, and Birdzell, JJ., concur.

GRACE, J. (dissenting). I disagree with the conclusion arrived at by the majority opinion. The reasons for my dissent in this case are largely similar to those stated in Stutsman County v. Dakota Trust Co. ante, 228, 181 N. W. 586.

JOHN McDONOUGH, Appellant, v. RUSSELL-MILLER MILLING COMPANY, a Corporation, Respondent.

(182 N. W. 251.)

Judgment — notwithstanding verdict for riparian owner, proper where he was not entitled to recover damages for pollution of ice field by upper owner.

The plaintiff is the owner of certain lands, within the boundaries of the city of Dickinson, traversed by the Heart river. He brought this action to recover damages against the defendant, who is an upper riparian owner, for pollution of the stream. In this action the plaintiff was awarded damages for the acts of the defendant: (1) Rendering unsalable the ice on the river on plaintiff's premises; (2) depreciating the rental value of a pasture adjacent to the river; and (3) interfering with the enjoyment of plaintiff's dwelling house. Prior to the time involved in this action, the city of Dickinson had enacted an ordinance prohibiting the cutting of ice from a certain portion of Heart river within the city limits. Plaintiff's premises were within such prohibited district. It is *held:*

1. That the trial court, on motion for judgment notwithstanding the verdict or for a new trial, properly ruled that plaintiff could not recover damages for pollution of his ice field.

Judgment — judgment of dismissal notwithstanding verdict held improper in action for pollution of waters by upper riparian owner.

2. That as to the other two items of damages, it cannot be said as a matter of law that plaintiff has no cause of action; hence, the trial court should not have ordered judgment in favor of the defendant for a dismissal of the action, but should have ordered a new trial of the action.

Abatement and revival — death held not to abate action for damages by pollution of stream.

3. That such action does not abate by the death of the plaintiff.

Opinion filed January 25, 1921. Rehearing denied March 26, 1921.

From a judgment of the district court of Burleigh County, *Nuessle,* Special Judge, plaintiff appeals.

Reversed and remanded for a new trial.

T. F. Murtha and *C. H. Starke,* for appellant.

After a judgment has been rendered in an action and while such judgment remains in full force and effect, a court does not possess the power to dismiss the action. Todd v. Todd, 7 S. D. 174, 63 N. W. 777; Barnett v. Will (N. D.) 166 N. W. 511.

"The theory of the law is that the infliction of past damages will cause the abatement of a temporary nuisance; if it does not successive actions may be maintained." R. Co. v. Pattison, 67 Ill. App. 351; 11 Dec. Dig. (Judgment) § 606; Bowers v. Boom Co. 81 N. W. 208; Bennett v. Marion (Iowa) 93 N. W. 558; Sanitary Dist. v. Ray (Ill.) 64 N. W. 1048; R. v. Church (U. S.) 34 L. ed. 784.

The recovery of the judgment in the first action settled the fact that the deposit of sewage into the Heart river was a nuisance for which plaintiff might recover damages. 2 Black, Judgm. § 742; Casebeer v. Mowry, 93 Am. Dec. 766.

Young, Conmy, & Young, for respondent.

The verdict is excessive. Durham v. Eno Cotton Mills (N. C.) 7 L.R.A.(N.S.) 321, 54 S. E. 453; 27 R. C. L. 1216.

PER CURIAM: This action was commenced by the plaintiff in January, 1919, to recover damages for the alleged pollution by the defendant of the waters in Heart river. The case was tried to a jury, and resulted in a general verdict in favor of the plaintiff in the sum of $9,852.98. Judgment was entered pursuant to the verdict. Defendant moved for judgment notwithstanding the verdict or for a new trial. The trial court ordered judgment in favor of the defendant notwithstanding the verdict. Judgment was so entered, and the plaintiff appealed.

This litigation, or rather another phase thereof, was before this court in a former action. McDonough v. Russell-Miller Mill. Co. 38 N. D. 465, 165 N. W. 504. Both parties are riparian owners upon the Heart river within the limits of the city of Dickinson. The plaintiff owns a tract of land traversed by the Heart river. The tract originally consisted of 160 acres. Later plaintiff platted a portion of it, on both sides of the river, as an addition to the city of Dickinson, and sold some of it,

for residence lots. Of the remainder, 40 acres are under cultivation, and about 80 acres in pasture. The plaintiff also used to maintain an ice house, which is situated on the bank of the river on this land. Immediately below plaintiff's land is a concrete dam constructed by the Northern Pacific Railroad Company about 1908 or 1909. This dam is situated about 2,060 feet below plaintiff's ice house, and he cut ice from the pond formed above the dam.

The defendant owns a tract of land up stream from plaintiff's premises. In 1910 the defendant constructed a large flour mill upon said tract of land. The drainage from the mill led into the river at a point 6,350 feet above plaintiff's ice house. The plaintiff claimed that this drainage polluted the waters of the Heart river. And in June, 1914, he brought an action against the defendant, wherein he claimed that this drainage polluted the waters of the Heart river, and caused them to become "absolutely unfit for any use in connection with any human or animal food or drink, and rendered all ice cut on said pond unfit and dangerous for use to which ice is commonly used, and valueless and unsalable, thereby destroying utterly the value and profitableness of said ice business" (38 N. D. 471), and asked that he be awarded damages in the sum of $40,600 for: (1) The loss of profits of value or the ice cutting privilege; (2) the expense incurred one winter in cutting off about five inches from the bottom of the cakes of ice when such bottom part was filled with black specks; (3) the loss of the use of the land for pasturage purposes; and (4) the additional expense for cutting and hauling ice a distance of about two miles during the winter of 1913–14; and that defendant be enjoined from continuing the acts which it was asserted caused the pollution of the stream. 38 N. D. 474. A trial of that action resulted in a judgment in favor of the plaintiff for $100, allowed as and for nominal damages, and denial of the injunctive relief prayed for. That judgment was affirmed by this court. 38 N. D. 465. The drainage from the mill, complained of in that case, consisted of certain water wherein wheat had been washed, and the discharge of a certain water-closet used by the employees of the mill. 38 N. D. 471. Upon the trial of that action it was shown that the defendant was constructing a septic tank; that the latest and most approved scientific apparatus and appliances for purification were utilized in such construction; that the same would completely deodorize

and destroy all bacteria and germs; that a large force of men was then at work on such construction; and that the tank would be fully completed and in use within ten days or two weeks from that time. And in the findings of fact, signed several months later, the trial court found that the defendant had "installed a septic tank at its said mill and elevator, and that since that time it has not discharged, and is not now discharging, into the Heart river, any sewage from its said mill and elevator." 38 N. D. 482. The defendant pleaded the judgment in the former action as a bar in this action, and the judgment roll and the transcript of the evidence in that action was offered and received in evidence in this case, and the court was requested to take judicial notice of the decision of this court in the former action.

In this action plaintiff seeks to recover damages for pollution, alleged to have taken place since the trial of the former action. It is contended that the septic tank did not do the work it was supposed to do, and that sewage was discharged into the river; that the defendant put manure on its dam, and repaired breaks therein by filling in manure; that oil and grease was discharged into the water, and that refuse, sweepings and waste matter from the mill were dumped into the river, and were placed upon the banks of the river so that they found their way into the river. As a result thereof plaintiff claims that, since the trial of the former action and up to the commencement of this action, he was damaged, and entitled to judgment, as follows: "$7,500 for the pollution of the ice field; $3,000 reduced rental of pasture; $2,000 damages for interfering with the enjoyment of his dwelling and premises by reason of the bad odors; $5,000 damages for preventing the sale of said lands; $5,000 exemplary damages." No evidence whatever was offered as to the loss of sale of the premises. And at the close of the testimony the trial court announced that in his judgment there was no room for the allowance of exemplary damages. There was submitted to the jury for determination whether, and to what extent, plaintiff had been damaged: (1) By the pollution of his ice field so that he could not cut ice himself or sell or lease the ice cutting privilege to others; (2) lessened rental value of his pasture; and (3) interference with the use and enjoyment of his dwelling house by reason of bad odors. In answer to special interrogatories the jury found that the value of the untilled land for pasturage purposes was $800 per year, and that its

value for haying purposes was $300 per year; that plaintiff has sustained damages in the sum of $1,602.98 on account of the bad odors which prevented his full enjoyment of the dwelling house. The verdict returned in favor of the plaintiff was for $9,852.98.

We are entirely satisfied that the verdict cannot stand, and that the trial court was correct in so far as he held that the plaintiff could not recover any damages for the alleged damages occasioned by pollution of the ice field. The plaintiff testified that in the course of the years he had taken this ice and sold it to the people of Dickinson and vicinity; and that the ice cutting privilege during the years involved in this action was worth from $1,500 to $2,000 per year. Yet the evidence shows that prior to the time involved in this action, the city of Dickinson enacted an ordinance prohibiting the cutting of ice on Heart river at any point within the limits of the city of Dickinson. That ordinance was in effect before the first action was brought. It was considered, and its provisions referred to, in our decision in that case. See, 38 N. D. 478. That action was tried anew in this court. There was no difference of opinion among its members as to either the facts or the law. The ordinance by its terms, (a) "prohibited the cutting of ice from that portion of the Heart river within the city limits, east of the mill-dam," and, (b) "required all persons desirous of cutting and packing ice for sale or distribution within the city of Dickinson to apply to the local board of health, and receive its approval as to the sanitary condition of such ice." 38 N. D. 475. In that action the plaintiff contended that the ordinance had been "adopted because the city authorities had determined that the drainage from the mill polluted the waters in the Heart river and rendered the ice therein unfit for human use. In support of this contention plaintiff called Dr. Davis and one Rabe, two members of the local board of health, who testified in regard to the reasons for the action of the city officials." 38 N. D. 478.

In disposing of that contention this court said:

"It is a rule of construction universally adopted, that courts are not concerned with the wisdom of legislative policy or the motive or necessity for legislative acts, except in so far as these may furnish some aid in ascertaining the intent of the legislative body in case the language of an enactment is ambiguous or doubtful. It surely cannot be con-

tended that a party who is injured by the enactment of a prohibitory or regulatory measure by a legislative body is entitled to recover damages against the person or persons whose conduct was responsible for or created the public sentiment or necessity which led to the enactment of the measures. Nor does it seem that the reasons which actuate a legislative body in enacting a measure can be deemed to have any particular probative force in a controversy between private parties and involving private rights, even though the reasons for the enactment are recited in the measure itself. It is for the legislative body to determine what the law shall be, and for the courts to determine what it is. It is solely for the legislative body to determine whether the facts, existing or prospective, require certain legislation to be enacted. The courts are not concerned with whether the reasons which actuated the legislative body to adopt a law were wise or unwise, or whether the promises on which legislative judgment was exercised were correct or incorrect. These are matters to be determined solely by the legislative body itself, and may be considered by the court only to ascertain the legislative intent in case the enactment is couched in language of ambiguous or doubtful meaning. Sedgwick (Sedgw. Stat. & Const. Law, pp. 56, 57), in discussing what weight and effect should be given to facts recited by a lawmaking body in the preamble of an enactment, says: 'As between individuals whose rights are affected, the facts recited ought not to be evidence. We well know that such applications are made frequently ex parte. Once adopt the principle that such facts are conclusive, or even prima facie evidence against private rights, and many individual controversies may be prejudged and drawn from the sanctions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not a decision or forestalling of rights accrued or vested under previous laws. Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true.'

"Even if the enactment of the ordinance could be considered, however, it is difficult to see wherein it would strengthen plaintiff's cause. It seems rather far-fetched to say that the ordinance was passed because defendant polluted the water in the stream. If the city authorities deemed that the discharge of drainage from defendant's mill tended to pollute waters in the stream so as to render them dangerous

to public health, it seems as though the logical thing for them to have done under the circumstances would have been to prevent such pollution, rather than to permit the pollution to continue and prohibit the cutting of ice.

"The evidence in this case, however, shows that there were other sources of possible pollution below the milldam which of themselves furnished adequate reason for the adoption of the ordinance in question. For instance it is shown that South Dickinson lies between the milldam and plaintiff's premises. That there are in all three or four hundred German, Russian, Bohemian, and Polish families living here. There are no sewers, and the houses have privies, and there are also barns situated on the bank of the river. The land slopes toward the river. The surface drainage from this town, as well as the seepage from the privies, discharge into the river. Cattle and horses pastured on plaintiff's premises, and the town herd containing some 80 to 100 head of cows, are permitted to wade into the river. There are piles of manure along its banks. There is a brickyard which drains into the river.

"Professor Snyder in his testimony gave a graphic description of these sources of pollution.

"He testified in part as follows:

" 'Q. Now, what was the first source of contamination which you discovered below the mill?

" 'A. At the brickyard there is a cut through which the clay material is brought to the brickyard, affording a natural drainage for a large portion of the brickyard area, and there is also situated on this gully an open privy the drainage of which leads down a channel into the river. That was the first one.

" 'Q. You don't know how many men are employed in that brickyard?

" 'A. I don't . . . but I would judge from the size of the works there would be a large number.

" 'Q. Going on down the stream what else did you discover?

" 'A. Buildings located near the bank, barns, the natural drainage directly into the river, also privies of buildings further down; also located a small flour mill a little off, but where the drainage would find its way into the river. Also general conditions such as was described by the doctor (Dr. Davis) this morning.'

"This testimony was corroborated by Professor Hulbert, who testified to other sources of pollution observed by him, including piles of manure and the carcass of a horse.

"Dr. Davis, the local health officer who apparently was largely responsible for the enactment of the ordinance, admits that these other possible sources of pollution would have justified the enactment of the ordinance.

"On his cross-examination Dr. Davis testified in part:

" 'Q. Assuming that his (plaintiff's) ice house is below the pond where the surface drainage from all of South Dickinson enters the Heart river, wouldn't you say that that situation alone would be sufficient grounds to pass the ordinance there?

" 'A. I certainly would. . . .

" 'Q. So that, entirely independent of the Russell Mill Company's sewerage, there was another distinct ground upon which you would have been justified in passing that regulation?

" 'A. I think so.' "

There is no contention here, nor was there any contention in the former action, that the ordinance, for any reason, is invalid. Nor is there any contention that it has been repealed or altered. On the contrary all reference to it during the course of the trial implied that it was in full force and effect. An ordinance of a city is a rule of conduct within its corporate limits, and every person is as much bound to obey and observe a law laid down by the city council as one laid down by the legislature. Dorrame v. Omaha & C. B. Street R. Co. 105 Neb. 196, 180 N. W. 90; Memphis Steel R. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374. Hence, we have the situation that the plaintiff seeks, and was awarded, damages because he was prevented from doing, or it became unprofitable for him to do something which was forbidden by law. Manifestly he could recover no damages because he was prevented from violating, or because it became unprofitable for him to violate, the law.

There is some evidence tending to show pollution of the waters in Heart river by the defendant by placing manure on top of its milldam; by using manure to fill breaks in such dam; by dumping refuse into the river, and by sewage going into the river at a time when the septic tank was out of order. While as to some of these things the evidence is

not strong, we believe there is sufficient evidence to make it a question for the jury whether there was or was not pollution by the defendant. A majority of the members of the court are, also, of the opinion that the evidence is sufficient to sustain a verdict in favor of the plaintiff for damages by reason of lessened rental value of his premises for pasturage purposes, and, also, for the interference with the enjoyment by plaintiff of his dwelling. The members of the court, who join in this opinion, however, are agreed that as to the former there is no way to determine upon the record here what the jury allowed therefor in their verdict in this case. The plaintiff testified that the pasture was sufficient for twenty head of stock, and that he could have charged and recived 25 cents per day for each head; that the stock could be pastured ten months a year; that at the time of the trial he was pasturing some eight or nine head therein (for which he was receiving such sum), as well as some of his own horses; that if not pastured the land would produce, and there could be cut thereon, on the average about one-half tons of hay per acre; that hay was selling at $34 or $35 per ton; that for the purposes of cutting hay thereon the land would rent for about $200 per year. With respect to the interference with plaintiff's enjoyment of his dwelling, the evidence shows that the dwelling is situated about three city blocks from the pond formed above the dam; that a short distance below the dam there is emptied into the river, at a point about two and a half city blocks from plaintiff's dwelling, the sewage of the city of Dickinson; that while the greater part of the sewage of such city was treated in a septic tank, a portion thereof was raw sewage; that complaint had been made by certain residents of the city on account of the stench caused by the city sewer. The plaintiff, however, testified that the city sewer caused him no annoyance, but that the annoyance was caused by the stench from the waters above the dam. While there is evidence tending to show other sources of pollution, a majority of the members of the court are not willing to say as a matter of law that the plaintiff may not upon another trial establish that some or all of the injuries which he claims to have sustained as regards the lessened rental value of his pasture, and the interference with his dwellings, are not chargeable directly to the acts of the defendant. Hence, the judgment is reversed, and the case is remanded for a new trial.

Upon the oral argument it was suggested by defendant's counsel that he had been informed that plaintiff had died interim the taking of the appeal and the oral argument. Later defendant filed a motion to dismiss the appeal on this ground. We do not believe that under our statutes the action abated by the death of the plaintiff. Comp. Laws 1913, §§ 5446, 7408. See also § 8800, Comp. Laws 1913.

Reversed and remanded for further proceedings.

ROBINSON, Ch. J. and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). This is an action to recover damages for the pollution of Heart river, which flows through plaintiff's land, from which until 1912 or 1913 he cut and removed ice for market, both wholesale and retail. The claims for damages are in the following amounts: $7,500 for the pollution of ice field; $3,000 for reduced value of pasture on plaintiff's farm; $2,000 for interfering with the enjoyment of his dwelling and premises, by reason of the bad odors arising from the river; $5,000 damages for preventing the sale of certain lots, and $5,000 exemplary damages.

The case was tried to the court and a jury. The jury returned a general verdict in favor of plaintiff, assessing his damages at $9,852.98. The following special questions were submitted to the jury and answered by it.

Question No. 1. Is the use of the Heart river by this defendant in the conduct of its business a reasonable use? A. No.

Question No. 2. Did the defendant company pollute the waters of the Heart river? A. Yes.

Question No. 3. If you answer question No. 2 in the affirmative, was the pollution of the waters unreasonable, considering all the circumstances? A. Yes.

Question No. 4. Is the Heart river water flowing through plaintiff's premises polluted from other sources than by the defendant company? A. Yes, natural pollution.

Question No. 5. Did any pollution put in the Heart river by the defendant company render plaintiff's land unfit for pasturage purposes? A. Yes.

Question No. 6. What is the value per year of McDonough's untilled land for pasturage purposes? A. $800.

Question No. 7. What is the value per year of McDonough's untilled land for haying purposes? A. $300.

Question No. 8. Does a stench or foul odor come from the Heart river, on the plaintiff's premises, at times during the year? A. Yes.

Question No. 9. Is that stench or foul odor caused solely by matter placed in the Heart river by the defendant company? A. Yes.

Question No. 10. If you answer question No. 9 in the negative, are you able to determine what portion of the stench is caused by matters put into the river by the defendant company and what portion is caused by other things or from other sources of pollution, assuming that there is other pollution? A. No answer needed.

Question No. 11. If you answer question No. 9 in the affirmative, state whether the stench created by matters put into the stream by the defendant company has interfered with plaintiff's use of his dwelling house? A. Yes.

Question No. 12. If you answer question No. 11 in the affirmative state what damage in money plaintiff has suffered because of this interference with the use of his dwelling house? A. $1,602.98.

Question No. 13. Does the railroad dam east of McDonough's ice house contribute to the pollution of the waters running through his land, if you find there is pollution there? A. No.

On motion of plaintiff an order for judgment was granted. Judgment was entered upon the general verdict, for the amount above stated, together with costs for $154.70, in all, $10,007.68. Thereafter, defendant made a motion for judgment notwithstanding the verdict, or in the alternative for a new trial.

The grounds of this motion were:

(1) Errors in law occurring at the trial.

(2) Insufficiency of the evidence to justify the verdict and judgment, and that the same were against law.

(3) Excessive damages appearing to have been given under the influence of passion or prejudice.

The court granted the motion and made an order, vacating the judgment.

The reasons given by the court for granting this order are:

(1) That the vital and controlling issues in the case were litigated in a prior action and are res adjudicata.

(2) Insufficiency of evidence to justify the verdict returned by the jury, or the judgment entered thereon.

Judgment was entered upon this order, vacating the judgment, dismissing the action on the merits, and awarding defendant costs in the sum of $534.65.

From the judgment thus entered, plaintiff appeals. Errors assigned are based on the claim that the court erred in granting the above motion and making the above order, and that it is in error in the reasons given for its holding.

The principal questions on this appeal are:

(a) Were the issues herein litigated in the prior action, so that they are now res adjudicata?

(b) Is the evidence insufficient to sustain the verdict?

Any other matter which need be discussed may be analyzed in connection with these dominant questions. A short statement of the material facts will aid in more clearly understanding the issues.

The plaintiff is the owner of the Northeast quarter of section 10, township 139, range 96. He has lived on this land since 1881. It adjoins the city of Dickinson on the south. Twenty-eight acres of it are within, and one hundred thirty-two acres of it are without, the townsite. Part of it was used for the pasturage of stock, and forty acres were tilled.

The Heart river enters plaintiff's land toward the southwest corner and flows entirely through it, in a northeasterly direction. Across the river, a few feet east of plaintiff's east line, the Northern Pacific Railway Company, in about 1908, constructed a cement dam. Plaintiff knew of and consented to the construction of this dam, and received a consideration from the railway company for the privilege of permitting them to construct it.

In 1910, the defendant erected a large mill near this river, and about a half mile West of plaintiff's west line. The mill is one operated night and day. About thirty-five men are required to operate it during each twenty-four hours. The men are divided into different shifts, so that all the men work part of each twenty-four hours.

In or about defendant's property, there are several toilets, or out-

houses, for use by the men or help employed in or about the mill. These empty into a septic tank, which empties into a gravel bed, and then through a bed of cinders, then a certain pipe into this river.

From plaintiff's land the mill is up stream. Plaintiff's dwelling house is about 900 feet from the river. The river is ordinarily fed by springs. The South Heart river and Bull creek, both of which empty into it, are also fed by springs.

First in order will be the consideration of the plea and issue of res adjudicata. We have no hesitancy in saying, that there is not the least merit to this claim. It requires no extended introspection of the former litigation to determine that the subject-matter and facts there and here are entirely dissimilar. If this be true, the fact that the former action was between the same parties as this is immaterial.

A concise review of the former case is necessary to lead to a clear understanding of the dissimilarity of the subject-matter and facts of the two actions. The former action, which was appealed to this court, is reported in 38 N. D. 465, 165 N. W. 504. That was an action, commenced on June 5, 1914, for an injunction to enjoin defendant from a further pollution of the Heart river, and for damages in the sum of $40,600. These damages clearly were claimed for injuries received prior to the time of the commencement of that action.

Paragraph 9 of the complaint there reads thus: "That, by reason of the foregoing, and by reason of defendant's said wilful and negligent acts, in constructing and maintaining said sewer system, and in polluting the waters of said Heart river, plaintiff has been, and is, damaged in the sum of $35,000."

Other elements of damage were there pleaded, and the manner and form of pleading them clearly shows that they were such damages as were claimed to have occurred from prior injuries, the nature of which is set forth in the complaint, and which continued down to the time of the bringing of that action. The prayer of that complaint was as follows:

"Wherefore plaintiff prays judgment against defendant (1) For the sum of $35,000; (2) for the further sum of $5,600, for damages to the pasture; (3) that defendant be forever restrained from polluting the waters of the Heart river, by depositing human excreta, or mill refuse therein, or in any other manner; (4) for the costs and disburse-

ments of this action; and (5) for such other and further relief as plaintiff shall show himself entitled to."

On November 27, 1914, and the day following, that case was tried to the court without a jury.

Evidence was introduced by the defendant, to the effect that it was then constructing, at the mill, a septic tank. That the latest and most approved scientific apparatus and appliances for purification were utilized in such construction; that the same would completely deodorize and destroy all bacteria and germs; that a large force of men were then at work on such construction; and that the tank would be fully completed and in use within ten days or two weeks from the time of the trial.

The findings of the trial court in that case, of date of August 31, 1915, contain the following: That "defendant installed a septic tank at his said mill and elevator; that since that time it has not discharged and is not now discharging into the Heart river, any sewage from its said mill or elevator, and by reason of said instalment of said septic tank, by said defendant, it has ceased to discharge into the Heart river any sewage matter, such as it was discharging thereinto at and prior to the time of the commencement of said suit."

This finding, of course, relates to the condition that was supposed to exist at the time of the completion of the septic tank. Principally on the strength of this showing, the trial court denied plaintiff any injunctive relief and awarded him nominal damages, in the sum of $100, for injuries alleged to have been sustained by him at the time of the commencement of that action. An appeal from that judgment was taken to this court and the judgment affirmed.

The character of the pollution of this stream by defendant, prior to the time of the commencement of the former action, is shown by the evidence in that case.

Robert S. Davidson, who had been the manager of the Russell-Miller Milling Company for five years, or ever since the Russell-Miller Milling Company at Dickinson had been in operation, at the former trial, in substance, testified, that, in that mill there are closets, or privies, for the use of the employees, which closets discharged into the sewer, which discharged into the river; that there were between twenty-five and thirty men employed in the mill, and had been for the last five

years, sometimes more and sometimes less; that one of the closets had been in constant use; that the mill, as a rule, runs night and day, the year round; that there has been practically no shutdown since it started; that the excretions of these men have been deposited in the Heart river, through the closet, at all times since the mill has been oprating.

By another witness it was shown that the fact that this excreta was being so directly discharged into the river was a matter of public notoriety for three or four years preceding the trial; that the public in Dickinson and elsewhere, upon learning this fact, refused longer to buy the ice; that none of the customers wanted it.

Other evidence shows that, after the mill began to operate, the bottom of the ice on plaintiff's ice field was covered by black particles, and it became unmarketable, and thereby his ice business became destroyed.

Plaintiff testified that in former years there were fish in the river. Since the erection of the mill he has seen dead ones. He had not noticed any live fish the last three winters.

In that case Professors Snyder and Hulburt, chemists and bacteriologists, gave testimony to the effect that samples of water taken from the Heart river, some distance above the mill, and in the river in the vicinity of plaintiff's ice house, each contained about the same amount of colon bacilli. They testified, also, that the ice taken from the river in the vicinity of plaintiff's ice house, when tested, showed no colon bacilli, and explained this upon the theory that, during the crystallization of the ice, the colon bacilli is eliminated, by being pushed outward, so that it is not retained in the ice, and that the same, for all practical purposes, was pure.

There was some testimony by other witnesses in that case as to the offensive odors existing in and emanating from the river, between the mill and the railroad dam. In the present case, there was a great deal of testimony showing the polluted condition of the river between the mill and the railroad dam. It was of a much more positive character than testimony in that regard in the former case. It shows that the septic tank, at one time, was working improperly; that there is an unbearable stench from the discharge of the pipe leading from the septic tank; that particles of human excreta float on the river; that tissue paper is found in large quantities thereabouts, and that the bottom of

the river, instead of being as formerly, covered with gravel, is now, since the erection of the mill, between the mill and the railroad dam, covered with a malodorous muck, ranging from 4½ to 7 feet in depth.

Plaintiff introduced many samples of water, some taken above the mill, showing the uncontaminated condition there, and some taken between the mill and the railroad dam, showing the polluted, contaminated, and putrid condition of the water in the river.

Testimony here further shows, that the stock will not drink the water. There is abundance of testimony on the part of plaintiff to show the polluted condition of the river between the mill and the railroad dam to such an extent as to cause it to become of practically no value to the plaintiff, for the purposes for which the evidence shows he had always used it.

His testimony further shows that ice was taken from the ice field between the mill and the railroad dam for two years after the latter was constructed, and that the same was just as pure as it had been in prior years, but that immediately upon the construction of the mill, the water became polluted. The experts, Snyder and Hulburt, who testified for defendant in the former case, also testified in this case, and generally in support of defendant's theory.

We cannot take further time nor space to refer to the evidence in the former, nor in this, case. Sufficient has been said to direct the attention to the important evidence in either case. The trial court in the former action presumably did not grant injunctive relief, upon the theory that the construction of the septic tank would result in an abatement of the nuisance. It is fair to assume that but for the showing made by defendant in that regard, the injunction would have been granted, restraining the continuance of the nuisance then clearly shown to have existed.

The defendant claimed, in effect, in regard to the septic tank, that it did not construct it because of necessity, but, as a matter of sentiment. We think, however, the energy displayed by defendant, before the hearing of the injunction, in proceeding to construct the septic tank, and the full showing at that trial, as to what it was doing in that regard, had the effect to prevent the issuing of an injunction, on the theory above stated.

Now it is clear that, if the defendant, by the installation of the

septic tank, had wholly abated the nuisance, the pollution of the river in that locality would have practically ceased, and further injuries to plaintiff's property would not have occurred. But it is absolutely clear, from the evidence, on behalf of plaintiff in this action, that the installation of the septic tank did not abate the nuisance; and that it has ever since then continued; that since the installation of the septic tank there has been practically no diminution of the pollution.

This being true, a new cause of action for damages arose in plaintiff's favor, for the continuation of the nuisance, from the time of the commencement of the former action where was shown the installation of the septic tank, and resulting in the judgment above mentioned.

This cause of action relates to a new subject-matter, to-wit: the continuation of a nuisance after it was claimed, by the plaintiff, to have been abated.

While the subject-matter and facts proved in this case at first may appear, from a superficial examination, to be similar to the subject-matter and facts proved in the former case, they appearing to be facts of somewhat similar nature, they are not the same, but wholly different, for they do not, in fact, relate to the same subject-matter, but, to a new and different one, just as distinct in character as any two actions of admittedly distinct subject-matter.

"Where the nuisance is of a continuing nature, each continuance gives rise to a new cause of action and successive actions may be maintained for the damages accruing from time to time." 29 Cyc. 1255. See also there, note 23, citing cases from many states, supporting this principle, among which are cases from Illinois, Indiana, Massachusetts, New York, Ohio, Pennsylvania, and other states. Under this note is also cited the decision of the Supreme Court of the United States, in the case of Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 34 L. ed. 784, 11 Sup. Ct. Rep. 185.

We have no hesitancy in stating, that the plea of res adjudicata is here unavailing, and is without any merit whatever.

20 R. C. L. p. 401, § 22, in an analysis of a nuisance of the character we are considering, states the matter as follows: "A nuisance of very common occurrence may be produced by the obstruction of or interference with water rights such, for example, as an unreasonable diversion of waters, or their pollution by débris from mines and factories, or the

filth that flows and seeps from drains and sewers. The rule of law is uniform and undoubted that every riparian owner is entitled, as an incident to his land, to the natural flow of the water of a stream running through it, undiminished in quantity and unimpaired in quality, subject to the reasonable use of the water by those similarly entitled, for the ordinary purposes of life; and any sensible or essential interference therewith, if wrongful, whether attended with actual damage or not, is actionable."

For cases sustaining the principle enunciated in the above section of R. C. L., see note, 19, citing a large number of them, among which, is that of Bowman v. Humphrey, 132 Iowa, 234, 6 L.R.A.(N.S.) 1111, 109 N. W. 714, 11 Ann. Cas. 131. In that case the supreme court of Iowa, speaking through Weaver, J., said: "Nuisance is a condition, and not an act or failure to act on part of the person responsible for the condition. If the wrongful condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages to others, though he may have used the highest possible degree of care to prevent or minimize the deleterious effects. Nor it is any answer to say that a creamery, or tannery, or industrial plant of any kind, is a perfectly legitimate enterprise, or one of great and general convenience and benefit; for, if it be of such a nature, or be so conducted, that it substantially pollutes or destroys the usefulness and value of the water to the proprietors of the lower lands, it is a nuisance for which action will lie, *though the utmost care has been taken to avoid all just cause of complaint.*"

Citing in support, Sutherland, Damages, 4th ed. § 1035; Pach v. Geoffroy, 67 Hun, 401, 22 N. Y. Supp. 275; Aldrich v. Howard, 8 R. I. 246; Pennoyer v. Allen, 56 Wis. 502, 43 Am. Rep. 728, 14 N. W. 609; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L.R.A. 262, 19 Am. St. Rep. 34, 23 N. E. 389; Ducktown Sulphur Copper & Iron Co. v. Barnes, — Tenn. —, 60 S. W. 593; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; Dygert v. Schenck, 23 Wend. 446, 35 Am. Dec. 575; Jutte v. Hughes, 67 N. Y. 267; Hauck v. Tidewater Pipe Line Co. 153 Pa. 366, 20 L.R.A. 642, 34 Am. St. Rep. 710, 26 Atl. 644; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; Stokes v. Pennsylvania R. Co. 214 Pa. 415, 63 Atl. 1028. See also case of

Ingmundson v. Midland Continental R. Co. 42 N. D. 455, 6 A.L.R. 714, 173 N. W. 752.

Other cases directly in point are MacNamara v. Taft, 196 Mass. 597, 13 L.R.A.(N.S.) 1044, 83 N. E. 310; Middlestadt v. Waupaca Starch & Potato Co. 93 Wis. 1, 66 N. W. 714; People ex rel. Goff v. Kirk, 65 Misc. 657, 122 N. Y. Supp. 604; Bradley v. Warner, 21 R. I. 36, 41 Atl. 564.

Joyce, in his work on Nuisances, § 266, states the rule thus:

"As a general rule every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality and any invasion of this right, causing actual damage or which is calculated to found a claim which may ripen into an adverse right, entitles the injured party to the court's intervention. So, every proprietor of the soil through which a stream passes, has a right to have it run in its natural current, without diminution or obstruction. . . . It is the right of every owner of land over which a stream of water flows, to have it flow in its natural state and with its quality unaffected. The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be disseized except by due process of law, and the pollution of a stream constitutes the taking of property, which may not be done without compensation." Citing, Kewanee v. Otley, 204 Ill. 417, 68 N. E. 388.

"So it has been declared in an Iowa case that the lower owner of land upon a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome condition as a reasonable and proper use of the stream by the upper owner will permit. What is a reasonable use must be determined from the circumstances of the case." See, Ferguson v. Firmenich Mfg. Co. 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448.

The author, then, in § 267, proceeds to discuss what is a reasonable use and arrives at the conclusion, which is the general rule, that: "Whether the use of a stream by one riparian proprietor is reasonable or not, in view of the rights of other proprietors, depends largely upon the circumstances of each case, and it is essentially a question of fact." Citing, Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 48 L.R.A. 691, 77 Am. St. Rep. 335, 45 Atl. 154.

There is no doubt of the correctness of this principle. It must follow, therefore, that the question of reasonable use in this case was one of fact, exclusively for the jury. It has decided, in answer to a special question submitted to it, that the use of the Heart river, by the defendant, in the conduct of his business, is not a reasonable one. See, question 1 and answer, supra. Other special questions and answers show, that the defendant polluted the waters of the Heart river, and that such pollution was unreasonable. See, special questions and answers, supra.

There are no inconsistencies between the answers to the special questions and the general verdict. The principal error remaining to be examined, relates to the error of the trial court in holding that the verdict was not sustained by the evidence. This needs no extended discussion. The trial court's order granting the judgment notwithstanding the verdict, on that ground, is so clearly erroneous that a lengthy discussion of it would be a waste of time and energy. The most casual examination of the evidence will readily disclose that the verdict is sustained by substantial evidence. That is all that is required.

The evidence adduced by plaintiff is direct and certain, in kind and quality, with reference to the pollution of the river, in the time and manner shown by such evidence. It was convincing, as shown by the return of the general verdict in plaintiff's favor, and the favorable answer given in his favor, by answers to the special questions.

It is true defendant placed experts on the stand, who gave testimony, which, to some extent, is contradictory of plaintiff's evidence of the pollution; but that, as all of the evidence, is for the jury. An examination of the evidence will show that the plaintiff's injury is neither fanciful nor imaginative, but substantial, tangible, and material. There is no other conclusion that reasonably could be reached, other than that the verdict is abundantly sustained by substantial evidence.

Some evidence was introduced by defendant, by which it endeavored to show that there were other sources of pollution than that claimed by plaintiff. The answer to special question No. 8 finds that a stench or foul odor does come from the Heart river, on plaintiff's premises, at times during the year; and the answer to special question No. 9 finds that such stench or foul odor is caused solely by matter placed in the Heart river by defendant company.

The only pollution, other than that by defendant, which the jury

found, was *natural pollution* of the river, while flowing through plaintiff's premises. That, as we understand, would be such pollution as would occur by reason of natural, as contradistinguished from artificial, causes. It would be such as would be caused by erosion, etc. It would occur without acts of persons contributing thereto; while, on the other hand, artificial pollution would be that which is caused by the act of some person, or agency, which contributes in some way to the creating or originating of a nuisance, which is shown, in some manner, to have become connected with the water of the river, to such an extent as to pollute it.

The jury have, in effect, found, that there was no pollution of the river on plaintiff's premises, by artificial means, other than that by defendant, for it found there were no other sources of pollution nor other pollution, except by the defendant, other than natural pollution. There was some evidence in regard to the conditions in South Dickinson, showing there were a large number of families living there, and that, in connection with their premises, there were privies, some piles of manure and rubbish, etc., which defendant endeavored to show were sources of pollution.

There is no evidence to show that any of such matter reached the river. There is evidence, showing that, for three or four years preceding the bringing of this action, there was little rainfall in the vicinity of Dickinson. The court may take judicial notice of the seasons, and of the extreme general drought in Western North Dakota, during the time mentioned. It is a matter of common knowledge. There could not be, in such circumstances, much, if any, surface drainage; neither could there well be underground drainage or seepage.

The jury must have taken all these matters into consideration and it decided the only pollution of the river on plaintiff's premises, aside from that by defendant, was that caused by natural pollution.

The evidence adduced by plaintiff at the trial, clearly established the continuation of the nuisance by the defendant, and the damages, and the different elements of the damage, resulting therefrom. There is no doubt of the sufficiency of substantial evidence to support the verdict.

The jury has, in the exercise of its constitutional powers, decided

the questions of fact involved in this case. This court has no right nor authority to invade the province of the jury. It cannot substitute its judgment for that of the jury, nor usurp its privileges and functions.

The majority opinion clearly takes away from plaintiff the advantages he gained by the verdict of the jury. It does not pass upon the insufficiency of the evidence to sustain the verdict, but deliberately substitutes its own convictions, and decisions on the questions of fact, for that of the jury; and this, upon every element of damage established by competent and substantial evidence by the plaintiff.

A more flagrant invasion of the rights and province of the jury is not found in the books. This court, under the evidence in this case, cannot say, nor could any court say, that the verdict is not sustained by substantial evidence. It should be remembered that the question is not now whether plaintiff has sustained his burden of proving his cause of action by a preponderance of the evidence, but, on the other hand, it is, whether or not there is any substantial evidence to sustain the verdict.

The majority opinion, however, seeks to strengthen the position it has assumed, by maintaining that the verdict cannot be sustained, for the reason that the plaintiff cannot claim any damages for the injury to his ice field. The language of the majority opinion in that respect, is as follows:

"We are entirely satisfied that the verdict cannot stand, and that the trial court was correct in so far as he held that the plaintiff could not recover any damages for the alleged damages occasioned by pollution of the ice field. The plaintiff testified that he had, in the course of the years, taken this ice and sold it to the people of Dickinson and vicinity; and that the ice cutting privilege, during the years in question, in this action, was worth from $1,500 to $2,000 per year. Yet, the evidence shows that, prior to the time involved in this action, the city of Dickinson enacted an ordinance prohibiting the cutting of ice on Heart river, at any point within the limits of the city of Dickinson. This ordinance was in effect before the first action was tried. See 38 N. D. 465, 165 N. W. 508. There is no contention that it has ever been repealed or altered. On the contrary, all references to it, during the course of the trial, implied that it was in full force and effect. Hence, we have the situation that the cutting of ice on plaintiff's prem-

ises was expressly forbidden by the laws of the municipality, within which they were situated. Manifestly, he could sustain no damage by reason of that other act, which might prevent him from, or make it unprofitable for him to attempt to violate the law."

The ordinance to which reference is made is one, which made the cutting of ice in plaintiff's ice field, on the Heart river, and the selling of it, at Dickinson, and vicinity, a public nuisance, in that those acts were dangerous to the public health. It passed the ordinance on the theory that the cutting and selling of the ice was a public nuisance.

In the trial of the former case, the ordinance was introduced in evidence, in support of plaintiff's case, over the objection of defendant. The following testimony was given in the former case:

"Q. Prior to the location of the mill there, did you operate any business in connection with this stream, the Heart river, that flows through your land?

"A. Yes, sir.

"Q. What business was that?

"A. The ice business.

"Q. For about how many years did you maintain that?

"A. Since '83.

"Q. When was the last year you cut ice upon your land there?

"A. Last winter, started to cut ice.

"Q. Were you ever stopped from cutting ice upon this land?

"A. Yes, sir.

"Q. By whom?

"Counsel for defendant: I object to that, unless it appears it was by the defendant in this action, on the ground that, were he forbidden to cut ice by nobody else than the defendant, it would not be binding upon the defendant.

"Q. You may answer.

"A. Why, I was stopped from cutting by the board of health, one of the board, I asked if I had the right to cut for cold storage. No, he said, 'It might possibly be used for drinking purposes.' Advised me to cut somewhere else.

"Counsel for defendant: I move to strike the answer as not being the best evidence, the same not being in writing, as being the act of a

so-called board or official authority, which, in order to have effect, must be in writing and which would not, in any event, be bending upon the defendant in this action, and as sharing, in any respect, its rights, duties, or obligations.

"The witness: And further there is written notice in the Dickinson Press, which forbids the ice cutting below the dam.

"Mr. Heffron (plaintiff's attorney): We now offer in evidence, Exhibit B, the same purporting to be a true and correct copy of the ordinance of the city of Dickinson, which has been duly passed, as appears from the appendant dates, at the bottom thereof, and which ordinance is now in full force and effect.

"Counsel for defendant: We have no objection to the foundation laid, showing the passage, approval, and publication of the ordinance, but defendant objects to the same, on the ground that it is not competent proof of any fact, or facts, which would bind the defendant in any matter at issue in this lawsuit; that it is irrelevant and immaterial, and that the rights of the parties to this action cannot be, in any wise, affected, either the right of the plaintiff, as set out in his complaint, or otherwise, by the passage of this ordinance, and that the same is in no wise binding upon and determinative of any of the rights of the defense in this action."

It will thus be seen, that the position of the defendant in the former trial, as to the relevancy of the ordinance, is entirely contrary to that of the majority opinion in this case. We think defendant's position there, in the manner stated in its objection, is correct, for the reason that, if it be conceded the city had the right and authority to restrain the commission of the public nuisance, to-wit, the cutting and sale of the ice, that could not prevent plaintiff from recovering damages for any special injury suffered by him, on account of the pollution of the stream, resulting in the pollution of his ice field, and thereby damages to his property.

We have conclusively above shown that the pollution of the stream by defendant was a nuisance. On this point there can be no dispute. The pollution of the stream was the cause of the pollution of plaintiff's ice field. The pollution of the stream and of the ice field caused the city of Dickinson to pass an ordinance prohibiting the cutting and sale of ice from this ice field. Plaintiff was the owner of the ice field,

and, as such, had a right to cut and sell the ice, except for the ordinance prohibiting him from doing so, enacted because of the existence of the nuisance, but not until after the pollution of the stream and ice field by the defendant.

If it be conceded that the city had authority to enact the ordinance, it could not thereby take away plaintiff's property right to recover damages for special injury suffered by him. This rule is so well settled that it scarcely needs to be mentioned. This principle was enunciated in an early case which came before the Supreme Court of the United States, entitled Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012, there, the court, in its opinion, stated: "A public nuisance being the subject of criminal jurisdiction, the ordinary and regular proceeding at law is by indictment or information, by which the nuisance may be abated; and the person who caused it may be punished. If any particular individual shall have sustained special damage from the erection of it, he may maintain a private action for such special damage; because, to that extent, he has suffered beyond his portion of injury, in common with the community at large."

See, also, Muir v. Louisville & N. R. Co. (D. C.) 247 Fed. 888–897; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1–19, 38 L. ed. 55–64, 14 Sup. Ct. Rep. 240. In the latter case, in the syllabus, the court states this principle: "A right of action to recover damages for an injury is property, and the legislature has no power to destroy such property."

Both of these cases were cited with approval in the case of McGregor v. Great Northern R. Co. 42 N. D. 269, 4 A.L.R. 1635, 172 N. W. 845, the opinion there being by Mr. Justice Birdzell, and concurred in by Justices Christianson and Robinson. The power of a city council to pass ordinances is legislative in character.

"Because the nuisance affects a great number of persons in the same way, it cannot conclusively be said that it is a public nuisance and nothing more. The fact that a nuisance is public does not deprive the individual of his action in cases where, as to him, it is private and obstructs the free use and enjoyment of his private property." Joyce, Nuisances, § 424; Fisher v. Zumwalt, 128 Cal. 493–496, 61 Pac. 82; Harniss v. Bulpitt (1905) 1 Cal. App. 140, 81 Pac. 1022; Wylie v. Elwood, 134 Ill. 281–287, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N.

E. 570; Scheurich v. Southwest Missouri Light Co. 109 Mo. App. 406–420, 84 S. W. 1003; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055.

"The doctrine now is that a nuisance may be at the same time both public and private. An individual, who receives actual damage from a nuisance, may maintain a private action for his own injury, although there may be others in the same situation." Joyce, Nuisances, § 424.

"It is a general rule that the person who erects, constructs, or creates a nuisance is liable for the injury thereby occasioned, in such civil or criminal action, suit or proceeding, as the nature of the nuisance and the surrounding attendant circumstances warrant." Joyce, Nuisances, § 447. See authorities cited in note 144.

"A private corporation may be held liable in a civil action for creating and maintaining a nuisance." Joyce, § 450. Cases cited in note 159.

The majority opinion is not based upon the points or assignments of error presented upon this appeal. The questions presented here are only those above stated, to-wit, that this action is not res adjudicata, and that there is sufficient evidence to sustain the verdict; that these vital, and, in fact, only, points in this case, are ignored by the majority opinion is manifest.

The majority opinion quotes considerable testimony to show that other sources of pollution contributed to plaintiff's injury, but that, as well as all of the evidence, was for the jury. It decided specifically that there were no other sources of pollution, other than natural, and there is substantial evidence to sustain its verdict in that regard.

We can find no reason in the record why the judgment appealed from should not be reversed and the case remanded, with instructions to the trial court to reinstate the judgment in favor of plaintiff. Neither does the majority opinion point out any reason why this should not be done. There is no legal reason given why a new trial should be granted. There is no legal reason shown why plaintiff should not recover the damages to his ice field. He sustained the burden of proof upon every element of his cause of action, including damages to his ice field; in regard to the damages to the ice field, the trial court gave the following instruction:

"Plaintiff claims to recover by reason of an alleged injury to, and

interference with, the privilege of cutting and harvesting ice on the stream in question. I charge you, gentlemen of the jury, before you can find for the plaintiff on that account, you must find, and plaintiff must establish, by a preponderance of the evidence, that such use of the stream for such purpose, by the plaintiff, was a reasonable use, under all the facts and circumstances as shown, that is, taking into consideration, as I have stated to you, the condition and situation of the stream, the normal condition of the country through which the stream flows, the proximity of any towns or cities, or any manufacturing establishments—taking all of these facts and circumstances into consideration, was or was not the use of this stream for ice cutting purposes a reasonable use, as those facts and circumstances are disclosed by the evidence in this particular case. And unless it is so established to have been such a reasonable use, then and in that event, plaintiff is not entitled to a verdict at your hands, on account of any injuries suffered by him, by reason of such interference or injury to such ice business. Likewise, with reference to this matter of pasturage: I further charge you, that if you find for plaintiff and return a verdict for him on account of such injury to such ice business, the measure of damages is the value of his right to harvest ice upon the premises at the proper times and seasons, and the loss of profits, which would have flowed directly to him by reason of his so doing, had he been able so to do."

Plaintiff conclusively proved the value of the privilege of cutting ice during the years 1914 to 1918, both inclusive. His evidence in this regard is undisputed. When the trial court gave the above instruction, it must have been impressed with the fact that plaintiff had offered substantial evidence, with reference to the damage resulting from the loss of the privilege of cutting ice, etc., which evidence it felt it to be his duty, as an impartial court, to submit to the jury; otherwise, it would have refrained from giving the above instruction.

The verdict recovered by plaintiff was not excessive. Neither is there anything to indicate or show, nor did the trial court hold, that the judgment was rendered under the influence of passion and prejudice.

Through a course of tedious litigation, extending over a term of several years, the plaintiff has sought to protect his rights in his property, and at the hands of a jury of his fellow peers, in a county far removed from the place of his residence, he was awarded justice and compensa-

tion for the injuries to his property and for the unlawful invasion of the right of use and enjoyment thereof. The verdict of the jury in his favor should remain inviolate.

The error of the trial court, in setting aside plaintiff's judgment and awarding defendant judgment of dismissal, should not be dealt with, in language that is harsh, for it is clear, that it was impressed by defendant's claim to the effect, that the subject-matter of this action is res adjudicata, but this court has no such impression. It knows that this cause of action is not res adjudicata.

From what has been above stated, it would seem to us that the decision of the majority is an arbitrary one, which finds no support in the law applicable to this case, nor in the facts, as disclosed by the evidence and found by the jury.

Justice requires that the judgment appealed from should be reversed and the case remanded, with instructions to the trial court to reinstate plaintiff's judgment. Nothing less will be either law or justice.

BRONSON, J., concurs.

On Petition for Rehearing, Filed March 26, 1921.

PER CURIAM: Plaintiff has petitioned for a rehearing. The principal complaint of the former opinion is with respect to our holding that upon the evidence in this case the plaintiff is not entitled to recover damages for the alleged pollution of his ice field. In this connection it is pointed out that the ordinance prohibiting the plaintiff from cutting ice was not pleaded, and hence it is asserted that it was not available as a defense. It is true the defendant did not plead the ordinance; but it did plead the adjudication in the former action as a defense and it offered the record in that action in evidence, and asked the trial court to take judicial notice of the decision of this court in that case. As pointed out in the former opinion in this case, at the time of the trial of the former action the *plaintiff* offered the ordinance in evidence. No question was raised as to its validity or effectiveness. On the contrary the position of the plaintiff was that the ordinance had been enacted because of the actions of the defendant, and that since it was adopted, plaintiff had been precluded absolutely from cutting ice.

In our former opinion in this case we quoted at length from the decision rendered on the former appeal. In the portion quoted, the provisions of the ordinance as well as the circumstances incident to its passage were discussed, and the conclusion reached that the enactment of the ordinance was not evidence of the alleged wrongful acts of the defendant; that since the enactment of the ordinance the plaintiff had been precluded from cutting ice, and hence no damages could have been sustained by reason of the loss of the ice cutting privilege subsequent to the time the ordinance became effective. Manifestly, the pleas of the former adjudication, and the offer of the record in that case inclusive of the decision of this court in evidence upon the trial of this action, made the ordinance as set out in the decision, part of the proof in this case.

It is suggested in the petition for rehearing that the ordinance may have been repealed, or that it may be invalid. On the record before us, we would not be justified in assuming any such condition. The presumption is the ordinance remains in force. Comp. Laws 1913, § 7936, subd. 32. On the trial of the first action plaintiff invoked the ordinance as a valid measure. Its validity has never been questioned by anyone. Certainly invalidity should not be assumed, and it is quite doubtful if plaintiff could be heard to question its validity at this time. See 10 R. C. L. p. 836, § 140; 1 Van Fleet, Former Adjudications, pp. 500, et seq. See also Missouri v. Chicago, B. & Q. R. Co. 241 U. S. 533, 543, 60 L. ed. 1148, 1156, 36 Sup. Ct. Rep. 715.

We see no reason for qualifying or changing our former decision in this case. The conclusions announced therein will stand, that the evidence adduced upon the trial of this action did not warrant the award of any damages to the plaintiff for the alleged loss of profits for the pollution of the ice field; but that as to the other two elements of damages (while the evidence is far from satisfactory), a majority of the court do not feel justified in saying, as a matter of law, that there is no cause of action.

Rehearing denied.

ROBINSON, Ch. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

CHARLES ALTENBRUN and Minnie Altenbrun, Appellants, v. FIRST NATIONAL BANK OF ROCK LAKE, a Corporation, Nels W. Hawkinson, and W. J. Lichty, Respondents.

(181 N. W. 590, 908.)

Mortgages — intent of parties controlling in determining whether deed is a mortgage.

1. In considering whether a deed was executed for purposes of a sale, or for purposes of security, and therefore a mortgage, the essential thing in equity is to determine the real intention of the parties.

Mortgages — surrounding circumstances admissible in determining whether deed a mortgage.

2. In ascertaining such intention, equity will regard the substance rather than the form, and, presuming that all parties intended to act in good faith, will view all of the surrounding circumstances.

Mortgages — absolute deed proved a mortgage only by clear evidence.

3. Although this intention must be disclosed by clear, convincing, and satisfactory evidence, in order to overcome the presumption accorded to a solemn deed, absolute on its face, nevertheless, if such intention be so shown by a consideration of the substance of the transaction, its form then becomes immaterial.

Mortgages — deed with option contract and crop lease held a mortgage.

4. Where a deed, absolute on its face, was made for 480 acres of land, and, in connection therewith, an option contract for the sale of the land and a crop lease were made to the grantor, it is *held*, for reasons stated in the opinion, that the deed was made for purposes of security and, therefore, in equity was a mortgage.

Opinion filed January 28, 1921.

Action in District Court, Towner County, *Burr*, J., to declare a deed a mortgage.

Plaintiffs have appealed and demand a trial *de novo*.

Reversed.

G. Grimson and *J. M. Snowfield* (*William Lemke*, of counsel), for appellants.

NOTE.—On the question of admissibility of parol evidence that a written instrument which, on its face, imports a complete transfer of a legal or equitable title or interest in property was intended as a mortgage, see comprehensive note in L.R.A. 1916B, 18.

"Where a deed of land absolute on its face is accompanied by an instrument of defeasance providing for the reconveyance of the property to the grantor, or the revesting of title in him, on his paying a debt or performing some other act intended to be secured, the two instruments will be taken together to constitute a mortgage." 27 Cyc. 994; 18 Ala. 501; 2 Root (Conn.) 279; 21 D. C. 24; 23 Ind. 51; (Ky.) 24 S. W. 629; 13 Ark. 112.

The truest test of whether the transaction is a mortgage or not is the intention of the parties at the time the deal was made, and an absolute deed may be shown to have been nothing more than a mortgage. Jasper v. Hazen, 4 N. D. 1; McGuin v. Lee, 10 N. D. 160; Forester v. Van Auken, 12 N. D. 175; Little v. Baun, 11 N. D. 410; Miller v. Smith, 20 N. D. 96.

"Retention of grantor's notes would be a strong circumstance to establish the transaction of a mortgage." Pitts v. Cable, 46 Ill. 103, 44 Ill. 103; Ennor v. Thompson, 46 Ill. 214; Fielder v. Darrin, 50 N. Y. 437; Murphy v. Darst, 9 N. E. 343.

The fact that the grantor became a tenant of the grantee, and paid rent, was held not to be inconsistent with the character of the mortgagor and mortgagee. Marshall v. Steel, Russ. Eq. (Nova Scotia) 116; Haggerty v. Brower, 75 N. W. 320; Roger v. Davis, 59 N. W. 265: Wilson v. McWilliams (S. D.) 91 N. W. 453.

Flynn, Traynor, & Traynor, for respondents.

Inasmuch as the contract, exhibit 2, gives Altenbrun no authority or right to purchase the land himself, therefore under the law he could not become a purchaser and there is no agreement to reconvey. For authorities on this point see the following: 31 Cyc. 1437; 20 L.R.A. (N.S.) 1158, note; Durand v. Preston (S. D.) 128 N. W. 129; Merriam v. Johnson (Minn.) 90 N. W. 116; Curran v. Kent (S. D.) 153 N. W. 142; Sawyer v. Issenhuth (S. D.) 141 N. W. 378; Robbins v. Maher, 14 N. D. 228, 103 N. W. 755.

The conveyance was not a mortgage. Elling v. Fine (Mont.) 164 Pac. 891; Greff v. Hobbs (Iowa) 159 N. W. 429; City Lumber Co. v. Hollands (Mich.) 148 N. W. 361; Gogarn v. Connors (Mich.) 153 N. W. 1068; Lamberson v. Bashore (Cal.) 139 Pac. 817; Devore v. Woodruff, 1 N. D. 143; McGuinn v. Lee, 10 N. D. 160; Miller v. Smith, 20 N. D. 96; Forester v. Van Auken, 12 N. D. 175; Little v.

Braun, 11 N. D. 410; Northwestern F. & M. Ins. Co. v. Lough, 13 N. D. 601.

The question whether a deed which is absolute in form is to be taken as a mortgage depends upon the intention of the parties in regard to it at the time of its execution. 27 Cyc. 1007.

To convert the instrument into a mortgage there must be a continuing, binding debt, in its fullest sense. Miller v. Smith, 20 N. D. 102; 27 Cyc. 1010.

Robinson, Ch. J. From the beginning to the end, the transactions narrated in this case bear marks of indirection, windings, and subterfuge. On January 25, 1917, for the express consideration of $1, the plaintiffs made to Hawkinson and Lichty, officers of the bank, a warranty deed for 480 acres of good land in town 122, ranges 65 and 66. The grantees quitclaimed the land to the bank. The plaintiffs continued their residence on the land, farming it, and giving to the bank a large part of the annual crops and returns. Now the plaintiffs claim that the deed is in fact a mortgage to secure the bank for debts and advances. They ask that the bank account and give them a true statement of all debts, advances, and moneys received from the plaintiffs and the crops; that the court determine the amount due and adjudge the deed to be a mortgage. Defendants, by answer, claim that the deed was an actual bona fide sale of the land, and not a mortgage. Plaintiffs appeal from a judgment against them.

Now the turning facts of the case are these. The plaintiffs owned the land. They had resided on it for some twenty years, and naturally by such long residence they had become attached to the land and set on it a price of affection. They owed the bank on chattel security about $2,000, and, on a second mortgage, $1,000. They owed each defendant named in the deed about $100. No other securities had become due except some interest on a mortgage to McLaughlin. The amount secured on the land was $12,000, more or less. The bankers represented to plaintiffs that McLaughlin was about to foreclose and to make a ruinous expense, and that to avoid the same it was necessary to deed the land to the bank. Confiding in their bankers, the plaintiffs acquiesced. Accordingly the bankers prepared the deed in question, took it to the farm, and obtained the signatures of plaintiffs. Then the plaintiffs

were induced to take a cropping lease of the land, signed by Lichty and Hawkinson, and they made to the plaintiffs a contract authorizing them, within one year, to sell the land for any sum in excess of $12,400, and to retain the excess. During the deal the bankers continuously protested and assured the plaintiffs that they did not want the land, and that all they wanted was the money due. Neither at the time of the making of the deed, nor at any time until two days before the commencement of this action, did the defendants, or either of them, return, release, or offer to surrender to the plaintiffs any of the notes and mortgages held against the land. In other words, the plaintiffs made the deed without a particle of consideration, except an oral understanding that they would be protected against foreclosures. The record contains not a word of evidence to show that the plaintiffs ever bargained to sell the land.

Mr. Foley, the bank manager, testifies:

Q. There was not any talk of the bank buying the land out and out?
A. No, not definitely.
Q. Was he offering to sell the land?
A. No, sir; not exactly.
Q. Your idea was to save expense of foreclosure?
A. Yes, sir.
Q. You were interested because you had a subsequent mortgage?
A. Yes, sir.

In October, 1919, two days before the commencement of this action, he figured the amount against the land at $12,241.68. Then he made a pretended sale of the land to Mr. Langley and Mr. Hall for the price of $31 an acre. That included a commission of $3 an acre.

Question to Mr. Foley:

Q. The land was sold to Mr. Langley and Mr. Hall?
A. Yes, sir.
Q. Mr. Langley is a brother of your cashier?
A. Yes, sir.
Q. He is also your agent for the sale of the land?
A. Yes.
Q. In fact, all he has paid down is the commission?
A. Yes, sir.

Q. He had not put one cent of money into it?

A. No, sir.

And that is how they tried to save the expense of foreclosure! It is needless to extend the discussion. The record shows conclusively and beyond all doubt that the plaintiffs did not bargain to sell the land to the defendants or either of them, and that the deed in question was made as a security for past and future advances necessary to save the expense of foreclosure. Such a deed is a mortgage. Sherwin v. American Loan & Invest. Co. 42 N. D. 389, 173 N. W. 758.

Every transfer of an interest in land, other than in trust, made only as security for the performance of an act, is to be deemed a mortgage. Comp. Laws, § 6727.

The judgment must be reversed and the case remanded to the District Court for further proceedings.

GRACE, J., concurs.

BRONSON, J. (concurring specially). The crucial question in this case is to determine whether the deed was executed upon a sale made, or, for purposes of security. As stated in Sherwin v. American Loan & Invest. Co. 42 N. D. 389, 173 N. W. 760, in transactions of this kind, the essential thing, in equity, is to determine the real intention of the parties. In so doing, equity, presuming that all parties intended to act in good faith, will view all of the surrounding circumstances in order to determine this real legal intention of the parties. In ascertaining such intention room is afforded for the application of the maxim that equity regards the substance rather than the form. Although the intention of the parties must be disclosed by clear, convincing, and satisfactory testimony in order to overcome the presumption accorded to a solemn deed absolute on its face, nevertheless, if such intention is so shown by a consideration of the substance of the transaction, its form then becomes immaterial.

This is a case involving not fraud of the parties, but rather the question of determining their real legal intentions upon the transaction had. Ofttimes it is by indirections that we find directions out. A careful survey of the testimony in this case discloses that the plaintiff never had any real legal intention to sell the land involved through the deed

executed; that the bank, furthermore, took this deed not because it wanted to buy the land, but because of the financial embarrassment in which the plaintiff was found. Throughout the testimony the bank continuously asserted an intent that it wanted only its money due it from the plaintiff upon both its real estate and chattel securities. That it caused this deed to be made in order to save the plaintiff from the expenses of a foreclosure, and, further, in order that it might secure to itself the money due. At the time the deed was executed, the plaintiff was delinquent in interest payments upon existing real estate mortgages; he was then seeking without avail to place a loan through Federal land agencies upon the land, and the bank then was in a position, by reason of its inferior real estate securities, where it was required, in order to preserve its lien, to assume, or to make arrangements to take care of, prior liens upon the premises affected. The foreclosure of these prior liens would lessen the security of the bank by reason of the expenses involved. At the time when the deed was executed, there was no stated consideration computed as the value of the land, and for which a stated amount should be paid by the bank as a consideration for the sale. In this regard, the evidence in favor of the bank, in any event, amounts only to a showing that the land involved was not worth any more than the indebtedness secured against it, and that consequently such indebtedness represented the consideration for the value of the land.

This statement, as computed by the bank, gave an aggregate sum of $14,450.19. It included principal and interest secured by liens prior to the bank's mortgage, also taxes and unsecured claims of one Hawkinson for $38.15, and of the Lichty Merc. Company for $150.85. Hawkinson and Lichty were grantees in the deed made by the plaintiff, and were officers of the bank. The indebtedness owing by the plaintiff to the bank, as computed by the bank, then amounted to $6,018.94. It was secured by a mortgage upon the land involved and also a mortgage upon plaintiff's chattels. In this regard it is to be noted that the bank, in this transaction, proceeded first to consider the security of both plaintiff's real estate and chattels; it then made an apportionment of this indebtedness, allotting $12,241.64 upon the land, and the balance, $2,019.60, upon the chattels. This, accordingly, divided the indebtedness owing by the plaintiff to the bank, a portion thereof upon the land

and the balance as stated, secured by chattel mortgages already existing. At this time neither a new note nor new chattel mortgage was taken by the bank, but all of the outstanding notes, together with the chattel mortgages executed in securing thereof, were held by the bank, as it claims, as collateral to the payment of this indebtedness then resulting and existing upon the chattel security. It is evident that, as a result of this transaction, the security of the bank was strengthened through giving to it a larger measure of title and an equitable lien upon the land, as well as upon plaintiff's chattels so mortgaged, including, further, the theretofore unsecured claims of Hawkinson and the Lichty Merc. Company. It gave to the bank the opportunity to negotiate concerning the prior liens, to have a measure of direction in the farming operations of the land concerned, and to receive an application yearly of the crop proceeds, thus better insuring payment and reduction of its indebtedness. It is evident further, from the record, that at the time of this transaction the plaintiff was not relieved or released by express acts of the parties concerning any of the indebtedness then owing by him to the bank; no note was canceled; no mortgage was released. The claim of the bank that this indebtedness was held as collateral by reason of its connection with the chattel security, and in order that it might preserve the status of such chattel security, and its lien thereupon, does not answer the fact that the transaction in its legal essence still remained a continued indebtedness on the part of the plaintiff towards the bank for the full amount existing prior to the execution of the deed.

The earmarks of the transaction indicate, further, the real thought of the parties; namely, that the bank should be better secured, and the plaintiff should be better afforded an opportunity to try and work out from his financial embarrassment. The execution of the option contract, practically simultaneously given, by two of the officers of the bank in whose name the title to the land was taken, evidences further an indication to give to the plaintiff and to preserve to him his equity in the land over and above the indebtedness owing by the plaintiff and secured thereon. This negatives an intent to secure, through the execution of a deed, the equity of redemption possessed by the plaintiff. The fact that leases were executed from year to year by the officers and the bank to this plaintiff upon this land did not serve to foreclose this equity

of redemption possessed by the plaintiff, or, in connection with the execution of the deed, to evidence a direct sale of the premises. It rather served to disclose a legal intent on the part of the bank to secure the largest measure of control possible in order to preserve to the bank better opportunity for realizing upon its indebtedness, and still permit to the plaintiff full opportunity to make redemption and relieve himself from financial embarrassment. This real legal intent of the parties is further shown by a letter written by the cashier of the bank nearly a year after the execution of this deed, wherein it was stated: "We paid McLaughlin the $1,800 second mortgage, and renewed the $3,200 deed, so you will not have to make a loan with the Federal Bank, now that we are taking the land over." Assuredly, this statement made by the cashier of a bank in a letter, in connection with a statement containing crop report and crop division for the year 1917, discloses affirmatively a legal intent on the part of the bank to recognize an interest and a right on the part of the plaintiff in the land involved. Manifestly, if a sale of the premises had been made, in fact, at the time of the execution of the deed and the lease, no such statement would have been made by the bank cashier in such letter. Furthermore, if the transaction was, at the time of the execution of the deed, a transaction for purposes of security, it so continued to remain. It is further to be noted that the sale by the bank in September, 1919, of these premises pursuant to a farm contract, was upon a consideration of $31 per acre, to be paid through one promissory note of $1,500 and another promissory note of over $14,000, payable by one half of the crops raised each year on such premises, with interest at 6 per cent per annum. In this transaction, the evidence discloses that a commission of $3 per acre was allowed, and was to be paid to the cashier of the bank, and that the bank's security then was sought to be changed from an indebtedness on the part of the plaintiff that paid them about 10 per cent per annum, with direct control over the crop proceeds each year, into a form of indebtedness that drew only 6 per cent per annum, and an agreement to turn over one half the crops until such indebtedness was paid. The good faith of such transaction might well be questioned if the best interests of the bank were being considered. Upon a careful survey of the entire record, and for the best in-

terests of both the plaintiff and the bank, upon principles of equitable consideration, we are of the opinion that this transaction was and should be deemed a transaction for purposes of security, and therefore a mortgage.

It is accordingly ordered that the judgment be reversed and remanded to the trial court, for further proceedings according to law, pursuant to this opinion, with costs to the appellant.

BIRDZELL, J., concurs.

CHRISTIANSON, J. (concurring). A careful consideration of the evidence in this case leads me to the conclusion that so far as the plaintiffs are concerned they had no intention to actually sell and transfer title to the land in controversy, either to Hawkinson and Lichty or to the bank. The evidence shows that the deed was executed by the plaintiffs at their farm. The deed was presented to them for execution by the cashier of the defendant bank, who was accompanied by the assistant cashier. Hawkinson, the president of the bank, testified that before the cashier and the assistant cashier went out to the plaintiff's farm, he instructed them specifically that they must make the Altenbruns understand that they were in fact selling the land. I am satisfied, however, that when the Altenbruns signed the deed they had no intention sell, and did not understand that they were actually selling, the land; but supposed that the deed was necessary, or at least desirable, as further protection to the bank, to secure its claims, and to enable it to take care of, and avoid foreclosure upon, the prior mortgages against the land. In other words, I am of the opinion that, regardless of what intentions the defendants may have had, the evidence shows that the Altenbruns intended to and did execute the deed for purposes of security only.

PETER LANDSEIDEL, Respondent, v. R. CULEMAN, Fred Schwenk and Peter Jungers, Appellants.

(13 A. L. R. 1339, 181 N. W. 593.)

False imprisonment — justice of peace immune from liability for judicial acts in issuing warrant of arrest.

The plaintiff was arrested by a deputy sheriff under a warrant issued by a justice of the peace. The warrant purports to have been issued pursuant to a complaint of one Schwenk, a creditor of the plaintiff, charging that the defendant (the plaintiff herein) used a fraudulent and false device to cheat the complainant. The plaintiff was taken before the justice of the peace, and was later remitted to the custody of the officer who locked him in jail. In an action for damages for the arrest, it is *held:*

1. A justice of the peace, in the exercise of his judicial functions, is immune from personal liability for the correctness of his decisions and acts to the same extent as judges of courts of general jurisdiction.

False imprisonment — justice of peace not liable for issuing warrant of arrest though acting maliciously or without belief in guilt.

2. A justice of the peace, acting judicially, and within his jurisdiction, is not personally liable for damages resulting from the arrest and confinement of an individual in jail, though it might appear that he had acted maliciously and without a belief that the person had committed a criminal offense.

Appeal and error — judgment for punitive damages reversed as to all defendants when one not liable.

3. Where two or more defendants are sued jointly for damages arising out of malicious trespass against the person of the plaintiff, and, from the evidence and the issuable facts as found by the jury in a special verdict, it appears that one of the defendants is not liable, the award of punitive damages cannot stand as to the codefendants.

Opinion filed January 28, 1921. Rehearing denied February 21, 1921.

Appeal from order denying new trial, District Court, Morton County, *Crawford,* J.

Reversed.

Jacobsen & Murray, for appellants.

NOTE.—On liability of judicial officer to civil action for acts of judicial nature, see note in 44 L.R.A.(N.S.) 164.

On the question of application of rule of civil liability of judicial officer for false imprisonment, to judges of inferior court, see note in 13 A.L.R. 1344.

It is very apparent that the complaint charges false imprisonment only. 26 Cyc. 72.

"It is essential that the complaint must contain a substantial, accurate, and complete description of the original proceeding, and it must set forth facts showing that it was judicial in character; in criminal cases the particular offense must be stated. Process issued must be adequately described." 26 Cyc. 8.

"The essential foundation of an action for malicious prosecution is an original proceeding, judicial in character." Burns v. Ebern, 26 How. Pr. 273.

"Complaint, in action for malicious prosecution, failing to allege commencement of original proceeding or bona fide termination in favor of the instant plaintiff, was insufficient." 26 Cyc. 74.

"An action for false imprisonment does not lie for an imprisonment in due course on regular proceedings of a court having jurisdiction of the offense. If the order or process be valid, the person wrongfully detained must seek his remedy in some other form of action." 19 Cyc. 339.

"Valid judicial authority existing at the time of the detention is a full justification for proper conduct thereunder." 19 Cyc. 340.

Where a justice of peace has jurisdiction over the subject-matter, he is not liable in a civil action for damages, even though he acts corruptly and maliciously. Gordon v. District Ct. (Nev.) 131 Pac. 134; Pratt v. Carter (Mass.) 48 Am. Dec. 652; Cook v. Bangs, 31 Fed. 640; Curnow v. Kessler (Mich.) 67 N. W. 982; Grant v. Williams (Mont.) 169 Pac. 286; Bradley v. Fisher (U. S.) 20 L. ed. 646.

Sullivan & Sullivan, for respondents.

Even a regular process is no defense if the imprisonment is made use of to extort money or property from the prisoner. 8 Stand. Enc. Proc. 927; Clark v. Tilton, 74 N. H. 330; 11 R. C. L. pp. 798 and 799.

All persons who directly procure, aid, abet, or assist in an unlawful imprisonment, are liable as principal. And where there is some participation and concert of action on the part of various defendants, they become joint tort-feasors. 19 Cyc. 326; 11 R. C. L. p. 809, ¶ 22.

BIRDZELL, J. This is an appeal from an order denying a motion for a new trial. The action is one to recover damages for illegal imprisonment of the plaintiff Landseidel in the city jail of Hebron, North Dakota, in circumstances presently to be stated. The action was tried before a jury, and a special verdict rendered. Upon this verdict judgment was entered for the plaintiff. Consideration of the errors assigned upon this appeal requires that attention be given to the allegations of the complaint as well as to the evidence adduced at the trial and the special verdict. The complaint is stated in eight paragraphs. All of them except the first relate to the damages. The cause of action is alleged in the first paragraph, which reads as follows: "That on the 17th day of July, 1919, at Hebron, in the county of Morton, state of North Dakota, the defendant Rome Theiring, at the instigation and procurement and request and orders of the defendants Fred Schwenk, R. Culeman, and Peter Jungers, unlawfully and maliciously, and without probable or reasonable cause, and without any cause whatsoever, but solely for the purpose of attempting to extort from this plaintiff a note and mortgage, and with intent to injure the plaintiff, by force compelled the plaintiff to go with him to the city jail of Hebron, North Dakota, and there imprisoned this plaintiff, and then and there detained him and restrained him of his liberty from 11 o'clock on July 17, 1919, to noon on the 18th day of July, 1919, against the will of the plaintiff herein."

Upon the trial the defendants objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was overruled, and testimony was adduced showing that the plaintiff, for a considerable period prior to his arrest, had been indebted to the defendant Schwenk in an amount approximately $87; that there had been some understanding between Schwenk and the plaintiff to the effect that the plaintiff would give Schwenk the exclusive agency for the sale of his government homestead, consisting of 80 acres in Stark county, and that out of the proceeds of such sale Schwenk's claim might be satisfied. It appears that the plaintiff subsequently sold his land and disposed of the proceeds without paying Schwenk's claim. There were some negotiations looking toward a settlement in June, 1919, and as a result the plaintiff agreed to discharge the claim at the rate of $10 per month.

He accordingly paid $10 on June 28th. In the evening of the 17th of July, as the plaintiff and his wife were leaving the dentist's office in Hebron, Theiring, a deputy sheriff, arrested the plaintiff upon a warrant issued by the defendant Culeman, a justice of the peace. The warrant had been issued upon the complaint of Schwenk, charging that on the 29th day of December, 1917, at the city of Hebron in Morton county, the above-named defendant (Landseidel) "did wilfully and unlawfully swindle this plaintiff out of his money by means of a note in writing, and which defendant used as a false and fraudulent device to cheat this complainant," etc.

The warrant was fair on its face, but it does not appear that the complaint had been submitted to the state's attorney as required by § 10,135, Comp. Laws 1913. There is evidence, however, that the state's attorney had talked with the justice of the peace some time previously, and had given him to understand that he might issue warrants in minor cases where he thought a man should be arrested, that it would be all right with him and he would O. K. it. Immediately after the arrest, the plaintiff was taken to the office of the defendant Jungers, an attorney at law, who apparently was representing Schwenk. The defendant Culeman was also there. The plaintiff desired a continuance, owing to the absence from the city of his attorney. After some discussion involving the Schwenk claim, and, as the defendants Jungers and Culeman testified, involving also the unwillingness of the plaintiff herein to give bail in the sum of $50 for his appearance the following day, the plaintiff was taken to the city jail and locked up for the night. On the following morning he was allowed to go home for his breakfast, with the understanding that he would return in about an hour. Upon his return he was again taken to the office of Jungers, where there was some further discussion with reference to the Schwenk claim. Jungers, Schwenk, and Culeman were present and participated in the discussion. It seems that Landseidel was given to understand at the time of both his appearances before the justice of the peace in Junger's office, that if he would pay the Schwenk claim or if he and his wife would join in a mortgage upon their home in Hebron, securing it, the proceedings against him would be dropped. The plaintiff refused to give the mortgage demanded and to give bail, whereupon he was returned to the jail and kept

confined for several hours. An entry in the justice's docket dated July 19, 1919, shows that on July 18th the defendant refused to give any undertaking, and that he was left in charge of the officer. Following this is this statement: "Later, complaining witness dropped the prosecution, and the case was then dismissed, with costs in the sum of $6 against the complaining witness Fred Schwenk."

Upon the trial the action was dismissed as to Theiring, deputy sheriff, who made the arrest, upon the stipulation that the dismissal should not affect the cause of action against the other defendants.

It seems that the complaint upon which the warrant issued was drawn under § 9968, Comp. Laws 1913, which makes it a felony for one person to obtain money or property from another "by color or aid of any false token or writing or other false pretense," etc. There were twenty-one questions submitted to the jury for their special verdict, some of which were not answered.

The questions responded to and the answers are as follows:

Q. Did the defendants, Fred Schwenk, R. Culeman and Peter S. Jungers, jointly, on or about the 17th day of July, 1919, at Hebron, North Dakota, *without probable or reasonable* cause and maliciously and for the purpose of attempting to extort from the plaintiff, Peter Landseidel, money or a note and mortgage, cause Peter Landseidel, the plaintiff, to be arrested and confined in the city jail of Hebron, North Dakota?"

A. Yes.

Q. Did the defendants, Fred Schwenk, R. Culeman, and P. S. Jungers, in instituting and executing the proceedings leading up to the arrest of the plaintiff herein, and in causing the arrest and detention of the plaintiff, Peter Landseidel, if you find such to be the fact, actually and in good faith believe that the plaintiff Peter Landseidel had committed the crime of obtaining property by false pretense or any other crime?

A. No.

Q. If you find that some of them in executing and instituting said proceedings did in fact believe in good faith that Landseidel had committed some crime, you will state which of the defendants in good faith believed that Landseidel had committed a crime.

A. None of them.

Q. If you find that in fact the plaintiff was arrested, did said arrest cause the plaintiff mental suffering?

A. Yes.

Q. If you find that in fact the plaintiff was arrested, did said arrest reasonably cause the plaintiff physical suffering?

A. Yes.

Q. If you find that in fact the plaintiff was arrested, did said arrest reasonably cause the plaintiff to be kept from his work?

A. Yes.

Q. Were all the acts and things that you find were done or caused to be done by the defendants, Fred Schwenk, R. Culeman, and P. S. Jungers, done maliciously, and without reasonable or probable cause therefor?

A. Yes.

Q. Did the defendant Fred Schwenk have probable cause for the arrest of said plaintiff in the criminal proceedings complained of herein?

A. No.

Q. Did the said defendant Fred Schwenk act maliciously against the said plaintiff in having him arrested in the proceedings complained of?

A. Yes.

Q. What damages did the plaintiff suffer? 1st. Actual damages?

A. One thousand dollars.

Q. 2d. Exemplary damages?

A: Three thousand dollars.

It is difficult to ascertain from the complaint whether the plaintiff relies upon a cause of action for malicious prosecution, false arrest, or abuse of process. There was evidence submitted at the trial from which the jury might have found the defendants, or some of them, to have been guilty of one or more of these forms of trespass against the person of the plaintiff. But before a judgment could be legally entered upon the special verdict under this complaint and the evidence, it would have to appear that the jury had found all of the essential facts in issue in favor of the plaintiff; and, to sustain the judgment for punitive damages, the facts must support the liability of all of the defendants. The verdict charges the defendants with punitive damages

in the sum of $3,000, and it cannot be assumed that this verdict would necessarily have been the same if any one of the defendants were not legally answerable for the commission of the wrong for which the punitive damages are assessed. Punitive damages are largely in the discretion of the jury, and they are presumed to be assessed as a measure of punishment for culpable conduct. If any one defendant be not answerable, a joint award of punitive damages against him and his codefendants cannot stand, for there is no way of determining the amount the jury considered as appropriate punishment for his share in the wrongful conduct. See 2 Sutherland, Damages, § 407.

The defendant Culeman was a justice of the peace, and it is undisputed that a complaint was filed with him, a warrant issued thereon, and that the arrest was made under the warrant.

It is elementary that judicial officers are not liable for the erroneous exercise of the judicial powers vested in them. This immunity from liability is based upon considerations of public policy. To hold judicial officers personally liable for errors of judgment concerning either questions of law or fact would be subversive of both independence and efficiency in the administration of justice. This rule of public policy applies as well to inferior courts of limited jurisdiction as to superior courts of general jurisdiction. We can see no reason for the distinction that has sometimes been drawn between the two classes of judicial officers in this respect. On this subject, Ruling Case Law says (11 R. C. L. 15): "In the later cases a clear tendency has been evident to abolish altogether the discrimination between judges of different rank, and to extend to justices of the peace and other lesser judicial officers immunity from personal responsibility for the correctness of their decisions and acts to the same extent that it is granted to judges of the superior courts." If a judge acts within his jurisdiction, it has been held that he is not even liable to a party civilly though he act both maliciously and corruptly. Broom v. Douglass, 44 L.R.A. (N.S.) 164, and note (175 Ala. 268, 57 So. 60, Ann. Cas. 1914C, 1155).

In the instant case the justice cannot be held liable for any mistake he might have made in determining that the complaint was sufficient to authorize the issuance of the warrant. And there is no finding that any subsequent act of his converted the arrest and imprisonment into

a trespass *ab initio*. The only findings that tend in this direction are in substance that Jungers, Schwenk, and Culeman, without probable or reasonable cause, and maliciously, for the purpose of extorting money from the plaintiff, caused him to be arrested and confined; that none of them, in good faith, believed that Landseidel had committed any crime; that all the acts participated in by Culeman were malicious and without reasonable or probable cause. The jury omitted answering the specific question as to whether or not Culeman had acted in good faith in issuing the warrant and in the subsequent proceedings in connection therewith. Obviously if Culeman was acting judicially and within his jurisdiction, his belief as to whether or not Landseidel had committed some crime was immaterial, as it might have been his duty to issue the warrant nevertheless, or at least he might well have conceived it to be his duty. And if he regarded it as his duty to issue a warrant, neither the fact that he acted maliciously nor the absence of probable cause for the arrest, would render him personally liable. Broom v. Douglass, supra; 11 R. C. L. 815. It follows that, as facts sufficient to charge Culeman with liability are not found, the verdict is vitiated in so far as it awards punitive damages.

The court erred in denying defendant's motion for a new trial. The order is reversed and the cause remanded for a new trial. Costs to abide the event.

CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

ROBINSON, Ch. J. (concurring specially). In this case defendants appeal from an order denying a motion for a new trial. The complaint is sufficient. It avers that, to extort money from the plaintiff, the defendants arrested and imprisoned him in the county jail in Hebron, to his damage $10,000. The verdict is for actual damages, $1,000; for exemplary damages, $3,000. The arrest and imprisonment is not denied, but each defendant claims to be perfectly innocent. Culeman, the justice, says he merely acted as a justice of the peace and issued a warrant; Jungers, that he merely acted as an attorney at law; Schwenk, that in making the complaint and in causing the arrest, he

acted in good faith on the advice of Mr. Jungers. The warrant on which plaintiff was arrested merely charges him with swindling. The charge of the complaint is as follows:

"Fred Schwenk, being first duly sworn, says: That on the 29th day of December, 1917, at the city of Hebron, in said county, the above-named defendant did wilfully and unlawfully swindle this plaintiff out of his money by means of a note in writing, and which defendant used as a false and fraudulent device to cheat this complainant, against the peace and dignity of the state of North Dakota.

"Wherefore, complainant prays that the said defendant may be arrested and dealt with according to law.

"(Signed) Fred Schwenk."

The complaint does not state facts sufficient to constitute a public offense, and the justice had no right or jurisdiction to issue a warrant. The arrest was made in the nighttime about 10:30 P. M. on July 10, 1919. It was made to force the plaintiff to pay or secure a promissory note for $87 that he had made to Schwenk for money loaned. When arrested the plaintiff was taken to the office of Jungers. Culeman was there and wanted the plaintiff to settle by giving a note and mortgage on his house, or by inducing his uncle to sign a note with him.

Plaintiff testifies: Culeman said he would put me to jail if I did not give the note and mortgage. Plaintiff refused. They put him in jail and he was there over night. Next morning they brought him again before the justice and Jungers.

Plaintiff testifies: Culeman said to him: You got to give a mortgage or get your uncle to sign a note and then you can go.

Q. Well, what did he do?

A. Well, when I say that I would not settle that way he went up from his chair, went with his fist for my face and shook his fist in my face, and he says: "You are a robber." He said: "You are the biggest robber and the biggest lawbreaker in the whole world;" and Jungers said: "You have to settle, that is all there is about it."

Then they said, if you have no money to pay it you got to go to jail till your lawyer comes back, and they put me in jail again. They left me there till noon. Then the deputy sheriff came and opened the lock

and said: "You can go to dinner; you can go to work." That was the end of it.

By a special verdict the jury found that, for the purpose of extorting money from the plaintiff, the defendants jointly caused him to be arrested and confined in the city jail at Hebron, and that none of the defendants believed the plaintiff to be guilty of any offense. That part of the verdict is well sustained by the evidence. The legal procedure was a mere hocus-pocus and a gross abuse of legal process. It was no justification to any party. However, the verdict is clearly excessive. The sum assessed for actual damages was entirely sufficient to include the exemplary damages. Hence, it is ordered that a new trial be granted, with costs to abide the event of the action.

Reversed and remanded forthwith.

GEORGE P. McMILLEN, Receiver and Respondent, v. A. N. NELSON, Claimant and Appellant.

(181 N. W. 618.)

Fraudulent conveyances — purchaser who has failed to comply with Bulk Sales Law cannot recover against receiver on an assigned claim payment of which was assumed by such purchaser.

In September, 1918, the appellant, Nelson, purchased a going retail hardware business from one Zorn. The property transferred by Zorn to Nelson in such transaction consisted of the hardware stock and fixtures, the premises where the business was being conducted, and a certain dwelling house. In consideration of the transfer to him of this property, Nelson conveyed to Zorn certain equities in Minnesota lands; paid him $491.58 in cash, and assumed and agreed to pay debts which Zorn owed to certain wholesale houses. Among the claims which Nelson assumed and agreed to pay was one in favor of Farwell,

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NOTE.—For authorities expressly considering or necessarily involving and passing upon the question as to the form of remedy available to the creditors of one who has sold goods in violation of the Bulk Sales Law, see note in 39 L.R.A. (N.S.) 374, on remedy of creditors where sale is made in violation of Bulk Sales Law.

On right of purchaser in violation of Bulk Sales Law, where price has been applied to payment of creditors of seller, see note in 51 L.R.A.(N.S.) 343.

Ozmun, Kirk, & Company. On September 25, 1918, Nelson settled such claim by paying Farwell, Ozmun, Kirk, & Company, $468 in cash, and executing and delivering to it certain notes for the balance of the claim. In the transaction between Nelson and Zorn there was no attempt whatsoever to comply with the provisions of the so-called Bulk Sales Law (Comp. Laws 1913, §§ 7224–7227). On August 16, 1919, upon proceedings instituted by certain creditors, a receiver was appointed to take charge of the hardware stock, and distribute the proceeds thereof *pro rata* among the creditors entitled thereto. On December 15, 1919, Farwell, Ozmun, Kirk, & Company executed a written assignment to Nelson of the claim which it had against Zorn on September 25, 1918. Nelson at no time rescinded or attempted to rescind the transaction with Zorn. On or about December 29, 1919, Nelson, claiming to be the owner of such claim, presented it to the receiver for allowance. The receiver rejected it. The trial court sustained the action of the receiver.

***Held*, that the trial court's ruling was correct.**

Opinion filed January 29, 1921. Rehearing denied February 17, 1921.

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

A. N. Nelson appeals from an order rejecting a claim presented to a receiver.

Affirmed.

Harold B. Nelson, for claimant and appellant.

The debt of Zorn to Farwell, Ozmun, Kirk, and Company was transferred, not paid. Savage v. Murphy, 90 Am. Dec. 733; Thomas v. Lye, 37 Ill. App. 482; Barhydt v. Perry, 10 N. W. 820.

Any interest in property may be transferred under our statute, and the transfer of a thing transfers all of its incidents. Comp. Laws 1913, §§ 5438, 5509.

And a consideration is unnecessary to its validity. Comp. Laws 1913, § 5489.

The assignment of the Zorn claim, or its transfer to Nelson, carried with it the right of Nelson to file it with the receiver and share in the distribution of the estate. 1 Moore, Fraud. Conv. p. 204; Hand v. Breckenridge, 56 N. W. 221.

The assignee of a claim founded in contract may sue to set aside a fraudulent conveyance by the debtor, though the conveyance was made prior to the assignment. Noble v. McKeith, 86 N. W. 526; Hernton v. Short, 181 S. W. 142; Gill v. Newhouse, 178 S. W. 495.

One who pays a debt which, being bound with or for others, he has an interest to discharge, is legally subrogated to all the creditors' rights, and may use all the means he could to enforce payment. Nichols v. DeEnde, 3 Mart. (N.S.) 310; Surres v. His Creditors, 3 La. 341.

Knowledge of the sale does not estop a creditor from claiming the benefits of the law. Modinette County Sav. Bank v. Koivisto, 127 N. W. 680; People's Sav. Bank v. Van Allsburg, 131 N. W. 101; National Grocer Co. v. Hanna, 133 N. W. 493.

W. H. Adams, for receiver and respondent.

The Bulk Sales Law applies only to creditors existing at the time of the sale and transfer of merchandise and fixtures. N. D. Comp. Laws 1913, § 7224; Ewaniuk v. Rosenberg, 34 N. D. 93–99.

Claimant, if creditor, cannot share with Zorn's other creditors. N. D. Comp. Laws 1913, §§ 7224–7227.

The appellant would be permitted, if his contention were sustained, to receive the benefit from his own wrongful act. He is not entitled to any relief under the circumstances. 21 C. J. 184, 185.

No one can take advantage of his own wrongdoing. N. D. Comp. Laws, § 7251.

CHRISTIANSON, J. In September, 1918, the appellant, Nelson, purchased from one Zorn a hardware store located at Gardena, in Bottineau county in this state. The appellant purchased the entire business, including the premises where the business was transacted, the fixtures, and the stock. In consideration of the transfer to him of this property, Nelson conveyed to Zorn certain lands in Minnesota, subject to certain mortgages (the payment of which was assumed by Zorn); paid him some $491.58 in cash, and assumed and agreed to pay debts owing by Zorn to certain wholesale houses. Among the claims which Nelson assumed and agreed to pay was one in favor of Farwell, Ozmun, Kirk, & Company, in the sum of $4,947.84. Part of this claim was represented by open account and part by notes. On September 25, 1918, Nelson paid this claim,—part in cash and in part by giving his notes, all of which were later paid. In the transaction between Nelson and Zorn there was no attempt to comply with the provisions of the so-called Bulk Sales Law of this state. On November 21, 1918, the Bottineau County Bank, one of the creditors of Zorn, brought an

action and caused an attachment to be levied upon the hardware stock. On August 16, 1919, the Bottineau County Bank (and other creditors of Zorn) made application to the district court for the appointment of a receiver to take charge of the hardware stock. In that application it was stated that such creditors had instituted actions on debts existing prior to the sale by Zorn to Nelson; and that such sale was made without any compliance whatsoever with the provisions of the Bulk Sales Law of this state. The application for the appointment of a receiver came on to be heard pursuant to stipulation between the attorney representing the creditors of Zorn and the attorney representing the appellant, Nelson. A receiver was accordingly appointed, and he forthwith qualified and entered upon the discharge of his duties. On December 15, 1919, Farwell, Ozmun, Kirk, & Company executed a written assignment, in which it is recited that it "does hereby sell, assign, transfer, and set over onto the said party of the second part (Nelson) his heirs, executors, administrators, and assigns, without recourse upon the first party (Farwell, Ozmun, Kirk, & Company), all of the right, title, and interest first party has or had in and to that certain account with one T. H. Zorn, of Gardena, North Dakota . . . on which account there was due on the 25th day of September, 1918, the sum of $4,947.84 . . . said sum of $4,947.84 being for goods, wares, and merchandise sold and delivered by first party to the said T. H. Zorn, prior to the 25th day of September, 1918, and on which there remains due to the first party from the said T. H. Zorn on said day said sum of $4,947.84." Nelson presented this claim to the receiver, who rejected it. At the time the receiver's report was presented, Nelson objected to the disallowance of his claim, and the matter came on for hearing before the district court, with the result that an order was entered sustaining the action of the receiver.

The sole question presented on this appeal is the correctness of the order made by the district court. The only papers certified to this court on appeal are—the summons, complaint, affidavit for attachment, undertaking in attachment, warrant of attachment, sheriff's return, application for appointment of receiver, stipulation for hearing of such application, order appointing receiver, assignment of claim by Farwell, Ozmun, Kirk, & Company to Nelson. Proof of claim by Nelson, order of receiver disallowing claim, report of receiver, objections

to disallowance, order to show cause hearing receiver's report, order confirming receiver's report, application for and order enlarging time in which to procure "a transcript of the proceedings had in said matter of the official stenographer reporting the same," stipulation as to the papers to be certified to this court, order identifying such papers, notice and undertaking on appeal. We have no means of knowing what proceedings were had, or what proofs were adduced, upon the hearing before the trial court; for although the record before us shows that the time was enlarged in which to obtain a transcript of the proceedings had before the trial court, such transcript is not in the record. However, there is apparently little or no dispute as to the transaction between Nelson and Zorn. In his brief on this appeal, appellant says: "*It was agreed in the deal that Nelson was to take over the payment of the amounts owing the wholesale houses, and that Zorn was to take over the payment of the amount due on the mortgages on the land.* The value of Nelson's interest in the land was estimated, and it was agreed that an inventory of the hardware stock should be taken, and, if inventoried below a certain amount, Zorn was to pay up the deficiency, and if more than a certain amount Nelson was to pay the difference to Zorn. Thereafter and on September 18, 1918, the inventory was taken, and on September 25, 1918, Nelson was given the possession of the hardware business and Zorn was given possession of the Minnesota land. *In conformity with the agreement between Nelson and Zorn, Nelson did take over the payment of the wholesale accounts.*

It is the account of Farwell, Ozmun, Kirk, & Company against Zorn, as it existed on September 25, 1918, that is the basis of the controversy in this case.

". . . *There had been no compliance with the sales in the Bulk Law,* as Nelson was informed when inquiry of Zorn was made that all his indebtedness consisted of the accounts he owed to the wholesale houses. Zorn, however, did have other creditors, and thereafter several of them instituted actions upon their claims against Zorn, and attached the hardware stock, and subsequently applied to the court for the appointment of a receiver to distribute the proceeds of the stock *pro rata,* among the creditors of Zorn."

"In his brief, the respondent, says: 'The respondent desires to supplement appellant's statement of facts. Besides the hardware stock and

fixtures, the defendant Zorn sold to claimant, A. N. Nelson, a store building and lot and a dwelling house and lot, both in Gardena, North Dakota. As consideration for the hardware stock and fixtures, store building and lot, and dwelling and lot, claimant, A. N. Nelson, transferred to defendant Zorn an equity in real property in the state of Minnesota, paid him $491.58 in cash, and assumed and agreed to pay the indebtedness owing by said Zorn to Farwell, Ozmun, Kirk, & Company, the amount of which was $4,947.84. This claim was evidenced by notes executed and delivered by Zorn to Farwell, Ozmun, Kirk, & Company. Claimant Nelson paid Farwell, Ozmun, Kirk, & Company, a part of this claim and gave them his notes for the balance, and, having paid such notes, Farwell, Ozmun, Kirk, & Company thereupon transferred their Zorn notes and assigned their Zorn account to claimant Nelson. We desire to emphasize the fact that claimant Nelson assumed and agreed to pay Zorn's indebtedness to Farwell, Ozmun, Kirk, & Company, as a part of the purchase price which he paid Zorn for the hardware stock and fixtures, the store building and lot, and the dwelling and lot, which he bought from Zorn. And it is the same $4,947.84 which he paid, or assumed and agreed to pay Farwell, Ozmun, Kirk, & Company, that he claims should be repaid to him out of the Zorn stock of merchandise and fixtures in the hands of the receiver McMillen. Nelson also filed with the receiver a claim for the $491.58 which he paid Zorn as part consideration. This claim was also disallowed, but no appeal is taken from its disallowance.'

" 'The contract which claimant Nelson made with Zorn has never been rescinded. Zorn still retains the money paid him by Nelson and the Minnesota land. Nelson retains the store building and lot and the dwelling house and lot in Gardena, North Dakota.' "

In its memorandum decision the trial court said: "The defendant Zorn was the owner of a stock of merchandise consisting of hardware, etc. He entered into a contract with one A. N. Nelson, by the terms of which he sold this stock of merchandise in bulk to the said A. N. Nelson. It appears that Nelson was trading Zorn land for the stock of goods, with the agreement that, if the stock of goods inventoried more than the agreed value of the land, then Nelson would pay the difference in cash; and if the stock inventoried less than the agreed value of the

land then Zorn would pay to Nelson the difference in cash. It was also agreed that Nelson should assume the claim of Farwell, Ozmun, Kirk, & Company against Zorn, and it is this claim which the receiver disallowed. This claim was assumed by Nelson as part of the purchase price of the stock of goods. Farwell, Ozmun, Kirk, & Company agreed to this assumption of the claim by A. N. Nelson, and Nelson executed and delivered to the company his notes for the full amount of the claim after paying some $468 in cash."

From these statements it appears that there unquestionably was a deal made whereby Zorn transferred a stock of hardware and fixtures (and certain real property) to the appellant Nelson. That, as consideration for the property which Zorn so transferred, Nelson (1) transferred some Minnesota land, (2) paid Zorn $491.58 in cash, and (3) assumed and agreed to pay certain debts owing by Zorn, among which was the account of Farwell, Ozmun, Kirk, & Company. That Nelson, later, on September 25, 1918, paid such debt by paying Farwell, Ozmun, Kirk, & Company, $468 in cash, and giving his notes for the balance. That on December 15, 1919, Farwell, Ozmun, Kirk, & Company, executed a written assignment, whereby it purported to assign to Nelson the claim which it had against Zorn on September 25, 1918.

The Bulk Sales Law was first enacted in this state as chapter 221, Laws 1907, being entitled, "An Act Providing for the Giving of Notice by Merchants to Their Creditors before Making Sale of Their Entire Stock of Goods." It was subsequently amended by chapter 247, Laws 1913, and incorporated as §§ 7224–7227 inclusive of the Compiled Laws of 1913. The provisions applicable in this action are as follows: "The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferrer, or assignor, shall be void as against the creditor of the seller, transferrer, or assignor, unless the seller, transferrer, assignor and purchaser, transferee, and assignee, shall, at least five days before the sale, make a full detailed inventory showing the quality, and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferrer, and assignor, of each article to be included in the sale; and unless the purchaser, transferee, and assignee demand and

receive from the seller, transferrer, and assignor a written list of names and addresses of the creditors of the seller, transferrer, and assignor, with the amount of indebtedness due or owing each, and certified by the seller, transferee, and assignor, under oath, to be a full, accurate, and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee, and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms, and condition thereof." Comp. Laws 1913, § 7224.

"Any purchaser, transferee, or assignee who shall not conform to the provisions of this chapter shall, upon application of any of the creditors of the seller, transferrer, or assignor, become a receiver and be held accountable to such creditors for all the goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment." Comp. Laws 1913, § 7226.

"Provided, however, that any purchaser, transferee or assignee, who shall conform to the provisions of this chapter shall not in any way be held accountable to any creditor of the seller, transferrer, or assignor for any of the goods, wares, merchandise, or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment." Comp. Laws 1913, § 7227.

The act applies only to creditors existing at the time of the transaction, and not to creditors whose claims have come into existence subsequent to the sale or transfer. Ewaniuk v. Rosenberg, 34 N. D. 93, 99, 157 N. W. 691.

It is elementary that the order appealed from is presumed to be correct, and that the appellant has the burden of presenting to this court a record affirmatively showing it to be erroneous. As already indicated, we have before us only the judgment roll, and we are, of course, limited to a consideration of whatever errors, if any, appear therein. There is no basis in the judgment roll for some of the facts asserted in the briefs on this appeal. In fact, upon the record before us, the order might well be affirmed on the ground that there is nothing in the judgment roll to show that the order is incorrect. But, assuming the facts to be as asserted in the briefs and in the trial court's memorandum de-

cision, we have a situation where Nelson is attempting to recover a part of the purchase price which he agreed to, and did, pay Zorn for the property which he purchased. There is no basis for the contention that Nelson intended to and did buy the claim from Farwell, Ozmun, Kirk, & Company. That is inconsistent with the arrangement which he made with Zorn, and the assignment was not made until more than a year after the claim had been paid off by Nelson. The only theory on which Nelson can be permitted to recover is that he is entitled to be subrogated to the rights of the creditor whose claim he paid. We are aware that there are cases arising under the Bulk Sales Acts, which have applied the doctrine of subrogation where the purchaser has paid off existing encumbrances against the stock, or paid claims of creditors. In other words, they have applied the rule that where a conveyance is merely constructively fraudulent, or where the grantee is not a participant in or chargeable with knowledge of the fraud of the grantor, such grantee is entitled to be subrogated to the rights of the creditors whom he has paid. We do not find it necessary to determine whether one who purchases a stock of goods in violation of the provisions of the Bulk Sales Act can invoke the doctrine of subrogation, and thereby, in effect, recover a part of the purchase price. The doctrine of subrogation is a creature of courts of equity. It is applied to the facts and circumstances of each particular case according to the principles of justice. It will never be enforced where the equities are equal, or the rights are not clear, nor to the prejudice of the legal or equitable rights of others. Story, Eq. Jur. 14th ed. § 707. In this case the receiver in his report said: "The Farwell, Ozmun, Kirk, & Company was advised and had actual knowledge that a sale and transfer of said stock and merchandise was to be made by the said Theo. H. Zorn to the said A. N. Nelson, and, at the request of both said Zorn and Nelson, sent an expert from the house to make the appraisal of said stock of hardware and merchandise at the time of said transfer." The receiver further reported that said Nelson had abstracted and carried away in his automobile certain portions of said stock, and had shipped to his home in Minnesota goods of the value of $441.05. The trial court, in its order approving the report, found these statements to be true. As already stated Nelson received not only the stock of hardware, he received a going business, including good will, and the building where the business was being con-

ducted, and a certain dwellinghouse. Such real estate was, of course, not within the terms of the Bulk Sales Law, and is therefore beyond the reach of creditors, unless the sale was in fact made in fraud of creditors. So far as the record shows, Nelson never has sought to rescind the transaction with Zorn. On the contrary he has affirmed it. He still retains and claims to be the owner of the real property. He still claims as purchaser of the stock of goods. So far as we are aware the evidence adduced before the trial court may have shown that Zorn and Nelson intentionally evaded and failed to comply with the provisions of the Bulk Sales Law. Assuming, without deciding, that the doctrine of subrogation may be applicable in certain cases in favor of one who purchases a stock of goods in violation of the Bulk Sales Act, we do not believe that the record before us in this case warrants its application.

The order appealed from must be affirmed. It is so ordered.

BRONSON and BIRDZELL, JJ., concur.

ROBINSON, Ch. J. I dissent.

GRACE, J. (dissenting). The facts of this case are quite fully set forth in the majority opinion, and it is needless here to restate them. The section of our statute here for construction is § 7224, Comp. Laws 1913, and it provides: "The sale, transfer, or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and fixtures pertaining to the conducting of said business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, transferrer, or assignor, shall be void as against the creditor of the seller, transferrer, or assignor, unless the seller, transferrer, assignor and purchaser, transferee, and assignee shall, at least five days before the sale, make a full detailed inventory, showing the quality, and, so far as possible with exercise of reasonable diligence, the cost price to the seller, transferrer, and assignor of each article to be included in the sale; and unless the purchaser, transferee, and assignee demand and receive from the seller, transferrer, and assignor a written list of names and addresses of the creditors of the seller, transferrer and assignor, with the amount of indebtedness due or owing each, and certified by the seller, transferee, and assignor, under oath, to be a full,

accurate, and complete list of his creditors, and of his indebtedness; and unless the purchaser, transferee, and assignee shall, at least five days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally or by registered mail every creditor whose name and address are stated in said list, or of which he has knowledge, of the proposed sale and of the price, terms, and conditions thereof."

It is conceded that the purchaser of this stock of merchandise paid therefor full value, that he acted in good faith in every respect, and that there is no actual fraud. In view of these facts, it is clear that no creditor, excepting one who has attached the property, or who has obtained a lien thereon by garnishment, etc., and who has obtained judgment for his debt, is entitled to appropriate the property held by the innocent vendee, who has paid the seller the full consideration for it. McGreenery v. Murphy, 76 N. H. 338, 39 L.R.A.(N.S.) 374, 82 Atl. 720.

Again, we think it is correct to hold that the purchaser of a stock of goods in good faith, for full value, who became such without attempting to comply with the Bulk Sales Law, and who pays one of the creditors of the seller, would be liable only to the other creditors for their *pro rata* share of the contract price of the property sold, and that the purchaser would be entitled to share *pro rata* for the share he had thus paid over to any creditor. That is, Nelson having paid the claim of Farwell, Ozmun, Kirk, & Company, he is entitled, with the remaining creditors, to share *pro rata* in the distribution of the value of the whole stock of merchandise. In other words, he is entitled, as a matter of law, to be subrogated to the rights of Farwell, Ozmun, Kirk, & Company. Fechheimer-Keifer Co. v. Burton, 128 Tenn. 682, 51 L.R.A.(N.S.) 343, 164 S. W. 1179. That case cites Adams v. Young, 200 Mass. 588, 86 N. E. 942.

In the latter case the defendant, as here, had purchased a stock of goods in violation of the Bulk Sales Law. There, the seller and purchaser acted in good faith and with no actual intent to defraud creditors, and, as in this case, a large part of the consideration was paid over to a creditor. The creditor there, however, held two mortgages on the goods, and had taken possession of a part of the property, under the terms of the mortgage. Upon the payment of these claims, he discharged the

first mortgage and assigned the second to the purchaser of the goods. The balance of the purchase price was used in paying other small debts which were owing by the seller.

It was held that the plaintiff (the trustee in bankruptcy of the seller) was entitled to no relief against the defendant (the purchaser), and the court there said:

"But one whose purchase of property has, for that reason, been avoided by the creditors of the seller, being himself free from any actual fraud, may stand in the place of creditors whose demands he has paid out of the property or in consideration of the transfer to himself. Citing, Loos v. Wilkinson, 113 N. Y. 485, 4 L.R.A. 353, 10 Am. St. Rep. 495, 21 N. E. 392; Robinson v. Stewart, 10 N. Y. 189; Pond v. Comstock, 20 Hun, 492; Butler v. White, 25 Minn. 432; Crowninshield v. Kittridge, 7 Met. 520. So, if he has paid off debts which constituted liens or encumbrances upon the property conveyed to him, he may, for his protection and reimbursement, take, by subrogation, the rights of the secured creditors whom he has thus paid. . . . The merely constructive fraud of a purchaser will not prevent him from being protected in this manner, if he has not himself actively participated in the fraud."

We see no reason why that same principle is not applicable here. As a matter of equity, Nelson should be subrogated to the rights of Farwell, Ozmun, Kirk, & Company, as they existed at the time of the sale. In other words, all the creditors of Zorn were entitled to was to have the value of the entire stock of merchandise applied to the discharge of their debts. Provided, further, they had attached or garnished the goods, and reduced their debts to judgment.

By the majority opinion, the creditors attaching and those not attaching are not only allowed to resort to the value of the entire stock of merchandise, but also, in effect, to the sum of $4,947.84, which Nelson had paid Farwell, Ozmun, Kirk, & Company. In other words, there was that amount left to the remaining creditors for the satisfaction of their debts, more than if Farwell, Ozmun, Kirk, & Company had not been paid.

Now, it would seem, all the creditors, in any event, are entitled to, is that the value of the whole stock of goods be forthcoming to satisfy the claims of all creditors whose claims were in existence at the date of

sale. In other words, that the law means there was no sale, and that matters must be placed in the same condition as they were before the sale.

In this view of the case, Nelson should be permitted to share *pro rata* with all the creditors, even if, as claimed by the majority opinion, all the creditors are entitled to share without any attachment proceedings, etc.

RUDOLF DUBS, Respondent, v. NORTHERN PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

(181 N. W. 608.)

Refusal of new trial.

The case is controlled by the decision in the case of Edmund Dubs v. Northern P. R. Co. ante, 210, 181 N. W. 606.

Opinion filed February 21, 1921.

Appeal from the District Court of Grant County, *J. M. Hanley,* J. Reversed.

Young, Conmy & Young, for appellant.

Jacobsen & Murray, for respondent.

PER CURIAM. This case is an action for damages brought by the father of the boy referred to in the previous litigation, 42 N. D. 124, 171 N. W. 888, and ante, 210, 181 N. W. 606, the action being primarily for loss of services. Substantially the same proceedings were had in this action as in the action above referred to, and the case is controlled by the decision in that case. The order appealed from is reversed.

ROBINSON, Ch. J., and BIRDZELL and CHRISTIANSON, JJ., concur.

BRONSON and GRACE, JJ., concur in result.

HELEN CLARK, Plaintiff, v. WILD ROSE SPECIAL SCHOOL DISTRICT No. 90, Defendant.

(182 N. W. 307.)

Schools and school districts — board of education removing teacher for cause must inform her of charges and give her hearing.

Where a board of education of a special school district undertakes to dismiss and remove a school teacher under subdivision 8 of § 1251, Compiled Laws of 1913, which provides for removal "for cause," it is prerequisite to a valid removal that the teacher be informed of the charges and be given a reasonable opportunity for a hearing thereon.

Opinion filed March 4, 1921.

Question of law certified from District Court of Williams County, *Leighton,* J.

Remanded.

Burdick & Spencer, for plaintiff.

Wm. G. Owens, for defendant.

BIRDZELL, J. This is an action originating in a justice court of Williams county. The plaintiff sued for breach of contract of employment as a school teacher and claimed to be entitled to wages as a measure of damages. From a judgment in her favor for $192.40 the defendant appealed to the district court. In the district court the facts were stipulated and are as follows:

The plaintiff, a regularly licensed school teacher, was employed by the defendant school district under written contract dated May 14, 1918, to teach school for nine months beginning September 30, 1918, for $80 per month. On April 22, 1919, at a special meeting of the school board the board discussed the advisability of dismissing the plaintiff for voluntary neglect of school work by not reporting for duty on the preceding day which was Monday. It appears in the minutes that after some discussion of this and other neglects, the board determined that her interests were not for the good of her school work or for the good of the district and authorized a communication to her as follows:

"We, the members of the board of education of Wild Rose Special School District, No. 90, at a special meeting assembled, at the Security State Bank, hereby respectfully resolve and request that you hand your resignation to the above named board of education, for voluntary neglect of school work."

The clerk was authorized to deliver this communication, together with a warrant for her salary to date. On the following day, no resignation having been received, the board held another special meeting at which it was resolved that the plaintiff be dismissed from her position for the good of the district. A communication to this effect was authorized in which it was stated that the dismissal should take effect immediately and that the notice was given by virtue of plaintiff's refusal to hand in her resignation as requested. Plaintiff was also notified that if she desired to do so she might appear before the board at a special meeting to be held the following evening at nine o'clock. A warrant for the salary to date accompanied the notice.

On the above facts the district court was called upon by both counsel to determine whether or not the plaintiff had been legally dismissed and removed under subdivision 8 of § 1251, Comp. Laws 1913. The trial court held that her removal was legal and the question was duly certified to this court under chapter 2 of the Session Laws of 1919.

The statute (subdivision 8 of § 1251) provides that the board of education "shall have the power and it shall be its duty: . . . 8. To contract with, employ and pay all teachers in such schools and to dismiss and remove for cause any teacher whenever the interests of the school may require it. . . ."

It is agreed that the removal action was taken without any notice to the teacher and with no opportunity given her to answer the charges which it is claimed amount to "cause" for removal. We are of the opinion that the statute authorizes removal only for cause as distinguished from removal at the pleasure of the school board, and that the cause must be a real cause affecting the interests of the school. It is elementary that where the power to dismiss an employee of a public corporation is conditioned upon the existence of cause therefor, the employee has a right to know the nature of the charge or charges which it is claimed constitute cause, and the further right to a reasonable opportunity to appear and defend against the charge or charges.

35 Cyc. 1092, 1093. Otherwise, the condition upon which the power of removal depends is effectually read out of the statute.

The cause is remanded to the district court for further proceedings not inconsistent with this opinion.

CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. I dissent.

ROBINSON, Ch. J. (dissenting). The plaintiff sues to recover from defendant on a contract for two months' services in the capacity of a school teacher. By answer defendant admits the hiring of plaintiff to serve for nine months at $80 a month in the capacity of a school teacher and avers that on September 23, 1919, two months before the date of the completion of the contract, defendant, by its board of directors, for good cause discharged the plaintiff and paid her for her services to that time. The answer avers:

"That during the greater portion of said time after the plaintiff had entered upon the performance of her contract she failed, refused, and neglected to perform the duties required of her ordinarily or under her contract with the defendant as a teacher and failed to become interested in the welfare of the schools of defendant district, and failed to give her attention to the best of interest of such schools or the pupils or patrons thereof, and, instead of complying with her contract, conducted herself in such a way as to become detrimental to the interest of the schools, and her actions tended to disorganize the regulations, operations, and management of defendant schools. Particularly during such time did the said plaintiff neglect and fail to come to her schoolroom in the mornings or noons in time to properly perform her duties as a teacher, and at different times she left and entirely abandoned the work which she was to do under her contract and wholly failed during certain periods of her contract to teach or to do any other work as a teacher. During the months of December and January, 1918 and 1919 she failed entirely, and without any excuse offered to the defendant board of education so to do, to attend school at all for a period of more than a week, and persisted in being late to school , conducting herself in her personal matters so as to be-

come obnoxious to the patrons of the school, and made insulting and revolutionary remarks about the superintendent of schools; and on the 21st of April, 1919, as well as at other times during the period she was teaching, she failed to appear and perform her duties as teacher at all."

Manifestly the answer states a good cause for the discharge. The rights and position of a teacher, whether public or private, is one of contract. He does not hold as the appointee of a public office. If a teacher fails to observe his contract, it becomes void or voidable at the election of the other party to the contract, and the teacher may not insist that his contract shall remain in force until the other party to the contract has served him with notice of his own delinquencies and give him a hearing in the nature of a mock trial. For it is certain that neither party to a contract can be made a judge in his own case. The statute which recognizes the right to discharge a teacher for good cause does not vary the existing law in any particular or give to the most formal decision by either party a scintilla of judicial effect. Yet on the trial of this case it seems the court and counsel on both sides wholly ignored the plain issues presented by the complaint and the answer. The case turned on a question which was moot and irrelevant, viz.: the right of defendant to discharge the teacher without first giving her a notice of her defaults and a kind of mock trial. And the question as to whether the teacher might be discharged without such a mock trial is gravely certified to this court. There is no demurrer to the answer. Clearly it states a good cause for the discharge of the plaintiff. Hence the case should be remanded for trial on the issues presented by the complaint and answer.

PIERCE COUNTY, NORTH DAKOTA, a Municipal Corporation, Appellant, v. CITY OF RUGBY, PIERCE COUNTY, NORTH DAKOTA, a Municipal Corporation, Respondent.

(181 N. W. 954.)

Infants — city held not liable for mothers' pension allowances payable by county.

Section 2508, Comp. Laws 1913, has no application to the payment by a county of allowances for mothers' pensions (Laws 1915, chap. 185), and a city is not liable for 25 per cent of such allowances paid by the county.

Opinion filed March 4, 1921.

Action in District Court, Pierce county, *Burr,* J., to recover proportionate amounts paid for mothers' pensions by the county.

Affirmed.

Harold B. Nelson, for appellant.

To sustain the charge of double taxation it must be shown that the second tax was imposed upon the same property, by the same state or government, during the same taxing period. 37 Cyc. 753, and cases cited.

Taxation of lands constituting a portion of the capital stock of banks and the taxation of the stock itself is not double taxation, likewise, the taxation of railway right of way, as such, and the taxation of elevator sites upon the right of way was not double taxation. Re First Nat. Bank, 25 N. D. 625; Northern P. R. Co. v. Morton County, 32 N. D. 627; State ex rel. Atty. Gen. v. Douglas County, 26 N. W. 378.

L. R. Nostdal, for respondent.

The constitutional inhibition against special legislation does not prevent classification, but such classification must be natural, not arbitrary; it must stand upon some reason, having regard to the character of the legislation of which it is a feature.

It is not the form, but the effect of a statute which determines its special character. Edmonds v. Herbrandson, 2 N. D. 270, 50 N. W. 970.

"The object and meaning of these constitutional provisions (Const.

§§ 11 and 20) has been passed upon so often, and is so well understood that a discussion of the subject is unnecessary." Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33; 15 N. D. 327, 108 N. W. 36.

Robinson, Ch. J. The plaintiff brings this action against the city of Rugby to recover $148.25, being 25 per cent of the sum paid by the county of Pierce on pensions to mothers residing in the city of Rugby. In counties having a township organization it seems that each township is charged with the necessary relief of its poor. Each township supervisor is an overseer of the poor and the board of county commissioners has the power to reduce or increase any allowance for aid made by an overseer of the poor, and in such cases it is provided the township in which the poor person has a legal residence shall pay 25 per cent of the sum allowed, and the county shall pay the balance. Comp. Laws, § 2508. The statute does in no manner refer to allowances made under the Mothers' Pension Act. By that act it is provided: "In every county of the state every woman who has one or more children under fourteen years of age, dependent upon her for support, shall receive an allowance of not more than $15 a month for each child, such sum to be paid out of the county treasury." Laws 1915, chap. 185. The allowance is made by the county court upon conditions prescribed by the statute. The Mothers' Pension Act is complete in itself. The sum which is allowed becomes a county charge and is levied the same as other county charges against all the taxable property of the county, and in every city and township of the county. Certain it is the statute imposes no liability upon any city or township for the payment of mothers' pensions. There is no claim that the city of Rugby has in any way contracted to pay the 25 per cent in question or that it has incurred any liability by reason of going into the business of growing children and caring for their mothers. That might not be considered a business enterprise.

In truth, there is nothing in the complaint nor in the evidence which begins to state in any way a cause of action against the city of Rugby.

Judgment affirmed.

Birdzell, J., concurs.

BRONSON, J. (concurring specially). I concur in the affirmance of the judgment. The contention of the plaintiff that § 2508, Comp. Laws 1913, imposes a proportionate liability upon the city must be denied. The Mothers' Pension Act (Laws 1915, chap. 185), is not to be treated as an auxiliary or supplementary poor relief act. The act is termed a pension. It is so for the humanitarian purposes therein involved. The act specifically provides for payment of the allowance out of the county treasury. There is no prescription in the act imposing liability on the city directly for the allowances so paid. The provision in § 7 of the act which prescribes "Nothing in this act shall be so construed as to change the proportionate payment by county, city, incorporated village or township," does not create a direct liability for the city payment of the pension allowed. Its only effect, apparently, is with reference to cases where poor relief may be allowed pursuant to statute in the nature of temporary aid. It is not necessary to consider the constitutional questions propounded by the parties.

CHRISTIANSON, J., concurs.

GRACE, J. (specially concurring). I concur in the affirmance of the judgment.

The Mothers' Pension Act, chapter 185, Session Laws of 1915, is, as the title plainly states, a "mothers' pension." It is in no sense a poor relief act.

In the case of Cass County v. Nixon, 35 N. D. 601, L.R.A.1917C, 897, 161 N. W. 204, in an opinion by the writer, the constitutionality of the Mothers' Pension Act was at issue, and determined by that decision, in which all of the members of the court, as then constituted, concurred. It was there claimed that the act was contrary to § 111 of our Constitution.

In that decision, also, the purpose and intent of the act were discussed, and the following language used:

"It is a sociological truth that if the environment of childhood is extreme poverty and continual want and penury, accompanied by scanty clothing, unnutritious, unwholesome, and scanty food, we may expect such an environment must of necessity waste the energies of childhood and subject it to the inroads of disease, which may be com-

municated to part of the public. Meantime this continued want and misery must weaken the moral fiber of childhood, at the very period of life when the child's mind and being are most susceptible to impressions, either good or bad. . . . Therefore the public policy of chapter 185 is the protection of the public health and the elimination of an environment which has a tendency to weaken the moral fiber of those of tender years, and thus superinduce crime."

FARGO MERCANTILE COMPANY, a Corporation, Respondent, v. MARTIN E. JOHNSON et al., Appellants.

(181 N. W. 953.)

Evidence — loose-leaf ledger account under double-entry system held admissible.

1. A loose-leaf ledger account for merchandise sold, made under a double entry system from original memoranda of orders taken, is admissible in evidence, pursuant to § 7909, Comp. Laws 1913.

Evidence — loose-leaf ledger account held admissible against guarantors as res gestæ.

2. In an action on a contract of guaranty, such ledger account is admissible against the guarantors as a part of the *res gestæ*.

Opinion filed March 4, 1921.

Action in District Court of Cass County, *Englert*, J., on a contract of guaranty. From a judgment in favor of the plaintiff the defendants have appealed.

Affirmed.

Lyman Miller; for appellants.

Plaintiff's exhibit "A," should not have been admitted over the objections of the defendants, for the following reasons:

NOTE.—For authorities discussing the general rule that a party's own books of original entries made in the ordinary course of business, and contemporaneous to the transactions to which they relate, are admissible, has been generally held to include card-index or loose-leaf systems of accounts, such forms being regarded as books within the meaning of the rule, see note in L.R.A.1916B, 634, on admissibility of card-index or loose-leaf system of accounts.

That they are not the plaintiff's original entries of the first permanent records of the transaction. Jones, Ev. 1913 ed. § 569, p. 706; N. D. Comp. Laws 1913, §§ 7900, 7909.

A person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such third persons are *res inter alios acta,* and cannot be used against persons not parties to them. Boyd v. Yerkes, 25 Ill. App. 527; Schwartz v. Sutherland, 51 Ill. App. 175; Harrison v. Lagow, 1 Blackf. 307; Ridgeley v. Johnson, 11 Barb. 527; Sloan v. McDowell, 75 N. C. 29; Powers v. Hazelton & L. Y. Co. 33 Ohio St. 429.

Books of account are not admissible as evidence of any facts that may arise collaterally. Moody v. Roberts, 41 Miss. 74; Gage v. M'Illwain, 1 Strobh. L. 135; Juanita Bank v. Brown, 5 Serg. & R. 226.

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

The ledger was the original permanent book of record and the entries therein were made contemporaneously with the events recorded. United States v. Gaussen, 19 Wall, 197, 22 L. ed. 41; Union Cent. L. Ins. Co. v. Smith, 77 N. W. 706; Coleman v. Retail L. Asso. 79 N. W. 588.

BRONSON, J: *Statement:*—This is an action upon a contract of guaranty for goods sold and delivered. Upon a previous appeal (41 N. D. 534, 171 N. W. 609) this court held that the contract covered goods sold anterior to its date. The defendants have appealed from a judgment awarded for goods sold, both anterior and posterior to the date of the contract of guaranty. The essential facts necessary to be stated are as follows:

Between October 17' 1913, and September 14, 1914, the plaintiff engaged in the wholesale business, sold and delivered certain merchandise to the Everybody's Store, a corporation engaged in the retail business. On September 14, 1914, the account between the retailer and the wholesaler not being in a satisfactory state, and the plaintiff desiring security in order to continue the credit relations and further sales, the defendants, who were then officers of the retail company, one, the president and the other, the active manager, made to the plaintiff the con-

tract of guaranty herein involved. Thereafter, until October 1914, further sales were made to the company. Thereupon the retail company went into bankruptcy. This action is maintained to recover the amount due for the sales made, less moneys paid upon the account by the trustee in bankruptcy. Upon the trial the plaintiff introduced in evidence its loose-leaf ledger sheets of its account with the retail store. The plaintiff, in maintaining books of account, employed the double entry loose-leaf system. This system involved substantially the following operations: The making of an order for merchandise by a salesman personally, or, over the telephone; the checking of such order through the credit department and its final shipment with the invoice to the vendee. These orders so made, after verification, were thereupon posted in the ledger from which the account introduced in evidence was taken. These orders were thereupon filed alphabetically for each day's business. They were kept a few years and then destroyed. Evidence was also introduced that the orders for the merchandise sold to Everybody's Store up to September 14, 1914, had been destroyed. That the ledger sheets introduced were the permanent records of the plaintiff and they were verified as true and correct by the plaintiff's bookkeeper and its cashier. The evidence further shows that, when this contract of guaranty was signed by the defendants, plaintiff's credit man produced for the defendants a full itemized statement of the account; that the defendants referred to the retail store ledger, compared it, and such account agreed therewith. The defendants offered no evidence. Both parties moved for a directed verdict, the defendants, particularly, that judgment be rendered against them for only the amount of merchandise furnished since the date of the contract of guaranty. The trial court, dismissing the jury, made findings of fact in favor of the plaintiff for the whole amount of the unpaid account. Upon this appeal the defendants specify, as grounds for reversal, that the trial court erred in receiving the ledger account as proof of the particular goods sold and delivered, and, particularly as against these defendants who are third parties with respect to the sales so made.

Decision.—Upon this record the trial court properly received in evidence the ledger account of the plaintiff. The record sufficiently demonstrates that this ledger account was the permanent book record of the plaintiff's account with the retail store. This account was admissible

pursuant to § 7909, Comp. Laws 1913. The sufficiency of the testimony to permit its admission under the statute was for the trial court. See Dr. R. D. Eaton Chemical Co. v. Doherty, 31 N. D. 175, 184, 153 N. W. 966. Under the circumstances of this record it was entirely proper for the trial court to regard the ledger account involved as the book of original entries, and also as the first complete and permanent record of the debits and credits between the parties. See Haley & L. Co. v. Vecchio, 36 S. D. 64, L.R.A.1916B, 631, 633, 153 N. W. 898; State v. Stephenson, 69 Kan. 405, 105 Am. St. Rep. 171, 76 Pac. 905, 2 Ann. Cas. 841; Minot Flour Co. v. Swords, 23 N. D. 571, 575, 137 N. W. 828; 22 C. J. 887; 3 Jones, Ev. § 569; 2 Wigmore, Ev. §§ 1518 and 1549. The record affirmatively shows that the orders in question were not collated as an account against the store but were rather used as memoranda distributed by days. Furthermore as against these defendants the account in question was admissible as part of the *res gestæ*. Coleman v. Retail Lumbermen's Ins. Co. 77 Minn. 31, 79 N. W. 588; United States v. Gaussen, 19 Wall. 198, 22 L. ed. 41; Northern Trust Co. v. First Nat. Bank, 33 N. D. 1, 19, 156 N. W. 212. The judgment is affirmed with costs to the respondent.

CHRISTIANSON and BIRDZELL, JJ., concur.

ROBINSON, J. I dissent as in the former case.

GRACE, J. (dissenting). I dissent, for the same reason that I dissented in the case of Fargo Mercantile Co. v. Johnson, 41 N. D. 534, 171 N. W. 609.

MARGARET KRAPP, Respondent, v. PAUL KRAPP, Executor of the Last Will and Estate of Johan Krapp, Deceased, Appellant.

(181 N. W. 950.)

Executors and administrators — relationship held to negative ability of deceased to pay for board and lodging.

In an action by plaintiff against her deceased father-in-law's estate to recover for board and lodging furnished to deceased, it is *held:*

1. In the absence of circumstances showing extraordinary services to the deceased, the presumption of gratuity arising from the relationship of the parties negatives liability upon an implied contract.

Witnesses — plaintiff's husband may testify as to transaction between wife and deceased.

2. Where the evidence tends to establish that the plaintiff's husband is not a co-owner with his wife of a claim against his father's estate for board and lodging supplied, and where he is not a party to the action, he is a competent witness to a transaction between his wife and the deceased.

Opinion filed March 4, 1921. Petition for rehearing denied March 26, 1921.

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

Reversed and remanded.

Aylmer & Aylmer, for appellant.

"The law denies generally a claim filed against the executors. It was incumbent upon plaintiff to prove his claim." Hartje v. Bostelman (N. D.) 179 N. W. 91.

In support of the general principle that an express contract is necessary to enable relatives who are members of the same family with decedent to recover from his or her estate, see Barhite's Appeal, 126 Pa. St. 404, etc.; Re Young (Pa.) 24 Atl. 124; Sawyer v. Hebard (Vt.) 3 Atl. 529.

"Cases of this kind are odious, and are not favored by the court, because they afford opportunity for fraud against estates of deceased per-

NOTE.—The question of implication of agreement to pay for services rendered by relative or member of household is discussed in a note in 11 L.R.A.(N.S.) 873.

On competency as a witness of the husband or wife of a party to an action involving a decedent's estate, see note in L.R.A.1917A, 2.

sons, and great temptation to perjury." Hinkle v. Sage (Ohio) 65 N. E. 999; Lynn v. Lynn, 29 Pa. 369; Williams v. Barnes, 14 N. D. 351; Heffrom v. Brown, 155 Ill. 322, 40 N. E. 583.

If there was a gift it amounted to an assignment of his rights, and the testimony is justly regarded by the law with scrutiny, and when the opposite party is executor, the assignor equally with assignee is excluded from testifying in some states. 1 Abbott, Trial Ev. 3d ed. p. 46 (94).

Where there is such an arrangement between husband and wife, it must be communicated to the parties to be bound and he must have understood it and acquiesced therein. Brackett's Estate (Mich.) 174 N. W. 121.

Knauf & Knauf, for respondent.

The plaintiff furnished the services and board, and should be paid for same. 18 Cyc. 413, 414.

The following sustain plaintiff's position in this case: Allen v. Allen, 74 S. W. 396; Shannon v. Carter, 72 S. W. 495.

BIRDZELL, J. This is an action to recover for board and lodging alleged to have been furnished by the plaintiff to the deceased. A statement of the account, which is made a part of the complaint, shows that board and lodging were furnished during divers periods of time between September 20, 1913, and May 10, 1918, for which the estate is sought to be charged at the rate of $30 per month and interest from the last-named date. Prior to September 30, 1913, the deceased had been living in Iowa. That fall the plaintiff, a daughter-in-law of the deceased, and her husband, or the latter alone, induced the deceased, Johan, to come to North Dakota. At that time Johan was about eighty-two or eighty-three years of age. From that time until his death, in the month of October, 1918, the deceased lived with the plaintiff and her husband approximately twenty months. There is no claim that the services rendered to Johan were of any special or peculiar character or that he was in any way disabled. The plaintiff, however, testified that he required more care than an ordinary person; that his room required as much care as a little child's room; that he smoked in his room, was not careful in his habits, and spat upon the floor. At the time of his decease Johan was staying with another son, Paul, who lived about half a mile distant from the plaintiff. About three weeks before he died,

Johan made a will leaving practically all of his property to Paul. It seems that the relations between Paul and John, plaintiff's husband, were somewhat strained before this and it appears that John did not visit his father during his last illness more than once, the plaintiff not at all, and that neither the plaintiff nor her husband attended the funeral. There had been some prior business relations between Johan and John, as a result of which the father took legal proceedings to collect a debt amounting to more than $3,500, and there was also some litigation between John and Paul which resulted in a judgment in favor of the former for $140. After Johan's decease, contest proceedings were entered to set aside the will. A settlement was later made as a result of which Paul paid agreed amounts to the other heirs, the plaintiff's husband John receiving a cashier's check dated August 1, 1919, for $800, which was indorsed as settlement in full for his claims against the estate of Johan Krapp. This suit was begun in January, 1920. From a judgment in the plaintiff's favor for the full amount of the claim with interest and costs, the defendant appeals. A number of errors are assigned but it will be unnecessary to consider more than one or two of them.

In charging the jury the court said:

"There are two kinds of contracts, an express contract and an implied contract. If the plaintiff agreed to furnish certain board and lodging for said Johan Krapp, without express terms having been agreed upon, if the same was furnished, then there would be an implied contract upon the part of the said Johan Krapp, to pay for the same what it was reasonably worth. If you find that there was an express contract or an implied contract upon the part of Johan Krapp, to pay for any lodging that was furnished, then the plaintiff would be entitled to recover for the same if she is the owner and holder of this claim, and if no part of the same has been paid. . . .

"You understand that the estate of Johan Krapp, deceased, is bound and obligated to any contracts or agreements, express or implied, that were entered into and made by him prior to his death."

The appellant predicates error on the court's action in charging the jury as above. We are of the opinion that the charge is erroneous and clearly prejudicial. It is a well-established rule that services of the character of those rendered in the instant case, when performed by one

member of a family for another, are presumed gratuitous. If gratuitous, it follows that the person rendering the services does not expect to charge therefor and that the person to whom they are rendered does not expect to pay. This negatives a contract relation. The presumption of gratuitous service which arises from the relationship of the parties must be overcome either by proof of an express contract or by proof of circumstances, such as the menial character of the services rendered, sufficiently strong to warrant an inference that compensation was intended. Bergerson v. Mattern, 41 N. D. 404, 170 N. W. 877. See also The Law of Quasi-Contracts, Woodward, § 51, and cases cited; note in 11 L.R.A.(N.S.) 873, 879; 11 R. C. L. 208; 18 Cyc. 412.

We are of the opinion that there were no facts shown in the instant case sufficient to overcome the presumption of gratuity and thus there is lacking any basis for liability upon an implied contract. Under this record, if the defendant is liable at all, he is liable because of an express contract. But, under the court's charge, if the jury had not believed the testimony going to establish the express contract, it would have been their duty nevertheless to have rendered a verdict for the plaintiff upon the implied contract, as they were told that an implied contract resulted from the furnishing of the board and lodging. For this error a new trial must be awarded.

The appellant asks, however, that this court order a dismissal of the case on the ground that it is impossible for the plaintiff to establish a liability. The argument is based upon the incompetency of the plaintiff and her husband as witnesses to any transaction with the deceased under § 7871, Comp. Laws 1913. The plaintiff is clearly incompetent under that section, but it does not follow that her husband is. Under the evidence presented here, we are of the opinion that a question of fact is presented as to whether the plaintiff is the sole owner of the claim in suit or a joint owner with her husband. If the latter, the husband is likewise incompetent. There is testimony to the effect that John Krapp disclaimed from the beginning all interest in the transaction and referred his father to Mrs. Krapp for the making of any arrangement concerning his board and lodging with the understanding that she was the sole person interested. If there was a parol contract between the plaintiff and Johan Krapp, if the plaintiff was the sole person interested therein upon one side, and if John Krapp heard the provisions of the

contract discussed between the plaintiff and Johan, he is a competent witness. But testimony of this character should be weighed with caution. See 9 Enc. Ev. 518.

It is obviously unnecessary to consider the other assignments of error. The judgment and order appealed from are reversed and the cause remanded for a new trial.

CHRISTIANSON and BRONSON, JJ., concur.

ROBINSON, Ch. J. (concurring in reversal and dissenting in part). The plaintiff sues to recover for board, lodging and care furnished her father-in-law for twenty months at $30 a month. The defense is that there was no express contract to pay and that by reason of the relation of the parties the law does not presume a contract. The presumptions of the law are presumed to be founded on reason, custom, and common sense. As said by the writer in a former case (41 N. D. 407, 170 N. W. 877): "Of course the general rule is that a child is always welcome to the home of the parent and a parent to the home of a child, nor for any ordinary care and hospitality neither one ever thinks of making a charge against the other, and in such a case the law does not imply a contract. Custom makes the law. Reason is the soul of the law, and when the reason of the law ceases, so does the law itself." If the deceased had lived with his daughter-in-law for a month or two that might well be considered a visit, but if the deceased was a person of considerable means and his daughter-in-law a person of small means (then it would not accord with custom that he, a well-to-do man of eighty-two years, should sit himself down and live on his daughter-in-law for twenty months without any pay. Hence from the relation of the parties, their ages, prior dealings, and associations the jury might well infer a contract to pay. The jury might well infer that the deceased intended and promised to do what was fair and honorable, and that he did not intend to impose on his daughter-in-law. A promise may be inferred from acts as well as from words. Under all the circumstances the question of a contract, either express or implied, should have been left to the jury. It was a question of fact, and not of law.

GRACE, J. (dissenting). The presumption referred to in the majority

opinion, with reference to a gratuity arising from the relationship of the parties, which may, in some cases, negative liability upon an implied contract, in the circumstances of this case, has no application.

The question of whether there was an implied contract, in the circumstances of this case, was a question of fact for the jury, and it decided in plaintiff's favor, thereby finding as a fact that, in the circumstances of this case, there was an implied contract.

There is substantial evidence to sustain the judgment. The judgment appealed from and order should be affirmed.

On Petition for Rehearing, Filed March 26, 1921.

BIRDZELL, J. In a petition for rehearing counsel for the respondent seem to contend that the conclusion reached in the foregoing opinion enables the defendant to take advantage of his own error. It is pointed out that the plaintiff's testimony concerning the express contract was adduced by the defendant in cross-examining her. It follows from this, of course, that the defendant cannot claim that her testimony on this subject is incompetent. Counsel have clearly misconstrued the opinion. The judgment is not reversed because the defendants themselves drew from the plaintiff as a witness testimony which, under the statute (Comp. Laws 1913, § 7871), she was incompetent to give; but it was found necessary to reverse the judgment because of an erroneous instruction—an instruction which amounted practically to a direction to find a verdict for the plaintiff. While the defendant, by reason of the cross-examination, was no longer in a position to claim that the plaintiff was an incompetent witness to the express contract, it does not follow that the defendant was bound by the testimony so elicited. The credibility of this testimony was for the jury, who might or might not believe that there was an express contract. But the trial court instructed the jury that they could find for the plaintiff upon an implied contract and that they might imply this contract from the bare fact that board and lodging were furnished. It is this portion of the instruction that is held to be erroneous.

The petition for rehearing is denied.

CHRISTIANSON and BRONSON, JJ., concur.

STATE OF NORTH DAKOTA, EX REL. LAUREAS J. WEHE, a Commissioner of the North Dakota Workmen's Compensation Bureau, Respondent, v. LYNN J. FRAZIER, as Governor of the State of North Dakota, Appellant.

(182 N. W. 545.)

Certiorari — writ does not lie to review sufficiency of evidence where jurisdiction is shown; writ appropriate to review Governor's jurisdiction in removing commissioner of Workmen's Compensation Bureau.

1. Certiorari in this state will lie only to review acts in excess of jurisdiction; it will not review the sufficiency or insufficiency of the evidence where jurisdiction is shown; it is an appropriate proceeding to review the jurisdiction of the Governor in a proceeding removing a commissioner of the Workmen's Compensation Bureau.

Certiorari — constitutional law — officers — "removal for cause" means for legal cause; act limiting Governor's right of removal not an interference with executive function; in exercising power of removal, Governor acts in quasi judicial capacity, with legal and executive discretion; to remove officer, Governor must accord a hearing and right to examine witnesses and produce testimony; removal of commissioner of Workmen's Compensation Bureau by Governor without hearing held void; certiorari lies to review judicial acts of the Governor in removing commissioner of Workmen's Compensation Bureau.

2. (a) A removal for cause means for a legal cause. An act of the legislature limiting the right of removal by the Governor for a legal cause shown is not an interference with an executive function.

(b) The Governor in exercising the power of removal over such commissioner acts in a quasi-judicial capacity pursuant to the legislative limitations, and must exercise a legal discretion in addition to an executive discretion.

(c) Where the legislature has prescribed the existence of a legal cause for the removal of an officer by the Governor, it is essential, in order to confer jurisdiction for such removal, that a hearing be had, where the accused may know the nature of the charges against him, may cross-examine witnesses, and produce testimony to disprove the charges.

(d) Where the Governor has removed a commissioner of the Workmen's Compensation Bureau without according to such commissioner a hearing as required, it is *held* that the order of removal is void and that certiorari will lie to review the jurisdictional acts of the Governor.

Officers — in absence of hearing Governor had no power to remove commissioner of Workmen's Compensation Bureau as upon default where he refused to be sworn.

3. Where the Governor did not accord to such commissioner a hearing as required by law, and where the commissioner refused to be sworn as a witness unless such hearing was accorded, it is held that jurisdiction was not conferred to order the removal of the relator as commissioner as upon a default.

Opinion filed March 12, 1921.

Certiorari proceedings in District Court, Burleigh County, *Nuessle*, J. to review the action of the Governor in removing the relator as a commissioner of the Workmen's Compensation Bureau.

The Governor has appealed from the order and from the judgment entered.

Judgment construed and affirmed.

Foster & Baker, and *Simpson & Mackoff*, for appellant.

Upon the refusal of the respondent to be sworn at the hearing to be examined as a witness as to matters material to the inquiry at the instance of the Governor, it was legal for the Governor to render judgment as upon *nil dicit*, confession or default. Comp. Laws 1913, § 7870.

This court has held that § 7870, providing for the examination of the adverse party applies to a proceeding for the removal of an officer. State v. Borstad, 27 N. D. 539, 147 N. W. 380.

Judgment as by default or *nil dicit* may be entered against a defendant where his plea or answer is stricken out. 23 Cyc. 749; Belton v. Smith, 45 Ind. 294; Followed in Nelson v. Neeley, 63 Ind. 197.

There is very respectable authority to the effect that a public officer appointed for a fixed time subject to removal generally for cause may be removed without notice and hearing. People v. Welty, 75 Ill. App. 514; Hertel v. Boismenue, 229 Ill. 478, 82 N. E. 298; Wilcox v. People, 90 Ill. 186; People v. Higgins, 15 Ill. 110; People ex rel. Platt v. Stout, 19 How. Pr. 176, 11 Abb. Pr. 17; Territory v. Cox, 6 Dak. 510.

L. J. Wehe, and *Theodore Koffel*, for respondent.

Even if Commissioner Wehe had defaulted and not appeared at the time set for the alleged hearing before the Governor, the Governor would not have had the right to remove him for said default without the introduction and taking of some evidence to support some of the alleged charges. State ex rel. Wehe v. Frazier, opinion of Dist. Court herein.

Function of writ to correct proceedings where boards and tribunals act without their jurisdiction. Where there is no writ of error or appeal, nor any other plain, speedy, and adequate remedy, a writ of certiorari will issue. State ex rel. Bone v. Sioux Falls, 25 S. D. 3, 124 N. W. 693; State ex rel. Dollard v. Hughes County, 1 S. D. 292, 10 L.R.A. 588, 46 N. W. 1127; State ex rel. Tedford v. Knott, 207 Mo. 167, 105 S. W. 1040; Riley v. Crawford (Iowa) 165 N. W. 345.

The Governor may be enjoined by injunction, and the issue determined whether or not his removal of a state official was according to law; and, if not, he may be permanently enjoined and the official restored to office, if not legally removed therefrom. State ex rel. Poole v. Peake, 22 N. D. 457, 40 L.R.A.(N.S.) 354, 135 N. W. 197; Ekern v. McGovern, 154 Wis. 152, 142 N. W. 595; Shaw v. Frazier & Wehe, 39 N. D. 430, 167 N. W. 510.

Certiorari is the proper remedy to review the decision of the governor in removing an official from office. State ex rel. Nash v. Burnquist (case not yet reported, decided Dec. 17, 1920); State ex rel. Martin v. Burnquist (Minn.) 170 N. W. 201; State ex rel. Kinsella v. Eberhart, 116 Minn. 33, 133 N. W. 857.

Statement.

Bronson, J. This is a certiorari proceeding by the relator to test the validity of his removal by the Governor as a commissioner of the Workmen's Compensation Bureau. The Governor has appealed from the order of the trial court overruling a motion and a demurrer to the application and, from the judgment in certiorari, determining the removal to be invalid. The facts in the record are as follows:

Pursuant to chapter 162, Laws of 1919, the Governor on March 31, 1919, appointed the relator as a commissioner of the Workmen's Compensation Bureau for the three-year term. The relator qualified and

entered upon the performance of his duties. In December, 1919, at a special session of the legislature, chapter 162, Laws 1919, was amended by chapter 73, Spec. Sess. 1919, so as to increase the membership of the bureau to five members and to extend the term of the relator until the second Monday in January, 1923. This act became effective as a law on July 1, 1920. On April 19, 1920, the Governor, through a letter to the relator, upon charges therein preferred, temporarily suspended him as a commissioner until final determination thereof. In general, the letter charged that the relator had carried on a private law practice; that he had used bureau supplies; that he had shown generally a lack of executive ability, irascibility, and incompatibility of temperament; That at public hearings he had conducted himself detrimentally to public interest; that employees of the bureau had tendered their resignation by reason of his presence, and with difficulty were retained as employees; and that his presence impaired the efficiency of the bureau's operation. This was followed by a letter, dated April 20, 1920, to the relator, directing him to show cause, before the Governor on April 23, 1920, why his suspension should not be made permanent.

In response to this letter, the relator appeared before the Governor. He filed written objections to the jurisdiction of the Governor to take any action; these were overruled. The Governor stated that he did not know that it was necessary to have a hearing at all, but, in order to give the relator a chance to answer the charges made, this hearing was called; that he called him there to show, if he had any evidence or any reasons to produce, why the order issued suspending him should not be enforced. The relator asked whether the affidavits would be served upon him so he could see their contents. In the record there are contained numerous affidavits which set forth stated derelictions of the relator, and upon which the Governor, in his return, has asserted that cause was shown for his action in removing the relator as a commissioner. The Governor stated that they were not serving any affidavits; that the general trend of the affidavits was contained in the letter he wrote the relator; that the letters will speak for themselves. The relator asserted that he was willing to answer and make a reply, but that no charges had been made; that there were no charges to which to reply; that he wanted to know what the charges were, in order to

defend them. The Governor replied by stating that the charges were set forth in the letter; that there was nothing to the procedure, unless the relator wanted to answer those charges then. The relator asserted that he was willing to answer; that he denied each and every part of each and every allegation, matter, statement and thing contained in the letter and also in the affidavits, so far as they charged the relator with any official misconduct in office, although he did not know the contents thereof. The Governor inquired whether the relator was ready to take up the charges and the relator answered in the affirmative. The Governor then stated that the relator had been given an opportunity to come there and answer the charges that had been made. But, if he was going to object to his jurisdiction, he did not see that there was anything further to take up at that time. Counsel, appearing against the relator, stated that the Governor, in a matter of this kind, made his rules and procedure; that the relator had asked to come before him; that if he objected to his jurisdiction, the place for him was before the court, not before the Governor; that the Governor has investigated, and that he investigates as he pleases. The Governor asked relator if he wished to be sworn, and the relator replied that he refused to be sworn until he knew what the specific charges were; that he came there to answer any charges the Governor had; that he demanded the right of cross-examination, and the calling of any witnesses to which he might be entitled in defense. The Governor then stated that there were charges made against the relator set forth in the letter; that he would like to ask him some questions concerning the affidavits under oath; that, if he wished to be questioned, they would proceed; if not, this would end the hearing. Then followed the following colloquy between the Governor and the relator.

"Mr. Koffel: Do I understand the Governor's position to be that he refuses to produce any witnesses or record he may have, and that he wants to ask the defendant, under oath, concerning his entire record as a public officer?

"Governor Frazier: The whole situation is this, as to whether or not Mr. Wehe wants to answer the questions in regard to these charges that have been made against him, at this time. If he wants to answer to them, this is his opportunity.

"Mr. Koffel: As stated before, we are willing to answer them.

"Mr. Wehe: Let the records show that we are ready to answer when they have produced their case and that we are willing to answer when given a hearing.

"Governor Frazier: If you want a hearing—

"Mr. Wehe: We demand a hearing, and we refuse to answer any questions before their witnesses are produced. We are right here willing at all times to produce our defense on any and all specific charges.

"Governor Frazier: Then you do not want to be sworn?

"Mr. Wehe: I absolutely refuse to be sworn at this time.

"Governor Frazier: Then the meeting is adjourned."

No further hearing was held. The record shows that the affidavits were neither produced at the hearing nor served upon the relator.

Subsequently the relator was debarred from personal attendance upon the duties of the office, but since the order of removal has offered to perform such duties. Later, the relator instituted an action by mandamus, to compel the compensation bureau to pay to the relator his salary for the month of April, 1920. A demurrer to the petition of the relator was sustained in the trial court and overruled in this court. State ex rel. Wehe v. North Dakota Workmen's Compensation Bureau, 45 N. D. 147, 180 N. W. 49. Later, the relator sought the exercise of the original jurisdiction of this court in a certiorari proceeding, which was denied. Thereupon, in November, 1920, this action in the trial court was instituted and an order to show cause why the Governor should not certify to the court the removal proceedings had. The Governor appeared, and moved to vacate the order upon the grounds that the court had no jurisdiction over the Governor and the subject-matter. That the application was not seasonably made and did not state a cause of action. The court overruled the motion and demurrer. The Governor then made a return wherein he justified the removal upon satisfactory evidence presented to and considered by him, after a hearing was ordered, had, and an opportunity given the relator to appear and defend and he further showed that in November, 1920, C. A. M. Spencer had been appointed and had qualified as commissioner in place of the relator. At the trial the letters and the affidavits hereinbefore mentioned, upon which the Governor's action

were premised, were received; also a stenographic transcript of the proceedings had before the Governor concerning such removal. It was agreed and conceded, as the trial court finds, that the record contains substantially a full and complete record of all the facts and proceedings had and done before the removal of the relator as commissioner; that any further return to the writ would not furnish additional facts; that the defendant waived any right or demand to make such further return to such writ. The trial court accordingly ordered that the writ be considered as issued and returned; that the hearing be had as if upon a writ of certiorari. Pursuant thereto, the court determined that the removal of the relator was irregular, illegal and void and ordered that the same be set aside; that the relator be reinstated in his position as commissioner with all the rights, privileges, and emoluments, with interest thereto pertaining, as of the date of April 23, 1920.

Contentions.

The Governor contends (1) that certiorari is not the proper remedy for the relator; (2) that, concerning the acts involved herein, there is no legal control over the Governor excepting that furnished by impeachment; and (3) that upon the refusal of the relator to be sworn at the hearing and to be examined as a witness it was legal for the Governor to render judgment as upon *nil dicit,* confession and default.

Decision.

(1) *Certiorari:* Both the supreme and district courts possess original jurisdiction to issue writs of certiorari. Const. §§ 87, 103. Section 8445, Comp. Laws 1913, amended (Laws 1919, chap. 76) provides: "A writ of certiorari shall be granted by the supreme and district courts, when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent miscarriage of justice."

The function of this writ under the statute is peculiar and *sui generis.* This court, in agreeing with an interpretation made in South

Dakota upon a similar statute, has held that, gathering its meaning and intent from its language, the office of the writ which it authorizes is not confined to a review of judicial or quasi-judicial proceedings, but extends to every case where, in the language and upon the conditions of the statute, inferior courts, officers, boards, or tribunals have exceeded their jurisdiction. State ex rel. Johnson v. Clark, 21 N. D. 517, 528, 131 N. W. 715; State ex rel. Dollard v. Hughes County, 1 S. D. 292, 10 L.R.A. 588, 46 N. W. 1127; State ex rel. Poole v. Peake, 22 N. D. 457, 461, 40 L.R.A.(N.S.) 354, 135 N. W. 197; State ex rel. Poole v. Nuchols, 18 N. D. 233, 238, 20 L.R.A.(N.S.) 413, 119 N. W. 632.

The contention that the statute (Comp. Laws 1913, § 8445) by construction, refers to inferior courts, inferior officers, inferior boards, or inferior tribunals, is without merit. No such construction may be placed upon the plain reading of the statute. The function of the writ has heretofore been applied to a general court martial although such court martial belongs to the executive department, is organized, and its judgments approved by, the Governor. State ex rel. Poole v. Peake, 22 N. D. 461, 40 L.R.A.(N.S.) 354, 135 N. W. 197, supra; State ex rel. Poole v. Nuchols, 18 N. D. 238, 20 L.R.A.(N.S.) 413, 119 N. W. 632, supra. Chapter 162, Laws 1919, which grants to the Governor the right of removal for cause, does not provide for an appeal.

The writ will lie only if the Governor has exceeded his jurisdiction. It follows that it will not lie to review the sufficiency or the insufficiency of the evidence or the merely erroneous orders of the Governor, if the Governor acted within his jurisdiction. State ex rel. Noggle v. Crawford, 24 N. D. 8, 11, 138 N. W. 2; Fuller v. Board of University & School Lands, 21 N. D. 212, 221, 129 N. W. 1033; Smalley v. Lasell, 26 S. D. 239, 128 N. W. 141. It is evident that certiorari, if applicable, is an appropriate remedy. See 11 C. J. 108, 112.

(2) *Legal Control over the Governor:* The contention is made that the Governor is immune from judicial control or interference by reason of his position as chief executive officer, exercising an executive function in a removal proceeding. This might be conceded, for purposes of this case, if the Constitution or the legislature, in creating

the power of removal, had prescribed an arbitrary or solely executive function or removal. See Wilcox v. People, 90 Ill. 186. Thus, it might be so contended, if the legislature had provided that the officer might be removed without cause dependent solely upon the exercise of executive discretion. The sovereign power of removal from office is not necessarily an executive function, unless so made by the Constitution and statutes of the state. This power, formerly at the common-law resident in the King, in our state rests with the people, and evinces its expression in the Constitution or statutory laws. It may be executive, judicial or legislative, dependent upon the manner in which the people in the specific instance have allotted or bestowed this power. 29 Cyc. 1406. Thus, the legislature may exercise the power directly by impeachment proceedings. N. D. Const. §§ 194–196. Again the legislature, pursuant to constitutional provision, might grant this power of removal to the judicial department. Section 197 N. D. Const., provides that all officers not liable to impeachment shall be subject to removal for certain acts in such manner as may be provided by law. This court has held, in construing such constitutional provision, that there may be removal for other causes, too, or without cause, if the legislature so declares, provided they are officers whose offices are created by statute. State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234. The legislative prescription, in such event, would make the exercise of this power of removal judicial in its character. The exercise of the power has been termed to be of a judicial character. State ex rel. Shaw v. Frazier, 39 N. D. 430, 444, 167 N. W. 510; State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 39 L.R.A.(N.S.) 788, 797, 133 N. W. 857, Ann. Cas. 1913B, 785; 29 Cyc. 1406; Atty. Gen. v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 616, 619, 58 N. W. 611; Bailey, Habeas Corpus, § 173. Accordingly, the legislature has provided for proceedings for the removal of state officers not liable to impeachment, and other public officers, by direct judicial proceedings for that purpose. Comp. Laws 1913, §§ 10,467–10,482. Likewise, the legislature might confer this power of removal upon the executive department, an officer, or board thereof, and make such power wholly an executive function. Thus, the Game and Fish Commission may appoint and remove at pleasure deputy game wardens. Comp. Laws 1913, § 10,269.

The fact that the Constitution vests in the Governor the executive power section 71, Const. does not grant to the Governor the power of removal, unless by legislative act such power of removal is made an executive power. This court has heretofore held in construction of constitutional powers, that the power of appointment to office (and this includes power of removal) is vested neither in the executive nor judicial department of the Government, excepting as the Constitution has expressly granted such power. That this power resides in the legislature. That all governmental sovereign power is vested in the legislature, except such as granted to other departments of the government or expressly withheld from the legislature by constitutional restrictions. State ex rel. Standish v. Boucher, 3 N. D. 389, 396, 21 L.R.A. 539, 56 N. W. 142. In that case the broad contention was made that the right to appoint to office and to fill vacancies, except as to legislative and judicial offices, was an implied executive function, and that the Governor, in whom the executive power was vested by the Constitution, possessed the inherent right to appoint officers and fill vacancies as an executive function, independently of express constitutional or statutory authority. This contention was denied, a distinction being drawn between the powers of the President under the Federal Constitution and those of the Governor in this state, and it was held that the power of appointment to office does not necessarily and in all cases inhere in the executive department; and that when, as in this state, the express provisions of the Constitution vest in the Governor a limited power of appointment, such grant is exclusive, and no other or greater appointing power can be exercised. State ex rel. Standish v. Boucher, supra, 409. See O'Laughlin v. Carlson, 30 N. D. 213, 221, 152 N. W. 675; State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917E, 955; State ex rel. Langer v. Scow, 38 N. D. 246, 164 N. W. 939; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572. Accordingly, it follows that if the legislature possesses the power of prescribing the method and manner of appointment to and removal from office, it may allot this power to either the executive department or the judicial department or to both and may prescribe the method of its exercise, namely, partly executive, partly judicial, that is quasi-judicial in its nature. So, when the Governor exercises this power pursuant to the

legislative grant, it may not be said that the limitations placed on the exercise of this power is an interference with an executive function, when such power was not thereto possessed as an executive function and when, further, it is not granted to him as a purely executive function. The legislature has provided that the Governor may remove certain officers, such as state's attorneys, clerks of the district court, etc., when guilty of certain acts after a hearing as prescribed, chap. 184, Laws 1919 (amended Comp. Laws 1913, § 685). This right of removal is made subject, however, to the right of appeal to the district court and to a trial de novo therein. Comp. Laws 1913, § 690. Surely, it may not be said that this legislative grant and limitation concerning the Governor's right of removal under such law and the right accorded of reconsideration by the judicial department is either the creation of, or an interference with, a purely executive function. Rather does it demonstrate a legislative will to grant to the Governor the power to act in a quasi-judicial manner and to avail himself, if he desires, of judicial rules of procedure applicable. State v. Borstad, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014; State ex rel. Shaw v. Frazier, 39 N. D. 430, 167 N. W. 510. In the latter case the constitutionality of the act was affirmed as against the contention that it delegated judicial powers to the Governor. Further it was stated "While the power to remove from office is generally regarded as a power possessed by the courts, in the absence of an express or implied grant to another authority in the government, this power may be exercised by the legislature or may be delegated by the legislature to some other authority."

In the legislative act under consideration, the legislature has granted to the Governor the power of appointment and of removal, but it has expressly provided that the removal must be for cause. Laws 1919, § 4, chap. 162; Spec. Sess. Laws 1919, chap. 73. An express legislative limitation was placed upon this executive power of removal. This limitation prescribed the exercise of a legal discretion in addition to an executive discretion. This limitation, as has been stated, the legislature had the right to prescribe. A removal for cause means for a legal cause. State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Townsend v. Sauk Centre, 71 Minn. 379, 74 N. W. 150; State v. Donovan, 89 Me. 451, 36 Atl.

985; Andrews v. Biddeford Police Bd. 94 Me. 76, 46 Atl. 804; State ex rel. Reid v. Walbridge, 119 Mo. 383, 41 Am. St. Rep. 663, 24 S. W. 437; Hayden v. Memphis, 100 Tenn. 582, 47 S. W. 182. When the legislature deemed it proper to prescribe a legal cause as the basic ground for the removal of the office involved, necessarily there then applied those fundamentals in Anglo-Saxon jurisprudence, essential and recognized in any free and democratic government, namely, the right of the accused to a hearing, to be confronted with his accusers, and to the right of defense. See People ex rel. Metevier v. Therrien, 80 Mich. 187, 195, 45 N. W. 78.

In a mandamus action involving this removal proceeding at bar, this court has stated: "The respondent relies upon the familiar principle that where offices are created with definite terms and the incumbents are removable for cause, sufficient legal cause must exist to warrant removal. Also that officials not removable at pleasure are entitled to a hearing for the purpose of ascertaining whether or not sufficient cause for removal exists, and that the hearing must be one at which they are given reasonable opportunity to be present, to know the nature of the charges against them, to cross-examine witnesses, and to adduce testimony to disprove the charges. Throop, Pub. Off. §§ 362, 365; Mechem, Pub. Off. § 454. We do not question any of these propositions, but we do not deem them determinative here." State ex rel. Wehe v. North Dakota Workmen's Compensation Bureau, 46 N. D. 147, 180 N. W. 49, 50.

This court, therefore, has already adopted, without dissent, the principle that a legal cause in such case must exist and must be established at a hearing. It is merely trite to state that a legal cause is a judicial cause. It follows, accordingly, that the Governor, in exercising his power in such removal proceeding, necessarily acts in a quasi-judicial manner. That his orders, quasi-judicial in character, are subject to judicial jurisdictional review and that such review does not serve to interfere with any purely executive prerogative. 11 C. J. 108, 120; State ex rel. Shaw v. Frazier, supra; State ex rel. Martin v. Burnquist, 141 Minn. 308, 170 N. W. 201, 609; State ex rel. Kinsella v. Eberhart, 116 Minn. 313, 39 L.R.A.(N.S.) 788, 133 N. W. 857, Ann. Cas. 1913B, 785; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Re Nash, 147 Minn.

383, 181 N. W. 570; Ekern v. McGovern, 154 Wis. 157, 46 L.R.A. (N.S.) 796, 142 N. W. 595; People ex rel. Clay v. Stuart, 74 Mich. 411, 16 Am. St. Rep. 644, 41 N. W. 1091.

It is evident from this record that the Governor did not appreciate the extent of this legislative prescription. It is quite apparent that he doubted whether it was necessary that charges be preferred or a hearing be given. That he considered, to a considerable extent, that he might exercise this right of removal as a pure act of executive discretion based upon facts that might have brought to his attention ex parte as the chief executive. By reason of such construction of his powers, it is further evidence from this record that the Governor overlooked and ignored, in order to exercise his power of removal for cause, the necessity of granting a hearing to the relator, where the relator might learn the nature of the charges against him and might have an opportunity to answer the same, cross-examine witnesses, and adduce testimony to disprove such charges. Manifestly such hearing was not accorded the relator. It was jurisdictional for the exercise of the power of removal. No legal cause for removal was established at the hearing. The affidavits upon which the order for removal was based were neither produced nor presented. Accordingly it follows that the order of removal must be determined illegal and void unless the act of the relator in refusing to be sworn as a witness has conferred a jurisdiction to order a removal as if upon default.

(3) *Refusal of Relator to be Sworn:* It may be granted that the Governor had the right to examine the relator as a witness. State v. Borstad, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014. The exercise of this right, however, involves the concession that a hearing was necessary with the rights that flow to the relator at such hearing. Plainly, therefore, this right could not be exercised without according to the relator his rights. The record fairly shows that the relator was willing to be sworn if to the relator a hearing would be accorded. The record fails to show any offer to accord such hearing as was required.

The trial court, in the writ of certiorari, ordered that the relator be reinstated in his position of commissioner with all the rights, privileges, and emoluments, with interest thereto pertaining as of the 23d day of April, 1920, the date of his illegal suspension and removal,

as fully as if said order of removal had never been made. This portion of the judgment, perhaps may, by construction, receive an interpretation beyond the issues in this certiorari proceeding. It appears from the record herein that the Governor has appointed another person in place of the relator as commissioner and that such person has qualified as commissioner. The only issues involved in this proceeding are the jurisdictional questions concerning the order of removal. The questions of law involved between the relator as a de jure commissioner and Mr. Spencer as the de facto commissioner are collateral to the present inquiry. 29 Cyc. 1393. The judgment of the trial court should not be construed to extend further than the restitution of the relator as Commissioner de jure the same as if no order of removal had ever been made. Thus construed and modified the judgment of the trial court should be and is in all things affirmed.

CHRISTIANSON and BIRDZELL, JJ., concur.

ROBINSON, Ch. J. (dissenting). This is a second proceeding to override and annul an order made by the Governor removing Wehe from the office of Workmen's Compensation Commissioner. The first proceeding was a mandamus to compel the Compensation Bureau to pay Wehe a salary for one month after his removal from office. In that case the court stated fully the charges of malfeasance in office made against Wehe and held that such charges were sufficient and constituted good cause for removal. 46 N. D. 147, 180 N. W. 49. This court held on demurrer that the answer and return stated facts sufficient to justify the removal—and that is virtually a decision of this case, because the facts and the records are identical. The first case presents the same identical facts which appear by the Governor's return made pursuant to a writ of certiorari. On April 23, 1920, the complaint or accusing notice was duly served on Wehe and he was cited to appear before the Governor on April 23, 1920, and to show cause why he should not be removed from office. On April 23d Wehe and his attorney appeared before the Governor at his office in the capitol and rather contemptuously denied the right of the Governor to remove him. He objected that the charges were not sufficiently specific; that he should be confronted with the witnesses against him, and at the

same time he refused to be sworn at the request or demand of the Governor.

By the Governor, Wehe was appointed commissioner of the Workmen's Compensation Bureau under a statute requiring him to give all his time to the duties of the bureau. Laws 1919, chap. 263. The work of the bureau was sufficient to demand all the time and thought of the commissioner and also the supervision of the Governor. The accidental insurance thus far collected is $950,000; losses paid, $69,000; expense of administration, $49,000.

The first charge against Wehe is that he did not devote all his time to the duties of his office, that he carried on a private law practice, using for that purpose the help and the stationery of his bureau. The charge was sufficiently specific. The Governor knew it to be true; Wehe knew it to be true, and this court knows that it is true, because, in several cases, Wehe appeared as an attorney before this court and filed lengthy briefs and made lengthy arguments. Wehe v. Wehe, 44 N. D. 280, 175 N. W. 366; Streeter v. Archer, 46 N. D. 251, 176 N. W. 826; State ex rel. Amerland v. Hagen, 44 N. D. 306, 175 N. W. 372 (Comp. Act); State ex rel. McDonald v. Hanley, 43 N. D. 388, 175 N. W. 569; State ex rel. Stearns v. Olson, 43 N. D. 619, 175 N. W. 714. The Governor had several affidavits which he did not care to exhibit to Wehe. One is Exhibit P. It shows that while acting as a commissioner in 1919, W. H. Turner employed Wehe to collect $137; that while Wehe collected and paid the costs of the suit he collected not a penny for Turner, and charged him $50 and rendered a bill for the same on the stationery of the bureau. When Wehe appeared before the Governor with his counsel he either knew or surmised that the Governor had numerous affidavits to sustain the charges made against him. He knew that he could not hope for a decision in his favor. Hence, he did in effect set the Governor at defiance, denying his jurisdiction, denying the sufficiency of the charges against him, claiming a right to inspect affidavits not put in evidence, and claiming a right to a trial according to court practice. He refused to submit to any trial, unless first shown the affidavits made against him. He took the position of dictating to the Governor the terms and conditions on which he would submit to a trial. The Governor demanded that he be sworn as a witness to answer questions concerning the charges, and he absolutely re-

fused to be sworn. His position was not that of an innocent and honest person appearing before the Governor who had appointed him to office. It was that of a person making a grandstand play to attract notice in the newspapers.

Of course, even under the strict rules of court procedure, the Governor had a right to demand that Wehe be sworn and that he submit to an examination concerning the charges against him. If Wehe had been sued and denied the charges against him, in strict legal procedure he might have been called as a witness to testify concerning such charges, and of course he might be confronted with his letters on the stationery of the bureau, charging Turner $50 for services. Under the facts, if the judges feel bound to reverse and annul the order of the executive, it should be done with express and profound regret, for in this court there is always cause for regret when a mere technicality prevails over right and justice.

To hold void the order of removal is to seriously impede and cripple the executive power of the Governor, to invite litigation on every order or removal, and to permit Wehe to sue the state and to recover a salary for a year or more when another person has done the work and received the compensation. Then there is sure to be another proceeding by the Governor and possibly another refusal to testify, another order of removal and another appeal to this court. And there is no limit to the extent and the cost of the litigation.

Another matter for consideration is this: The writ of certiorari does not issue as a matter of right. The writ is discretionary. It will not issue to lay the foundation for doing a wrong, such as the collection of an unearned salary. It will not issue when the petitioner has been guilty of laches and delay which may inure to his benefit and the detriment of the other party.

"A writ of certiorari may be granted by the supreme court and district courts when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, and no other plain, speedy, and adequate remedy." Comp. Laws, § 8445. Now in the performance of his executive duties the Governor is not an inferior court, an inferior officer, board or tribunal. He is the head of the executive department and he is vested with the executive power of the state. Const. § 71. His constitutional power as executive differs in

no way from that of the President or the Sovereign of Great Britain. The power includes appointments to office and removals from office. When the removal must be for cause and on notice it is for the executive, and not the courts, to determine the sufficiency of the cause, the weight of the evidence, the notice, and the procedure. It is not for the courts to lay down hard and fast rules to govern the exercise of the executive power.

Of course to some extent this rule prevails when the executive undertakes to remove a sheriff or a city mayor. Such a removal is the exercise of a judicial power and an appeal lies to the courts. State ex rel. Shaw v. Frazier, 39 N. D. 430, 167 N. W. 519. But as Job said in his affliction: "The Lord giveth and the Lord taketh away." So when the chief executive gives and then takes away an office, it is the exercise of an executive power and it is for the executive, and not for the courts, to determine the procedure. It is not for the courts to lay down hard and fast rules, or any rule, to govern the executive in the removal of his common and ordinary appointees.

Furthermore, if the order of removal was not void, if it were merely voidable, then the courts have no right to review it. If the order was void it would not prevent Wehe from bringing an action against the state to recover his salary. He had an adequate remedy. Hence the judgment of the district court should be reversed.

GRACE, J. (dissenting). This is an appeal from an order of the district court, overruling the motion and demurrer of the defendant, Lynn J. Frazier, as the Governor of the State of North Dakota, interposed to plaintiff's petition for a writ of certiorari. Defendant challenges the jurisdiction of the court over him as Governor, with reference to the matters therein involved, and its authority and jurisdiction to issue the writ of certiorari, and to adjudge the respondent unlawfully removed from office and reinstating him. This opinion deals only with appointive offices. No question relating to elective or constitutional offices is involved.

The legislature, at the regular session of 1919, duly enacted a law, entitled Workmen's Compensation Fund. Though it is a law of great importance, we feel it not necessary to enter into a discussion of

the principles contained therein, as that is not necessary in our consideration of the matters involved upon this appeal.

The intent of the law is to provide relief for those engaged in hazardous employments, who receive injuries while engaged in the course of the employment. A further understanding of the purpose and the relief intended to be granted by the act will be better ascertained by the reading of it.

Section 4 thereof creates a Workmen's Compensation Bureau, which is attached to the Department of Agriculture and Labor. The Commissioner of Agriculture is, ex officio, one of the commissioners. The act provides, that the governor shall appoint two commissioners who shall devote their entire time to the duties of the bureau, and who may be removed for cause. A salary of $2,500 is provided for each of the members, exclusive of the commissioner of agriculture.

By chapter 73 of the Laws of the Special Session of 1919, the membership of the bureau was increased by providing for an additional commissioner, so that the membership of the bureau, as now constituted, consists of the commissioner of agriculture, and three commissioners appointed by the Governor. By the Amendatory Act, it was also provided, that the Governor may remove the appointed commissioners for cause.

The respondent was appointed a Workmen's Compensation Commissioner on March 31, 1919, for a term of three years, and duly qualified, and entered upon the discharge of his duties. His appointment was for the short term, the terms of the commissioners being, respectively, three and five years. By the law, as amended, the term of this respondent, who was appointed for the short term, was made to expire on the second Monday in January, 1923.

On the 19th day of April, 1920, there was duly served upon the respondent the following charges made against him by the Governor:

State of North Dakota,
Office of the Governor, Bismarck.
April 19, 1920.

Hon. L. J. Wehe, Bismarck, N. Dak.
Dear Sir:

Evidence has been presented to me to the effect that since your

appointment and qualification as Workmen's Compensation Commissioner, and during the period that you have been acting as such commissioner, and drawing the salary of such commission, you have been carrying on a private law practice; that in connection with the carrying on a private law practice, you have had stenographers in the employ of the Workmen's Compensation Bureau do a large amount of stenographic work in connection with such private law practice, during the time which they should have devoted to the work of the bureau, and for which they were paid by the bureau;

That for such stenographic work you have used the office supplies of the bureau, and that by reason of these facts there has been great delay in the work of the bureau, and particularly in the adjustment of claims, which come to the bureau for adjustment, under the law;

That through lack of executive ability, irascibility, incompatibility of temperament and lack of comprehension of the spirit of the Workmen's Compensation Law, and by your general inefficiency, you have been a detriment to the bureau and a handicap, particularly to the work of the claim department of said bureau;

That at the public hearings conducted by the Minimum Wage Commission, held during the month of February, 1920, you conducted yourself in a manner detrimental to public interest, being tactless in the examination of, and disrespectful and offensive to, a number of witnesses, who appeared to testify at such hearing;

That several efficient employees of said bureau have tendered their resignations, on account of your incompetency, inefficiency, irascibility and your attitude of intolerance toward them; that such employees have been induced to remain in the employ of the bureau only through the exercise of the utmost persuasive powers of persons deeply interested in the welfare of the bureau, and that employees decline to remain in the employ of the bureau, if you continue longer as a Workmen's Compensation Commissioner;

That your presence has impaired the efficiency of the bureau and the resignation of such employees would be a great detriment to the work of the bureau, and that your continuance in the office, as Workmen's Compensation Commissioner, will do great harm to the proper functioning of the bureau.

In the light of this evidence, I feel it my duty to inquire what, if

anything, you desire to state in your defense. As the charges, if true, are of such nature as to require the immediate severance of your connection with the Workmen's Compensation Bureau, an immediate reply is requested. Failing to receive any statement from you, or your resignation on or before the 22d instant, I shall consider it my duty to remove you summarily from office. You are hereby notified that I have suspended you from the office of Workmen's Compensation Commissioner, such suspension to continue until the final determination of this matter.

Respectfully,
Lynn J. Frazier,
Governor.

Upon these charges being served, Mr. Wehe addressed the following communication to Governor Frazier:

April 20, 1920.

Gov. Lynn J. Frazier,
Capitol Building,
Bismarck, N. Dak.

Dear Sir:

I have received your favor of April 19, 1920, and wish to say that I am very much surprised at the tone of its contents, and had, at least, expected the general courtesies shown in such matters. Your statements are too general and I must have something more specific to act upon in so serious a matter as this.

I deny the contents of your letter in answer thereto.

I most respectfully refuse to hand in my resignation under the circumstances, and demand a hearing; and shall exercise the duties of the office until I am legally removed.

I deny your right to suspend me from office, as you have attempted to do by your letter until final determination of this matter.

Respectfully,
(Signed) L. J. Wehe,
Commissioner of the Workmen's Compensation Bureau.

Thereafter, the following order to show cause was duly served upon Mr. Wehe:

State of North Dakota.
Office of the Governor, Bismarck.

To L. J. Wehe, Bismarck, N. Dak.

NOTICE.

You are hereby directed to show cause before me at my office on Friday, April 23, 1920, at three o'clock in the afternoon of said day, why your suspension from office as Workmen's Compensation Commissioner should not be made permanent.

Dated April 20, 1920.

Lynn J. Frazier,
Governor.

Pursuant to the order to show cause before the Governor, Commissioner Wehe was present in person, and as attorney in his own behalf, and was further represented by Mr. Theodore Koffel as counsel.

Governor Frazier was assisted by Attorney George K. Foster and C. A. Marr, secretary of the Workmen's Compensation Bureau. The respondent filed objections to the jurisdiction of the Governor, claiming that the Governor had no authority to suspend the respondent and that there were no specific charges filed with and served upon the respondent, setting forth any cause, or causes, for his removal from office; and that the letter dated April 19th, which sets forth the charges against Mr. Wehe, is too indefinite and uncertain to apprise the respondent of the nature of the charges against him, and demanded that he be apprised more fully of the nature of the charges. Further objection was made that the time of notice was too short, and that the proceedings were summary and arbitrary. Other objections of the same character were made at the time of the hearing, as appears from the transcript.

Certain affidavits were filed with the Governor, which were intended to substantiate the charges in the letter of April 19th, which affidavits were not served upon respondent. The Governor stated, at the hearing, that the general trend of the affidavits is contained in the letter that he wrote to Mr. Wehe.

Mr. Koffel's contention was, that no charges had been made, and that there were no charges to answer or to which to reply. The Governor notified him the charges were set forth in the letter to Mr. Wehe.

After more or less discussion along this line, Mr. Koffel, attorney for the respondent, put in an answer for the respondent, which is as follows:

"We deny each and every part of each and every allegation, matter, statement and thing contained in the letter, and also in the affidavits, in so far as they charge this respondent with any official misconduct in office, although we do not know what the contents are."

Governor Frazier then asked if they were ready to take up the charges presented. Mr. Koffel answered, "Yes." Governor Frazier then asked the following question:—

Do you wish to be sworn and proceed with the hearing?

Mr. Wehe: I absolutely refuse to be sworn until I know what the specific charges are. I am here to meet any charges that the Governor may have, and I demand the right of cross-examination and the calling of any witnesses I may be entitled to in defense of myself.

Governor Frazier: There have been charges made against you that have been set forth in that letter which suspends you from office, and now I would like to ask you some questions concerning those affidavits, under oath.

Mr. Koffel: We, as the respondents in the case, demand to have the Governor present his case and until that is done we see nothing for us to deny at this time. There is no evidence that we can bring forth now, excepting of a general nature. It is up to the relator to make a record. As soon as a record is made we are ready to defend.

Governor Frazier: What I stated was, that I wanted to question Mr. Wehe, under oath. If he wishes to be questioned, we will proceed, if not, this will end the hearing.

Mr. Koffel: Do I understand the governor's position to be that he refuses to produce any witnesses or record he may have, and that he wants to ask the defendant, under oath, concerning his entire record as a public officer?

Governor Frazier: The whole situation is this, as to whether or not Mr. Wehe wants to answer the questions in regard to these charges that

have been made against him at this time. If he wants to answer to them, this is his opportunity.

Mr. Wehe: Let the record show that we are ready to answer when they have produced their case and that we are willing to answer when given a hearing.

Governor Frazier: If you want a hearing—

Mr. Wehe: We demand a hearing and we refuse to answer any questions before their witnesses are produced. We are right here, willing at all times to produce our defense on any and all specific charges.

Governor Frazier: Then you do not want to be sworn?

Mr. Wehe: I absolutely refuse to be sworn at this time.

Governor Frazier: Then the meeting is adjourned.

There were a mass of affidavits filed with the Governor, substantiating the charges, among which were those of commissioner of Agriculture and labor, Hagan, ex officio member of the Workmen's Compensation Bureau, and that of Mr. MacDonald, another commissioner, and Mr. John Brown, formerly secretary of the bureau. There were affidavits of stenographers and other employees of the bureau, and abundant and substantial proof of the charges.

The Governor, on April 23d, made his conclusion, to the effect that since the appointment and qualification of Wehe, as Workmen's Compensation Commissioner, and during the time he was acting as such commissioner, and drawing salary as such, that he had carried on a private law practice, using the stenographers of the bureau to do the stenographic work in connection therewith, thereby causing great delay in the work of the bureau and adjustment of claims, and that through lack of executive ability, irascibility, incompatibility of temperament and lack of comprehension of the Workmen's Compensation Law, and by general inefficiency, that the respondent had been a detriment to the bureau and a handicap to the claim department of the bureau; that at public hearings conducted by the Minimum Wage Commission, respondent had conducted himself in a manner detrimental to public interest, being tactless in the examination of, and disrespectful and offensive to, witnesses who appeared to testify at such hearings.

That several efficient employees of the bureau had tendered their resignation on account of the incompetence, inefficiency, irascibility

and respondent's attitude of intolerance toward them, and had been induced to remain in the employ of the bureau only through the exercise of the utmost persuasive powers of persons deeply interested in the welfare of the Bureau.

That the presence of respondent has impaired the efficiency of the bureau, in that he did not possess the kind of qualifications which are necessary to the discharge of the duties of the office of Workmen's Compensation Commissioner; and the Governor further ordered that respondent is removed from the office of Workmen's Compensation Commissioner, and relieved of all further duties, and deprived of all the authority and of all rights, privileges, and prerogatives of such Workmen's Compensation commissioner. This substantially covers the proceedings had before the Governor at the time of the hearing on the order to show cause.

This brings us to a consideration of the first legal principle involved in the proceeding had before the Governor. At this point it should be determined whether that proceeding was a judicial or an administrative proceeding. We have not the least hesitancy in stating that it was an administrative proceeding, because the act which the Governor was doing—that is, the removal of Commissioner Wehe—was a political act, not in the interest of himself, or any individual citizen of the state, but for and on behalf of the state of North Dakota.

"The executive power shall be vested in a governor, who shall reside at the seat of government and shall hold his office for the term of two years and until his successor is elected and duly qualified. Const. § 71.

"The powers and duties of the secretary of state, auditor, treasurer, superintendent of public instruction, commissioner of insurance, commissioners of railroads, attorney general, and commissioner of agriculture and labor, shall be as prescribed by law." Const. § 83.

"The Governor and other state and judicial officers, except county judges, justices of the peace, and police magistrates, shall be liable to impeachment for habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of trust or profit under the state. The person ac-

cused, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law." Const. § 196.

"All officers not liable to impeachment shall be subject to removal for misconduct, malfeasance, crime or misdemeanor in office, or for habitual drunkenness or gross incompetency in such manner as may be provided by law." Const. § 197.

Section 76 of the Constitution defines the Governor's power, in conjunction with the board of pardons, of which he is an *ex officio* member, with reference to granting pardons, remitting fines and forfeitures, etc.

Sections 121 to 131 of the Political Code, Comp. Laws 1913, define the duties of the Secretary of State. Sections 132 to 144, those of state auditor; §§ 143 to 156, those of State Treasurer; §§ 157 to 162, those of the Attorney General; §§ 163 to 171, those of Commissioner of Agriculture and Labor; §§ 172 to 175, those of the Commissioner of Insurance. This, the legislature could do, as it is in accordance with § 83 of the Constitution.

By §§ 111 to 117 of chapter 4, supra, the legislature assumed to grant certain powers and impose upon the executive certain duties, in addition to those specified in the Constitution. Section 111 of chapter 4, supra, is entitled "Powers and Duties of Governor." It provides: "In addition to those prescribed by the Constitution, the Governor has the power and must perform the duties prescribed in this and the following sections:

(1) He is to supervise the official conduct of all *executive and ministerial officers.*

(2) He is to see that all offices are filled, *and the duties thereof performed,* or in default thereof apply such remedies as the law allows. If the remedy is imperfect, acquaint the legislative assembly therewith at its next session.

(3) He is to make appointments and fill vacancies as required by law.

(10) He must issue patents for land as prescribed by the provisions of this Code.

(11) He must discharge the duties of a member of the following State Boards: Equalization; University and School Lands; Trustees of Public Property; State Historical Society; State Auditing Board;

State Banking Board; State Board of Pardons; High School Board; Trustees of the Normal Schools."

It will be observed that the Constitution nowhere authorized the legislature to prescribe the duties of the Governor. But that it does authorize it to prescribe the duties of all other state officers. See § 83, supra.

But assume that the legislature, for convenience and to facilitate the performance of the duties of the executive department, may detail the duties of the Governor, it is nevertheless certain that it cannot impose duties on him which will abridge his constitutional duties or powers, or those requiring the exercise of his political discretion, or which impair the prerogatives of the branch of government of which he is the head, and which is, by the Constitution, co-ordinate with the other two branches.

The legislature has made him *ex officio* member of many boards. These boards have various duties imposed upon them, of varying nature. Perhaps the duties of the board of equalization, of which he is a member *ex officio,* are of a legislative character, and his membership on other boards is perhaps a different nature.

If the Governor should determine that his membership on any of these boards was in direct conflict with his duties, as an executive of the state, the law imposing a duty upon him of being *ex officio* member of such board, in that event, would not be effective to control his executive discretion. If his membership thereon would prevent him from executing laws, or supervising the official conduct of that board, in his executive capacity, or if it prevented him from removing a member of such board for cause, upon notice given, charges made, and hearing held before him, or if it prevented him from transacting all necessary business with the officers of the government, civil or military, and thus be in direct conflict with his executive duties as governor, certainly the legislature would have no authority to require, nor the court to compel, him to violate his constitutional duties.

Where a board is a direct agency of the governor, in executing his official duties, or in exercising his political discretion, and where the control or direction of such board, by either of the other two departments of government, would, in effect, be the control of the discretion of the Governor, in a political act requiring the exercise of his dis-

cretion, then that board could not be controlled or directed by the legislative or judiciary branches any more than either of them could control or direct the discretion of the Governor, in the manner of his performance of a political act requiring the exercise of his discretion. In such case, such board is an agency of the executive, and its act would be his act.

In the case now before us, we are not concerned with the powers of the governor as a member of any board of which he is a member, *ex officio,* or otherwise. That question is not presented in this case, and we make no decision with reference thereto. What has been said along this line was for the purpose of drawing attention to the exclusive character of the powers possessed by the Governor, who represents the executive branch of the government, which is co-ordinate in character with the legislative and executive branches.

We have above stated that the proceedings instituted by the Governor to remove Mr. Wehe were administrative and political in character. This being true, the Governor had exclusive jurisdiction of the proceeding. He, therefore, had the right to prescribe and initiate the form and character of the procedure. That is, he could frame his charges in such way as appeared to him to be proper. He did frame those charges and had them personally served upon respondent three days before the time set for the hearing.

The respondent interposed a general denial to those charges, and these constituted the pleadings in the case. In the case of State ex rel. Wehe v. North Dakota Workmen's Compensation Bureau, 46 N. D. 147, 180 N. W. 49, a proceeding in mandamus just decided by this court, in an opinion written by Mr. Justice Birdzell, which referred to the character of the charges made in writing by the Governor, and served upon the respondent, the following language was used:

"As to the indefiniteness of the charges, it would seem that they were about as specific as laymen are apt to make charges in matters of this kind. If drawn by lawyers accustomed to the niceties of criminal pleading, by indictment or information, they might have been made to conform more nearly to the petitioner's motion of definiteness; but we fail to see wherein they did not charge with substantial clearness grounds which amount to legal cause for removal. . . .

"In view of the record made, there is no merit in the objection stat-

ing that the time of notice was too short. It does not appear wherein the petitioner would have been benefited by being given more time."

We may adopt that statement as disposing of the sufficiency of legal cause and specific nature of the charges, the charges there being the same as are in controversy here. We also think there is no merit in the contention that the time of notice was too short.

The language just quoted also indicates that the Governor had the right and exclusive jurisdiction to determine the character of the pleadings, as it draws a distinction between the nicety to be expected from pleadings drawn by attorneys and those drawn by laymen, such as the Governor is, so far as knowledge of pleadings and judicial process is concerned. Though he is Governor of the state, he is a layman, so far as knowledge of law and judicial procedure is concerned.

The judiciary, as we view the matter, has no right nor authority, under the Constitution, to impose its process upon the Governor in proceedings before him, or his department, nor impose their will upon him, respecting the manner of performance of his executive duties while engaged in executing a political act on behalf of the state. It cannot be successfully disputed, that the power of the Governor to appoint and remove executive and ministerial officers is a political act.

If the judiciary may impose its form of pleadings and practice and process upon the executive department represented by the Governor, and which is a co-ordinate department of the government—a subject we will discuss more fully later in the opinion—then why may it not impose its will in other matters upon the executive department? Truly, if it could in one instance, it could in the other. But we think it cannot do so in either or any event. For to concede that this might be done would be to concede the control of the political acts of the Governor by the judiciary.

We hold that the form of procedure taken by the Governor was a matter for him to determine within his executive discretion. The respondent was offered an opportunity to testify and produce any evidence that he might have to disprove the charges. He refused to be sworn. He did not produce any other evidence. He asked for no further time to produce evidence. He had ample notice of charges and full opportunity to be heard thereon. He simply challenged the jurisdiction of the Governor and the method of procedure. The Governor

ordered him to show cause why he should not be removed from office, and he not only did not, but refused to do so.

The Governor did not have to serve the affidavits upon the respondent. Neither did he have to disclose their contents. That was a matter within his executive discretion. The respondent refused to proceed only in a manner indicated by himself.

This was not a proceeding before a judicial tribunal, involving the principles of a default judgment, but one before a co-ordinate branch of the government, where the jurisdiction is determined by the Governor. His order was that the respondent be removed from his office, and this order recites all the charges contained in the notice, which respondent declined to disprove when he had an opportunity to do so, thereby conceding the truth of them, and which was further substantiated by other evidence then in the possession of the Governor of which respondent knew, but of which he did not have full knowledge of the contents.

The order made was one within the executive discretion. It was one with which neither the district court nor any other court may interfere, for the very plain reason that the courts have no jurisdiction to do so.

The next point for consideration is, whether the district court had any authority to issue the writ of certiorari. Comp. Laws 1913, § 8445, as amended by Session Laws of 1919, provides: "A writ of certiorari shall be granted by the supreme court and district courts, when inferior courts, officers, boards or tribunals have exceeded their jurisdiction and there is no appeal, nor, in the judgment in the court, any other plain, speedy and adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent miscarriage of justice."

The writ of certiorari, as a general rule, may be used only when the proceeding is judicial or quasi-judicial, and the proceeding before the Governor was neither. It was purely and only an executive proceeding, and, though it may have taken on the appearance, and, to some extent, the form, of a quasi-judicial proceeding, in the preferring of charges, the issuing order to show cause, and in the opportunity for a hearing granted, yet, each act in the whole procedure was in connection with an executive proceeding, over which the Governor had

exclusive jurisdiction, as the head of a co-ordinate branch of the government.

"The bill of certiorari, or certiorari bill, is a bill in equity, prayed for by defendant, having for its object removal, by writ of certiorari, of a cause from an inferior court of equity to the court of chancery; and the ground on which such a writ is allowed is that, because of the inferior court's limited jurisdiction, or because of its wrongful assumption of jurisdiction, it cannot afford defendant complete justice." 11 C. J. p. 88.

This proceeding can never be resorted to for any other purpose than to test the jurisdiction of the inferior court. Albrecht v. Zimmerly, 23 N. D. 337, 136 N. W. 240. The appointment and removal of the commissioner of the compensation bureau, being a political act, requiring the exercise of discretion, the executive department had exclusive jurisdiction thereof. That jurisdiction was apparent on the face of the record, and the issuing of a writ of certiorari, in these circumstances, was an improvident act, and was a nullity.

It is almost an invariable rule that the writ will never lie for other than acts partaking of a judicial or quasi-judicial nature. However, in New Jersey, North Dakota, and South Dakota, the writ is not so confined. It were better that it were, for the extension of the right to officers but shows the desire of the legislature and the courts to encroach upon and arrogate to themselves the administrative functions, in addition to those respectively imposed upon them by the Constitution.

However, even though the writ has been by this court held to apply to inferior officers, as well as to inferior courts, boards, or tribunals, as in the case of State ex rel. Johnson v. Clark, 21 N. D. 517, 131 N. W. 715, it can never be held to apply to the Governor, who is the head of a co-ordinate branch of the government, to review any of his political acts performed on behalf of the state, nor control his executive discretion.

To hold that the writ of certiorari might be so applied would be directly to hold that the judicial department may control either of the other co-ordinate branches of the government, to-wit, the executive or legislative, and thus absolutely destroy the co-ordinate character of the three branches of government.

Respondent places great reliance upon the case of Ekern v. Mc-

Govern, 154 Wis. 157, 46 L.R.A.(N.S.) 810, 142 N. W. 595. We do not agree with the reasoning in that case, in so far as it maintains that the title to office may be determined in a proceeding in equity. The respondent here is not in the same position as was Ekern. The latter was in possession of the office, and the Governor having appointed another to the office, undertook to forcibly oust Ekern. Here the respondent is not in possession of the office, but was, by the order of the Governor, removed therefrom.

Thereafter, the governor appointed another in his stead as a member of the Workmen's Compensation Bureau, who received his commission, thereafter qualified and entered on the discharge of his duties, and has ever since occupied that office and discharged the duties incumbent upon him as such commissioner.

In these circumstances, the Ekern Case is rather authority against respondent's position, for, in that case, it was at least impliedly held that one out of possession could not maintain an action in equity. The court said: "An action in equity, whether instituted by one in or out of possession, to try the title, is one thing; an action by a person in possession of an office, having at least a *de facto* status, to compel an adversary to vindicate his claim by lawful methods, and to restrain him from disturbing the existing state of things in the meantime, is quite another affair. The one involves the adjudication of the title *de jure*. The other merely involves the right *de facto* and to have the claimant proceed lawfully to settle his claim of title *de jure*."

In other words, the court impliedly held that if Ekern had been out of possession, he could not have maintained the action in equity. In this sense, that case is against this respondent's position.

In an endeavor to sustain its contention, with reference to the power of the court in an equity proceeding to determine the title, or the right of office, the court said: "Should the court rest in a case of this sort, having reached a point calling for judgment vindicating the primary right—the right to immunity from being forcibly dispossessed by illegal methods—leaving the more important question, the right to the office, undetermined? That is an important question. It has been taken largely for granted that either the court is without jurisdiction to, or, in any event, should not, try the title *de jure* in an equity action to quiet the right of possession against forcible attempts to disturb it.

Must parties in such a case, though in the court having jurisdiction to settle the whole controversy, depart with but partial relief, and none as to the ultimate matter, and come back not really in another form of action, because we really have but one, but asking another form of relief,—a part of the same form as before and, from a practical standpoint, including it?"

As we view that expression, its inherent weakness is, that the court assumed to be in possession of something which it, in fact, did not possess, that is, jurisdiction to determine the right of office in that proceeding. We do not think the principle asserted there has any real support in principle or authority. It is not only contrary to the great weight of authority, but, practically speaking, is without support. It is not supported to such an extent in this regard, that it could be called the minority rule.

That case is also against the great weight of authority, in its holding that an office, with its honor and emoluments, is property. We think the rule stated in State ex rel. Starkweather v. Superior, 90 Wis. 612, 64 N. W. 304, is the correct one, wherein it is stated: "An office is not regarded as property, or as a vested right, and the legislature which creates it may, in the absence of constitutional restrictions, undoubtedly make such a provision as the one in question here for the removal of the incumbent."

The rule above stated that an office is not regarded as property, or as a vested right, is upheld by the great weight of authority. It is practically the universal rule. It is the rule announced and adhered to by the United States Supreme Court.

The cases holding otherwise are few and are not based upon sound, legal reasoning or logic.

In the case of Butler v. Pennsylvania, 10 How. 405, 13 L. ed. 473, the Supreme Court of the United States said: "The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, *are the periods for the appointment of such agents.* . . . The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity, but to insist beyond this on the perpetuation of a public policy *either useless or*

detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither *common justice nor common sense.* The establishment of such a principle *would arrest, necessarily, everything like progress or improvement in government.* . . . It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; *and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic and for the safety of the individuals of the community."*

This case, and the principles involved in it, were quoted with approval in the case of Crenshaw v. United States, 134 U. S. 99, 33 L. ed. 825, 10 Sup. Ct. Rep. 431. In the syllabus the principle is stated, that "an officer of the navy, appointed for a definite time or during good behavior, has no vested interest or contract right in his office, of which Congress cannot deprive him." Taylor v. Beckham, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890, 1009; State ex rel. Jones v. Sargent, 145 Iowa, 298, 27 L.R.A.(N.S.) 719, 139 Am. St. Rep. 439, 124 N. W. 339.

Other decisions holding that an office is not property, and that the right to hold it is not a vested right, are State ex rel. Starkweather v. Superior, supra; State ex rel. Cook v. Houser, 122 Wis. 534, 619, 100 N. W. 964.

It is clear, that an office is not property, and the right to hold it is not a vested one. In these circumstances, a denial of due process of law, under the 5th and 14th Amendment, cannot be invoked.

But if the principle of due process were applicable, respondent could not complain, for, as said in the case of Pacific Live Stock Co. v. Lewis, 241 U. S. 440, 60 L. ed. 1091, 36 Sup. Ct. Rep. 637. "The essential elements of due process, are, first, notice, and second, opportunity to be heard."

"Due process does not always mean proceedings in court." Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272–286, 15 L. ed. 372–378; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

In the latter case, the United States Supreme Court said: "Nor does the phrase 'due process of law' mean by a judicial proceeding."

Mr. Justice Miller, speaking for the court in the case of Davidson

v. New Orleans, 96 U. S. 97, 24 L. ed. 616, in referring to the case of Den ex dem. Murray v. Hoboken Land & Improv. Co. supra, said: "A most exhaustive judicial inquiry into the meaning of the words 'due process', as found in the 5th Amendment, resulted in the unanimous decision of this court, that they do not *necessarily imply a regular proceeding in a court of justice, or after the manner of courts.*"

In the case of Atty. Gen. ex rel. Rich v. Jochim, 99 Mich. 358, 23 L.R.A. 699, 41 Am. St. Rep. 607, 58 N. W. 611, in the syllabus is stated the following principle:

"The state is not so bound by the term 'due process of law' that it is impossible for it to invest its agents with its offices without subjecting itself, so far as their removal is concerned, to the delays and uncertainties of strict judicial action, and it may, in cases of emergency, summarily remove them if permitted by the state Constitution.

"When the state Constitution invests the Governor with power to remove certain constitutional state officers for gross neglect of official duty, it is the duty of the Governor, upon discovering such neglect, to remove them after notice to them of the charges, and an opportunity to be heard, *and although his action is in a sense judicial, it is no valid objection thereto that he acts both as accuser and judge.*"

In Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435, in the syllabus, the court laid down the principle, with reference to due process of law, in the removal of a state officer: "The suspension by the Governor of a railroad commissioner, under N. C. Act 1891, chap. 320, which operates only until the next general assembly determines the question, is not wanting in due process of law, and does not deny the equal protection of the laws, because the Governor refuses to produce to the officer the evidence against him, or give him an opportunity to confront his accusers and cross-examine the witnesses."

New Orleans v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; Weimer v. Bunbury, 30 Mich. 201 (Cooley, J.); Ex parte Wall, 107 U. S. 265–318, 27 L. ed. 552–572, 2 Sup. Ct. Rep. 572.

As the concluding part of this opinion, it is proper to examine the three co-ordinate branches of government, and the powers and duties, so far as necessary, of the executive and judiciary, as co-ordinate de-

partments, in order to determine if, in this proceeding, the judicial arm of the government has encroached on and arrogated to itself certain duties and powers which are the exclusive prerogative of the executive department.

The sovereign power, the people, for the purpose of forming a government that would be balanced, and in order that too great a power might not be concentrated in one place, divided such powers and classified them into executive, legislative and judicial. That these powers might securely remain divided, a written Constitution was evolved and duly ratified, in the manner prescribed therefor, which largely defines the powers of each of such branches.

The duty of the legislative branch is to enact the laws, of the executive to execute the laws, of the judicial to interpret the laws. Being co-ordinate, neither branch may trespass upon the powers or duties committed by the Constitution to the other.

"The executive power of the Federal government is vested in a President, and, as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed in the Constitution, *through the impeaching power.* A state's judiciary sustains the same relation to its Governor that the Federal judiciary does to the President of the United States; and as a state court, by reason of that relation, has no jurisdiction to coerce or restrain the Governor with respect to his official duties, so the Federal courts, for the same reason, have no power to interfere with the official actions of the President." 6 R. C. L. § 150; Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346.

The President of the United States bears relatively the same relation to the national government as the Governor to the state government. Within their respective spheres, in the discharge of executive duties, requiring discretion, or, in the refusal to exercise duties of that character, they may not be interfered with, or restrained, by either of the other departments. The only way is by the process of impeachment, or, by the people, in the exercise of their voting franchise.

Our Constitution imposes upon the executive no ministerial duties, and the legislature has no authority to impose any ministerial duties upon him, which would conflict with his political and executive duties, or interfere with his executive discretion. Neither can it impose con-

ditions and duties upon him, that would weaken his executive power and which would have a tendency to impede or prevent his enforcement of the laws, and the discharge of his executive duties, to the best interest and welfare of the state.

The appointment of officers, as agents to carry out his will and the duties of his department, is a political act, and the power to appoint includes the power to remove. If the legislature has any authority to prescribe the method of removal of executive appointees for a definite time, or has authority to prescribe that such removal shall not be made unless for cause, and directly or impliedly provides that a hearing shall be had upon that cause, that hearing must occur in the executive department, and no other department, or branch of government, has any jurisdiction in the matter.

If the legislature may impose its will upon the executive, absolutely, in the appointment or removal of executive agents or officers which are necessary to assist the executive in the discharge of his official duties, then, in effect, the power of appointing or removing officers is transferred to the legislature, and it can thus control the executive department.

Likewise, if the judicial department, where the Governor has removed an officer, or executive agent appointed by him, can reverse the action of the Governor, and require that the one removed be reinstated, and decree that the one appointed to fill the place of the one removed, has no authority and is not an executive officer, then the judicial department has assumed, and is discharging, the executive duties, and is fully controlling the executive discretion. It is exercising the power of appointing and removal of officers in the executive department.

If the judiciary may do this and similar acts, and likewise the legislature can control and direct the executive discretion, then the three departments are not co-ordinate, but that branch which is required to observe a decree or order of either of the other branches becomes subordinate.

We have, on the North American continent, three national entities. The United States, Great Britain, in its possession of the Dominion of Canada, and Mexico. They are separated from each other by national boundary lines. They are separate and distinct nations, each possessing its own governmental powers and system of laws. No one would con-

tend that any governmental powers of the United States has any force or effect in either of the others, nor that it could impose its will upon them against their consent, unless by force. To admit that it could do so, would be to destroy the national character of the others. It is in this sense that the three co-ordinate departments of our government are distinct in character and power, so that neither can impose its will upon either of the other co-ordinate branches. As soon as this may be done, the co-ordinate character of the branches must disappear, and thus would be practically destroyed the very cornerstone of republican form of government.

The imposition, by the judiciary, of its will upon the executive or legislative departments, in matters committed to those departments, by the Constitution, or by necessary implications derived therefrom, is not an act which tends to preserve a republican form of government, and our democratic ideals, but is one which tends to directly destroy them by the establishment of judicial tyranny.

We think a reading of the history of ancient republics will show that the concentration of executive, legislative, and judicial functions, in the hands of any given class of officials, was the rock upon which their ships of state were wrecked.

The same tendency to weaken the republican form of government, and to destroy its fundamental functions, is manifested in the impairment of the right of trial by jury, and by the impairment of the functions of the jury. This is, to some extent, accomplished by providing that its verdict shall be a special one, composed of many intricate and complicated questions, instead of a general one, which passes upon all the issues of the case in the ordinary manner, as was intended by the Constitution.

It is again impaired, where trial courts substitute their own judgment for that of the jury, and set aside a verdict when there is some substantial evidence to support it. It is impaired where any court minimizes the effect of the verdict of the jury. It is impaired, when the press, or the bar, or the court, dwell on and magnify the alleged prejudice and ignorance of the ordinary jury.

Democracy is weakened where the will of the majority, duly and lawfully expressed by law, and in pursuance of law, with reference to any matter which is properly presented to them for their decision, and

which is by them lawfully decided, and the minority refuse to be bound thereby, and insist that the will of the minority must be supreme, and that the majority must submit thereto.

The executive and legislative branches of the government, while engaged in the performance of the duties imposed upon them by the Constitution, and in exercising the powers conferred upon them, cannot be restrained or coerced by the judicial department.

Both branches of our legislature might introduce a bill which would be clearly unconstitutional, but the judiciary cannot intervene to restrain them from doing this. They may pass it and present it to the Governor, and he may sign it, yet the court may not restrain the Governor from that. The judiciary may not interfere with the law until the time when it becomes effective, and when it is presented in a court of competent jurisdiction, and the constitutionality of the law is drawn in question, by reason of the impairment of some property or personal right; but, when that time arrives, the law is then before the judicial branch of government, in its co-ordinate capacity, and then, neither the executive nor the legislative can interfere in any manner to prevent a judicial tribunal from declaring the unconstitutionality of the law.

Though our Constitution says that a member of the House of Representatives should be twenty-one years of age, if one were elected who was only eighteen years of age, he could qualify and enter upon the discharge of his duties, and the judicial department could not restrain him, though, under the Constitution, he is clearly disqualified to fill the office. For, by the terms of the Constitution, each house is the judge of the election and qualification of its own members.

Each house is required to keep a journal of its proceedings, and the yeas and nays on any question shall be taken and entered, at the request of one sixth of those present, and if either house refuse to keep a journal, or refuse to take and enter the yeas and nays, in the manner above specified, the judicial branch of government could not certainly, by mandamus, compel them to do so. But if the constitutionality of the law is challenged before a judicial tribunal, on the ground that the proceedings, in reference to its passage, was not placed upon the journal in either house, or upon its final passage, that the voting was not taken by yeas and nays, and the names of those voted entered on the journal, it could then be declared unconstitutional. If the Governor refuse to

perform his executive duties, he cannot be coerced by the judiciary. Neither can his executive discretion be restrained nor compelled by it. The remedy, so far as he is concerned, is by impeachment and the power of the people at election.

The Constitution prescribes the penalties which may be imposed upon members of the legislature for misconduct, and, aside from this, they are answerable to the people at election periods.

It is the duty of the executive of this state, under the Constitution, to enforce the laws. In order to do this, the assistance and service of subordinate officers and agents must be used. Now it is not difficult to discern that, if such subordinate officers and agents may resist the power of the Governor; if they may perform their duties in an unsatisfactory and inefficient manner; and if the Governor has not, within himself and his department, the power to remove them from office, or from their positions, after serving notice of the charges upon them, and giving a reasonable notice to be heard; and if he must wait until the determination of the judicial tribunals, as to his power and right to remove such an officer, in these circumstances; and if he can be compelled by such tribunals to retain, in the service of the state, a subordinate officer who he believes is incompetent, inefficient, and a detriment to public service, then the executive is not a co-ordinate branch of the government. Then, is he not an executive, and neither does he possess the power to enforce the law.

Those holding subordinate positions or offices in that department, or under the control or direction of that department, will feel perfectly free to use their own judgment and discretion in their official acts, and disregard the commands and directions of the supreme executive of the state, in whom the Constitution has reposed full and complete executive authority, and who is charged, by the Constitution, directly with the enforcement of all laws.

This case involves not only the power of the Governor to remove the respondent, but, involves the welfare, peace, and dignity of the state. The Governor cannot enforce the law, and thereby protect life and property, unless he can provide competent subordinate officers and agents, nor unless he can remove from office or service those who his executive discretion and judgment declares to be incompetent and inefficient.

Under the power vested in him by the Constitution, and in pursuance

of § 4 of the law above mentioned, and in the manner above described, after proceedings had, the Governor did enter his order removing the respondent. In making and entering this order, he exercised his executive judgment and discretion, in the performance of an act which was purely political in character, and, with his order, no court has any right or jurisdiction to interfere. Parsons v. United States, 167 U. S. 325, 42 L. ed. 185, 17 Sup. Ct. Rep. 880; Keyes v. United States, 109 U. S. 336–340, 27 L. ed. 954–956, 3 Sup. Ct. Rep. 202; Blake v. United States, 103 U. S. 227–237, 26 L. ed. 462–465; People ex rel. Sutherland v. Governor, 29 Mich. 320; State v. Borstad, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014, and cases cited; State ex rel. Shaw v. Frazier, 39 N. D. 430, 167 N. W. 510, and cases cited.

The respondent cites the case of State ex rel. Poole v. Peake, 22 N. D. 457, 40 L.R.A.(N.S.) 354, 135 N. W. 197. It is not necessary to enter into a discussion of the peculiarities of that case, further than to remark that even if the Governor did not have authority, under the law, to convene a court-martial, and if there were no law providing for the convening of the court-martial, in times of peace, the Governor was, according to the provisions of § 75 of the Constitution, commander in chief of the military and naval forces of the state, except when they are called into the service of the United States, and he may at any time call out the militia to execute the law, suppress insurrection or repel invasion.

He might, therefore, in the absence of a law providing for court-martial in times of peace, have simply discharged the relator, which would have been an executive act, with which the courts could not have interfered.

So far as that case may be regarded as authority for the principle, that the judiciary has a right to interfere with the executive department, and to assert its jurisdiction over it, or over the executive discretion of the Governor, in the execution of his duties, it should be overruled.

It will not be amiss to consider in which branch of the government the appointive power is lodged. The Constitution has not, in specific terms, placed it with either branch. Where it actually is lodged must be determined from implications to be drawn from the Constitution,

and by the construction placed upon that implication by the three branches of government.

The Constitution does vest in the Governor, under § 71 of the Constitution, the executive authority of the state; that is, the power and duty to enforce the laws.

It is manifest, that the Governor cannot, acting alone, carry out that mandate of the Constitution. He must have agents, and the power of appointing certain officers to assist him in the execution of his duties; and in this discussion we are dealing only with such agents and appointive officers, and do not undertake to discuss the removal of officers, who are elected by the people, in their sovereign capacity; and in this connection it is well to consider that the sovereign power, formerly possessed by the King, is now possessed by the people as a whole; and it is also to be observed that, in the creation of the state, the people did not part with one jot or tittle of that sovereign power. They retained it all. What they did do was to delegate certain governmental powers only, to the three co-ordinate branches of government.

They also defined and limited those powers by a written Constitution, which specifically sets forth, in direct words or by implication, the actual powers delegated to each branch, and the duties imposed upon them. So that to say that all the governmental power that is not delegated to the executive or judicial branches is lodged with the legislative branch is a fallacy; and such a principle is absolutely contrary to the provisions and the fundamental principles of the Constitution.

The true rule is, that each branch has such powers and duties as are specifically delegated to it, or that it must be held to possess, by reason of necessary implications naturally flowing from or derived from the Constitution.

The implication is natural and conclusive that, if the executive must enforce the law, he must control the appointment and removal of such agents and subordinate, appointive officers as are necessary to assist him. If he possess not this power, he cannot enforce the law, and if the other branches of government may tell him what officers he may appoint and in what manner, and when he may remove them, then those branches of government are controlling the executive branch, and it is subordinate and subject to their will. For the legislature to provide that an officer appointed by the Governor should be removed only for cause, is not a

claim by the legislature of a right to remove officers, neither does such a provision confer any power or right on the court to do so, but, on the contrary, it is a recognition of the sole authority of the Governor in that regard.

But let it be clearly understood that it is not the view of the writer that the legislature has ever usurped the power, or claimed the right, to appoint officers to assist the executive in the enforcement of law, but that, on the other hand, in practically all legislative action, in the creation of governmental boards, commissions, etc., to carry into operation any given governmental power, it has uniformly recognized and construed the power to appoint officers and to remove them to be in the executive department.

We might recite, by name, all such various boards and commissions, such as, Board of Control, Boards of Health, Vital Statistics, State Board of Dental Examiners, Practice of Osteopathy, State Board of Examiners in Optometry, State Board of Embalmers, and Board of Accountancy, and very many others.

The Constitution in several provisions recognizes that the power of appointment is in the executive department. Those provisions are as follows: Sections 71, 78, 81 and 98, and section 76, as amended. As we have above stated, the power to appoint implies and includes the power to remove.

The power of the executive to appoint subordinate officers and agents to execute the laws is, we believe, an inherent power, conferred upon him by § 71 of the Constitution, and the natural and necessary implications emanating from that section; that is, he has the inherent power to appoint all subordinate officers and agents, which necessarily act in the branch of government of which he is the executive head.

It does not follow from this that he may appoint subordinate officers, or officers or agents, in the legislative and judicial branches. For instance, if the Governor has inherent power to appoint all the officers and agents necessary to the enforcement of law, it does not necessarily follow that he has authority to appoint officers in the other branches of government, nor power to fill vacancies occurring in official positions in those branches.

That the Governor may not have power to fill a vacancy occurring in a judicial office is shown by § 98 of the Constitution, where, in the event

a vacancy in the supreme court is caused by the death, resignation, or otherwise, of a judge of that court, the Governor has power to fill the appointment until the next general election.

So that § 98 rather confirms the principle that the Governor has no inherent power to appoint judicial officers, and it also, we believe, recognizes the principle, that the power of the Governor to appoint subordinate officers and agents to enforce the laws, is an inherent power under the Constitution, and that § 98 is a limitation on that power; and we believe that § 78 likewise is a limitation upon the inherent power of appointment; that is, the Governor may have inherent power to appoint and remove subordinate officers and agents necessary to execute the laws, but he might not have power to fill every kind of vacancy. But, if it be conceded he has the inherent power to fill a vacancy which relates only to subordinate officers and agents acting under the executive department, it does not follow that he would have power to appoint officers to fill vacancies occurring in judicial or legislative offices, unless that authority is specially conferred upon him.

There may be many offices of a quasi-judicial or legislative nature, which might become vacant, and which the Governor, under his inherent power, might not have authority to fill, except for the provisions of § 78 of the Constitution, and, we believe, this section must be construed as a limitation on his otherwise inherent power to appoint subordinate officers and agents necessary to the proper conduct of the executive department and the enforcement of the laws.

The absolute right to appoint and remove subordinate officers or agents of the executive department was, by the Constitution, unquestionably deposited with one of the three branches of the government. The power to appoint and remove was not, so to speak, suspended in the air. If the majority of the court assert that that power is in the legislature only, or in the legislature and the courts combined, then they should go further and point out what provision of the Constitution these respective branches of the government derive that power.

If they should undertake to do so, we are fully satisfied they would fail, for, as we view the matter, there is no provision in the Constitution delegating such power to any branch of the government, excepting § 71, which unmistakably deposits that power with the executive branch of the government, as represented by the Governor of the state.

In closing this opinion, which has grown quite in length, owing to the importance of the principles involved, we can do no better service toward sustaining the principles which underlie every republican form of government, than to quote the language of the Arkansas court, in the case of Hawkins v. Governor, 1 Ark. 570, 33 Am. Dec. 346, supra, the able opinion in which was written by Judge Lacey. He there said: "There can be no liberty, says Montesquieu, where the legislative and executive powers are united in the same person or body of magistracy; or if power of judging be not separate from the legislative and executive powers. This is a political axiom established by the deliberate judgment of centuries, and confirmed by the universal experience of mankind. The American Constitutions have therefore made those departments as independent, and as separate from each other, as the nature of the case would admit of, or as their necessary connection or bond of union would allow. Each department is made sovereign and supreme within its own sphere, and is left in the full and free exercise of all the powers and rights respectively belonging to it. Each is a co-ordinate and equal branch of the government, and they all represent the sovereign will of the people, as embodied in the Constitution. The Constitution makes and ordains them all, and appoints each department to guard the sacred and invaluable rights established by that instrument. The Constitution is then above all the departments of the government; for it creates and preserves them. The will of the people must be greater than that of their agents, or there can be no constitutional liberty or independence. All the departments of the government unquestionably have the right of judging of the *Constitution and interpreting it for themselves.* But they judge under the responsibilities *imposed in that instrument, and are answerable in the manner pointed out by it.* The duties of each department are such as belong peculiarly to it, and the boundaries between their respective powers or jurisdictions are explicitly marked out and defined. For any one department to assume powers or exercise a jurisdiction properly belonging to another department, is a gross and palpable violation of its own constitutional duty.

The legislature, then, can exercise no power which properly belongs to the judiciary, or the judiciary any power that rightly belongs to the executive."

JOHN F. BEYER, Appellant, v. THE INVESTOR'S SYNDICATE, a Corporation, The North American Coal & Mining Company, a Corporation, Herbert Williams, Myra L. Williams, D. C. Wolpert, A. E. Wolpert, A Maud Wolpert, J. L. Treyillyan, J. L. Ludwig, F. B. Nicholl, John E. Tappan, and The Producers & Consumers Co-operation Company, a Corporation, Respondents.

(182 N. W. 934.)

Judgment — filing of process and lis pendens held not to confer jurisdiction of res in action to impress lien in favor of stockholders.

1. In an equitable action *in rem* to impress a paramount lien in favor of a stockholder upon the lands of his corporation for moneys paid in behalf of the corporation and in connection with his stock, necessarily involving upon the allegations of the complaint equitable proceedings *in personam* in order to afford relief *in rem*, jurisdiction of the *res* is not secured by the filing in of a verified complaint, of an affidavit for service of the summons by publication or without the state, and, of a *lis pendens*.

Corporations — complaint in equitable action in rem to impress lien in favor of stockholder held not to state cause of action.

2. For reasons stated in the opinion, it is *held* that the complaint, viewed as a proceeding *in rem*, does not state a cause of action *in rem*.

Corporations — act providing for appointment of resident agent by foreign corporation held repealed.

3. Section 3192, Terr. Laws 1887 (§ 569, Dak. Civil Code 1877 and chap. 36, Terr. Laws 1885), providing for the appointment of a resident agent by a foreign corporation upon whom service of process might be made was repealed by the N. D. Revised Codes of 1895.

Opinion filed March 17, 1921. Rehearing denied April 26, 1921.

Action in District Court, Stark County, *Crawford,* J., to impress a lien upon lands.

From the order made upon a motion to quash, the plaintiff appealed.

Modified and affirmed.

Melvin A. Hildreth, for appellant.

A court of equity will impress a trust upon the property in favor of the plaintiff, John F. Beyer, because the assets of the defendant, the North American Coal & Mining Company, consist of these lands and Beyer can follow his money into the land, and the property is subject to his lien for the money advanced. Spokane v. First Nat. Bank, 68 Fed. 982; South Park Comrs. v. Kerr, 13 Fed. 502; Lerr v. Evans, 67 Fed. 677.

The complaint, therefore, states a good cause of action. 97 Fed. 696; 76 Fed. 472.

A court of equity has the power and it is its duty to protect the parties situated as John F. Beyer is. There is no limit to the trust that may arise when complete justice is done. 3 Pom. Jur. 4th ed. § 1053 and cases cited in the notes.

The complaint, therefore, states a good cause of action for equitable relief. 1 Pom. Eq. Jur. 4th ed. § 155 and cases cited in notes; 3 Pom. Eq. Jur. 4th ed. § 1044.

A court of equity will always protect and reach out its hands and control the officers of the corporation, their aiders, and abettors, in seeking to cheat a minority stockholder out of his rights. Continental v. Belmont, 207 N. Y. 13.

Bangs, Hamilton & Bangs and *W. J. Mayer,* for respondents.

The provisions of the Code as to service by publication must be strictly complied with in order to confer jurisdiction. Haley v. Certar, 1 Dak. 504.

The jurisdiction sought to be acquired by publication of the summons is strictly statutory and can be acquired only in the mode prescribed by Dak. Code Civ. Proc. § 104; Soderberg v. Soderberg, 1 Dak. 503.

A strict compliance with the statutes in all respects is required. Coughram v. Markley, 15 S. D. 37, 87 N. W. 2; Dallas v. Luster, 27 N. D. 450, 147 N. W. 93; Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145.

The affidavit for publication must state the several places of residence of the defendants or that such place of residence is unknown. Jablonski v. Tiesik, 30 N. D. 543, 153 N. W. 274; Krumenagher v. Andis, 38 N. D. 500, 165 N. W. 524; Johnson v. Englehard, 176 N. W. 734.

The title to all the corporal assets is in the corporation, and the stockholders have neither a legal nor equitable title thereto. The ownership of a share of stock is but the ownership of the right to participate from time to time in the management and net profits of the business. 26 Enc. Law, p. 899.

BRONSON, J. *Statement.*—This cause of action, like the proverbial cat with its many lives, again is presented to this court as a memorial,

as it were, to show the perplexities and delays in litigation. Some twelve cases, covering a period of time from 1906 to the present, are to be noted wherein controversies between the parties herein are involved. These cases may be cited as follows: 99 Minn. 475, 109 N. W. 1116; (U. S. Dist. Court, 1909, not reported); 22 N. D. 452, 134 N. W. 317; 25 N. D. 490, 142 N. W. 919; 31 N. D. 247, 153 N. W. 476; 31 N. D. 259, 153 N. W. 472; 32 N. D. 542, 156 N. W. 204; 32 N. D. 560, 156 N. W. 203; 37 N. D. 319, 163 N. W. 1061; 42 N. D. 483, 173 N. W. 782; 42 N. D. 495, 173 N. W. 787; 43 N. D. 401, 175 N. W. 216.

In 1906, in the Minnesota case cited, the plaintiff instituted a proceeding to dissolve the defendant coal company, which proceeding was dismissed. In 1909, in the Federal case cited, the court dismissed the petition of the plaintiff herein to set aside the Dana mortgage of $500, assigned to the defendant Investor's Syndicate by the coal company upon grounds of fraud. In 1911, this court (22 N. D. 452) upheld the right of the Investor's Syndicate to foreclose this mortgage, as against the personal claim of the plaintiff herein, as intervener in such action, to defeat such foreclosure upon the ground that he was the owner of such mortgage. In that action the decision of the Federal court was held to be *res judicata* concerning the mortgage. In 1913, this court (25 N. D. 490) affirmed a bill of costs for the foreclosure of such mortgage. In 1915, this court (31 N. D. 247), in an action brought by the plaintiff, Beyer, to determine adverse claims to three quarter sections of the coal company's lands, held that Beyer was entitled to a lien upon such lands for taxes that he had paid thereon. In 1915, again, this court (31 N. D. 259), in an action brought by the defendant Investor's Syndicate to foreclose a mortgage given by the coal company, upon the three quarter sections of land, held that, the plaintiff, Beyer, appearing as intervener, and representing the minority stockholders, the corporation having defaulted in appearance, such mortgage was fictitious and therefore void. In 1916, this court (32 N. D. 542) upon a demurrer to a complaint by Beyer representing the minority stockholders, to enjoin the foreclosure of the Dana mortgage by the Investor's Syndicate, held that the complaint stated a cause of action, and that the plea of *res judicata* was not available against Beyer, because he represented minority stockholders. In 1916, again, this court (32 N. D. 560) affirmed an order of the district court setting aside a sale made upon the judg-

ment rendered in the action to determine adverse claims (31 N. D. 247) by reason of a misdescription therein. In 1917, this court (37 N. D. 319) sustained a demurrer to the answers interposed to the complaint of Beyer seeking to enjoin the foreclosure of the Dana mortgage (32 N. D. 542). In 1919, this court (42 N. D. 483) held that, upon the foreclosure sale of the Beyer judgment for a lien for taxes, etc., as rendered in the adverse claims action, the Investor's Syndicate could not redeem by reason of their mortgage upon the coal land; that such mortgages were null and the redemption made by the Investor's Syndicate was for the benefit of the coal company. In 1919, again, this court (42 N. D. 495) simply held that the trial court did not err in amending its judgment to conform to its order for judgment in the action mentioned, in 31 N. D. 247. In 1919, again (43 N. D. 401), the same judgment under consideration in 42 N. D. 483, was involved. The court held that equity had the power to impose a lien upon the assets of the coal corporation for the costs and expenses of Beyer, incurred in his efforts to save and protect the assets of the coal company. Accordingly, the judgment of Beyer, for approximately $6,000, as a lien upon the three quarter sections of the coal company's land, was upheld.

In March, 1920, plaintiff filed a notice of *lis pendens* in Stark county, claiming a lien for $4,000 upon the three quarter sections mentioned, and therein giving notice of the commencement of an action to impress such land with a lien for such amount prior to any claim or demands of the defendants. Plaintiff also filed in the district court an affidavit, which states that plaintiff and the defendants are all nonresidents, and that personal service of the summons cannot be made, with the possible exception of the coal company, which has a resident agent at Dickinson. After the filing of the complaint the summons and complaint in this action were served upon one Folsom, as the agent of the coal company, in Stark county, and upon all of the other defendants by personal service without the state, excepting the defendant co-operative company, which, as a corporation, has ceased to exist. In June, 1920, the defendants, upon notice, appeared specially and moved the trial court for an order quashing and setting aside the attempted service of the summons on the ground that the same was abortive, null, and void. Upon the hearing of this motion, the trial court did not deem it

necessary to pass upon the sufficiency of the service, but held that the complaint did not state facts sufficient to constitute a cause of action, and sustained the motion as if a demurrer to the complaint, with leave to the plaintiff, within thirty days, to plead over. From such order the plaintiff has appealed.

In the record it appears that the coal company, in August, 1895, certified that Mr. Folsom was appointed as its agent, and was authorized to accept service of processes on behalf of the coal company. This certificate was then filed with the secretary of state. Mr. Folsom, in an affidavit, states that he was informed some twenty or twenty-five years ago that it was necessary for the coal company to have a local agent in Stark county upon whom a process might be served. That he informed Mr. Williams that he would accept such appointment. That he never received any appointment or authority to act as agent for the corporation; that he does not know the postoffice address of such coal company, and he has never notified them of the service of any papers that has been made upon him. The attorney for the plaintiff submitted an affidavit to the effect that, in the litigation during the years past, he has always served upon Mr. Folsom as the resident agent of the coal company.

The complaint in this action is long, covering some fourteen typewritten pages. It recites many of the facts that have heretofore been stated in the opinions of this court. The co-operative company is joined as defendant, but the allegation is that it has no corporate standing; that it has neither a body to be kicked nor a soul to be damned. It alleges that none of the stockholders of the coal company have ever paid anything into the treasury of the company, excepting the plaintiff. Upon information and belief, that the Investor's Syndicate and Tappen have acquired and control the majority of the coal company's stock: It recites the conspiracy of the defendants to place bogus mortgages and liens upon the lands of the coal company and to cheat this plaintiff out of any interest in such lands, and the efforts of the plaintiff through litigation in the courts of this state, resulting in the frustration of the defendants' schemes. It alleges that the corporate life of the coal company expires August 7, 1925; that the plaintiff is the owner of 400 shares of stock therein of the par value of $25 each; that no meetings of the stockholders or directors have been held since March 20, 1899;

that the assets of the coal company consist of its interest in four quarter sections of land in Stark county and the right to compel the stockholders to pay into court the sum of their respective shares, and to be assessed by this court for an assessment to pay the debts of the coal company; that large quantities of coal are situated upon the lands; they might have been developed, made remunerative and paid dividends, but no coal has been mined and no income produced therefrom; that the officers of the coal company have never accounted for the sale of approximately $40,000 worth of stock. Upon information and belief, that the Investor's Syndicate and Tappen have converted to their own use the same; that the plaintiff advanced $3,440 to acquire the land assets of the coal company, and $1,200 to pay taxes and liens thereon, all when the coal company was organized. That for many years last past the coal company has failed to pay the taxes on such lands, and the same have been advanced by the plaintiff, for which the company is now indebted to him in the sum of $1,000; that unless the court declares a prior lien upon such lands in favor of the plaintiff to protect him in the moneys expended to acquire title to such lands, the defendants will fraudulently convert and absorb the title and interests of the coal company, and plaintiff's interest and stock will be worthless; that it is necessary that the court impress upon such lands a lien in favor of the plaintiff, paramount to the rights of the defendants; that if the stockholders are compelled to pay into court and discharge the claims and liens against the property, plaintiff's stock will be increased in value and he will be able to receive some income therefrom; that the defendants, in equity and conscience, should be required to make an accounting and disclosure concerning the stock; that they should be required to pay into court or into the hands of a receiver the amount due for the stock; that any liens against the property should be paid by the defendants, who have fraudulently attempted to cheat and defraud the plaintiff; that the rights of the defendants are subordinate to those of the plaintiff; that they should be restrained from asserting any rights superior to those of the plaintiff, and that any rights or title of the defendants asserted should be deemed held by such defendants as trustees *ex maleficio* for the benefit of the plaintiff. Further, the complaint demands that the plaintiff recover out of a sale of the lands all sums of money that he has invested in the coal company, and, if in-

sufficient, that the stockholders be assessed to pay proportionately for the demand of the plaintiff.

Decision.—Upon the oral argument, the plaintiff stated that this proceeding is to be classed as an action *in rem.* Manifestly, it is wholly such an action, unless the service made upon Mr. Folsom be deemed a personal service upon the coal company. Even if the service of the process upon Mr. Folsom be deemed proper as a personal service upon the coal company, it is further manifest that this proceeding, in its essence, still will remain an action *in rem,* for the reason that an action *in personam* alone against the coal company would not serve to accomplish the allegations and purposes of the complaint, while the proceeding remained an action *in rem* against the remaining defendants. All of the parties, plaintiff and defendants, are nonresidents. No process was served upon any of the defendants within the state excepting the service made upon Folsom. The plaintiff maintains that this appeal must be determined upon the theory that the trial court's order was made as if a demurrer to the complaint had been interposed. No demurrer to the complaint appears in the record. The defendants made a special appearance and motion to quash the proceeding; upon that motion the trial court acted. The trial court's order may not convert the special appearance made into a general appearance so as to convert the proceeding from an action *in rem* to one *in personam,* unless the record demonstrates that the defendants have waived their rights. The plaintiff has characterized this proceeding as an action *in rem;* it is, in its essence, an action *in rem* regardless of the consideration to be given to the effect of the service made upon Folsom.

As a proceeding *in rem,* it was necessary and essential that the court first have jurisdiction of the *res,* the property of the defendants. In such proceeding the court has no jurisdiction over the person of the defendants. 12 C. J. 1226; Hughes v. Fargo Loan Agency, 46 N. D. 26, 178 N. W. 997. This proceeding is not an action to determine adverse claims or quiet title. The question of obtaining jurisdiction over the *res* pursuant to the statutory method prescribed therefor does not obtain. Comp. Laws 1913, § 8144 et seq.; note in 29 L.R.A.(N.S.) 625; Hughes v. Fargo Loan Agency, supra; Fenton v. Minnesota Title Ins. & Trust Co. 15 N. D. 365, 372, 125 Am. St. Rep. 599, 109 N. W. 363; Pom. Eq. Jur. 3d ed. § 135; Arndt v. Griggs, 134 U. S. 316, 33

L. ed. 918, 10 Sup. Ct. Rep. 557; Jones v. Gould, 80 C. C. A. 1, 149 Fed. 153; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cabanna v. Graf, 87 Minn. 513, 59 L.R.A. 735, 94 Am. St. Rep. 725, 92 N. W. 462; Dull v. Blackman, 169 U. S. 248, 42 L. ed. 734, 18 Sup. Ct. Rep. 335; Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; note in Ann. Cas. 1914A, 769. The plaintiff alleges neither a title nor an interest in the real estate involved. It is true he claims and alleges the right to have a paramount lien impressed upon the lands, but this is made dependent upon his position as a stockholder in the coal company, and upon the amounts that he advanced when the company was organized, to acquire some of the lands involved and liens thereupon in payment of his stock. He does not ask to be subrogated to the theretofore existing interests of the vendors or lienholders. This right of the plaintiff is further made dependent upon the corporate action of the coal company, the Investor's Syndicate, and its officials, as well as the action of the other defendants, alleged to have been fraudulent, and for purposes of cheating and defrauding the plaintiff; the complaint seeks to have equity apply to the persons of the defendants. It requires that the defendants make an accounting concerning payments made upon their stock in the coal company. It seeks to have the court make an assessment upon defendants' stock; it demands a disclosure by the defendant officials of the coal company and the Investor's Syndicate. It requires that the defendants discharge or pay certain liens and claims, so as to thereby increase the value of plaintiff's stock in the coal company. It demands that the defendants be determined trustees *ex maleficio* of the lands. It seeks, further, that defendants pay into court or into the hands of a receiver moneys found due on their stock, and, for payment, out of the assessments made, upon plaintiff's demand, if a sale of the lands shall be insufficient so to do. In plaintiff's own words: "He asks the court to compel these defendants, who have paid nothing for their $40,000 worth of stock, to come into court, and, if there are debts outstanding against this corporation, then that they be compelled to contribute to the canceling of such debts, and, in other words, make a full disclosure of their relation to the defendant coal company." The plaintiff contends for the principle that equity is all powerful in its ability to reach out and do everything that is needful in order to protect the rights of a defrauded party and impose a con-

structive trust in protection. This principle may apply in an action *in personam,* but it is quite extraordinary to seek the application of this principle upon persons who are beyond the confines of this state and without the jurisdiction of the court. For it is to be noted, that the gist of the plaintiff's right is the establishment of this equitable paramount lien upon the lands after equity has searched the persons and consciences of the defendants, and their transactions in corporate affairs, and then has determined plaintiff's rights after a search, disclosure, and accounting. This perhaps may be done in equity if there be a jurisdiction over the *res* in the first instance, but surely this jurisdiction must first exist, and not as an aftermath of proceedings *in personam.*

It remains, therefore, to be seen in what manner the plaintiff has invoked a jurisdiction over the *res* in the light of the considerations applied to plaintiff's alleged cause of action.

The filing of the verified complaint and the affidavit for the publication or service of the summons without the state, even if held sufficient in form was not sufficient to confer a jurisdiction over the *res,* since no actual lien in fact is asserted except such as might result after proceedings *in personam,* and the lands were not otherwise placed *in custodia legis.* The filing of the *lis pendens,* furthermore, did not confer jurisdiction over the *res.* This is a mere notice of the pendency of an action, constructive to purchasers or encumbrancers. Comp. Laws 1913, § 7425. Accordingly, the record fails to disclose a jurisdiction over the *res.* It is unnecessary to determine the sufficiency of the service made upon Folsom, or of the affidavit for publication or service of the summons. It may be noted, however, that the statute under which the certificate of the appointment of Folsom as the resident agent of the coal company was filed with the secretary of state in 1895 was repealed over twenty-five years ago. See § 3192, Terr. Laws 1887 (§ 569, Dak. Civ. Code 1877, and chap. 36, Terr. Laws 1885); "Repeals" N. D. Rev. Codes 1895, pages 1517 and 1518. Sections 7426, 7428, Comp. Laws 1913, now provide the manner in which the summons may be served upon a foreign corporation.

Furthermore, in construing the complaint, this court will take judicial notice of its previous decision involving the parties herein, and of its records and the judgments rendered therein. See § 7937, Comp.

Laws 1913; People v. Oakland Water Front Co. 118 Cal. 234, 50 Pac. 308. For reasons hereinbefore discussed, and particularly because the allegations of the complaint involve, necessarily, direct proceedings *in personam,* in order to afford relief *in rem,* we are of the opinion that the complaint, viewed as a proceeding *in rem,* does not state a cause of action *in rem.* See also Fletcher, Cyc. Corp. vol. 8, § 5802.

The order of the trial court is modified accordingly, and the proceedings ordered dismissed, with costs to the respondent.

ROBINSON, Ch. J., concurs.

GRACE, J. (concurring specially). It is my opinion that the contentions of the defendants, that the attempt of the plaintiff to acquire jurisdiction over the defendants, by substituted service, was wholly ineffective and void, cannot be successfully denied.

In Johnson v. Engelhard, 45 N. D. 11, 176 N. W. 134; Krumenacker v. Andis, 38 N. D. 500, 165 N. W. 524, the subject of service by publication was quite fully considered. The law in this regard, as defined by the two cases above cited, was recognized and followed in the case of Hughes v. Fargo Loan Agency, 46 N. D. 26, 178 N. W. 997.

We think the contentions of defendants, that there was a lack of jurisdiction, by the failure to properly procure due service of the summons by publication, must be sustained, and the action, for this reason, dismissed.

CHRISTIANSON, J. (concurring specially). In my opinion the service of the summons in this case was ineffectual and void under the former decisions of this court. See Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274; Krumenacker v. Andis, 38 N. D. 500, 165 N. W. 524; Hughes v. Fargo Loan Agency, 46 N. D. 26, 178 N. W. 993.

I am further of the opinion that when the complaint in this case is construed in the light of the former decisions of this court rendered in the various actions brought by the plaintiff, Beyer—which actions all grew out of the same original transaction—it must be said that the complaint fails to state facts sufficient to constitute a cause of action.

BIRDZELL, J. (concurring specially). I am of the opinion that the

service was defective under former decisions of this court, which are cited in the other opinions and which need not be again cited here. I am also of the opinion that the complaint, viewed in the light of the prior litigation of which this court takes judicial notice, does not state a cause of action.

I do not, however, agree with the discussion in the principal opinion herein, which relates to the question as to whether this suit is to be treated as a proceeding *in rem* or *in personam*. It is my opinion that if the complaint states a cause of action at all, if proper service were had, and if the allegations and prayer for relief show an attempt to charge the lands within the state with a specific equitable lien, or as being held in trust *ex maleficio*, the rest of the complaint, in so far as it might appear to set forth a cause of action for either a personal judgment or for relief obtainable only through a decree operating *in personam*, might well, upon demurrer, be disregarded. In modern jurisprudence, where there is a subject-matter, such as property, within the jurisdiction upon which the equities in favor of a plaintiff can be made to operate through an equitable decree, the consideration as to whether the decree proceeds *in personam*, *in rem*, or quasi in either, is, in my opinion, too academic to warrant serious attention. See 1 Pom. Eq. Jur. 4th ed. §§ 135, 171, 428, 429; 4 Pom. Eq. Jur. 4th ed. §§ 1317, 1318.

FRANK GOUGHNOUR, Respondent, v. E. H. BRANT, as County Auditor of Emmons County, North Dakota, Appellant.

(182 N. W. 309.)

Officers — constitutional amendment for recall held inapplicable to county commissioners.

Article 33 Amendments, North Dakota Constitution (Laws 1919, chap. 93; Laws 1921, chap. —), providing for the recall of certain elective officers, does not apply to county commissioners.

Opinion filed March 17, 1921.

Appeal from the District Court of Emmons County, *McKenna*, J.

Defendant appeals from an order granting a temporary injunction. Affirmed.

Lynn & Lynn, for appellant.

Constitutional provisions which have been adopted by a vote of the electors of the state shall be construed to give effect to the intent of the electors who adopted the provision. 12 C. J. 700, § 43.

The state Constitution designates a county commissioner a county officer. Const. § 172.

By legislative enactment a county commissioner is designated a county officer. Code, § 3257.

The word "district" as used in the provision, considered in connection with the recall of a county commissioner, a county officer, does not give rise to any uncertainty as to what was intended. 12 C. J. 704 and cases cited in footnote 2; Cox v. Robinson, 105 Tex. 426; State v. McGaugh, 118 Ala. 159.

Cameron & Wallam, for respondent.

A taxpayer has sufficient interest in an election and in the expense thereof to bring an action testing the legality of the same. State ex rel. Linde v. Hall.

Where the plaintiff has a peculiar interest in the outcome of the action as being an incumbent in office attacked or a candidate for the office, it is not necessary to join the state as a party. Chandler v. Starling, 19 N. D. 144.

The provisions of a constitutional amendment which has for its object the setting aside of the will of the people are mandatory, and its language must be strictly construed. Baker v. Hanna, 31 N. D. 570.

Where peculiar classes are mentioned, general words are limited to those particular classes. Ex parte King (Ark.) 217 S. W. 465.

CHRISTIANSON, J. The plaintiff is one of the county commissioners of Emmons county. The defendant is the county auditor of Emmons county. It appears that certain petitions were filed with the defendant, asking for the recall of the plaintiff; and that pursuant thereto the defendant proceeded to call an election for the purpose of submitting to the voters of the county commissioner district from which plaintiff was elected the question whether plaintiff shall be recalled. The plaintiff

brought this action to enjoin the defendant from proceeding with such recall election. The trial court granted a temporary injunction during the pendency of the action, and the defendant has appealed from such order.

The plaintiff contends, and his cause of action is predicated upon the propositions:

1. That a county commissioner is not subject to recall under the amendment to the state Constitution providing for the recall of certain elective officers.

2. That in any event the petitions filed with the defendant asking for a recall of the plaintiff were not signed by a sufficient number of petitioners.

These propositions, and these alone, were presented to this court. No question was raised as to the validity of the constitutional amendment providing for the recall; but it is assumed, and the action of both parties is predicated upon the theory, that the amendment was duly adopted and is a part of the Constitution of this state. The constitutional provision involved in this controversy reads: "The qualified electors of the state or of any county, or of any congressional, judicial, or legislative district, may petition for the recall of any elective congressional, state, county, judicial, or legislative officer by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by at least 30 per cent of the qualified electors who voted at the preceding election for the office of governor in the state, county, or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty or more than forty-five days from the filing of such petition.

The officer against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After

one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing, and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict, or impair the right of recall." This provision was proposed as an amendment to the Constitution by the legislative assembly in 1919. See chap. 93, Laws 1919. No laws have been enacted to facilitate its operation; and there is concededly no other provision of law, either constitutional or statutory, relating to the recall of state, county, legislative, and judicial officers. If a county commissioner is subject to recall it is by virtue of this provision, and this provision alone.

Does the provision under consideration provide—was it intended to provide—for the recall of a county commissioner? That is the first, and in our opinion the determinative, question here.

The object of all interpretation and construction of laws is to ascertain and give effect to the intention of the lawmakers. Applied to a Constitution, the object of construction is to ascertain and give effect to the meaning and intention of the framers, and of the people in adopting it. Such meaning and intention must be sought first of all in the language of the Constitution itself. 12 C. J. 703. For it must be presumed that the language used to express the will of those who gave the provision life and force is adequate for the purpose, and does express that will correctly. If the language is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning intended to be conveyed. If the language is ambiguous, or lacks precision, or is fairly susceptible of two or more interpretations, the intended meaning must be sought by aid of all pertinent and admissible considerations. But here, as before, the object of the search is the meaning and intention of those who framed and those who adopted the provision, and the court is not at liberty, merely because it has a choice between two constructions, to substitute for the will of the lawmakers its own ideas as to the justice, expediency, or policy of the law. Black, Interpretation of Laws, pp. 35, 36.

It is the duty of the court to have recourse to the whole Constitution, if necessary, to ascertain the true intent and meaning of any particular

provision. All provisions bearing upon a particular subject should be brought into view, the fundamental aim and object kept in mind; and the interpretation should be such as to effectuate the fundamental aim and object. 6 R. C. L. pp. 47–49.

The primary purpose of the constitutional amendment under consideration was doubtless to make it possible to recall, in the manner therein provided, those officers who under the then existing constitutional provisions might not be so recalled. Prior to the adoption of the amendment "the governor and other state judicial officers, except county judges, justices of the peace, and police magistrates," were liable to impeachment, and might be removed from office by impeachment, and in this manner only. N. D. Const. § 196. "All officers not liable to impeachment" were "subject to removal for misconduct, malfeasance, crime or misdemeanor in office, or for habitual drunkenness or gross incompetency in such manner as may be provided by law." N. D. Const. § 197.

Certain county offices such as superintendent of schools, county judge, clerk of district court, register of deeds, county auditor, treasurer, sheriff, and state's attorney were embedded in the Constitution, and the terms of office and mode of selection of the officers specifically prescribed by the Constitution. N. D. Const. §§ 150, 173. See also Ex parte Corliss, 16 N. D. 470, 114 N. W. 962. It is different, however, with respect to county commissioners. While the Constitution provides that "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," it also provides that the terms of office of such county commissioners shall be prescribed by law. N. D. Const. § 172. And the Constitution does not, in terms, provide that county commissioners shall be elected. See O'Laughlin v. Carlson, 30 N. D. 213, 219, 220, 152 N. W. 675. The county commissioners are elected from certain districts. The plaintiff is commissioner from the first county commissioner district in Emmons county, and was chosen by the voters of that district alone. The voters of Emmons county residing in the other four districts had no voice in his election, and will be given no voice in the proposed recall election, although as taxpayers of the county they will be required to defray the cost of the election.

Bearing these facts in mind, we approach the question presented for determination in this case.

The material part of the provision involved in this controversy is embodied in the first two sentences therein, which read: "The qualified electors of the state or of any county, or of any congressional, judicial, or legislative district, may petition for the recall of any elective congressional, state, county, judicial or legislative officer by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by at least 30 per cent of the qualified electors who voted at the preceding election for the office of governor in the state, county, or district from which such officer is to be recalled." Laws 1919, p. 111. The word "district" as used in the first sentence is definitely restricted, by the qualifying words therein, to a congressional, judicial, or legislative district. By well-settled rules of construction the word must be assumed to have been used in the following sentence in the same sense in which it was used in the first. By no means of construction can it be said that the word "district" as used in the provision was intended to include a county commissioner "district." There is nothing to indicate that the framers of the provision had a county commissioner in mind at all. If they had they would doubtless have manifested their intention that county commissioners should be subject to recall in clear terms. So far as a county officer is concerned, the plain language is that a petition for recall "shall be signed by at least 30 per cent of the qualified electors who voted at the preceding election for the office of governor in the . . . county . . . from which such officer is to be recalled." Except as applied to a legislative officer, no provision is made for the filing of a recall petition based upon anything less than the electorate of the entire county; nothing is said about a recall petition being filed by the electors of, or a recall election being held, in a portion of a county. Was it the intention to permit the electors of the entire county to petition for the recall of anyone of the county commissioners? If so, a county commissioner might be recalled even though not a single elector in his district signed the petition. Was it the intention to permit the electors of the entire county to vote at the recall election? If so may they also vote for the commissioner to be chosen at such election? These questions suggest

themselves if the provision is held applicable to county commissioners. We, of course, have no right to resort to guess or conjecture as to what those who framed and those who adopted the provision under consideration might have provided if they had contemplated the recall of county commissioners. The question before us is whether they intended that the provision should apply to county commissioners. In our opinion the situation presented in this case is such that we cannot say that the provision was intended to and does apply to county commissioners; but that in so far as so-called county officers are concerned, it was intended to and does apply only to officers chosen by the electorate of the county as a whole. That is, it contemplates a petition based upon the electorate of the entire county, and one which may be signed by any elector in the county having the prescribed qualification; and it contemplates an election throughout the entire county, and not throughout some portion thereof.

It follows from what has been said that the ruling of the trial court was correct. The order appealed from is affirmed.

ROBINSON, Ch. J., and BIRDZELL and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

MERCHANTS' STATE BANK, a Corporation, Appellant, v. SAWYER FARMERS' CO-OPERATIVE ASSOCIATION, a Co-operative Association, Respondent.

(14 A.L.R. 1353, 182 N. W. 263.)

Landlord and tenant — lessee's interest in crops under farm lease on shares not superior to landlord's rights.

1. Where a lease of a farm on shares contains a provision to the effect that title to and possession of all crops shall be in the lessor until the conditions of the lease have been complied with by the lessee and a division made of the crop, he (the lessee) has an equitable interest in the crops, even prior to the performance of the conditions and division of the crop; but such equitable interest is not superior to and does not avoid or infringe upon the rights of the landlord as reserved in such stipulation. The rights of both the landlord and tenant are measured by the terms of their contract. And such rights will be recognized and enforced not in derogation of, but in harmony with, each other.

Landlord and tenant — lease on shares held effective, without filing as chattel mortgage, as to purchaser of crops from lessee.

2. The provision reserving title to all crops in the landlord is effective without filing the contract as a chattel mortgage. An assignee of the tenant is presumed to be acquainted with the terms and stipulations of the lease, and acquires no greater rights than the tenant had to transfer.

Opinion filed March 17, 1921.

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

Plaintiff appeals from an order sustaining a demurrer to the complaint.

Reversed.

Bagley & Thorpe, for appellant.

"Possession by a tenant is constructive notice, as to third persons, of the title of the landlord." 24 Cyc. 924.

"The ownership of the realty carries with it, as an incident thereto, the prima facie presumption of the ownership of annually sown crops. And the owner of the land may, in parting with the use of it to another, make such conditions and reservations in relation to the land itself or to

NOTE.—Authorities discussing the question of necessity of filing lease or contract which reserves title to crops in lessor are collated in a note in 14 A.L.R. 1362.

the products growing from it as he chooses, instead of parting with the full right." 17 C. J. 381 and North Dakota cases cited in note 33.

"An instrument leasing premises and providing that title to all crops raised shall be in the lessor until the rent has been paid is not a chattel mortgage so as to be required to be executed as such." Dobbs v. Atlas Elevator Co. (S. D.) 126 N. W. 250; Mueller v. Bohn (N. D.) 171 N. W. 255.

Nestos & Herigstad, for respondent.

"Under the regular crop contract, each party has title to his share of the crop from the time it is sown until it is harvested, threshed, and sold, and he may at any time sell or mortgage his share of the crop, subject, of course, to any just liens." Fraine v. N. D. Grain & Land Co. 170 N. W. 307; McNeal v. Rider, 81 N. W. 830; Agne v. Skewis-Moen Co. 107 N. W. 415, 23 L.R.A. 468, 14 Am. St. Rep. 166, 119 Am. St. Rep. 122.

CHRISTIANSON, J. This action was brought in the district court of Ward county to recover damages for the alleged conversion of certain wheat. The complaint contained two causes of action. The defendant interposed a general demurrer to both causes. The trial court sustained the demurrer, and the plaintiff has appealed,

For a first cause of action it is averred, in substance: That the plaintiff during all of the year 1919 was the owner of certain lands in Ward county in this state; that in the spring it leased such lands for that year, by a written contract or lease on the so-called "crop-share plan," to two men named, respectively, Gordon Fix and F. J. Fix; that by the terms of said contract it was provided that the said Gordon Fix and F. J. Fix should not sell or remove, or suffer to be sold or removed, any of the produce of said farm or premises of any kind, character, or description until the division thereof, without the written consent of the plaintiff, and that until such division, the title and possession of all the hay, grain, crops, and produce raised, grown, and produced on said premises should be and remain in the said plaintiff. That by the terms of said contract it was further provided that the plaintiff might deduct from the share of the crop due to the said Gordon Fix and F. J. Fix certain indebtedness owing to the plaintiff from one Anton Fix, the father of said Gordon Fix and F. J. Fix. That the contract further provided

that the said plaintiff might deduct from the share coming to said Gordand F. J. Fix any just costs or disbursements and any indebtedness owing from them to the said plaintiff. That the said Gordon Fix and F. J. Fix farmed the land described in such contract during the season 1919, and raised 503 bushels of macaroni wheat and 585 and 30 pounds of D–5 wheat. That the plaintiff got its full share (one-half of all) of the macaroni wheat, with the exception of 4 bushels. That the D–5 wheat was all sold, and the proceeds of the share of the crops stipulated to be turned over to said Gordon and F. J. Fix, amounting to $679.64, was turned over to the plaintiff, who applied $662.70 thereof on the indebtedness of Anton Fix in accordance with the stipulation in the contract to that effect, and applied the balance of $16.94 on advances made by the plaintiff to the said Gordon and F. J. Fix in connection with the threshing of the grain. That during the year the plaintiff advanced to the said Gordon and F. J. Fix, $220 in addition to paying their share of the threshing bill. That these items have not been paid. That the notes of Anton Fix which were paid by the proceeds of the crop were, by the plaintiff, delivered to Gordon and F. J. Fix, and received and retained by them without protest. That no division of the crop was ever made. That on October 17, 1919, Gordon Fix delivered to the defendant 127 bushels and 30 pounds of macaroni wheat. That plaintiff made demand on the defendant for such wheat, and that such demand was refused. That the defendant had no actual knowledge of the conditions contained in the farm contract. That said contract was at no time recorded or filed in the office of the register of deeds of Ward county.

The second cause of action constitutes a reaverment of the foregoing facts, and in addition thereto it is averred that on or about March 8, 1919, said F. J. Fix made, executed, and delivered to the plaintiff his certain promissory note in the sum of $220.63 payable October 1, 1919, with interest from date at the rate of 10 per cent per annum. That at the same time and place, for the purpose of securing the payment of said note, said F. J. Fix executed and delivered to the plaintiff a certain chattel mortgage, whereby, among other things, he mortgaged to the plaintiff an undivided one-fourth interest in and to all crops of every kind sown, grown, or harvested during the year 1919 upon the premises in controversy. That said chattel mortgage was filed for record in the

office of register of deeds of Ward county on March 9, 1919. That the plaintiff is the owner and holder of said promissory note and chattel mortgage, and that no part of the indebtedness evidenced thereby has been paid.

The defendant contends that the provision in the contract reserving title in the plaintiff to all of Gordon and F. J. Fix's share of the crop was ineffective against it, for the reason that the contract was not filed as a chattel mortgage. That contention presents the principal, and determinative, question on this appeal.

Defendant admits that this court in McFadden v. Thorpe Elevator Co. 18 N. D. 93, 118 N. W. 242, ruled that such provision was effective without filing; but it contends that that decision was overruled by this court in Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A. 1917E, 298, 162 N. W. 543. The question of the filing of such contract was not involved or decided in the Branum Case. The controversy there arose between the holder of a chattel mortgage and a general creditor who had garnished an elevator company which had received into its possession the tenant's share of the grain before any division had been made. Under former decisions of this court it had been ruled that the tenant, prior to division, had no interest in the grain to which a mortgage could attach. After due consideration we determined that such former rulings were erroneous. The decision in the Branum Case, however, was specifically restricted to the following propositions: "1. That instruments known as cropper's contracts or farm leases, like all other contracts, must be construed so as to carry into effect the actual intention of the parties thereto. One provision cannot be singled out and given an effect nullifying other provisions, but the contract must be construed as a whole, and the real intention of the parties as thus gathered must control.

"2. That where a lease of a farm on shares gives to the lessee a certain share of the crop, but contains a provision to the effect that title shall remain in the lessor until the conditions of the lease have been complied with by the lessee, he (the lessee) has an equitable interest in the crops, even prior to the performance of the conditions, which equitable interest may be mortgaged.

"3. That the decisions of this court in Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, and Herrmann v.

Minnekota Elevator Co. 27 N. D. 235, 145 N. W. 821, in so far as they announce the doctrine that a lessee under such lease has no interest in the grain to which a mortgage lien can attach until after a division of the crop has been made, are hereby overruled." 36 N. D. 383.

The free and untrammeled right to make lawful contracts is guaranteed not only by the Constitution of the state, but by the Federal Constitution, N. D. Const. §§ 1, 13; 14th Amend. U. S. Const. 6 R. C. L. pp. 269, 270. The decision in the Branum Case was not intended to deny or infringe upon such right. The decision did not hold the provision reserving title in the landowner to be ineffective or void. If this court had so ruled, then of course the lessee would have been the *legal* owner of the share of the crop coming to him; but the decision, it will be noted, merely holds that the lessee under a contract containing such provision "had an *equitable* interest in the crops, even prior to the performance of the conditions (of the contract), which equitable interest may be mortgaged." 36 N. D. 383. This language, at least, impliedly recognized that, prior to the performance of the conditions of the contract, the theoretical legal title is, by virtue of the provisions of the contract, in the landlord. It will also be noted that the former decisions of this court were overruled *only "in so far as they announce the doctrine that a lessee under such lease* (one containing a provision reserving title to all crops in the landlord until the division thereof) *has no interest in the grain to which a mortgage lien can attach until after a division of the crop has been made."* 36 N. D. 383.

The fact that the contract may or may not create the relation of landlord and tenant does not alter or affect the relative rights and obligations of the parties thereto. Those rights and obligations are still measured by the terms of the contract. Thus, in Angell v. Egger, 6 N. D. 391, 71 N. W. 547, this court, in effect, held that the contract was a lease, and the relation between the parties that of landlord and tenant. The court said: "Whether the agreement between plaintiff and defendant created the relation of landlord and tenant is not material. We may safely assume it to be a lease, and certain provisions of it seem to be inconsistent with any other interpretation of it. But while it is true that one who has an interest as lessee in real property is prima facie entitled to the crops raised thereon during the life

of the lease, yet the parties may, by express agreement, provide that the title to certain crops, or to a certain share of all crops, or to all crops until a certain period, or to all crops absolutely, shall vest in the lessor from the time they come into existence. He who owns the land may certainly reserve to himself any interest therein, or in the produce thereof, he sees fit to reserve, provided the other party to the contract assents to such reservation. There is nothing in the law to prevent a lessee from agreeing that he shall own none of the crops. He may even make an improvident agreement, and give the lessor the title to everything raised on the land as a consideration for the right to occupy it. So he may agree that the title to all crops shall remain in the lessor until the happening of a certain event. Such contracts are not opposed to any principle of law, and should be enforced according to their terms." 6 N. D. 396. And in Whithed v. St. Anthony & D. Elevator Co. 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238, this court held a person cropping land under such contract to be a tenant in possession, under the statute authorizing the purchaser at a judicial sale to receive from a tenant in possession of the property sold the rents thereof from the time of the sale until a redemption. That the contract involved in that case was a lease, and created the relation of landlord and tenant, was especially emphasized in the concurring opinion written by Chief Justice Bartholomew, who also wrote the opinion in Bidgood v. Monarch Elevator Co. 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561, wherein the rule was announced that the tenant under such contract had no mortgageable interest in the grain until after division had been made.

Stipulations reserving title to all crops in the landlord until a division thereof have been the source of much litigation. Some courts have construed such stipulations as vesting actual and complete title in the landlord, and as precluding the tenant from having any interest whatever therein until after a division is made and certain grain set apart to the tenant. That was the view originally taken by this court. After due deliberation we determined that that view was erroneous, and that the tenant did have an *equitable* interest in the crops which he was producing, even before a division. Those views we still entertain. We do not believe that it accords with the intention of the parties to construe such stipulation as vesting the actual

and complete ownership to all the crops in the landlord, and as devesting the tenant of all interest therein until after an actual division has been made. Such construction ignores the very purpose and intention of the parties, and would enable the landlord to violate the rights of the tenant, and "would lead to the unconscionable result that prior to settlement and division the entire crop would be subject to a levy of execution against the landlord, to the exclusion of any rights or interest of the tenant therein." On the other hand, if such contract is nothing but a chattel mortgage, then of course a subsequent mortgagee may limit the credit to be given under the contract and stop all future advances by giving the landlord actual notice of his mortgage; and in many cases this would quite effectively impede the carrying out of the contract. In such cases, the owner would be placed between the mortgagee, who gives him notice, and the cropper, who might have little if any further interest in the crop. The owner in contracting with another to till land on the share plan presumably takes into consideration the personal fitness and ability of the person with whom he contracts. The tenant undertakes himself to do certain things. Under our statute "the burden of the obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise" (except as to covenants running with the land). Comp. Laws 1913, § 5782. If the tenant is the absolute legal owner of the share of the crop stipulated to be turned over to him, even before the performance of the terms of the contract, then of course the stipulation reserving title in the landlord is virtually of no effect whatever, and will in no manner protect the rights of the landlord. If the tenant is the absolute legal owner, he may at any time mortgage and sell his share of the crop, and thereby transfer all the interest which the tenant has at the time he gives the mortgage or makes the sale, and the purchaser or mortgagee, by giving notice to the landlord, could, in effect, terminate and cut off rights which the contract had expressly reserved to him. The tenant in such cases might step out entirely, or be thrust aside by the mortgagee or by the sheriff under a warrant of foreclosure, and the intention of the parties as to essential portions of the contract be wholly defeated. In effect the inducement of the contract would be destroyed, and a contract the parties never made would be substituted by judicial construction. Hence, it seems clear

to a majority of the court that it does not accord with the intention of the parties to construe such stipulation either as vesting the actual complete ownership of all crops in the landlord and as devesting the tenant of all interest therein, or as vesting in the tenant the legal ownership, subject, in fact and in law, to a mere chattel mortgage in favor of the landlord. Either situation is contrary to the intention of the contracting parties. As already stated, the parties have the right to make their own contracts. It is not for the courts to make contracts for them. The courts are alone concerned with ascertaining what the contract is, and, if lawful, then to enforce it in accord with the intention of the parties.

We are not concerned with a situation where, by provision in a lease, it is sought to reserve title in the landlord to certain personal property, such as furniture or appliances, which the tenant has brought upon the premises. We are concerned only with a situation where the owner of land, in contracting with another for its use, expressly stipulates that title and possession of all crops produced shall be and remain in the owner of the land. The right to so contract has frequently been upheld, and, so far as we can ascertain, has never been denied.

It is a well-settled principle of law that "the ownership of realty carries with it as an incident thereto the prima facie presumption of the ownership of both the natural products of the land, such as grass and trees, and the emblements, or annually sown crops, but such presumption is not conclusive. And the owner of land may, in parting with the use of it to another, make such conditions and reservations in relation to the land itself or to the products growing from it as he chooses, instead of parting with the full right." 17 C. J. 381. And where the owner of land, in parting with the use of it to another, stipulates that the legal title, control, and possession of all crops shall be in him for certain purposes, that stipulation is entitled to be enforced so as to carry out the intention and purposes for which it was made. But it will not be construed so as to enable the owner to violate the rights of the tenant, nor will it be construed so as to violate the rights of the owner of the land. On the one hand, the legal title reserved in the landlord will be recognized and enforced in accordance with, and to carry out, the intention and purposes for which the reservation was

made, i. e., it will be enforced in recognition of, and harmony with, the equitable interest which the tenant has in crops, and not in disregard of such interest. On the other hand, the equitable interest of the tenant or those claiming under him will be recognized and enforced in accordance with the terms of the contract,—that is, they will be enforced not in derogation, but in recognition of and harmony with the rights of the landlord as stipulated in the contract. The rights of the landlord and tenant run along parallel lines, and are measured by the terms of the contract. An assignee of the tenant is presumed to be acquainted with the terms and stipulations of the lease, and acquires no greater rights than the tenant had to transfer. Underhill, Land. & T. § 639.

As pointed out in the decision in Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543, the supreme court of our sister state, South Dakota (National Bank v. Elkins, 37 S. D. 479, 159 N. W. 60), refused to follow the rule laid down in Bidgood v. Monarch Elevator Co. and Herrmann v. Minnekota Elevator Co. and adopted the rule announced by this court in Minneapolis Iron Store Co. v. Branum, 36 N. D. 384, L.R.A.1917E, 298, 162 N. W. 543. That is, the South Dakota supreme court held that under a farm lease reserving title and possession of all crops in the lessor until a division thereof, the lessee has an equitable interest subject to mortgage, and that such mortgage, after division and settlement, attaches to the legal interest of the lessee. National Bank v. Elkins, 37 S. D. 479, 159 N. W. 60. In so doing, the South Dakota court in effect predicated its ruling upon two former decisions: Lyon v. Phillips, 20 S. D. 607, 108 N. W. 554; Iverson v. Soo Elevator Co. 22 S. D. 638, 119 N. W. 1006 (37 S. D. 479, 159 N. W. 61), The South Dakota supreme court did not, however, deem these decisions contrary to the decision of this court in McFadden v. Thorpe Elevator Co. 18 N. D. 93, 118 N. W. 242; for, although that court in both Lyon v. Phillips, and Iverson v. Soo Elevator Co. supra, had ruled "that the interest of the tenant in crops to be grown under this kind of a farm lease or contract is the subject of mortgage" (37 S. D. 479), it had no hesitancy later to rule that such contract was "not a chattel mortgage, nor in the nature thereof, so as to be required to be executed as such." Dobbs v. Atlas Elevator Co. 25 S. D. 177, 126

N. W. 250. In Dobbs v. Atlas Elevator Co. supra, ¶ 1 of the syllabus reads: "An instrument, leasing premises for a stipulated term at an agreed rental, and providing that the title to all crops raised should be and remain in the lessor until the rent had been paid, is not a chattel mortgage nor in the nature thereof, so as to be required to be executed as such." In the decision in that case the court said: "The instrument is not a chattel mortgage, neither is it an instrument in the nature of a mortgage. McFadden v. Thorpe Elevator Co. supra. The clause therein, that title to the crops raised under the said lease should remain in N. J. Hunt and her assigns until the rent was paid relates solely to the ownership of the crops, and in no manner attempts to create a lien thereon. It is a provision frequently made in leases, and one which the parties had the right to make, whether the landlord received money or a share of the crop as rent. It was a matter subject to, and that might be varied by, the terms of the contract in accordance with the will of the parties. Consolidated Land & Irrig. Co. v. Hawley, 7 S. D. 229, 63 N. W. 904; Baumann v. Jerome, 21 S. D. 42, 109 N. W. 513; Olson v. Ausdal, 13 S. D. 26, 82 N. W. 89; 24 Cyc. 1470."

It is interesting to note in this connection that a majority of the members of the South Dakota supreme court (Judges Whiting, Smith, and McCoy) who participated and concurred in the decision in Dobbs v. Atlas Elevator Co. also, participated and concurred in the decision in National Bank v. Elkins. It might further be noted that two of the judges of the South Dakota court (Judges Corson and Whiting), who participated and concurred in the decision in Dobbs v. Atlas Elevator Co. also participated and concurred in the decision in Iverson v. Soo Elevator Co.; and that the decision in Iverson v. Soo Elevator Co. was written by Judge Whiting, who, as already stated, also participated and concurred in the decisions in Dobbs v. Atlas Elevator Co. and National Bank v. Elkins. Hence, in so far as South Dakota is concerned, we have the situation that the supreme court of that state refused to follow the decisions of this court in Bidgood v. Monarch Elevator Co. and Herrmann v. Minnekota Elevator Co. in so far as they announced the doctrine that a lessee, under a lease containing a stipulation that the title to all crops raised shall be and remain in the lessor until certain acts are performed by the

lessee and a division of the crop is made, has no mortgageable interest in the grain until after a division is made; but that it adopted and recognized as correct the rule announced by this court in McFadden v. Thorpe Elevator Co. 18 N. D. 93, 118 N. W. 242, that the stipulation in a farm contract reserving title to the crops in the lessor did not in law constitute a chattel mortgage so as to require the contract to be filed in order to render such stipulation effective against purchasers or encumbrancers claiming under the lessee. In our opinion the conclusions thus reached by the South Dakota court were correct ones. They are in harmony with the views which we have expressed above. They give effect to the intention of the contracting parties, and recognize and enforce their rights in accordance with well-settled legal principles applicable to the relation of the parties and the provisions of their contract. We are of the opinion, and hold, that it was not necessary to file the contract involved in this case as a chattel mortgage in order to render effective, as against subsequent purchasers or encumbrancers claiming under the lessee, the provision reserving title to all crops in the landlord. See McFadden v. Thorpe Elevator Co. supra; Dobbs v. Atlas Elevator Co. 25 S. D. 177, 126 N. W. 250; Fox, B. & Co. v. McKinney, 9 Or. 493. See also Consolidated Land & Irrig. Co. v. Hawley, 7 S. D. 229, 63 N. W. 904.

Reversed and remanded for further proceedings in conformity with this opinion.

BRONSON and BIRDZELL, JJ., concur.

GRACE, J. (concurring in part and dissenting in part). In so far as the majority opinion affirms the decision in the case of Minneapolis Iron Store Co. v. Branum, 36 N. D. 381, L.R.A.1917E, 298, 162 N. W. 543, I am in accord with it. That that case should be recognized as completely settling the law on the questions there involved is a matter about which there can be no controversy, in view of the fact that, for a period of twenty-five years, a large amount of litigation was continually carried on, with reference to the matters and legal propositions which were finally settled in that case. We confidently believe that the decision in this case will be as productive of as much litigation in the court as the case of Angell v. Egger, 6 N. D. 391, 71 N. W. 547.

It is not necessary here to enter into any extended discussion of

that case, for it is fully discussed and analyzed in the case of Minneapolis Iron Store Co. v. Branum, supra.

Where a farm is rented for a share of the crop, as, for instance, where the owner of the land leases it to another, the tenant, to farm and cultivate, and each to receive one half or a share of the crop, the landlord and tenant are tenants in common of the crops raised by the tenant. Minneapolis Iron Store Co. v. Branum, supra; Smyth v. Tankersley, 20 Ala. 212, 56 Am. Dec. 193; Knox v. Marshall, 19 Cal. 617; Riddle v. Dow, 98 Iowa, 7, 32 L.R.A. 811, 66 N. W. 1066; De Mott v. Hagerman, 8 Cow. 220, 18 Am. Dec. 443; Strangeway v. Eisenman, 68 Minn. 399, 71 N. W. 617; Anderson v. Liston, 69 Minn. 82, 72 N. W. 52; Avery v. Stewart, 75 Minn. 106, 77 N. W. 560, 78 N. W. 244; McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 437, 81 N. W. 830; Adams v. State, 87 Ala. 89, 6 So. 270; Ponder v. Rhea, 32 Ark. 435; Tinsley v. Craige, 54 Ark. 346, 15 S. W. 897, 16 S. W. 570; Creel v. Kirkham, 47 Ill. 344; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; McLaughlin v. Salley, 46 Mich. 219, 9 N. W. 256; Rohrer v. Babcock, 126 Cal. 222, 58 Pac. 537; State, Edgar, Prosecutor, v. Jewell, 34 N. J. L. 259; Wilber v. Sisson, 53 Barb. 258.

To the same effect in principle is National Bank v. Elkins, 37 S. D. 479, 159 N. W. 60.

Where the contract, as in this case, reserves the title to the crops in the landowner, and the right to take and hold enough of the tenant's share to repay advances, etc., that provision is nothing but a chattel mortgage, and, as such, to be valid against creditors of the tenant or subsequent purchasers, without notice, it must be filed in the same manner as is required by our statute for the filing of a chattel mortgage.

It must be considered that the landowner, by reason of that provision, does not have anything but a lien upon the tenant's share. That lien is a chattel-mortgage lien, nothing else. But, at least some of the members of this court contend that, under the statute requiring chattel mortgages to be filed, in order to be notice to subsequent purchasers, there is no provision made whereby the lease should be filed.

We contend that this is not a defect, for the clause in the lien is, in reality, a chattel mortgage, and should be filed as such, and this is the rule in Minnesota and several other states.

In the case of McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 437, 81 N. W. 830, where a provision in a lease similar to that here under consideration was before the court for construction, in an opinion written by Brown, Justice (now Chief Justice, and one conceded by all to be a very eminent jurist), it was directly held that, in legal effect, that provision was a chattel mortgage, and was required to be filed in the same manner as a chattel mortgage. Neither did Minnesota have any law, providing for the filing of leases containing such a provision, in order to give notice of such chattel mortgage interest to subsequent purchasers or creditors. Minnesota then had, and has yet, a law requiring the filing of chattel mortgages, the same as we have at this time.

The Minnesota statute was § 4129, General Statutes 1894. It reads thus:

"*Chattel Mortgage Void, Unless Filed.*—Every mortgage on personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless it appears that such mortgage was executed in good faith, and not for the purpose of defrauding any creditor, and unless the mortgage, or a true copy thereof, is filed as hereinafter provided."

Sections 4130 and 4131 of the General Statutes of 1894 of Minnesota provide for the place of filing and the effect of filing, and the court held that a lease containing a clause similar to the one under consideration, in order to be effective as a lien against subsequent purchasers or encumbrancers of the mortgagor, must be filed in accordance with § 4129, General Statutes of 1894 of Minnesota.

Our § 6758, Comp. Laws 1913, is practically identical with the section of the Minnesota statute. It reads thus:

"*Void as to Whom, Unless Filed.*—A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith for value, unless the original or an authenticated copy thereof is filed by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated."

It is our opinion that the lien of the landowner on the tenant's share, for advances, etc., is a chattel mortgage, and that to be effective against subsequent purchasers, or encumbrancers of the mortgagor's share of the crop, that such lease must be filed.

This is the logical and only reasonable construction. The opinion of the Minnesota court in the case above cited is based upon justice and reason. It imposes no hardship; it protects everyone, the landowner, as well as the mortgagor and subsequent purchasers or encumbrancers in good faith of the mortgagor's share of the crop, under the lease. It operates to protect the public, to protect those who extend credit to the mortgagor. It in no manner impairs the contract between the landlord and the tenant, but gives effect to it, and to the real intention of the parties. Its further effect is to prevent litigation, by clearly defining the rights of the parties and the right of subsequent encumbrancers and purchasers, and by protecting them.

The only effect of the majority decision in this case is to create chaos, to lay the foundation for much future litigation. Creditors or persons who become subsequent purchasers and encumbrancers of tenants having a lease similar to the one in question will be met, no doubt, in scores of instances, by the landowner, who will appear on the scene, with a lease containing a provision such as this, and will claim the right to the mortgagor's share of the crop, to satisfy all the demands owing the landowner, and will be permitted, under this decision, to hold it, although creditors and subsequent encumbrancers could have known nothing of such a claim, and who, if they had known, would not have extended credit represented by the chattel mortgages, which they may have taken to secure the same.

Under the determination of the matter, as contended for by the writer, all would be protected as in Minnesota, South Dakota, and many other states.

There is no reason why this harsh rule, contained in the majority opinion, should be adopted. It opens the door to collusion and injustice. The landowner and the tenant could, under it, collude and defeat the claim of any mortgagee who may have chattel-mortgage security on the tenant's share of crop.

There is neither reason nor justice in the decision. It is simply one which magnifies the rights of the landlord, or landowner, under his

contract, and accords to him contract rights which he does not possess, under, nor by, the terms of the contract. It gives him far more power and rights than he possessed, under the very terms of the contract. It minimizes the rights of all other parties who are directly interested, or who may become indirectly interested by the taking of a chattel-mortgage lien upon the mortgagor's, or tenant's, share of the crop. It totally disregards the protection due the public and to the secured creditors of the mortgagor. It is a trap into which will be led many scores of unwary creditors who will extend credit to mortgagors, who have such leases, and will be prolific of litigation and dissatisfaction. It is a denial of right and justice.

ROBINSON, Ch. J., concurs.

NELS MARTINSON, Respondent, v. NILS O. FREEBERG, Appellant.

(182 N. W. 461.)

Libel and slander — letter impliedly charging illicit relations held actionable and question was for jury — evidence sustaining verdict for plaintiff.

In two actions for defamation which were consolidated and tried as one, the facts are stated, and it is *held:* (a) That no errors occurred at the trial prejudicial to the defendant; (b) that the trial court correctly charged the jury; and (c) that the verdict is amply supported by the evidence.

Opinion filed March 19, 1921.

Appeal from the District Court of Ransom County, Honorable *F. J. Graham,* Judge.

Affirmed.

O. S. Sem and *Jos. G. Forbes,* for appellant.

Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty; and the privilege embraces cases where the

duty is not a legal one, but where it is of moral or social character of imperfect obligation. Ross v. Ward (S. D.) 85 N. W. 182.

Plaintiff's testimony does not establish malice, does not show any injury to have been wanton or gross or outrageous, and does not show any act or omission on the part of the defendant to have been conceived in a spirit of mischief, or criminal indifference to a civil duty or obligation. Comp. Laws, § 7145; Lindblom v. Soustelie, 10 N. D. 140; Baxter v. Campbell, 97 N. W. 386.

It is the duty of the court to charge on all material points without being requested to do so. Moline Plow Co. v. Gilbert, 3 Dak. 239; Carr v. Mpls. etc. R. Co. 16 N. D. 217; Comp. Laws, § 7620.

The failure of the court to instruct the jury concerning the defense of justification by proving the truth of the charge was reversible error. Burnham v. Stone, 35 Pac. 627; Virtue v. Creamery Package Mfg. Co. 142 N. W. 930; Greengard v. Burton, 88 Minn. 252, 92 N. W. 931; Forzen v. Hurd, 20 N. D. 54.

Curtis & Remington (*E. T. Burke* on oral argument), for respondent.

Counsel did not object to the exhibit in question being sent out with the jury. Their failure to then object precludes them from raising the point now. 5 Enc. Ev. p. 467, and many cases there cited.

"The court in giving instructions is not required to recognize any defense presented by the pleadings which is unsupported by any evidence." Hughes, Instructions to Juries, ¶ 83.

The principle upon which this rule is founded is that only such an instruction should be given as is based upon the legitimate evidence in the case. 14 R. C. L. 786, ¶ 51.

BIRDZELL, J. This is a sequel to Martinson v. Freeberg, 44 N. D. 363, 175 N. W. 618. There are two cases of this title—one for an alleged slander and one for libel. They were consolidated and tried as one. The jury found the issues for the plaintiff and assessed his damages at $500. Judgment was entered upon the verdict, and the defendant has appealed.

The plaintiff and defendant are neighbors living on farms in the southern part of Ransom county. They have been friends and neighbors for more than twenty years, and their families are related through

the fact that the plaintiff's first wife and the defendant's wife were sisters. In the latter part of February, 1918, the plaintiff and his wife decided to go to St. Paul for a visit, and, in pursuance of a prior understanding of the defendant's desire to visit St. Paul at the same time, the plaintiff sent word to him as to the date when they were going. As a result the plaintiff, his wife and two children, and the defendant and his wife, went together to St. Paul. When they arrived there, the plaintiff made arrangements with a friend and distant relative, Peter Olson, whereby the whole party were to be accommodated in a large room in the Olson home. The room contained two beds, and it was necessary for both families to occupy it. On a certain evening during their stay there, Mrs. Martinson (plaintiff's wife) and Mrs. Olson went to the city, leaving Olson, the plaintiff, the defendant, the defendant's wife, and the two Martinson children at home. Between 8 and 9 o'clock defendant's wife, noticing that one of the Martinson children had fallen asleep in a chair, carried it upstairs, undressed it, and put it to bed. A short time after she left the room, the plaintiff carried the other child upstairs to put it to bed. About five minutes later the plaintiff started to retire, and met his wife on the stairs as she was returning from her errand. Nothing appears to have been thought of this matter at the time, but later, on March 21st, after the party had returned home, the defendant wrote the following letter to plaintiff's wife:

Lisbon, March 21, 1919.

Mrs. Martinson:—

Nar Mrs. Olson och Mrs. Martinson gick ner i stan am qvellen sa satt jag ock Per Olson och talade sa gick min hustru upp pa roomett och sin gick Martinson efter upp pa roomett. Sa jag tyckte det sag ente bra ut for mig jag trode di hade glomt varanra nu Tilda och Nels.

—which, being translated, reads:

Lisbon, March 21, 1919.

Mrs. Martinson:—

When Mrs. Olson and Mrs. Martinson went down town in the evening, Peter Olson and I were sitting and talking together. Then my wife went up to the room and afterwards Martinson went up to the

room. I thought that did not look good to me, I thought that they had forgotten each other by this time, Tilda (defendant's wife) and Nels (plaintiff).

A few days after the above letter was written, there was a gathering at the defendant's house of an organization affiliated with one of the churches. At this gathering one of the children of a neighbor, Matt Johnson, was to be baptized, and it was desired that the plaintiff and his wife act as sponsors for the child. They accordingly went to the gathering, and it seems that the matter referred to in the letter previously written by the defendant underwent some discussion through the initiative of the defendant, who made certain statements in the hearing of others of the general purport of those contained in the letter.

This court had previously ruled, Martinson v. Freeberg, supra, that language such as that used in the letter is reasonably susceptible of a construction that would make it actionable; that the jury might find that it was intended to convey to Mrs. Martinson the charge that her husband and the defendant's wife had sustained some illicit relations. This was a question of fact for the jury. N. D. Const. § 9.

The appellant, however, upon this appeal, challenges the correctness of the English rendition of his letter. Upon the trial he admitted that the letter was properly translated as above set forth, but upon this appeal his counsel contends that the second sentence should be translated: "So I thought I should worry for that, I believed that they had forgotten each other by now, Tilda and Nels."

We find no warrant for any such rendition of the language used in the letter, and no occasion to depart from the meaning which the defendant himself attached to it upon the trial.

A number of errors are predicated upon the charge of the court. We have carefully read the charge and find that it clearly states the law applicable. No errors prejudicial to the defendant occurred during the trial. The verdict finds ample support in the evidence. It appears that a fair trial has been had. In the light of the record we regard the assignments of error as being without sufficient merit to warrant discussion seriatim. Finding no reason to disturb the verdict, the judgment is in all things affirmed.

ROBINSON, Ch. J., and CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. (dissenting). I dissent for the same reason that I dissented in the case of Martinson v. Freeberg, 44 N. D. 363, 175 N. W. 618.

I dissented there, on the ground that the demurrer should have been sustained to each of the charges, or alleged causes of action, as set forth in the complaint. I have in no measure changed my mind in that regard.

Further dissenting, it is clear to my mind that the language used was neither slanderous nor libelous.

STATE OF NORTH DAKOTA, Appellant, v. GEORGE LENNICK, Respondent.

(182 N. W. 458.)

Larceny — presumption from unexplained possession applicable to possession of another in another jurisdiction.

1. The presumption of fact that the recent possession of stolen property not satisfactorily explained is an evidentiary fact from which the crime of larceny may be imputed equally applies when such property is found in the possession of another in another jurisdiction.

Criminal law — failure of justice to indorse on complaint formal order binding defendant over held not to deprive court of jurisdiction.

2. For reasons stated in the opinion, it is *held* that the failure of the justice of the peace to indorse upon the complaint the formal order required by § 10,611, Comp. Laws 1913, did not deprive the trial court of jurisdiction.

Opinion filed March 19, 1921. Rehearing denied April 4, 1921.

NOTE.—That there seems to be quite a conflict of authority on the question as to whether the possession of goods recently stolen, where such possession was not satisfactorily explained and the burglary and larceny were proved, has been held to be prima facie evidence of guilt, will be seen by an examination of cases collated in a note in 12 L.R.A.(N.S.) 199, on possession of recently stolen property as evidence of burglary and larceny.

Criminal prosecution for larceny, in District Court, Mercer County, *Hanley*, J.

From an order granting a new trial after conviction by the jury, the state has appealed.

Order reversed.

John Moses, State's Attorney, and *Miller, Zuger, & Tillotson*, for appellant.

"Venue need not be proved beyond a reasonable doubt, and may be proved by circumstantial evidence." Fuller v. Territory (Okla.) 99 Pac. 1098; Brunson v. State (Okla.) L.R.A.1918B, 1187, 1188, 111 Pac. 988.

The presumption of guilt from the unexplained possession of recently stolen property is for the jury. State v. Ross, 179 N. W. 993; State v. Davis (Iowa) 179 N. W. 514.

Halpern & Rigler and *Sullivan & Sullivan*, for respondent.

"Where there is no proof of some material fact, or where proof of such fact which is plainly insufficient, a new trial ought to be granted." 12 Cyc. 732, and cases cited.

The information must allege the commission of the crime within the jurisdiction of the court. Comp. Laws 1913, 10,693, subd. 4.

The failure to prove the place (even though the place proven is within the jurisdiction of the court, and in the same county) alleged in the information is a fatal variance. State v. O'Neal, 19 N. D. 436, 124 N. W. 68; State v. Kelly, 28 N. D. 5, 132 N. W. 223.

The court had no jurisdiction to receive or file the information, and the same should have been quashed. People v. Wilson, 93 Cal. 377, 28 Pac. 1061.

BRONSON, J. The defendant was convicted upon an information charging him with the larceny of three milch cows in Mercer county. The trial court ordered a new trial upon the insufficiency of the evidence to show the commission of the crime in Mercer county. The state has appealed from the order. The complainant was a farmer in Mercer county engaged in the dairy business. On May 26, 1920, in the morning, he put ten milch cows and some other cattle in a pasture on his farm, consisting of some 200 acres fenced. This pasture had two gates, and in places the fence was not in good condition, although

it was in such shape that the cattle would not get out. In the evening one of his boys reported three milch cows missing. During three days thereafter the complainant searched throughout the surrounding neighborhood, and was unable to locate the missing cows. On June 8, 1920, upon information furnished, he found the cows upon the defendant's farm, some 40 miles distant from complainant's farm. The cows had been rebranded "K. L." over the brand of the complainant. Theretofore the cows were branded "M. F.," the registered brand of the complainant. Upon the next day the complainant returned, and, not finding the defendant or his wife there, took the cows back to his farm. Later he caused the defendant to be arrested for larceny, and, upon the preliminary examination before a justice of the peace, the defendant was bound over to the district court.

In a conversation which the complainant had with the defendant at the time of the preliminary examination and afterwards, the defendant admitted that he had got the brand from his father, a neighbor of the complainant in Mercer county; that he branded the cows; that he purchased them from one Schaffner on May 26, 1920, and had brought them to the farm on May 27, 1920; that he had given to Schaffner a note and mortgage for such cows. After the preliminary examination, the defendant went to see the complainant, and made some offer of settlement by stating that he would work his whole life to pay for the trouble.

Schaffner, as a witness, testified that he did not sell these cattle to the defendant; that he never received any note or mortgage from him therefor; and that he had not seen the defendant until he came out with an attorney to see him (which was after the cows had been taken back by the complainant). The pasture of the complainant was about 4 miles from the Dunn county line. No direct evidence appears in the record that the defendant was within the county of Mercer between the time when the cows were lost and were found. At the trial, on the conclusion of the state's case, the defendant moved to dismiss because of the failure to prove the commission of the crime within Mercer county, and then submitted the case without introducing any testimony in behalf of the defendant.

The justice of the peace, in his return of the proceedings had at the preliminary hearing, did not indorse upon the complaint or in his

docket the statutory formal order required by § 10,611, Comp. Laws 1913. The state contends that the evidence was sufficient for the jury to find that the crime was committed in Mercer county, and that the trial court abused its discretion in granting a new trial. The defendant maintains that the state wholly failed to prove the venue of the offense, and, further, that, in any event, the failure of the justice to make the indorsement required by law is fatal to the state's contentions.

The evidence adduced was sufficient to warrant the verdict of guilty returned by the jury. This the defendant does not deny. The jury also were warranted in finding that the defendant had the possession of stolen property, recently, after it was stolen. This gave rise to the presumption of fact that the recent possession of stolen property, not satisfactorily explained, is an evidentiary fact from which the crime of larceny may be imputed. State v. Rosencrans, 9 N. D. 163, 82 N. W. 422; State v. Ross, 46 N. D. 167, 179 N. W. 993. Upon this record, larceny, if any, was the stealing of the cows from the possession of the complainant. The trial court charged the jury that it was necessary and incumbent upon the state to prove beyond a reasonable doubt that the defendant did commit the crime charged in the county of Mercer, or that he did partly commit it in such county, before a conviction could be had. Upon this record, in connection with the presumption quoted, the jury were warranted in finding that the property was stolen from the possession of the complainant in Mercer county. This presumption quoted applies, likewise, when such property is found in the possession of another in another jurisdiction. McGuire v. State, 6 Baxt. 621; Graves v. State, 12 Wis. 592; 25 Cyc. 134. The trial court accordingly abused its discretion in granting a new trial.

We are further of the opinion that the trial court did not err in refusing to set aside the information because the justice of the peace did not make the formal indorsement upon the complaint or in his docket, pursuant to § 10,611, Comp. Laws 1913. It appears from the proceedings had before the justice that a preliminary hearing and the rights and privileges prescribed by law were accorded to the defendant. No prejudice to the defendant is shown by reason of the justice's failure to make the indorsement or entry in the formal words of the stat-

ute. Pursuant to the order and commitment of the justice, binding the defendant over to the district court, the defendant duly gave bond for his appearance in the district court. The justice should have followed the statutory requirement, but in the absence of prejudice shown the objection is highly technical. See State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Johnson, 34 S. D. 601, 149 N. W. 730; People v. Wallace, 94 Cal. 497, 29 Pac. 950; People v. Tarbox, 115 Cal. 57, 46 Pac. 896. After the case was called, and after the defendant had made his plea, consent was requested and granted to withdraw such plea, and then, orally before the court, the motion was made to set aside the information upon such grounds, which motion was denied. The statute requires that such motion be made in writing subscribed by the defendant or his attorney, and that it must be made before the defendant demurs or pleads, or the objection is waived. Comp. Laws 1913, § 10,729. In view of such proceedings, where technicality meets technicality, the jurisdiction of the trial court, when retained, should not be disturbed. The order of the trial court is accordingly reversed.

ROBINSON, Ch. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

NORTHWESTERN TELEPHONE EXCHANGE COMPANY, a Corporation, Respondent, v. WORKMEN'S COMPENSATION BUREAU OF THE STATE OF NORTH DAKOTA et al., Appellants,

and

THE GRAND FORKS STEAM LAUNDRY COMPANY et al., Respondents, v. WORKMEN'S COMPENSATION BUREAU OF THE STATE OF NORTH DAKOTA et al., Appellants.

(182 N. W. 269.)

Injunction — continuing restraining orders pending determination of validity of orders of minimum wage commission held not an abuse of discretion.

An application was made to the trial court for a temporary restraining order against the defendants, pending the determination of the above cases

upon their merits, which was granted. These cases were brought for the purpose of procuring a permanent injunction. Upon a motion before the trial court to continue the temporary order in force until the final determination of the cases upon their merits, an order to that effect was made.

The cases present, when tried upon their merits, questions of great importance. The trial court required of plaintiffs bonds in sufficient amount, and made provision for additional bonds in case of necessity, which would protect all parties interested or affected, if, upon final determination of the cases, they were determined adversely to plaintiffs.

In these circumstances, the trial court did not abuse its discretion in so continuing in force the temporary restraining orders.

Opinion filed March 21, 1921.

Appeals from orders of the trial court, continuing in force certain temporary restraining orders.

Appeal from District Court of Burleigh County, Honorable *W. S. Nuessle,* Judge of the Fourth Judicial District.

Order affirmed.

Wm. Lemke, Attorney General, and *Foster & Baker,* for appellants.

Under § 7214, Comp. Laws 1913, an injunction cannot be granted unless the bureau's orders are no manifestly arbitrary and unreasonable in their operation and effect as to justify this court in holding as a matter of law that the bureau acted without authority; the restraining order must be quashed. State ex rel. Dergan v. Fisk, 15 N. D. 219, 107 N. W. 191, Comp. Laws 1913, § 7214; Louisville & N. R. Co. v. Garrett, 213 U. S. 289.

Bangs, Hamilton, & Bangs, and *Bangs & Robbins* for respondents.

The preliminary injunction was properly issued to maintain the status quo of the parties pending final determination. Denver & R. G. R. Co. v. United States, 124 Fed. 156; Harriman v. Northern Security Co. 132 Fed. 485; Carll v. Seider (N. J.) 26 Atl. 977; Western U. Teleg. Co. v. Penn. R. Co. 120 Fed. 981.

Such bureau constitutes a body in whose action all must participate or have an opportunity to participate. Grindley v. Barker, 1 B. & P. 229; Leavenworth, N. & S. R. Co. v. Meyer (Kan.) 49 Pac. 89.

Said bureau, after the attempted removal of L. J. Wehe, one of the commissioners, was without power to act. Leavenworth, N. & S. R. Co. v. Meyer, supra.

No public meeting was held as required by law. Sess. Laws 1919, chap. 174, § 7.

GRACE, J. The above cases are presented to this court on appeal from an order entered, in each granting a temporary restraining order. Each has been brought for the purpose of obtaining a permanent injunction against the defendants.

The complaints do not challenge the validity of the Workmen's Compensation Act, which is chapter 174, Session Laws of 1919. They challenge the validity, regularity, and reasonableness of certain orders and proceedings of the minimum wage department of the compensation bureau, and charge that such orders, or some of them, are violative of the 14th Amendment to the Federal Constitution; and further charge that certain of said orders are an unreasonable restriction of and violate plaintiffs' right of contract for service.

The plaintiffs further charge in their complaints, that, for several reasons not necessary here to mention, such orders were not lawfully made or issued.

The complaint in the telephone case is exceedingly long and consists of forty-one paragraphs, most of which are very extended. It is not necessary to set out the complaint. The complaint in the laundry case is in about the same situation, and is of the same general nature.

Each complaint prays for a permanent injunction. Some of the orders complained of fix minimum wages for certain classes of employees engaged in certain kinds of employment, which minimum wage, as thus fixed, is much higher, in many instances, than that ordinarily paid by plaintiffs.

None of the matters charged in the complaints, and put in issue by the answer, can be decided on this appeal. All of those matters and points involved will be for consideration and decision when the case is tried upon its merits in the trial court.

At the commencement of these actions, the plaintiffs, each respectively, applied for a temporary restraining order, restraining defendants from the enforcement of all the orders and proceedings complained of herein, until a determination of the cases upon their merits. This application was made to Judge A. T. Cole, and he issued a tem-

porary restraining order in each case, on the 13th day of August, 1920. The venue of the cases was afterwards removed to Burleigh county. A hearing was had before Judge W. L. Nuessle of the fourth judicial district, and on the 2d day of December, 1920, he made an order in each case continuing in force the temporary restraining order, until a determination of the cases upon their merits.

He further ordered that, pending final determination, the Northwestern Telephone Exchange Company should execute and file with the clerk of court a bond in the sum of $20,000, to be approved by the clerk, and conditioned for the prompt payment to each of such employees entitled thereto, the amount to which he or she would have been entitled under said minimum wage department orders aforesaid, over and above the amounts actually paid.

He further ordered that this company shall make, execute, and deliver to the clerk of court such further and additional bonds, in the sum of $20,000, each to be approved by such clerk as may from time to time be required and necessary to cover any amount or amounts in excess of the amount or amounts covered by the first, and any other bond or bonds that may hereafter be filed under the terms of the order. Conditioned, further, that such bonds were to be effective only in case the final determination of the action shall be that the minimum wage department orders are enforceable.

It will be noticed in the laundry case, that there are several distinct persons, firms, or corporations who are parties to the action, and the action is brought on their behalf and all other laundries similarly situated. In that case, the court ordered that each of the persons, firms, or corporations execute and deliver to the clerk of court, with approved sureties, a bond in the sum of $1,000, conditioned as above in the telephone case. The further provision was made that an additional $1,000 bond might be required of each of the plaintiffs, as from time to time necessity might require.

The issues in these cases, as appears from the pleadings, present important and far-reaching principles and questions of law, the determination of which will affect many kinds and classes of employers and employees.

The questions are not only of transcendent importance, but are in

this state presented for the first time. As will be seen by the Compensation Act, it is of very recent origin.

What has been done by and under authority of that law, by the minimum wage department, as well as by the commissioners of the bureau, is presented in those cases for consideration, and the legality thereof in many respects is directly challenged.

As we view the matter, the issues and matters involved in these cases should not be discussed in this opinion, as it seems to us any such discussion here would be merely *obiter dicta*. The lower court, in continuing the restraining orders, took precaution to protect the interested parties. It would seem the plaintiffs were required to, and did, execute bonds which the trial court thought sufficient for the protection of employees interested or affected, or which might become affected, by a determination in favor of the defendants. Precaution was also taken to provide for additional bonds in case necessity should require.

The only real question presented in this appeal is: Did the lower court abuse its discretion in continuing in force the temporary restraining orders, until the final disposition of the cases upon their merits in the trial court? This question, in all the circumstances of these cases, we are certain, must be answered in the negative.

In the circumstances of these cases, it is unnecessary to cite authority for the conclusion at which we have arrived. This opinion is intended to, and does, dispose of the appeal in each of said cases above entitled, so far as the questions presented in those appeals are here presented. We refrain entirely from expressing any opinion with reference to the merits of either case.

The order appealed from is affirmed.

The respondents are entitled to their statutory costs and disbursements on appeal.

STATE OF NORTH DAKOTA EX REL. WILLIAM LEMKE, Respondent, v. UNION LIGHT, HEAT, & POWER COMPANY, a Corporation, Appellant.

and

CITY OF GRAND FORKS, a Municipal Corporation, M. F. Murphy, R. B. Griffith, N. G. Benner, and All Users of Electricity, Heat, or Gas Furnished by Defendant, Respondents, v. RED RIVER POWER COMPANY, a Corporation, Appellant.

(Two Cases)

(182 N. W. 539.)

Public service commissions — injunction against surcharging public utilities rates and subsequently permitting such surcharges to be collected held within discretion of trial court.

In two actions brought to enjoin defendant utility companies from putting into effect certain surcharges upon their rates for electricity, gas, and heat, which surcharges purport to be authorized by orders of the board of railroad commissioners, the complaints attack the validity of the orders of the commissioners on the ground that the purported orders reflect the individual action of two members of the board rather than the action of the commission as a body. The pleadings frame issues of fact concerning the manner in which the action resulting in the purported orders was taken. Upon orders to show cause the trial court granted injunctions against the surcharges, but subsequently superseded the injunctions and allowed defendants to collect the surcharges, requiring them to give bonds conditioned for repayment in case the injunctional orders be held on appeal to have been wrongfully issued. It is *held:*

1. The action of the trial court, both in granting the injunctions *pendente lite* and in subsequently permitting the surcharges to be collected, involved the exercise of discretion, and created a status for the parties to the litigation which will not be disturbed on appeal unless the discretion was abused.

Public service commissions — railroad commissioners can act only as a board, and each member must be given reasonable opportunity to attend.

2. The board of railroad commissioners is a public body and can only act as a board. While the questions before it may be decided by a majority vote (Comp. Laws 1913, § 601), it is a prerequisite to valid board action that each member shall have reasonable opportunity to offer his counsel and judgment to the other members, and to this end it is required either that action be taken at regular meetings or at a meeting of which each member is advised and given reasonable opportunity to attend.

Appeal and error — public utility companies by giving security for repayment may be allowed to collect surcharges pending appeal.

3. Since the action of the district judges in superseding the injunctions *pendente lite* has created a status which, in view of the uncertainty of the outcome of the trials on the merits, should not be disturbed, the defendants are given an opportunity to continue the status so created by giving security for the repayment of surcharges pending the determination of the litigation, in default of which the orders appealed from are affirmed.

Opinion filed March 21, 1921.

Appeals from orders of the District Courts of Cass and Grand Forks Counties, *Cooley, Cole,* and *Englert,* Judges.

Remanded with directions.

Bangs, Hamilton & Bangs, and *Denegre, McDermott, Stearns & Weeks* (*Cummings, Roemer & Flynn,* and *Andrew Miller* of counsel), for defendant and appellant Red River Power Co.

"The presumption is that public officials do as the law and their duty require them" (20 N. D. 398), and the order of September 2, 1920, being regular on its face, "it is presumed that the board did everything which the statute in question required it to do, before it made the order" (20 N. D. 398). (Greenfield School Dist. v. Hannaford, 20 N. D. 393, 398, and cases there cited; Commissioners v. Hall, 70 Ind. 469; 16 Cyc. 1076), including calling and holding of meeting (Merchant v. North, 10 Ohio St. 252; Schuerman v. Arizona, 184 U. S. 342, 46 L. ed. 580, 585.)

The law nowhere provides for the calling or holding of any regular or special meetings of the board at which the matters pending before it shall be discussed and at which its decision shall be rendered." Comp. Laws 1913, § 584, repealed by § 55, chap. 192, Laws 1919; Laws 1919, § 31.

"Proceeding" in its general acceptation, and as used in § 24, chap. 192, Sess. Laws 1919, means "the form in which actions are to be brought and defended, . . . the manner of conducting them, the mode of deciding them . . . and of executing." (Erwin v. United States, 37 Fed. 488, citing Bouv. Law Dict.) and include all possible steps in an action, from its commencement to the execution of judgment. Ex parte McGee (Or.) 54 Pac. 1092.

"Anything done from the commencement to the termination is a proceeding." Sherman v. So. P. Co. 31 N. W. 285, 102 Pac. 259; 6 Words & Phrases—First Series; 3 Words & Phrases—Second Series.

A vote as contemplated by § 601, Comp. Laws 1913, is any act by which the expression or choice of a commissioner in regard to any question before the board for decision is made known or communicated to the other members of the board. 40 Cyc. 224; Worcester Dict. Maynard v. Kent Co. (Mich.) 47 N. W. 759; State v. Blaisdell, 18 N. D. 36.

William Lemke, Attorney General, and *W. J. Mayer,* for plaintiffs and respondents.

G. S. Wooledge, City Attorney, for city of Minot.

Denegre, McDermott, Stearns, & Weeks, and *A. W. Fowler* (*Andrew Miller* and *Cummins, Roemer & Flynn,* of counsel) for appellant Union Light, Heat, & Power Company.

When the method of exercising the powers conferred upon the board is not specially described by charter or by general law, the board may exercise the power in any appropriate method. 28 Cyc. 322, and cases cited; State v. C. & N. W. R. Co. (N. D.) 179 N. W. 378.

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." Comp. Laws 1913, § 4741; Laws 1919, chap. 192, § 31.

BIRDZELL, J. The above cases come to this court on appeals from orders entered in each of them granting an injunction *pendente lite.* The injunction prevents each of the defendants from putting into effect and collecting certain surcharges upon its rates for electricity, gas, and heat, which surcharges purport to be authorized by an order of the board of railroad commissioners. Pending this appeal, however, the injunctional order is stayed. The trial judges have required the defendants to execute bonds conditioned, among other things, for the refunding of the surcharges, and have permitted the surcharges to be collected by the defendants pending the appeal. The facts upon which the orders appealed from are based are substantially identical for both cases, and the two appeals may thus be disposed of under one opinion.

Upon the argument the city of Minot was represented by its city attorney, who stated that that city was likewise interested in the ques-

tions presented here, as a stipulation had been entered into with a view to avoiding the necessity of litigating the same questions, as they affect that city in its relations with the utility company supplying similar services to its inhabitants.

These proceedings originated by complaints praying that the defendants be enjoined and restrained from charging increased rates for electricity, gas, and heat. In the complaint in the Fargo case it is alleged that the defendant Union Light, Heat, & Power Company has unlawfully, and without authority, increased its rates on electricity and gas 25 per cent and on heat 35 per cent; that it bases the increases complained of upon a purported order of the board of railroad commissioners dated September 2, 1920; that the purported order is illegal for the reason that it was never adopted by a majority of the board at any special or regular session of the board; that it was signed by two of the commissioners, Sam Aandahl and C. F. Dupuis, in their private and individual capacity, and not as members of the board of railroad commissioners; that the minutes of the board show that the case involving the increase was never considered by the board, nor the increased rates adopted or passed in any regular or special meeting; that the fact was there had never been a hearing in regard to the proposed increases in rates in which the city of Fargo and the inhabitants were given a fair opportunity to be heard and protect their interests as provided by law. In the Grand Forks case the surcharge on electricity which the board purported to authorize is 12½ per cent, for gas 25 per cent and for heat 35 per cent. It is not alleged in this case that there was not ample notice and opportunity for a hearing.

The answers set up the legal conclusion of regularity and validity, and deny the allegations of fact in the complaint with reference to the manner in which the order was promulgated.

In the Grand Forks case there was a temporary restraining order, dated November 9th, preventing the collecting of the surcharge until the further order of the court. This was later vacated. In each case there was an order to show cause why a temporary restraining order should not be issued. Both cases came on for hearing upon the orders to show cause, in the city of Grand Forks on November 26, 1920, and were heard before the district judges of the first district sitting together. Under the opinion and order of the lower court the defend-

ants are restrained from collecting any sums in excess of the rates in force prior to September 2, 1920, the opinion being based upon the proposition that the members of the board, in purporting to authorize the surcharges, acted individually, and not as the board of railroad commissioners.

But this court order is not in effect pending this appeal, and the surcharges complained of are apparently being collected. The facts concerning the manner in which the hearing was held in the board of railroad commissioners and the purported order issued, as shown by affidavits accompanying the complaints, are as follows:

In the affidavit of Frank Milhollan, one of the members of the board of railroad commissioners, it is stated that after the hearing the deponent requested the director of utilities of the railroad commission not to prepare a tentative opinion in the case until investigation could be made as to why the city of Fargo was not represented at the hearing; that shortly thereafter a tentative report, opinion, and order were shown him by Commissioner Dupuis, which had been signed by Commissioners Aandahl and Dupuis; that deponent protested against the releasing of any order, because of a letter received by the commission from a large consumer at Fargo and a resolution passed by the city commission of Fargo, protesting against the increased rates until further hearing; and that affiant informed Commission Dupuis that if such an order were released he would submit a dissenting opinion. The most important part of the affidavit reads:

"That prior or subsequent to September 2, 1920, nor at any other time has the matter of disposition of the case been formally brought before the commission for a decision.

"That at no time has deponent had an opportunity to express at a regular or special meeting of the board of railroad commissioners, his views in connection with this matter, nor has he at any such meeting been given an opportunity to enter into a discussion of, or vote upon, this matter."

Following this the deponent states that he has been present at all meetings of the board held since August 16, 1920, and that of his own knowledge no formal action has been taken by the commission in disposition of this matter.

The affidavit of J. H. Calderhead, secretary of the board of rail-

road commissioners, states that on September 2, 1920, the purported order was placed before him for signature and for affixing the seal of the commission; that the purported report and order had been signed by Commissioners Aandahl and Dupuis, and annexed thereto was a dissenting opinion, signed by Commissioner Milhollan; that the purported report and order were duly signed and sealed by deponent, with full knowledge that no formal action had been taken at any regular or special meeting of the board of railroad commissioners; that deponent had been present and kept the minutes of all meetings of the board of railroad commissioners, and that the matter had never been discussed or acted upon at any meeting of the board.

The order, to which was attached the signature of the board of railroad commissioners by Commissioners Aandahl and Dupuis, contained an affirmative showing in support of its regularity as follows:

"This matter being at issue upon the application of the Union Light, Heat, & Power Company of Fargo, North Dakota, for an increase in its rates for the utility services of electricity, gas, and steam heat to be levied as a surcharge to the present existing rates in order to meet an emergency situation due to the increased costs in coal, *and having been duly heard by this commission, and full consideration having been given to all the matters and things contained in the said application,* and the commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereof, which said report is hereby approved and made a part hereof—now, after due deliberation by the commission, it is ordered," etc.

The minutes of the meeting for August 16, 1920, when the hearing was held, which are attached to and made a part of the affidavit of J. H. Calderhead, secretary of the board, state that there were present at the meeting Vice President Dupuis and Commissioner Milhollan, Commissioner Aandahl apparently being absent.

The cases have not been tried on their merits, and consequently no question is presented upon this appeal concerning the right to the permanent relief prayed for. It will, however, be necessary to consider the principles upon which the validity of the action of the board of railroad commissioners depends, for the reason that there is no right to temporary relief unless facts are alleged which constitute grounds for permanent relief.

It is to be seen from the foregoing statement of facts that the purported order complained of was not issued by a majority of the board of railroad commissioners participating in the hearing at the date the hearing was held. Also that it was signed by one member who heard the evidence and one member who apparently did not hear it. From these facts the respondent contends that it is apparent no valid order of the railroad commission authorizing the surcharges was ever made. In support of this contention various sections of the statutes relating to the Constitution, organization, and method of transacting the business intrusted to the board, are cited, from all of which it appears, it is contended, that the individual members of the board are not authorized to take action upon such matters as that under consideration, and that valid action can only be taken by the board as such. While it is conceded that a hearing may be conducted, in pursuance of statutory authorization, by one or more members of the board, it is contended that the statutes nowhere authorize action such as that taken in the instant case in any manner except by the board. Though the statute (Comp. Laws 1913, § 601) expressly authorizes all questions to be decided to be determined by a majority vote of the commissioners, it is nevertheless argued from the various sections of chapter 192, Session Laws of 1919, that the commission must first be convened in some sort of meeting where opportunity will be afforded for an exchange of views before a majority may bind the board by its action. It is contended, in brief, that the purported order is void for the reason that it is not shown to have been passed at a regular or special meeting of the board of railroad commissioners by a majority vote of those present.

On the other hand, the appellants contend that the entire proceedings from the date of the filing of the petition up to and including the filing of the written findings, decision, and order, are fair and regular, and purport to be and were clearly intended to be the action of the commission; that the laws governing the commission do not expressly or by implication require that its decision be arrived at in the manner contended for by the respondent. It is pointed out in this connection that even Commissioner Milhollan treated the order as the action of the commission, dissenting therefrom because he thought there should be an additional hearing. It is argued that the

whole action of the members of the board is such as to show that they did not purport to act as individuals, but as members of the board of railroad commissioners. In support of their principal contention the appellants point out that the statutes nowhere provide for the calling or holding of any regular or special meetings at which the matters pending before it shall be discussed and its decisions arrived at. It is shown that § 584, Comp. Laws 1913, which provided for five regular sessions to be held annually at certain named places, was expressly repealed by § 55 of chapter 192, Session Laws of 1919, and that, aside from § 585, which provides for the calling of special sessions by the president of the commission or the governor on ten days' notice, there is no statute governing the meeting of the board.

The Public Utilities Act (Sess. Laws 1919, chap. 192) § 54 expressly provides that it is to be construed and interpreted with all other statutes of the state having for their purpose the regulation of public utilities, and that it is intended to be supplemental to such statutes. It is unnecessary to deal in detail with the various statutes which have to do with the manner in which the board of railroad commissioners is required to transact its business. Suffice it to say that all of them treat it as a public entity comprised of members who must act jointly as a board, and not severally as so many individuals; that the board must make certain records of its proceedings, and that the votes of the members shall be recorded, though the manner in which their votes may be evidenced is not specifically covered.

From the arguments advanced by the respective parties, it seems that the essence of the opposing contentions centers about the answers to the query: Under the statutes of this state, is the board of railroad commissioners a public body composed of a number of individuals who can only bind the body when assembled for the purpose of taking action? In short, does the rule which is concededly applicable to all such organizations as city councils, boards of county commissioners, and school boards apply to the deliberations of the board of railroad commissioners?

Upon a careful examination of the statutes bearing upon the question and of the rather numerous authorities cited by counsel, we are of the opinion that this question must be answered in the affirmative. We can see no distinction in principle, between the action of the board

of railroad commissioners within the range of subjects committed to it and the action of the various bodies to which the rule clearly applies. In one of the leading cases on the subject, namely, Paola & F. River R. Co. v. Anderson County, 16 Kan. 302, the reason for the rule is stated so aptly in the opinion by Mr. Justice Brewer that it is in effect an argument demonstrating its application to such a board as that in question. After discussing earlier authorities, both English and American, Justice Brewer states (page 309):

"Nor is this merely an arbitrary rule, but one founded upon the clearest dictates of reason. Wherever a matter calls for the exercise of deliberation and judgment, it is right that all parties and interests to be affected by the result should have the benefit of the counsel and judgment of all the persons to whom has been intrusted the decision. It may be that all will not concur in the conclusion; but the information and counsel of each may well affect and modify the final judgment of the body. Were the rule otherwise, it might often happen that the very one whose judgment should and would carry the most weight, either by reason of his greater knowledge and experience concerning the special matter, by his riper wisdom and better judgment, or by his greater familiarity with the wishes and necessities of those specially to be affected, or from any other reason, and who was both able and willing to attend, is through lack of notice an absentee. All the benefit, in short, which can flow from the mutual consultation, the experience and knowledge, the wisdom and judgment, of each and all the members, is endangered by any other rule."

And Justice Selden, in People ex rel. Loew v. Batchelor, 22 N. Y. 128, has stated that "it is not only a plain dictate of reason, but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body."

When we consider that the board of railroad commissioners consists of members, each of whom is elected at large, supposedly on the basis of his qualifications for the duties imposed, and that the board is intrusted with an extensive authority, legislative in character, to determine rates at which public service corporations must serve the public and the public pay for such service, the requirement that its determinations shall only be made after opportunity is afforded to

every member to bring to bear upon his associates his counsel, opinion, and judgment upon all matters entering into the decision, is most reasonable and salutary. This safeguard operates for the protection of both parties to a controversy, and cannot properly be disregarded in arriving at the validity of action of such general importance and affecting so many persons. If orders issued or decisions rendered by two of a board of three members are allowed to stand where no opportunity to participate in the steps leading up to the decision is afforded to the third member, the latter could be rendered entirely useless, and the public be effectually deprived of the service of one in whose judgment upon such matters it had expressed confidence. For other authorities supporting this general doctrine, see Zottman ex rel. Anderson v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; People v. Coghill, 47 Cal. 361; Schwanbeck v. People, 15 Colo. 64, 24 Pac. 575; Herrington v. Liston, 47 Iowa, 11; Aikman v. School Dist. 27 Kan. 129; First Nat. Bank v. Drake, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445; Thompson v. West, 59 Neb. 677, 49 L.R.A. 337, 82 N. W. 13; Day v. Jersey City, 19 N. J. Eq. 412; Schumm v. Seymour, 24 N. J. Eq. 143; Downing v. Rugar, 21 Wend. 178, 34 Am. Dec. 223; Crocker v. Crane, 21 Wend. 211, 34 Am. Dec. 228; State ex rel. School Dist. v. Tucker, 39 N. D. 106, 166 N. W. 820; State ex rel. Lemke v. Chicago & N. W. R. Co. 46 N. D. 313, 179 N. W. 378; School Dist. v. Shelton, 26 Okla. 229, 109 Pac. 67; Murphy v. Albina, 22 Or. 106, 29 Am. St. Rep. 578, 29 Pac. 353; Nason v. Erie County, 126 Pa. 445, 17 Atl. 616; Pennsylvania R. Co. v. Montgomery County Pass. R. Co. 167 Pa. 62, 27 L.R.A. 766, 46 Am. St. Rep. 659, 31 Atl. 468; First Nat. Bank v. Mt. Tabor, 52 Vt. 87, 36 Am. Rep. 734; McNolty v. School Directors, 102 Wis. 261, 78 N. W. 439.

Upon the argument appellants' counsel relied upon the recent case of Hackley-Phelps-Bonnell Co. v. Industrial Commission, 173 Wis. 128, 179 N. W. 590, as an authority holding that the record of a public body could not be impeached by a showing that the action was in fact not the action of the body (the industrial commission) but of an employee (an examiner). We do not understand the holding in this case to be as contended for. It was held merely that the allegations of the complaint and assertions in the brief, based on information, were not a sufficient impeachment of the record of the industrial com-

mission. The court clearly intimated that the record could be impeached by proper allegations and proof, for it said (p. 592):

"It would be indeed surprising if a party had no opportunity to show, if such be the fact, that a document in the record purporting to be the findings, and award of the commission was in fact not the act of the commission."

In the case at bar there is an issue of fact joined in the pleadings, as to whether the action is the action of the board, and there is no presumption of regularity or validity that precludes a full trial of that issue.

The above holding is not to be construed as requiring any particular formalities with reference to a notice of any meeting that might have been called for the purpose of deciding the controversy in question, for obviously any notice that gave the members of the commission a reasonable opportunity to be present would be sufficient. Nor is it to be construed as requiring the vote to be manifested and recorded in some formal way other than that which might be indicated by the signing and filing of a decision, opinion, and order, or by dissenting therefrom. Inasmuch as the validity of the order of the board of railroad commissioners is yet to be determined as a finality upon such proof as may be offered in a trial on the merits, further discussion of the matter at this time will serve no useful purpose.

This brings us to a consideration of the orders appealed from. They grant injunctions *pendente lite*. Whether or not they should have been issued depends upon the balance of inconvenience entailed thereby as it appeared to the court at the time.

"If," says High on Injunctions, "upon the application for a preliminary injunction, it is doubtful what may be ascertained to be the real facts of the case upon final hearing and if the rights of the plaintiff will suffer no serious injury if not enforced until such hearing, the court may, in the exercise of a sound discretion, refuse the injunction *in limine*. If, however, the danger threatened is of such a nature that it cannot easily be remedied in case of a refusal of relief, and the answer does not deny that the act charged is contemplated, a preliminary injunction should be allowed unless the equities of the bill are satisfactorily refuted by the defendant." 1 High, Inj. 4th ed. p. 17, § 11.

The balance of inconvenience is determined by the consideration as

to whether, pending the litigation, greater danger of irreparable injury to one or the other of the parties is likely to result from granting, than from withholding, the relief.

In the instant cases the defendants threatened to apply a surcharge, and thus to change the relations with their patrons to the apparent prejudice of the latter. These facts, coupled with the doubt as to the validity of the surcharge, apparently led the trial judges, in the first instance, to determine the balance of inconvenience in favor of the plaintiffs; that, is, it seems to have been thought that the defendants were apt to suffer less inconvenience from granting the temporary relief than would the plaintiffs from withholding it. But almost immediately thereafter this determination was in effect reversed by the action of the trial judges in superseding their previous order by an order which would allow the defendants to collect the surcharge, supplying a bond conditioned for repayment in case of the reversal on appeal of the preliminary injunctional order. In this the trial judges exercised a discretionary power. Comp. Laws 1913, § 7832.

In view of the uncertainty as to the ultimate outcome of this litigation following a trial on the merits, we cannot say that the trial court, in either instance, abused its discretion. It is a well-known rule that where a temporary injunction is issued at the instance of plaintiffs, unless a bond is executed, those prejudiced thereby may not, in the absence of malice, recover damages even though it be subsequently determined that the injunction should not have issued. Such damages are regarded as *damnum absque injuria*. Minneapolis, St. P. & S. Ste. M. R. Co. v. Washburn Lignite Coal Co. 40 N. D. 69, 12 A.L.R. 744, 168 N. W. 684, affirmed in 254 U. S. 370, 65 L. ed. 310, 41 Sup. Ct. Rep. 140 (decided December 20, 1920); Russell v. Farley, 105 U. S. 433, 26 L. ed. 1063; Meyers v. Block, 120 U. S. 206, 211, 30 L. ed. 642, 643, 7 Sup. Ct. Rep. 525; Arkadelphia Mill. Co. v. St. Louis Southwestern R. Co. 249 U. S. 134, 145, 63 L. ed. 517, 524, P.U.R. 1919C, 710, 39 Sup. Ct. Rep. 237; Scheck v. Kelly, 95 Fed. 941; Hayden v. Keith, 32 Minn. 277, 278, 20 N. W. 195; St. Louis v. St. Louis Gaslight Co. 82 Mo. 349, 355; Lawton v. Green, 64 N. Y. 326; Palmer v. Foley, 71 N. Y. 106, 108. In recognition of this rule, our statute requires a written undertaking on the part of the plaintiff in certain instances. Comp. Laws 1913, § 7532.

To have continued the temporary injunctions in these cases without security for damages being furnished by the plaintiffs might have thrown the entire burden incident to the uncertainty of the outcome upon the defendants; and they are in nowise chargeable with the alleged irregularities in the proceedings complained of. These considerations doubtless led the trial court to change the status of the parties through the supersedeas.

The power to require security for damages includes the power to require it as a condition of withholding injunction where the balance of inconvenience seems to warrant it. Kerr, on Injunctions, 5th ed. p. 28, says:

"In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. . . .

The court may often, by imposing terms on the one party, as a condition of *either granting or withholding the injunction,* secure the other party from damage in the event of his proving ultimately to have the legal right. . . . The defendant may be required to do such acts, or execute such works, or to remove any works, or otherwise deal with the same as the court shall direct; or to enter into an undertaking to refrain from doing in the meantime the acts complained of, or to abide by an order the court may make as to damages or otherwise, in the event of the legal right being determined in favor of the plaintiff."

It has been held proper in an action to prevent an infringement of a copyright to permit the defendant to continue to sell the work, in the meantime undertaking to account according to the result of the action. Wilkins v. Aikin, 17 Ves. Jr. 422, 34 Eng. Reprint, 163, 11 Revised Rep. 118.

The difficulty in preserving the rights of parties litigant pending a final decree, without visiting upon either more or less inconvenience, if not in fact some irreparable loss, is one that is frequently encountered in cases involving rates for public service. This difficulty, it appears, has generally found its most satisfactory solution in orders permitting the higher rates to be collected pending suit, particularly where their collection does not involve a real change of status, and

where there is a reasonable showing that such rates may be required as a fair measure of compensation. Consolidated Gas Co. v. Mayer, 146 Fed. 150; Buffalo Gas Co. v. Buffalo, 156 Fed. 370; Re Arkansas R. Rates, 163 Fed. 141, 168 Fed. 720; Spring Valley Water Co. v. San Francisco, 165 Fed. 657. In permitting the rates to be collected pending suit, however, the rights of the patrons are safeguarded by requiring the excess to be impounded, as will be seen in the foregoing cases. See also State ex rel. Lemke v. Chicago & N. W. R. Co. 46 N. D. 313, 179 N. W. 378. The action of the district judges in these cases created exactly this status for the parties to the litigation. In effect there is no injunction against the surcharges, and every reason that actuated the district judges in superseding the injunctions pending this appeal pertains with reference to the continuance of the status so created until the end of litigation. If the district judges did not abuse their discretion in superseding the injunctions, this court should not reverse the effect of their action by reinstating them.

We deem it proper to observe in this connection that while the right to recover and collect the surcharges is dependent upon the order of the board of railroad commissioners, it does not appear in the records of that board, in so far as presented here, that the surcharge was not required to secure a fair return. Neither does the record here disclose any individual opinion of the members of the board to the contrary. This is a matter that may be entitled to no weight in deciding the merits of this controversy, but which may nevertheless properly be considered in reviewing the discretionary act of the district judges in permitting the surcharges to be collected during the pendency of this litigation to date.

A proper application of the foregoing principles to the cases at bar seems to us to require the continuance of the present status of the litigation pending the trial on the merits, rather than an affirmance of the order granting the injunction *pendente lite;* for to affirm would involve a breach of the supersedeas bond and give the plaintiffs an opportunity to reclaim the surcharges thus far collected, although it may later appear that the orders granting the surcharges were valid. The orders should be affirmed, however, unless the defendants are willing to give the requisite security for continuing the present status.

The judgment of this court is that the defendants be required to

furnish adequate bonds, the amount and sufficiency thereof to be determined by the district court, conditioned for the repayment of all surcharges heretofore and hereafter collected under the purported orders of the board of railroad commissioners, to continue until such time as the present suits are terminated upon their merits, in default of which the temporary injunctions shall be continued in force, and in all things affirmed for purposes of liability on the supersedeas bond. It is so ordered.

ROBINSON, Ch. J., and CHRISTIANSON and BRONSON, JJ., concur.

GRACE, J. (concurring in the result). As I view these cases, they are not presented here at this time upon their merits. Hence, all the discussion contained in the opinion, which refers to the merits, is *obiter dicta.*

I concur only in the result, but express no opinion upon the merits.

ADOLPH KLIMPEL, Respondent, v. JOHN HAYKO, Appellant.

(182 N. W. 535.)

Agriculture — on foreclosure of thresher's lien evidence held to sustain a finding of substantial performance.

Plaintiff brought an action to foreclose a thresher's lien. The defendant, by way of defense and counterclaim, asserted that the threshing was done in such negligent manner that a great deal of the grain was wasted. He therefore asked that plaintiff be allowed nothing for doing the threshing, and that he be allowed judgment for the damages he had sustained. The trial court rendered judgment in favor of the plaintiff, as demanded in his complaint. The defendant appealed and demanded a trial *de novo* in the supreme court. On such appeal he asserts that the plaintiff is not entitled to recover anything, and that defendant is entitled to recover damages against the plaintiff. He further asserts that the thresher's lien statement was defective; and that defendant was entitled to have the questions relating to the performance and breach of the contract submitted to a jury. It is *held:*

1. That the findings of the trial court that plaintiff substantially performed his contract, and that he did not breach the same, are in accord with the weight of the evidence.

Appeal and error — supreme court will not consider questions not determinative of appeal.

2. That for reasons stated in the opinion, the questions raised by appellant relating to the validity of the thresher's lien and the right to a trial by jury are not involved on, or determinative of, this appeal.

Opinion filed March 26, 1921.

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

Affirmed.

F. B. Lambert, for appellant.

"One who relies upon an express contract, must prove a substantial compliance with the contract before he can recover at all." Ball v. Dolan (S. D.) 101 N. W. 719.

Where defects pervade the whole building, the contractor cannot recover on the theory that he has substantially complied with the contract. Braseth v. First State Bank, 12 N. D. 486, 98 N. W. 79.

The work must be beneficial before it can be held that a contract has been substantially performed. 9 Cyc. 602.

One cannot sue on a contract and recover in that action on a quantum meruit. Werre v. N. W. T. Co. (S. D.) 131 N. W. 721.

John J. Coyle, for respondent.

Where the contract is substantially performed, the party may recover as for a complete performance, less such damages as the other party may have been put to by reason of the matters not performed. 13 C. J. 691; Columbian Lyceum Bureau v. Sherman, 19 N. D. 58; Omaha v. City, 158 Fed. 922; Omaha Water Co. v. Omaha, 156 Fed. 926; 13 C. J. 691 note (a); St. Charles v. Stocky, 154 Fed. 772.

CHRISTIANSON, J. The plaintiff instituted this action to recover $541.75 and interest from September 16, 1919, which he alleges is due to him for threshing defendant's grain in the fall of 1919; and also to foreclose a thresher's lien filed by the plaintiff. The complaint alleges that the defendant is the owner of certain real property situated in Ward county in this state, and that he farmed the same in the year 1919; that during that year the defendant employed the plaintiff

as the owner of a threshing machine to thresh the 1919 crop on said premises for the agreed price of $25 per hour; that the plaintiff threshed said crops under said contract, being engaged therein for a period of twenty-one and three quarters hours; that the value of such services is the sum of $543.75, of which only $2 has been paid; that there is due and owing to the plaintiff the sum of $541.75, with interest thereon from September 16, 1919; that on September 29, 1919, the plaintiff executed and caused to be filed with the register of deeds of Ward county a certain thresher's lien, a copy of which is attached to and made a part of the complaint; that no action or proceeding at law or in equity has been had for the collection or enforcement of said lien.

The first paragraph of the answer interposed by the defendant denies "each and every allegation, matter, and thing in said complaint contained, save and except as thereinafter admitted, qualified, or explained." The next two paragraphs admit that the defendant "is the owner and in possession of the premises described in the plaintiff's complaint, and that he farmed the said land during the season of 1919;" and "that in the year of 1919, the defendant employed the plaintiff to thresh the 1919 crop on the said premises for him at the agreed price of $25 per hour, and that the plaintiff threshed the said crops for this defendant and was engaged therein for the period of twenty-one and three quarters hours." The answer denies that the services were of the value stated in the complaint. The answer further avers, as an affirmative defense and by way of counterclaim, that the threshing was performed under an agreement by the terms of which it was provided that the plaintiff should do a good job of threshing, and thresh the grain in such manner that none of it would go into the straw pile; that the plaintiff failed to comply with this agreement, and did in fact thresh the grain in such careless manner that a large amount of grain went into the straw pile to the damage of the defendant in the sum of $700. The plaintiff interposed a reply denying all the new matter set forth in the answer. The cause was tried upon the issues framed by these pleadings. The trial was to the court, without a jury. The trial court made findings in favor of the plaintiff upon all the issues, and judgment was rendered in his favor for the sum demanded in the complaint and costs, and for the foreclosure of his lien.

Defendant has appealed from the judgment, and demands a trial anew in this court.

There is a direct conflict in the evidence as to whether the plaintiff did or did not do a good job of threshing. There is evidence that the grain was injured by rust; that a considerable portion of the Marquis wheat was lying on the ground, the shocks having been thrown down and the bundles trampled upon by the defendant's cattle, and that as a result the bundles were wet and in bad condition for threshing. There is also evidence that the threshing was interrupted or delayed on account of rain, and that it was resumed before the grain was in good condition for threshing, because defendant insisted upon it. There is also evidence (and this evidence is not contradicted) that, very shortly before this threshing was done, the plaintiff put in a complete set of new teeth in the cylinder of the separator; and that in performing this threshing the machine was equipped and operated in such manner that it would knock the grain out of the heads if there was any possible way to do it. The defendant testified that during the course of the threshing he called plaintiff's attention to the fact that a great deal of grain was going into the straw, and that during such conversation the plaintiff stated that if the defendant would permit him to go on and complete the threshing that he would come back later and thresh the straw pile over again. The plaintiff denied that any such conversation took place, or that he made any such promise. The evidence further shows that the defendant sent a check for $300 to the plaintiff, which he offered as payment in full of the threshing bill; but that the plaintiff refused to accept the same and returned it to the defendant. The defendant testified that he took three loads of straw from the various straw piles and caused it to be threshed over again, and it is contended that the grain realized upon threshing such straw should be taken as a basis for computing the amount of grain contained in the various straw piles.

In rendering his decision the trial court filed the following written statement or memorandum decision: "There is no question as to the agreement of $25 per hour; that is admitted on both sides. The whole issue is as to the defense set up by the defendant, that threshing was improperly done and that consequently there was no substantial performance of the contract. I think there is no question but what

part of this grain was down at the time the threshing was done, and that a portion of it at least was in poor condition to be threshed at that time, and under the conditions existing at that time it was impossible to perform the best possible work. I am also of the opinion that these facts were communicated to the defendant, and that he advised the threshers to go ahead with the work and complete the job.

"There is evidence undisputed that some of this straw was re-threshed, and there was procured 4½ bushels of durum wheat, 4 bushels of marquis wheat, and 4 bushels of oats out of the straw so threshed, that is, for each load that was threshed, there being only three loads threshed.

"The evidence is somewhat conflicting as to where this straw was taken from the stack, but it is not at all probable that defendant took the straw from any place except where he anticipated he would find grain, and it is difficult to conceive that you would find this grain in all portions of the stack, considering the nature of the crops on a general average in that vicinity and the yield per acre shown by both parties as to the grain threshed on the land, so it seems to me that it is reasonable to conclude that this grain was taken from either beneath or near the blower.

"There is no manner or method of anyone saying as to how much grain there was left in the stack, and to conclude that the balance of the straw would average the amount as the loads threshed would be purely guesswork, as no one can say how much these stacks can thresh, nor is there any evidence as to the number of loads in the stack which is definitely certain, and I am unable to see how any damages could be allowed defendant on the proof submitted.

"I am also of the opinion that under the conditions the testimony shows the grain to be in at the time of the threshing, that there is not sufficient evidence to warrant any conclusion except that the contract was substantially performed, or that there was any more grain went through the machine than ordinarily occurs in threshing under similar conditions."

The conclusions of the trial court were not based upon the cold paper record of the testimony, but upon the words as they fell from the lips of the parties and witnesses. There were, inclusive of the parties, seven witnesses who testified in favor of the plaintiff and

six witnesses who testified in favor of the defendant. The trial court, who not only heard the testimony, but saw the witnesses and observed their demeanor while testifying, manifestly, was in a far better position to pass upon the credibility of the witnesses than are the members of this court. While, it is true, the statute says that this court shall try the case anew, that does not mean that we must wholly disregard the views of the trial court upon matters where, by the very nature of things, its judgment is more likely to be correct than any we could possibly form.

The question of the purpose and effect of the statute authorizing a trial anew of equity cases in this court was considered by this court in Christianson v. Farmers' Warehouse Asso. 5 N. D. 438, 32 L.R.A. 730, 67 N. W. 300. This court said: "The statute says that this court 'shall try the case anew.' This language, it is apparent, was not used with exact accuracy. The case is not tried anew. There is no new evidence or any evidence adduced in this court. The case must be decided upon a record already prepared by a judicial tribunal. This court simply reviews the record, and the practical and necessary result of such review is to correct the errors, if any, either of the law or fact, into which the court below may have fallen. . . . The judgment of the trial court upon the facts must still have weight and influence with this court, especially when based upon the testimony of witnesses who appeared in person before that court. It may be that the strong presumption of correctness under which findings of fact came to this court under the former practice does not follow them with equal force under this statute, and it may be that to some extent the appellant is relieved from the burden of pointing out the specific error of the trial court. This would seem to follow from the fact that the particular errors of the trial court, if any there be, need not be discussed by this court, or pointed out to the court below, as was imperatively necessary in all cases where a reversal sent the case back for trial *de novo*. Nevertheless, the independent judgment of this court upon the record presented, irrespective of what the trial court may or may not have held, is based only upon a review of the record made in the trial court; and, when the judgment of the trial court was based upon error in law or fact, the judgment of this court necessarily reviews and corrects such error. But the manner in which this result is accomplished

is radically different under the two systems of practice. The statute under discussion requires us to render final judgment, and thus, by its mandate, forever terminate the particular litigation. This is such an innovation upon a practice that is familiar to and well settled in the professional mind, that it is received with distrust. But to the legislative mind it doubtless suggested a means of terminating litigation in a manner that should at once possess the strongest probability of absolute justice with the least expenditure of time and money. It avoids the delay and expense of a second trial, and the risk of further errors that might necessitate a second appeal." 5 N. D. 443–445.

The provisions of the statute referred to in the foregoing opinion still remain in force (§ 7846, Comp. Laws 1913), and the language used by this court in Christianson v. Farmers' Warehouse Asso. supra, is as applicable to-day as it was when that decision was rendered. We do not, however, rest our decision upon the findings of the trial court. We have carefully read and considered the evidence in this case. After so doing, we are of the opinion that the conclusions drawn by the trial court in the memorandum decision are the only ones which can reasonably be drawn from the evidence. The testimony of the defendant to the effect that the plaintiff promised that he would thresh the straw stacks over again, if he (defendant) permitted him to go ahead and finish the threshing at that time, is, to say the least, highly improbable. The defendant did not have the straw stacks threshed, and at the trial some months later he testified that he had permitted his stock to eat all of the straw stacks including, of course, whatever grain they contained. Considering the evidence as a whole, we are of the opinion that it is established by a fair preponderance that plaintiff substantially performed his agreement with the defendant; and that the alleged breach of contract asserted by the defendant is not established.

A question is raised by the appellant as to the validity of the thresher's lien. It is contended that the lien does not state all the facts required by the statute. The question is raised for the first time in this court. The record clearly shows that no such question was raised upon the trial of the action. The lien was received in evidence without objection, and, from the beginning to the end of the trial, not even a suggestion was made to the effect that the lien statement was defective. In its memorandum decision the trial court said: "The

whole issue is as to the defense set up by the defendant, that the threshing was improperly done and that consequently there was no substantial performance of the contract." This statement of the trial court is fully sustained by the record, and is the only conclusion that can reasonably be reached by any party reading the record in the case. It further appears that, in any event, the question of the validity of the lien is at this time largely, if not wholly, moot. Upon the oral argument it was stated that the grain, upon which a lien was claimed, had been retained by the defendant and sold by him. And on this appeal, the defendant furnished a supersedeas bond conditioned not as upon an appeal from the judgment in foreclosure, but as upon an appeal from a judgment for money only. It also appears that no costs were taxed by the sheriff on his return or in the judgment for seizing the grain under a warrant of foreclosure; and a statutory attorney's fee for the foreclosure of a mortgage was not taxed as costs in this action. In these circumstances, we deem it wholly unnecessary, if not improper, to express any opinion as to the validity of the lien. See 3 C. J. 718 et seq.; Ugland v. Farmers & M. State Bank, 23 N. D. 536, 137 N. W. 572; Ravicz v. Nickells, 9 N. D. 536, 84 N. W. 353; DeLaney v. Western Stock Co. 19 N. D. 630, 633, 125 N. W. 499; La Duke v. Malin, 45 N. D. 349, 177 N. W. 673; Northern Shoe Co. v. Cecka, 22 N. D. 635, 135 N. W. 177; Mahon v. Fansett, 17 N. D. 104, 115 N. W. 79; Steen v. Neva, 37 N. D. 40, 163 N. W. 272; Baxter Sash & Door Co. v. Ornes, 130 Minn. 214, 153 N. W. 594. See also 4 C. J. 575. Even though the question of the validity of the lien was before us, it would not affect the judgment rendered for the amount of the threshing bill, and that should in any event be affirmed. Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152; Smith v. Gill, 37 Minn. 455, 35 N. W. 178; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564. See also Bidwell v. Astor Mut. Ins. Co. 16 N. Y. 263, 267. The statute (Comp. Laws 1913, § 7846) under which appellant asks us to try the case anew provides that this court "shall finally dispose of the same whenever justice can be done without a new trial."

Appellant contends that if there was in fact and in law no thresher's lien, he would have been entitled to a trial by jury; and that he was in effect denied such trial. Plaintiff's cause of action, with all of its merits and defects, was stated in the complaint. If there was no lien,

that fact appeared on the face of the complaint, for the lien was attached to and specifically made a part of the complaint. The defendant did not demand a trial by jury. He, at least, impliedly consented that all issues be tried to the court. Not only was that his attitude upon the trial, but it continued after the trial. Thus, the record certified to this court shows that at the time the costs were retaxed, defendant's counsel objected to the taxation of a term fee for the February, 1920, term, and in support of such objection filed an affidavit containing the following statement: "Affiant further states that the above-entitled action is one for the foreclosure of thresher's lien and is a court case; that the February, 1920, term of the above court was a jury term of this court, and no court cases were tried or set for trial at the said term of court; that the defendant had at no time made any demand for a jury trial on his counterclaim herein, and that the said case was therefore not properly on the calendar at the said February, 1920, term of this court." Not even a suggestion was made, until the question was raised in this court, that the defendant was entitled, or desired, to have any issue submitted to a jury. Even though he was entitled to have the questions relating to the performance or breach of the contract submitted to a jury, he cannot be heard to say so at this time. Delany v. Western Stock Co. 19 N. D. 630, 633, 125 N. W. 499; Gray v. Hickey, 94 Wash. 370, 162 Pac. 566. See also Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N. W. 527.

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

ROBINSON, Ch. J., and BIRDZELL, J., concur.

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

WALTER GRAHAM and Philip Rau, Doing Business under the Name of GRAHAM & RAU, Appellants, v. ALLIANCE HAIL ASSOCIATION OF NORTH DAKOTA, a Corporation, Respondent.

(182 N. W. 463.)

Insurance — receiving notice of loss by mail held a waiver of notice by registered mail.

1. In an action on a hail insurance policy, where the insurance company, without objection, received by mail notices of loss and requests for adjustment, it is *held* that it waived the provision of the by-laws requiring such notice to be sent by registered mail.

Insurance — notices required by by-laws of hail insurance society held given under evidence.

2. The evidence is examined, and it is *held* that there is substantial evidence that the notices required by the by-laws were given.

Contract — jurisdiction of court held not ousted by conditions precedent in hail policy making adjustment by association final.

3. Where a policy issued by a mutual hail insurance association expressly declares certain provisions of the by-laws relating to adjustment to be conditions precedent, the by-laws, construed in accordance with the expressed intention, do not serve to oust the courts of jurisdiction.

Opinion filed March 29, 1921.

Appeal from District Court of Burleigh County, *Nuessle*, J.

Reversed and remanded.

Peter A. Winter, for appellants.

"In civil cases if hearsay is admitted without objection, the evidence is competent although any adherent weakness still attaches." 16 Cyc. 1194.

Testimony elicited by respondent's own attorney, and let in without objection, became good evidence upon which the jury could base their verdict. 4 C. J. 703; 80 Pac. 856; 131 Pac. 69; 94 Pac. 553; State ex rel. Race v. Cranney, 71 Pac. 50.

C. S. Buck, for respondent.

The courts have uniformly held that where the contract of insurance, either fire or hail, provides a manner for determining the actual loss, such a provision is binding on both of the parties and must be

complied with. Montgomery v. Whitbeck, 12 N. D. 385; Peterson v. Independent Order of Forresters, 166 N. W. 951; Mutual Ins. Co. v. Atty. Gen. 131 N. W. 1119.

GRACE, J. This action is one to recover loss, sustained by hail, to a certain crop of barley grown upon certain land described in the policy.

It was tried to the court and jury. The jury returned a verdict in plaintiff's favor in the sum of $400. The defendant moved for judgment, notwithstanding the verdict, and the court made an order granting the motion. Judgment was entered upon that order for a dismissal of the action and for the sum of $43.40 costs, in favor of defendant, and from the judgment plaintiffs appeal.

The complaint, in substance, charged that the loss upon given dates was in the amount of $400. The defendant, in its answer, admits its corporate existence, the issuing of the policy, the giving of a premium note in the sum of $64.40, the proper description of the land, and the amount and kind of crops thereon insured. It admits that it received written notice of the loss. It also pleads a general denial.

It further claims, in its answer, that Malin, one of its adjusters, upon notice of the claim of loss, on the 19th and 21st day of August, 1918, examined the same, and claimed that no loss had been suffered by reason of hail on those dates, and that plaintiff did not accept the adjustment, and further alleges that the plaintiff did not immediately notify the secretary of the defendant's corporation by letter, calling for a readjustment, as provided in § 2 of article 14 of the by-laws of the defendant company, which is claimed to be a part of the policy of insurance.

The defendant further alleges to have suffered damages, by way of expense, in the sum of $20, claiming that the loss was less than 5 per cent, and in that event, by the terms of the by-laws, no loss is allowable.

The following facts are established by substantial evidence: It is admitted that the notice of plaintiffs' loss, by reason of the two hail storms, was by them sent to and received by the defendant. Upon receiving this notice, defendant sent one Malin, as its adjuster, to adjust the loss. He did not do so. He refused to allow plaintiffs anything for the loss, claiming that it was less than 5 per cent, and that, therefore, the company was not liable.

That defendant refused to pay any loss. This appears from exhibit "6," which is entitled "Adjustment of Loss," which was signed by the adjuster, but to which the plaintiffs refused assent.

After the hail storms had destroyed the plaintiffs' crop, Rau called up the agent of defendant, Arnold Gerberding, and notified him of the loss. Gerberding's name appears on the application as the agent of defendant. He made a proof of loss, which plaintiff signed and which was sent by registered letter to the company and received by it.

On cross-examination, Rau testified that he sent a second notice; that he was not satisfied—meaning, with the alleged adjustment. He said that he notified the agent (Gerberding)—talked with him just the same as the first time. He testified that he, the plaintiff, did not send the notice, but that, upon being asked if he knew whether the banker (Gerberding) sent in the notice, or not, he answered, "Yes," testifying further that the banker told him so.

There was no objection to this testimony, on the ground that it was hearsay, and, in these circumstances, it was proper for the jury to consider the same. Defendant was again notified of plaintiffs' dissatisfaction of and resistance to the adjustment, as attempted to be made by the defendant, by Mr. Winter, plaintiff's attorney.

We think the evidence is sufficient, in this regard, so that the jury could find therefrom that a second notice was sent by plaintiffs to defendant, notifying it of plaintiffs' dissatisfaction in regard to the adjustment and of their refusal to accept the same.

As a matter of fact, there was no adjustment of any kind or character, but a simple refusal of the defendant to allow any loss whatever. The clause in the by-laws relied upon by defendant to evade liability provides: "An adjuster will be sent within a reasonable time after the loss is reported, and his decision shall be binding upon the insured, unless objected to by the looser, when, the looser shall *immediately* notify the secretary by registered letter, calling for a readjustment, and *this readjustment shall be final, subject only to review and change by the board of directors.* In case of readjustment the expense shall be borne equally by the insured and the association, insured's share of expense to be levied as part of his assessment."

That provision, as we view it, is absolutely void, in so far as it seeks and pretends to oust the courts of jurisdiction of any action which

might be brought by the insured to recover for the loss sustained, if by inadvertence he failed to send the second notice in the time and manner required by the by-laws.

In addition to this, the provision is absolutely unreasonable. It constitutes nothing but a trap into which the unwary may fall. The defendant having received due notice of the loss, it was its duty to adjust and allow all the loss plaintiffs had sustained, not exceeding the amount of the policy. But it refused to allow any loss, and plaintiffs refused to receive any such alleged adjustment, which was in fact no adjustment. Plaintiffs then had an absolute right, in law, to proceed in court to compel defendant to pay the amount of such loss. And any provision in the by-laws which denies him such right is, as above stated, wholly invalid. 1 Bailey, Jur. § 54; Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313, 13 C. J. 455, 456, and cases cited in notes 8 and 9.

Insurance companies, or other corporations, partnerships, or persons, cannot, in this manner, oust the court of its jurisdiction of this subject-matter, clearly within its jurisdiction, nor thus prevent plaintiffs from their right of having due process of law.

There is not only sufficient evidence, substantial in character, to support the verdict, which plaintiffs received in regard to the amount of damage which they sustained, to their barley crop, by reason of the two hail storms, but it is also of a very conclusive character. Each of four witnesses gave positive testimony that plaintiffs' loss on the barley field was total.

It is needless to set forth such testimony. Sufficient to say, it is very abundant and substantial. The insurance policy provided for $8 per acre, in the event of a total loss of the barley by hail. There were 50 acres of barley. The total amount of damages recovered by plaintiffs was $400.

Upon argument of the case before this court, attorney for the defendant and respondent advanced the point that this court had no jurisdiction, for the alleged reason that the appeal was not taken within six months after the entry of the judgment. There is no merit in this contention.

It is true that the notice of entry of judgment served by defendant upon plaintiffs was dated the 23d day of June, 1920, and that the notice of appeal recites an appeal from a judgment entered in this

case on the 23d day of June, 1920, and that the undertaking describes the judgment entered at that date, but both the notice and the undertaking describe accurately the judgment appealed from as one in the above-entitled action; and the undertaking describes it as a judgment of $41.40, which was the amount thereof, except for the fee for entry of judgment, which was $2, making a total of $43.40.

The judgment was not entered on the 23d day of June, 1920, but on the 1st day of July of that year, as appears from the judgment duly authenticated by the signature and seal of Charles Fisher, clerk of the district court of Burleigh county, and it is a part of the judgment roll. The most that can be said is that, in the notice of appeal and undertaking, a clerical error was made in inserting the wrong date of the entry of judgment. This was, no doubt, caused by the erroneous date of entry contained in the notice of entry served by defendant upon plaintiff.

The notice of appeal and undertaking were dated the 21st day of October, 1920, and due and personal service thereof, and the specifications of error, were by defendant admitted on the 20th day of December, 1920, and they were filed with the clerk of court December 30, 1920. The appeal, therefore, was wholly perfected within the six months' period of time allowed for an appeal from a judgment. Hence, the appeal was properly here, and this court had full jurisdiction to hear the same.

The jurisdiction of this court is not attacked otherwise than as above stated. It is clear, from what has been said, that the order of the trial court, vacating the judgment in favor of plaintiff, and ordering judgment in favor of defendant, and for a dismissal of the action, and for costs, was without any authority in law and wholly void. It is apparent that the judgment entered thereon in favor of defendant must be reversed.

The judgment appealed from is reversed, and the case is remanded to the trial court, and it is directed to enter an order reinstating the judgment in favor of plaintiff.

The appellants are entitled to their costs and disbursements on appeal.

ROBINSON, Ch. J., concurs.

BRONSON, J (concurring specially). I concur in the reversal of the

judgment. After the respective hail storms of August 19 and 21, 1918, two notices of loss were sent to the defendant. These notices were typewritten, signed by the plaintiff, upon stationery of the defendant's agent, and as the testimony sufficiently shows were sent to the defendant by its agent, the cashier of the bank at Regan. It does not appear in the evidence that these notices were sent by registered letter as required in the by-laws. After an adjuster of the defendant had visited the farm and made an offer of adjustment to the plaintiffs, which was refused, one of the plaintiffs testified that he requested this banker agent of the defendant to again send notice to the company; that this banker agent told him that he did send such notice. The reception of any notice for readjustment, by mail or otherwise, was denied by the defendant.

The by-law involved provides that when an adjustment is objected to by the insured, he shall immediately notify the secretary by registered letter calling for readjustment, and this readjustment shall be final, subject only to review and change by the board of directors. Later, the attorney for the plaintiffs notified the defendant that he had for collection loss under the policy upon which a 100 per cent loss was claimed, and stated that he was writing to the defendant in the hope that it might desire to pay such loss before any action was started. In response to this letter the defendant explained the situation to the attorney, and advised him that they would send another man to see if he could effect an adjustment. A second adjuster was sent out, but the record does not disclose what efforts, if any, were made toward another adjustment. The question was submitted to the jury as to whether the defendant received this notice asking for a readjustment.

It accordingly sufficiently appears in the evidence that the defendant received the first two notices, not by registered letter so far as the record discloses; without objection; that it acted upon such notices and sent an adjuster. That the adjustment proposed by its adjuster was refused by the plaintiff. The jury, through its findings, determined that a second notice for readjustment was sent to the defendant. It further appears, without dispute, that after the defendants were notified by plaintiffs' attorney it did send another adjuster. The record does not disclose that any adjustment was made or tendered by the defendant through this second adjuster.

I am of the opinion that the defendant waived the requirement of the by-laws that these notices must be sent by registered letter through recognition of the first notices and the manner in which the same were permitted to be sent through its agent, the banker, and that it is not in a position to require strict compliance with its by-laws for another adjustment or review thereof by the directors, not having tendered or made a readjustment after notice thereof was given. See Schultz v. Des Moines Mut. Hail & Cyclone Ins. Asso. 35 S. D. 627, 153 N. W. 884, Ann. Cas. 1917D, 78; Stockwell v. German Mut. Ins. Asso. 37 S. D. 348, 158 N. W. 450; see note in 15 L.R.A.(N.S.) 1075.

4 Cooley, Briefs on Ins. 36, 58–60. The provisions of the by-law cited do not serve, by its terms, to oust the jurisdiction of the courts. It operates as a condition precedent for the adjustment of claims between the parties. There is no provision in the by-laws inhibiting final resort to the courts. 4 Cooley, Briefs on Ins. 3680, 3681; note in 15 L.R.A.(N.S.) 1056.

CHRISTIANSON, J., concurs.

BIRDZELL, J. (specially concurring). I concur in the disposition made of this case in the principal opinion, but on grounds that are not fully stated in any of the opinions prepared by my associates. The case seems to call for an interpretation of the by-laws relating to adjustments. The by-laws read as follows:

"Article XIV. Losses and Adjustments.

"Sec. 1. Losses must be reported at once to the secretary by registered letter, and no loss will be allowed unless so reported within five days, and unless such loss shall be at least 5 per cent, and if the insured in his notice of loss calls for an adjustment, and it is found that the association is not liable for any loss according to the policy, the assured shall pay all expenses of the adjustment, and no loss to grain after it is cut will be allowed, or after September 15th of each year. All losses payable December 1st, except that where cash premium has been paid the loss shall be paid by September 15th. (When grain is ripe at time of loss, cut at once, as adjustment can be made after grain is cut.)

"Sec. 2. An adjuster will be sent within a reasonable time after the loss is reported, and his decision shall be binding upon the assured unless objected to by the loser, when the loser shall immediately notify the secretary by registered letter calling for a readjustment, and this readjustment shall be final, subject only to review and change by the board of directors. In case of readjustment the expense shall be borne equally by the insured and the association, the insured's share of expense to be levied as a part of his assessment."

The foregoing by-laws are referred to on the face of the policy, where it is expressly stated that they are made *conditions precedent*. The pertinent inquiry is: What are the conditions precedent to be gathered from the sections above quoted? It is certain that they do not provide for arbitration. They provide for notices to the insurance company, and in response to these notices the company agrees to send an adjuster, and as a last step the board of directors may review a readjustment. The adjuster is, of course, the adjuster of the company, and no matter how strong the language used in describing the binding force of the adjustment, it remains only the determination of one of the parties interested, and is in no sense an arbitration. Before there can be an arbitration, there must be someone capable of sitting in judgment on the matter in dispute between the parties, for "arbitration implies the exercise of the judicial function. An arbitrator ought to be free from prejudice and able to maintain a fair attitude of mind toward the subject of controversy. It would be a travesty upon the ideas of judicial propriety or of judicial work for a man to be an arbitrator to settle the amount of his own liability. It is contrary to natural right and fundamental principles of the common law for one to judge his own cause." Rugg, Ch. J., in Brocklehurst & P. Co. v. Marsch, 225 Mass. 3–8, 113 N. E. 646. See also White v. Middlesex R. Co. 135 Mass. 216; 3 Williston, Contr. § 1724. In my opinion this principle is as applicable in the adjustment of losses in mutual insurance companies as it is in stock companies, for the interest of the individual claimant is, for purposes of his claim, adverse to that of every other member.

In so far as the by-laws may be construed as an agreement by the insured to accept as final the adjustment of the board of directors, they

would be clearly void. Comp. Laws 1913, § 5927; Huber v. St. Joseph's Hospital, 11 Idaho, 631, 83 Pac. 768.

Since the by-laws really contain no provision for arbitration at all, or at most contain provisions that cannot be given effect as *arbitration* clauses, we must revert to the original question: What condition or conditions precedent *are* prescribed? It would seem that the only conditions which the insured is bound to comply with are those requiring the giving of the notices of loss and of subsequent dissatisfaction with the adjustment. The giving of the first notice was admitted, so the only controverted fact regarding notice relates to the notice of the insured's dissatisfaction with the adjustment. There is ample evidence in the record from which the jury could find that this notice was given. This is referred to in the other opinions, and need not be repeated here, although it may be observed that the claim was promptly put in the hands of the plaintiffs' attorney, who wrote less than a month after the attempted adjustment, advising the defendant of his intention to sue.

Being of the opinion that the by-laws have only the effect of requiring notices to be given, and that there is ample evidence of a reasonable compliance on the part of the insured, I concur in ordering judgment on the verdict.

THE GARDNER HOTEL COMPANY, a Corporation, Appellant, v. MARIAH HAGAMAN, Hattie Hagaman, et al., Respondents.

(182 N. W. 685.)

Partnership — realty purchased with partnership funds and for partnership purposes treated in equity as "personalty."

1. Real estate purchased with partnership funds and for partnership purposes in equity is treated as personalty, and is subject to disposition for partnership purposes.

Partnership — in conveyance to partners legal title remains in grantees in trust for partnership purposes.

2. In a conveyance to partners, the legal title remains in the grantees named in the deed, who hold the same as trustees for partnership purposes.

Partnership — on decease of partner holding legal title in partnership real estate, title passes to heirs, and surviving partner succeeds to partnership property in trust for liquidation.

3. Upon the decease of a partner holding a legal title in partnership real estate, his legal title passes to his heirs. The surviving partner succeeds to the partnership property in trust for purposes of liquidation, and is authorized to make a contract for the sale of, and to sell, the partnership real estate for purposes of liquidation.

Partnership — deed by surviving partner for purposes of liquidation under trust passes full equitable title to grantee; transfer of bare legal title from minor heir of deceased father may be compelled.

4. A deed of partnership real estate made by the surviving partner for purposes of liquidation pursuant to the trust passes the full equitable title to the grantee, and the district court has jurisdiction to compel the transfer of the bare legal title to such grantee from a minor heir of the deceased partner.

NOTE.—The general doctrine as drawn from the cases, with regard to the ownership of real estate by a partnership, is that where real estate is purchased with partnership funds, for partnership purposes, and is appropriated to partnership uses, or taken and treated as partnership property, equity regards it as partnership property no matter in whose name the legal title is taken; and it is regarded as personal estate so far as it is required for the payment of the debts and liabilities of the partnership, as will be found by an examination of the cases collated in notes in 27 L.R.A. 449, and 37 L.R.A.(N.S.) 889, as to when real estate will be considered partnership property.

On rights of partners in partnership real property, see note in 48 Am. St. Rep. 62.

On right of partners to convey partnership real property, see note in 26 L. ed. U. S. 635.

Partnership — requirement of inventory and bond by surviving partner held not to affect interest of survivor, and are not conditions precedent to his rights.

5. The provisions of § 8711, Comp. Laws 1913, which require the making of an inventory and the filing of a bond by the surviving partner in the county court does not affect the nature and extent of the interest possessed by the surviving partner or partnership property, and are not conditions precedent for the exercise of such right by the surviving partner.

Opinion filed April 4, 1921.

Questions of law certified in an action to determine adverse claims in District Court, Cass County, *Cole,* J.

Determination of trial court modified and affirmed.

Spalding & Shure, for appellant.

Without the furnishing of the inventory of the partnership property and the giving of the bond required by § 8711, the surviving partner is disqualified to sell and convey the partnership realty. McFadden Case, 40 N. D. 415; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510 and other authorities.

Partnership realty is converted into personalty only for the purpose and to the extent necessary to liquidate partnership affairs, that the ultimate right to the surplus of the proceeds is in the heirs, and that this leaves the legal title to real property in the heirs. Tillinghast v. Champlin, supra, is a leading authority on the subject and treats it exhaustively. Woodword-Holmes Co. v. Rudd (Minn.) 27 L.R.A. 340 and notes 348; Barton v. Lovejoy, 56 Minn. 360, 45 Am. St. Rep. 482; Hanson v. Metcalf, 46 Minn. 25, 40 N. W. 441.

Fowler & Green, for respondents.

The provisions of § 8711, Comp. Laws, are for the protection of beneficiaries, and are intended to see that the surviving partner performs his trust, but are not limitations upon his power to sell or convey. Havens & Co. v. Harris (Ind.) 39 N. E. 49; Courtland v. Bank (Ind.) 40 N. E. 1070; Bank v. Peru (Ind.) 27 N. E. 486.

The entire fee-simple title vested in the surviving partner. Comp. Laws 1913, §§ 5261, 6389, 6394, 6425; Woodward v. Nudd, 27 L.R.A. 340, and editorial notes to that case, 59 N. W. 1010.

Robinson, Ch. J. This is a suit to quiet title to certain property

adjacent to the Gardner Hotel in Fargo, North Dakota. It was the partnership property of C. A. Bowers and J. H. Bowers. In 1917 the latter died leaving a widow, Catherine, and daughter, Helen, ten years old. The surviving partner contracted to sell the property to the Gardner Hotel Company, and on receipt of $40,000 made to the hotel company a conveyance whereby for himself, individually and as surviving partner, he conveyed the property to the Gardner Hotel Company. Catherine Bowers joined in the deed. The surviving partner did not make to the administrator of the deceased an inventory of the partnership property, with a bond, as provided by statute. Comp. Laws, § 8771. The court gave judgment sustaining the deed as a valid conveyance and quieting title under the deed. And to remove all doubts on the matter the case has been duly certified to this court pursuant to the statute.

The question is on the power of the surviving partner to sell and convey the partnership property regardless of any inventory or bond, and on the jurisdiction of the court to quiet title. Doubtless the heirs of the deceased might have obtained an order from the probate court requiring the filing of an inventory and bond, but the surviving partner is so amply responsible and so far above suspicion that the filing of a bond and inventory would be an idle act. It would have made expense for no purpose. And such filing is not made a condition precedent to the power to sell and convey the partnership property of the vesting of title in the surviving partner.

By statute, "on the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purpose of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property." Comp. Laws, § 6425. The term "other personal property" indicates that the partnership assets are classed as personal property. The statute contemplates no procedure in probate. It vests in the surviving partner the title to all partnership property in trust for the purpose of liquidation,—for the purpose of selling the property, paying the debts, winding up and closing the affairs of the partnership. When that is done the interest of the deceased in the distribution of the partnership assets passes to

the heirs the same as "other personal property." On the plain words of the statute it is entirely clear that the surviving partner had full power to sell and convey the property in question. His deed gives a good title to his own and to the partnership estate. There is no good reason for reviewing the numerous authorities cited by counsel.

Objection is made to the jurisdiction of the court on the ground that this is a probate matter, in which the Constitution gives to the county court exclusive original jurisdiction. Constitution, § 111. The answer is that the liquidation of a partnership estate is not a probate matter. County courts have no jurisdiction of actions to quiet title, and in such actions the district courts have original jurisdiction. The district court, with few exceptions, has original jurisdiction of all cases, both at law and in equity. Const. § 103. In the district court actions to quiet title and determine adverse claims to real estate are a common and every-day occurrence. By statute any person having an estate or interest in land may maintain an action to quiet his title against any person claiming an adverse estate or interest. Comp. Laws, § 8441.

"To quiet title to real property or to remove an existing cloud and to prevent a threatened cloud is an ancient and well-established head of equity cognizance."

"The broad grounds on which equity intervenes to remove a cloud on title are the prevention of litigation, the protection of the true title and possession, and because it is the real interest of both parties and promotive of right and justice that the precise state of the title should be known if all are acting bona fide." 32 Cyc. 1305, 1306.

Accordingly this court does hold and determine:

(1) That the district court has power to quiet title in the plaintiff as to any possible estate Helen Bowers may have in such real estate.

(2) That the deed made by the surviving partner of Bowers Brothers and the widow of J. H. Bowers conveyed the entire legal and equitable title to the property.

BRONSON, J. (concurring). The certification in this case is, in effect, a certification of the entire record for purposes of reviewing the two determinative legal questions involved. The facts are not disputed. The trial court has made its findings and order for judgment

quieting title in the plaintiff. The two ultimate legal questions involved are:

First: Did the deed of the surviving partner convey upon this record a good title to the plaintiff?

Second: Did the court have jurisdiction in an action to determine adverse claims over the title of the minor heir of the deceased partner?

I am of the opinion that these questions are to be answered in the affirmative, and that the order of the trial court directing title to be quieted in the plaintiff is correct. It is fundamental that, upon the conveyance of real estate purchased with partnership funds and for partnership purposes, such real estate, in equity, is treated as personalty, and is subject, so treated, to disposition for partnership purposes. Betts v. Letcher, 1 S. D. 182, 46 N. W. 193; Brady v. Kreuger, 8 S. D. 464, 59 Am. St. Rep. 771, 66 N. W. 1083; 30 Cyc. 430. In such case it is immaterial whether the title be taken in the name of all of the partners, one of the partners, or even in the name of a person who is not a partner. Notes in 37 L.R.A.(N.S.) 892, and 27 L.R.A. 463; Johnson v. Hogan, 158 Mich. 655, 37 L.R.A.(N.S.) 889, 123 N. W. 891; Hardin v. Hardin, 26 S. D. 601, 129 N. W. 112; Devlin, Deeds, 3d ed. §§ 208, 209. The status of the realty in any event remains the same for partnership purposes. Owing to the distinction, however, that exists concerning the application of principles of law to realty and personalty, the legal title in such partnership real estate resides and remains in the grantee or grantees named in the deed. Note in 27 L.R.A. 462; Spaulding Mfg. Co. v. Godbold, 92 Ark. 63, 29 L.R.A.(N.S.) 282, 135 Am. St. Rep. 168, 121 S. W. 1063, 19 Ann. Cas. 947; Tidd v. Rines, 26 Minn. 201, 2 N. W. 497; Gille v. Hunt, 35 Minn. 357, 29 N. W. 2; note in 48 Am. St. Rep. 65; Riffel v. Ozark Land & Lumber Co. 81 Mo. App. 177. In such case the grantee in such deed holds such legal title as a trustee for partnership purposes. In law a partnership has no status as a person, the title to real estate therefore must rest in some person who holds the same as trustee for the partnership purposes. 30 Cyc. 430. In the instant case the legal title to the realty involved was in C. A. Bowers and J. H. Bowers. Upon the decease of the latter, his legal title devolved upon his widow, Catherine, and his minor child, Helen. This real estate was bought with partnership funds and for partner-

ship purposes. In equity, it was partnership real estate; it was personalty for purposes of the partnership. Upon the decease of one of the partners, the surviving partner succeeded to the partnership property, including this real estate, in trust for purposes of liquidation. Comp. Laws 1913, § 6425. As such trustee, the surviving partner had the same power for purposes of liquidation as the partners would have had as a partnership. The surviving partner accordingly was authorized as such trustee to make a contract for the sale of the real estate, and to sell it for purposes of liquidation. Comp. Laws 1913, § 6423, note in Ann. Cas. 1912D, 1222; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. 440; Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Burchinell v. Koon, 8 Colo. App. 463, 46 Pac. 932. In this case, for purposes of liquidation, it does appear that the surviving partner did enter into a contract to sell this real estate, and did sell and convey the same, the widow of the deceased partner joining in the conveyance to the plaintiff. This deed clearly conveyed the legal title of the surviving partners and of the widow of the deceased partner. It clearly conveyed the full equitable title in such real estate for the reason that the record discloses that such conveyance was made for purposes of liquidation, pursuant to a holding of such real estate for partnership purposes. The decease of the one partner, however, did not operate to transfer the legal title from the deceased partner to the surviving partner. For instance, if, upon the decease of the partner named, there had existed no partnership debts and no reasons for liquidation of this partnership real estate, such real estate, being freed of its partnership status, would have been held by the surviving partner with the heirs of the deceased partner, as tenants in common. In such case manifestly a conveyance of such real estate by surviving partner would have served to have conveyed no title other than that possessed by himself. In the instant case the minor heir of the deceased partner held merely the legal title of the real estate in trust for partnership purposes. Note in Ann. Cas. 1912D, 1213; Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 27 L.R.A. 340, 49 Am. St. Rep. 503, 59 N. W. 1010. Upon conveyance made by the surviving partner, for purposes of liquidation, pursuant to his trust, the grantee received full equitable title, and was entitled to receive and have the full legal title.

Section 8711, Comp. Laws 1913, requires the surviving partner to make an inventory of the partnership property, and to give a good and sufficient bond, approved by the county court to the personal representative of the deceased. Section 8717, Comp. Laws 1913, provides that the interest of the deceased in an unsettled partnership must be included in the inventory, and appraised upon the statement rendered by the surviving partner like other property. Sec. 8711, Comp. Laws 1913, was enacted in its present form in 1897, chap. 111, § 23. Prior to that time the surviving partner was not required by statute to give such bond. Section 6425, Comp. Laws 1913, has existed as the law since territorial days. See § 1442, Civ. Code 1877. This statute (§ 6425) specifically grants the right of disposition of partnership property for partnership purposes. The statutes, §§ 8711 and 8717, quoted do not pretend, by their terms, to affect the nature and extent of the interest possessed by the surviving partner in partnership property. Such statutes, by their terms, do not prescribe conditions precedent for the exercise of the right of a surviving partner to execute his trust powers. Courtland Forging Co. v. First Nat. Bank, 141 Ind. 518, 40 N. E. 1070; Havens & G. Co. v. Harris, 140 Ind. 387, 39 N. E. 49; First Nat. Bank v. Parsons, 128 Ind. 147, 27 N. E. 486; McIntosh v. Zaring, 150 Ind. 301, 49 N. E. 164; Silver v. Eakins, 55 Mont. 210, 175 Pac. 876; Caughan v. Brown, 76 Miss. 496, 25 So. 155. Such statutes differ from certain statutes in other states requiring such bond to be given, and, upon failure, for administration of a partnership estate by the probate court. See Cook v. Lewis, 36 Me. 340; Shattuck v. Chandler, 40 Kan. 516, 10 Am. St. Rep. 227, 20 Pac. 225; State ex rel. Richardson v. Withrow, 141 Mo. 69, 41 S. W. 980. Accordingly the deed of the surviving partner was not made void through the failure to make and file the inventory and bond required.

Section 8768, Comp. Laws 1913, providing for the sale of a partnership interest, belonging to any estate, through probate court proceedings, refers necessarily to the interest of the estate in the ultimate distribution of the partnership assets pursuant to § 6425, Comp. Laws 1913. It manifestly has no reference to the sale of a specific partnership interest in specific partnership real estate or personalty. See Brown v. Farnham, 55 Minn. 27, 35, 56 N. W. 352.

The district court had jurisdiction to order the transfer of this

bare legal title from the minor heir to the owner and holder of the full beneficial and equitable title. Bates, Partn. § 294. Upon this record the estate of the deceased partner had no interest in this real estate, its sole interest being in the ultimate distribution of the partnership assets. Comp. Laws 1913, § 6425. Determination of the party who was the holder of this bare legal title and of her rights and duties as such holder were within the jurisdiction of the district court. Barton v. Lovejoy, 56 Minn. 380, 45 Am. St. Rep. 482, 57 N. W. 935; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510.

The foregoing determinations dispose of the questions certified, and the cause is remanded for further proceedings, consonant with this opinion, without costs to either party.

BIRDZELL, J., concurs.

CHRISTIANSON, J. (concurring): There is no room for argument as to the status of partnership property; or as to the duty and authority of the surviving partner with respect thereto. Our statute provides: "On the death of a partner the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property." Comp. Laws 1913, § 6425. The rule announced by this statute is merely a statutory declaration of the common law, see Re Auerbach, 23 Utah, 529, 65 Pac. 490; Shanks v. Klein, 104 U. S. 18, 26 L. ed. 635; 20 R. C. L. p. 993 et seq. The real question in controversy here is whether the surviving partner has any authority to dispose of the partnership property until he has qualified by making an inventory and giving a bond as prescribed by § 8711, Comp. Laws 1913, which section reads: "In case of the death of one partner, the surviving partner or partners must make a full, true, and complete inventory of the property of the copartnership, with a list of all the liabilities thereof at the time of the death of the deceased partner, and deliver the same to the executor or administrator of such deceased partner, or to the county court, and must give a good and sufficient bond to such executor or administrator to be approved by the county court. Such surviving partner or part-

ners have the right to continue in possession of the effects of the partnership, pay its debts out of the same, and settle its business; but must proceed thereto without delay, and account with the executor or administrator, and pay over such balance as may from time to time be payable to him in the right of the decedent. Upon the application of the administrator or executor, the county court may, whenever it appears necessary after citation, order such surviving partner to deliver an inventory or render an account, and may enforce the order as in other cases."

I have found this question one of some difficulty. But a careful consideration thereof has led me to the conclusion that the making of the inventory and the giving of the bond is not a condition precedent to the exercise by the surviving partner of those powers which the law requires him to exercise with respect to the partnership property. The surviving partner is not appointed by any court to take charge of or exercise control over the partnership property. He is appointed for that purpose by operation of law. The appointment becomes effective immediately upon the death of the other partner. It will take some time before either an executor or an administrator can be appointed. Until such appointment is made there is no way in which the surviving partner can either furnish an inventory or give a bond to the executor or administrator; yet there can be no question but that in the meantime the surviving partner is charged with the duty to carry out the trust which the law has placed upon him with respect to the partnership property. It will be noted that our laws make no provision for the appointment of some one else to take charge of the partnership property in event the surviving partner fails to give a bond or make an inventory; nor does it provide that in event of such failure or refusal the executor or administrator may take charge of such property. The statute provides "that the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation." Comp. Laws 1913, § 6425. The duty of making proper disposition of the property and applying the proceeds to the proper uses in liquidation of the partnership affairs rests upon the surviving partner, and not upon the executor or administrator. Of course the condition of the partnership affairs is of importance—it might be of vital importance—to those who are en-

titled to share in the distribution of the dead partner's estate. And in order that the estate may be intelligently administered, it is highly desirable that the administrator or executor be informed of the assets and liabilities of the partnership. "The interest of the decedent in an unsettled partnership must be included in the inventory and appraised upon the statement rendered by the surviving partner or otherwise, like other property." Comp. Laws 1913, § 8717. If the surviving partner fails to deliver an inventory or render an account, the county court may order him to do so, upon the application of the administrator or executor; and such order may be enforced as in other cases. Section 8711, supra. The surviving partner is, also, required to give a bond to the executor or administrator. This bond is for the protection of those entitled to share in and receive the interest of the deceased (after all partnership debts and obligations have been discharged), in the ultimate distribution of the partnership assets. It would seem that the power vested in the county court to require the surviving partner to do what § 8711, supra, says he should do, implies, rather than denies, that the surviving partner has authority to perform the duties which the law imposes upon him with respect to such property, even though he has not made the inventory or furnished the bond required by that section. It seems, also, that the power vested in the administrator or executor to apply for an order to compel, and the power on the part of the county court to require, the surviving partner to do the acts which this section requires him to do, furnishes adequate protection against any misconduct on the part of the surviving partner. And inasmuch as the surviving partner sells and conveys only the equitable title, a court of equity would not compel the heirs of the deceased partner to convey the legal title where it would be unjust or inequitable to do so,—as, for instance, where the sale was made for an inadequate consideration or was in other ways unfair. 20 R. C. L. 995.

GRACE, J. (dissenting). I dissent from the result arrived at in the majority opinion.

WILLIAM A. SANDRY, Respondent, v. BROOKLYN SCHOOL DISTRICT NO. 78 OF WILLIAMS COUNTY, NORTH DAKOTA, a Municipal Corporation, Appellant.

(15 A.L.R. 719, 182 N. W. 689.)

Schools and school districts — driver held not entitled to recover under contract for transportation of pupils, where school closed.

In an action brought by a driver to recover the compensation stipulated in a driver's contract with a school district for the transportation of teachers and pupils to and from a consolidated school, where the plaintiff seeks to recover upon his own contract and upon claims arising under three similar contracts of which he is assignee, for a period of thirteen weeks during which the school was closed on account of an epidemic of influenza, it is *held:*

1. The driver's contract is not so far analogous to a teacher's contract that the driver, upon showing readiness to perform during a period when the school is closed on account of an epidemic, may recover the agreed compensation as upon a full performance.

Schools and school districts — contract for transportation of teachers and pupils is discharged by impossibility of performance.

2. The driver's contract is a contract for personal service, and if, without fault of either party, its performance is rendered practically impossible for a period of time, the party thus unable to give or receive performance during the period is not liable for breach of the contract.

Contracts — service actually rendered held not "substantial performance" of entire contract.

3. Where compensation is agreed upon as an equivalent for full performance, and where there is excusable nonperformance for an extended period, the service actually rendered under the contract is not a substantial performance of the entire contract such as will enable the plaintiff to recover the full compensation.

Opinion filed April 4, 1921.

Appeal from an order of the District Court of Williams County, *Leighton,* J.

Reversed and dismissed.

NOTE.—That there seems to be a distinction made between the rights of a teacher to compensation under his contract and that of one employed to transport pupils while the school is closed on account of epidemic, will be seen by an examination of cases collated in note in 15 A.L.R. 725, on interruption of school session as affecting contract other than with teacher.

Wm. G. Owens, for appellant.

School district officers have and may exercise only such powers as are expressly or impliedly granted by statute. Kretchmer v. School Dist. 34 N. D. 412; Pronovost v. School Directors, 36 N. D. 288.

"It is immaterial what the parties denominate a contract, as its terms and conditions, rather than the name applied to it, must govern." State ex rel. v. Hall, 25 N. D. 85.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from writing alone, if possible, subject, however, to other provisions of this article." Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803; Comp. Laws, §§ 5599, 5901–5908.

Geo. A. Gilmore, for respondent.

Contracts must be interpreted to give effect to the mutual intention of the parties. Comp. Laws, § 5896.

The intention of the parties must be ascertained from writing alone, if possible. Comp. Laws, § 5899.

"No deduction can be made from a teacher's salary when a school is closed during the term on account of epidemics, destruction of building, or holidays, unless special provision is made in the contract which will allow such deduction to be made. Libby v. Douglas, 175 Mass. 128; McKay v. Barnett (Utah) 50 L.R.A. 371.

All that is necessary to earn and collect such wages is that the person hold himself in readiness at all times to perform his part of the contract. Randolph v. Sanders (Tex.) 54 S. W. 621; Dewey v. Union School Dist. 5 N. W. 646; 35 Cyc. 1098, 1099.

Birdzell, J. This is an appeal from a judgment for $775 in an action upon four transportation contracts. The plaintiff brought action in his own right upon one of these contracts and as an assignee of three others. The contracts cover the conveyance of the teachers and pupils of the defendant school district for the period of nine months beginning September 23, 1918. They prescribe the routes of travel and the compensation of each driver. The school was open two weeks in September and October of 1918, when it was closed on account of the epidemic of influenza, and did not reopen until January 3, 1919. The drivers performed under the contracts during the time the school was open, and were paid for their services according to the

contract rate. They were not paid, however, for the period during which the school was closed. This action is brought to recover the stipulated compensation as upon a performance of the contract during the thirteen weeks the school was closed.

The trial court instructed the jury that under the written contract the drivers would be entitled to recover the full amount stipulated as compensation, if they at all times held themselves in readiness to perform, and were prevented from performing by the action of the board in closing the school; that it would make no difference in this respect whether the school was closed by the order of the board of health on account of the epidemic; that the method of avoiding liability upon the contract for this period would have been by cancelation, and that the contract had not been canceled. The court also left it to the jury to determine whether or not, under the evidence, the parties themselves had placed a contrary interpretation upon the contract. This instruction was occasioned by evidence to the effect that at other times when the school had been closed for short periods the board, in compensating the drivers, deducted for the days the school was so closed. There was evidence that the drivers had received compensation on this basis without objection, but it was explained that the matter was of too trivial a nature to warrant any attention being paid to it.

In our opinion this case turns upon the legal interpretation of the contracts. They are substantially the same, being upon printed forms. The following may be taken typical:

"Witnesseth.

"1. That the said William A. Sandry is to provide the safe conveyance of such teachers and pupils of the school in Brooklyn school district as live on or near the route designated in this contract, to the school in said school district by 8:45 A. M. of every school day, and back to their homes or places designated herein, being ready to leave the school by 4:10 P. M. of every school day, during the school term of (9) nine months commencing on the 23d day of September, 1918.

"2. That the said William A. Sandry shall furnish all necessary blankets and robes during inclement weather for the sufficient comfort of the persons conveyed.

"3. That it shall be the duty of the said William A. Sandry to pre-

serve orderly conduct on the part of the children while in his care to or from the school, and to report all misconduct on the part of such children to the teacher or principal.

"4. That the said William A. Sandry hereby expressly agrees to exercise great care in performing his duties as driver, and in preventing accidents to the children while in his care.

"5. That in case the said William A. Sandry should wish to engage any other person than himself to act as driver, written permission must first be granted by the president of the school board, but the said William A. Sandry is still responsible to the school board for the performance of this agreement.

"6. That the route of travel to and from the school shall be as follows (unless a deviation from this route shall be granted by the president of the school board): For route No. two (2) between December 1st and April 1st to arrive at schoolhouse at 9:20 A. M. and be ready to leave the schoolhouse at 3:45 P. M.

"7. That for these services truly rendered the school board of said Brooklyn school district, Williams county, North Dakota, agrees to pay the said William A. Sandry at the expiration of each school month of service the sum of sixty-five and no/100 ($65) dollars:

"Provided, That the school board reserves the right to withhold such part of the month's wages as in their opinion is equitable in case the services do not meet this agreement.

"Provided, Further, That the school board may at any time cancel this contract in case of the nonperformance of this agreement by the driver, or in case of the discontinuance of school."

The plaintiff regards this as a contract for personal services, and claims for each the same legal effect as the ordinary teacher's contract. The authorities relied upon to support recovery are principally those dealing with teachers' contracts where recovery has been allowed in circumstances similar to those presented here, on the ground that the teacher's services are engaged for a stipulated term. It is held that where, during a portion of the term when the school was closed without the fault of the teacher, he or she necessarily remained in an attitude of readiness to perform, the compensation had, in effect, been earned.

Under the statutes of this state, teacher's contracts are required to

contain an express stipulation against compensation in case the school be discontinued for the reasons stated in the statute. Comp. Laws 1913, § 1189. The statute has not assigned prevalence of an epidemic as a reason for discontinuance. From the fact that the law requires this provision to be inserted, it may fairly be implied that the district agrees to pay the teacher the stipulated salary during the term of the engagement if the schools are temporarily closed for some such cause as an epidemic. Other statutory provisions require the teacher to be compensated for legal holidays (Comp. Laws 1913, § 1382) and for periods of attendance upon teachers' institutes. Comp. Laws 1913, § 1385. A teacher is required to have certain qualifications, and to have a certificate as a prerequisite to a right to receive compensation. Comp. Laws 1913, § 1382. The teacher is generally a person coming from outside the district, and the duties involved in the performance of the contract effectually preclude other employment for the period. In these circumstances it is a fair inference that the parties intend that the teacher should be compensated during periods of temporary suspension while he or she is held in a position of readiness to perform. Libby v. Douglas, 175 Mass. 128, 55 N. E. 808; Dewey v. Union School Dist. 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646; Carthage v. Gray, 10 Ind. App. 428, 37 N. E. 1059; Randolph v. Sanders, 22 Tex. Civ. App. 331, 54 S. W. 621; McKay v. Barnett, 21 Utah, 239, 50 L.R.A. 371, 60 Pac. 1100; 3 Williston, Contr. § 1958; 3 Page, Contr. § 1376.

Is the driver's contract of the same character? We are of the opinion that it is not. No specific qualifications are prescribed. The contract is generally entered into between the district and some person within it. Its performance involves little or no preliminary preparation. The driver is not required to furnish the bus or other vehicle of conveyance. The performance does not require the whole time of the driver, and, while personal performance is contracted for, it clearly appears from the evidence in this case that the school district readily paid for the service, though the work of driving was delegated to suit the convenience of the driver. The dissimilarity of these two contracts gives rise to widely different points of view in construing them for the purpose of ascertaining the true intention of the parties. We think it quite clear that the holding in readiness required of the driver during

a period of prolonged suspension involves so little inconvenience on his part that it cannot reasonably be said to be the intention of the contracting parties that he should be paid for such period. In these circumstances the ordinary rule applicable to personal-service contracts applies. They are subject to the implied condition, on the one side, of ability to perform, and, on the other, of ability to receive performance. Either party is excused if, without his fault, performance for a period becomes impossible. Such impossibility may arise upon the sickness or death of either party, or the inability of one party to give or receive performance, occasioned by the prevalence of an epidemic. Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77.

The stipulated compensation is the equivalent of full performance, and where nonperformance for an extended period is excused on either side by reason of practical impossibility, the service actually rendered is not such a substantial performance as to entitle the plaintiff to full compensation. See Littell v. Webster County, 152 Iowa, 206, 131 N. W. 691, 132 N. W. 426; 2 Williston, Contr. § 838. See also Lacy v. Getman, 119 N. Y. 109, 6 L.R.A. 728, 16 Am. St. Rep. 80. As we view the contracts in the instant case, the situation of the parties is in no respect different from what it would have been had they, in January, 1919, upon the reopening of the school, rescinded the contracts made in September and entered into new agreements for the remainder of the term. In that event we do not think it could have been reasonably claimed by the plaintiff that the actual conveyance of the pupils for two weeks under these contracts was a substantial performance for fourteen or fifteen weeks.

Being of the opinion that the contracts in question must be construed as above indicated, it follows that the plaintiff may not recover the agreed compensation for the period during which the school was closed. The judgment is reversed and the action dismissed.

ROBINSON, Ch. J., and CHRISTIANSON, J., concur.

ROBINSON, Ch. J. (concurring). This is an appeal from a judgment on a verdict for $775. The plaintiff is one of four persons who made similar contracts to drive a school conveyance for the school year

commencing in September, 1918, to convey teachers and children to and from the school. The plaintiff sues for a breach of his contract and for a breach of the other contracts, claiming under an assignment from the other drivers. The complaint avers that the plaintiff and the other drivers were duly paid for their services during the first two weeks, from September 23 to October 5, 1918, and from January 6 to the end of the school year. But for an interim of thirteen weeks, from October 7, 1918, to January 3, 1919, during which time the school was closed and no services rendered, the defendant refused to pay. The complaint does not aver that during said thirteen weeks the drivers performed any services or did a single thing under the contract.

As the record shows beyond dispute, the drivers were fully paid for all services actually rendered, but that they were not paid for the thirteen school weeks during which the school was closed and during which time they claimed to have stood in watchful waiting for the school to open. As shown by exhibit A and the oral testimony, the school was closed pursuant to an order promulgated by the county board of health. The order directs the school board to close all schools and places of public amusement, saying: "This is not only a board of health measure, but it is the substance of a telegram received by the state board of health from the Surgeon-General at Washington. It is therefore a war measure." The court will take judicial notice of the fact that the flu was a very infectious and fatal disease, and that it prevailed to an alarming extent over the state and the nation. The order was fully authorized; the closing of the school was compulsory. Indeed, it was an act of God, and the drivers had due notice of the closing as well as the opening of the school. There was no occasion for any watchful waiting. When the time came for the opening of the school, the drivers were notified and resumed the work and accepted their monthly pay without protest. As the answer avers, during the thirteen weeks the drivers rendered no services whatever. The school was closed by order of the county board of health and because of the prevalence of the flu. The defendant school district was not responsible for the epidemic or the closing of the school. "No man is responsible for that which no man can control." Comp. Laws, § 7260. And, except as given by statute, the school board had no power to contract for the conveying of pupils to and from the school. The board had no power to

contract for the payment of drivers at a time when the school was closed and when the drivers could not possibly render any services. Hence, on the undisputed facts, the action should be dismissed.

But the court instructed the jury that if the drivers at all times held themselves in readiness to perform under the terms of the contract, and were prevented from so doing by reason of the action of the board, then they were entitled to recover the full amount claimed in the complaint, $775, and that it made no difference that the school was closed by order of the board of health on account of the epidemic. The instruction is clearly erroneous. The closing of the school was by compulsion and by act of God, and not by any action of the defendant. If the closing was rightful, as it was, the defendant was not liable. If the closing was wrongful, then the district would be liable for a breach of its contract. However, the instruction was clearly erroneous. It holds, in effect, that when a contracting party holds himself in readiness to perform a contract, it is the same as performance. Under such a rule a person contracting to build a house for $5,000 might recover the contract price without doing a thing, if he only held himself in readiness to perform and the other party forbade performance. But such is not the law. If the board wrongfully closed the school, if it wrongfully prevented the drivers from performing the services under the contract, then the statute gives the measure of damages thus: "The amount that will compensate the party aggrieved for all loss proximately caused by the breach of the contract, or which in the ordinary course of things would be liable to result therefrom." Comp. Laws, § 7146. And "damages must in all cases be reasonable." § 7183. In this case plaintiff sues to recover for the breach of contract, and not for services actually rendered. He sues to recover on each of the four contracts for thirteen weeks of idleness. He wants pay for fifty-two weeks or one year of doing nothing. Of course that is not reasonable; it is grossly unconscionable. It seems like an attempt to hold up and rob the defendant of $775 under the forms and technicalities of the law. If the defendant had legal capacity to hire the drivers to do nothing for thirteen weeks and then wrongfully discharged them and prevented the performance of the contract, the liability is the same as that of a farmer hiring help to work on a farm and discharging the help before the time. In all such cases the liability is

for the proximate loss. If a man is hired to serve for a year, and is at once recalled or discharged without cause, his proximate loss is the difference between the contract wage and that which he may earn during the year. He cannot pass a year in idleness and collect for it the same as if he had been faithfully at work.

Then there is another rule that a contract must be binding on both parties, or neither is bound. If the drivers were not legally bound to serve, and if they had a right to jump the contract, the school district had the same right, and under the statute, if constitutional, any person, whether singly or in concert, may at any time terminate any relation of employment or labor, and even persuade others to do the same. Laws 1919, chap. 171. And it is generally known that as a rule employees no longer consider contracts for services or labor binding on them. They feel free to jump and disregard any such contract. In this case the question is: Did the school board make with the drivers a valid and binding contract to pay them for services during the thirteen weeks of idleness whether school kept or not, and to pay each of them for thirteen weeks of idleness and doing nothing while the school was closed without any fault of the school board? As I maintain, the school board made no such contract. It had no legal right to make it. The school was closed by compulsion, and no man is responsible for that which no man can control. Comp. Laws, § 7260. The drivers have had pay for their work, and this court should not aid them in holding up the school district. Hence the action should be dismissed.

BRONSON, J. (dissenting). The opinion of Justice Birdzell treats the contract involved as continuing for the period prescribed. Right of recovery is denied because of the failure of the drivers to substantially perform the contract during the period of time that the school was closed.

In this case no breach of the contract on the part of the drivers is presumed or proved. Confessedly, the failure of the drivers to perform the contract services during the time that the school was closed is due entirely to the action of the defendant. Whatever breach of the contract occurred was the act of the defendant. The case was tried and submitted upon the theory that the drivers were entitled to recover, if at all, the contract rate stipulated. In this regard, I am of the

opinion that there was error. The record justified the finding of the jury that the closing of the school operated as a breach of the drivers' contracts. Upon the holding in the opinion referred to, the breach of the contract by the defendant leaves the drivers without right to recover the detriment, if any, they have suffered. In this case the statutory rule permitting the party aggrieved to recover the detriment proximately caused through the breach of a contract should be applied. Comp. Laws 1913, § 7146. See McLean v. News Pub. Co. 21 N. D. 89, 129 N. W. 93, and note in 6 L.R.A.(N.S.) 94. The judgment should be reversed and a new trial ordered.

GRACE, J. (dissenting). The contract in this case was for a definite period of time. All the rights and duties of the parties were definitely specified in the contract. The evidence warranted the finding by the jury that the plaintiffs had substantially performed their contracts. There was no evidence to show to the contrary, nor was there any evidence showing that the defendants were entitled to any reduction from the full contract price, by reason of having performed other services for other persons.

If there were any such evidence, the jury passed upon the same and disposed of it by its verdict in favor of plaintiff. Their verdict is conclusive in this case on this court, on the questions submitted to them, which were all questions of fact in the case.

It seems to us the construction placed by the majority upon the contract is such that a contract of this character would be of little force or effect; and, as it appears to my mind, the court, by its decision, permits the impairment of the contract.

It was by no means a one-sided contract. The amount which the plaintiffs were paid for performing the service specified in the contract was a very small sum per month. We may draw on our common knowledge of the surrounding condition to demonstrate this.

For instance, the time of commencement of the performance of the contract was in the latter part of September, 1918. From that time until about the first part of November, at least, any of the plaintiffs could have taken his team, and, in all probability, for the use of the team and himself, gotten $10 per day threshing.

Then, commencing again on, say, the first day of April, 1919, and

from that time onward until the time specified as the time of the termination of the contract, certainly a man and team would be worth several times as much per day in the field at farm work, as they would receive for performing the service specified in the contract.

Again, it may be taken into consideration that, during the winter months, plowing back and forth through the snow, and delivering the children, and redelivering them at their homes, would be no easy task.

In the state of the evidence at the close of the case, the trial court could do nothing less than give the instruction which it gave. We do not regard the analysis of the majority opinion, which endeavors to distinguish between this contract and a teacher's contract, as at all correct. Both are contracts, and the principles of law which are applicable to written contracts, which are wholly complete, are as applicable to one as to the other, in the circumstances of this case.

GLADSTONE EQUITY EXCHANGE COMPANY, a Corporation, et al., Respondents, v. WALKER D. HINES, Director General of Railroads, and M. L. Day, Appellants.

(182 N. W. 763.)

Railroads — fire from cook car held not from "operation of railway" within exemption from liability.

1. A lease of a portion of a railroad company's right of way provided that the lessee assumed all risk of loss, damage, or destruction to buildings or contents, or to any other property brought upon or in proximity to the leased premises, without regard to whether such loss was occasioned by fire or sparks from locomotive engines, or other causes incident to or arising from the movement of locomotives, trains, or cars, misplaced switches, or in any respect from the operation of a railway; or whether it was the result of negligence or misconduct of any person in the service of the company. *Held*, that the clause "operation of a railway" in such lease does not apply to, and relieve the company from liability for, a loss occasioned by a fire set by sparks emitted from a stovepipe in a cook car, which the company placed close to the elevator of the lessee, and permitted to so remain after the station agent had been notified of the danger to which such elevator was being subjected.

Railroads — trial — instruction on negligence causing fire correct as to Director General, but inapplicable to codefendant station agent.

2. An instruction relating to negligence in the manner of operating the stove in the cook car is, for reasons stated in the opinion, *held* to be erroneous as to the defendant Day, but correct as to the defendant Director General of Railroads.

Sufficiency of instructions and findings.

3. Other assignments of error relating to instructions, and the sufficiency of the findings of the jury considered and *held* to be without merit.

Opinion filed April 4, 1921. Rehearing denied May 10, 1921.

From a judgment of the District Court of Stark County, *Lembke,* J., defendants appeal.

Affirmed as to the defendant Director General of Railroads and reversed as to the defendant Day.

Young, Conmy, & Young and *W. F. Burnett,* for appellants.

When plaintiff claims damages because of fire, which he avers was started through the neglect to observe due care and caution, his proofs must establish the charge. Mere speculation or possibility will not do. Sheldon v. R. Co. 29 Barb. 228; Longabaugh v. R. Co. 9 Nev. 296; Smith v. R. Co. 27 Mo. 295; Omaha R. Co. v. Ckarj (Neb.) 23 L.R.A. 509, 53 N. W. 970; Kilpatrick v. Richardson (Neb.) 56 N. W. 481; White v. R. Co. 1 S. D. 330, 9 L.R.A. 824, 47 N. W. 146; Sheldon v. R. Co. 29 Barb. 228.

A lease by a railroad company of a portion of its right of way upon condition that the company shall not be liable for any damage to buildings or personal property situated thereon by reason of fire originating from its locomotives, or for damage resulting from the negligence of its employees or agent, is not void, as against public policy. 62 Fed. 904; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 70 Fed. 201, affirmed in 175 U. S. 91; Blitch v. Central of Georgia R. Co. (Ga.) 50 S. E. 945; Kennedy v. Iowa State Ins. Co. (Iowa) 91 N. W. 831.

The company would not be liable for damages to property placed upon its right of way by strangers without its permission, caused by fires occasioned by its want of ordinary care. James Quirk Mill. Co. v. Minneapolis & St. P. L. R. Co. (Minn.) 107 N. W. 742; Wabash R. Co. v. Ordelheide (Mo.) 72 S. W. 684.

T. F. Murtha, for respondents.

It was for the jury to pass upon the case of the fire and the question of negligence. McFarland v. Sayen (Mich.) 120 N. W. 794.

"The question of negligence is ordinarily one for the jury, and when negligence is sufficiently shown liability follows." American Ice Co. v. Lumber Co. (Me.) 32 L.R.A.(N.S.) 1003 (citation from pp. 1004, 1006); Hinds v. Barton, 25 N. Y. 544; John Mouat Lumber Co. v. Wilmore, 15 Colo. 136, 25 Pac. 556; Webster v. Symes, 109 Mich. 1, 66 N. W. 580.

"If upon a fair construction that a reasonable man might put upon the evidence, or any inference that might reasonably be drawn therefrom, the conclusion of negligence can be arrived at or justified, then the defendant is not entitled to a nonsuit, but the question of negligence should go to the jury." Huffman v. Bosworth, 25 N. D. 22; Olson v. Riddle, 22 N. D. 144 (whole case is good upon question of the province of the jury); McCaffery v. R. Co. 22 N. D. 544; 29 Cyc. 461, 463.

If defendant wished to claim that elevator company was a trespasser or mere licensee upon the premises occupied by its buildings, such defense would have to be pleaded,—it was not pleaded, and therefore is not avoidable. 33 Cyc. 1343 (II).

The fact that the cook car in this case was on wheels does not alter the case. It was not being used in operating the railway, and does not fall within the provisions of the lease. R. Co. v. Blaker (Kan.) 75 Pac. 71; Ins. v. Foley Bros. 169 N. W. 793; Ins. v. R. Co. (Ky.) 99 Am. St. Rep. 313.

The fire provisions of the lease are against public policy and void; these provisions attempt to interfere with and abrogate by contract many provisions of statute, in which the public is interested, regulating public warehouses and carriers. Quirk Mill. Co. v. R. Co. (Minn.) 107 N. W. 742.

CHRISTIANSON, J. Plaintiffs brought this action to recover damages occasioned by the destruction by fire of the elevator belonging to the Gladstone Equity Elevator Exchange on August 26, 1918. The elevator was situated on the right of way of the Northern Pacific Railway Company at Gladstone in Stark county in this state. It is alleged that the elevator was burned because of the negligence of the defendants,

the Director General and his agent, Day. The complaint alleges that the Gladstone Equity Elevator Exchange was the owner of the property destroyed; that such property was of the value of $25,000; that the various insurance companies named as parties plaintiff had written insurance policies in various amounts upon the property and have paid losses aggregating in all $12,579.26. Judgment was demanded in favor of each of the insurance companies for the amount paid under the insurance policies, and in favor of the Gladstone Equity Elevator Exchange for the difference between the alleged value of the property and the aggregate amount which it had received from the different insurance companies.

The defendants, in their answer, denied any negligence, and denied that they set the fire which destroyed the elevator. Thy further alleged that the elevator was placed upon, and occupied, the right of way under a certain lease by which the elevator company assumed the risk of fire arising from or incident to the operation of the railroad. The case was tried to the court and a jury, and at the request of plaintiffs' counsel was submitted to the jury for a special verdict. Judgment was entered in favor of the insurance companies for the amounts which they had paid under the respective insurance policies, and in favor of the Gladstone Equity Elevator Company for the sum of $7,779.42, which latter amount the jury fixed as the value of the property destroyed, over and above the sums which had been received by the elevator company from the various insurance companies. Defendants have appealed from the judgment so entered.

Plaintiff offered proof showing that some days prior to August 26, 1918, the defendant Director General caused a string of about ten box cars to be placed on the spur track on which the elevator was located, within a few feet of said elevator and a shed adjacent thereto. That said cars were used for housing a certain crew of workmen engaged in repairing bridges along the railroad, and that one of the cars was used as a cook car. That in said car the servants of the defendant used a stove, with the stovepipe going through the roof, and extending a short distance above the roof. That when there was a fire in the stove, and especially when the fire was started, sparks were emitted from the stovepipe. That the stovepipe was a distance of only about 50 feet from the buildings of the plaintiff elevator company; that upon two

occasions, the manager of the elevator company called upon the defendant Day,—who was the station agent at Gladstone,—and requested that said cars be removed for the reason that the fire emitted from the stovepipe endangered the buildings of the plaintiff elevator company. The manager, Robertson, testified that on the day of the fire,—about 20 minutes before the fire started,—he heard the cook rattling the griddle on the stove; that he went outside and saw sparks and flames shooting out of the chimney on the cook car. There was also evidence introduced by the plaintiff tending to show that the wind blew in a direction, so that sparks from the stovepipe would fall upon the buildings of the plaintiff elevator company at the place where the fire started. The defendants' testimony showed that there were other outfits in the yards at Gladstone, and that other available places on the tracks were occupied by these other outfits. The defendant Day positively denied that the manager of the elevator company ever requested that the cars be removed; or notified him that there was any danger to the buildings of the elevator company from sparks emitted from the stovepipe. The evidence adduced by the defendants further was to the effect that fire had not been started in the stove at the time that the plaintiff's buildings caught on fire; that the prevailing winds were in such direction that the sparks would not have fallen in the place where the fire started, and that the cook car was at least 80 feet distant from the east edge of the elevator shed, on the roof of which the fire originated. The defendants also put in evidence an agreement under which the spur track was constructed and the lease under which the right of way was occupied. And in connection with these two instruments, it is contended that the plaintiff elevator company was using the leased premises for storing paint, gasolene, farm machinery, etc.,—all contrary to the terms of the lease. And that the lease contained a provision whereby the plaintiff elevator company assumed all risk of injury by fire incident to the operation of the railroad.

The special verdict was as follows:

Q. 1. What was the value, August 26, 1918, of all the property of the plaintiff Gladstone Equity Exchange destroyed by fire August 26, 1918?

A. $20,358.68.

Q. 2. Was the fire which destroyed the elevator and other property

of the plaintiff Gladstone Equity Exchange communicated to the elevator by sparks from the stovepipe of the cook car?

A. Yes.

Q. 3. If you answer question numbered 2 in the affirmative, did the leaving of the cook car and its use, at the place where it was located on August 26, 1918, at the time of the fire, constitute negligence on the part of the defendant Walker D. Hines, Director General of Railroads?

A. Yes.

Q. If you answer question numbered 2 in the affirmative, did the leaving of the cook car and its use, at the place where it was located on August 26, 1918, at the time of the fire, constitute negligence on the part of the defendant M. L. Day?

A. Yes.

Q. 5. If you answer question 3 in the affirmative, was such negligence gross negligence?

A. No.

Q. 6. If you answer question numbered 4 in the affirmative, was such negligence gross negligence?

A. Yes.

Q. 7. If you answer question numbered 2 in the negative, was the fire which destroyed the elevator and other property of the plaintiff Gladstone Equity Exchange communicated to the elevator by sparks from the locomotive which passed through Gladstone about 4:11 P. M. August 26, 1918?

A. X.

Q. 8. If the plaintiffs are entitled to recover in this action, should the plaintiffs recover interest from the date of their respective losses?

A. Yes.

(Questions 9 to 18 inclusive relate to the amount of losses paid by the various insurance companies carrying policies, obtained by the plaintiff elevator company, on buildings and property destroyed. Under the evidence there is no question but such losses were paid by the respective insurance company, and that they amounted to the sums found by the jury.)

Q. 19. What was the value, if any, on August 25, 1918, of the property of the plaintiff Gladstone Equity Exchange, destroyed by fire on

that day, over and above the amounts of insurance received by said plaintiff Gladstone Equity Exchange from the various insurance companies under the insurance policies offered in evidence in this case?

A. $7,779.42.

Q. 20. Did defendant Day know prior to August 26, 1918, that the site of the plaintiff Gladstone Equity Exchange was being used by said Gladstone Equity Exchange as a place of storage and sale of machinery, machine extras, paint, glass, twine, etc?

A. Yes.

Q. 21. Did defendant Walker D. Hines, Director General of Railroads, know prior to August 26, 1918, that the site of the plaintiff, Gladstone Exchange was being used by said Gladstone Equity Exchange as a place of storage and sale of machinery, machine extras, paints, glass, twine, etc?

A. No.

Appellants contend that under the terms of the loss and trackage agreement, the court erred in not directing a verdict in their favor and in denying their motion for judgment on the special verdict.

The contract under which the spur track was built contains the following provision:

"The applicant understands that their premises and property will be in dangerous proximity to the track, and will be in danger of injury or destruction by fire or other causes incident to the operation of the cars and engines over it, and the applicant understands such dangers, and accepts this contract subject to the same. It is therefore agreed as one of the material considerations and inducements, without which this contract would not be made, that the applicant assumes all risk of loss, damage, or destruction to buildings or contents, or to property of any kind located or stored along the track by the applicant, or by any other person or party, occasioned by fire or sparks from locomotive engines, or other causes incident to or arising from the movement of locomotives, trains, or cars, and without regard to whether such loss or damage by the result of negligence or misconduct of any person in the employ or service of the railway company, or of defective appliances, engines, or machinery. And the applicant shall save and hold harmless the railway company from all damage, claims, and losses herein specified."

The lease under which the elevator is occupying the right of way contains the following provision:

"It is understood by both parties hereto that the leased premises are in dangerous proximity to the tracks of the railway company, and that persons and property on the leased premises will be in danger of injury or destruction by fire or other causes incident to the operation of a railway, and the lessee accepts this lease subject to such dangers. It is therefore agreed, as one of the material considerations of this lease without which the same would not be granted, that the lessee assumes all risk of personal injury to the lessee, and to the officers, servants, employees, or customers of the lessee while on said premises, and all risk of loss, damage, or destruction to buildings or contents or to any other property brought upon or in proximity to the leased premises by the lessee, or by any other person with the consent or knowledge of the lessee, without regard to whether such loss be occasioned by fire or sparks from locomotive engines or other causes incident to or arising from the movement of locomotives, trains, or cars, misplaced switches, or in any respect from the operation of a railway, or to whether such loss or damage be the result of negligence or misconduct of any person in the employ or service of the railway company, or of defective appliances, engines, or machinery. And the lessee shall save and hold harmless the railway company from all such damage, claims, and losses."

It is contended by the respondent that these provisions are inapplicable for the reason that at the time of the fire the railroad was under Federal control, and the industrial sites were under the control of the railroad company; that it was the servants of the Director General, and not the servants of the railroad company, whose negligent acts caused the destruction of the property involved in this action; that the provisions of the trackage agreement and the lease were personal in their nature, and operated in favor of the railroad company alone, and did not operate in favor of the Director General. It is further contended that the provisions are contrary to public policy, and hence invalid. We find it unnecessary to consider these various contentions. Assuming, without deciding, that the provisions are valid and that they inured to the benefit of the Director General, and that he stands precisely in the same position as though the suit were one against the railroad company, the question still remains whether the agreements ex-

empting from liability applies in this case. It will be noted that the injuries for which the trackage agreement exempts the railroad company from liability are those "occasioned by fire or sparks from locomotive engines, or other causes incident to or arising from the movement of locomotives, trains, or cars." The lease recites that the parties thereto understand "that the leased premises are in dangerous proximity to the tracks of the railway company, and that persons and property on the leased premises will be in danger of injury or destruction by fire or other causes incident to the operation of a railway," and that the lessee accepts this lease subject to such dangers. And "it is therefore agreed . . . that the lessee assumes . . . all risk of loss, damage, or destruction to buildings or contents, or to any other property brought upon or in proximity to the leased premises by the lessee, or by any other person with the consent or knowledge of the lessee, without regard to whether such loss be occasioned by fire or sparks from locomotive engines or other causes incident to or arising from the movement of locomotives, trains, or cars, misplaced switches, or in any respect from the operation of a railway, or to whether such loss or damage be the result of negligence or misconduct of any person in the employ or service of the railway company, or of defective appliances, engines, or machinery. And the lessee shall save and hold harmless the railway company from all such damage, claims, and losses."

In the construction of contracts, courts look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and accordingly they are entitled to place themselves in the same situation as the parties who made the contract, so as to judge of the meaning of the words and of the correct application of the language to the things described. The contract must be read in the light of the circumstances under which it was made, and must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful. Comp. Laws 1913, § 5896; 6 R. C. L. p. 849. The whole of the 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 1913, § 5901. Particular clauses therein are

subordinate to its general intent. Comp. Laws 1913, § 5910. However broad may be its terms, it extends only to those things concerning which it appears that the parties intended to contract. Comp. Laws 1913, § 5908.

The language of the provisions relied upon has already been quoted. It appears from the first sentence in each provision that the parties had in mind the fact that railroad trains would pass near the property of the elevator company on the main line and on the sidetrack and spur; that there was danger of injury from sparks and fire that might be scattered from engines or cars utilized in the operation of the railroad, as well as danger of injury from misplaced switches, etc. There is no contention that the loss involved here was occasioned "by fire or sparks from locomotive engines or other causes incident to or arising from the movement of locomotives, trains, or cars," or "misplaced switches." The question therefore resolves to this: "Was the cause of the loss in this case one incident to or arising from the *operation* of a railway, as that term was understood and intended by the parties to the contracts?" We think this question must be answered in the negative.

The meaning of the words "operate" and "operation" as applied to a railway has frequently been considered by the courts.

In Nordean v. Minnesota, St. P. & S. Ste. M. R. Co. 148 Wis. 627, 135 N. W. 150, the supreme court of Wisconsin was called upon to construe the word "operate" as used in the sentence, "all roads hereafter built shall be so fenced and such cattle guards be made within three months from the time of commencing to operate the same so far as operated." After a thorough consideration of the question, the court reached the conclusion that the word "operate" in such statute had reference "to the transportation of goods and passengers, and not to the running of construction trains." Substantially the same conclusion was reached in Rothman v. Interborough Rapid Transit Co. 66 Misc. 378, 121 N. Y. Supp. 200.

In Connors v. Chicago & N. W. R. Co. 111 Iowa, 384, 82 N. W. 953, the supreme court of Iowa was required to construe and apply a statute of that state, providing in effect that in an action against a "corporation operating a railway," for damages "occasioned by fire set out or caused by the operation of such railway," a prima facie case of negligence is established by showing that property for which recov-

ery is sought was injured or destroyed by a fire set out or caused by the operation of the railway. The plaintiff in that case contended that "a fire set by sectionmen in burning the grass along a railroad right of way" was one "set out or caused by the operation of a railway." The court held to the contrary. In its opinion in the case the court said: "The important inquiry then is, What is meant by "operating a railway?" In none of the cases heretofore determined has the application of the statute gone beyond a fire set out or caused by an engine on the track. But under the Coemployees' Act (Code, § 2071), allowing recovery by an employee injured by negligence 'in any manner connected with the use and operation of any railway on or about which they shall be employed,' the clause 'use and operation of any railway' has been frequently considered and defined. Thus, in Stroble v. Chicago, M. & St. P. R. Co. 70 Iowa, 560, 31 N. W. 63, the court, through Beck, J., said: 'What is the use and operation of a railway? It is constructed for the sole purpose of movement of trains. That is its sole purpose. What is the operation of a railway? They can be operated in no other way than by the movement of trains.' . . . We are content with the conclusion reached in Akeson's case,—that a railroad is only operated within the meaning of the law, by 'moving trains, cars, engines, or machinery on the tracks.' The same definition is peculiarly applicable to the clause 'operating any such railway' contained in the statute relating to fires."

In Slaughter v. Canadian P. R. Co. 106 Minn. 263, 119 N. W. 400, the supreme court of Minnesota ruled that a joint traffic arrangement under which the cars of a foreign company were hauled within that state by a domestic railway company did not constitute the "operation of a railroad" within the state by the foreign company whose cars were so hauled.

In Hibbard v. Chicago, St. P. M. & O. R. Co. 96 Wis. 443, 71 N. W. 807, the supreme court of Wisconsin ruled that "a warehouseman of a railroad company who was injured while sealing the doors of a car attached to an engine, through the negligence of the engineer or fireman in suddenly moving the engine, was not employed in 'operating, running, riding upon, or switching' trains or cars, within the meaning of chap. 220, Laws 1893, providing that a railway employee so engaged may recover for injuries caused by the negligence of an-

other employee in the performance of his duties." See syllabus, 96 Wis. 443, 444. In the opinion in that case the court said: "That the plaintiff was not at the time of his injury engaged in 'operating, running, riding upon, or switching' a car, is so plain that argument of the question is unnecessary. Sealing the door of a car, plainly, is not operating or running it."

The provision contained in the lease in this case was invoked by the railway company as a defense in Cooper v. Northern P. R. Co. 212 Fed. 533. In that case the property of the lessee "was destroyed by fire due to dead grass, weeds, brush, and other combustible material upon the right of way, fired by sparks and fire from a locomotive moving cars upon the road." 212 Fed. 534, 535.

The court held "that the lease should be so construed as exempting from liability from fire incident to or arising from railway operation, and not from fires due to the railroad company's violation of Mont. Rev. Codes, § 4310, making it the duty of railroad operators to keep their rights of way free from combustible material, and imposing a liability for damages from fire resulting therefrom, and hence it was no defense to an action for loss occasioned by a failure of the railroad company to keep its right of way free from combustible materials." 212 Fed. 534, ¶ 5, syllabus.

We have cited and quoted from the various cases involving the meaning of the words "operate" and "operation" as applied to railroads, not necessarily because we approve of the meaning attributed to them in all of these cases, but as indicating that the words do not necessarily have the all inclusive meaning for which the defendant contends. In the last analysis the question is, What meaning did the contracting parties intend the word "operation" to have in the contractual provisions involved in this case? The agreements were prepared by the railway company, and hence should be construed most strongly against it. The housing and feeding of men engaged in repairing bridges is necessary to keep a railroad in operation, and in a sense it may be said to arise from or be incident to the operation of a railway. But so is the manufacture of the rails and of the rolling stock, and the mining of the coal with which the engines are fired. So is also the production and distribution of food. And

during the great World War the government found it necessary to exercise its war powers in these several fields. The burning of weeds and dead grass along the right of way, as well as of old rotted ties, is a matter of frequent occurrence in the operation of a railway, yet it would hardly be contended that the contracting parties here contemplated that the railroad company might, with immunity, place piles of weeds or old ties in close proximity to the elevator of the plaintiff company, set fire to them, and thereby cause the destruction of the elevator. Neither do we believe that they contemplated that crews engaged by the railroad company to repair bridges or perform other necessary work on the road should, for the purpose of cooking their food, kindle fires, either on the ground or in cook cars, in such close proximity to the elevator of the plaintiff company as to cause the same to be set on fire. It is our opinion that when the parties contracted with respect to injuries arising from or incident to the operation of the railway, they had in mind such injuries as it might reasonably be anticipated might occur from the carrying on of its traffic, *i. e.*, from the operation of a railway at that place. And we do not believe that the act which it is alleged, and which the jury found, caused the fire in this case, was one covered by the exemption provisions.

It is contended that inasmuch as the jury found that the plaintiff stored machinery, twine, glass, and other things not provided for in the lease, the plaintiff could in no event be held liable unless "wilful and wanton negligence" was established. Under the evidence and the findings of the jury, we do not believe there is any reason for holding that the elevator company, in effect, was trespasser. It is true the lease provided that the premises "shall be used for the exclusive purpose of receiving, storing, shipping, elevating, and delivering grain," but the uncontroverted evidence disclosed that the elevator company constructed its warehouse many years ago for the purpose of storing farm machinery, twine, flour, and feed therein, and had since that time carried on such business. The court takes judicial notice that the only railroad that runs into Gladstone is the railroad which was operated by the defendant. Doubtless the farm machinery and twine which was handled by the elevator company was shipped in over such railroad. The jury also found, as it must, that the station agent, Day, had knowledge of the use to which the premises were being put.

It is true they also found that the defendant Hines did not have such knowledge, and that is unquestionably literally true. Of course there was no evidence tending to show that the Director General personally had such knowledge; but the knowledge of Day was, in contemplation of law, the knowledge of his principal. Furthermore, it does not appear that the destruction of the buildings and property involved in this suit was in any manner either occasioned or augmented by the other articles stored on the premises. If the plaintiff's evidence is true (and the jury so found) the fire started upon the roof of the shed, and from there spread and destroyed the buildings and contents.

It is asserted that the evidence does not show that the plaintiff is the owner of the elevator and the real party in interest. In view of the issues made by the pleadings, we do not deem that question subject to controversy on this appeal. The answer in effect admitted that the plaintiff elevator company was the owner, and no application was made to amend the answer to aver anything to the contrary.

In its instructions to the jury, the court read the following paragraph of the complaint: "That in cooking in said car the servants of the defendants used a stove fed with light highly inflammable fuel made of soft pine grain doors or pine blocks or chips of bridge timbers; that the stovepipe leading from said stove went out through the roof of the box car in which said stove was located, and extended above the roof only a short distance." Later in the instructions the court said: "Now, gentlemen, in answering the question as to negligence, the jury may consider the nature of the kindling and fuel used in the cook car, the manner of kindling the fire therein, the length of the stovepipe, the distance of the stove from the elevator, the weather, the wind, and all other pertinent matters brought out by the evidence." These instructions were made applicable to both defendants. And it is contended in behalf of the defendant Day that as to him these instructions are erroneous. In our opinion, this contention is well founded and must be sustained. It is quite likely that plaintiff's buildings would not have been set on fire if the stove had been properly operated and the usual fuel utilized. The plaintiff predicated negligence not alone upon the position of the car, but upon the particular manner in which the stove was being operated. Day is liable for his own act of negligence. But he had nothing to do with the operation or use of the stove.

There is no evidence and no contention that he had any knowledge that such highly inflammable fuel was being used in its operation. Day's act of negligence, if any, consisted in leaving the car where it was. But for all that appears there would have been no injury if the stove had been properly operated. So far as the Director General is concerned, however, it was proper for the jury to consider the manner of the operation of the stove. If, under the circumstances, it was used in a negligent and careless manner by his servants, such negligence would, of course, be attributable to him.

It is contended that the jury did not find the proximate cause of the destruction of the property in suit. We believe that this contention is untenable. The jury found that the fire which destroyed the property was "communicated to the elevator by sparks from the stovepipe of the cook car;" and that "the leaving of the cook car and its use, at the place where it was located on August 26, 1918, at the time of the fire, constituted negligence on the part of the defendant Walker D. Hines, Director General of Railroads."

It follows from what has been said that the judgment must be affirmed as to the Director General and reversed as to the defendant Day. Respondents will recover costs against the Director General, and the defendant Day will recover costs against the respondents. It is so ordered.

ROBINSON, Ch. J., and BIRDZELL and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

NELS K. MOGAARD, Respondent, v. CITY OF GARRISON, a Municipal Corporation, and Joseph Fitzgerald, J. A. Reuter, Wm. Robinson, and W. H. Robinson, Appellants.

(182 N. W. 758.)

Mandamus — Inferior tribunal cannot be compelled to decide fact questions in particular way, though it must take action.

1. Where an inferior tribunal is vested with power to determine a question

of fact involving the taking and consideration of evidence, it cannot be compelled by mandamus to decide in a particular way, though it may be compelled to take action and to make some determination.

Municipal corporations — territory sought to be excluded from city limits held not to be within statute authorizing exclusion.

2. For reasons stated in the opinion it is *held* that a 35-acre tract sought to be excluded from the city of Garrison in McLean county is not within § 3969, Comp. Laws 1913, as amended by chapter 79, Laws 1919, which makes is the duty of the city council to exclude lands from the city, upon the petition in writing signed by not less than three fourths of the legal voters and by the owners of not less than three fourths, in value, of the property sought to be excluded, in all cases where the lands sought to be excluded are bordering upon the limits of the city, are wholly unplatted, and have no municipal sewers, water mains, pavements, sidewalks, or other city, town, or village improvements made or constructed therein.

Opinion filed April 18, 1921.

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

Defendants appeal from a judgment awarding a peremptory writ of mandamus to compel them as members of the city council of the city of Garrison to pass an ordinance disconnecting certain territory from that city.

Reversed and dismissed.

E. T. Burke and *J. E. Nelson,* for appellants.

"The writ of mandamus may be issued to any inferior tribunal to compel the performance of an act which the law specially enjoins as a duty resulting from office, trust, or station." Comp. Laws 1913, § 8457; 18 R. C. L. pp. 116–128.

Norton & Kelsch, for respondent.

"The legislature has the inherent authority to alter or change the boundaries of municipal corporations." Glaspell v. Jamestown, 11 N. D. 90; Johnson v. Clark, 21 N. D. 526; Const. § 130; Hunter v. Tracy (Minn.) 116 N. W. 924.

In proceedings taken under the statute, its provisions must be substantially followed, and the conditions therein specified must be fully complied with. Oehler v. Big Stone City (S. D.) 91 N. W. 450; Johnson v. Clark, supra; 28 Cyc. 202.

Writ of mandamus proper remedy. State v. Albright, 11 N. D. 29; Fuller v. University School Lands, 11 N. D. 212.

CHRISTIANSON, J. This is an appeal from a judgment of the district court of McLean county awarding a peremptory writ of mandamus to compel the defendants, Joseph Fitzgerald, J. A. Reuter, W. H. Robinson, and W. M. Robinson, as members of the city council of the city of Garrison, to pass an ordinance disconnecting or detaching certain territory from said city. The petition for the writ of mandamus was based on § 3969, Comp. Laws 1913, as amended by chapter 79, Laws 1919, which reads as follows: "On petition in writing signed by not less than three fourths of the legal voters and by the owners of not less than three fourths, in value, of the property in any territory within any incorporated city, town, or village, and being upon the border and within the limits thereof, the city council of the city or the board of trustees of the town or village, as the case may be, may disconnect and exclude such territory from such city, town, or village; provided that the provisions of this section shall only apply to lands not laid out into city, town, or village lots or blocks.

Provided, further, that when the property or lands described in such petition bordering upon and within the limits of any such incorporated city, town, or village are wholly unplatted, and no municipal sewers, water mains, pavements, sidewalks, or other city, town, or village improvements have been made or constructed therein, and this is made to appear upon the hearing upon such petition by the city council, commission, or board of trustees of the town or village, as the case may be, it shall be the duty of the city council, commission, or board of trustees to disconnect and exclude such territory from such city, town, or village." In the petition for the writ of mandamus, it is averred that the city of Garrison is a municipal corporation organized under the laws of this state; that the defendants, Joseph Fitzgerald, W. H. Robinson, W. M. Robinson, and J. C. Reuter, are the duly elected, qualified, and acting members of the city council of said city; that the plaintiff is the owner of the real property situated within the city of Garrison, which it is sought to have detached; that the petitioner and others caused a petition to be filed and notice to be given of the presentation thereof as required by law; that the city council set said matter for hearing; that a hearing was had, at which plaintiff was represented by counsel and testimony taken; that after such hearing, the city council adopted the following resolution:

"Whereas, the petition No. 1 of Nels Mogaard and others has been presented to the city council of Garrison, North Dakota, requesting that that certain strip of land 70 rods in width, lying upon and being situated along the north line of the southeast quarter of the southeast quarter of section 7, township 148, range 84, be excluded from within the limits of the said city, and,

"Whereas, it is within the personal knowledge of the members of the city council that the said tract of land is a part and portion of the southeast quarter of the southeast quarter of said section 7, upon which there is now located a certain portion of the main line of the sewer system of the city of Garrison, and,

"Whereas, the said tract of land does not border upon the outer limit of the said city, except 70 rods along the western line thereof, and,

"Whereas, by the exclusion of the said tract, it will leave the western boundary of the said city in an unnatural and inconvenient form and manner, and,

"Whereas, it has not been made to appear to the city council that three fourths of the legal voters have signed said petition, and,

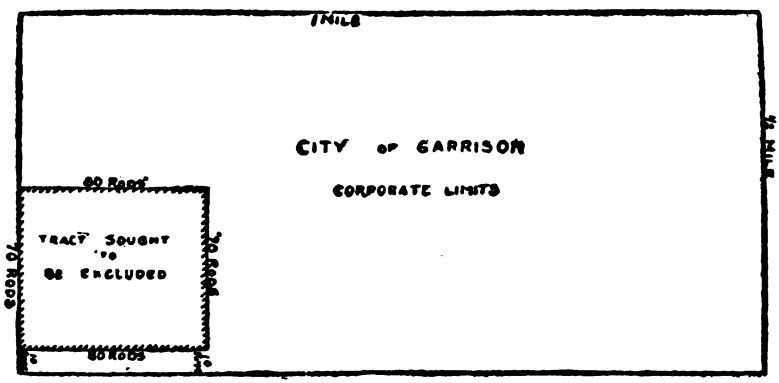
"Whereas, it is apparent that the alleged voters residing upon the said tract are merely temporary residents thereon, and that the owner of said tract is not a legal voter, therefore it is,

"Resolved, That that said petition No. 1 be and the same is hereby denied."

It is further averred that the action of the city council was contrary to the facts established by the testimony at such hearing; that the grounds contained in the resolutions are insufficient as a matter of law to sustain the resolution; and that the action of the city council is illegal, oppressive, and arbitrary. In the return of the defendants it is averred, among other things, that the tract sought to be excluded is a part of the legal subdivision described as the S.E. $\frac{1}{4}$ of the S.E. $\frac{1}{4}$ of section 7, township 148, range 84; that the main outlet of the sewer system of the city of Garrison extends over and across the said 40-acre tract of land heretofore described; that said sewer system is a municipal improvement; that there is included within the territorial boundaries of the city of Garrison the S.W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the S.E. $\frac{1}{4}$, of section 8, and the E. $\frac{1}{2}$ of S.E. $\frac{1}{4}$ of section 7, of said township and range; that by exclusion of the tract of land described in plaintiff's

application, there will be left within the limits of the city of Garrison a strip of land, 10 rods in width and 80 rods in length, extending in a westerly direction to the western boundary of said city, and that said strip of land will be connected to the city limits for 10 rods along the eastern line thereof, and that said extension of 10 rods is an unnatural, inconvenient, and irregular form for the city boundary. It is also averred that bonds have been issued by the city of Garrison with boundaries as now existing; that the sewer laid across the land is so constructed that it is convenient to make connection therewith, and hence affords sewer facilities to the owner or owners of said lands. The plaintiff demurred to the return on the ground that it did not state a defense to the application of the plaintiff and the alternative writ of mandamus. Upon the hearing in the district court, certain facts were stipulated, with the reservation that the parties did not either admit their materiality or waive the right of objection thereto.

The boundaries of the city of Garrison, and of the tract sought to be excluded, are shown on the following plat:



On this appeal appellants assert.

(1) That mandamus is not the proper remedy.

(2) That in any event the tract sought to be excluded is not one which the statute makes it obligatory upon the city council to exclude.

In our opinion, both contentions of the appellants must be sustained. Assuming, without deciding, that the determination of the

city council upon an application to exclude property is subject to judicial review, we do not believe that mandamus is the proper remedy to review the correctness of the action taken.

It will be noted that the statute makes it the duty of the city council to disconnect and exclude lands from the city only when the lands described in the petition: (1) Border upon the limits of the city; (2) are wholly unplatted; and (3) have no municipal sewers, water mains, pavements, sidewalks or other city improvements made or constructed therein. Hence, when an application is made to have certain territory excluded from the city, it becomes necessary for the city council to determine whether these facts exist. In making such determination the council exercises powers that are judicial in their nature. Glaspell v. Jamestown, 11 N. D. 86, 89, 88 N. W. 1023; Brenke v. Belle Plaine, 105 Minn. 84, 117 N. W. 158. "The writ of mandamus may be issued to any inferior tribunal to compel the performance of any act which the law specially enjoins as a duty resulting from office, trust, or station." Comp. Laws 1913, § 8458. Hence, when an inferior tribunal vested with jurisdiction to hear and determine a certain matter or proceeding refuses to act at all, it may be compelled by mandamus to act and make some determination. In other words, the inferior tribunal will be compelled to perform the duty which the law enjoins upon it, namely, hear and determine. But in such case, *i. e.*, where the performance of an official duty or act involves the exercise of judgment or discretion, such judgment or discretion cannot be controlled by mandamus. In other words, while mandamus is regarded as the appropriate remedy to set the tribunal, empowered to exercise the judgment or discretion, in motion, it will not control its motion, or direct how or in whose favor such judgment or discretion shall be exercised. High, Extr. Leg. Rem. 2d ed. §§ 149 et seq.; 18 R. C. L. pp. 124 et seq. See also Ex parte Newman, 14 Wall. 152, 20 L. ed. 877; Oliver v. Wilson, 8 N. D. 590, 73 Am. St. Rep. 784, 80 N. W. 757; State ex rel. Wiles v. Albright, 11 N. D. 22, 88 N. W. 729. And where a tribunal vested with jurisdiction to hear and determine a certain matter exercises its jurisdiction by hearing and determining the matter, mandamus will not lie to review its proceedings or to revise its rulings. High, Extr. Leg. Rem. 2d ed. § 150; 18 R. C. L. pp. 124, 125. See also Ex parte Newman, supra. The propriety of the writ

of mandamus to review the action of a public body required by law to determine certain questions of fact was considered by the court of appeals of New York in People ex rel. Francis v. Troy, 78 N. Y. 33, 34 Am. Rep. 500. That case involved the designation of official newspapers for the city of Troy. The city charter required the common council to designate the newspapers (not to exceed four) having the largest circulation in the city, as official newspapers of the city. The common council having designated official newspapers, the relator, insisting that his newspaper was one of the four newspapers having the largest circulation in the city and entitled to be designated, applied for a writ of mandamus to compel the council to designate his newspaper as one of the official newspapers. In considering whether the action of the city council might be reviewed by mandamus, the court said: "The further question remains, whether, when the duty of selecting the persons to be employed is imposed by law upon a public body, and the question whether they possess the necessary qualifications is one of fact, to be determined by it, no particular mode of determining the fact being provided by law, and the public body has exercised this power, and made the selection, its action can be reviewed by mandamus, and it can be compelled by that proceeding to appoint particular persons, on their allegation that in fact they, and not the persons actually selected, possess the prescribed qualifications.

"The office of the writ of mandamus is in general to compel the performance of mere ministerial acts prescribed by law. It may also be addressed to subordinate judicial tribunals, to compel them to exercise their functions, but never to require them to decide in a particular manner. It is not, like a writ of error or appeal, a remedy for erroneous decisions. Judges of Oneida Common Pleas v. People, 18 Wend. 92–99, and cases cited. This principle applies to every case where the duty, performance of which is sought to be compelled, is in its nature judicial, or involves the exercise of judicial power or discretion, irrespective of the general character of the officer or body to which the writ is addressed. A subordinate body can be directed to act, but not how to act, in a matter as to which it has the right to exercise its judgment. The character of the duty, and not that of the body or officer, determines how far performance of the duty may be enforced by mandamus. Where a subordinate body is vested with power to

determine a question of fact, the duty is judicial, and though it can be compelled by mandamus to determine the fact, it cannot be directed to decide in a particular way, however clearly it be made to appear what the decision ought to be. . . .

"The duty of selecting the newspapers having the largest circulation in the city being imposed upon the common council, the power to determine as matter of fact which papers have the largest circulation is necessarily vested in that body.

"The most that can be done by mandamus is to compel the common council to determine the question and designate the papers with reference to the statutory requirement; but I apprehend that it was not the province of the court to determine the question of fact in the first instance, and direct what particular paper or papers should be designated. . . . In the present case the evidence seems to have been quite satisfactory to the court that the relator's paper should be the one of those designated, but if it was within the power of the court in this case to order the common council how to decide, or to designate any particular paper, it would be equally in its power to do so in cases involving nicely balanced and difficult questions; and the duty of designating official papers for every city in the state could be transferred from the officers charged by law with that duty, to the courts of justice." 78 N. Y. 39–41, 34 Am. R. 504–506.

Nor do we believe that the tract sought to be excluded falls within the class which the statute says it is the duty of the city council to exclude and disconnect from the city upon being properly petitioned to so do. As already pointed out, the lawmakers have plainly said that it is only tracts of land which (1) border upon the limits of the city, (2) are wholly unplatted, and (3) have no municipal sewers, water mains, pavements, or other city improvements constructed therein, that it is the duty of a city council to exclude when petitioned to so do. In order to bring a tract within the provisions of the statute, all these elements must exist. In this case the plaintiff is the owner of a 50-acre tract which borders on the limits of the city for a distance of 80 rods running east and west, and for a similar distance running north and south. In other words, 160 rods of the boundary of the tract also constitute the boundary of the city. There is a city sewer constructed on this tract, within a distance of 10 rods from the south-

ern boundary line, running east and west across the entire tract. Hence, it is manifest that the entire tract does not fall within the provisions of the statute. But the plaintiff seeks to have excluded a 35-acre tract 70 rods of which borders upon the western border line of the city, and which leaves a tract 10 rods wide and 80 rods long lying immediately south of the tract sought to be excluded, still within the city limits, and it is contended that this 35-acre tract falls within the provisions of the statute. We are unable to agree with this contention. We do not believe that the lawmakers had any intention that anything like that sought to be done here might be accomplished under this law. We do not believe that it can be said that the tract sought to be excluded is one which borders upon the limits of the city, and has no municipal sewer constructed therein, within the meaning of the statute.

A somewhat similar question was considered by the supreme court of Colorado in Anaconda Min. Co. v. Anaconda, 33 Colo. 70, 80 Pac. 144. The statute there involved provided that a tract or contiguous tracts of land aggregating 20 or more acres in area embraced within the corporate limits of any city or town," and being upon or contiguous to the border thereof," should be excluded from the city or town, upon petition of the owner or owners of such lands, when certain facts were shown to exist. In the case cited it was sought to detach a tract a small portion of which touched the border, and the court held that it was not such a tract as might be detached under the statute. The court said: "The plat shows that the territory sought to be disconnected does not lie upon the border of the town, or contiguous thereto. The land is of irregular shape, and extends from the border several hundred feet to the platted portion of the town. A portion of the tract about 150 feet in width touches the border. The average width of the tract is about 600 feet; its average length about 1,500 feet. It comprises nearly all of two mining claims and a small portion of three others. The clear intent of the legislature was to permit persons owning property lying upon the border to disconnect from the town. The disconnection of property so lying upon the border would not be injurious. The limits of the town would be changed, but the town would not be divided. If 20 acres or more of land can be disconnected from a town where but a small portion lies upon the

border, it follows that a tract can be disconnected by the simple expedient of connecting the territory with the border by a narrow strip. This the legislature did not intend should be done." 33 Colo. 75.

The reasoning of the Colorado court is directly applicable here, and meets with our approval. The judgment appealed from is reversed, and the proceeding is ordered dismissed.

ROBINSON, Ch. J., and BIRDZELL, J., concur.

BRONSON, J. I concur upon grounds set forth in paragraph 2 of the syllabus.

GRACE, J. (dissenting). It would appear to be clear that the intention of chapter 79, Session Laws of 1919, which amends § 3969, Comp. Laws 1913, is to make it obligatory on the trustees of the village or the city council of the city, to disconnect and exclude farm lands from such city or village, on a proper petition presented complying with the requirements set forth in the statute.

The title to the act is "An Act to Amend and Re-enact § 3969, Comp. Laws 1913, Relating to Excluding Farms Lands from the Limits of Cities, Towns, or Villages." It shows the purpose of the statute. The body of the act provides that such land may be excluded if such land is unplatted and there are not on it certain municipal sewers, water mains, pavements, sidewalks, or other city, town, or village improvements.

It is clear, in this case, that the 35-acre tract is unplatted, and that there is not upon it any of such city improvements. It is clearly nothing but farm land. As we understand the matter, there is still a 5-acre tract of the 40-acre tract, upon which the sewer is located, and that is not sought to be excluded.

If the statute is to have any meaning or effect, it must be given a reasonable construction, and one which accords with common sense.

If, for instance, the whole tract involved were 2,000 acres of farm land, all of which lay within the corporate limits, and if a sewer were constructed which would segregate 1 acre of land from the 2,000 acres, under the theory of the majority opinion, the whole tract would have to be retained within the city limits, and could not be excluded

on the ground that it was farm land, and this, simply because the sewer cut off 1 acre of the whole tract, or was located on that acre.

There is just as much reason in saying that the remainder of the 2,000-acre tract should not be set off, for the reason that a sewer cuts off, or is on, 1 acre, or, in passing through the land, separates 1 acre from the mainland, as there is to say that the 35 acres shall not be set off where there is a 5-acre tract remaining, through which the sewer extends.

The point which we wish to make clear is that the statute must have a reasonable interpretation to mean anything. Any question relating to the sewer bonds mentioned in this case, perhaps, in any event, cannot be determined in any manner, except the bondholders are parties to the action. It may be further noticed that at the time these bonds were floated, § 3969, Comp. Laws 1913, had not been amended. At that time that statute made it discretionary with the council or trustees to exclude the land, and nothing in it was said in regard to sewers or municipal improvements. But that discretion would necessarily have to be exercised in a reasonable manner, and any proceeding of a board of trustees, etc., under said law, which was arbitrary, or was an abuse of discretion, could be remedied in a proper court. In other words, as the law then stood, a city council could exclude farm lands, even if there were sewers upon them, and it was while this law was in effect that the bonds in question were floated. So that, if the matter of the bonds were in issue in this case, which they are not, we do not think the issue with reference thereto would be material.

Of course anyone would know that the 35-acre tract can receive no benefit from the sewer. No one lives on it that is benefited thereby. It could be excluded, and there still remain a reasonable acreage, to wit, 5 acres, in which the sewer is located and which is not sought to be excluded.

A reasonable construction of this statute would operate to exclude the 35 acres, and retain the 5-acre tract within the city. To subject the whole tract of land for all the city improvements, which may be constructed in, upon, or about it, is virtually to confiscate the land by taxation, where that land is purely agricultural land, and can be used for nothing else.

STATE OF NORTH DAKOTA, Appellant, v. JACK GUYER, Respondent.

(182 N. W. 693.)

Larceny — variance as to description of animals stolen held not material.

In this case the defendant is accused of stealing two cattle, the property of Peter Blackhawk. Because of certain variances between the description of the animals as given in the information and the proof, the court made an order granting a new trial, subject to the ruling of the supreme court on the question of variance. *Held*, that there was no variance which in any way misled the defendant or prevented him from maintaining his defense on the merits.

Opinion filed April 18, 1921.

Appeal from the District Court of Sioux County, Honorable *J. M. Hanley*, Judge.

Reversed.

Edw. S. Johnson and *Foster & Baker*, for appellant.

Julius Skaug (*J. A. Heder*, on oral argument), for respondent.

ROBINSON, Ch. J. In July, 1920, in the district court of Sioux county, defendant was convicted of the crime of grand larceny and sentenced to imprisonment in the penitentiary for two years. Then, it seems, on December 30, 1920, the court made an order that the verdict and judgment be set aside and a new trial granted, subject to the ruling of the supreme court on the question of variance, which is certified to the court. From said order the state appeals. The motion for a new trial was based on a statement of the case and on assignments of error, and this court is requested to pass upon and determine the following question: When the information charges the theft of one two-year old red cow, branded PP on left ribs, and one two-year old red muley steer, branded in the same way on the left ribs, and the proof shows that the property lost was one yearling heifer, branded on the right side, and one yearling bull calf, with horns, branded on the right side, was the variance prejudicial to the rights of defendant and fatal to the judgment so as to warrant the granting of a new trial?

The answer to the question is, "No." It was not a fatal variance.

The neat animals in question are fully identified and were in view of the court and jury at the time of the trial, and the question was: Did defendant steal them as charged? The description of animals continuously changes. The heifer becomes a cow and the bull calf, a steer with horns. The branding is of no consequence, only to identify the animals. The testimony is lengthy. We cannot undertake to repeat it. Six persons were sworn and testified as witnesses for the state. They fully identified the two animals with the brand of Peter Blackhawk. They showed that defendant had twice rebranded them and had blurred over the brand of Blackhawk. Surely the animals were well branded and identified, and the jury went to the government corral, adjacent to the courthouse, and inspected the animals. The testimony was reduced to writing and made a part of the record, so that, in case of a second prosecution for the stealing of the two animals from Peter Blackhawk, it will be an easy matter for defendant to plead and prove a former conviction. The testimony shows that the animals bear the original brand of Peter Blackhawk and two brands of the defendant. It shows that the defendant knew well the two animals that he was accused of stealing. There was no chance of a misapprehension. There was no chance of an injury by reason of any variance between the description, as stated in the information, and the proof at the trial. In civil actions a variance between the pleadings and the proof is not material unless it actually misleads the adverse party to his prejudice in maintaining his action or defense. Comp. Laws, § 7478. The same rule is now applied to criminal pleadings. Under the Criminal Code, "neither a departure from the form or mode prescribed in the Code in respect to any pleadings or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right. Comp. Laws, § 11,088. In charging a criminal offense it is sufficient that the act or omission charged as an offense be clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. Comp. Laws, § 10,693. In this case the information charges that on June 1, 1919, in Sioux county, North Dakota, Jack Guyer did commit the crime of grand larceny; that he did then and there feloniously steal and carry

away two neat cattle, each of the value of $60, which animals bore the brand and were the property of Peter Blackhawk.

Of course the age and the exact description of the animals varied from day to day. The yearling heifer became a two-year old cow, and the bull calf became a steer, but each retained the Peter Blackhawk brand, and, aside from the brand, the animals were well identified by several witnesses, and it was conclusively shown that the defendant had twice branded each of the animals, and had done the branding so as to blur or obliterate the original branding. Clearly defendant has not been misled to his prejudice by any variation between the information and the proof. The jury was not misled and the court was not misled.

The order for a new trial must be reversed and the judgment of conviction affirmed.

BIRDZELL, J., concurs.

GRACE, J. I concur in the result.

CHRISTIANSON, J. (concurring specially). The sole question presented in this case is whether, by reason of the difference between the description of the cattle contained in the information and that given in the evidence on the trial, there was a fatal variance.

After careful consideration of this question, I have come to the conclusion that, upon the record here, there is, under our statute, no such variance. Shortly after the commencement of the trial, the complaining witness was called as a witness for the prosecution. Almost at the outset of his testimony he was asked to, and did, describe the animals which he claimed the defendant had stolen from him. No objection was offered to such testimony on the ground that it was variant from the information, or upon any other ground. Later, when counsel for the prosecution suggested that the jury be taken down to the corral to view one of the animals which the defendant was charged with having stolen, and which the complaining witness had identified as one of those stolen from him, defendant's counsel stated that he had no objection to the jury viewing such animal. So far as the trial is concerned there is nothing to indicate even the remotest chance that the defendant was prejudiced by the variance between the property de-

scribed in the information and that proven. There was no contention that the complaining witness had been deprived of, or that the defendant had stolen from the complaining witness, anything except the two animals to which the evidence referred. In these circumstances it seems to me that the case falls squarely within § 11,088, Comp. Laws 1913, which provides: "Neither a departure from the form or mode prescribed in this Code in respect to any pleadings or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right."

BRONSON, J., concurs.

THEODORE PRIEWE, Administrator with the Will Annexed, Petitioner and Appellant, v. ALBERT G. PRIEWE, Richard Priewe, et al., Respondents.

(182 N. W. 697.)

Executors and administrators — administrator held entitled to credit for money paid out more than received.

In the order allowing the final report and account of the administrator with the will annexed of the estate of Carl W. Priewe, the administrator was allowed credit in the sum of $610.29 and interest thereon for "moneys paid out more than received by the administrator," as evidenced by a former report which had been duly allowed. 43 N. D. 509. Later, the county court on motion amended its order and disallowed such item. On appeal to the district court the ruling of the county court was affirmed. For reasons stated in the opinion it is *held* that the administrator was entitled to credit for such item in his account with the estate.

Opinion filed April 20, 1921.

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

Reversed and remanded.

Augustus Roberts, for appellant.

A final order settling and allowing an administrator's final account is conclusive. Comp. Laws 1913, §§ 8533, 8827; Joy v. Elton, 9 N. D.

438; Sjoli v. Hogenson, 19 N. D. 95; Re Nelson, 26 S. D. 615; Priewe v. Priewe (N. D.) 175 N. W. 132.

"When statutes authorize the vacation of a judgment entered against a party through his mistake, it is to be understood that they mean a mistake of fact." 1 Black, Judgm. 2d ed.

Pollock & Pollock and *Taylor Crum,* for respondents.

The widow's personal expenses unpaid and arising after her death, including personal expenses for care and attendance during her last illness, burial expenses, and whatever claims, so far as they are not fictitious, are not charges against the estate of Carl W. Priewe, but are charges against the estate of the widow, now deceased. Johnson v. Kimball (Mass.) 52 N. E. 386; Dalrymple v. Arnold, 21 Hun, 110; 18 Cyc. 445, i; Notes in 33 L.R.A. 662 and 52 L.R.A.(N.S.) 1153; Re Van De Walker, 79 Misc. 661, 141 N. Y. Supp. 325.

Per Curiam. This controversy involves the final settlement and distribution of the estate of Carl W. Priewe, deceased. On a former appeal this court construed the will, and determined that the widow possessed a life estate with power of alienation and encumbrance, if necessary, for her use and support. 43 N. D. 509, 175 N. W. 734. And we found as a fact that during the life of the widow an outstanding mortgage against the premises in the sum of $700 had been paid off by moneys belonging to the widow; that the administrator had been compelled to and had borrowed some $610. And we ruled that these items constituted a charge upon the property as against the residuary legatee, and in effect constituted a fund in the hands of the administrator properly applicable to the payment of claims incurred for the support, care, and burial of the widow. 175 N. W. 735.

The facts relating to the litigation are fully stated in the opinion on the former appeal. See 175 N. W. 732. As stated therein Carl W. Priewe died testate on or about June 3, 1895. By his last will and testament his widow was given a life estate with power of alienation or encumbrance, if necessary, in all real and personal property. 175 N. W. 734. The widow died December 19, 1916. From 1901 to 1916 the land had been looked after by the administrator, who received the rents and profits therefrom and made an accounting therefor to the county court. 175 N. W. 733. On April 25, 1917, the administrator

presented to the county court a final report and account. That report formed the basis of the decree from which the former appeal was taken. The report, which is involved on this appeal, purports to be a final report and account of the administrator up to February 10, 1920. It appears therefrom that during the years of 1917, 1918, and 1919, the administrator received, among other things, rents for the land aggregating $3,107.94. After due notice and hearing, the county court on April 30, 1920, made an order allowing such final report and account. In such order the county court allowed as an item of disbursement and expense of the administration of the estate, "moneys paid out more than received by the administrator . . . $610.29," and interest thereon. Later, on a motion to open and amend such order, the county court disallowed such item. An appeal was taken to the district court from the whole of the order amending the order allowing the final report and account, and from certain parts of the order allowing the final report and account. Such appeal was taken upon questions of law alone. The district court affirmed the county court, and the controversy has been brought here by appeal.

Aside from certain procedural questions, which we find it unnecessary to consider, the errors assigned on this appeal relate solely to the $610 item referred to in the opinion on the former appeal.

Much of the differences of opinion which have given rise to this litigation have been caused by the failure of the parties to recognize the fact that in this case the will vested in the widow a life estate of the character determined in our opinion on the former appeal. During the lifetime of the widow she was not only entitled to possess, but to sell and encumber, the property, if necessary, to provide for her support and maintenance. Yet, during this time the property was administered by the administrator with the will annexed. In other words the administrator, as administrator, purported to and did handle moneys and property which in fact belonged to the widow absolutely.

In the original opinion on the former appeal we said: "We agree with the determination of the trial court that the accountings made by the administrator to which no objection was made or appeal therefrom were taken are final, and not subject to review. . . . Accordingly the appellant (the respondent on this appeal) herein is not in a position to dispute the disbursements made by the administrator as shown

by nine accountings that he made to the county court. Upon this construction and interpretation it follows, therefore, that the disbursements made by the administrator, as shown by nine accountings, are not subject to review, and are therefore concluded; that the payment of claims for funeral expenses, for last sickness, and for the care of the deceased widow, is dependent upon the moneys received from the use and disposition of the property of the deceased during the lifetime of the widow; with propriety, owing to the form of administration had, such claims may be allowed by the administrator and by the county court only out of such moneys available; that in considering such moneys there should be added thereto the value of the property taken by the appellant herein and converted to his use during the lifetime of the deceased widow." Some of the parties to the litigation, who had filed claims for the care and funeral expenses of the widow, filed a petition for rehearing, wherein they assailed the correctness of the former opinion in so far as it limited the payment of creditors' claims to moneys received by the administrator, and asserted that this holding practically eliminated the claims of creditors, for the reason that there were no moneys so available. In answer to this we said in supplemental opinion denying a rehearing: "Such position is a misconstruction of the views of this court as contained in the opinion. Properly the county court may consider, for purposes of such creditors' claims, the moneys received by the administrator upon the sale of the land, and by him paid upon the principal mortgage indebtedness, to wit, $700, and the moneys borrowed by the administrator, to wit, some $610, for purposes of the deceased widow. This makes a total of $1,310 available. Under the circumstances of this case the interest paid on the principal mortgage indebtedness by the widow, or the administrator, out of the moneys received during her lifetime, may be considered the complement of the amount of such mortgage indebtedness that the widow should have assumed and paid. The principal mortgage indebtedness, therefore, is properly chargeable upon the residue of the estate. The fees and expenses of the administrator not heretofore paid out of moneys received by him during the course of administration may likewise be considered a charge upon the residue of the estate."

The language quoted from the supplemental opinion forms the basis of the controversy between the parties on this appeal. It seems

that this language has also been misunderstood or misconstrued. By what was said, there was no intention on the part of this court to definitely fix the amount of moneys available for the payment of claims for the care, support, and burial of the widow. The situation before us should be borne in mind. It had been asserted that, under our opinion, all these claims had in reality been eliminated because the administrator (as shown by his report then before us) had no actual moneys in his hands, and the language quoted was used to call attention to the fact that during the course of administration moneys which in fact belonged to the widow absolutely had been utilized in payment of claims which properly should have been paid out of, and were chargeable upon, the property claimed by the residuary legatee; and that hence claims properly incurred for the use and support of the widow might and should be deemed payable out of the moneys belonging to the widow which had been so expended, and which moneys so constituted a charge upon the residue of the estate of Carl W. Priewe. It will be noted that the supplemental opinion did not attempt to state the exact amount available for the payment of claims for the support, care, and burial of the widow. Thus, in speaking of the moneys borrowed by the administrator, they are referred to as "some $610," whereas the exact amount, as shown by the findings of fact of the trial court then before us, was $610.29. If we had had any intention of fixing the exact amount available for the payment of the claims then in question and other claims of a like nature, we would, of course, have stated the exact amount of moneys so borrowed. This we did not do, and the language used clearly indicated that we did not purport to do so. All we intended to do was to point out that certain funds were or would be available for the payment of the claims under consideration, the exact amount of which was ascertainable by computation based upon the former reports of the administrator.

As we have already indicated, much of the misunderstanding and disagreement in this case is doubtless due to the fact that the property of the widow was treated as the property of the estate, and claims chargeable against her and claims chargeable against the estate and the administrator were commingled, and all treated as claims against the estate and the administrator. In other words, there was a complete failure to recognize the fact that the widow was the owner of a life

estate in all the property; that by virtue of the estate vested in her by the will she was the absolute owner of all income from the property during her lifetime; and was not only entitled to possess and exercise control over the property while she lived, but, if it became necessary, had the right to sell or encumber it.

There ought, however, to be no difficulty in fixing the liability of the administrator in this proceeding. He is entitled to such compensation for his services as the law prescribes, and he is entitled to be reinbursed for whatever moneys he has actually advanced in carrying out the directions of the will and the different orders of the court, whose validity is no longer subject to review. In the report and account dated April 25, 1917, it appeared, and in the determinataion thereof which was brought before this court for review on the former appeal it was determined, that the administrator had borrowed and advanced to the widow $610.29 more than he had received from all sources. This finding we approved, and it necessarily followed, under the views we then expressed, that the administrator was entitled to be reimbursed for such expenditures.

In the final report and account rendered in February, 1920, the administrator showed that he had collected rents for the land and for the three years subsequent to the death of the widow. While these moneys in a sense belonged to the residuary legatee, they were nevertheless, under the views expresesd in our former opinion, properly chargeable, in the hands of the administrator, with what he had expended or advanced for the support and maintenance of the widow, and would also be chargeable with whatever moneys legally belonging to her had been expended in paying off encumbrances on the land. It appears that in such last final report and account the administrator charged, as against the moneys which he had so received subsequent to the death of the widow, the said $610.29 item and interest thereon, and this was allowed by the county court in the order allowing the final report. In the order amendatory thereof, however, such item was disallowed. As already indicated, we believe that this item was properly allowed as a credit in the administrator's account, and that it was error to change the order as as to disallow such item.

The county court disallowed certain claims for the care of the widow, and for services rendered and expenses incurred in connection

with her last sickness and burial, as claims against the estate of Carl W. Priewe, but allowed them as claims against the estate of the widow. So far as we know, the estate of the widow has not been probated. And while the claims for her care, sickness, and burial would, strictly speaking, be claims against her estate, rather than claims against the estate of Carl W. Priewe, we can hardly shut our eyes to the fact that during this long term of years the property and moneys of the widow were treated as part of the Carl W. Priewe estate. Many of the claimants had, during this time, transacted business with the administrator, and, as appears in the former opinion, the administrator had made an agreement for the care of the widow. See 175 N. W. 733. That is, it appears that for more than fifteen years, during the lifetime of the widow, all these transactions were handled as matters relating to the estate of Carl W. Priewe, and were so construed by all of the parties to this proceeding. This being so, we see no reason why at this time this course should be departed from. It would be manifestly unjust to the parties interested at this late date to depart from the course which they mapped out or acquiesced in during this long period of time. We therefore hold that the administrator is entitled to charge as a credit item in his favor in the final account the $610.29, which it was adjudged upon the former trial that he had advanced to the widow in excess of what he had received prior to April 25, 1917. So far as the other moneys are concerned, which in fact—belonged to the widow and which were expended in such manner that the residuary legatee got the benefit thereof,—such as the moneys used to pay for the mortgage upon the land, the value of the personal property converted by the residuary legatee and which we on the former appeal held to constitute a fund from which the claims for the care, support, and burial of the widow might properly be paid,—we are of the opinion that the ends of justice require that they be disbursed by the administrator in—this proceeding to the claimants found to be entitled thereto.

Reversed and remanded, with directions that the cause be remanded to the county court for further proceedings in conformity with this opinion.

GRACE, J. (specially concurring). I agree with the result that has been arrived at in this case. I do not think the filing of the nine dif-

ferent accounts by the administrator had the effect accorded them in the decision in 43 N. D. 509, 175 N. W. 735. Partial accounts of the administrator, rendered from year to year, or from time to time, are permissible and largely operate to keep the probate court informed of the condition of the estate. The final account is, however, the real accounting.

The question of estoppel is not presented in the case. It is neither pleaded nor relied on. We think, however, in this case the proper conclusion and the proper result has been reached.

FIRST NATIONAL BANK OF APPELTON, Minnesota, a Corporation, Appellant, v. WILLIAM GALLINGER, Respondent.

(182 N. W. 695.)

Bills and notes — evidence of want of consideration held admissible as to execution of note.

In an action upon a promissory note, where the plaintiff alleged that it was a holder in due course, and the defendant, having interposed a general denial, relied upon nonexecution as a defense, it is *held*:

1. Evidence showing that there was no consideration for the instrument in question has a circumstantial bearing on the issue of execution, and was properly admitted.

Bills and notes — other transactions held admissible on issue of execution of note sued on.

2. Where a witness for the plaintiff testified to the execution of the instrument by the defendant, evidence of the transaction out of which the note is claimed to have arisen and other transactions taking place at the same time between the witness and the defendant are admissible for their bearing upon the issue of execution.

New trial — properly denied for newly discovered evidence of unnamed experts in handwriting.

3. Where the pleadings form an issue as to the execution of an instrument, and where upon the trial this issue was fairly presented upon contradictory evidence, it is *held* that the trial court did not abuse its discretion in denying a motion for a new trial on the ground of newly discovered evidence consisting of the testimony of unnamed experts in handwriting.

New trial — newly discovered evidence of journal entry of bank, payee of note sued on, held no ground.

4. The denial of a motion for a new trial on the ground of newly discovered evidence consisting of an entry of the note in suit upon the "Journal" of the payee bank was a proper exercise of discretion.

Opinion filed April 20, 1921.

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

Affirmed.

Cuthbert, Smythe, & Wheeler, for appellant.

It is proper to ask questions calling for a repetition of answers where the object sought is to test the credibility of a witness. Beers v. Payment, 95 Mich. 261; Zucker v. Kareles, 88 Mich. 413; Auroro v. Hillman, 90 Ill. 61; Jones v. Stevens, 36 Neb. 849.

"The rules that a new trial will not be granted for newly discovered evidence where such evidence is merely cumulative is not applicable to a case where testimony is corroborative of a party to the action who is his own principal witness." Sherman v. Dolan, 123 N. W. 72.

"Where it is evident that the trial proceeded on an erroneous view of the law, a new trial is properly granted." 20 R. C. L. 227; Adams v. Clark, 9 Cush. 215, 57 Am. Dec. 41.

"And in very intricate and doubtful cases, notwithstanding the finding of a jury, the court will, in the exercise of its extraordinary discretion, order a new trial in some cases for the better attainment of justice." 20 R. C. L. 227; Brown v. Frost, 2 Bay (S. C.) 126, 1 Am. Dec. 633; Pursley v. Hayes, 22 Iowa, 1, 92 Am. Dec. 350.

Rollo F. Hunt and *Flynn, Traynor, & Traynor*, for respondent.

BIRDZELL, J. This is an action by the holder to recover on a promissory note for $1,500. There was a verdict and judgment for the defendant. The appeal is from the judgment and from the order of the trial court denying a new trial.

The complaint sets forth a copy of the note as follows:

St. John, North Dakota, Sept. 10, 1917.

October 15th, 1918, after date I promise to pay to the order of Rolette County Bank fifteen hundred and no/100 dollars, at the

Rolette County Bank, St. John, North Dakota. Value received, with interest at the rate of ten per cent per annum.
P. O. ———— William Gallinger.

It then alleges that before the maturity of the note the payee bank, for a valuable consideration, transferred the same to the plaintiff, and that the plaintiff became the holder in due course of business before maturity and without notice of any defenses. The answer put in issue all allegations except the corporate character of the plaintiff bank and the payee bank. Upon the trial the plaintiff made out a prima facie case by the testimony of one T. J. Clifford, who was president of the Rolette County Bank at the time of the transaction, and by the testimony of C. M. Krebs, president of the plaintiff bank. Clifford testified to the execution of the note in suit by the defendant, and, upon cross-examination, explained the transaction giving rise to the note in substance as follows:

The father of the defendant for some years operated a farm near St. John. He had contracted indebtedness with the Rolette County Bank, secured by mortgages on his land. To avoid foreclosure he had deeded the land to the bank, and the bank, in order to escape the appearance of carrying an excessive amount of real estate as assets, had deeded the land to the defendant. Clifford explained that, with the land in the defendant's name, a first-mortgage loan of $2,000 was placed on it; also a second loan of $1,500 to clean up coupons and taxes. He stated that the note in suit evidenced this $1,500 loan. These loans being placed against the land in the name of the defendant, it was then reconveyed to the bank, so that in reality the whole transaction, so far as the defendant is concerned, was for the accommodation of the bank in making it appear to hold live mortgages against the land in question as assets, rather than the land itself, which it in fact owned. The "loans" were mere paper transactions. Clifford testified that the defendant received nothing whatever for the note.

The defendant farmed the land until the season of 1918, and while so farming it maintained business relations with the Rolette County Bank. He denied having executed the note in question, claiming that

on the date borne by it he executed another note for $700; also a chattel mortgage securing the same, at the same time paying over some cash in settlement of all his transactions with the bank. At the trial he produced the $700 note which he had paid to the holder, the First National Bank of Pipestone, Minnesota, ten days before maturity.

Several witnesses were produced on behalf of the defendant to impeach Clifford by showing his bad reputation for truth and veracity; and on behalf of the plaintiff in an attempt to show that on different occasions when the note had been presented to the defendant in efforts to collect it, he had not claimed it to be a forgery.

The assignments of error argued upon this appeal are so numerous that it is impracticable to consider them individually. They are principally concerned with rulings upon the admission and exclusion of evidence, and with the ruling of the trial court in denying the motion for a new trial on the ground of newly discovered evidence.

It is contended that the court erred in permitting the defendant, during the cross-examination of Clifford, to establish the latter's connection with a corporation known as the Farmers National Live Stock Company, and to show that some of the bank's paper was disposed of through that organization. While the defendant did not succeed in establishing any connecting link between the Farmers National Live Stock Company and the transaction in question, we fail to see wherein the plaintiff could have been prejudiced by showing Clifford's relations with that company. There is nothing in the record showing that that company is in any way discredited. Furthermore, in instructing the jury, the court carefully narrowed the issue for their determination to the one question of the genuineness of the signature on the note. So, even though the court erred in allowing the defendant to attempt upon cross-examination to establish Clifford's connection with the Farmers National Live Stock Company and that company's connection with the business of the Rolette County Bank, we cannot regard the error as prejudicial.

In a number of assignments, error is predicated upon rulings of the court admitting evidence of lack of consideration for the note; also evidence of other transactions taking place concurrently with the alleged transaction. It is argued that inasmuch as the plaintiff had assumed and sustained the burden of proving that it was a holder in

due course, evidence of lack of consideration should not have been admitted at all, as it would not establish a defense and its only effect would be to prejudice the jury. We are of the opinion that it was proper to place before the jury both the testimony relating to the transaction which gave rise to the note in suit and the testimony relating to other transactions between the same parties at the same time for their circumstantial bearing upon the question of execution. The scope of examination on this issue is well stated in 8 C. J. pp. 1028, 1029, as follows:

"Where the contention is that defendant did not execute the instrument or that it is a forgery, evidence tending to support it or to show the contrary is admissible, including *circumstantial evidence, such as evidence of facts and circumstances surrounding the parties and attending the giving of the instrument.* And evidence of defendant as to whether he signed it is of course admissible. . . .

"Evidence to show a state of affairs which would render it probable or improbable that the instrument was executed by defendant is admissible. Thus for that purpose evidence of dealings between the parties is admissible, such as evidence that at the date of the note other transactions took place between the parties which render it improbable that the note was executed and which are inconsistent with its execution. So evidence is admissible to show the relation between defendant and the person claimed to have committed the forgery. . . .

"So evidence that defendant was not indebted to plaintiff at the time the note was executed is admissible as tending to show that he did not execute the note."

The evidence complained of falls cleary within the legitimate range of inquiry on the issue of execution; and if it be conceded that its tendency in the instant case was to arouse sympathy for the defendant, it should not have been excluded on that account. The record shows that the trial court took great pains to caution the jury against finding in favor of the defendant merely because he had received nothing from the Rolette County Bank. After a careful reading of the entire testimony and the instructions given, we are of the opinion that no error prejudicial to the plaintiff was committed, and that the plaintiff was given the benefit of a fair trial.

The remaining specifications relate to the insufficiency of the evi-

dence to sustain the verdict and to the sufficiency of certain newly discovered evidence as a ground for a new trial. We are of the opinion that there is ample substantial evidence in the record to warrant the submission to the jury of the question of the genuineness of the signature of the defendant. The defendant not only denied that he signed the note, but proved a set of circumstances consistent with the non-execution of the instrument. While the plaintiff's chief witness, Clifford, swore that he did sign it, he was not so prone to remember the admittedly genuine, concurrent transaction relating to the $700 note; also he was rather effectively impeached as to his truth and veracity generally.

The newly discovered evidence stated in the affidavit in support of the motion for a new trial was principally that of two unnamed experts, who, it is claimed, would give testimony favorable to the plaintiff on the issue of genuineness. Evidence of this sort is not generally of such a satisfactory character that a court would be warranted in granting a new trial for the sole purpose of receiving it. Besides, in the instant case the showing of diligence to procure the evidence at the original trial is weak.

In so far as the motion is supported by alleged newy discovered evidence of an entry of this note in the bank's "Journal," we are of the opinion that it is wholly without merit. The entry, if admissible at all, would only have a circumstantial bearing on the main issue. Whatever knowledge the plaintiff might have had with reference to the defendant's contention of forgery, there can be no doubt it had long known that he claimed he had received nothing for such a note. The knowledge gained through the efforts made to collect this note clearly indicated the importance of all evidence relating to the transaction, which would, of course, include evidence of the character of that now made the basis of the motion. We are of the opinion that the trial court did not abuse its discretion in denying the motion for a new trial. The judgment and order are affirmed.

JOHN SHONG, Respondent, v. C. E. STINCHFIELD and Atlantic Elevator Company, a Corporation, Appellants.

(183 N. W. 268.)

Malicious prosecution — probable cause a question for jury.

1. In an action for malicious prosecution, where the facts are disputed and reasonable men might differ upon the conclusions to be drawn therefrom, the question of probable cause is for the jury upon proper instructions.

Malicious prosecution — advice of counsel.

2. One seeking to rely upon the advice of counsel as a defense in an action for malicious prosecution must show that he communicated to such counsel all of the facts within his knowledge and all that he could ascertain with reasonable diligence and inquiry and that he acted on the advice received honestly and in good faith in causing the arrest.

Malicious prosecution — malice may be inferred by jury from want of probable cause.

3. Malice may be inferred by the jury from want of probable cause.

Malicious prosecution — record does not show damages found by jury to have been excessive.

4. In such action damages awarded in the sum of $2,200 are held, upon the record, not to disclose the influence of passion, partiality, or prejudice, beyond the exercise of a reasonable and sound discretion by the jury and not, as a matter of law, excessive.

Opinion filed April 21, 1921. Petition for rehearing denied June 6, 1921.

Action for malicious prosecution in District Court, Bottineau County, *Buttz*, J.

Affirmed.

F. B. Lambert and *J. J. Weeks*, for appellants.

In actions for malicious prosecution and false imprisonment, proof that defendant as prosecuting witness in good faith fully and fairly stated all of the material facts within his knowledge to the prosecuting officer and acted on his advice establishes a case of probable cause. Smith v. Tolan (Mich.) 122 N. W. 513; Baldwin v. Capitol Steam Laundry Co. (Minn.) 122 N. W. 460; Brisley v. Schuls, 124 Wis. 426, 102 N. W. 918.

NOTE.—On the question as to whether probable cause is for the court or jury in malicious prosecution, see comprehensive note in L.R.A.1915D, 1.

The question whether the defendant was protected from a suit for malicious prosecution, when she acted upon the advice of counsel after a full statement of the facts to him, and there was no evidence that she acted maliciously or in bad faith, other than the proof that the plaintiff was acquitted, was one of law for the court. Krause v. Bishop (S. D.) 100 N. W. 434.

"In an action for malicious prosecution, to justify recovery, it must appear not only that the facts would not have aroused belief of guilt in an ordinary mind, but also that the prosecution was malicious." Small v. McGovern (Wis.) 94 N. W. 651.

"Where evidence is undisputed, want of probable cause is for the court." Bulmer v. Reusse (Minn.) 175 N. W. 1005.

W. H. Adams, for respondent.

The statement made by the complainant must be a "full and fair statement" of all the facts known to him or that should be known to him at the time. The statement must also be made to the counsel in good faith, and the advice received must be acted on in good faith. Newell, Malicious Prosecution, 310; 20 Cyc. 34–36; Merchant v. Pielke, 10 N. D. 48.

If there was want of probable cause for the prosecution of a criminal action, the law will presume malice. Kolks v. Jones, 6 N. D. 461.

BRONSON, J. *Statement.*—This is an action for malicious prosecution. The jury returned a verdict of $2,200 in plaintiff's favor. The defendants have appealed from the judgment entered and the order denying a judgment *non obstante,* or, in the alternative, a new trial. The facts are substantially as follows:

The plaintiff was employed as the grain buyer and agent of the defendant company, in charge of its elevator, coal, feed, and grain business at Kramer, North Dakota, for about thirteen months from July, 1917 until August, 1918. He was hired at a salary of $60 per month with the understanding, as plaintiff claims, that he was to receive $15 per month extra if he remained in the employment for a year, and, as the defendant claims, $15 per month if he so remained and performed his services satisfactorily. Plaintiff's school education did not extend beyond the third grade. He was poorly versed in bookkeeping. Formerly, he had worked on a farm as a laborer and for a time had operated

a pool room in Kramer. In August, 1918, upon checking plaintiff's business at Kramer the representative of the defendants reported a shortage of approximately $676. This shortage, as reported, consisted of the difference between receipts of wheat and rye, and shipments made; the difference between receipts of corn and millet, and sales made; and the difference between the coal received, determined by the dockage weights in Minnesota upon shipments, and the sales thereof made and the amount on hand remaining, determined by measurement of the bin. This total shortage also included a report upon "sales collected for and undeposited," amounting to $171.57 and a flour shortage of $3.85. In connection with this shortage the plaintiff was credited with an overage, figured likewise with reference to the grain, upon flax, oats and barley amounting to $67.86. The superintendent of the defendant company visited Kramer and the plaintiff and this superintendent made efforts towards collecting upon accounts owing. Some moneys were collected upon these accounts, but there still remained a difference or balance of some $180. Concerning this amount, as the plaintiff testified, he told the superintendent that he did not want to collect such accounts because he owed the parties private debts and had promised them that he was expecting money from the elevator company at the end of the year with which he was going to pay their accounts to the company. It appears that the plaintiff became indebted to various customers of the defendant company upon his personal accounts, such as for rent, for hay, etc. Plaintiff made various sales to such customers of the defendant with the understanding that he would pay such accounts to the company and thus offset his own indebtedness to such customers.

A day book was kept as well as a ledger in which entries were made of sales including the charge accounts and the same were posted into the ledger. These items were rather imperfectly kept. In the ledger appear items of credit to certain customers for indebtedness owing upon merchandise received by the plaintiff. The plaintiff testified that he reported the sales to the company. The amount of plaintiff's money shortage was determined by deducting from the record the total sales made by the plaintiff and the amount of cash remitted by the plaintiff. The representative of the defendant company made various attempts

to secure settlement of the shortage reported. The plaintiff was requested to raise the necessary amount of money to cover the shortage from among his friends. The bonding company upon the plaintiff's bond urged immediate payment of the shortage, in amount, stated to be $670.80. The superintendent of the defendant was urged by this bonding company to take action against the plaintiff by filing information if he failed to fix the matter up. The bonding company stated that they believed an example should be made of some of these fellows who converted other people's money to their own use. Not securing a settlement from the plaintiff, the superintendent of the defendant visited the state's attorney and stated to him the facts of the shortage and signed a criminal complaint charging the plaintiff with the felonious appropriation of money amounting to $171.57. Upon September 23, 1918, the plaintiff was accordingly arrested and brought before a justice of the peace. Upon failure to give bond he was committed into the custody of the sheriff. Within four days thereafter he was released upon furnishing bail in the sum of $1,000. On September 26, 1918, the superintendent of the defendant wrote a letter to the plaintiff to the effect that he would not spend any more time trying to help him and that unless he made settlement in full with him, expenses included, before October 9, he would push the case to the limit and that "nothing goes except the cash." On October 9, 1918, the preliminary hearing was held, and the plaintiff, waiving examination, was bound over to the district court. Thereafter, in March, 1919, upon trial of the criminal action, the plaintiff was acquitted. This action for malicious prosecution has resulted. The record is voluminious; the exhibits extensive. Much evidence was introduced which concerned the method by which plaintiff conducted the business of the defendant and maintained its books. Much testimony, likewise, was adduced on the part of the defendant, in an effort to show that the plaintiff was guilty of embezzlement of the company's property through the manner in which he had conducted this business. No attempt will be made to detail such evidence in its various aspects.

It is undisputed in the record that the company defendant made a mistake in listing the corn shortage against the plaintiff; that in such shortage he was both improperly charged as to weights concerning the corn and also concerning certain corn that was spoiled in shipment

and otherwise. There appears evidence on the part of the plaintiff's witness to the effect that whatever shortage occurred in the handling of the grain, or flour, was incidental to the operation of the company's business, and likewise the overage that accrued. There is evidence concerning the accounts to the effect that the plaintiff did give credit to various customers for property of the company delivered to them, with the understanding that he would apply his indebtedness to such customer's accounts and pay the company. There is evidence also on the part of the plaintiff that he was not paid this $15 per month bonus and was not paid for the two weeks that he worked in August. On the part of the defendant there is evidence to the effect that the plaintiff made some of these sales to customers and made some settlements without accounting to the company upon such settlement with such customers. That he did use some coal and some flour without accounting therefor to the company. That he made admissions that he was short and that he turned over his salary to the plaintiff with reference to his shortage. There is also evidence on the part of the defendants to the effect that they made full and complete statement of the facts to the state's attorney; that in causing the arrest they acted without malice and upon grounds of probable cause pursuant to the requirements of the bond existing between the company and the bonding company. There is also evidence to the effect that the plaintiff did not keep correct and proper accounts of sales made and did not list fully sales for cash or sales on credit, and that the books of the company as kept by the plaintiff showed distinctly a shortage on the part of the plaintiff. Plaintiff on the other hand offered evidence in contradiction of such evidence.

Decision.—The defendants contend principally that the record discloses, as a matter of law, absence of malice, probable cause, and a full statement made of the facts and circumstances of plaintiff's shortage to the state's attorney. It is also contended that the verdict is excessive. This court has heretofore held that malice may be inferred by the jury from want of probable cause. Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 588. That probable cause becomes a question of law alone when the facts are undisputed and then only when the record discloses that the plaintiff acted in the belief that he had probable cause. Ibid.; Comeford v. Morwood, 34 N. D. 276, 158 N. W. 258. This court has further held that one who seeks to rely upon the

advice of counsel as defense must show that he communicated to such counsel all of the facts within his knowledge and all that he could ascertain with reasonable diligence and inquiry and that he acted on the advice received, honestly and in good faith, in causing the arrest. Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574. In connection with these contentions the defendants maintain that the evidence in the record, including particularly admissions made by the plaintiff, demonstrate that the plaintiff was guilty of embezzling the company's property and that this shows affirmatively the existence of probable cause for the prosecution maintained. We are unable to adopt defendants' contentions in this regard. The gist of plaintiff's action, after proof that the criminal prosecution terminated in his favor, was to establish that such prosecution was malicious, without probable cause, and resulted in his damage. Ibid. The questions therefore in this dispute in the evidence were sufficient to form a question of fact for the jury. Likewise, there exists a dispute concerning the facts and circumstances that the defendants' representative knew, or that, in the exercise of reasonable diligence, he ought to have known when he made the statement to the state's attorney, and, accordingly, the question of whether the defendant communicated all the facts within his knowledge or all that he should have ascertained with reasonable diligence and inquiry, were questions of fact for the jury. The trial court fairly submitted thees questions to the jury. The findings thus made by the jury do not warrant this court, upon this record, in determining, as a matter of law, that there existed neither malice nor want of probable cause.

The damages awarded appear large. There is evidence, however, that the plaintiff, in the defense of the criminal action, incurred expenses aggregating $650. The trial court properly instructed concerning the questions of damages. The award of damages was peculiarly for the determination of the jury, in the exercise of a reasonable and sound discretion, unless the record discloses the influence of passion, partiality, or prejudice. We are not prepared to hold, as a matter of law, that the record so discloses. Ann. Cas. 1916C, 251; Merchant v. Pielke, supra. The judgment and order are affirmed with costs to the respondent.

CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J. (specially concurring). We are of the opinion, that the evidence clearly establishes want of probable cause.

In the case of Rhoads v. First Nat. Bank, 37 N. D. 421, 163 N. W. 1051, it was held that malice may be inferred where want of probable cause is proved.

We agree, as, in substance, is stated in the main opinion, that the verdict is not excessive, and that the record does not disclose the influence of passion, partiality, or prejudice.

ROBINSON, Ch. J. (dissenting.) In the administration of the law the first duty of a court is to prevent one party from robbing another. On a complaint for embezzlement the plaintiff escaped by the skin of his teeth and a mistake by the state's attorney. Then in this action for malicious prosecution he recovers a verdict for $2,200. The complaint and the information made no charge against the plaintiff, only embezzlement of money to the amount of $171, whereas the proof tends to show only an embezzlement of property. The ordinary layman may well be excused for not knowing the distinction between an embezzlement of money and of goods and chattels, but, on the record, it does not appear that the state's attorney had any excuse for drafting the complaint and the information as he did for the embezzlement of money. Nor does it appear that he had any excuse for drafting the information and going to trial without any evidence to show a conversion of money. He was the person who had sole charge of the criminal prosecution. He drafted the complaint, which was dated September 12, 1918, and he drafted the information, dated February 17, 1919. Between those two dates he had plenty of time to investigate the facts. In March, 1919, he conducted the prosecution before Judge Buttz and a jury, and, of course, it resulted in a verdict and judgment of acquittal.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. Comp. Laws, § 9929.

Sec. 9936: "A distinct act of taking is not necessary to constitute embezzlement, but any fraudulent appropriation, conversion, or use of property coming within the above prohibition is sufficient."

Sec. 9939: "The fact that the accused intended to restore the prop-

erty embezzled is no ground of defense if it has not been restored before a complaint has been laid."

Now in this case while the plaintiff did not embezzle money of the corporation that employed him, it does appear that he did what is known as a crooked business, to which he was tempted and almost forced by his poverty. He was twenty-seven years old; he had a family of three children and a wife. He lived with them in Kramer. He had a salary of only $60 a month, which he accepted because his pool business had played out, for it was a lean year in which it did not pay to keep the elevator open and it took in only three carloads of wheat. So it appears the plaintiff became indebted to several of his relations and other persons and apparently stood them off or liquidated his own debts by selling them property of the elevator company and promising to pay the company.

In that way he used the property of the company to the amount of $171. He says: "I charged them with the flour, coal, and stuff just as though I had no account with them myself, but I made a verbal agreement with them that at the end of my year in the elevator I would pay their account, because I figured that I would be getting in the neighborhood of $200 from the elevator company, and I was short and I wanted to pay these fellows. In that way they could get their bills straightened up and I got my money. But I left their account just the same with the company and reported to the company as though they never owed me a cent."

When the complaint was made the accused waived examination and gave bail. Then he went around, saw his friends and creditors and tried to induce them to pay their debt to the company on assurances that he would pay them. The complaint and the arrest was the natural result of crooked business. The case presents three questions: (1) Was the prosecution malicious? (2) Was it without probable cause? (3) Is the damage excessive?

Malice is the very essence of the action. The lack of probable cause is of no consequence only as it is evidence of malice. " 'Malice' and 'maliciously' import a wrong wish to vex, annoy, or injure another person or an intent to do a wrongful act." Sec. 10,360. Malice is a condition of the mind or the head, and not of the foot. Where there is no mind there can be no malice or intent. A corporation has no mind.

It is a legal entity, existing only in the contemplation of law. Hence it cannot be guilty of malice. True it is said that most of the decisions are to the contrary. 18 R. C. L. 45. But there is no good reason why this court should follow such wrong decisions and pile error upon error. The statute is that "Malice imports a wrong wish to vex or injure a person." Hence, where there is no such wish or intent, there can be no malice. Thus it is that idiots, lunatics, and mere corporate entities having no mind, cannot be guilty of malice, though they may be guilty of torts not requiring an act of the mind. That is self-evident. It is as clear as any axiom. The making of the complaint was not the act of the corporation or its directors. There is no evidence that any director knew of it. It was the direct act of the state's attorney, who advised it, and of the person who signed it, and there is not a scintilla of evidence that he was actuated by malice. On the contrary, it appears that he was a stranger to the defaulting elevator agent and gave him every opportunity to pay his confessed shortage. He consulted the law officer and was advised to make the complaint. There is a wrongful assumption that his statement to the prosecuting officer was not full and fair, but such is not in accord with the evidence or the presumptions; and, of course, the complainant did not have before him all the mass of stuff submitted as evidence to this court. And we may fairly assume that after reading such evidence and exhibits, which would require at least three days, no two judges would agree as to a full and fair statement of the same. Besides it appears that the agent had kept his books in such a way as not to disclose the real nature of his questionable transactions. The books do not show how he sold the property of the company to get credit or to stand off his creditors. That was a new device. Manifestly if the agent had kept his books right and had done a straight, honest business, there would have been no occasion for a criminal prosecution against him.

The criminal complaint, as drafted by the state's attorney, was signed and sworn to by the defendant, C. E. Stinchfield, the superintendent of the company. So far as the evidence shows, the complaint was made in good faith, and not maliciously. The complainant was not a lawyer and he did not retain private counsel. He went to the state's attorney and to him stated the case. As he had no reason for making a wrong statement, the presumption is that he made a fair and honest statement

of the facts as understood by him. He stated the facts as he had learned them from the plaintiff and the meager records kept by him. The facts did show a misuse of the corporate property, but not a conversion of money. There was probable cause for believing that a public offense had been committed, but the offense was not properly charged in the complaint or in the information. However, that was not the fault of the complainant. Had the complaint and the information been properly drafted, the facts as proven would have sustained a verdict of guilty; but, under all the circumstances, the chances are that a jury would not have found a verdict of guilty under any complaint or any true testimony. And still there was probable cause. The complaint against the defaulting agent was only for the embezzlement of money. If there was no probable cause that he had embezzled money or property, why did he waive examination and give bail; why did he not stand a preliminary hearing before the magistrate and defy the prosecution? It must be that he feared the result of an examination. His shrewd counsel must have feared that he might be held for the embezzlement of property, though the charge was not in the complaint. Of course he did not fear the charge of embezzling money. Hence he waived an examination and invited a trial on the false charge. In that way he did entrap or deceive the prosecuting attorney who filed an information for the embezzlement of money only and went to trial in a haphazard way without any investigation of the facts. It is not the duty of the state's attorney to prosecute an innocent person, or any person, without probable cause. His duty was to make a full investigation and inquiry into the facts touching the alleged crime. Sec. 10,629. And in case it appeared that no offense had been committed, it became his duty to refuse to file an information. Sec. 10,630. In this case the duty of the state's attorney was to examine the books, to inquire into the matter, to hear both sides of the case and to refuse to file an information for the embezzlement of money when there was no evidence to sustain it.

The verdict of $2,200 is not merely excessive. It shocks the conscience and it has no support in the evidence. If the defendants had not appeared and conducted the trial in a tactless way, it is quite certain that such a verdict would not have been given. But on the trial, by overzeal, counsel for defendants made a mountain out of a molehill, cross-examined the accused agent till he became a kind of martyr, pro-

tracted the trial, putting in evidence countless and confusing exhibits and a mass of testimony. It was enough to swanp the real and simple merits of the case.

However, it is entirely clear that the primary fault was with the agent; he has not been slandered or maligned; and so far as he did a crooked business, it was proper to expose it to the light of truth. That was not a legal injury. Aside from that he suffered no injury, because he waived examination before the magistrate and invited a trial on a false issue, the embezzlement of money. On that charge there was no proof—and he knew it. There was no need of counsel to defend him. There was no reason for incurring any expense, and before any expense was incurred, he had every opportunity to settle the matter by paying his shortage, $171, or by inducing his friends to pay for the coal, feed and other property of the company which he had sold them to set off or liquidate his own debts, promising to pay the company for its property.

The trial, both of this and the preceding criminal action, was made in reality a burlesque, and though the lawyers were the principal actors, the trial judge did his part. He magnified this case and made of it a grave matter. He gave the jury a charge of over 3,000 words and gravely cautioned them against finding damages in excess of $10,000. The wonder is that the jury did not resolve in favor of the Plumb plan and solace the defaulting agent by an award of the Atlantic Elevator. Assuredly the judgment should be reversed and the action dismissed.

On Petition for Rehearing, Filed June 6, 1921.

BRONSON, J. Two juries through their verdicts have held respectively; the first jury, that the plaintiff was not guilty of the crime of embezzlement, and, the second jury, that there existed no probable cause to warrant belief of the embezzlement of either money or property. This appeal is before this court for a review of errors alleged to have been committed upon the trial of the civil action. Our chief justice has presented a dissenting opinion upon the determination made by this court and a further dissenting opinion upon the petition for rehearing. The appellants have filed an extended petition and supplemental petition for rehearing. From these dissenting opinions and the petitions one might well infer that this cause is presented to this court both upon the

law and the fact as a trial *de novo*. This court, sitting to review the errors specified, must review the error specified upon the record. It is not the function of this court, in this appeal, as apparently appears in the dissenting opinion of our chief justice, to adjudge guilty, both the state's attorney of failure to properly perform his duty, and the plaintiff of the crime of embezzlement. Not thus may one so be condemned and convicted. The right of trial by jury still remains in the state.

The state's attorney in the criminal action, who is one of the attorneys for the defendant has an honorable record before the courts of this state as a lawyer. The jury, by a verdict, have found that there was not a full disclosure of the facts made by the complaining party to this state's attorney. The record amply warrants this holding.

Our chief justice asserts that the jury made no such finding and that our opinion does not attempt to show wherein the defendant failed to make a full disclosure. A mere inspection of the record answers this assertion. The court charged the jury: "So, that if you believe in this case that the defendant Stinchfield made a full, fair, and honest statement of all the facts in the case as were known to him, or believed by him to exist, and that upon such statement he received advice from the state's attorney that he had good cause for making complaint against the plaintiff, then, I charge you that the plaintiff *cannot recover* in this law suit."

The jury found that the plaintiff could and was entitled to recover. Necessarily, the jury found that the defendant did not make a full and fair disclosure of the facts. This court has heretofore held that one who seeks to rely upon the advice of counsel as a defense must show that he communicated to such counsel all of the facts within his knowledge, and all that he could ascertain with reasonable diligence and inquiry and that he acted on the advice received honestly and in good faith in causing the arrest, and that further, to obtain the protection which the advice of counsel affords, it is not enough to prove generally that all the facts were laid before him. The proof must show what facts were communicated, so that it may be seen whether the presentation was full and fair. Merchant v. Pielke, 10 N. D. 48, 53, 84 N. W. 574. Whether there has been a full and fair communication to counsel is a question of fact for the jury. 26 Cyc. 111. The dissenting opinion of the chief justice, of itself, shows that there was neither a full nor fair disclosure

of the facts made by the defendant to the state's attorney. So faulty was it, that the chief justice terms the criminal prosecution a mere fiasco. So flimsy was it, that the chief justice states that there was no reason for employing counsel to defend against it. Yet, the fiasco resulting, if such it may be termed, was occasioned through the disclosure of facts as stated by the defendant to the state's attorney, supposable facts which it then knew or ought to have known. The chief justice states that it was the duty of the state's attorney to examine into the charges and either to approve or disprove the issuing of the warrant, to refuse to sanction a prosecution without probable cause, and that the presumption of law is that he did his duty. The state's attorney did issue this warrant. The chief justice avers that the complainant did make a fair, honest statement of the case. Yet he avers that there was no excuse for drafting this information against the plaintiff herein and going to trial without any evidence to show a conversion of money. No showing exists in the record nor does the chief justice assert that the state's attorney acted upon other or different information than he received from the defendant. The state's attorney testifies that he acted upon the information furnished by the defendant. The criminal prosecution had, as the chief justice argues, was without probable cause. Manifestly, if the defendant had made a full and honest statement of the facts to the state's attorney, no prosecution upon the criminal charge of embezzling money would have resulted. For, as the chief justice asserts, the presumption is that the state's attorney did his duty. Thus does our chief justice blow both hot and cold upon the contentions of a full and fair statement made to counsel. Wherein did the defendant fail to make a full disclosure of the facts? A few illustrations will suffice: The chief justice quotes the argument of the state's attorney (one of the attorney's for the defendants herein) viz:—"The confessed shortage of $171.57—the money shortage was determined by deducting from the record of sales made the amount of cash deposited and the accounts outstanding as reported by the plaintiff. The plaintiff was charged with the total sales, then credited with the cash deposited and the accounts outstanding as reported by him." At the trial, the state's attorney testified:

"A. Mr. Stinchfield told me that he wanted to make a criminal complaint against their agent at Kramer, Mr. John Shong, and I

asked him what the case was, what it was about; he says, he was short over there and I asked him how much could be proven or something to that effect, what the evidence was, how he knew he was short and he told me they had the records and reports that he had to make and did make of all his sales; they also had the records of his deposits of cash that he had received and statement of all the outstanding accounts that Mr. Shong claimed to have and from those statements that he figured he was short in cash something like $170 or $180, I don't know the exact amount, I believe the exact amount was stated in the criminal complaint. Mr. Stinchfield also said that when he had figured this up with Mr. Shong, Mr. Shong had told him that he was short, made that admission he says; that is the substance of what he told me."

The state's attorney further testified, in response to the question whether Stinchfield had a statement showing the amount of the various shortages, that he would not be certain; that he thought perhaps he did; that the only thing he was interested in was the shortage of money. He further testified that he did not remember whether he (Stinchfield) told him that Shong claimed the company was indebted to him for wages in the sum of $120. The defendant, Stinchfield, as superintendent of the elevator company, testified that when he signed the criminal complaint he did so under instructions from the elevator company and the bonding company. In response to a question to tell the jury everything that he told Mr. Weeks at that time, he stated that he introduced himself, and told Mr. Weeks that he had a criminal complaint to make; that he wanted to swear out a complaint against Mr. Shong, and he gave him a statement of the facts that he had; that he wanted a warrant for this man; that he told Mr. Weeks it was a shortage of $171.57 in cash; that Mr. Shong had embezzled; that Weeks wanted to know if he had the evidence and he told him he had; that he laid it before him, and the state's attorney, after looking it over, said, there was no question but what he had the proper evidence so far as he could see and he issued the warrant; that he laid all the evidence that he had from the Atlantic Elevator Company before him as to any money shortage; that this evidence was "a statement gotten out showing what he was short and it was the shortage of the difference between, the difference here in his sales accounts and his deposits and nothing to cover the difference;" that this statement showed a short-

age of $182.57 and that he wanted a warrant for $182.57; that at that time there was an error of $11 which he had not noticed. (It is here to be noted that this $11 error consists of two accounts, Perry $8, and Schultz $3, which Stinchfield authorized plaintiff to charge off as bad accounts. These two accounts were in the list of eleven accounts which aggregated over $182, and which in amount covered the shortage in money claimed; evidently Stinchfield knew something about these accounts.) He also testified that he told the state's attorney that Shong admitted that he was short and that he used the money. In this connection the testimony of Stinchfield himself is significant. The chief justice asserts that because plaintiff testified that he did not show the ledger to Stinchfield that thus he was keeping Stinchfield in the dark. Stinchfield, on cross-examination was asked if he made an examination of this small ledger at that time, referring to the time when plaintiff was checked out in August, 1918. He answered:

"Not at that time.

Q. "When did you examine it last? A. *In April.*"

Q. "As a matter of fact that ledger shows at least some of these accounts that he claims existed, does it not? A. Possibly, but he was not keeping his book up, and it was no authority to me as to whether the accounts were correct or not."

Q. "You didn't take the trouble to make an examination of it at all? A. No, Sir."

Thus is plaintiff corroborated that he did not take statements from that ledger; that such book was never a full account of the outstanding accounts. Thus is it shown that Stinchfield knew about this ledger; and knew or had the means of the knowledge of its contents, and, further, that Stinchfield did not check up; through this ledger; it was unnecessary; the sales slips and the day book, each spoke for themselves; the sales slips showed either cash or charge sales. The question as to whether Stinchfield made a full, fair and honest disclosure of the facts to the state's attorney, as a matter of law, upon this record answers itself. It is apparent that Stinchfield went to the state's attorney for the purpose of getting a criminal warrant for the arrest of the plaintiff for embezzling money. He did not first lay the facts before the state's attorney. First he stated that he wanted a criminal warrant. He even asserted to the state's attorney that Shong admitted that he had

embezzled and had used money. In accordance wih Shong's testimony which was for the jury, and which testimony apparently they believed, this was not true and Shong had not admitted that he had embezzled or used the money, and assuredly upon this record it was false to state or assert that plaintiff had embezzled the company's money. This first was a disclosure found not true. Again he did not disclose to the state's attorney concerning the claim of Shong that the company owed him money. Further, he did not disclose to the state's attorney the facts as disclosed in the record that the sales made were evidenced by sales slips showing the date, the party to whom sold, and the merchandise sold, and that these sales slips were sent to the home office or were supposed there to be sent. He did not disclose to the company that sales which were made not for cash were shown by these sales tickets, by entries upon the day book and to some extent by charges entered in the small ledger. He did not disclose to the state's attorney concerning customers' accounts as shown by the sales slips on the day book, and in the small ledger wherein entries of credit were made by the plaintiff for accounts that he owed such customers or in explanation concerning such entries. He apparently did not disclose to the state's attorney the list of the accounts receivable such as could have been readily ascertained if he did not already know them from the day book, the ledger, and the reports made by the plaintiff to the home company. The statement concerning which Stinchfield testified did not pretend to have any list of accounts receivable. It was a statement prepared or submitted by defendant which showed and claimed a shortage of over $600. The shortage with reference to coal, wheat, rye, flax, oats, barley and millet was not a shortage claimed through malefaction, but a shortage or overage, as the case might be, in fact, in business operations. And in this regard no disclosure or statement is made to the state's attorney. The claimed shortage in corn was false, so the record discloses; the shortage reported on accounts was claimed, as if plaintiff had collected for the accounts and not deposited the moneys; yet even then Stinchfield knew, or ought to have known, that it was false to charge the plaintiff with embezzlement of $11 which represented two admitted bad accounts.

Furthermore, Stinchfield testified that when he was checking up in June, 1918, for the cut off that there was not enough to cover the sales

as the sales amounted to, including the outstanding accounts which were on statements, that he had some statements of accounts in the drawer. Subsequently when he was at Kramer again he went around with the plaintiff and collected some accounts. The shortage then was figured around $180. The plaintiff said that he had accounts for that but did not want to collect them as he owed these parties private debts and was expecting money from the elevator company at the end of the year with which he was going to pay their accounts with the company. These accounts are in evidence. Exhibits 632 to 643 inclusive. Including the account of the plaintiff which was $37.84, they total over $218 eliminating plaintiff's account, they total a little over $180. With two accounts eliminated which were admitted bad by Stinchfield such accounts amount to a little over $170, approximately the amount of the claimed shortage. In the evidence in response to a question by the court, the defendant's attorney admitted that these accounts were what made the difference in cash. These accounts, as plaintiff testified, had been reported to the company. Again Stinchfield did not make a disclosure of these facts to the state's attorney. Furthermore, plaintiff testified that Stinchfield when he came there August 1st, got the sales slips so that the company was in a position to know the outstanding accounts in connection with plaintiff's previous monthly reports. Manifestly, it is assuming much to state upon such disclosures that, as a matter of law, Stinchfield made a full honest statement to the state's attorney.

Assuredly, the question of whether the defendant was in good faith trying to enforce the law upon a full presentation of the facts, or was acting maliciously for purposes of compelling a settlement in cash by the plaintiff upon its own figures as submitted to him, was for the jury.

But the contention is strenuously made in the petitions for rehearing and in the dissenting opinions that the plaintiff is an admitted embezzler of property and that therefore there existed probable cause for his arrest. We are firmly of the opinion that the record warrants no conclusion by this court, as a matter of law, that this plaintiff was an embezzler of property, either through his own admission or upon the record testimony.

The defendant placed in charge of its elevator this young man, with meager education and without any experience in book-keeping methods

or as a business man. The book-keeping tools that were furnished to him consisted of a cheap form of day book, individual blank sales tickets (to be sent to the general office with his reports), covering individually flour and feed, coal, and grain. Blanks were also provided for a weekly report for flour and feed sales, coal and wood sales, and grain and sundry sales. Also a blank for a monthly report showing a list of accounts receivable, etc. When sales were made sales tickets were likewise made. In accordance with plaintiff's testimony, when cash sales were made, the sales slips were marked paid. Some of these tickets are marked "paid," some charged, and many without any such notation. In this day book entries of charge accounts and, to some extent, of payments were made.

There was also a small ledger (size 6 by 9 in.). The plaintiff claimed in his testimony that this book never belonged to the company, that it was turned over to him, not by the company but by the agent who preceded him, who bought it for his private use; that it was not kept for the records. The defendant maintained to the contrary. A cursory checking of the books discloses that all charges in the day book to individuals were not carried or posted into this small ledger. It is a book that concerns alone individual accounts charged.

The books were poorly kept, as might readily be expected. The chief justice in his dissenting opinions cites the Herman Thiel and Louis Sunnburg accounts to illustrate the manner in which the plaintiff did business and as illustrative of his method of embezzling the company's property. It is well to consider these accounts. In the Herman Thiel account, the item of July 16, 1917, for $6.50 is evidenced in the company's record by a sales ticket issued that day for flour and is shown in the day book. The next item of July 16, is likewise evidenced by a sales ticket issued that day for coal and is shown on the day book. The item for $35 is against evidenced by a sales ticket issued on August 1, 1917, for flour and feed and is shown in the day book. Likewise, the credit item of August 2d, for $2.25 is shown on the day book. These sales tickets, in accordance with plaintiff's testimony, were sent to the company. The $45 item (paid to myself by rent) is not shown on the day book. It is not claimed or asserted that the plaintiff reported to the company that this $45 item was paid or collected. The plaintiff does claim that he used this book as a personal

memorandum book and did make arrangements with various customers to pay their accounts to the company. In accordance with this ledger, apparently, the agent of the company who preceded the plaintiff did likewise because this very Herman Thiel account shows a credit on April 2, 1917 (before the employment of plaintiff) to wit: by house rent March, $10. Plaintiff further testified that he did not deliver these sales in payment of his own bills. Thus does the plaintiff deny delivery of company coal to pay house rent. Upon the books, accordingly, the defendant had notice of this Herman Thiel account, of its amount, and the liability of the plaintiff therefore either for cash to be paid by the plaintiff himself or to be collected from Thiel. It is to be noted here again that Stinchfield testified that he saw this ledger in April, 1918. This does not disclose, as a matter of law, property embezzlement. On June 15, 1918 (Exhibit 314) plaintiff sold to himself, as evidenced by a sales slip not marked "paid," barley in the amount of $31.45. This again, does not disclose, as a matter of law, property embezzlement.

The Louis Sonnenberg account. The item in the dissenting opinion stating, "Amount of sales $79.20," is evidenced by various items in the small ledger aggregating $79.20. These various items are each evidenced by sales slips for flour and feed or coal. Three items are entered in the day book for corn. (There exists in the record apparently no individual sales slip for corn sales.) There are, however, sales slips issued to Louis Sonnenberg that are not shown in this little ledger, namely, Dec. 12, 1917, for coal, $5.90; Apr. 27, 1918, for flour, $6.70; June 3, 1918, for flour, $4.55 (Exhibits 336, 529, 547). The credit, March 13, "by check $51.15" appearing in the ledger, is not shown in the day book. Likewise an anterior credit dated Dec. 20, 1917, "by check $39.50," which balanced a previous account, is likewise not shown in the day book. The $20 item of March 13, 1918, was for hay that the plaintiff purchased from Sonnenberg; it is not credited on the day book. There is no claim or assertion made that the plaintiff embezzled either the check for $51.15 or the anterior check for $39.50. Again this transaction does not show, as a matter of law, that the plaintiff embezzled or intended to embezzle any company property. The books and the records, likewise, were irregularly

and imperfectly kept, but the system of the defendant was to charge the plaintiff with the property that he had received and to make him account for such property; this is shown by the defendant's attempt to hold the plaintiff responsible for a corn shortage which resulted partly from an improper price charged to the plaintiff and, partly, from the spoiling of the corn. The record does not disclose that the plaintiff concealed by the manipulation of the books any sales of merchandise whatever. If the plaintiff had kept these personal items of credit entirely absent from this small ledger which he claimed himself to be partly a memorandum book, and kept an account of the same in a separate little personal book until settlement day with the customers of the company, little attempt would probably have been made to claim that plaintiff was guilty of embezzling property.

Our chief justice quotes some of the testimony concerning the plaintiff's testimony about the entries in the small ledger. He states that this served to keep Stinchfield in the dark; that this testimony served to show that the plaintiff embezzled coal. The conclusion is further drawn that the plaintiff was doing a crooked business. There is testimony in the record, however, that the amount of these accounts for which shortage was claimed was evidenced upon the records of the company by charges made to customers for each item of merchandise with sales slips for each of such articles that were reported to the company. Certain it is that these outstanding accounts amounted to the shortage for which the defendant desired a criminal prosecution upon the theory that the plaintiff had collected and appropriated the money therefor. There is evidence in the record that Stinchfield was told about these accounts by the plaintiff. There is evidence further that Stinchfield himself and plaintiff proceeded to collect some of these accounts. An account was collected from Sonnenberg; another, from plaintiff's mother; another from Redlaczyk. Stinchfield knew about the Kretchmar account. All of these accounts were in the list that accounted for the claimed shortage of $170. At that time before the arrest the plaintiff was claiming $180 due him from the elevator company for back pay in accordance with their agreement. The amount of the accounts totaled about $180. Stinchfield knew about these accounts and was told about the arrangement that plaintiff had made for paying some of these accounts. No attempt was made to conceal

this arrangement either by withholding the daily slips of merchandise sales or by concealing the arrangement of plaintiffs bills to defendants' customers. The jury were warranted, in our opinion, in finding as they did that the plaintiff had neither intent nor desire to embezzle plaintiff's property. On this feature, the court fully charged the jury as follows:

"If Mr. Shong was actually guilty of having embezzled either money or property of the company there was probable cause for the criminal prosecution. If you find that the defendants in this lawsuit, because of the conditions of the records kept by the plaintiff, were unable to say definitely whether the plaintiff had embezzled money or property of the Atlantic Elevator Company, and acted in good faith in charging the plaintiff with embezzlement of money, and proofs on the criminal trial showed it was property instead of money that was embezzled, and plaintiff was guilty of embezzlement in that form, then, in that case, you are instructed that there was probable cause for his arrest, probable cause existed for his arrest on the charge of embezzlement of either money or property, and your verdict must be for the defendants for a dismissal of this action. If you find from the evidence in this case that Shong did not disclose to Stinchfield the outstanding accounts which he now claims were coming to the company, or any of such, so that on balancing his accounts there appeared to be a money shortage, then Stinchfield and the company would have had probable cause for believing Mr. Shong guilty of having embezzled funds to the extent of that apparent shortage, even though it may now appear there was no shortage in fact."

The chief justice is assuming erroneously that this court is determining that there was want of probable cause to believe the accused guilty of embezzlement. Such is not the case. This question upon this record was for the jury, and the jury have found that there was want of probable cause by their verdict. This court has reviewed the record and in the opinion of the majority it has found, as a matter of law, that the jury did not err in so doing.

In point of fact, if these accounts, amounting to over $170 were accounts of the company, collectable as such, there was no shortage. The company did attempt to collect them and did make collections therein. These facts were for the jury. In point of fact, further,

there was no shortage on plaintiff's part in any event if the company did owe him as he claimed $180 for back pay and in addition two weeks' wages in August, 1918. It is apparent that the defendant was acting upon the theory that it was the duty of the plaintiff to account to the defendant for any shortages of grain bought and for any shortages of coal or flour and feed sold, determinable through the gross receipts and gross disbursements, and that, if he failed so to account, he was guilty of embezzlement of money. Apparently, afterwards, when it appeared from this small ledger that the plaintiff was making settlements with customers through an exchange of debts, with the promise to pay the amount of plaintiff's personal debt to the company, the claim then was asserted that the plaintiff was embezzling the company's property.

Upon the entire record we are satisfied that the findings of the jury should not be disturbed. The jury evidently found, through the verdict rendered, that the defendant through malice and acts of oppression attempted to take advantage of plaintiff's ignorance and inexperience; that the plaintiff, thus assaulted and charged with crime, did not meekly submit but chose to fight and defend his reputation. The record discloses much publicity resulting to the effect that the plaintiff was guilty of a shortage with the defendant. He was deprived of his liberty for several days; his ability to secure employment was affected. The plaintiff has testified that he incurred expenses of $650 in defending the criminal action.

The chief justice asserts that the verdict $2,200 rendered is not merely excessive but that it shocks the conscience and has no support in the evidence. It is well to answer such assertion by his own opinion in the case. Huber v. Zeisler, 37 N. D. 556, 562, 164 N. W. 131. In that case the plaintiff was arrested upon the criminal charge of adultery. He was a married man, forty-eight years old with seven children. The record does not disclose that he was deprived of his liberty. Special damages including proof of attorneys' fees of $500 and of other expenses aggregating the total sum of $850 escaped without any comment by our present chief justice that such fees were exorbitant or that the case was a contingent fee case. There is no issue or facts in this record concerning contingent fees. The chief justice in that case had no hesitancy in stating that the verdict was far from be-

ing excessive; that it might well have been for $5,000. The court unanimously held in that case that the verdict was not excessive. We find in this case that it is not excessive as a matter of law. Apparently, in the former case our chief justice recognized the philosophy of Iago in Othello: "He that filches from me my good name robs me of that which not enriches him and makes me poor indeed." Likewise, he might recognize in this case.

We should all be able to agree that, upon this record, the jury, as triers of facts, were warranted in concluding that the defendant without reasonable excuse or probable cause accused the plaintiff of the embezzlement of money; that unconscionably it attempted to collect from him a claimed corn shortage that was wrong and improper. That unconscionably it threatened the plaintiff with criminal prosecution unless he paid all of the claimed shortage together with expenses. See Rhoads v. First Nat. Bank, 37 N. D. 421, 437, 439, 163 N. W. 1046.

The justification for this too extended opinion is based upon the necessity of answering small excerpts of the testimony quoted in the dissenting opinion and the broad conclusions drawn therefrom, and to demonstrate, in a manner that a large record of evidence, with a multitude of exhibits, all submitted to a jury, must not be judged and determined by fragmentary quotations therefrom. The petition for rehearing is denied.

CHRISTIANSON and BIRDZELL, JJ., concur.

On Motion for Rehearing.

ROBINSON, Ch. J. This is a contingent fee case. The plaintiff sues to recover $10,000 for a malicious prosecution and recovers a verdict of $2,200. The contingent fee business is becoming more and more demoralizing. It leads the lawyer into temptation; it tempts him to undertake desperate and unconscionable actions, to fix or unduly influence witnesses and jurors and to pervert justice.

This case presents a gross miscarriage of justice. Indeed it might well be acted on the stage as a burlesque on the lawyers and the court procedure. In July, 1917, at Kramer, in Bottineau county, the plaintiff was employed as agent of the elevator company to sell coal, feed,

and flour. At the end of the year he had made default in the sum of $171, by using the property of the company for his own purposes. He may have intended to pay the company, but he failed to do it. He is arrested for embezzling $171 in money, waives examination, gives bail, goes to trial and in ten minutes, more or less, is acquitted because the proof showed or tended to show only an embezzlement of chattels, and not of money.

In the next act the plaintiff brings an action to recover $10,000 for malicious prosecution, and obtains a verdict for $2,200. He claims that in defending against the criminal prosecution he incurred expense to the amount of $650, and in the majority opinion as written by Mr. Justice Bronson, it is said: "There is evidence to that effect," and casts the responsibility on the jury. But there is no credible evidence to show that the plaintiff ever paid or incurred any expense, except as he may have agreed to divide the recovery with his attorney. The criminal prosecution was of his own seeking. It was a mere fiasco, a ridiculous failure. There was no reason for employing counsel to defend against it or against any prosecution without probable cause. But, as it seems, the plaintiff or his counsel wanted a criminal prosecution to lay the foundation for this suit.

When arrested, he did not, like an innocent person, go before the magistrate and challenge proof of his guilt. He waived the proof, waived an examination, and of course the natural inference was that he had reason to fear the result of an examination.

On September 12, 1918, two months after the discharge of Shong by the company, the complaint was made to the state's attorney. He drafted the complaint against Shong "for the embezzlement of money amounting to $171.57." Then he made on the complaint this certificate: "The complaint and evidence having been submitted to me, I hereby approve the same and the issuance of a warrant. J. J. Weeks, state's attorney." It was the duty of the state's attorney to examine into the charges and either to approve or disapprove the issuing of a warrant. Comp. Laws, § 10,535. The presumption of law is that he did his duty. He says: "The confessed shortage of $171.57—the money shortage—was determined by deducting from the record of sales made the amount of cash deposited and the accounts outstanding as reported by the plaintiff. The plaintiff was charged with the total

sales, then credited with the cash and the accounts outstanding as reported by him." "But when Shong took the stand in the criminal action he produced certain statements of account against his friends that were not credited in the books of the company to an amount about equal the money shortage. And on the trial he explained the admitted shortage by saying that he took defendant's coal, flour, feed and other property and did not take money." "In the criminal action the court instructed the jury that to find defendant guilty it must appear that he embezzled money of the company, and not flour, feed, or coal."

Now it appears that on the trial Shong did boldly and safely testify in regard to the unpaid accounts: "These accounts were flour, coal, and feed bought from the Atlantic Elevator Company. I owed these parties money, but I charged their flour, coal, and stuff to the Atlantic Elevator Company and made a receipt of it just as though I had no account with myself, but I made a verbal agreement with them that at the end of my year in the elevator I would pay the accounts, because I figured that I would be getting $200 from the Atlantic Elevator Company, and I was short and I wanted to pay these fellows, but left the accounts with the company and made a report to the company. The stuff was not charged to me. It was charged to them, but I had a verbal agreement that at the end of the year I would take up their accounts with the company."

Now, whether true or false, it was entirely safe for Shong to testify that he had reported to the company the ten unpaid accounts for goods sold to pay his own debts or to get property for himself. If untrue, there was no possible way of disproving it. Hence the word of Shong does not prove it. It is in no way convincing and the strong circumstantial evidence is to the contrary.

Here is his entry of two accounts:

Exhibit 631, page 32.
Herman Thiel account.

July 16, C	$ 6.50
July 16, C	5.75
Aug. 5	35.00
	$47.25

Credits.

Aug. 2.	By Cash	$ 2.25
Aug. 2.	Paid to myself by rent	45.00
		$47.25

Here is the account of Louis Sonnenberg:

Exhibit 631, page 55.

Amount of Sales	$79.20
" 3–13. By Check	51.15
" " 3370#, 12.00	20.00

Thus with coal of the company Shong paid his house rent, $45—and did it within two weeks after his employment. With coal of the company he bought hay, 3,370 pounds, at $12 a ton, and on the books of the company gave the seller credit for $20. In regard to the credit of $45, Shong testifies: "I made the entry. I gave him credit for that rent on account."

On the second entry he testifies:

"Q. Did you make that entry? A. I did.

"Q. What does it mean? A. *I don't know what it means.*

"Q. Is that 3,370 pounds of hay that Sonnenberg sold you? A. I remember I did get some hay at that time.

"Q. And you gave him credit for that hay, did you not? A. Yes, sir."

Now the court will note that at first he pretended he did not know what the account meant and finally, when pressed, he woke up and remembered that he did get the hay. Then he says that the ledger—Exhibit 631—in which the account was kept, was not the ledger of the company and that it was not shown to Mr. Stinchfield. Thus it seems he was keeping Stinchfield in the dark. And still this court is disposed to hold him responsible for not making to the state's attorney a full and true statement of the facts.

Then Mr. Sonnenberg is called as a witness. He testifies that the hay came to more than twenty dollars; that it came to twenty-two or twenty-three dollars, and that Shong promised to give him credit for it on the books of the Atlantic Elevator Company. "In August, 1918,

I gave him a check for $4.55. It was supposed to balance my account. After his arrest in 1918 he offered to pay me for the hay, saying that he did not turn that money over to the company. I did not take it. The hay was sold to Shong on March 13, 1918, and fed to his two cows by himself. He could not have forgotten it.

Now I do hold and affirm that the record clearly shows that Shong did embezzle the coal that he exchanged for the hay. Sonnenberg did not sell his good hay on time to an irresponsible person. He traded the hay for the coal of the company. Shong may have intended to pay the company, but he never did pay; and so it is with the other accounts amounting to $171.57. Certain it is that Shong was doing what is known as a crooked business and making in the books of the company entries that were purposely blind and misleading, and regardless of what he says, the chances are more then ten to one that he never reported to the company the unpaid accounts. That would have spoiled the game he was playing.

Mr. Justice Bronson says the record fully justifies the findings of the jury that the defendant did not make a full and fair disclosure of the facts to the state's attorney. Now the jury has made no such finding and the learned Justice does not attempt to show wherein the defendant failed to make a full disclosure. There is no showing that he intended to deceive or mislead the state's attorney or that he answered any question falsely. And now, with a record of two trials submitted to this court, I affirm that no two judges will agree on a full and fair statement of the facts.

Now I affirm that Judge Bronson does not correctly state the facts and he does cloud the case by stating a lot of irrelevant matter. The judge erroneously says: "Two juries by their verdict have held that the plaintiff was not guilty of the crime of embezzlement, and that there existed no probable cause to warrant belief of embezzlement of money or property." Now I do most solemnly affirm that is not true. In the first case there was no question of probable cause or the embezzlement of chattels. The court instructed the jury thus: "The defendant is not charged with the embezzlement of flour or feed. He is charged with the embezzlement of money and, therefore, the state must prove an embezzlement of money." In the second case—in the civil action—there was no legal question concerning the guilt or innocence

of the accused. The only question was "Did the complainant have reason to believe the accused to be guilty of any embezzlement?" Comp. Laws, § 10,531. And even though Shong had been perfectly innocent, the complainant might have had reason to believe him to be guilty. The questions are these:

(1) Did the complaining witness have reason to believe that Shong was guilty? If he did, then, under the statute, he was fully justified, and even required, to make the complaint.

(2) Did he make to the state's attorney an honest and fair, and not a deceptive statement?

(3) Was the complaint malicious and without probable cause?

By statute, if the complaining defendant had reason to believe that Shong had committed a public offense, it was his duty to make the complaint. Sec. 10,530. Then the duty of the state's attorney was to make a full investigation and inquire into the facts and to refuse to sanction a prosecution without probable cause. Secs. 10,629, 10,630. Of course the presumption of law is that the state's attorney did his duty, and likewise the presumption is that the complainant did his duty. The policy of the law is to protect those who honestly try to do a duty imposed on them by statute. If the complainant had reason to believe the defendant guilty of a public offense, his duty was to make the complaint. Sec. 10,530. He had a right to make to the state's attorney a fair, honest statement of the case and to act on his advice, and to leave the prosecution to the state's attorney—and that is what he did. And now he judges of this court are in a better position than complainant to state the case. And yet no two of them will read the records and the evidence and agree on what is a fair statement. One judge says on his word and oath that there was reasonable cause to believe the accused guilty, and that in trading the coal for hay he was guilty of embezzlement. Another judge says to the contrary. In such a case it is certain the majority may be wrong. The judges have no claim to infallibility. But it were a grievous hardship and a shame for the judges to hold that in stating the case to the state's attorney the complainant acted at his peril and that he was bound to make a statement in conformity with the views of the majority of the judges.

These are points on which it seems every judge should agree.

The record shows the plaintiff is by no means innocent of wrong-

doing. His conduct ill deserves commendation or reward. Defendants have done nothing worthy of punishment. Yet the verdict is so punitory and monstrous an affirmation of it would be to the court a monumental disgrace.

STATE OF NORTH DAKOTA, Respondent, v. CLIFFORD A. McCARTY, Appellant.

(182 N. W. 754.)

Criminal law — evidence sufficiently corroborating accomplice to require submission to jury in larceny prosecution.

1. In a prosecution for larceny of five calves, § 10,841, requiring, as corroboration of an accomplice, such other evidence as tends to connect the defendant with the commission of the offense, testimony of recent possession of stolen property by accused, attempting to discourage the arrest of the accomplice, and claiming to the wife of the accomplice that he has matters fixed up with the owner of the calves at a cost of $300, etc., held sufficient corroboration to require submission of the case to the jury.

Larceny — recent unexplained possession of stolen property tends to show guilt.

2. In a prosecution for larceny, an instruction "that the recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant, and must be taken with the other evidence in the case to determine his guilt or innocence," is held to be a correct statement of the law, and is in harmony with the recent decision of this court.

Criminal law — instruction as to guilt of one aiding in commission of crime not error when considered with other instructions.

3. An instruction that if the defendant advised and encouraged the witnesses "to commit the crime charged in the information, or aided or abetted in the commission of such crime," he would be guilty as principal, though not sufficiently in the alternative, is not ground for reversal when considered in connection with other parts of the instruction.

NOTE.—On larceny or embezzlement as affected by belief in right to property taken, see note in 41 L.R.A.(N.S.) 549.

On possession of recently stolen property as evidence of burglary or larceny, see note in 12 L.R.A.(N.S.) 199.

Criminal law — instruction that named witnesses were accomplices can be given only under undisputed evidence.

4. An instruction "that the witnesses Al Metzler and John Bergstad, who testified for the state in this case, are accomplices in the crime charged," is erroneous under the disputed evidence on the subject. Such instruction can properly be given only in cases where the evidence as to the accomplices is not in dispute. But taken in connection with the whole charge, it was error without prejudice.

Larceny — refusal of instruction to acquit if defendant came innocently into possession of the stolen property held error.

5. In a prosecution for larceny of five calves, under defense of having purchased the same in good faith, and without knowledge of their being stolen, *held*, to refuse an instruction that if defendant came innocently into possession of the calves, he should be acquitted, to be prejudicial error.

Larceny — defendant having innocently obtained possession of property and later conceived intent to convert to his own use not guilty.

6. In a prosecution for larceny where the defense was that the defendant had purchased the property in good faith, the special prosecutor argued to the jury that the defendant might be convicted if at any time within three years subsequent to obtaining possession he conceived the idea or formed an intent to appropriate the property to his own use; and the court charged the jury that if the defendant obtained the property without fraud or deceit and, after taking it into his possession, conceived the intent to convert it to his own use, it was their duty to find the defendant guilty. *Held*, this is prejudicial error.

Larceny — statute as to finding and appropriating lost property held inapplicable to larceny.

7. Section 9914, Compiled Laws, providing the circumstances under which one may be guilty of larceny for finding and appropriating lost property, is not applicable to a prosecution for larceny, under defense of ownership through purchase in good faith, since this section relates in terms to property lost and found.

Opinion filed April 21, 1921.

Appeal from District Court, Stark County, *Frank T. Lembke*, J.

Clifford A. McCarty was convicted of grand larceny and appeals. Reversed.

H. E. Haney, for appellant.

If defendant did so obtain the property, without fraud or deceit, he is not, under the law, guilty of larceny, no matter what intent he may have formed thereafter. This is well settled by the authorities.

2 Sackett, Instructions, §§ 30–32; Starch v. State, 63 Ind. 283, 29 Am. Rep. 762; State v. Meldrum, 70 Pac. 526.

The court invaded the province of the jury in assuming and informing them that in his mind the crime charged had been committed, thus taking from the jury the important province of ascertaining this fact. 12 Cyc. 445, 449; Keivner v. People, 43 Pac. 1047; State v. Reilly, 25 N. D. 339, 361; Sackett, Instructions, pp. 771–774.

J. P. Cain, Special Prosecutor, *Wm. Lemke,* Attorney General, and *Walter Ray,* State's Attorney, for respondent.

That larceny may be accomplished by an open taking is upheld in the case of State v. Powell, 4 L.R.A. 291 and note on p. 292; 17 R. C. L. p. 11, § 10; 11 Whart. Crim. Law, §§ 1152–1155.

For the law of this state in regard to who are principals in the commission of any crime so committed, see: State v. Rosencranz, 40 N. D. 93.

ENGLERT, District J. The defendant was convicted of the crime of grand larceny and appeals.

The information charged that the defendant, "did by fraud or stealth, wilfully, unlawfully, and feloniously, take, steal, carry or drive away," five calves, belonging to Edward Jossucks, without his consent and "with intent then and there to deprive the owner thereof."

To enable an intelligent understanding and disposition of the questions raised on this appeal, it becomes necessary to set forth the material substance of the state's evidence.

Al Metzler testified that in the fall of 1918 he had several talks with the defendant, C. A. McCarty, about stealing some unbranded calves for him. On November 16th, 1919, Metzler and one John Bergstad, who also testified for the state, met the defendant at his office in Belfield, North Dakota, and after some talk, defendant said he would pay Al Metzler $20 per head for all unbranded calves he could steal and bring to him. That defendant at that time claimed that Mr. Jossucks was about to ship cattle, and that his calves were not yet branded. So that night Metzler and Bergstad went to the Jossucks ranch and stole six calves and with them came seven head of grown-up cattle, and put them in defendant's pasture on his ranch on the morning of November 17th, 1918. Metzler then went to his home and had his

wife write a note to defendant, informing him that he, Metzler, had delivered six calves by placing them in his pasture, and sent the note to defendant with a boy named James Gilman. About the 19th, Metzler saw defendant and asked him for the money; that defendant claimed to have seen the calves and refused to pay for one because it bore Goodacre's brand. He did pay Metzler $20 per head for the other five. That in December or January following defendant asked Metzler to buy a calf from Goodacre and secure a blank bill of sale so that the description of the calf on the ranch could be inserted. But Goodacre refused. Both Metzler and Bergstad admitted having stolen a drove of horses, and cattle, and that they had sold them to others, besides the ones in question.

Mrs. Metzler testified to having written the note to defendant, and that the boy carried it to him. She also testified that defendant saw her about the time warrants were issued for the arrest of Metzler and Bergstad, and that he told her to rest easy and not to worry for he had seen Jossucks, settled the matter with him at a cost of $300 and that "he would not take it to court."

Mr. Jossucks, owner of the calves, testified that he first learned of the whereabouts of the calves from the defendant; that defendant claimed at that time to have purchased the calves from Al Metzler; that owing to their long hair at the time he purchased them, he could not tell that any of them bore Jossucks' brand; that when they shed off in the spring, he noticed two or three bore Jossucks' brand; that defendant offered to return the calves to or pay Jossucks for them; that he told Jossucks about having his calves sometime in March or April, 1919; that when Jossucks suggested having Metzled arrested defendant said to him "not to do it, he would get him to leave the country, and if he didn't leave the country, then he will have him arrested."

C. P. Jacobson, foreman on defendant's ranch, and third owner, testified that defendant told him to "drive them (the big cattle) towards the brakes and they would go home." That this was in a northeasterly direction and towards the Jossucks ranch; that they returned a couple of days after; that defendant and his wife drove them off in the same direction. After defendant discovered that some of the calves bore Jossucks' brand, he told Jacobson not to brand them with the ranch brand, but that he, Jacobson, branded them about May 1st, with-

out the knowledge of the defendant. Defendant had told him in the spring of 1919 that he had found the owner of the calves; that they had never been returned to Jossucks and that they were still on defendant's ranch.

Without quoting any of the testimony of and for the defense, it is enough to say that he denied being a party to the stealing, and as an affirmative defense he claims to have purchased the calves in good faith from Al Metzler.

1. Defendant contended that the verdict is contrary to the law and the evidence, because the state offered no credible evidence corroborating the testimony of the accomplices which tended to connect appellant "with the taking of the property in question."

That Al Metzler and John Bergstad, if their testimony is true, were accomplices, is admitted by the state. Under the law of this state, the defendant cannot be convicted upon their evidence alone. Comp. Laws 1913, § 10,841.

In this case the evidence, which is entirely independent of the testimony given by the accomplices, shows that the property was found in possession of the defendant shortly after it was stolen. A couple of days after the larceny the defendant drove the big cattle in the general direction of their home, the Jossucks ranch. When Jossucks came to see the calves and spoke of having Metzler arrested, defendant told him not to, and that he would drive Metzler out of the country. About the time warrants were issued for the arrest of Metzler and Bergstad, defendant told Mrs. Metzler not to worry, that he had matters fixed up with Jossucks and that "he would not take it to court."

This evidence is sufficient to satisfy the statute. Its weight and credibility is for the jury.

2. The defendant complains of the following instruction given by the trial court:

"The court further instructs you that the recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant, and must be taken with the other evidence in this case to determine his guilt or innocence."

This instruction is in accord with the general rule on the subject (17 R. C. L. 71, § 76), and is in harmony with the recent decision of this court. State v. Ross, 46 N. D. 167, 179 N. W. 993.

3. Error is assigned on the following instructions:

(1) "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt, that the defendant, Clifford A. McCarty, at the time alleged in the information, advised and encouraged the witnesses Al Metzler and John Bergstad to commit the crime charged in the information, or aided or abetted in the commission of such crime, then Clifford A. McCarty is as guilty as though he actually stole the property alleged to have been taken in the information."

(2) "You are further charged that the witnesses, Al Metzler and John Bergstad, who testified for the state in this case, are accomplices in the crime charged."

Each of these two instructions was taken from a different part of the general instruction given by the trial court on the subject.

It is contended that by these instructions the court assumed that the crime charged in the information had been committed, and so informed the jury. Each of these two instructions standing alone is subject to criticism. State v. Reilly, 25 N. D. 339, 141 N. W. 720. But in other parts of its general charge, the trial court told the jury that the information "merely states the charge," and "outlines the issues to be determined from the evidence," and from the reading of the entire charge, we are satisfied that the jury was not misled, and at most, it was error without prejudice.

4. The evidence as to the accomplices was in dispute. Such an instruction can only be given where there is no dispute in the evidence. Territory v. West, 14 N. M. 546, 99 Pac. 343. But when considered with the rest of the instruction, it may be considered error without prejudice.

The special prosecutor argued at some length to the jury that even though defendant came innocently into possession of the calves in the first instance, if at any time within three years subsequent thereto, he conceived the idea or formed an intent to appropriate the same to his own use, and he did so, and now has them, he would be guilty of larceny. Counsel for defendant objected to this argument both at the commencement and conclusion thereof, and asked the court to instruct the jury to disregard the same. The objections were overruled and the request denied.

5. Counsel for defendant then requested the court to instruct the

jury "that if the defendant came innocently into the possession of these calves that their verdict in that event should be not guilty."

This request was refused, and defendant contends that such refusal was prejudicial error. The defendant claimed to have purchased the calves in good faith, and under such defense it was the duty of the trial court to give this instruction or one of similar import. Peterson v. People, 65 Colo. 106, 173 Pac. 876; State v. Crossen, 77 Wash. 438, 137 Pac. 1030; State v. Riggs, 8 Idaho, 630, 70 Pac. 947; People v. Morino, 85 Cal. 515, 24 Pac. 892; Ward v. State, 70 Ark. 204, 66 S. W. 928; Ludlum v. State, 13 Ala. App. 278, 69 So. 255; Yarbrough v. State, 115 Ala. 92, 22 So. 534; Varas v. State, 41 Tex. 527; 25 Cyc. 149 (IV.).

6. The appellant claims that the trial court erred to the prejudice of the defendant in refusing to give the following requested instruction, and in giving the one it did on the subject: "That if they (the jury) find that the defendant, McCarty, came innocently into possession of this property at the time he was accused of having stolen the same—any act done or performed by McCarty subsequent to that time cannot be construed into a larceny of the property." This instruction was refused, and in lieu thereof the following instruction was given: "The court further instructs you, as a matter of law, that if the defendant obtained the property without fraud or deceit and after taking the said property into his possession afterwards conceived the intent to convert the property to his own use, then it is your duty to find the defendant guilty."

The correctness of appellant's position as to the law on the subject cannot with propriety be questioned. The cases above cited are directly in point. In addition to those the following announce the rule in unmistakable language: Wilson v. State, 96 Ark. 148, 41 L.R.A. (N.S.) 549, 131 S. W. 336, Ann. Cas. 1912B, 339; Leak v. State, — Tex. Crim. Rep. —, 97 S. W. 476; Veasly v. State, — Tex. Crim. Rep. —, 85 S. W. 274; People v. Call, 1 Denio, 120, 43 Am. Dec. 655; Rex v. Charlewood, 1 Leach, C. L. 409, 2 East, P. C. 689, 8 Eng. Rul. Cas. 81.

In the case of Wilson v. State, supra, the trial court gave this instruction: "If he took it innocently, believing it was his, and, learn-

ing afterwards that it was not his property, converted it to his own use with the felonious intent to deprive the owner of it, when he knew it was not his own property, he would be guilty." Because of this instruction the court granted a new trial, saying: "If a person takes property in good faith, under an honest belief that he is the owner, it does not constitute larceny for the felonious intent is lacking. The felonious intent must, in order to constitute larceny, exist at the time of the taking; a subsequent formation of such an intent is not sufficient. So, if the taking is under an honest belief of ownership, there being no felonious intent to steal at that time, the fact that such an intent is formed after ascertaining that another person is the true owner does not make it larceny."

7. But the state contends that the court's instruction is justified under § 9914 of the Complied Laws, which reads: "One who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person who is not entitled thereto, without having made such effort to find the owner and restore the property to him, as the circumstances render reasonable and just, is guilty of larceny." Neither the state nor defendant has cited any cases in support of or in opposition to this contention. The all conclusive answer to this argument is that it is nowhere claimed that defendant found and appropriated lost property. The evidence conclusively shows that the calves were not lost, but were stolen by Metzler and Bergstad, and by them turned into the pasture belonging to defendant. The defendant claimed that he purchased them from these parties and paid $20 per head therefor. This is admitted by the state's witnesses, but they claim that he was a party to the stealing, and that he advised and encouraged Metzler and Bergstad to steal them for defendant at the price mentioned. A mere glance at the charge itself is sufficient to advise that it was not prepared to meet the requirements of this statute. This section of the statute is by its very terms applicable only to "one who finds lost property" and appropriates the same as therein provided. The supreme court of California has construed this identical section in People v. Divine, 95 Cal. 227, 30 Pac. 378. The rule is thus stated in the syllabus of that case: "Section 485 of the Penal Code, providing that one who finds

lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property, without trying to find the owner and restore the property to him, is guilty of larceny, relates in terms to property lost and found, and does not apply to a case where property comes into the possession of a party who does not know or suspect it to be the property of another; and an instruction based on that section, given in such a case, where there is no evidence of the finding of any lost property, is prejudicially erroneous." State v. Boyd, 36 Minn. 538, 32 N. W. 780. It is apparent that this section merely enunciates a rule of evidence, and hence there must be some evidence on the part of either the state or the defendant that he found and appropriated lost property in order to justify an instruction under said statute.

But is is suggested that the error is technical and not substantial, and hence does not justify the granting of a new trial.

Adhering to the rule of this court and the statutes of this state that a case shall not be reversed upon technicalities merely, we feel that the error complained of is not technical but substantial. By the refusal of the requested instruction, the court refused, in the presence of the jury, as the record shows, to submit the defendant's only defense. By the instruction given, the court injected an issue into the case which is not the law. It invited the jury to convict on evidence which does not constitute the crime of larceny. Under the evidence in this case, it was much easier to convict on subsequent appropriation of the calves than on the crime charged in the information. The defendant's theory of his defense, namely, that he claimed to have purchased the calves and thus came innocently and honestly into possession of them was in no way submitted to the jury by the trial court in its instruction. Substantial rights of one accused of crime cannot be thus corrupted, frittered away, or ignored under the guise of their being mere technicalities. If, during the course of the trial, evidence is erroneously admitted or rejected, but after a full and fair consideration of the whole record the court can conscientiously say that there has been no miscarriage of justice, then such error would be a mere technicality, and would be error without prejudice. So, if an instruction on a proposition of law is in some respects faulty or erroneous in the abstract, if it does not involve the jurisdiction of the

court, material issues, or substantial rights of a party, it would not be ground for a reversal. But it is universally held that if a principle of law has been violated during the trial, which involves the jurisdiction of the court, material issues, or which affects the substantial rights of the party complaining, it will not constitute a technicality, but reversible error.

For refusal to give the requested instructions, and giving the one it did, the order and judgment of the trial court must be reversed and a new trial granted. It is so ordered.

BIRDZELL and BRONSON, JJ., concur.

Mr. Justice CHRISTIANSON, deeming himself disqualified, did not participate, Hon. M. J. ENGLERT of the First Judicial District, sitting in his stead.

GRACE, J. (specially concurring). The trial court gave the following instruction, which the defendant assigns as error, viz.:

"The court further instructs you that the recent possession of stolen property, unless satisfactorily explained, is a circumstance tending to show the guilt of the defendant, and must be taken with the other evidence in the case to determine his guilt or innocence."

In the case of State v. Ross, 46 N. D. 167, 179 N. W. 993, we said of a similar instruction:

"The instruction was entirely too broad in its language, and must have had a far-reaching and prejudicial effect on the minds of the jurors. If the property were found in the possession of the defendant, shortly after the same was stolen, that was a fact or circumstance, considered in connection with other competent proof and the whole testimony, from which the jury could draw an inference of defendant's guilt. This is a wholly different matter than where it is, in effect, instructed by the court that the possession of the personal property, shortly after it has been stolen, is a presumption of guilt."

We are convinced that such an instruction is an invasion of the province of the jury. The giving of that instruction in this case was reversible error.

The trial court refused to give the following instruction, requested by defendant, viz.:

"That if the defendant came innocently into the possession of these calves that the verdict in that event should be not guilty."

We agree with Judge Englert in his holding that the refusal to give this instruction was reversible error.

By reason of the above errors, we agree the judgment appealed from should be reversed and a new trial granted.

ROBINSON, Ch. J. (dissenting). The charge against defendant is that in November, 1918, in Billings county, he stole five cows, each of the value of $20, the property of Edward Jossucks. The defense was that he had honestly purchased the stolen cows; but it was an obvious sham. He resorted to all devices for delaying the trial, took changes of venue, hired a lawyer in the legislature when in special session. Yet, in June, 1920, he was convicted and sentenced to five years. He appealed to the pardon board and then to this court, and is given a new trial, which may be as good as a pardon, because witnesses die, forget, and migrate to distant lands the same as birds of passage. Without a word concerning the merits of the case, a new trial is given on the ground that the court erred by refusing to instruct the jury that if defendant came innocently into possession of the property, converted the same to his own use, it is not larceny. Now the point I wish to make is that the defense of an innocent possession or an honest purchase is a mere sham. The evidence shows beyond dispute that the defendant contracted with the two actual stealers to pay them $20 a head for all the unbranded calves they could bring to him. When they concluded the contract it was late in the evening. The darkness was falling, and they at once set out on horses for Edward Jossucks' place and took from him six calves, one branded, and five unbranded, and during the night drove them into the enclosure of defendant as per his instructions. Then they rode home while it was still night and sent a note to defendant that they had put the six calves in his enclosure. He promptly went, saw the calves, saw that one was branded, refused to pay for it, but paid the stealers $100. Each of the two actual stealers testified positively, circumstantially, and convincingly to the contract with defendant and to all the details of the stealing. The defendant knew well that the stealers did not own the calves or claim to own them. He paid them and asked them no questions, not a word as to how they

came by the calves. Then there was plenty of other convincing evidence besides that of the mother cows and the ox which came with them. The mother cows refused to be separated from their calves and followed after them or with them, and when the calves were put into defendant's enclosure the cows remained on the outside, each bellowing and plainly showing that its calf had been stolen. The cows were the best witnesses, and they were not accomplices. When defendant received the note he went immediately, saw the calves, saw the cows, knew well that the bunch had been taken from someone in the vicinity. Yet he did not use the 'phone, the automobile, or any means to ascertain the owner of the animals. He drove the cows toward their home, perhaps a mile or two; but the cows came back to the calves, and the next day he and his wife got on their saddle horses and drove the cows and the ox a distance of several miles from his home, and that was the last of them. Doubtless they fell into the hands of some good cattle rustler. On the whole record it clearly appears that the defense of an honest purchase or an honest possession is an obvious sham. From the beginning to the end, from the time defendant set eyes on the calves and the cows, his every act, both in court and out of court, has been that of a guilty person. In a case of this kind a new trial is a serious matter. It is sure to make the people a great amount of cost. It is sure to delay, if not to defeat, justice. Hence it should not be allowed where there is no reasonable doubt concerning the guilt of the accused. And the judges, as well as the jury, are supposed to be fairly competent to read the record and to judge of what is or is not a reasonable doubt. A new trial, regardless of the guilt or the innocence of the accused, may well defeat justice. It may well bring into contempt the administration of the law. While in such a case the theory of a new trial may be very nice and in accordance with old time reasoning, in practice it is dead wrong and contrary to common sense.

JOHN SOUTHALL, Appellant, v. LEE HERRING, Respondent.

(182 N. W. 753.)

Replevin — ownership and right of possession of hay held for jury.

In an action in claim and delivery for certain hay involving the question of the title and the right of possession thereof, it is *held*, for reasons stated in the opinion, that the issue of ownership and right of possession were questions of fact for, and properly submitted to, the jury.

Opinion filed April 26, 1921.

Action in claim and delivery in District Court, Lamoure County, *Graham*, J.

Plaintiff has appealed from a judgment and order denying a new trial.

Affirmed.

Hutchinson & Lynch, for appellant.

In an action of replevin in the absence of any direct evidence to the contrary, possession is presumptive evidence of ownership, but when direct evidence is offered the fact of possession loses its presumptive character and is to be used only in connection with other facts at its real probative value. 34 Cyc. 1391, 1501.

The jury should have been instructed to take into consideration all the circumstances surrounding the pretended transfer of this hay from Pugh to Herring and should have been instructed as to the question of fraud. 34 Cyc. 1491, 1519; Pinkerton Bros. Co. v. Bromley (Minn.) 87 N. W. 200.

After the showing made by the plaintiff as to his ownership, the defendant must show that Pugh had the right to sell the hay. 34 Cyc. 1502; Pion v. Scolnik, 177 N. Y. Supp. 872.

Under the issues of ownership and the denial of ownership and the right of possession, either party may show that the right of the adverse party to possession is based upon fraud. 24 Cyc. 1399; Manufacturing Co. v. Daley, 6 N. D. 331; Kenney v. Goergen (Minn.) 31 N. W. 210; Benish v. Waggner (Colo.) 21 Pac. 706.

A. G. Porter, for respondent.

Where the jury has determined a fact from conflicting evidence this court will not disturb such verdict. This hardly needs citation. Mon-

tana Eastern R. Co. v. Bebeck, 32 N. D. 162; Rittle v. Woodward, 31 N. D. 113.

BRONSON, J. This is an action in claim and delivery for twenty-five tons of hay. The plaintiff has appealed from the judgment in favor of the defendant and an order denying a new trial. The facts are substantially as follows:

During the year of 1917 the plaintiff made an oral agreement with one Pugh concerning 69 acres of hay land owned by the plaintiff. The agreement was to the effect that Pugh should cut and stack the hay on such land and receive one half of the hay crop, or that, upon the payment of $2 per acre, Pugh should have the hay. In accordance with plaintiff's testimony, the hay should remain upon his land until payment was made therefor. In accordance with Pugh's testimony, he was to become the owner of the hay as soon as settlement was made with the plaintiff. On September 28, 1917, settlement was made between the plaintiff and Pugh concerning this hay through the payment of $118.60 as part of the proceeds of some wheat hauled to plaintiff's elevator by Pugh. At that time certain notes and papers were turned over by the plaintiff to Pugh. There was a balance then left of $19.40 due for the hay. In accordance with Pugh's testimony, this transaction was a settlement for the hay. On September 29, 1917, Pugh gave a bill of sale for twenty-five tons of such hay to the defendant. A few days afterwards one Flood, while about to haul some of such hay covered by the bill of sale, as the defendant claims, was advised by the plaintiff of this balance still due for the hay. Flood testified that the plaintiff retained some $16.65 due Flood for a labor lien, to apply upon such hay balance. A few days subsequent the defendant hauled the hay. Subsequent to the settlement made between the plaintiff and Pugh, plaintiff paid $118.60, above mentioned, to the bank for the reason, as he claims, that the bank had a prior lien upon the wheat hauled by Pugh to the elevator. Pugh testified that he had previously made settlement with the bank concerning his obligations and had renewed his indebtedness by new notes and liens.

In the trial of the action much evidence was introduced concerning the transaction of Pugh covering crops raised in 1917 upon other lands, his indebtedness to the plaintiff, to the defendant, and to the

bank, and also with reference to the fraudulent attempt to dispose of this hay without payment to the plaintiff of the amount due him. Considerable of this evidence is without the main issue involved.

Upon the record, the issue of the ownership of this hay was fully presented to the jury. This issue was whether the plaintiff retained title and the right to possession of this hay until payment was fully made therefor, or whether he released his title and right of possession upon the settlement made by Pugh with him. This issue, upon the record, was a question of fact for the jury.

The plaintiff has specified many errors in the rulings and instructions of the trial court in the progress of the trial. It is unnecessary to state them in detail. They are deemed without merit. The trial court gave ample latitude to both parties to bring out all of the facts before the jury, pertinent to the issues involved in the action and properly and fairly submitted upon instructions to the jury the issue of ownership under the disputed testimony. There is evidence in the record to warrant the finding of the jury that Pugh made the bill of sale to the defendant bona fide and upon ample consideration. The issues involved are wholly issues of fact and this court is not warranted in disturbing the verdict of the jury so determining these issues upon conflicting evidence. The judgment and order are in all things affirmed with costs to the respondent.

ROBINSON, Ch. J., and CHRISTIANSON and BIRDZELL, JJ., concur.

GRACE, J., I concur in the result.

NAPOLEON FARMERS' ELEVATOR CO. OF NAPOLEON, NORTH DAKOTA, a Corporation, Plaintiff and Respondent, v. CHARLES I. DUNAHEY, A. V. Marcellus, and A. L. Garnes, Co-partners, Doing Business under the Firm Name and Style of Charles I. Dunahey, Defendants, and A. L. GARNES, Defendant and Appellant.

(182 N. W. 926.)

Partnership — evidence insufficient to show defendants sued for merchandise sold were copartners.

An action was brought against the defendants, on the theory that they were copartners, and, seeking to charge them as such, for merchandise alleged to have been sold them, to the amount of $1709.39. *Held*, that there is no evidence to show that defendants were copartners, or that they represented or held themselves out as such.

Opinion filed April 30, 1921.

Appeal from an order of the District Court of Logan County, *F. J. Graham*, J.

Judgment and order reversed.

Newton, Dullam, & Young, for appellant.

Neither Garnes nor any other party to the contract, considered or intended there should be any partnership. The business was conducted by Dunahey as an individual. It had none of the earmarks of a partnership. Grigsby v. Dey (S. D.) 70 N. W. 884.

The participation of one in the profits of the business without having an interest in or right to control the business does not make him a partner. Something more is essential. Conklin v. Barton, 43 Barb. 435; Dutcher v. Buck (Mich.) 55 N. W. 676; Beecher v. Bush (Mich.) 7 N. W. 785.

It does not affect a question of partnership liability that the share of the profits promised for the use of money would make the loan usurious. Irwin v. Bidwell, 72 Pa. 244; Lord v. Proctor, 7 Phila. 630; Eastman v. Clark, 53 N. H. 276; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267.

A. B. Atkins and *Cameron & Wattam*, for respondent.

The only intent of the parties that is immaterial is not the intent to

be or not to be "partners." It is the intent to do those things which constitute a partnership. 20 R. C. L. 833.

A contract may create a partnership although there is no mention in it of the word "partnership." Griffin v. Cooper, 50 Ill. App. 257; Powell v. Moore, 79 Ga. 524.

The use of the word "partnership" is not essential to the creating of that relation. Johnson Bros. v. Carter, 120 Iowa, 355; Poundstone v. Hamburger, 139 Pa. 319; Beecher v. Bush, 45 Mich. 188.

If the contract in legal effect constitutes a partnership, the intention of the parties is not needed to be expressed in words. Frankel v. Hiller, 18 N. D. 381; Kelley v. Bourne, 15 Or. 476.

GRACE, J. This appeal is from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, and from the judgment.

The action is brought against the defendants, on the theory that they are copartners, to recover the purchase price of certain goods, wares, and merchandise, claimed to have been sold by the plaintiff to them, of the alleged value of $1,709.39, which sales were made, between May, 1920, and the 1st day of September, 1920.

The defendant Dunahey interposed no answer and defaulted. The summons was not served upon Marcellus. Garnes answered by interposing a general denial. The case was tried to a court and jury, and a verdict for $1,758, which included costs, was returned in favor of plaintiff.

The facts are substantially as follows:

Dunahey, in August, 1919, entered into certain contracts to grade certain roads in Logan county, North Dakota, which were Federal Aid projects. After he commenced work, having insufficient money to finance himself, he applied to Garnes and Marcellus for a loan of money, to assist him in his finances. They loaned him a certain amount of money, taking his note as evidence thereof, which was afterward secured by chattel mortgage. The note was in the sum of $3,000 and bore interest at the rate of 10 per cent per annum.

Dunahey entered into three of these road construction contracts with the State Highway Commission of the state of North Dakota. Garnes and Marcellus also entered into a written agreement with Dunahey, which is as follows:

Exhibit "A"

Bismarck, No. Dak., Sept. 17, 1919.

THIS AGREEMENT, Made in triplicate and entered into this 17th day of September, A. D. 1919, by and between Charles I. Dunahey, party of the first part, and A. V. Marcellus and A. L. Garnes, parties of the second part,

WITNESSETH, That for One and no-100 dollars and other valuable consideration, the said party of the first part hereby agrees to pay to parties of the second part, according to the schedule hereinafter set forth, out of the net earnings under three contracts entered into between said party of the first part and the State Highway Commission for the state of North Dakota, and Logan county, North Dakota, being Contracts Nos. 2481.40A, 2481.40B and 2481.40C, as follows:

Party of the first part shall pay to the parties of the second part 10 per cent of the net earnings under said contracts if such earnings shall not exceed $10,000; $1,250 if the earnings under said contracts shall amount to and not exceed $12,500; and $2,000 if the earnings under said contracts shall aggregate $15,000 or over.

It is hereby agreed by and between the parties hereto that all moneys due party of the first part for such labor to be done shall in accordance with a certain order given to the State Highway Commission, bearing even date herewith, be paid to parties of the second part, and from such payments shall first be deducted any amounts due parties of the second part, and the balance paid to party of the first part. Provided, however, that at the completion of the contract to be performed by the party of the first, parties of the second part shall retain from the moneys due and payable, when paid, such amount as they shall properly be entitled to hereunder and in accordance with report of net earnings under the contracts with the State Highway Commission for the state of North Dakota, and Logan county, North Dakota.

Witnesses:
J. L. Bell.
H. E. Hanson.

Chas. Dunahey,
Party of the first part.
A. V. Marcellus.
A. L. Garnes.
Parties of the second part.

The sole question presented in this case is, whether or not Dunahey,

Garnes and Marcellus were copartners. Section 6386, C. L. 1913 defines a partnership thus:

"Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." Section 5388 provides, that a partnership can be formed only by consent of all parties thereto. Section 6412 provides: "Anyone permitting himself to be represented as a partner, general or special, is liable as such to third persons to whom such representation is communicated, who on the faith thereof give credit to the partnership."

Section 6413 provides: "No one is liable as a partner who is not such in fact, except as provided by the last section."

There is no evidence in the record to show that these parties were partners, associated in business as such, nor that Garnes or Marcellus had any right of control or direction of the business. There is no evidence showing that there was any intention or consent to form a partnership. There is no evidence that Garnes or Marcellus in any way represented themselves as having any interest in the business. No such representation was made to plaintiff, and it extended no credit to Dunahey on that theory.

The mere fact that the defendants were to receive the compensation specified in the contract, in addition to the rate of interest they were to receive for the loan of the money, would not, of itself, make them partners, even though that additional compensation was specified as a part of the profits of the business.

In the case of Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972, the Supreme Court of the United States in effect held, that the receiving a part of the profits of a commercial partnership as interest, in addition to interest as compensation for a loan, does not make the lender a partner. We think this is the correct rule. That rule applies in the case before us.

The case presented to us is scarcely different in principle than if Garnes and Marcellus, on loaning Dunahey $3,000, had taken his note for that amount, bearing 20 per cent interest, 10 per cent of which would approximately equal the lawful rate of interest, and the remainder equal to the anticipated profits, but all specified as interest in the note.

If the transaction had thus been conducted, could it be claimed that

by it the defendants would be liable as partners, simply because they had been allowed part of the profits as additional interest, over and above the regular, lawful rate of interest, for the loan of the money? We think it is clear they would not.

It is true that, as between the defendants and Dunahey, a note for an usurious rate of interest would be unenforceable for a greater amount than the face of the note, and that, if Dunahey had paid such usurious interest, he could recover twice the amount thereof, as provided by statute, etc.

It may be, if the defendants had brought an action against Dunahey to recover the profits specified in the contract, in addition to the amount of the note and lawful interest thereon, that they could not have succeeded, the contract being perhaps a cover for usury; upon this question we express no opinion, as it is not involved in the case, and is a question that can only be raised as between the defendants and Dunahey. The plaintiff may not raise the question.

If the contract would be partially unenforceable by the defendants against Dunahey, that does not concern plaintiff and it can derive no benefit from that situation.

The contract being silent as to any reference to a partnership, or intention to form one, we think it was reversible error on the part of the court to sustain the objection to the question asked of defendant Garnes as to whether or not it was his intention or purpose to form a partnership with Dunahey.

The court also erred in denying the motion at the close of the testimony for a directed verdict in defendants' favor; and further erred in not granting defendants' motion for judgment notwithstanding the verdict.

The evidence is wholly insufficient to sustain the verdict. In fact, there is no evidence to sustain it.

The judgment and order appealed from are reversed, and the case remanded to the trial court, and it is directed to enter an order dismissing the action.

The appellant is entitled to the statutory costs and disbursements on appeal.

ROBINSON, Ch. J., concurs.

CHRISTIANSON, J. (concurring specially). The sole question in this case is whether there is sufficient evidence to sustain a finding that the three defendants were copartners. In my opinion this question must be answered in the negative. The contract between Dunahey as party of the first part and Marcellus and Garnes as parties of the second part was one between lender and borrower. The moneys advanced by Marcellus and Garnes to Dunahey were advanced, not as capital of a partnership, but as a loan. The share of the profits to be received by Marcellus and Garnes was to be paid to them as compensation for loaning the money, and not as their share of the profits of a partnership in which they were members. Where a party is interested in the profits of an undertaking only as a means of compensation for services rendered, or for money advanced, he is not a partner. Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Eager v. Crawford, 76 N. Y. 97; Burnett v. Snyder, 76 N. Y. 344; Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343; Cassidy v. Hall, 97 N. Y. 159, 168; Davis v. Patrick, 122 U. S. 151, 30 L. ed. 1094, 7 Sup. Ct. Rep. 102; Beecher v. Bush, 45 Mich. 188, 40 Am. Rep. 465, 7 N. W. 785. In my opinion the evidence in this case clearly shows that there was no intention of the parties to form a partnership. There is no contention that the defendants Marcellus and Garnes ever held themselves out as partners of Dunahey. Nor is there any contention that the plaintiff extended credit to Dunahey on the strength of any belief on its part that Marcellus and Garnes were Dunahey's partners. I therefore agree that the judgment appealed from should be reversed and the action dismissed.

BIRDZELL, J., concurs.

BRONSON, J. (specially concurring). The sharing of profits is a test of partnership. Comp. Laws 1913, § 6386; Frankel v. Hiller, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265. It is not, however, a conclusive test. Profit sharing in a transaction as a means to compensate for the use of money may exist without rendering the lender liable as a partner. The test seems to be whether money advanced for profit sharing was made as a loan or as an investment in capital. Rowley,

Partn. § 80. If advanced in a venture as an investment in the capital a partnership is created. Frankel v. Hiller, 16 N. D. 387, 397, 113 N. W. 1067, 15 Ann. Cas. 265; Kirkwood v. Smith, 47 Misc. 301, 95 N. Y. Supp. 926. Such is the result although the parties treat and term the advance made as a loan. Wood v. Vallette, 7 Ohio St. 172; Poundstone v. Hamburger, 139 Pa. 319, 20 Atl. 1054. Again the fact that the profit sharing agreement for the use of money in a venture may render the contract usurious treated as a loan is not determinative in creating a partnership. Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Rowley, Partn. § 80.

In the case at bar the extrinsic facts concerning the written contract for profit sharing and the inferences to be drawn therefrom may be said to be fairly free from dispute. Upon this record they become questions of law for the court. T. R. Foley Co. v. McKinley, 114 Minn. 271, 274, 131 N. W. 316. I am of the opinion that the record discloses fairly that the advances made were loans and a partnership was not created. T. R. Foley Co. v. McKinley, supra; Wisotzkey v. Niagara F. Ins. Co. 112 App. Div. 599, 98 N. Y. Supp. 760; Meehan v. Valentine, 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 972; 30 Cyc. 373.

BIRDZELL, J., concurs.

HERMAN OLSON, Respondent, v. GOWAN-LENNING BROWN COMPANY, Appellant.

(182 N. W. 929.)

Army and navy — under Soldiers' and Sailors' Civil Relief Act, sheriffs' deed held not to affect expiration of equity of redemption.

In an action to set aside a sheriff's deed upon a mortgage foreclosure by advertisement, relying upon the Federal and State Moratorium Acts, where it appears that on December 1st, 1917, the foreclosure sale was held; that on January 29, 1918, the State Act, and, on March 8, 1918, the Federal Soldiers

NOTE.—Authorities discussing the question of validity and construction of war legislation in the nature of moratory statute are collated in a note in 9 A.L.R. 6.

and Sailors Civil Relief Act, were enacted; that on December 6, 1918, the sheriff's deed was issued; that the plaintiff was in the military service from July, 1917, to May 22, 1919, and that, in October, 1920, he instituted this action, it is *held:*

1. That the execution of a sheriff's deed evidences only the ministerial act of the officer to complete the formal transfer of the naked legal title after the expiration of the equity of redemption and does not affect the expiration of the equity of redemption.

Army and navy — Federal Moratorium Act held inapplicable in action to set aside sheriff's deed.

2. That the Federal Act is not applicable, even though it be assumed that the plaintiff's equity of redemption was suspended during the period of his military service and for three months thereafter, for the reason that such equity of redemption thereafter fully expired before the institution of the present action and without any alleged offer or tender made to redeem.

Army and navy — State Moratorium Act held inapplicable in action to set aside sheriff's deed.

3. That, upon construction, the provisions of the State Moratorium Act (chapter 10, Spec. Sess. Laws 1918) granting privileges to a soldier during the time the United States is engaged in war and for an additional period of one year, refers, pursuant to the purposes of the act, to the actual engagement of the United States in the war and that such engagement terminated on Armistice day, November 11, 1918.

Army and Navy — State Moratorium Act held inapplicable where equity of redemption fully expired.

4. That the plaintiff has not brought himself within the terms of such State Moratorium Act, although it be assumed that his equity of redemption was suspended since the inception of the act and until one year after Armistice day, November 11, 1918, for the reason that subsequent to such time and before the institution of this action his equity of redemption fully expired.

Opinion filed May 2, 1921.

Action in District Court, Eddy County, *Cole,* J.

Defendant has appealed from an order overruling a demurrer.

Reversed.

Henry G. Middaugh, Fred T. Cuthbert, and *Arthur Ray Smythe,* for appellant.

The law in force at the time a mortgage is executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of a mortgage. Von Hoffman v. Quincy, 4 Wall. 535,

18 L. ed. 403; Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143; Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042.

Any modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution. Barnitz v. Beverly, supra.

The defendant does not offer to do equity. Beekman v. Frost, 18 Johns. 544.

"The party, to entitle himself to the aid of a court of chancery, should show himself ready and desirous to perform on his part." Easton v. Lockhart, 10 N. D. 181, 86 N. W. 697.

Lyman N. Miller, for respondent.

BRONSON, J. *Statement.*—The defendant has appealed from an order overruling a demurrer to the complaint. In November, 1914, the plaintiff gave to the defendant a mortgage upon farm lands in Eddy and Griggs counties. On July 8, 1917, plaintiff entered the service of the United States and served thereafter as a private soldier until May 22, 1919, when he was honorably discharged. On December 1st, 1917, pursuant to proceedings had to foreclose the mortgage by advertisement, the lands were sold and a sheriff's certificate issued to the defendant. On December 6, 1918, a sheriff's deed was issued. In October, 1920, the plaintiff, relying upon the Federal and State Moratorium Acts, instituted this action to set aside the sheriff's deed, to compel the defendant to account for the rents and profits received by the defendant for the years 1918 and 1919, and to pay the plaintiff for the rents and profits received in the year 1920. On January 29, 1918, the State Moratorium Act (chap. 10, Spec. Sess. Laws 1918) was adopted. On March 8, 1918, the Federal Soldiers and Sailors Civil Relief Act was enacted.

Decision.—We are of the opinion that the Federal act, upon the alleged facts, is not applicable. The plaintiff relies upon that portion of the act which provides that no sale under the power of sale shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court. Sec. 302. Plaintiff also cites § 8087, N. D. Comp. Laws 1913, which pro-

vides that if any mortgaged premises are not redeemed, it shall be the duty of the officer to complete the sale by executing a deed of the premises so sold to the purchaser. He contends that the issuance of such deed is a part of the sale. The foreclosure sale in the instant case was had before the Federal act was enacted. No question is therefore injected of the necessity of foreclosing by action under the terms of the Federal act. Such sale operated to pass to the purchaser the title to the premises subject only to the equity of redemption within one year. At the expiration of this equity of redemption the full beneficial title of the mortgagor passed to the purchaser. The execution of the sheriff's deed is only the ministerial act required to complete the formal transfer of the legal title when the equity of redemption had expired. State ex rel. Forest Lake State Bank v. Herman, 36 N. D. 177, 161 N. W. 1017. Neither the execution nor the nonexecution of this sheriff's deed serves to diminish or extend the equity of redemption. If, for purposes of argument only, it be assumed that the equity of redemption was suspended, during the period of plaintiff's military service and for three months thereafter, it fully appears, nevertheless, that his equity of redemption thereafter fully expired before the institution of the present action, and without any alleged offer or tender made to redeem.

Has the plaintiff brought himself within the terms of the State Moratorium Act? This court has heretofore given a broad and liberal construction to the State Moratorium Act to accomplish the beneficent purposes for which it was enacted. Thress v. Zemple, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 85; Strand v. Larson, 45 N. D. 7, 176 N. W. 736.

It is to be noted again that the foreclosure sale was had prior to the enactment of the state act. It is not contended that the act affects the validity of such sale held in December, 1917. The point of attack is that the sheriff's deed, issued in December, 1918, and while the plaintiff was still in service, was directly within the terms of the act and, therefore, is void. As heretofore stated, the sheriff's deed simply evidences the formal transfer of the naked legal title and the ministerial act of the officer concerned. Accordingly, resort must be made to the position and contention that the state act operates to suspend the equity of redemption.

If it be conceded again, for purposes of argument only, that the equity of redemption was so suspended, the question then arises, During what period of time was it so suspended? The state act provides that no proceeding by action or otherwise shall be had or taken in this state for the foreclosure of a mortgage against any person in the active military service of the United States during the time the United States *is engaged in the present war* and for *an additional period of one year,* and, during such time, no further proceeding shall be taken in any action or proceeding that is pending at the time of the taking effect of the act in which such person is a party over his objection. Spec. Sess. Laws 1918, chap. 10. If, within the contemplation of the act, the United States *is still engaged in the present war,* then, under the assumption that the equity of redemption is suspended by the act, such equity of redemption is still suspended. If, however, the engagement of the United States in the war with Germany ended upon the cessation of actual war, then the equity of redemption remained suspended, under the assumption made, only until one year after Armistice day, November 11, 1918. Upon the former construction, the plaintiff would still have a right of redemption. Under the latter construction, this right of redemption expired in September, 1920.

In placing a construction upon the statute, aid can be afforded practically only through the consideration of the act itself and the circumstances existing when it was enacted.

In this regard the Federal act affords no aid: It provides that the act shall remain in force until the termination of the war and for six months thereafter. It extends its privileges to soldiers during their term of military service and for certain limited periods after its termination. It specifically provides that the termination of the present war means by the treaty of peace as proclaimed by the President. Generally speaking a Moratorium Act, favoring persons engaged in the military service, which operates to stay actions or proceedings against such person may be upheld when the period prescribed is for a reasonable time. See note in 9 A.L.R. 11; Breitenbach v. Bush, 44 Pa. 313, 84 Am. Dec. 442. This statute was enacted at a time when the Federal Selective Service Laws were in force and when the men of this state in various walks of life had been, or were being, called into actual service in the defense of our country.

Under the Federal act (May 18, 1917) the service of these men, whether selected by draft or under enlistment, was for the period of the war, unless sooner terminated by discharge or otherwise. 9 Fed. Stat. Anno. 2d ed. 1163. The state act was created and enacted as emergency legislation. Throughout, it contemplates the extension of its benefits to large numbers of our citizens who recently theretofore had been, or were being, called into service under an emergency situation and who necessarily had to leave behind, without personal protection, their civil rights while they were away in active military service. This court has heretofore held, in Strand v. Larson, supra, that a person so called into active military service, was entitled even after his discharge to the benefits of the act for the period therein prescribed. This gave recognition to an opportunity for, and a period of rehabilitation, namely, an additional period of one year after the engagement of our government in the present war. In the light of present circumstances and present knowledge it would appear to be a strange and unwarranted construction to extend this period of rehabilitation after return to civil life for an indefinite period of time dependent upon when the Federal government legally, although not actually, terminates the war. The act, as heretofore stated, was emergency legislation. It was put into operation under emergency conditions and to provide protection during an emergency. In fact the actual engagement of the United States in the present war ceased upon Armistice day, November 11, 1918. The purposes of the act are fully subserved and the emergency condition contemplated fully covered, by recognizing the extension of its benefits during the time that our government was actually engaged in the present war and for the additional period therein prescribed.

Any other construction would serve to extend the benefits of the act beyond its contemplated purposes and would serve to jeopardise its validity. See chap. 5, Subd. 6, Spec. Sess. 1918; chap. 138, Laws 1921. It is therefore our opinion that the act contemplates and was intended to contemplate the time when the United States was actually engaged in the war, and for an additional period of one year thereafter. The order of the trial court is reversed.

BIRDZELL, J., concurs.

CHRISTIANSON, J. (concurring specially). The case before us involves a construction of the Federal and State Moratory Acts. The facts involved are fully stated in the opinion prepared by Mr. Justice Bronson. I agree with Mr. Justice Bronson that plaintiff's complaint wholly fails to state a cause of action within the purview of the Federal act. I also agree "that the execution of a sheriff's deed evidences only the ministerial act of the officer to complete the formal transfer of the naked legal title after the expiration of the period of redemption and does not affect the expiration of the redemption period." In other words, I fully concur in the principles announced in paragraphs 1 and 2 of the syllabus and in those portions of the opinion relating thereto. I have had some difficulty, however, in arriving at a conclusion as to the matters covered by paragraphs 3 and 4 of the syllabus, namely, the construction to be placed upon the phrase "During the time the United States is engaged in the present war," in the state Moratorium Act. This phrase is contained in § 1 of the act, which section reads as follows: "No proceeding, by action or otherwise, shall be had or taken in this state for the foreclosure of a mortgage, or other lien, on real or personal property, or for the cancelation of an executory contract for the sale of land; or for the recovery of any indebtedness against any person in the active military service of the United States as hereinafter defined, during the time the United States is engaged in the present war and for an additional period of one year, and during such time no further proceedings shall be taken in any action or proceeding that is pending at the time of the taking effect of this act in which such a person is a party over the objection of such party, his attorney or any person interested on his behalf, nor shall any judgment against such person in the military service be enforced against him or his property during said period." Laws Spec. Sess. 1918, chap. 10.

I am frank to confess that my mind is not free from doubt as to what the lawmakers intended should constitute the point of time when the United States should be deemed to be no longer engaged in the "present war." Manifestly, "the time the United States is engaged in the present war" would terminate upon the happening of one of two

events: Namely, the signing of the armistice and the cessation of actual warfare, or the ratification of the treaty of peace, or a declaration of a state of peace by the Federal government, which one of these two events did the lawmakers intend should constitute the termination of the period defined in the Moratorium Act as "the time the United States is engaged in the present war? According to the views expressed by Mr. Justice Bronson, the United States ceased to be engaged in the present war within the purview of the state act, upon the signing of the armistice and the cessation of actual warfare. As I have already indicated, I have some doubt as to what the lawmakers actually did intend. But it is elementary that laws must be construed so as to be valid and operative if it is at all possible to do so. The validity of State Moratory Acts is generally held to be dependent upon whether the time of suspension of remedies is reasonable or unreasonable. See note in 9 A.L.R. 11. In Strand v. Larson, 45 N. D. 7, 176 N. W. 736, this court held that a person who had been called into active military service was entitled, even after his discharge, to the benefits of the act, for the full period prescribed therein. It is a matter of common knowledge that most of the men who were engaged in active military service from this state have long since returned to their usual avocations. Many of these men were men of affairs. If the state Moratorium Act means that actions may not be commenced to enforce contracts against them until one year after the treaty of peace has been signed or a state of peace declared to exist by the Federal government, then, manifestly, these men would be hampered in carrying on their business affairs, for a contract on which all remedies of enforcement are suspended, would be of little value. In view of the interpretation placed upon the State Moratorium Act in Strand v. Larson, supra. I am inclined to agree that the only interpretation which could possibly sustain the validity of the act, against an attack on the ground that the suspension of remedies therein provided is unreasonable, is that placed upon it by Mr. Justice Bronson.

I am aware that the last legislative assembly attempted to define the term, "during the time the United States is engaged in the present war." See chap. 138, Laws 1921. It is indeed difficult to understand exactly what the legislature intended by this enactment. Section 1 of that act says: "The period of time designated, 'during the time

the United States is engaged in the present war' in section one (1) of chapter ten (10) of the Laws of the Special Session of the Fifteenth Legislative Assembly is hereby declared to be terminated November 11, 1921." Section 2 of the act says:—"The period of time designated, 'the duration of the war' in chapter 5 of the Laws of the Special Session of the Fifteenth Legislative Assembly is terminated." As introduced, section 1 of the act also declared the period of time designated as "during the time the United States is engaged in the present war" to be terminated. During the course of passage, the act was amended so as to read as already indicated. It is for the courts to interpret and enforce laws. This action had been commenced, and had been determined by the trial court, before chapter 138, Laws 1921, was enacted, and the parties are entitled to the enforcement and application of laws existing at the time the controversy arose. While it is difficult to harmonize the provisions of chapter 138, Laws 1921, it is somewhat significant that the lawmakers recognized that Armistice day, rather than the day on which the treaty of peace may be ratified, or a state of peace declared to exist, constituted the date on which it might appropriately be declared that the United States ceased to be engaged in the World War.

In my opinion there is, however, another reason why plaintiff's complaint fails to state a cause of action within the purview of the State Moratorium Act. It will be noted that the act makes reference both to actions and proceedings sought to be instituted after, and to actions or proceedings pending at, the time it became effective. As to the former it provides that no actions or proceedings shall be commenced against persons in the active military service of the United States in the present war within the prescribed period. As to the latter it provides that during the prescribed time "no further proceedings shall be taken in any action or proceeding that is pending at the time of the taking effect of this act in which such a person is party over the objection of such party, his attorney, or any person interested on his behalf."

In this case the proceeding to foreclose the mortgage by advertisement had been completed, sale had been made, and certificate of sale issued to the purchaser, almost a month before the State Moratorium Act was enacted. The certificate of sale constituted a contract (Rob-

erts v. First Nat. Bank, 8 N. D. 504, 510, 79 N. W. 1049; Fisher v. Betts, 13 N. D. 197; E. J. Lander & Co. v. Deemy, 46 N. D. 273, 176 N. W. 922; 6 R. C. L. pp. 365, 366), and had the same force and effect as though it had been issued pursuant to a sale under a decree of foreclosure. Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

I express no opinion as to the constitutionality of the State Moratorium Act. Nor do I express any opinion as to whether that act was wholly superseded by the Federal Soldiers and Sailors Civil Relief Act as has been ruled by the supreme courts of Oregon and Wisconsin. Konkel v. State, 168 Wis. 335, 170 N. E. 715; Pierrard v. Hoch, 97 Or. 71, 184 Pac. 494, 191 Pac. 328.

Robinson, Ch. J. (concurring specially). I concur in the result of the decision as written by Mr. Justice Bronson. However, in a dissenting opinion, I have formerly held, and do still hold, that the State Moratorium Act is void for the reason that it impairs the obligation of contracts, and for the reason that the subject is governed by an Act of Congress, which supersedes and excludes any legislation on the part of the state. As held by the Oregon supreme court: "The National Legislature has occupied the whole field, which of necessity excludes all state legislation on the subject." Thress v. Zemple, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 87; Pierrard v. Hoch, 97 Or. 71, 184 Pac. 494, 191 Pac. 332.

Grace, J. (concurring in the result). This action is in reality one in equity. The plaintiff seeks thereby the right to redeem from a certain mortgage foreclosure sale of certain land, amounting to 480 acres. The mortgage foreclosure sale was one made under the power of a sale contained in the mortgage.

The complaint in this action is subject to criticism and objection, in that it does not set forth the equities, if any, which the plaintiff has. For instance, the 480 acres of land in question is, no doubt, fertile and valuable land. It is situated in a territory where land is valuable. There is, however, nothing in the complaint to show whether it is worth $40 per acre, or $75 per acre, or more or less than either of those amounts.

There is nothing to show whether this land is under cultivation, except the inference be drawn from the statement that certain crops were raised thereon in certain years.

There is no allegation, showing whether the buildings, if any, are worth $100 or $4,000, or any amount. There is nothing to show whether the $5,000 mortgage in question is a first mortgage, or whether there are other encumbrances prior or subsequent to it, or the total amount of the encumbrance or liens against the land, in order that it might be determined if the plaintiff has any equity in the land.

There is no allegation in the complaint that plaintiff never had any notice of the foreclosure sale, and that said foreclosure was started after his entrance into actual military service, and without his knowledge.

There is no allegation in the complaint showing in what manner, if any, the defendant took an undue advantage of plaintiff while he was absent in military service.

There is no allegation that plaintiff is able, ready, and willing to redeem the land, and is ready and willing to tender the amount of money necessary to redeem from the foreclosure sale.

There is no allegation as to the amount of the rents and profits for the years 1918 and 1919. No statement of the number of bushels raised, nor of the share to which plaintiff would be entitled as the owner of the land, nor of the price and value per bushel of the products raised on such farm.

There is almost a total failure in the complaint to set forth any equities claimed to exist in plaintiff's favor.

I concur in the result at which the majority opinion has arrived.

L. A. McGINNITY, Appellant, v. M. B. DOWD, Respondent.

(182 N. W. 938.)

Judgment — complaint attacking judgment for assault and battery occurring ten years before held to show no equity or ground for attack.

For an assault and battery occurring ten years ago, defendant obtained a

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NOTE.—On fraud or perjury as to physical condition resulting from injury as grounds for relief from an injunction against a judgment for personal injuries, see note in 16 A.L.R 397.

judgment against the plaintiff for nearly $10,000. On appeal, the supreme court affirmed the judgment and *held* that the damages were not excessive. The plaintiff sues to review and cancel the judgment and to recover $10,000 for wrongfully obtaining it and trying to enforce it. *Held*, that the complaint shows no equity and no facts sufficient to sustain an attack upon the judgment.

Opinion filed May 2, 1921. Rehearing denied May 17, 1921.

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

Affirmed.

Paul Campbell, for appellant.

If the original complaint was sufficient, it was reversible error to sustain the demurrer. If the proposed amended complaint was sufficient it was reversible error not to allow the amendment of the original complaint. Miller v. Nat. Elev. Co. 32 N. D. 357.

A Federal court may enjoin a personal-injury judgment rendered by a state court if it subsequently appears that the injury of which the plaintiff complained was simulated. Chicago, R. I. & P. R. Co. v. Callicotte, 267 Fed. 799.

B. H. Bradford, for respondent.

"When parties have exhausted every means for reversing such determination in the same proceeding, it must be regarded as final and conclusive unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." United States v. Throckmorton, 98 U. S. 65; Re Griffith, 84 Cal. 113; Allen v. Currey, 41 Cal. 321; Greene v. Greene, 2 Gray, 363, 61 Am. Dec. 454. See also note in 13 L.R.A. p. 336; Tuttle v. Tuttle, — N. D. —, 181 N. W. 898.

Robinson, Ch. J. This is an appeal from a judgment entered on an order sustaining a demurrer to the complaint and from an order denying leave to serve and file an amended complaint.

The complaint avers that in January, 1913, in the district court of Williams county, in an action for an assault and battery, the defendant wrongfully and by fraud and perjury obtained a judgment against

the plaintiff for nearly $7,000; that in said action Dowd imposed on the court by falsely claiming that he was permanently injured and that his mind was permanently injured, and that after a final hearing and determination of the case by the supreme court his mind at once became normal; and that plaintiff has sustained damages to the amount of $10,000 by reason of the judgment against him, and attempts to collect the same.

As it appears, the facts in the case are these: Ten years ago, on a side street in the village of Tioga, in Williams county, the parties met. Plaintiff threw off his coat, and, with the swiftness and strength of a tiger, he sprang upon defendant, knocked him down with one blow, beat him, and pounded him against the hard, stony street so that he became and remained unconscious for an hour. He was beaten, as they say, within an inch of his life. In January, 1913, in an action for the beating, in the district court of Williams county, Dowd obtained a judgment for damages $6,550, and interest, or nearly $7,000. In April, 1915, the judgment was affirmed by the supreme court. Dowd v. McGinnity, 30 N. D. 308, 152 N. W. 524. On a review of the record and the evidence, this court held that the verdict against McGinnity was well sustained by the evidence. The testimony, as cited, shows one witness testified thus: "I first saw McGinnity lay off his coat. Dowd was standing perhaps a rod or two from him. As McGinnity dropped his coat he started to run toward Dowd. Dowd raised his arms to his face. McGinnity struck him and knocked him down. Dowd fell on his side and rolled over onto his face. McGinnity took hold of his neck and chucked his face into the street several times. Then rolled him over onto his back. Then he took hold of his neck or clothing somewhere about the neck, and raised him high enough so that his head hung from the ground a few inches and hit him in the face again. The street along there was apparently a very hard street. I was watching the case. There was no obstructions to my view. Dowd made no offer to strike McGinnity. He tried to protect his face from the blow at the time McGinnity struck him. He did not try to throw the blow aside. He made no attempt to parry the blow."

Dr. Stobie testified that he and Mr. Nesseth picked up Dowd, carried him to the doctor's office, examined him and found on him several cuts and bruises,—a cut on the lip about a quarter of an inch deep, clear

through the lip, a broken nose, an injury to the skull over the left eye. He testified Dowd remained unconscious for about an hour, and was unable to leave the hotel for about ten days. Later he went for treatment to Rochester, Minnesota.

The complaint is in the nature of a bill of review. It asks the court to review the case, to cancel the judgment and award the plaintiff $10,000 damages. Before commencing such an action the plaintiff must obtain leave of the supreme court and of the trial court, and the complaint must show that such leave has been granted. Leave to file a bill of review will not be granted unless on a showing that is both equitable and conclusive. A bill of review may be allowed by the supreme court that has affirmed a conviction for murder, when it appears that the person supposed to be murdered is alive. So, in case of a judgment for a death loss on an insurance policy, the proper court may allow a bill of review when it conclusively appears that the insured is not dead. 16 Cyc. 523–534.

Counsel for plaintiff relies on the Callicotte Case, 16 A.L.R. 386, 267 Fed. 799. In that case it was alleged and proved that at the time of the trial Callicotte, being aided by conspirators, feigned paralysis of his lower limbs and by the use of drugs produced an apparent paralysis, which could not be detected from the real paralysis. Callicotte kept himself secreted in his house so that his true condition could not be ascertained, while during the time he had the perfect use of his limbs and made use of them at will. That by such means he deceived his own doctors, whom he called as witnesses. He deceived the court and the jury. By such means he presented a false case and prevented the defendant from proving his own case. 267 Fed. 802.

This case is wholly different. In neither the complaint nor the proposed amended complaint are there any facts stated showing a conspiracy to manufacture evidence, to deceive the court, or to testify falsely. There is no showing to contradict the testimony that Dowd was beaten till he became unconscious; that his nose was broken, his lip cut, and his head injured. In short, there is no showing that the supreme court was wrong in holding that the damages were not excessive. Neither the complaint nor the amended complaint makes attempt to show the nature and extent of the injury to Dowd. True it is averred that plaintiff did not commit an assault and battery upon Dowd, and that the verdict was obtained by fraud and perjury; but that is the very matter

that has been tried and determined against the plaintiff. The complaint shows no equity. It deals merely in generalities. On matters not extraneous to the trial and the record, the court is asked to reopen the case and to try anew the assault of ten years ago, and to award plaintiff $10,000 damages.

In the Tuttle Case, — N. D. —, 181 N. W. 898, recently decided by the court, the plaintiff sought to recover $300,000, and interest for twelve years, on the ground that defendant had wrongfully obtained a judgment of divorce in a case where it was alleged the court had no jurisdiction. This court held that the judgment imported absolute verity which overcame the averments against it, and that it was not subject to such a collateral attack.

As this court holds, the trial court was right in sustaining the demurrer and in dismissing the action. Affirmed.

CHRISTIANSON, J. (concurring specially.) I concur in the disposition made of this case in the opinion prepared by Mr. Chief Justice Robinson, but I do not concur in all that is said in that opinion.

While it is well settled that equity will afford relief against a judgment obtained by means of fraud (extrinsic or collateral to the matters involved in the action in which the judgment was rendered), where the party against whom the judgment was rendered brings himself within the equitable principles justifying such relief, it is equally well settled that a party seeking such relief must show not only fraud, but "that the judgment is unjust, that he has a meritorious cause of action or defense, that he has no adequate remedy at law, and that he is not guilty of negligence or other fault." 15 Standard Proc. 320. And "the doctrine is fully established that a court of equity will not, on the application of the defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense over which the court pronouncing the judgment had full jurisdiction, set aside the judgment or enjoin its enforcement simply on the ground that it was unjust, irregular, or erroneous, or because the equity court would, in deciding the same case, have come to a different conclusion." Black, Judgm. 2d ed. § 367. Where equitable relief is sought against a judgment, the fraud must be clearly stated and proved. Black, Judgm. 2d ed. § 368. And where the party seeking relief asserts that he has become aware of certain new evidence, which he could not, with due diligence, have discovered and produced at the trial, the substance of such alleged

evidence must be set forth in the complaint in order that the court may judge whether it is of the requisite character and weight. Black, Judgm. 2d ed. § 386. In construing the complaint, the court will take judicial notice of its records in the case in which the judgment which is assailed was rendered. Beyer v. Investor's Syndicate, ante, 358, 182 N. W. 934.

The original complaint in this case, in my opinion, wholly fails to state facts sufficient to justify equitable interference with the enforcement of the judgment. The averments therein are mere general conclusions that the defendant represented upon the trial of the former action that his mind had become deranged as a result of the injuries which he had received at the hands of the plaintiff. If the averments of the original complaint were contained in affidavits forming the basis of a motion for a new trial, they would be entitled to no consideration. While the amended complaint sets forth in greater detail the matters upon which reliance is placed, I do not believe that, when construed in the light in the principles above stated, the matters set forth in the amended complaint constitute a cause of action for equitable interference with the judgment. The undisputed fact still remains that there was an altercation between the parties to this controversy, and that, during such altercation, the defendant, Dowd, was severely beaten. That was found to be the fact in the former action, and is not denied now. In that action, it was contended by the plaintiff here that Dowd and not McGinnity was the aggressor. In the amended complaint in this case, it is averred that one Furstnow, who testified that he saw the altercation from a certain drug store, could not possibly have seen it from the place where he claimed to have been stationed. And it is further averred that "at the time of the trial, this plaintiff asked his counsel to have the jury view the premises, to wit, the said drug store and surroundings, for the purpose and with the view to meeting the testimony of the said witness Henry Furstnow, and of establishing the untruth of such testimony; and that it was a physical impossibility for said witness to be where he claimed to have been and to see the trouble between the plaintiff and opponent." An examination of the testimony of Furstnow, given upon the trial and certified to this court on appeal, shows that he was fully cross-examined as to where he stood at the time he claimed to have witnessed the altercation, and the entire transaction gone into fully. It will be noted that, according to the

amended complaint, the plaintiff was aware of the alleged falsity of Furstnow's testimony at the time it was given, and asked his counsel that the jury be asked to view the premises to the end that its falsity might be demonstrated. It does not appear that plaintiff's counsel acted on the suggestion. And for the purposes of this action it is immaterial whether counsel failed to make such request, or made it and the request was refused by the trial court. In either event it would not constitute a ground for equitable relief against the judgment. Black, Judgm. 2d ed. §§ 375, 376. If the testimony of Furstnow was so clearly and demonstrably false as it is alleged, that might and should have been submitted to the court upon the motion for a new trial. Yet, although both the plaintiff and the counsel who conducted the trial made affidavits in support of a motion for a new trial (relating to alleged newly discovered evidence), no attempt was made to present the fact (which, according to plaintiff's complaint in this case, he then knew and could readily have proven) that Furstnow had given false testimony upon the trial.

The amended complaint also avers that the defendant simulated mental derangement, and that subsequent to the affirmance of the judgment, by this court, the defendant has transacted business, and, among other things, at one time made computation of the cost of seed in connection with the adjustment of a hail loss, and at other times sold grain, and gave to the sheriff a list of certain property belonging to the plaintiff, with directions to levy execution thereon. In connection with these averments, it may be noted that, while it was contended in the former action that defendant's mind and power of speech had been impaired, there was, so far as we are aware, no contention that he had become *non compos mentis*. The action was brought and prosecuted by plaintiff in his own name, and not by a guardian, as would have been the case if he had been "of unsound mind, or from any cause mentally incompetent." See §§ 7401, 8886, 8887, Comp. Laws 1913.

BIRDZELL and BRONSON, JJ., concur.

GRACE, J. (dissenting). In the circumstances of this case, we think the court erred in making its order sustaining the demurrer, and that particularly did it err in not permitting the amendment of the complaint.

SARGENT COUNTY, a Municipal Corporation, Respondent, v. STATE OF NORTH DAKOTA Doing Business as the Bank of North Dakota, Appellant.

(182 N. W. 270.)

Banks and banking — Bank of North Dakota may function as a separate agency of the sovereign power.

1. Pursuant to constitutional and statutory enactments, the Bank of North Dakota, as an agency of the sovereign power, engaged in the banking business, has a distinct status separate and apart from that of the state itself; this status permits it to function as a distinct and separate agency of the sovereign power.

Banks and banking — garnishment — states — "garnishment" proceedings defined; statute relating to execution against state inapplicable to garnishment against Bank of North Dakota; under state banking act garnishment proceedings against Bank of North Dakota held proper.

2. (a) A garnishment proceeding is an action: It creates no specific lien; it seeks to hold the garnishee to a personal liability and judgment, dependent upon his liability to the defendant. It is a remedy separate and distinct from attachment or execution.

(b) Section 8177, Comp. Laws 1913, which relates to executions against the state, has neither reference nor application to a direct garnishment proceeding ancillary to a suit against the Bank of North Dakota.

(c) Where a county has instituted action to recover deposits made in the Bank of North Dakota, and also garnishment proceedings against various state and national banks by reason of redeposits made by the Bank of North Dakota in such banks it is *held*, pursuant to the express provisions of § 22, chap. 147, Laws 1919 (Bank of N. Dak. Act), that such garnishment proceedings are proper.

Opinion filed March 12, 1921. Rehearing denied April 4, 1921.

From an order refusing to vacate garnishment proceedings in Sargent County, *McKenna,* J., the defendant has appealed.

Affirmed.

Wm. Lemke, Attorney General, *W. A. Anderson,* Assistant Attorney General (*Simpson & Mackoff* and *S. E. Ellsworth* of counsel), for appellant.

"The industries under consideration in the present case are all pub-

lic industries belonging to the state of North Dakota. None of them are private industries or enterprises, but, on the contrary, are public enterprises and businesses exclusively owned and wholly operated by the state of North Dakota in its sovereign capacity, for the use and benefit of all the people of the state,—in other words, for a public purpose." Green v. Frazier (N. D.) 176 N. W. 20.

"There are certain principles which must be borne in mind in this connection, and which must control the decision of this court upon the Federal question herein involved. This legislation was adopted under the broad power of the state to enact laws raising by taxation such sums as are deemed necessary to promote purposes essential to the general welfare of its people." Green v. Frazier (U. S.) 40 Sup. Ct. Rep. 501.

"It (the supreme court of North Dakota) answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the state of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective." Green v. Frazier (U. S.) 40 Sup. Ct. Rep. 502.

"No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any action the clerk shall make and furnish to the state auditor a duly certified copy of such judgment, and the auditor shall, in due course, draw his warrant upon the state treasurer for such amount, and deliver the same to the person entitled thereto." Comp. Laws 1913, § 8177.

"Attachment is a mode of obtaining security for the satisfaction of any judgment which plaintiff may finally recover, an actual seizure of the goods of a debtor in order that they may be held to satisfy the judgment which plaintiff may recover in the future." 6 C. J. 29.

Garnishment is simply a convenient method of attachment.

"Garnishment is an attachment by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim." American Cent. Ins. Co. v. Hettler, 37 Neb. 849, 40 Am. St. Rep. 522.

"Garnishment is attachment in the hands of a third person, and is thereby a species of seizure by notice." Baemer v. Winter, 41 Kan. 596.

"Garnishment, while in the nature of a proceeding in rem, is in effect an action by the defendant in the plaintiff's name against the garnishee, the purpose and result of which are to subrogate the plaintiff to the rights of the defendant against the garnishee." Neufelder v. German etc. Ins. Co. 6 Wash. 336, 36 Am. St. Rep. 166.

"Garnishment" is a mode of attachment differing in no material respect from an attachment by actual levy and seizure, except in the mode of enforcement." Rood, Garnishment, § 1.

"Property exempt from execution cannot be attached." Drake, Attachm. § 244.

"Officers of the United States, and of the different states, having money in their hands to which certain individuals are entitled, are not liable to the creditors of those individuals in the process of attachment, garnishment, and the like. This rule, as far as the same is applicable to national and state officers, has never been seriously questioned, having been established at an early date in the history of our government, and ever since sustained by the adjudications of both the national and state courts." Freeman, Executions, § 132; Drake, Attachm. § 516a.

"Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of the distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be devested by process of attachment, in favor of creditors or otherwise, from their legitimate object, the functions of the government might be suspended." Bank of Tennessee v. Dibrell, 3 Sneed, 383. See also Divine v. Harvey, 7 T. B. Mon. 439, and valuable notes appended to this case in 18 Am. Dec. 200.

"Every banking association in this state shall be exempt from the legal process of attachment and execution." Comp. Laws 1913, § 5188.

Appellant's Supplemental Brief.

Section 8177, Comp. Laws 1913, provides specifically that no execution shall be issued against the state on any judgment.

The authorities uniformly hold that an attachment is an execution issued in advance of trial and judgment. 2 R. C. L. 800, § 1.

So that, even under § 8177, Comp. Laws 1913, above mentioned, an attachment would not lie against the state.

That a garnishment is also an execution in advance, or at least in aid of it, see 12 R. C. L. 776, §§ 4, 5.

Therefore it follows that a garnishment also would not lie against the state.

"The legal effect of a garnishment judgment is to sequester or set aside the property or money of defendant in the hands of the garnishee for the payment of plaintiff's judgment." 12 R. C. L. 840, § 76 citing Bowen v. Port Huron Engine Co (Iowa) 47 L.R.A. 131, 80 N. W. 345.

To the same effect, see 12 R. C. L. 850, § 92, and Farrington v. Glemming (Neb.) 142 N. W. 297, 47 L.R.A.(N.S.) 742. Also Hartzell v. Vigen, 6 N. D. 117.

In that case it was held that the court has power to make all necessary orders for the ultimate application of defendant's interest in the property in satisfaction of such judgment. Also see 2 Shinn, Attachm. & Garnishment, § 466, holding that the effect of garnishment is to sequester the property in the hands of the garnishee for the payment of plaintiff's judgment.

S. A. Sweetman, State's Attorney, *Engerud, Divet, Holt, & Frame,* for respondent.

The first question raised in this case was whether the Bank of Georgia might be sued in the circuit court of the United States, nothwithstanding the 11th Amendment to the Constitution. The reason urged why such suit could not be maintained was that the state of Georgia was a half owner in the bank. The court denies the contention, saying: "The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters Bank of Georgia is not the state of Georgia, although the state holds an interest in it."

Again: "It is, we think, a sound principle that when a government becomes a partner in any trading company it devests itself so far as concerns the transaction of that company of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those

with whom it associates itself and takes the character which belongs to its associates and to the business which is to be transacted. Thus many states of the Union, who have an interest in banks, are not suable even in their own courts, yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation a government never exercises its sovereignty, it acts merely as a corporation, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act." Bank of U. S. v. Planters Bank, 9 Wheat. 904, 6 L. ed. 244.

A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter. The use of the term "corporation" in its creation is of itself unimportant except as it will imply the possession of these. They may be expressly conferred, and then they denote this legal being as unerringly as if created in general terms. Thomas v. Dakin, 22 Wend. 70; Gross v. Kentucky Board of Managers of the World Columbian Exposition, 43 L.R.A. 703; Hancock v. Louisville & N. R. Co. 145 U. S. 409, 36 L. ed. 755; Dunn v. State University, 9 Or. 357.

The question raised was that the state of Kentucky being the sole proprietor of the bank, the suit was virtually against the sovereign state.

The contention is disposed of by the court by quoting with approval from Bank of United States v. Planters Bank, saying, among other things, with reference to the status of the state:

"Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted." Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. ed. 437; Briscoe v. Bank of Kentucky, 11 Pet. 257, 9 L. ed. 707.

Can it be doubted under these rules of law that the Bank of North Dakota could issue bills of credit without violating § 10 of the Constitution of the United States? If it could, it is not a branch of, or an agency of, the state, but a distinct business entity. Curran v. Arkansas, 15 How. 304, 14 L. ed. 705.

BRONSON, J. *Statement.*—The defendant has appealed from an order overruling a motion to vacate a garnishment. Sargent county has instituted an action against the defendant to recover a judgment of approximately, $125,000 upon deposits of moneys made in the Bank of North Dakota, both upon open account and otherwise. At the same time, the county instituted a garnishment proceeding against some seventeen national and state banks, wherein it appears that the Bank of North Dakota has redeposited funds. To the garnishment proceedings, the defendant interposed an answer alleging that the garnishment affidavits were false and untrue; that the garnishment summons were issued in plain violation of § 8177, Comp. Laws 1913, and is illegal and void, and that all of the property held by the garnishees belonging to the defendant is absolutely exempt from execution. The defendant thereupon moved to dismiss such garnishment proceedings upon the grounds set forth in the answer. The trial court overruled the motion.

At the general election, in November, 1918, the people ratified a constitutional amendment which provides, in part, that the state may make internal improvements, and may engage in any industry, enterprise, or business excepting the manufacture, sale, and disposition of intoxicating liquors. Amend. N. D. Const. art. 32.

Pursuant thereto, the legislative assembly, in February, 1919, established the Bank of North Dakota. Laws 1919, chap. 147. The act declares the purpose of the state of North Dakota to engage in the banking business and establish a system of banking under the name of the Bank of North Dakota, owned, controlled, and operated by the state under the name of the "Bank of North Dakota." The act further provides that the Industrial Commission (consisting of the governor, the attorney general, and the commissioner of agriculture and labor) shall operate, manage, and control the bank; that the bank shall be opened and shall proceed to business whenever there shall be delivered to the Industrial Commission bonds in the sum of $2,000,000 issued by the state; that the fund procured by the sale of such bonds shall be designated and known as the capital of such bank. § 6. All state, county, township, municipal, and school district funds, and funds of all penal, educational, and industrial institutions, and all public funds, were required to be deposited in such bank within three months after the passage and approval of the act, subject to certain exceptions.

§ 7. The bank was authorized to receive deposits from any source, including the United States government, and any foreign or domestic individual corporation, municipality, or bank, and to deposit funds to the credit of the bank in any bank or agency approved by the Industrial Commission. § 9. The act further provides that all deposits in the bank are hereby guaranteed by the state, and such deposits shall be exempt from all state, county, and municipal taxes at any and all times. § 10. Furthermore, that funds deposited by state banks in such Bank of North Dakota shall be deemed available funds pursuant to § 5170, Comp. Laws 1913 (relating to reserve funds of a state bank); that the Bank of North Dakota might perform the functions and render the service of a clearing house with reference to banks that make the Bank of North Dakota a reserve depositary. § 11. That all business of the bank may be conducted under the name of "The Bank of North Dakota;" that title to property pertaining to the operation of the bank shall be obtained and conveyed in the name of "The State of North Dakota Doing Business as the Bank of North Dakota." § 21.

Section 22 of the act provides as follows: "Civil actions may be brought against the state of North Dakota on account of causes of action claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota, upon condition that the provisions of this section are complied with. In such actions the state shall be designated as "The State of North Dakota, Doing Business as the Bank of North Dakota," and the service of process therein shall be made upon the manager of said bank. Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure. Such actions shall be brought, however, in the county where the Bank of North Dakota shall have its principal place of business, except as provided in §§ 7415, 7416, and 7418, Compiled Laws of North Dakota 1913. The provisions of §§ 375 and 657 of the Compiled Laws of 1913 shall not apply to claims against the state, affected by the provisions of this action."

Section 23 provides for the examination of such bank, at least twice annually, by the state examiner.

Pursuant to this act the Bank of North Dakota opened for business in July, 1919. It became the depositary of the public funds of munici-

pal subdivisions of the state, as well as of the state and its institutions. In August, 1920, after being in operation approximately one year, in this bank, pursuant to its statement of which judicial notice is taken, there were public deposits of over $15,000,000; deposits due depositary banks of about $1,700,000, and individual deposits of approximately $100,000. At that time the bank, pursuant to its statement, claimed a capital of $2,000,000, a surplus of $40,000; and a reserve of $30,000 and net profits for the year 1920 of over $171,000.

In a statement of the bank, under date of February 15, 1921, the public deposits, in round numbers, are listed as follows:

Sinking funds	$3,700,000
General and other funds, state treasury	2,400,000
General and other funds, county, city, township, and school treasury	3,800,000
The capital is stated to be	2,000,000
Surplus	40,000
Reserve items	34,000
Net profits for 1920	121,000
Net profits for 1921	8,000
Individual deposits are listed at	245,000

At the general election held on November 2, 1920, an initiative act was submitted to and adopted by the voters, which permits municipal subdivisions of the state to deposit their public funds in depositaries of their own choice.

The complaint in this action alleges that pursuant to this initiative act the county determined to discontinue further deposits of its funds in the Bank of North Dakota; that thereupon it drew checks upon its account wherein there were moneys therein to its credit, and such checks were dishonored in large numbers.

Section 8177, Comp. Laws 1913, provides: "No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any action, the clerk shall make and furnish to the state auditor a duly certified copy of such judgment, and the auditor shall in due course draw his warrant upon the state treasurer for such amount, and deliver the same to the person entitled thereto."

The defendant contends, viz.: (1) The Bank of North Dakota is

the state of North Dakota doing business under the title of the Bank of North Dakota. It is an integral part of the state government, "an arm of the sovereign power," and an action brought against it, under the provisions of § 22, chapter 147, Session Laws 1919, is an action against the state. The funds or assets of the Bank of North Dakota, redeposited in the banks of Sargent county, are public funds of the state.

(2) Under the state law, execution is not permitted to be issued against the state of North Dakota on any judgment obtained against it. The process of garnishment is a provisional remedy closely analogous to attachment, and designed to aid the levy of execution; and this process is not applicable to the state; nor to a public fund belonging to or administered by the state.

Decision.—Two fundamental legal questions are involved: First, the status of the Bank of North Dakota, and, second, the right to avail of garnishment process in a proceeding against it.

The Status of the Bank.—The defendant maintains that the state is the bank, and the bank is the state; that the constitutional amendment granted this express sovereign power, and that the state has exercised such sovereign power in creating, operating, owning, and controlling this bank as the bank of the state. Further, it is contended that this court in Green v. Frazier, 44 N. D. 395, 176 N. W. 18, has expressly held that the Bank of North Dakota is not a private corporation, or private agency, but is, so to speak, an arm of the state's sovereign power, reaching out to execute its mandate, and that, when the Bank of North Dakota functions, it does so as an agency of this sovereign power, in a like manner as the treasurer of the state; that the same is true of every other state industry, which was the subject of controversy in that case.

It may not be denied that the state of North Dakota, pursuant to constitutional and statutory enactment, has engaged in the business or enterprise of banking. No question is raised in that regard. In the case of Green v. Frazier, supra, this court determined that the engagement of the state in such enterprise was for a public purpose to accomplish the objects sought thereby. Upon writ of error to the Supreme Court of the United States, that court declared that the united judgment of the people, the legislature, and the court of this state, that the purposes involved were public, would be accepted unless clearly

unfounded, and such court declined to set aside the action of this state in that regard, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499.

The pertinent question, now, Is the manner and method of this exercise of the sovereign power in such business and enterprise, and the status thereof, pursuant to statutory enactment?

In Bank of the United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244, the state of Georgia and certain citizens thereof were members of the Planters Bank. The question of jurisdiction over the state of Georgia as a party defendant was concerned. In the opinion rendered, Chief Justice Marshall, among other things, stated:

"It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many states of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act."

In Briscoe v. Bank of Kentucky, 11 Pet. 257, 9 L. ed. 709, an action was commenced by the Bank of the Commonwealth of Kentucky upon certain notes made payable to it, and the defense was raised that such notes were given to the bank through a loan of its bills, and that the same were illegal because they were bills of credit emitted by the state in violation of the United States Constitution. It appeared that this bank had been established in the name and in behalf of the commonwealth of Kentucky, under the direction of a president and twelve directors chosen by the general legislative assembly. That such bank was designated as a corporation, and was capable of suing and being sued. The stock of the bank was exclusively the property of the com-

monwealth, and it was constituted from moneys paid into the treasury for the purchase of vacant land and land warrants. The bank was authorized to receive moneys on deposit and to make loans. It appeared that no part of the capital had ever been paid into the bank. The contention was made that the character of the bank was changed by reason of the state of Kentucky being its exclusive stockholder; that this made the bank identical with the state, and the operations of the bank the operations of the state. It was held, following the decision in Bank of United States v. Planters' Bank, supra, that these contentions could not be upheld. That the bank was a simple corporation acting within the sphere of its corporate powers, and that it could no more transcend them than any other corporation, and that the state, as a stockholder, bears the same relation to it as any other stockholder; that the act creating the bank was a constitutional exercise of power of the state.

In Darrington v. Bank of Alabama, 13 How. 12, 14 L. ed. 30, an action was brought by the bank against the makers of a note payable to the bank, and the defense was that the note was given for bills of credit issued by the state. It appeared that the bank (at Mobile) was created by legislative act; that a president and fourteen directors were annually elected by the legislature; that the state was the only stockholder in the bank; that its capital stock was $2,000,000, procured from the sale of bonds of the state created for that purpose; the bank was authorized to exercise the ordinary powers of a banking corporation, and was further authorized to issue notes. The credit of the state was pledged for the ultimate redemption of such notes. It was contended that the state employed the bank as an agency through which its bills should be circulated for the profit of the state. It was held that the state as a stockholder received a profit, if any profit was realized, through the operation of the bank, and this was the condition of individual stockholders in all banks; that a state as a stockholder holds its property as an individual or corporation would hold it in the bank. It was further held that the liability of the state for its guaranty of the eventual credit of the notes of the bank by the state was a liability altogether different from that of the state on a bill of credit; that it was remote and contingent; that it could have been nothing more than a formal responsibility, if the bank was properly conducted, and that no one

received a bill of such bank with the expectation of its being paid by the state.

In Curran v. Arkansas, 15 How. 304, 14 L. ed. 705, it appeared that the bank of the state of Arkansas was incorporated by legislative act with the usual banking powers of discount, deposit, and circulation. That the state was its sole stockholder; that the capital stock of the bank consisted of $1,146,000 raised by the sale of state bonds and certain other sums. It was again held that a bank was a distinct trading corporation having a complete separate existence; enabled to enter into valid contracts by itself alone, and having specific capital stock, provided and held out to the public, as a means to pay its debts. That the obligations of its contracts, the funds provided for their performance, and the equitable rights of its creditors, were in no way affected by the fact that a sovereign state paid in its capital and consequently became entitled to its property. It further reaffirmed the principle that a state, by owning all of the capital stock, does not impart to that corporation any of its privileges or prerogatives; that it lays down its sovereignty and exercises no power or privilege in respect to those transactions not derived from the charter. Likewise, in Amstein v. Gardner, 134 Mass. 4, where a railroad and tunnel line was created and operated pursuant to legislative enactment subject to executive control and supervision, it was held, against the objection that the commonwealth could not be sued in its own courts without its consent, that the legislative act intended to give its consent that actions be maintained, and to assume the same responsibilities as ordinary railroad corporations were obliged to assume.

In Western & A. R. Co. v. Carlton, 28 Ga. 180, it was held that when a state embarks in an enterprise such as is usually carried on by individual persons, the company puts away its sovereign character, and is subject to like regulations as persons engaged in like enterprises.

In Gross v. Managers of World's Columbian Exposition, 105 Ky. 840, 43 L.R.A. 703, 49 S. W. 458, the Kentucky legislature created a board of managers for the World's Fair, giving to such board the power to erect a suitable building, maintain a restaurant, and employ necessary agents and employees. It appropriated $100,000 for such purposes. The plaintiff was employed by the board to operate the restaurant. He brought this action for failure of the board to comply with

its contract. Demurrer was filed upon the ground that the board was only the agent of the state, and so could not be sued. It was held that, although this board was an agency of the state, it nevertheless was vested with corporate powers, and in such capacity it might be sued just as any other corporation. The court stated:

"The rule is well settled that the state cannot be sued, and that the same protection is extended to the officers of the state. But this rule does not apply to a corporation created by the state for certain public purposes. If appellee was made by the acts referred to a corporation or a quasi corporation, we see no reason why it should be exempted from the rule allowing suits to be brought against corporations on contracts they have made. So the question is presented whether appellee was invested by the legislature with the character of a corporation or quasi corporation. It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the legislature may call it." See also 36 Cyc. 919; note in 44 L.R.A.(N.S.) 226.

The fact that an agency is a public institution, or functions as an agency of the sovereign power, does not necessarily mean that its engagements are the direct engagements of the state, and that no assault by action may be made upon this agency by reason of the inhibition against suing a state without its consent. Note in 35 L.R.A.(N.S.) 243. The state may prescribe that such agency shall be subject to action, or it may create such powers and obligations for such agency that the right of action against it is implied from the status created. A county, a city, a township, or school district are agencies of the sovereign power, yet they may sue and be sued because they are created and treated as corporations. A department of the state government may sue or be subject to suit, dependent upon the nature of the powers conferred and liabilities imposed. Thus, the board of railway commissioners may bring an action in their own name, § 4735, Comp. Laws 1913; or, they may be sued. State ex rel. Lemke v. Chicago & N. W. R. Co. 46 N. D. 313, 179 N. W. 378; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Smith v. Ames, 169

U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; note in 44 L.R.A. (N.S.) 215. So, an action may be maintained by or against the State Workmen's Compensation Bureau. See chap. 162 (§§ 8–20) Laws 1919; North Western Teleph. Exch. Co. v. Workmen's Compensation Bureau, ante, 397, 182 N. W. 269. See 36 Cyc. 919.

It remains, therefore, to consider the status of the Bank of North Dakota as an agency of the sovereign power. The question is not whether the sovereign power of the state is engaged in the banking business, but rather the question concerns the status of such sovereign agency, when exercised in an engagement of a business or enterprise, pursuant to a constitutional and statutory enactment. In the light of the cases hereinbefore cited, it is very apparent that the status of a sovereign agency engaged in the banking business is to be distinguished from the sovereign state itself, particularly when the statutory enactment creates a specific agency for the exercise of this power in an enterprise upon certain prescribed limitations and liabilities. In what manner has the state of North Dakota created a particular status for the bank of North Dakota as an agency of the sovereign power engaged in the banking business?

The legislative act (Laws 1919, chap. 147) has created a bank with full banking powers. It has in effect constituted the Industrial Commission as a board of directors; it has established a capital for such bank. It has provided for the issuance of bonds of the state to provide such capital. These bonds, principal, and interest are to be paid out of the profits of the bank, if insufficient, otherwise, through the process of taxation. The act does not prescribe that the profits realized from such bank in operations shall be considered state funds for the purpose of distribution in governmental operation. Manifestly, the funds on deposit in such bank are not public funds of the state for disbursement in governmental operation, excepting as the same have been deposited by the treasurer of the state for such purposes. In State ex rel. Kozitzky v. Waters, 45 N. D. 115, 176 N. W. 913, the state auditor, in contending for the right to examine this bank, maintained that it was his duty under the law "to inspect, in his discretion, the books of any person charged with the receipt, safe-keeping, or disbursement of public moneys." Comp. Laws 1913, § 132 (14). This court held that the

matter was one of legislative intention; that the Bank Act (Laws 1919, chap. 147, § 23) had given this power to the state examiner. This court stated: "As a depositary of public funds, the Bank of North Dakota merely succeeds, under the law, to the functions of the privately-owned depositary banks. The Bank, while publicly owned, does have certain powers which have heretofore been exercised and enjoyed exclusively by privately owned banks." See State ex rel. Stearns v. Olson, 43 N. D. 619, 175 N. W. 714. Assuredly the deposits of counties and municipalities, as well as of private individuals, are not state public funds. Furthermore, the act specifically grants the power to such bank to sue and be sued the same as in any ordinary civil action, with all of the provisions of the Code of Civil Procedure applicable. It would appear, in the light of the principles above discussed, that this Bank Act in question has been drawn with intelligent discrimination in order to avoid constitutional objections that might be raised, if the state was directly engaged as the state in the operation of this bank. For it is plainly evident that serious constitutional objections by the operation and maintenance of this bank might be raised if the Bank of North Dakota should be treated as the state itself, and be subjected to the constitutional provisions concerning the creation of indebtedness either present or future, and the limitations of indebtedness prescribed in the Constitutions.

The fact that the act (§ 10) provides that all deposits in the bank are guaranteed by the state does not show an intention that the operation of the bank is the direct engagement of the state as such. Darrington v. Bank of Alabama, 13 How. 12, 14 L. ed. 30. Rather does it disclose an intention to create a distinct status for the bank apart from the status of the state itself. This is further emphasized by the fact that a capital fund is provided for the bank. That its profits in its operation are neither prescribed nor considered public funds, but are carried as profits or surplus of the bank for purposes of its business apart from the state's public funds; and that the specific right is granted to maintain actions on account of the bank's transactions. It is unnecessary to define the status of such bank as that of a corporation. It is sufficiently seen that, as an agency of the sovereign power, it possesses a status distinct and separate from that of the state itself, a status of a state enterprise circumscribed by and dependent upon, the rights, powers, and liabilities created by a specific statutory enactment.

Right to Avail of Garnishment.—The act (§ 22) by its specific terms provides that civil actions may be commenced on account of transactions connected with the bank; that such actions may be brought in the same manner and shall be subject to the same provisions of law as other actions brought pursuant to the Code of Civil Procedure. The complaint in this action seeks to recover moneys that the county has deposited in the Bank of North Dakota. It seeks to recover its own funds. It does not seek to lay hold upon state public funds, or to recover a judgment therefor. Again, it does not seek to impair the state sovereignty or state public funds. A garnishment proceeding in this state is entirely separate and distinct from either attachment or execution. Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555. It creates no specific lien. It seeks to hold a garnishee to a personal liability. 20 Cyc. 978. The measure of this liability is dependent upon the defendant's right to recover against the garnishee. F. B. Scott Co. v. Scheidt, 35 N. D. 433, 160 N. W. 502; Shortridge v. Sturdivant, 32 N. D. 154, 155 N. W. 20. The process of garnishment is an action subject to the provisions of law relating to provisions in civil actions applicable; a judgment may be rendered against a garnishee. Comp. Laws 1913, § 7581. Park, Grant & Norris v. Nordale, and F. B. Scott Co. v. Scheidt, supra. Such garnishment action is within the provisions of the Code of Civil Procedure mentioned in § 22 of the Bank Act. This proceeding seeks to recover a personal judgment against the garnishee banks. It is not a garnishment proceeding in aid of execution, and it is clear that § 8177, Comp. Laws 1913, which relates to execution, has no application to the present garnishment proceeding.

So far as public funds are involved, whether state or county, by reason of the deposits made in the Bank of North Dakota and the redeposits made by the Bank of North Dakota in the various garnishee banks, no difficulties are necessary to be considered or anticipated in the adjustment of the personal liability of the Bank of North Dakota to the county and its transfer, by the garnishment process, to a personal liability against the various garnishee banks. In this process it is wholly unnecessary to predicate any impairment of public funds in the resulting processes necessary to adjust the respective liabilities. It is accordingly the opinion of this court that, through the plain provisions

of § 22 of the Bank Act, garnishment process as herein instituted is available in an action against such bank.

The order is affirmed.

ROBINSON, Ch. J., and BIRDZELL and CHRISTIANSON, JJ., concur.

ROBINSON, Ch. J. The plaintiff sues to recover a balance of $50,000 deposited in the defendant bank, and to secure recovery of the same garnishees the First National Bank of Forman and others. Defendant moves to vacate the garnishment on the grounds that the funds due it from the other banks are not subject to garnishment, and because it is a part of the sovereign state, and not a corporate entity. The appeal is from an order refusing to vacate the garnishment.

The defendant bank is under the control of an Industrial Commission, *viz.*, the governor, attorney general, and commissioner of agriculture, and, under the bonding act, the state has issued to the commission "Bonds of North Dakota, Bank Series" to the amount of $2,000,000, with interest at 6 per cent, payable semi-annually. The commission is authorized to sell the bonds, and the moneys derived from the sale do constitute the capital of the bank. And from time to time the bank must pay to the state treasurer such moneys as may be available for the payment of such bonds and interest. Laws 1919, chap. 148. Thus the state does start the bank in business with a loan of $2,000,000, to be paid as funds become available. By its charter or the act of its organization the business of the bank must be conducted in the name of "The Bank of North Dakota."

"Civil actions against the bank must be brought against it in the name of the State of North Dakota, Doing Business as the Bank of North Dakota."

"And service of process therein shall be made upon the manager of the bank." "Such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the Code of Civil Procedure. Laws 1919, chap. 147, § 22.

By this act it is provided that all state, county, township, or municipal funds shall be deposited in the Bank of North Dakota, and that any

person having control of public funds and failing to make such deposit shall be guilty of a misdemeanor. That compulsory deposit feature is not constitutional, and it has been repealed by a vote of the people.

Those acts were prepared at a time when certain persons known as League Managers were in absolute control, and when the League had a two-thirds majority in each House. Doubtless they expected to retain control for many seasons, and to use the bank as a political asset. Certainly there was a purpose to control both the bank and the affairs of state. The Bank Act declares it is the purpose of the state to engage in the banking business, and to establish a system of banking operated by the state. But the legal maxim is that particular expressions control those that are general. The whole act shows that its purpose was to create a corporate entity, to conduct a banking business under the patronage of the state. The bank was organized as a corporate entity to do business as a bank in its own name, and to repay the state for the bonds issued to it as capital. The bank was given a right to receive deposits and to incur debts without limit, and it is provided that all deposits in the Bank of North Dakota are hereby guaranteed by the state. Clearly that guaranty is not constitutional, because, under it, the state would incur unlimited liability. The state may not assume or guarantee bonds or debts in excess of $2,000,000 unless well secured by mortgages upon real estate or some property of the state-owned utilities. Even then the issue or guaranty must not exceed $10,000,000. Const. § 182, art. 31. Thus it is manifest the state is one thing and the bank is another. The bank is not the state or a political subdivision of the state. It is a corporate entity, and as such it may contract, sue, and be sued, and receive deposits to an unlimited amount. It is vain to contend that it may contract, receive deposits, withhold the same, set the depositors at defiance, and claim exemption from the ordinary process of law.

By the Constitution every person is entitled to a remedy by due process of law for all wrongs done him in his person or property. When the bank receives deposits and refused to repay the same, it does the depositors a manifest wrong, for which there must be a remedy by due process of law. The ordinary remedy is by suit to recover a judgment and by execution, attachment, or garnishment to secure or satisfy the judgment. In this case the plaintiff brings suit and serves garnishee

process on parties owing the defendant bank. By that means it says to the garnishees: The bank owes me. You owe the bank, and you must pay the debt to me and that will release you from all liability. The process is the simplest or least expensive of all legal remedies. Counsel for the bank object to the remedy without attempting to show that its creditors have any other or better remedy. Certainly there is another and a far more drastic remedy, which is to force the defaulting bank into liquidation by the appointment of a receiver; but that is considered a last resort, and of course the bank does not insist on it.

Now it seems hardly credible that a great state bank should receive deposits amounting to millions of dollars, and set its depositors at defiance, claiming that it is exempt from due process of law. Yet it is not the first time that such claims have been made and denied. That sufficiently appears from the cases cited in the other opinions. Thus, by the United States Supreme Court, it is held that, a state by becoming interested in a corporation and by owning all the capital stock, does not impart to the corporation any of its privileges or prerogatives; that it lays down its sovereignty so far as respects transactions of the corporation. Curran v. Arkansas, 15 How. 308, 14 L. ed. 707.

In cases of this kind, as it appears from reason and authority, neither the state nor a corporate entity may play pig and puppy, or blow hot and cold, at the same time. In law a party must be consistent. No man can take advantage of his own wrong. No one should suffer from the acts of another. The law respects form less than substance. For every wrong there is a remedy. Now what is the remedy when the great Bank of North Dakota flatly refused to refund the money due to its depositors? That is the real question in this case. Counsel for the bank have made no attempt to answer it, because they cannot point to a remedy less drastic than garnishment. There is no claim that the only proper remedy is to put the defaulting bank into the hands of a receiver. There can be no claim that the bank may trifle with the administration of justice or repudiate its just debts.

It may be well to note that in this proceeding the plaintiff can assert no claim against the garnishee, except that which might have been asserted by the defendant bank. In its last report defendant counts among its resources nearly $5,000,000 for redeposits in 785 banks. The inference is that as a matter of bookkeeping, or in some way, the

defendant has received from the banks $5,000,000, and charged them back with a redeposit of their own money, so that one deposit may cancel the other. In other words, if a bank gets for its deposit nothing only a credit mark, and is charged with a redeposit of its own money, then one deposit offsets the other, and, except for a balance of the account neither party has a cause of action. There is no magic in words, figures, or bookkeeping that can charge a bank and make it liable for a redeposit of its own deposit.

The order refusing to vacate the garnishment is affirmed.

GRACE, J. (dissenting). This is an appeal from an order overruling a motion to vacate a garnishment proceeding. The action is one brought against the state of North Dakota, in which the plaintiff seeks to recover a judgment of approximately $125,000, for deposits of money made in the Bank of North Dakota.

The plaintiff, at the time of bringing the action, instituted garnishment proceedings against seventeen national and state banks, wherein it is claimed that the State of North Dakota, Doing Business as the Bank of North Dakota, had redeposited certain funds.

The defendant, the state of North Dakota, interposed an answer to the garnishment proceedings, wherein it charged the garnishment affidavits were false and untrue; that the garnishment summons was issued in violation of § 8177, Comp. Laws 1913, and that the same is illegal and void, and that all the property held by the garnishees, belonging to the defendant, is absolutely exempt from execution.

The defendant then moved to dismiss such garnishment proceedings, upon grounds contained in the answer, which motion was denied by the trial court.

This case is manifestly one of great importance, and should receive the earnest, serious, careful, and conscientious consideration of each member of this court. The majority opinion, if it shall eventually become final, strikes down every state-owned industry and utility heretofore brought into existence, in consonance with certain provisions of our State Constitution, and laws enacted under the authority and in pursuance thereof. It strikes down not only the Bank of North Dakota, exclusively owned and operated by the state, but the reasoning therein as well strikes down the state-owned industries of mills and

elevators, and the state-owned-and-operated Home Building Association; and this, as we firmly are impressed and believe, in direct violation of certain provisions of the Constitution, and certain laws enacted in pursuance thereof, hereafter to be particularly mentioned.

The majority opinion, at its very threshold, states that "two fundamental, legal questions are involved: First, the status of the Bank of North Dakota; and, second, the right to avail of garnishment process in a proceeding against it."

Thus, at the very inception of the decision, we find an erroneous premise, which consists in the claim that one of the fundamental, legal questions involved is the "status" of the Bank of North Dakota. There is no such question involved in this case. The real questions involved in this case are: First, the status of the State of North Dakota; and, second, the right to avail of garnishment process in a proceeding against the State of North Dakota.

It is only by the erroneous premise assumed in the first question, as stated in the majority opinion, that made it possible for the writer of that opinion to proceed to deliver himself of the thoughts contained therein. By assuming the erroneous premise, he was able to write something which at first glance may appear plausible, but upon serious consideration will be found to have no merit.

Having assumed an erroneous premise, there could be but one result, and that is, to reach an erroneous conclusion.

The first question to be decided is, whether the State of North Dakota, in its sovereign capacity, is engaged in the banking business, or whether the Bank of North Dakota, as a separate and distinct corporate entity, is thus engaged. We must determine, at the outset, whether, in the conduct of the business of the Bank of North Dakota, the state of North Dakota is functioning in its sovereign capacity, or whether it has loaned its credit, its money, its resources, to a separate entity or corporation, engaged in a private business or undertaking.

The principal contention or claim of the majority opinion is that the Bank of North Dakota is engaged in private business; that in effect it is a private corporation, and, as such, may sue and be sued. What is claimed in this regard in reference to the Bank of North Dakota, if such claim is well founded, applies with equal effect to the state-owned mill and elevator, and to the Home Building Association.

Section 185 of our Constitution, as the same was drafted by the members of the Constitutional Convention, and as it became a part of our Constitution, reads thus:

"Neither the state nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the people."

For more than twenty-five years the farmers of this state, agricultural interests, and producers incessantly carried on an agitation for state-owned mills and elevators and other state-owned utilities and industries. Finally it came to pass that the people, in their sovereign capacity, and in the exercise of their elective franchise, determined that the state should engage in its sovereign capacity in industry, enterprise, and business on its own account, and the people in their sovereign capacity, having so determined, it became necessary to amend § 185, and it was amended, and is referred to in the majority opinion as article 32. It reads thus:

"Section 185 in article 12 as amended by article 18 of amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by article 20 of the Constitution (provision with reference to prohibition), but neither the state nor any political subdivision thereof shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

The effect of this amendment is to authorize the state, in its sovereign capacity, to engage in any industry, enterprise, or business not prohibited by article 20 of the Constitution. But, as will be seen from a reading of § 185 as amended, it still prohibits the state, or any political subdivision thereof, from loaning or giving its credit, or from making donations in aid of any individual, association, or corporation, which, of course, means any individual, association, or corporation engaged in a private business. Neither can the state, nor any political

subdivision, subscribe to or become the owner of any capital stock of any such association or corporation.

Now, one of two propositions must follow. Either the state, in its sovereign capacity, has, in pursuance of the authority contained in § 185 as amended, engaged in industry, enterprise, or business, or it has loaned its credit, money, and made donations to an individual, or an association, or corporation, engaged in the conduct of a private business, such as the majority opinion claims the Bank of North Dakota to be.

Now, if the state of North Dakota has not engaged in business in its sovereign capacity, it has loaned its credit, or money, or made donations to the extent of $2,000,000, to the Bank of North Dakota, which, according to the majority opinion, is engaged in private business, the same as any other corporation, and liable as such to sue and be sued.

If this were true, which it certainly is not, than the loaning or giving of money, or making donations to the Bank of North Dakota, in the manner it has been done, would be a direct violation of § 185 as amended, which prohibits the state from loaning or giving its credit, making donations to individuals, associations, or corporations which are engaged in private business.

Can it be claimed that the people of the state of North Dakota, acting in their sovereign capacity, and exercising the sovereign right of elective franchise, were so foolish, or so simple, as to go to all the expense and trouble of amending § 185 of the Constitution, so as to permit the state to engage in any industry, enterprise, etc., if they were not thereafter to act under that section as amended, if they acted at all?

Did they do all of this, and then afterwards convene in their legislative capacity, through their representatives, and pass laws and make appropriations to private corporations, such as the Bank of North Dakota is by the majority opinion claimed to be, the only result of which was to violate § 185, which prohibits the loaning or giving of the state's credit to private corporations? Most certainly not. What the state of North Dakota has done, under § 185 as amended, permitting it to engage in industry and business, it has done in its sovereign capacity, and has established in that capacity a banking business, operated, owned, and controlled by the state, the mill and elevator

business, and the Home Building Association, owned, operated, and controlled by the state, in its sovereign capacity.

To prove this more conclusively, and to ascertain the intent of the legislature in this regard, it is not only necessary to examine and consider the contents of chapter 147 of the Session Laws of 1919, but, as well, those chapters which establish the mill and elevator business, and the Home Building Association, and the chapter which establishes the Industrial Commission, and from all of these may we draw the intent and purpose of the state to engage in business in its sovereign capacity.

Section 1 of chapter 147 reads thus: "For the purpose of encouraging and promoting agriculture, commerce, and industry, *the state of North Dakota shall engage in the business of banking, and for that purpose shall, and does hereby, establish a system of banking owned, controlled and operated by it, under the name of the Bank of North Dakota.*"

The title of the act reads thus: *"An Act Declaring the Purpose of the State of North Dakota to engage in the Banking Business and Establish a System of Banking under the Name of the Bank of North Dakota, operated by the State, and Defining the Scope and Manner of Its Operation, and the Powers and Duties of the Persons Charged with Its Management;* making an appropriation therefor; and providing penalties for the violations of certain provisions thereof."

From the language of the title and that contained in § 1, can there be the the least doubt in any fair or reasonable mind, that the state of North Dakota, in its sovereign capacity, is engaged in the banking business? It is the duty of this court to construe and interpret laws and constitutional provisions. We say that, under any fair construction, after even a glance at the above plain and clear statement of the purpose of the state of North Dakota to engage in the banking business, no other conclusion is even remotely possible than that it has been, and is, in its sovereign capacity engaged in the banking business.

The purpose of the state of North Dakota to engage, in its sovereign capacity, in the business of banking, is again reasserted in § 3 of chapter 148 of the Laws of 1919, which is an act providing for the issuing of the bonds of the state of North Dakota, in the sum of $2,000,000, which the state is to use as its capital in conducting its banking business.

Section 3, so far as material to the purpose of showing the intent of the state of North Dakota to engage in the banking business, reads thus: "The said issue of bonds is authorized for the purpose of making delivery thereof to the Industrial Commission of North Dakota as hereinafter provided, and as contemplated by section six (6) of the act entitled 'An Act Declaring *the Purpose of the State of North Dakota to Engage in the Banking Business* and Establishing a System of Banking under the Name of the Bank of North Dakota, *operated by the State,* and Defining the Scope and Manner of its Operation, etc.' "

To determine more clearly that the state of North Dakota is engaged in all the various kinds of business above mentioned, we will briefly consider part of chapter 150 of the Session Laws of 1919. The title of that act reads thus: "An Act Declaring *the Purpose of the State of North Dakota to Engage in the Enterprise of Providing Homes for Residents of this State, and to That End to Establish a Business System Operated by the State, under the name of the Home Building Association of North Dakota,* and Defining the Scope and Manner of Its Operation, and the Powers and Duties of the Persons Charged with Its Management; and Making an Appropriation Therefor."

Section 1 of that act reads thus: "For the purpose of promoting home building and ownership *the state of North Dakota shall engage in the enterprise of providing homes for* residents of the state, and to that end *it* shall, and does hereby, establish a business system *operated by the state,* under the name of the Home Building Association of North Dakota, hereinafter for convenience called the Association."

Section 15 of the same act provides that "all business of the Association may be conducted under the name of 'The Home Building Association of North Dakota.' *Title to property* pertaining to the operation of the Association shall be obtained and conveyed in the name of the 'State of North Dakota, Doing Business as the Home Building Association of North Dakota.' *Written instruments shall be executed in the name of the state of North Dakota, signed by any two members of the Industrial Commission of whom the governor shall be one, or by the manager of the Association, within the scope of his authority so to do as defined by the Industrial Commission.*"

The same provision with reference as to the execution of written instruments, and as to who shall execute them, is contained in the act establishing the Bank of North Dakota.

We shall also consider chapter 152 of the Session Laws of 1919, to determine if the state, in its sovereign capacity, is engaged in business. This act relates to the conducting of the state-owned mills and elevators. The title of the act reads thus: "An Act Declaring *the Purpose of the State of North Dakota to Engage in the Business of Manufacturing and Marketing of Farm Products* and for *Establishing* a Warehouse, Elevator, and Flour Mill *system* under the Name of the North Dakota Mill and Elevator Association *Operated by the State,* and Defining the Scope and Manner of its Operation, and the Powers and Duties of the Persons Charged with Its Management; and Making an Appropriation Therefor."

Section 1 of the act provides "that, for the purpose of encouraging and promoting agriculture, commerce, and industry, *the state of North Dakota* shall engage in the business of manufacturing and marketing farm products, and for that purpose shall establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipments, *owned, controlled, and operated by it* under the name of North Dakota Mill & Elevator Association, hereinafter for convenience called the Association."

Can any reasonable or unprejudiced mind, for a single instant, maintain that anything else is intended by the above language than that *the state of North Dakota, in its sovereign capacity,* is engaged in the mill and elevator business, and in the marketing and manufacturing of farm products, etc.?

Section 2 of chapter 153 of the Session Laws of 1919, which is an act providing for the issuing of bonds of the state of North Dakota, for the purpose of procuring money by the state, to conduct its mill and elevator business, owned and operated by it, recites in § 2 thereof, the title of chapter 152.

So, also, chapter 154 of the Session Laws of 1919, which provides for the bonds of North Dakota, Real Estate Series, and in § 2 recites the title to the act which is chapter 147.

We now turn to chapter 151 of the Session Laws of 1919, the act creating the Industrial Commission. It is entitled "An Act Creating the *Industrial Commission of North Dakota,* Authorizing *It* to Conduct and Manage *on Behalf of the State* Certain Utilities, Industries, Enterprises, and Business Projects, and Defining Its Powers and Duties; and Making an Appropriation Therefor."

Section 1: "A commission is hereby created and established *to conduct and manage, on behalf of the state of North Dakota,* certain utilities, industries, enterprises, and business projects, now or hereafter established by law. It shall be known as the Industrial Commission of North Dakota, but may be designated as the Industrial Commission."

Section 2: "The Industrial Commission shall consist of three members, namely, *the governor, the attorney general, and the commissioner of agriculture and labor, of the state of North Dakota, etc.*"

Section 3, so far as material here, reads: "*The governor* shall be the chairman of the Industrial Commission, and its attorney shall be the *attorney general of the state.*"

Section 4: "The Industrial Commission shall adopt and procure an *official seal,* and may authenticate therewith its documentary acts. All orders, rules, regulations, by-laws, and written contracts, adopted or authorized by the commission, shall, before becoming effective, be approved by the *governor* as chairman, and shall not be in force unless approved and signed by *him.*"

Section 5: "The Industrial Commission is hereby empowered and directed to manage, operate, control, and govern all utilities, industries, enterprises, and business projects, now or hereafter established, owned, undertaken, administered, or operated by the *state of North Dakota,* except those carried on in *penal, charitable, or educational institutions.* To that end it shall have the power, in the exercise of its sound judgment, and is hereby directed:

"(a) To determine the locations of such utilities, industries, enterprises, and business projects.

"(b) *For the state and in its name and behalf,* in order to accomplish the purposes of this act, to acquire by purchase, lease, or by exercise of the right of eminent domain, as provided by chapter 36 of the Code of Civil Procedure, Comp. Laws of 1913, all necessary properties and property rights, and to hold and possess or to sell the whole or any part thereof; to construct and reconstruct necessary buildings thereon; to equip, maintain, repair, and alter any and all such properties and the improvements thereon; and generally to use the same so as to promote such utilities, industries, enterprises, and business projects.

"(c) To appoint a manager, and all necessary subordinate officers

and employees, of and for each such utility, industry, enterprise, and business project; to constitute any such manager its *general agent* in the performance of *its* duties in *the particular utility, industry, enterprise, or business project* in which he shall be engaged, but subject, nevertheless, in such agency to the supervision, limitation, and control of the commission. . . .

"(h) To conduct investigations of all matters directly or indirectly connected with, or bearing upon, the success of any of the utilities, industries, enterprises, and business projects under its management, and of all matters which may directly or indirectly affect the methods, operations, processes, products, or results thereof. In aid of any such investigation, the Commission shall have the power to *summon and compel* the attendance of witnesses, and to examine them under oath, which any member thereof shall have the power to administer. It shall have access to, and may order the production of, all books, accounts, papers, and property, material to such investigation. Witnesses, other than those in the employ of the state, shall be entitled to the same fees as in civil cases in the district court. The claim that any *testimony* or *evidence* sought to be elicited or produced on such examination may tend to *criminate* the person giving or producing it, or expose to public ignominy, *shall not excuse him from testifying or producing evidence documentary or otherwise; but no person shall be prosecuted or subjected to any penally or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence;* provided, that he shall not be exempted from prosecution and punishment for perjury committed in so testifying."

In view of all these provisions, can it be successfully asserted or contended, or is there a shadow of reason for doing so, that all or either of the industries above mentioned are not conducted by the state of North Dakota in its sovereign capacity? Can any other intent or purpose be deduced from the foregoing constitutional provisions or laws?

Every member of this court, with the exception of Justice Christianson, not longer since than January 2, 1920, concurred in the decision of Green v. Frazier, 44 N. D. 395, 176 N. W. 11, wherein it was held that the establishment of all the above state industries, the proceeds of the bonds issued or proposed to be issued to establish and carry on the above industries, were to be used for a public purpose,

by the sovereign power, the state, for the promotion of the general welfare of all the people of the state.

This court there said: "It must be kept in mind, also, that the 'Bank of North Dakota' and 'Mill & Elevator Association,' and all other agencies established by the state, for the purpose of operating the state industries in question, are not private corporations or private agencies, but are, so to speak, arms of the sovereign power, the state, reaching out to execute its mandates. When the Bank of North Dakota functions, it does so as an agency of the sovereign power of the state, in like manner as the treasurer of the state of North Dakota. The same is true of every other state industry which is the subject of this controversy."

We further said there: "Under § 185 of the Constitution of the state of North Dakota, as amended, which was submitted to the people at an election, and by the votes of the majority of the voters voting at such election duly adopted, and which constitutional amendment has legally become a part of the organic law of this state, and is now in full force and effect, the state is *duly authorized and empowered to establish and operate state-owned elevators and mills.* The legislature has enacted into laws the laws in question, establishing these state-owned utilities, under and by virtue of such constitutional authority. *Not only were such laws duly enacted by the legislature of this state, but, after being enacted, under the initiative and referendum provisions of the Constitution, they were each and all referred to the people for their approval, and at a general election each of said laws were again approved by the majority of the electors voting thereon.*"

In the case of State v. Taylor, 33 N. D. 76, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583, the following principles of law are declared in the syllabus: "Wisdom, necessity, or expedience of legislation, are matters for legislative, and not judicial, consideration. The object of all statutory interpretation and construction is to ascertain and give effect to the intention of the legislature."

We further said in the Green v. Frazier case: "The creating and constituting of the Bank of North Dakota in the manner above set forth, the authorizing of $5,000,000 mill and elevator bonds, and the $10,000,000 bonds of North Dakota, real-estate series, are each and all acts intended to stimulate the production of and the caring for the

marketing of wheat and other small grains in the state of North Dakota, and *that* is held to be a public use, to effectuate which a tax may be levied and collected, and we so determined and decided. Each and all of said bond issues are in accord with the provisions of the Constitution in question, and laws of the state of North Dakota, *and we so hold.*"

In the case of Scott v. Frazier, 258 Fed. 678, Honorable Charles F. Ammidon, District Judge, recognized that all the above industries were state owned and operated, and that, largely, the purpose of the establishment of the various enterprises was public, and for public enterprises, owned and operated by the state of North Dakota.

The case of Green v. Frazier, supra, the opinion in which was written by the writer hereof, was appealed to the Supreme Court of the United States, and was, by that high court, affirmed, and here let us inquire, Upon what principle does their decision rest? It seems that all of the state-owned industries above mentioned, including the Bank of North Dakota, were established for a public purpose. If the United States Supreme Court had not thus held, it could not have affirmed the decision in that case; for, if the above industries were businesses, or private corporations, or in the nature of private corporations, as is in effect maintained in the majority opinion, then the state of North Dakota would have no authority or power, either under the state or Federal Constitution, to impose taxes upon property for a private purpose. The Supreme Court of the United States, in the case of Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499, in an able opinion written by Mr. Justice Day, said: "The due process of law clause contains no specific limitation upon the right of taxation in the states, but it has come to be settled that the authority of the states to tax does not include the righ to impose taxes for merely private purposes." Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 155, 41 L. ed. 387, 17 Sup. Ct. Rep. 56. That court further said, quoting from the Fallbrook Case: "In the 14th Amendment, the provision regarding taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived without due process of law, if it be taken by or under state authority for other than a public use, either under

the guise of taxation, or by the assumption of the right of eminent domain. In that way, the question of whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the *authority of the state,* instead of the Federal government." See Fallbrook Irrig. Dist. v. Bradley, supra. "In the present instance, *under the authority of the Constitution and laws prevailing in North Dakota, the people, the legislature, and* the *highest court* of the state, have declared the purpose for which these several acts were passed to be of a *public nature,* and within the taxing authority of the state. With this united action of *people, legislature,* and *court,* we are not at liberty to interfere, unless it is clear, beyond reasonable controversy, that rights secured by the Federal Constitution have been violated."

The Supreme Court of the United States further said that the precise question involved in the Green v. Frazier case had never been presented to that court, stating that the nearest approach to it is found in Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, L.R.A.1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660.

The Supreme Court of the United States recognized that the purpose of our state-owned-and-operated utilities is a public one, and contrasted the principle of a public use and public institutions with private institutions.

It further said, in the Green v. Frazier case: "This is *not a case* of undertaking to aid *private institutions* by public *taxation,* as was the fact in Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 665, 22 L. ed. 455. In many instances *states* and *municipalities* have in *late years* seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise."

It has been definitely stated by this supreme court (North Dakota) in no uncertain or doubtful terms, but with great certainty, that, under the constitutional provisions and laws passed in pursuance thereof, the utilities and industries above mentioned are state owned and operated by the state of North Dakota, in its sovereign capacity, and for a public purpose. See Green v. Frazier, 44 N. D. 395, 176 N. W. 11.

The people of the state, in the exercise of their sovereign powers, and in the exercise of their elective franchise, at the time of the adop-

tion of § 185 as amended, construed such anticipated state industries and utilities to be state owned and operated by the sovereign power of the state, and in its sovereign capacity.

A like construction by the legislature has been placed upon all the laws enacted for the purpose of establishing and carrying on all of such industries. A like construction has been placed upon all of such laws, when each of them were referended and ratified by the people in the most solemn discharge of their elective franchise, at a regular election called to vote upon those measures. It is the common understanding and the common knowledge of every lay person in this state, and in every other state, and of the press, both within and without the state, and every business interest, whether agricultural, commercial, or banking, that these industries are owned and operated by the state, in its sovereign capacity.

Large amounts of money have been, and are to be, invested in them, on the theory that they are state operated and owned, and that they were established for a public purpose and a public use, and that they are in no way private businesses or agencies.

Let us now hear from our venerable Chief Justice, The Honorable J. E. Robinson, in reference to whether the above industries and utilities are owned, controlled, and operated by the state. He expressed himself very fluently in the case of State ex rel. Langer v. Hall, 44 N. D. 536, 173 N. W. 763. In that case, the secretary of state refused to certify to the $2,000,000 of bonds of bank series, one of the grounds for refusal being that there, at that time, existed $412,000 of bonded indebtedness of the state of North Dakota. The $2,000,000 there in question were to be the capital of the state of North Dakota, in the operation of the Bank of North Dakota.

But let us listen to our venerable colleague. He first quoted the constitutional amendment, permiting the state to issue or guarantee the payment of bonds, provided that all bonds in excess of $2,000,000 should be secured by first mortgages upon real estate, etc. He further said:

"On this amendment the vote was: Yeas, 46,000; nays, 34,000. *On the amendment for public ownership the yeas were 47,000, nays, 32,000.* On the amendment for initiative and referendum, the yeas were 50,000 and the nays 31,000. Under those amendments *the state*

is free to issue bonds and to pursue *any industry*. . . . Under the *old* law the state was prohibited from engaging in any industry or enterprise, and accordingly the power to contract debts was limited to the small sum of $200,000, but under the *new amendment* the old *limitations* and *hamperments* are no more. Now *the state and any county or city may engage in any industry, enterprise, and business.* And as no limitations are placed on the manner of doing any business, of course the *state* may adopt the usual business methods, which include the borrowing of money, and the adaptation of means to ends. The amendments which permit and invite the state, *which make it the duty of the state to engage in business enterprises, must be liberally construed all together, so as to impose no handicaps on the state. It must be entirely free to adopt every means and method which may be necessary to business success.* The state and the several counties and cities are *public corporations* with large capital and credit. Thus far they have existed as *big nurslings* by pursuing the *feudal system* of levying taxes on the people and then squandering the public money. *Now*, the public corporations are invited to do business to make their own *expenses*, and a *profit* for the citizens or *stockholders* the *same* as all *private corporations* do. With all its capital and credit, if the state *cannot learn* to make its own expenses and a profit for its citizens, it does not deserve to exist. At the next election, there should be submitted a constitutional amendment prohibiting all further taxation, except it becomes necessary for the payment of the bonds. It is *high time* for the people to throw off the *yoke of bondage* and *feudalism*."

The opinion in the case of State ex rel. Langer v. Hall, supra, was written by the writer hereof. It was concurred in by Mr. Justice Birdzell and Mr. Justice Robinson, and was signed by Mr. Justice Bronson.

We think there are several other cases which have been before this court, wherein the majority of the court have either directly or indirectly held that all the above industries are owned and operated by the state, in its sovereign capacity. But we cannot take the time to examine them. Neither can we quote from every case, as that would make this opinion too extended.

One of the principal contentions in the majority opinion is that all

the above state industries, including the bank, are corporations, or quasi corporations. It refers to the Industrial Commission, as corresponding to directors of the bank. It seeks to show that the Bank of North Dakota is a private corporation, claiming that it can sue and be sued, the same as any other private corporation, but this is a matter with which we take direct issue, and will directly discuss when we come to consider § 22 of chapter 147.

The majority opinion seeks to show an analogy between the state of North Dakota, Doing Business as the Bank of North Dakota and a private corporation operating for gain, and then endeavors to apply the authority cited in the opinion. In other words, the opinion lays an incorrect premise, and then applies decisions of the Supreme Court of the United States, in an effort to sustain that incorrect premise.

We will try, in a few words, to point out the incorrectness of that premise, and to entirely destroy the alleged analogy of these state-owned industries to private corporations.

The same reasoning that applies to the bank of North Dakota applies to every other state-owned industry. If the Bank of North Dakota is a private corporation, or a quasi private corporation, then it must be authorized under some act authorizing its incorporation, or it must have been created a corporation by legislative act. We most sincerely maintain that neither of those conditons inhere in the creation of the Bank of North Dakota. Furthermore, if the Bank of North Dakota is a private corporation, or a quasi private corporation, it must possess the attributes of a private corporation.

The Bank of North Dakota has no president, vice president, or directors, or officers, of any kind or character, such as are necessary and indispensable in a private corporation. The Bank of North Dakota has no corporate seal, and, as is well known to all of us, a private corporation cannot act unless it possesses a corporate seal. It cannot act unless it acts through its officers. A private corporation must have stockholders. It must have capital stock, divided into shares. It must be capable of suing and being sued. It must be capable of executing instruments under its seal. This applies to all private corporations, unless organized for charitable and religious purposes, etc.

Now, the Bank of North Dakota, or any of the other state-owned industries, possess not a single one of these requirements, attributes, or

powers. It has no stockholders, no officers, no president or vice president, no capital stock divided into shares, and no capital stock in the sense that that term is generally understood and as applied to private corporations, but its capital stock, the $2,000,000, belongs to the state; for it is the state of North Dakota that is engaged in the banking business. It has no corporate seal. It cannot execute any instruments. No individual can receive any direct profit from the operation of the Bank of North Dakota, but only such benefit as is common to every other citizen of the state.

The purpose of the Bank of North Daktoa is public benefit not private gain. How is it operated? By the Industrial Commission. Who is the Industrial Commission? The governor, the commissioner of agriculture and labor, and the attorney general, each in execution of their duties, representing the sovereignty of the state. Are they conducting, on behalf of the state, only the Bank of North Dakota? No. They are the identical officers, acting in their sovereign capacity, who operate and manage for the state every other state-owned and operated industry; state-owned mills and elevators; the Home Building Association, etc.

By the act creating the Industrial Commission, their powers and duties are defined. Do they receive any additional pay over and above what they receive as constitutional officers representing the sovereignty of the state? Not one cent.

All written instruments of the Bank of North Dakota must be executed by the Industrial Commission, or under their direction, by some other person, as, for instance, the manager, under such powers as the Industrial Commission shall confer upon him. The manager of the Bank of North Dakota is the general agent of the Industrial Commission, and is specifically made so by the act creating the Industrial Commission.

The Industrial Commission has a seal. Every instrument and act of the Bank of North Dakota, of the state-owned Mill & Elevator Association, or the Home Building Association, which, if those acts were the acts of a private corporation, requiring a corporate seal, is sealed with the seal of the Industrial Commission. Their seal is just as authoritatively used in one of the state-owned industries as another. There is no distinction.

The Industrial Commission, as will be seen from § 1 of the act creating it (chapter 151 of the Session Laws of 1919), is established to conduct and manage (not on behalf of itself or on behalf of the Bank of North Dakota, nor the Mill & Elevator Association, nor the Home Building Association), but, on behalf of the state of North Dakota, certain utilities, industries, enterprises, and business projects, now or hereafter established by law. Can words be plainer? Can the language of that act, and all of the acts herein, be quite so distorted, misunderstood, and misconstrued as to arrive at any other conclusion than that the state owns and operates all of these industries in its sovereign capacity, and that none of such industries possess any of the qualities of a private corporation, or quasi private corporation? We say there can be but one answer, and that is, that the state owns and operates all these industries in its sovereign capacity, and every act done in connection with the operation of those industries is the act of the state of North Dakota, in its sovereign capacity. Hence, we see that the authority cited in the majority opinion has no application whatever.

We will discuss briefly two of the cases from the United States Supreme Court, cited in the majority opinion. All others there cited are the same in principle.

The case of Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244, cited as directly in point in this case, will, upon examination, be found to have no application whatever. In that case certain citizens of the state of Georgia and the state of Georgia organized a private corporation in just the same manner as if a number of citizens of the state of North Dakota, and the state of North Dakota, had organized one of the banks of Bismarck. The citizens of Georgia and the state were individual incorporators, in the Planters' Bank of Georgia. That bank was a corporation having all the officers that belong to any banking corporation. It had a president, a vice president, stockholders, and directors. If any profit were made in its operation, that profit went to the private incorporators, including the state. It had a corporate seal, as other private banking corporations has. It could sue or be sued, the same as any other private banking corporation.

Suits brought against the Planters' Bank of Georgia were, in that

case, held not suits brought against the state of Georgia. In short, that bank was just a plain banking corporation, organized for private gain and benefit to its incorporators.

Of course, in such case the mere fact that the state of Georgia was a private incorporator, just the same, and upon the same plane, as any other private incorporator, in that institution, would necessarily dispose of the contention that it could not be sued without its consent, by reason of its sovereignty. It became part of a private corporation. It, so to speak, became a part of that corporation as an individual and not as a state, and while it remained an incorporator thereof, its sovereignty did not attend it, because of the fact that the Planters' Bank of Georgia *was* a private corporation and incorporated as such.

None of those facts apply to the case at bar; but to proceed to demonstrate this more clearly would but lead to repetition. We think the point is clear. What has been said, with reference to the case of Bank of United States v. Planters' Bank, equally applies to the case of Briscoe v. Kentucky, 11 Pet. 257, 9 L. ed. 709. In the latter case, we have another private corporation, under the direction of a president and twelve directors chosen by the general legislative assembly. The bank was designated as a corporation, and was capable of suing and being sued. It is immaterial in such cases, that the capital of the bank was the property of the commonwealth. The principal point is, that the bank itself was a corporation, doing business on the same principles as any other private banking corporation. Whether the state of Kentucky owned one share of the stock, or all of the stock, is immaterial. It was a private banking corporation and incorporated as such; whether, under the regular incorporation act of the state of Kentucky, or by act of the legislature, is immaterial; and the United States Supreme Court held that the bank was a simple corporation, acting within the sphere of its corporate powers, and it needs no stretch of imagination to realize that when the state of Kentucky became an incorporator, or a part of that private corporation, it ceased to act in its sovereign capacity, and as that corporation had the right to sue and be sued, of course, the state of Kentucky could not claim any privilege, on account of its sovereignty, because it was a part of the private corporation.

That is not true of the case at bar. The state of North Dakota,

engaging in the banking business, has not become interested in any private corporation. It has created no private corporation. The Bank of North Dakota possesses no corporate powers of any kind or character, nor a single earmark incident to private banking corporations, as is above shown.

In this case, the state of North Dakota is engaged in the banking business in its sovereign capacity, under and by virtue of § 185 of the Constitution, as amended, and the laws enacted in pursuance thereof, creating the state industries, including the Bank of North Dakota.

The remainder of the authority cited in the majority opinion is exactly of the same nature as that above analyzed. It has no application whatever. It is not in point. It does not apply to this case. In most of the bank cases cited by the majority opinion, those banks, in addition to being private banking corporations, issue their own bank notes. The Bank of North Dakota does no such thing, nor has it attempted to. It uses the money and bank notes authorized by the Constitution of the United States; in short, our common medium of exchange. Their is no similarity or analogy between the cases cited in the majority opinion and the case at bar. No refined theory, or well-phrased language, can create any analogy or similarity. It is impossible.

We now desire to consider § 22 of chapter 147. The majority opinion, with reference to that section, uses the following language: "Furthermore, the act specifically grants the power to such bank (the Bank of North Dakota) to sue and be sued, the same as in any ordinary civil action, with all of the provisions of the Code of Civil Procedure applicable."

That section is set out in full in the majority opinion, and we will analyze it. First, it provides: "Civil actions may be brought against (whom?) *the state of North Dakota,* on account of causes of action claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota, upon condition that the provisions of this section are complied with."

Now, against whom does that language say the action may be brought? Think of that language. Read it as it is written. Give it a fair and unbiased construction and interpretation, and let me have your answer. Does it say actions may be brought against the

Bank of North Dakota, on account of causes of action claimed to have arisen out of transactions connected with its operation? It certainly does not. It says that such actions may be brought against *the state of North Dakota.* Then what? It further says, "In such actions;" and we stop again to inquire: What actions are meant by the words "such actions?" And I again pause for an answer.

The words "in such actions" refer to what has been stated. It means in the actions brought against the state of North Dakota, on account of causes of actions claimed to have arisen out of such transactions, etc. It says, in plain language, in such actions the state shall be designated as *the state of North Dakota,* Doing Business as the Bank of North Dakota. The words "doing business as the Bank of North Dakota" are *descriptive* only of the relation of the sovereign powers being exercised by the state.

No distorted construction of language can read out of the language quoted, *any authority of the Bank of North Dakota to bring a suit, or any authority for it to be sued.* We challenge any member of this court who has signed the majority opinion, to place his finger on the language in the statute, that says anyone can be sued, *excepting the state of North Dakota. I not only challenge, but I defy.* I would be willing to leave the interpretation of this statute to a thousand of the most eminent lawyers and judges in the United States, and I dare say not a single one would say that the *Bank of North Dakota,* as such, by the terms of this statute, has any authority to sue or be sued.

The language is too plain. It needs no interpretation. Elaboration of explanation or analysis only confuses. Such language as is used in this statute is not capable of being elaborated upon. It is plain; it is simple; it is clear; it construes itself; it admits of no construction other than that the *state of North Dakota, in its sovereign capacity,* is alone the only entity against whom a suit may be brought, and who has the authority to bring a suit, with reference to any transaction connected with the Bank of North Dakota; for it is *this state* that is in the banking business. That is the language of the statutes above quoted. It may not be denied. It shall not be denied.

Section 22 further says: "And the service of process therein shall be made upon the manager of said bank." Who is the manager of the bank? What are his powers and relations to the bank? The act

creating the Industrial Commission, as above pointed out, makes him the general agent of the Industrial Commission, and we have above pointed out the qualities, characteristics, and powers of the Industrial Commission, which, in short, represents, and is, the sovereignty of the state, acting.

The plaintiff, in bringing this action, in the form and character of its summons and complaint, and its affidavit for garnishment, has construed the act just as we are contending that it must be construed. The suit here is brought against the state of North Dakota. In other words, the summons is in harmony with those provisions of § 22, which we have just analyzed. The complaint likewise makes the charges against the state of North Dakota, and in the affidavit of garnishment, after mentioning the various banks, who does the maker of the affidavit say is indebted to the plaintiff? It says, naming those banks, that each of them "is indebted to and has in its possession, money and credits belonging (to whom?) to the defendant, the State of North Dakota, Doing Business as the Bank of North Dakota."

Who is it that is doing business as the Bank of North Dakota? The only answer possible is, *the state of North Dakota.*

Section 22 provides: "Such actions may be brought in the same manner, and shall be subject to the same provisions of law, as other civil actions brought pursuant to the provisions of the Code of Civil Procedure."

The only effect of that provision is that the state consents to be sued in an ordinary action. It means that the summons and the complaint may be used in the same manner as in any other action. That is, that the action may be brought against the state of North Dakota, by the service of a summons, just the same as against an individual in any other civil action.

The word "action" is defined in § 7075, Comp. Laws 1913, as follows: "Action includes counterclaim and set-off."

In § 7355, Comp. Laws 1913, it is stated: "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; and there shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. *In such action the party com-*

plaining shall be known as the plaintiff and the adverse party as the defendant."

Section 7420 provides that an action shall be commenced by the service of a summons. Section 7422 prescribes the form of that summons. An action cannot be commenced by a garnishee summons.

By chapter 9 of the Code of Civil Procedure a garnishment is not classified as an action, but *is* classified as a *provisional remedy* in civil actions.

Section 7487 classifies the provisional remedies in civil actions as:

(1) Arrest and bail.
(2) Claim and delivery of personal property.
(3) Injunction.
(4) Attachment.
(5) Garnishment.
(6) Receivers.
(7) Deposit in court.

All of these remedies are part of the Code of Civil Procedure. Under the effect claimed to be given by the majority opinion to that part of § 22, which provides that actions may be brought in the same manner, and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure, all, of such provisional remedies would be as available as garnishment. Where is the difference and why the distinction?

If, under the language of the act, garnishment will lie because that provisional remedy is found in the Code of Civil Procedure, on the same parity of reasoning every other provisional remedy would apply.

As we understand and construe § 22, it refers to a general action, and not to any provisional remedy. By that section the state has simply consented to be sued, and thus afford an opporunity to determine any controversy on its merits that may arise out of any of its transactions, in its conduct of its banking interests.

If, in such action, a judgment should be procured against the state, § 8177 would apply. So that no execution could issue against the state, and no better remedy is needed than is contained in § 8177; for when a judgment is obtained in any action against the state, the clerk of court simply makes a certified copy of such judgment, and furnishes it to the state auditor, who, in the due course of the conduct

of his duties, will draw his warrant upon the state treasurer, for such amount, and deliver the same to the person entitled thereto.

That may be done in this case, but garnishment will not lie against sovereignty, any more than injunction or receivership would lie. Certainly no receivership could be applied for or allowed, as that would be asking for a receiver for the state of North Dakota; for, as we have seen, it is the state of North Dakota, and the state of North Dakota only, who, under the constitutional provision and laws above mentioned, is actually engaged in the banking business, under the name of the Bank of North Dakota.

We feel certain that our position in this case is unassailable, and in closing we wish only to add:

If these state-owned-and-operated industries are to be annihilated, let it be done by the same agency that created them,—by the people of this state, in the exercise of their sovereign power. Let them do it, if they desire, by the exercise of their elective franchise. In the exercise of this sovereign right, they have authority and privilege to amend the Constitution, or laws, and to enact or repeal laws by and through the legislature. If the people of this state do not wish these state-owned-and-operated industries, they may dispense with them by an exercise of the elective franchise, the majority concurring.

But let not this court, by judicial fiat, strike down these state-owned-and-operated industries, and thus deny the people the rights and privileges which inured to them by the amendment of § 185 of our Constitution and the laws enacted in pursuance thereof, and which authorized and created these state-owned-and-operated industries.

I beg of my associates (each of for whom I have the utmost respect) to halt, and reflect, before they, by their decree, strike down sovereign rights of a great and good people, which rights emanate from § 185 of the Constitution, as amended, and the laws above mentioned.

The rights which the people of our beloved state have thus acquired, under that section of the Constitution and those laws, have come to them only after many decades of incessant struggle, and perseverance, and against the fiercest and most unrelenting opposition; opposition in the form of great and concentrated wealth; opposition of corporate greed; opposition of great and vested interests, and opposition of part of the public press, which part in general champions the

right of those enjoying and exercising special privileges and controlling great wealth, to gain unjust advantage over the common people, and the laborer, the farmer, who are the producers of real wealth, and which part of the public press listens joyously to the siren song of its advertisers, and too often disregards its own sacred duty, yes, its constitutional duty, to defend the rights, privileges, and liberties of the people, for we confidently believe that our justly venerated constitutional fathers would not have so securely thrown the mandate of Federal constitutional protection about the public press, if it had been thought that part of that public press should so far deviate from its true course of conduct and duty as to become the champion and defender of the economically great and powerfully represented in perfect organization, as against the economically weak, the unorganized common and wealth-producing citizen whose greatest ambition in life is to labor and serve faithfully and well his God and his country.

A volume might be written, portraying the opposition encountered in securing the rights provided for in § 185, as amended, and the laws above referred to. But it is not necessary. That opposition, its character, its tenacity, its nature, is a matter of common knowledge.

In conclusion, we assert that the majority opinion, in the conclusions arrived at therein, is clearly nothing less than judicial legislation. The conclusion which it draws are so patently erroneous when compared with the laws above mentioned, that this becomes obvious on the merest inspection.

The majority opinion in effect concedes that all the industries above instituted and initiated by the state of North Dakota are so initiated for a public purpose. It does this because it recognizes the correctness of the decision in the case of Green v. Frazier, 44 N. D. 395, 176 N. W. 11, as handed down by the court, and as affirmed by the Supreme Court of the United States.

The majority opinion contains this language:

"It may not be *denied* that the *state of North Dakota*, pursuant to constitutional and statutory enactment, has engaged in the business or enterprise of banking. *No question is raised in that regard.* In the case of Green v. Frazier, supra, this court determined that the engagement of the state in such enterprise was for a public purpose to accomplish the objects sought thereby. Upon writ of error to the

Supreme Court of the United States, that court declared that the united judgment of the people, the legislature and the court of this state that the purposes involved were public, would be accepted unless clearly unfounded, and such court declined to set aside the action of this state in that regard."

The majority opinion therefore admits that all of these industries, including the Bank of North Dakota, were created and exist for a public purpose. If so, they are *conducted by the state of North Dakota* in its sovereign capacity. This being true, those industries may be supported by taxation of private property. Under the admissions in the majority opinion above set forth, the contention therein that these industries are quasi private corporations falls flat. The fact that none of these industries can sue or be sued, as we have very clearly above pointed out, also operates to destroy entirely the contentions of the majority opinion. These industries, being for a public purpose and use, as is conceded by the majority opinion, cannot therefore be, by any stretch of imagination, denominated as private corporations, or quasi corporations, of the same general nature as any other private business corporation.

Further elaboration cannot show more clearly that the majority opinion is clearly, conclusively, and absolutely erroneous. Justice to the public requires that the order appealed from should be reversed, and the case remanded, and the District Court ordered to dismiss the garnishment proceedings.

On Petition for Rehearing, Filed April 4, 1921.

BIRDZELL, J. The petition for rehearing states six distinct grounds in support of the motion. The first is that the decision is contrary to law. In support of this contention the following assertions are made: (a) That the decision is not in conformity with the laws and Constitution of the state of North Dakota; (b) that it is judicial legislation in that it amends an act of the legislature which had been referred to the people and approved by them; (c) that it annuls the constitutional provision which authorizes the state in its sovereign capacity to engage in any industry, enterprise, or business other than the manufacture and sale of intoxicating liquors.

The second ground of the motion is that the comparison made in the principal opinion between the manner in which the Bank of North Dakota is organized and that disclosed in the legislation of certain southern states does not warrant treating the United States Supreme Court decisions, based upon the latter, as authorities in support of this decision.

The third ground is that the court erroneously assumes that a department of the state may be sued or be subject to suit depending upon the powers conferred and liabilities imposed.

Fourth, that the court failed to consider § 5188, Comp. Laws 1913, which exempts banks from attachment and execution; also § 7583, which relieves from garnishment property which is exempt from execution.

The fifth and sixth grounds do not go to the merits of the decision and need not be stated.

On account of its extraordinary importance, this case merits most careful consideration. Every point presented as having any bearing on the soundness of the conclusions heretofore reached in the decision of the case has received the undivided attention of every member of the court. A careful weighing of all the contentions advanced in the light of express constitutional and statutory provisions has served but to confirm the majority of the court in the views previously expressed. While added reasons in support of these conclusions may be superfluous, it is nevertheless deemed proper to state more fully than has been done before some of the principal considerations leading inevitably to the original result.

It is said: "The court holds that the Bank of North Dakota is not the state of North Dakota, but something else which it has not been able to clearly define, and this, for the reason that it is not something else, but that it is the state."

And then it is asserted: "It has been made the state by the laws and the Constitution of the state."

Section 185 of the Constitution, as amended by article 33, is referred to as authorizing the state to engage in any industry, enterprise, or business not prohibited by article 20, and since the same section and article prohibits the state from loaning or giving its credit or making donations in aid of individuals, associations, and corpora-

tions, it is argued that the bank cannot be considered in any sense an entity apart from the state. To treat it as a separate entity, it is said, is to involve the state in a violation of the latter clause. We think this argument clearly proves too much. It would prove that the state could make no donation to any public institution where it invested the same with a corporate or quasi corporate character. Yet it is constantly lending its support to fair associations, educational institutions, etc., upon which it has conferred corporate capacity. On the contrary, we are clearly of the opinion that the violation of the prohibition against lending public credit in aid of corporations, etc., is openly countenanced by considering the state and the bank as the same entity, as is done by the petitioners.

Let us first examine the petitioners' argument in the light of the act creating the bank. Section 2 of the act (Sess. Laws 1919, chap. 147) provides:

"The business of the bank, in addition to other matters herein specified, may include anything that any bank may lawfully do, except as herein restricted; but this provision shall not be held in any way to limit or qualify either the powers of the Industrial Commission herein created, or the powers of said bank, herein defined."

Section 15 provides:

"The Bank of North Daktoa may transfer funds to other departments, institutions, utilities, industries, enterprises or business projects of the state, which shall be returned with interest to the bank. It *may make loans* to counties, cities or political subdivisions of the state, or *to state or national banks* on such terms and under such rules and regulations as the Industrial Commission may determine; but it shall not make loans or give its credit to any individual, association or private corporation, except that it *may make loans to any individual, association or private corporation secured by* duly executed *first mortgages* in amounts not to exceed one-half the security *or* secured by *warehouse receipts* issued by the Industrial Commission or by any licensed warehouse in the state in amounts not to exceed 90 per cent of the value of the commodities evidenced thereby."

The first quotation (from § 2) clearly gives the Bank of North Dakota power to borrow money unless there are restrictive words elsewhere in the act. For it appears that it is given every power in this

respect that any other bank has. A reading of the remainder of the act fails to disclose any restrictions upon the power to borrow money, and it is a well-known fact that the bank has in fact, within the past year, exercised this power by borrowing $1,000,000, for which loan it pledged as collateral bonds of the state in a larger amount held among its assets. This loan has recently been repaid. There will be occasion to refer to this matter in another connection. The language quoted from § 15 expressly confers upon the bank power to loan money not only to political subdivisions, but to *state and national banks.* That its power to loan has been exercised clearly appears from its last statement (March 15, 1921), where the following items appear as resources:

Loans to banks	$2,312,865.05
Loans on warehouse receipts	70,656.90
Loans to public institutions and departments	1,195,000.00
Loans on real estate	2,881,089.92

So, again, referring to the constitutional provision upon which counsel so urgently stress the argument that the Bank of North Dakota is the state of North Dakota, we find that this section relied upon prohibits *the state* from doing the very thing that the legislature has expressly authorized *the bank* to do, and which it has done, namely, loan its credit to individuals, associations, or corporations. If the Bank of North Dakota is the state of North Dakota, it could not, therefore, possess any such authority as the legislature has expressly conferred in § 15. It surely would not be contended that the state, when acting as the Bank of North Dakota, can do the things which the Constitution says the state cannot do at all. The state, when functioning as a bank, is still subject to the express limitations of the Constitution. The creation of this agency of the sovereign power cannot result in a superstate,—a government functioning without constitutional restraint. It (the bank) may hazard the capital it has been authorized to use in whatever way may be deemed expedient, and within the law, in order to make the banking business a success, but it cannot involve the state by attempting to pledge its credit in transactions the state is expressly prohibited from entering into.

When we extend the examination of statutory and constitutional provisions with a view to determining the character of the agency of the bank, additional provisions are found which demonstrate that the bank, though owned by the state, is not in fact the state. Turning now to chapter 148 of the Session Laws of 1919, which provides for the issuing of the bank series of bonds; after prescribing the formalities for preparation and issuance, the law provides in § 4:

"Nothing in this act, however, shall be construed to prevent the purchase of any of said bonds with any funds in the Bank of North Dakota."

Similar provisions are found in the acts authorizing the issuance of $5,000,000 of the bonds of the mill and elevator series (chap. 153, § 7), in the act providing for the issuance of $10,000,000 of bonds of the real estate series (chap. 154, § 6), and also in the act authorizing the home building series (Laws Special Session 1919, chap. 24, § 6). Section 7 of the Bank Act provides for the deposit of all the state funds in the Bank of North Dakota. Note, however, the exception of the sinking fund of real estate series (Laws 1919, chap. 154, § 7). This, of course, would include the proceeds of the sale of bonds. These proceeds are, in the case of the bank bonds "designated as the capital of the Bank of North Dakota" (§ 4, chap. 148), and, in the case of the mill and elevator series, the proceeds are required to be "placed by the Industrial Commission in the funds of the association" (§ 7, chap. 153). Again, referring to § 15 of the Bank Act, it provides that the bank may transfer funds to other departments, institutions, utilities, industries, enterprises, or business projects of the state, which shall be returned with interest to the bank. Now, referring to § 175 of the Constitution, which reads: "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied," it is pertinent to inquire what relation the bank or the state sustains with reference to the various deposits of public funds required to be deposited therein?

If the bank is but the state holding these funds as a mere custodian, as a treasurer would hold them, they would not lose their character as public funds; and if the bank, in all its business relations, is but the state, whenever it would follow the express direction contained in the

law to transfer, invest, or loan its funds, it would do so in the direct pursuit of a governmental object. Manifestly, if this governmental object should differ from that for which the funds were originally raised by taxation, the mandate of § 175 of the Constitution, requiring tax moneys to be applied to the purpose for which they were raised, would clearly be violated. Can it be seriously contended that moneys raised by taxation for the support of the public schools in a remote section of the state are authorized to be used for the purpose of building a home for a bank cashier in the capital city of the state? This is the logical result of the petitioner's argument. The steps are these: The bank is the state, because the Constitution authorizes the state to engage in the banking business. The things that are done by the bank are therefore done by the state in pursuit of whatever governmental object the bank is authorized to attain. To attain these objects, public moneys are required to be deposited in the bank, there to be used through loan or transfer to finance any of the authorized operations. The flaw in the argument, as we see it, is this: It not only ignores the effect of express constitutional limitations upon the powers of the state government itself, but it ignores as well the legal effect of what the legislature actually did when it authorized the use of the credit of the state for the purpose of supplying *capital funds* to be used to form a separate organization through which it might seek to accomplish certain governmental ends. In attaining these ends, if the state should act directly, it would be hampered by reason of express constitutional limitations. But it can hazard whatever money, lawfully obtained, it may be authorized to use in conducting the particular business. To make the business a success, it may be necessary to vest in its agencies powers that could not be conferred on public officers whose acts as such would bind the state unqualifiedly. These agencies hazard only the appropriated capital, not the public credit. Doubtless it was partly on account of these limitations that it was thought best to appropriate a certain capital for use in the banking business, and to create a bank organization which, using this capital fund as its basic security, could so handle the funds deposited with it as to realize the governmental objects sought, without trenching upon the constitutional limitations applicable to the state itself. It

cannot be reasonably contended that the constitutional authority to engage in certain businesses nullifies by implication express limitations on the powers of the state government, especially where these limitations are embodied in amendments adopted concurrently with those giving the authority.

We have no doubt that under the Bank Act the bank sustains the relation of debtor with respect to all of the deposits, both public and private, that are placed in it. It is simply the authorized depositary of the public funds, and holds them in the same capacity that private depositary banks customarily held them before the Bank of North Dakota was created. There is a vast difference between this relationship and an official custodianship, in which the official is using the funds in furtherance of the particular purpose for which they were raised by taxation.

Pursuing the subject of legislative intent further in the light of still another constitutional provision: article 31 of the Amendments to the Constitution so amends § 182 of the original Constitution as to authorize the issuance of unsecured bonds to the extent of $2,000,000, certain real-estate bonds, and bonds secured by real or personal property or state-owned utilities up to $10,000,000. It then provides as follows: "No future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes."

We have previously referred to the fact that the Bank of North Dakota had borrowed $1,000,000, thereby, of course, becoming indebted in that sum. It is doubtless authorized by the Bank Act to borrow money. If it could borrow $1,000,000, pledging bonds held by it as collateral, it could borrow such greater sums as its business seemed to warrant, without collateral or with whatever collateral there demanded by the lender, and for every dollar so borrowed, if the contentions of the petitioner are correct, the state would be liable. Not only would the state be liable, but the creditor could obtain a judgment only against it which he could satisfy only by resort to the state treasury, being denied access to the resources of the bank. Thus, the limitation contained in article 31 of the Amendments, which was adopted at the same election as article 32, authorizing the state to engage in business, would be effectually nullified.

Some attempt is made to show that the limitation against future indebtedness does not apply where, as a result of the transaction, there is a corresponding amount of funds available for meeting liabilities. Conceding that this argument is to some extent applicable where a municipal corporation desires to borrow money for an authorized purpose, and where it already has certain funds in the treasury applicable to outstanding obligations, so that the debt limit may be properly calculated by subtracting from outstanding debts the available funds in the treasury (Anderson v. International School Dist. 32 N. D. 413, L.R.A.1917E, 428, 156 N. W. 54, Ann. Cas. 1918A, 506), it is clear that it has no application to such a situation as that presented here. If the argument is valid as applied to the borrowing power of the state in its present circumstances, considering the bank as the state, it is obvious that the language, "no future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes," means nothing. There would be no limit, as every exercise of the power to borrow would simply result in increasing available funds, and the transaction could be repeated ad infinitum. A concrete example may serve to illustrate the fallacy of the argument. If the funds on deposit, public or otherwise, in the Bank of North Dakota, seemed to the management to justify it, the bank might purchase $5,000,000 of the bonds of the mill and elevator series. It would still owe to the depositors the amount of deposits thus invested, but the state would owe the bank a like sum. Then the bank might borrow $4,000,000 elsewhere, pledging these bonds as collateral, in which event the state, if petitioner's argument is sound, becomes indebted to the extent of $9,000,000, only $5,000,000 of which is represented by bonds. Then this $4,000,000 could be used to buy more bonds to serve as collateral for another loan, and so on. What then has happened to this provision of the Constitution?

"No future indebtedness shall be incurred by the state *unless evidenced by a bond issue, which shall be authorized by law for certain purposes.*"

No bonds were issued for the $4,000,000 of obligations, and the purpose for which the loan is made is not clearly defined by law. It may be any purpose the managers of the bank should deem proper.

The proceeds could be transferred to any department or industry, or reloaned under the Bank Act, or used to purchase other bonds of the state.

In this case the court is, of course, concerned merely with the question of ascertaining the legislative intention in adopting the Bank Act. One of the primary canons of interpretation, so well known as to have become trite, is that as between two possible constructions of a legislative act, one of which will render it constitutional and the other unconstitutional, that construction is to be adopted which renders it consistent with the Constitution. We are confronted by the alternative of so construing the act in question as to make the bank and the state identical for all purposes, on the one hand, which would clearly render it unconstitutional in toto for the reasons stated; or of considering the act as one in which the legislature, in carrying out the authority vested in it by the Constitution, has hazarded a certain amount of capital furnished by the state in the transaction of the business of banking, subject to such regulations as appear in the act. In the handling of this capital fund in carrying on the banking business, it has clearly been thought necessary to vest in the managers of the enterprise powers which could not be given to officers authorized to bind the state by their acts. We are clearly of the opinion that under § 185 of the Constitution as amended, the state may engage in the business of banking and hazard a certain amount of capital therein. In conducting that business it may render that capital subject to the fulfilment of contracts which the bank may be authorized to enter into, and upon which the state itself is precluded from assuming an unlimited liability. A constitutional authorization to engage in the banking business may well carry with it by implication the power to do the things necessary to make a business successful, but where all these things can be done without nullifying other express constitutional restraints imposed for the protection of the people as a whole, it is the sworn duty of this court to uphold the express limitations.

Much stress has been laid upon the wording of § 22 of the Bank Act. It reads:

"Civil actions may be brought against the state of North Dakota on account of causes of action claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota,

upon condition that the provisions of this section are complied with. In such actions the state shall be designated as "the State of North Dakota, Doing Business as the Bank of North Dakota," and the service of process therein shall be made upon the manager of said bank."

In the light of the statutory and constitutional provisions hereinbefore considered, we do not see that particular importance attaches to this language. In so far as legal analogy may be resorted to to determine its real meaning, it clearly points to the meaning that only such liability is to be determined in any such action against the state as has arisen in connection with the bank. The closest analogy occurring to us is that of a suit against a partnership. In such an action the partners are individually named, and they are described as doing business in their firm name. But in an action so brought the partners are apprised that the matter is to be litigated as a partnership transaction, and not an individual one. At common law the partners could not even interpose a counterclaim based upon a debt owing by the plaintiff to one of the members of the firm individually. The law affords still another and closer analogy, possibly, in the limited partnership where the firm is similarly described, but yet where one or more of the partners has hazarded only a limited amount of capital in the venture. We are of the opinion that the qualifying portion of the expression designating the defendant as doing business as the Bank of North Dakota is the legally appropriate description of the capacity in which the defendant is sued, and that it implies the existence of all inherent limitations which existed with reference to the imposition of such a liability. These limitations, for the reasons hereinbefore stated, are such that the judgment obtained is only binding upon the state to the extent of the capital it has put into the bank. For the purpose of determining this liability, the bank is, in legal effect, an entity, for it is legally incapable of binding the state beyond its interest in its capital funds.

Turning now to the argument that the court has failed to give proper consideration to § 5188, Comp. Laws 1913, which exempts banking associations from the legal processes of attachment and execution: It is said that garnishment is but a form of attachment, and we are referred to the case of Safford v. Plattsburgh Nat. Bank, 61 Vt. 373, 17 Atl. 748, where it was held that the trusteeing of a debt

due to a national bank is in fact an attachment of the property of the bank within the provision of the National Banking Act, Rev. Stat. § 5242. Comp. Stat. § 9834, 6 Fed. Stat. Anno. 2d ed. p. 903. That provision reads: ". . . and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court."

It seems that the portion of the section above quoted came into the act of June 3, 1864, by way of amendment adopted in 1873. Its history is set forth in the New York case of Van Reed v. People's Nat. Bank, 173 N. Y. 314, 105 Am. St. Rep. 666, 66 N. E. 16.

The construction of the above act was for a long time involved in some difficulty, and there is a lack of harmony in the earlier cases. See 2 Morse, Banks & Bkg, § 257. It had been held, for instance, in New York (Southwick v. First Nat. Bank, 7 Hun, 96), that the act did not prohibit attachment against the property of a national bank located in another state, when attachment afforded the only means for creditors of the jurisdiction to pursue their claims within it. This case, as well as others of similar import, were later overruled in Van Reed v. People's Nat. Bank, supra. In the latter case the New York court of appeals was influenced by the decision of the United States Supreme Court in Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718. The Van Reed Case went to the United States Supreme Court on writ of error, and that court (Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154) reaffirmed its holding in the Mixter Case, so that by an authoritative interpretation of the Federal statute by the United States Supreme Court it is now thoroughly established that there may be no attachment, execution, or injunction against a national bank before judgment, whether there be any other means of acquiring jurisdiction or not, and whether the bank be solvent or insolvent or approaching insolvency.

In the light of this construction it is indeed interesting to note the decisions of the United States Supreme Court in garnishment proceedings. In construing the same statute that court has clearly recognized the distinction between garnishment and attachment, injunction,

or execution. In two cases the court was called upon to determine whether or not a national bank could properly be made a garnishee where no judgment had been previously obtained against it. The cases are Earle v. Pennsylvania, 178 U. S. 449, 44 L. ed. 1146, 20 Sup. Ct. Rep. 915; and Earle v. Conway, 178 U. S. 456, 44 L. ed. 1149, 20 Sup. Ct. Rep. 918. It was held in the first case that an attachment against a national bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it within the meaning of § 5242. In that case one Mary Rogers had obtained a judgment in the common pleas court of Philadelphia against one James Long. A writ of attachment issued upon the judgment, and an alias writ issued against the Chestnut Street National Bank *as garnishee.* The bank answered interrogatories as garnishee, and the plaintiff obtained a rule for judgment against it as garnishee on its answers. A few days later the bank suspended payment. The receiver attempted to vacate the attachment as being null and void under § 5242. The court held it valid, saying:

"Whatever may be the scope of § 5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. After the Chestnut Street National Bank had been served as garnishee with the attachment sued out in the Long suit, but before it went into the hands of a receiver, it admitted in its answers to special interrogations in the suit against Long that it was indebted to Long on a clearing-house due bill, and also that it held as collateral security for his debt to it certain shares of the stock of the Eighth National Bank of Philadelphia. By the service of the attachment upon the bank, *the plaintiff in the attachment acquired a right to have the money and property belonging to Long in the hands of the bank applied in satisfaction of its judgment against him,* subject, of course, to the bank's lien for any debt due to it at that time from him. The bank, therefore, became bound to account to the plaintiff in the attachment for whatever property or money it held for the benefit or to the use of Long at the time the attachment was served upon it. And the right thus acquired by the service of the attachment was not lost by the suspension of the bank and the appointment of the receiver.

The assets of the bank passed to the receiver burdened, as to the interest that Long had in them, with a lien in favor of the plaintiff in the attachment, which could not be disregarded nor displaced by the Comptroller of the Currency." (Italics are ours.)

In the Conway Case, which involves the same bank, Conway had obtained a judgment against one Schall. A writ of attachment was issued and served on May 24 and 25, 1898, upon the Chestnut Street Bank and upon Earle, receiver, as garnishee, he having been appointed the previous January. The court held, for the reasons stated in the other case, that the attachment could not create any lien upon physical assets of the bank in the hands of the receiver, nor disturb his custody of these assets, but that it became the duty of the Comptroller of the Currency to hold any funds coming into his hands as proceeds of the sale of the bank's assets, subject to any interest which the plaintiff may have legally acquired as against his debtor under the attachment issued on the judgment in his favor.

It will be seen then that, under the Federal statute upon which the Vermont case cited is based, the decisions of the United States Supreme Court distinctly recognize the difference between an attachment in a suit against a national bank, where it is sought to obtain a judgment against the bank, holding the attached property subject thereto, and a garnishment, where it is sought only to subject a claim the bank owes to the defendant in the main action to the payment of his debt,—a proceeding, in other words, which effects an assignment by operation of law of a claim against a bank. If the object of the proceeding is the latter, it is not regarded as an attachment against the bank such as prohibited by the Federal statute. These decisions supporting garnishment under the Federal statute were referred to in the later case of Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. ed. 1161, 25 Sup. Ct. Rep. 775, 3 Ann. Cas. 1154, and it was said that they in no way qualified the decision in the Mixter Case, 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. Rep. 718. Thus, the construction of the Federal statute, in so far as it affords an analogy to the instant case, is distinctly in support of the garnishment.

To hold that a bank may not be made a garnishee is, in effect, to read into the statute, § 5188, Comp. Laws 1913, a prohibition that is not there. The legislature, it must be assumed, was just as familiar

with garnishment as it was with attachment and execution, and with the differences in the operation of those remedies. It was just as cognizant of all of these terms as this court is. When it prohibited attachment and execution against banking associations, therefore, omitting garnishment, it must be assumed that the omission was intended. We think it clear that § 7583, which relieves from garnishment property that is by law exempt from execution, has no application to the garnishment proceedings in question. For it is the clear purpose of that statute to give effect to the exemption laws. Exemption laws exist to secure to debtors the right to enjoy "the comforts and necessaries of life." N. D. Const. § 208.

Entertaining no doubt as to the correctness of the conclusions stated in our former opinion, the petition for rehearing should be denied. It is so ordered.

ROBINSON, Ch. J., and CHRISTIANSON, J., concur.

BRONSON, J. The defendant has filed a petition for rehearing, wherein it is contended again that the Bank of North Dakota is the state, and as such is not subject to garnishment, and, further, that this court judicially legislated in holding to the contrary. The petition presents no legal issues that have not been fully considered by the court. It presents no legal determinative issues other than those considered and determined by the majority opinion. It reasserts many of the contentions made by Justice Grace in his dissenting opinion. Both the petition and the dissenting opinion, therefore, merit consideration not only by reason of the importance of the case, but also because of an interpretation attempted to be placed upon the majority opinion and the presentation of issues thereby, that lead far afield from the determinative issues in this case. To state that a court is judicially legislating concerning, or judicially destroying, a state enterprise or industry, is perhaps easy in bald assertion, but difficult in demonstration. Upon this court is imposed the sworn duty to uphold the Constitution of this state, as well as its laws; not one constitutional provision, not one law, but all of them. The same sovereign power, the people, that have sanctioned the Constitution, and the laws thereunder, imposed this duty upon the court. Amidst the turmoil

and strife of partisan controversy in this state, the noise and rumble of which are heard within and without the state, the judiciary, if it shall perform its sworn duty fearlessly and independently, must determine legal controversies upon the law and legal issues. The law is the Constitution, paramount, the statute, subordinate: All, the law when harmonious and consistent. The latter must be upheld when, upon interpretation, it may be rendered harmonious and consistent with the Constitution. Otherwise, it must yield to the paramount law. This law, the whole law as prescribed, must be upheld, as it is written, by the judiciary, pursuant to its imposed duty, disregarding and unmindful of the partisan clamor of approval or disapproval resulting. Mortal men err; judges err; mortal men differ; so do judges; but upon questions of law, upon legal issues, must judges, upon their conscience and sworn duties, differ. Thus, discrediting neither the sincerity of purpose of the attorney general in his petition, nor the vigorous dissenting opinion of our Honorable Associate Justice, the pertinent legal questions are to be approached and considered.

All of the assertions made in the extended dissenting opinion, and in the petition, to the effect that the state of North Dakota, in its sovereign capacity, is engaged in the banking business, and that the Bank of North Dakota is not a private bank, appear to be the violent threshing of a pseudo issue, and far distant from the legal issues involved. This court, in the majority opinion, has stated that it may not be denied that the state has engaged in the business or enterprise of banking; that the question was not whether the sovereign power of the state is engaged in the banking business, but rather concerns the question of the status of a sovereign agency when exercised in an engagement of a business or enterprise. Attention is thus called to the opinion of the court, so that the false bottom created for the contentions and arguments made that the Bank of North Dakota is held to be a private corporation may be seen. What application, therefore, has § 185 of the Constitution relating to the loaning of the state's credit to a private corporation?

So, reversion occurs to the real legal issues, (1) Is the Bank of North Dakota, the state; and (2) Is it subject to garnishment?

First. It is asserted that the status of the state of North Dakota is

the only question concerned. What is that status? Is it not a status subject to all constitutional and statutory provisions applicable to the state as such? But it is requested that a finger be placed on the statute, stating that anyone but the state of North Dakota may be sued with reference to transactions with the Bank of North Dakota. The statute says that actions may be maintained in the name of the State of North Dakota, Doing Business as the Bank of North Dakota. Why, the need of any pan handle to the name of the state, if the bank is the state? Why is it that the statute provides that all business of the bank may be conducted under the name "The Bank of North Dakota? Laws 1919, § 21, chap. 147. Is it the status of the state of North Dakota or the status of the State of North Dakota, Doing Business as the Bank of North Dakota, that is being considered? Is it not possible for the state to create an agency of the sovereign power and give to such the status of an agency of the sovereign power? When the state engaged in the bonding business, and created the state bonding fund under the management, control, and supervision of the Commissioner of Insurance (Laws 1915, chap. 62), were the fund, and the Commissioner while acting in the duties thereof, the state, or an agency thereof with a separate status. The Commissioners may be sued; judgments may be rendered against the fund; the moneys therein are not state funds. Laws 1915, chap. 62. State ex rel. Linde v. Taylor, 33 N. D. 109, L.R.A.1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583. So when the state established the hail insurance fund (Laws 1911, chap. 23; Laws 1919, chap. 160; see State ex rel. Olson v. Jorgenson, 29 N. D. 173, 150 N. W. 565) state fire insurance (Laws 1919, chap. 159) and teachers' pension fund (Laws 1915, chap. 251), and the workmen's compensation bureau (Laws 1919, chap. 258), were not agencies of the sovereign power created?

Was the United States Shipping Board Emergency Fleet Corporation created by the United States, with a capital stock of $50,000,000, all owned by the United States, and stated by congressional act to be considered a government establishment, the United States, or an agency thereof? In United States v. Strang, 254 U. S. 491, 65 L. ed. 368, 41 Sup. Ct. Rep. 165, it is held, citing the United States decisions quoted in the majority opinion herein, that it must be regarded as an entity separate from the United States.

Was not an agency created when the legislative act established the Bank of North Dakota? Does this agency function the same as the state? Why does this agency do a business under a distinct name and all of its dealings under the head Bank of North Dakota? Are its funds public funds? Are its obligations and indebtedness created direct indebtedness of the state, its parent? Is a deposit made by Jones, a private person, made a public fund, subject to disbursement by the state in payment of governmental expenses of the state? When a million dollars was borrowed in Chicago and a note given therefor, was such note a direct indebtedness of the state or of the bank? Were the millions of dollars on deposit in this bank in July, 1919, deposited by municipal subdivisions, private banks, and private individuals, state public funds, and funds for which the state was directly obligated as such?

The banking act provides that this bank may do the business that any bank may lawfully do, except as specifically restricted in the act. § 2. It provides that this bank may act as a clearing house. § 11. It particularly specifies for it the functions of a bank; it provides that funds may be deposited to the credit of the bank, or that the bank may deposit funds in any bank or banking association. §§ 9, 14. It further specifically provides that this bank may make loans to an individual, association, or private corporation secured by duly recorded first mortgages on real estate. § 15. It further provides that such mortgages shall run to the manager of the Bank of North Dakota. § 18. It further provides that such mortgage, together with the note, may be assigned to the state treasurer of the State of North Dakota, as security for bonds issued by the state. § 20. It further provides that the business of the bank may be conducted under the name of the Bank of North Dakota, § 21. Do these provisions of the act, and functions assigned to this bank, create directly the engagement of the state as such, or does it rather show the creation of an agency, a sovereign agency, for the performance of the functions assigned?

The dissenting justice refers to § 185 of the Constitution, which provides that the state may not loan or give its credit in aid of any individual, association, or corporation. The Bank Act, however (§ 15) states that the Bank of North Dakota may make loans to an in-

dividual, association, or private corporation. Is this section of the act unconstitutional because the bank is the state, or rather is it to be said that this agency, as an agency, possesses the function so to make loans. Article 31, Amend. Const., provides that no future indebtedness shall be incurred by the state unless evidenced by a bond issue which shall be authorized by law for certain purposes to be clearly defined, and no debt in excess of the limit named therein (relating to the issuance of the bonds) shall be incurred, except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in cases of threatened hostilities. This constitutional amendment was adopted at the same time that the constitutional amendment which provides that the state may engage in enterprise and industry. Do these constitutional provisions place any limitation upon indebtedness for the state as such?

In State ex rel. Langer v. Hall, 44 N. D. 536, 173 N. W. 765, Judge Grace, in the opinion of the court, stated that the main question to be determined in the case was, "What is the debt limit under § 182 of the Constitution as amended? The state contends that it is $2,000,000, in addition to the existing bonded indebtedness. The defendant contends that it is $2,000,000 less $412,000 of existing bonds of indebtedness. After a careful and painstaking examination of the whole subject-matter of the controversy, we are firmly convinced that the contention of the state must be sustained." It is apparent that his holding in that case was that there was a constitutional debt limit, and, in direct terms, stated what it was. Furthermore, in this same case, concerning the Bank of North Dakota, he further stated:

"It will thus be seen that the state is establishing the Bank of North Dakota as a fiscal agency for the transaction of its own business and as a fiscal agent for other purposes. It becomes, therefore, an important agency and means of properly carrying out the economic program which has been authorized by the people, and is a means to safeguard the interest of the people, and provides a safe depository for the funds in question, and one from which strict accountability may be required, as its accounts will be subject to the same examination as any other private banking institution of this state, by public examiner" (543).

Does not this opinion both recognize a constitutional debt limit and the Bank of North Dakota as an agency? If every act of the Bank of North Dakota is the act of the state itself, if every obligation and indebtedness created is the obligation and indebtedness of the state itself, how can there be any escape from the conclusion that the Bank Act must necessarily operate contrary to the Constitution of this state, both with reference to indebtedness created or to be created not warranted by the constitutional provisions, and with reference to loans to private individuals or private corporations.

Concerning state bonds issued for the purpose of providing capital for the Bank of North Dakota, it is specifically provided in the act authorizing such bonds, that nothing shall be construed to prevent the purchase of any of such bonds with any funds in the Bank of North Dakota. Laws 1919, § 4, chap. 148. When the Bank of North Dakota bought these state bonds from the state, and credited to itself the amount in money of such bonds, as its capital, what funds were used in payment of such bonds? Manifestly, the payment came from funds in the Bank of North Dakota, from deposits made by municipal subdivisions, private banks, or private individuals. Who, then, became indebted for the funds so used, the state or the bank? When a portion of these bonds so bought, and held by the bank, were pledged as collateral for a loan of $1,000,000, was the indebtedness of the state then extended so as to comprehend an obligation on the million dollars borrowed, as well as upon the bonds pledged? If the bank, pursuant to its powers, operates as a reserve bank, or a bank of rediscount, and it becomes necessary for it to borrow money, shall its obligation upon boney so borrowed, whether $1,000,000 or $10,000,000, be deemed the direct obligation of the state? So construed, what test is to be applied in determining the constitutionality of a legislative act? In State ex rel. Frich v. Stark County, 14 N. D. 368, 373, 103 N. W. 913, it is stated that its validity must be tested by what might be done, not by what has been done. What may be said of a judicial promulgation which would state to the people of this state that indebtedness without limit, or to any extent, might be incurred by the Bank of North Dakota, as the direct obligation of the state, in defiance of such constitutional provisions? Can the Bank of North Dakota, representing the state, as such, engage in contracts, create indebted-

ness, make loans, and do things that the state itself cannot do directly by reason of constitutional inhibitions? Complaint is made that the majority opinion has quoted decisions concerning state banks of the South, which concern corporations created as such. Do not these decisions demonstrate that the sovereign power may create an agency, a sovereign agency, and give to such agency a status, and that it is not necessary that it be termed a corporation in order that it do have the status of an agency? Does it not sufficiently appear that, necessarily, the Bank Act does create an agency of the sovereign power engaged in an enterprise with a distinct status as such, necessarily so to be regarded, in order that the constitutional provisions and the will of the people expressed in the legislative act may function in the enterprise designated?

Second. Is the Bank of North Dakota subject to garnishment? It is contended that garnishment is an attachment. That § 5188, Comp. Laws 1913, provides that every banking association in this state shall be exempt from the legal process of attachment and execution. That § 7583, Comp. Laws 1913, relating to the liability of a garnishee, expressly provides that property exempt from execution is not subject to garnishment. That the statute (Laws 1919, § 22, chap. 147, of the Bank Act) does not permit a garnishment action; that it refers to a civil action, and that garnishment is a provisional remedy.

The answer to these contentions must be made upon the Bank Act itself, the correlative statutes, and the decisions of this court applicable.

The statute provides that civil actions may be brought upon transactions connected with the operation of the Bank of North Dakota; that such actions may be brought in the same manner and shall be subject to the same provisions of law as other civil actions brought pursuant to the provisions of the Code of Civil Procedure.

Section 7581, Comp. Laws 1913, provides that the proceedings against a garnishee shall be deemed an *action* by the plaintiff against the garnishee and defendant as parties defendant, and that all proceedings of law relating to proceedings in *civil actions* at issue, including examination of the parties, amendments, and relief from default or proceedings taken, and appeals and all provisions for enforcing judgments, shall be applicable thereto. In F. B. Scott Co. v. Scheidt, 35

N. D. 433, 434, 160 N. W. 502, this court held that a garnishment proceeding is deemed an action, and that the provisions of law relating to civil actions are applicable.

In Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 555, this court specifically held that a garnishment proceeding in this state is entirely separate and distinct from either attachment or execution. These statutes and decisions were in force, and these decisions had been rendered when the legislative assembly had under consideration, and thereafter enacted, the Bank of North Dakota Act. Is it not to be presumed that they had notice of the statutory provisions concerning garnishment, and the construction placed upon the same by the decisions of this court? The legislature could easily have provided for exemption as to a garnishment proceeding. If it had intended so to do, is it not to be presumed that it would doubtless have said so? See Bovey-Shute Lumber Co. v. Erickson, 41 N. D. 365, 170 N. W. 630; Ruddy v. Rossi, 248 U. S. 104, 63 L. ed. 148, 8 A.L.R. 843, 39 Sup. Ct. Rep. 46.

Concerning the hail insurance fund (Laws 1919, chap. 160), there is a specific provision exempting a garnishment proceeding. Likewise, concerning the teacher's pension fund (Laws 1915, chap. 251). Do not the statutes and the decision of this court quoted therefore consider and treat a garnishment as an action, and subject to the provisions of law applicable to civil actions? Does not, further, the Bank Act by its plain terms, recognize the right to maintain such action, including a garnishment proceeding which is deemed an action?

Section 7567, Comp. Laws 1913, further provides that any creditor shall be entitled to proceed by garnishment in any court having jurisdiction of the subject to the action, against any person including a public corporation, etc. Under this statute may not a county, a city, a township, although agencies of the sovereign power, be made a garnishee defendant? If such agencies may be made garnishee defendants, what becomes of the assertion that garnishment process will not lie against sovereignty? The only apparent way to make such position unassailable is to declare the statute unconstitutional. In this case Sargent county, claiming $125,000 to be owing by the Bank of North Dakota, seeks to impose a personal liability upon the garnishee defendant for that amount. This garnishment proceeding against the

private banks does not ask for one dollar that the Bank of North Dakota has in its possession. It seeks to have the private banks, through a personal judgment against them, pay to Sargent county the amount which these banks owe the Bank of North Dakota, which amount, in turn, the Bank of North Dakota owes to Sargent county. Section 5188, Comp. Laws 1913, is contained in chap. 28, relating to private banking corporations. It provides that banking associations shall be exempt from the legal processes of attachment and execution. It does not provide that such banking association shall be exempt from the legal process of garnishment. It further provides that if any such bank fails to pay any final judgment, the State Banking Board shall declare such bank insolvent and cause a receiver to be appointed to wind up its affairs. The contentions made do not assert or maintain that the Bank of North Dakota is a private banking corporation. How, therefore, may they assert, or even contend, that such § 5188, Comp. Laws 1913, is to be applied?

But, if applied, the construction, for which contention is made by the defendant, would not permit a private bank to be a garnishee defendant. Upon such construction the deposit of a private individual in a private bank might not be subject to garnishment, for a private bank is not liable to the process of execution. Upon such construction, therefore, such private bank could not be made liable, because the personal judgment in garnishment was not subject to the process of execution. The answer to any such contention is that the legislature did not exempt, by the statute, the process of garnishment. Section 7583, Comp. Laws 1913, provides that the garnishee shall be liable to the plaintiff for property, money, credits, and effects, and all debts due or to become due to the defendant, except such as may be by law exempt from execution. What property, money, and debts are by law exempt from execution? Sections 7729 to 7743, Comp. Laws 1913, mentions the property that is exempt to the head of a family. It provides a method for claiming exemptions when property is so exempted by law. This statute plainly relates only to such property and debts as are by law exempt. It plainly has reference to property and debts that are both exempt and not exempt under the law. It has no refer-

ence to any exemption from the legal process of attachment or execution.

The statute in its plain terms permits an action to be maintained. It is plain to see that an action includes a garnishment proceeding. The statute by its terms does not include a garnishment proceeding. No specious reasoning nor arguments concerning sovereignty can overrule these plain provisions contained in the statute. The court cannot do otherwise than uphold such plain statutory provisions. It may well be repeated that if constitutional provisions are to be set aside, and if the plain mandates of the statutes are to be wiped out, let it be done by those who created and enacted such constitutional and statutory provisions, the people. The petition for rehearing is denied.

GRACE, J. (further dissenting). The defendant, the sovereign state of North Dakota, has filed a petition for rehearing, which, unquestionably, should be granted. The importance of the issues involved; the deleterious effects which will inure to the people of this state if the majority opinion becomes final; the failure to give the plain and unmistakable intent of the provisions of the Constitution and laws, mentioned in my previous dissent, to those provisions and laws; the denial to the state of North Dakota of the right to engage in business in its sovereign capacity, though authorized to do so by the constitutional provisions and laws heretofore referred to in my former dissent, are each and all matters of great and far-reaching importance, directly affecting the happiness, prosperity, and right of self-government of the people of this state. Hence, they should not be decided and determined in the manner that the majority opinion, including the majority opinion upon petition for rehearing, does determine them, nor until further investigation of the legal principles involved, nor until further analysis by counsel, including the attorney general of this state.

The majority opinion, upon rehearing, clearly does not attempt an answer to the reasoning of my previous dissent. The reasoning and the principles stated in that dissent are so plain and so clearly right that, should the majority attempt to analyze them, they would soon find their position indefensible. The laws and the constitutional provisions, referred to in our former dissent, so plainly show that the

state of North Dakota, in its sovereign capacity, is engaged in business, that any contention to the contrary is absolutely useless.

To say that the state of North Dakota is not, in its sovereign capacity, engaged in the banking business, or in the mill and elevator business, or in the home building business, is to contend against the plain words of the statutes, authorizing the state, in its sovereign capacity, to engage in those businesses. To contend that the state, in its sovereign capacity, has not authority to do so, is to contend against the plain provisions of § 185 of the Constitution, as amended.

The state of North Dakota is engaged in the banking business, in its sovereign capacity, as the Bank of North Dakota. The majority opinion in effect holds that the Bank of North Dakota is a private institution.

The public and the public press have generally construed the meaning of the majority opinion to be that the Bank of North Dakota is a private institution. No other conclusion can be derived from the plain language of the majority opinion.

The state of North Dakota has, in its sovereign capacity, engaged in all of these businesses heretofore mentioned, including the banking business, and, to do so, it was necessary to resort to taxation of private property within this state. In order to warrant this step, it is necessary that the business engaged in be for a public purpose and a public use, and such are the businesses above mentioned. Hence, they cannot be private, as is clearly the conclusion of the majority opinions. The majority are forced into one position or the other.

In the case of Green v. Frazier, 44 N. D. 395, 176 N. W. 11, these constitutional provisions and laws were construed, and it was held, by this court (Justice Christianson dissenting), that the state was engaging in business in its sovereign capacity. This opinion, as we have before stated, was affirmed by the Supreme Court of the United States. See Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499.

Since the decision of the Green v. Frazier Case, there has been no change in either the constitutional provisions nor the laws in question. They remain the same as they were at the time that case was finally terminated. If there has been a change in the opinion of the majority of those who signed the opinion of the writer thereof, who

is the writer hereof that would not operate to change the fact that the constitutional provisions and laws in question there remain the same and unchanged, and mean the same now as they did then.

We are unable to determine whether the majority who signed that opinion have changed their minds. The majority in its opinion upon rehearing has, figuratively speaking, created a dust cloud, which may, to some extent, obscure the vital issues herein involved, but, notwithstanding this, we are able to look through and beyond it, to the sunlight of truth, which is found in the constitutional provisions and laws aforesaid.

The dust cloud consists in a weak endeavor to show that the state of North Dakota heretofore established a certain so-called agency of the state of North Dakota, and that such agency has a separate and distinct status from the state, and is seeking to apply the alleged analogy to the State of North Dakota, Doing Business as the Bank of North Dakota. In other words, seeking to show that this alleged agency has a separate and distinct status from the state.

These agencies are claimed to exist, with reference to several different subject-matters. The first of these is the state bonding fund, as created by chapter 62, Laws of 1915; the state hail insurance fund, chapter 23, Laws of 1911, chapter 160, Laws of 1919; state fire insurance, chapter 159, Laws of 1919; teachers' pension fund, chapter 251, Laws of 1915; workmen's compensation bureau, chapter 258, Laws of 1919; The United States Shipping Board, Emergency Fleet Corporation, a Federal Corporation, created by act of Congress.

The majority opinion, after reciting these various state laws creating certain funds, asks: Were not agencies of the sovereign power created? We answer, Absolutely no.

We cannot take time nor space to analyze all these laws creating the various funds. We will examine the State Bonding Fund Law, chapter 62, Laws of 1915, and let that suffice.

Firstly, the creation of a fund for a specific purpose, where the fund is to be accumulated, not by taxation by the state, of private property, but by payment into the state treasury, of the equivalent of certain premiums theretofore paid by various municipalities, in procuring the bonding of their officers by private agencies, is an entirely distinct matter, than where the state, in its sovereign capacity, engages in the

business of bonding, where, in such case, it would assume liability for losses, and become responsible, in its sovereign capacity, for the payment of those losses, and where, in order to engage in that business, it would be necessary for it to levy a tax upon the private property in the state, to secure a fund.

In the so-called state bonding fund, the state, in its sovereign capacity, never could, under the law creating that fund, become liable for a single dollar.

Section 11 of that act provides that it shall not become liable. All that the State Bonding Fund Law did, was to require the different municipalities to pay the premiums, the amount thereof which is specified in the law, into the state treasury, and to be accumulated there as a state bonding fund.

The Commissioner of Insurance was to issue the bond, not the state of North Dakota, nor the Commissioner of Insurance acting for the state of North Dakota. Of course, if an action were necessary to recover upon any of such bonds, it could not be maintained against any one else excepting the Commissioner of Insurance, for the state of North Dakota was not liable. The state was not in business; it did not bond anyone by that law; it assumed no liability nor responsibility for payment of those bonds. By that law, and all similar laws, referred to in the majority opinion, the state had simply exercised its police power, without incurring any responsibility in its sovereign capacity for so doing.

None of such funding laws make those intrusted with the handling and disbursement of those funds, agencies of the sovereign state, and none of them are agencies of the sovereign power.

All hail insurance laws, prior to the enactment of chapter 160, Laws of 1919, were amended and superseded by chapter 160. By chapter 160, the state entered the hail insurance business, in its sovereign capacity, and prescribed a fund out of which hail losses are to be paid, and also that said fund shall be raised by taxation; the amount that may be so raised by taxation, and the manner of levying that tax, is specified in that chapter. But neither the state nor the Insurance Commissioner can be sued for any loss. The state, in its sovereign capacity, has prohibited that, so that chapter 160 is strictly not in point, and does not support the majority opinion; and the analogy

sought to be created by the state bonding fund, and other similar funds, absolutely fails when applied to the state of North Dakota, engaged in the banking business.

But the majority opinion on rehearing, after reciting the State Bonding Fund Law and laws similar to it, and after seeking to show that the state bonding fund was an agency of the state of North Dakota, and the same with other laws creating similar funds, has the temerity to ask the following questions:

"Was not an agency created when the legislative act established the Bank of North Dakota?"

The question above asked by the writer is the one we have been endeavoring to get him to answer. He answers by asking the question. We will answer it. The answer to it is § 1 of chapter 147. It is as follows:

"For the purpose of encouraging and promoting agriculture, commerce, and industry, *the state of North Dakota shall engage in the business of banking,* and for that purpose shall, and does hereby, establish a system of banking *owned, controlled,* and *operated* by *it* under the name of the Bank of North Dakota."

Section 1 is a complete answer to that question. It speaks for itself. Its meaning is plain. It cannot be misunderstood. Does it not say plainly, that the state of North Dakota shall engage in the banking business? Does it not say that it shall own that banking business? Does it not say it shall operate that banking business? It says plainly, that *it, the state of North Dakota,* shall do a banking business, and it says, also, in § 22, that "civil actions may be brought against *the state of North Dakota,* not against the Bank of North Dakota, on account of causes of action claimed to have arisen out of transactions connected with the operation of the Bank of North Dakota, etc."

Section 21: "*Title to property* pertaining to the operation of the bank shall be obtained and conveyed in the name of *the State of North Dakota,* Doing Business as *the Bank of North Dakota.* Written instruments shall be executed in the name of *the state of North Dakota, signed* by any two members of the *Industrial Commission,* etc."

All of these statutory provisions so plainly written in simple language are easy of comprehension. They all mean but one thing, and that is, that the state of North Dakota, in its sovereign capacity, is

engaged in the banking business, as it may lawfully do, by the provisions of § 185 of the Constitution as amended, and chapter 147 of the Laws of 1919, and other laws enacted to carry the intention of that act into effect.

There is not a word in the act creating an agency which shall engage in the banking business, but the act plainly provides that the *state itself* shall engage in the banking business. No amount of elaboration can make this statute plainer than it is. It is susceptible of but one construction, and it is that which we have given it.

Again, the majority opinion asks, and in asking assumes, something which does not exist, to wit, the agency.

"Does this agency function the same as the state?"

The answer is, It is not an agency functioning, for no agency exists, but it is the state that is functioning in its sovereign capacity.

Another question: "Why does this agency do a business under a distinct name, and all of its dealings under the head "Bank of North Dakota?"

Again, the word "agency" is improperly and unauthoritatively used, contrary to any intent of chapter 147. But the answer to that question is: That § 1 of chapter 147 provides that *the state of North Dakota* shall engage in the business of banking, under the name of the Bank of North Dakota. That means that when the state of North Dakota engages in the business of banking, in its sovereign capacity, *its* transactions in the banking business shall be transacted under the name of the Bank of North Dakota, and, as explained in my previous dissent, the words "under the name of the Bank of North Dakota" are merely descriptive, and are used to distinguish the engagements of the sovereign state of North Dakota, in business of banking, from its engagements, in its sovereign capacity, while engaging in the mill and elevator business, etc.

The language and intent of the statute in this regard are so plain as not to admit of controversy. They are self-evident.

The next question asked is:

"Are its funds (state of North Dakota, Doing Business as the Bank of North Dakota) public funds?"

In answering this question, we return to § 185 of the Constitution as amended, which authorizes the state, in its sovereign capacity, to

engage in the banking business. Section 9 of chapter 147 provides:

"The Bank of North Dakota may receive deposits from *any source,* including the United States government and any foreign or domestic individual, corporation, association, municipality, bank, or government. Funds may be deposited to the credit of the Bank of North Dakota in any bank or agency approved by the Industrial Commission."

If public funds of a county, township, or municipality are deposited in the Bank of North Dakota, they remain public funds of the county, township, or municipality, and are deposited with the state of North Dakota, in its sovereign capacity, exercised in doing a banking business in accord with the authority conferred by § 185 of the Constitution as amended, and chapter 147 of the Laws of 1919, and other laws enacted to carry that act into effect; and the obligations and indebtedness, if any, created, are the direct indebtedness of the state of North Dakota, in its sovereign capacity, engaged in the banking business.

Whether any such indebtedness exists is a question to which we will later refer, and to some extent then discuss, though no discussion thereof is proper in this case.

The next question asked reads thus: (Further questions asked in the majority opinion will be indicated by the word question.)

"Is a deposit made by Jones, a private person, made a public fund, subject to disbursement by the state in payment of governmental expenses of the state?"

Section 9, supra, authorizes the receiving of deposits by private persons, and such a deposit would be and remain a private deposit, with a public institution, to wit, The State of North Dakota, Doing Business as the Bank of North Dakota.

Governmental expenses of the state of North Dakota are all provided for by law, and hence no necessity of using the deposits of private persons to pay governmental expenses.

Is not the salary of each of the judges of this court always provided for by law? Likewise, the governor, the legislators, and all other state officers and officials? Clearly, the question asked is superfluous and meaningless.

Question: "When $1,000,000 was borrowed in Chicago and a note given therefor, was such a note a direct indebtedness of the state or of the bank?"

The answer is clear, that it was the indebtedness of the state, for it is the state of North Dakota that is engaged in the banking business, in its sovereign capacity, and this in pursuance of article 185 of the Constitution as amended, and chapter 147 and laws supplementary thereof. No other answer is possible.

Also, it may be observed, the $1,000,000 or $2,000,000, or whatever the amount may have been, of collateral security in the way of bonds, which were deposited with the Chicago Bank, to secure the $1,000,000, were the property of the state of North Dakota, in its sovereign capacity, and when the state of North Dakota, in its sovereign capacity, and in doing business as such, as the Bank of North Dakota, borrowed that $1,000,000, it, we may observe, did not increase its indebtedness a single dollar. For the Chicago Bank at all times had in its possession more property of the state of North Dakota, in the form of its bonds, than it had loaned money to the State of North Dakota, Doing Business as the Bank of North Dakota.

Question: "Were the millions of dollars on deposit in this bank in July, 1919, deposited by municipal subdivision, private banks, and private individuals, state public funds, and funds for which the state was directly obligated as such?"

We will answer this question in connection with the obiter dicta discussion thrown into the majority opinion, relative to the constitutional limitation of state indebtedness.

We wish now to answer one further question asked in the majority opinion, which is as follows:

"Was the United States Shipping Board Emergency Fleet Corporation created by the United States, with a capital stock of $50,000,000 all owned by the United States, and stated by congressional act to be considered a government establishment, the United States, or, an agency thereof?"

Answer: It was neither. It was just a simple, plain corporation, and the United States Supreme Court applied the same reasoning to it as I have analyzed in my previous dissent, in the Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244, and Briscoe v. Bank of Kentucky, 11 Pet. 257, 9 L. ed. 709. The United States Supreme Court, in the case of United States v. Strang, 254 U. S. 491, 65 L. ed. 368, 41 Sup. Ct. Rep. 165, in analyzing the nature and

functions of the United States Shipping Board Emergency Fleet Corporation, said of it, in an opinion written by Mr. Justice Reynolds:

"Counsel for the government maintain that the *Fleet Corporation* is an *agency* or *instrumentality* of the *United States*, formed only as an arm for executing purely governmental powers and duties vested by Congress in the President, and by him delegated to it; that the acts of the corporation within its delegated authority are the acts of the United States; that therefore, in placing orders with the Duval Company in behalf of the Fleet Corporation, while performing the duties as inspector, Strang necessarily acted as agent of the United States. The demurrer was properly sustained.

"As authorized by the Act of September 7, 1916 (39 Stat. at L. 728, chap. 451, Comp. Stat. § 8146a, Fed. Stat. Anno. Supp. 1918, p. 785), *the United States Shipping Board* caused the Fleet Corporation to be *organized* (April 16, 1917) under laws of the District of Columbia, with $50,000,000 capital stock all owned by the United States, and it became an operating agency of that board. Later, the President directed that the corporation should have and exercise a specified portion of the power and authority in respect of ships granted to him by the Act of June 15, 1917 (40 Stat. at L. 182, chap. 29), and he likewise authorized the Shipping Board to exercise, through it, another portion of such power and authority. See The Lake Monroe (Re United States) 250 U. S. 246, 252, 63 L. ed. 962, 966, 39 Sup. Ct. Rep. 460. *The corporation was controlled and managed by its own officers, and appointed its own officers,* and appointed its own servants and agents, who *became directly responsible* to it. Notwithstanding all its stock was owned by the United States, it must be regarded as a *separate entity.* Its inspectors were not appointed by the President, nor by an officer designated by Congress; they were subject to removal by the corporation only, and could contract only for it. *In such circumstances, we think they were not agents of the United States, within the true intendment of § 41.*"

Then, the United States Supreme Court cites in support of these contentions, Bank of United States v. Planters' Bank, and other similar cases, including Briscoe v. Bank of Kentucky. The same authority is cited in the majority opinion of this court, in its endeavor to show that the state of North Dakota was not, in its sovereign capac-

ity, engaged in the banking business, but that the Bank of North Dakota was a private banking institution, all of which authority, I conclusively show, through my former dissent, had no application to the questions, circumstances, or conditions involved in this case.

It is not necessary to elaborate upon the opinion of the United States Supreme Court, in the case of United States v. Strang, supra. So plainly it is against the theory of the majority opinion that it would be superfluous to make further comment upon it. It speaks for itself.

Since we have finished with that case, let us, now, take a case or state of facts which will, in reality, show the United States government, in its sovereign capacity, engaged in business, and thereby determine its course of conduct when it is so engaged. When the United States formally and constitutionally declared a state of war to exist between the United States and the Empire of Germany and its allies, it thereafter proceeded to directly engage in business in many respects. One illustration will be sufficient.

President Wilson, by virtue of the power reposed in him as Commander in chief of the United States Army and Navy, and for war purposes, by a proclamation, duly issued, took over and operated during the period of the war, and for one year thereafter, all, or practically all, of the railroads of the United States. Such railroads were all operated and controlled, absolutely, by the United States government during the time for which they were so taken over and retained.

The President appointed a director general to control and operate such railroads. In other words, the United States, in its sovereign capacity, through President Wilson, did this, just as the state of North Dakota, acting in its sovereign capacity, created the Industrial Commission to manage the banking business of the state of North Dakota, and the mill and elevator business, etc., and which Industrial Commission appointed a director general or manager of the banking business of the state of North Dakota.

Now, the United States, in its sovereign capacity, did operate and control those railroads during all the time above mentioned, and it, among other things, became subject to suit for damages for its negligence in the operation of those railroads. That suit was authorized to be brought against the Director General, but the suit in fact was

against the United States. For instance, if an employee of the United States, assisting in operating the railroads, for example, a brakeman, who, through the negligence of the United States, in the operation of the railroad, should be injured, by having his legs cut off, sustaining thereby great and irreparable damage, against whom, let us ask, should the employee bring the suit? He would bring it against the Director General, who represented the United States government; and let us suppose that he recovered a judgment of $10,000, could he get an execution out and levy upon some of the property of the United States, or could he garnishee some of its money in its postoffices? No. Nothing of this kind.

The judgment, while nominally against the Director General, was, in fact, a charge against the United States government, and was, in due course, paid out of the United States Treasury, either from profits earned by the operation of the railroads by the government, or by appropriations of Congress, to make up any deficiencies which accrued to the United States in its operation of the railroads.

Who did the Director General represent while acting in his position? The answer is plain: The United States government. If a suit were brought against the Director General, against whom, in fact, was it brought?

The answer must be, against the United States.

If the Director General made an order, as he did make thousands of them, with reference to the conduct of the railroads, whose order, in fact, was it?

Answer: It was the order of the United States government.

If the Director General placed an order for the construction of 5,000 new freight cars, who became responsible for the payment of them?

Answer: The United States government, and they were paid for out of the United States Treasury.

If a wreck occurred on the railroad, by reason of trains meeting in collision, and this through the negligence of some employee of the United States, engaged in assisting in the operation of the railways, and there resulted $100,000 in damages, which were recoverable by an action, who was liable in damages?

Clearly, the United States government.

Likewise, the United States government, through President Wilson, increased the freight and passenger rates. Whose act was that but that of the United States government? And that act or order was by members of this court who signed the majority opinion in the present case, with the exception of Justice Bronson, in the case of State ex rel. Langer v. Northern P. R. Co. 43 N. D. 556, 172 N. W. 324, declared illegal; they in effect said, the United States government had no authority to increase such rates and fares. The writer hereof, however, dissented from the majority in that case, and said in his dissenting opinion, the United States government did have the right and authority to increase such rates and fares.

From the decision of the majority, in that case an appeal was taken to the Supreme Court of the United States, and the decision of that court in effect made the dissenting opinion of the writer hereof in that case the law of that case. In other words, it, in substance, affirmed the dissenting opinion of the writer in that case, and necessarily reversed the opinion of the majority. See Northern P. R. Co. v. North Dakota, 250 U. S. 135, 64 L. ed. 897, P.U.R.1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878.

So that we discern the United States government, in its sovereign capacity, did go into the railroading business, and during that time, no matter through whom the act was done, with reference to the management and operation of the railways, all of those acts were the acts of the United States government; and if the railways were in many instances negligently operated, so as to result in damages, the United States became answerable for those damages, and never denied liability after such damages were properly established, but paid them in due course through the Treasury of the United States. See Gladstone Eq. Exch. Co. v. Hines, ante, 454, 182 N. W. 763.

The United States also took over the telephone and telegraph lines, or most of them, within the United States. It took over various other industries and operated them, in its sovereign capacity. In other words, the United States, in its sovereign capacity, was doing business. It had engaged in industry, as it then lawfully might do, just as the state of North Dakota, by § 185 of the Constitution as amended, was duly authorized to engage in industry.

The state of North Dakota, in its sovereign capacity, doing business

as the Bank of North Dakota, or doing business as the Mill & Elevator Association, or as the Home Building Association, is operating and functioning in its sovereign capacity, and its business is carried on by those who, by legislative authority of the sovereign state, are authorized to carry it on, to wit, the Industrial Commission, just the same as the business of railroading was carried on for the United States, by all those employed by the United States to carry on that business, and who, while so employed, were employed by and acting for the United States. It operated and controlled the railways, in its sovereign capacity; and that situation, and that only, is parallel with the state of North Dakota, in its sovereign capacity, engaging in the different businesses heretofore mentioned, including the banking business.

Principles of law and rules of construction thereof applicable to the United States, when so engaged, are analogous to those principles of law and rules of construction which must be applied to the state of North Dakota, in its sovereign capacity, while engaged in industry and business, as authorized by § 185 of our Constitution as amended, and chapter 147 of the Laws of 1919, and laws enacted supplementary thereof.

Applying this test, we can reach but one conclusion, and that is, the state of North Dakota is engaged in business in its sovereign capacity. It did not create any corporations or associations, to transact that business for it. But the state of North Dakota, in its sovereign capacity, is transacting all that business, by and through the Industrial Commission, duly authorized and created by law, the membership of which consists only of state officers, to wit, the governor, commissioner of agriculture and labor, and the attorney general, none of whom receive any increased compensation for their services, but who at all times, as state officers and as members of the Industrial Commission, are executing the sovereign powers of the state of North Dakota.

We now approach the duty of answering another and a final question asked in the majority opinion, viz.: "Were the millions of dollars on deposit in this bank in July, 1919, deposited by municipal subdivisions, or private banks and private individuals, state and public funds and funds for which the state was directly obligated as such?"

By this question, the majority seek to introduce into this case the

question of the constitutional debt limit of the state. For what reason has the majority of this court introduced this question? It is nowhere involved in the case. It is not an issue nor a point in the case. It has not been raised by either side. It is not in the pleadings nor the record. It has been the universal rule of this court, and especially has it been the rule of the members who signed the majority opinion, that a constitutional question would not be decided unless presented on the appeal, and not *then* unless a decision thereof was *necessary* to a decision of the case. In other words, if a case is presented before this court, involving a constitutional question, as well as other points, and it can be decided upon the other points, without deciding the constitutional question, that is the course that is pursued.

In view of that rule, I am unable to comprehend the reason for the interpolation here of the question of the constitutional debt limit. A discussion thereof, as we view the matter, can only have the effect to distract attention from, and obscure, the real questions in this case, which are such only as I have stated in my former dissent.

Manifestly, anything said in the majority opinion, or in my dissent, or that I may say in this further dissent on that question, can be nothing but obiter dicta. In other words, it will be of no force nor effect. It will amount to nothing, and decides nothing.

When the question of the constitutional debt limit is properly and legally presented to this court, and it becomes necessary to determine that broad question in all its aspects, I shall not hesitate nor fail to analyze that question most thoroughly; nor shall I have any hesitation nor fear to express myself at that time, fully, on that question; and I have not the least doubt at that time, that I shall declare what I believe to be the constitutional debt limit. At that time, also, it will be the proper time to determine what, in fact, is a debt, or what is indebtedness, as those terms are to be defined in determining the constitutional debt limit as it exists at this time. But the inquiry is, whether the millions of dollars on deposit in the bank in July, 1919, were state public funds. In other words, the question is: Was there a liability on the part of the state to repay such deposits? Thereby, intimating that the state was in debt to that extent.

Well, let us see. Let us assume that, July, 1919, the state of

North Dakota, Doing Business as the Bank of North Dakota, received $10,000,000 of deposits, of various kinds, including deposits by private persons, associations, or corporations. This would nominally create the relation of debtor and creditor between the state of North Dakota and those depositors, and the State of North Dakota, Doing Business as the Bank of North Dakota charges itself on its books with the $10,000,000 of deposits.

Now, what does the state do with those $10,000,000 deposits? It redeposits the same in various banks of the state, both national and state, and perhaps a portion thereof is deposited in national and state banks outside of the state. Then, on its books it charges against all those banks, in the respective amount deposited with each, all of the $10,000,000. Now, by that transaction, has the state increased its indebtedness a single dollar? Will the books of the state, which it keeps in doing its banking business, show that it is in debt a single dollar by that transaction? Has the state, in fact, in reality increased its indebtedness? Or, if the state of North Dakota, doing a banking business, invests part of those deposits in United States bonds, or warehouse receipts, or assets which it may lawfully purchase, which are worth a hundred cents on the dollar, or an asset which is secured by two or three times its face value, has the state by these transactions created any debt?

We will set forth the expression of the Supreme Court of the United States on that principle. In the case of Darrington v. Bank of Alabama, 13 How. 12, 14 L. ed. 30, the Supreme Court of the United States speaking through Mr. Justice McLean, used the following language:

"The bank had not only an ample fund for the redemption of its paper, but a summary mode was provided by which the payment of its bills could be legally enforced. And the directors were personally liable, if the issues of the bank exceeded twice the amount of its capital paid in. And besides, the notes and bills of exchange taken on its discounts enlarged the means of the bank, and increased the security of the bill holders. The charter of the bank gave to it all the means of credit with the public, that banks usually have or could desire. That some reliance may have been placed on the guaranty of the eventual payment of the notes of the bank by the state may be

admitted. But this was a liability altogether different from that of a state on a bill of credit. *It was remote and contingent.* And it could have been *nothing more than a formal responsibility, if the bank had been properly conducted.* No one received a bill of this bank with the expectation of its being paid by the state."

Now, why was it that the Supreme Court of the United States stated that the liability of the state on its guaranty of the payment of the notes of the banks of Alabama was remote, contingent, and nothing more than a formal responsibility, if the bank had been properly conducted? Certainly, it was because the bank being properly conducted, and its deposits being maintained intact, or in the equivalent of assets worth a hundred cents on the dollar, and this would be true if the bank were properly conducted, the state of Alabama would have no liability on its guaranty.

The state Bank of Alabama was, under certain restrictions of the Constitution, duly authorized, and in pursuance thereof the general assembly of that state were authorized to establish a state bank with branches.

In 1823, the state bank was established by funds of the state then in the treasury, and a loan obtained from an issue of state bonds. In 1832, the bank at Mobile was established, with a capital stock of $2,000,000, procured from a sale of the bonds of the state. The Bank of Alabama was organized as a corporation, and, by the charter, a president and fourteen directors were annually elected by the legislature. The corporation was authorized to issue notes of a denomination of not less than $1. The ordinary powers of a banking corporation were conferred, with a prohibition of owing debts aggregating twice the amount of capital; and the directors were made personally responsible for any excess indebtedness of the bank assented to by them.

The state of Alabama was the only stockholder of the bank. Certain bills were issued by the bank. In the charter creating the bank, the credit of the state was pledged to redeem the notes of the bank, and it was with reference to that pledge, or in a sense guaranty, that the United States Supreme Court used the above language, demonstrating that such liability of the state could only be contingent or formal, etc., if the bank were properly conducted.

So, we may reason, if the State of North Dakota, Doing Business as the Bank of North Dakota, properly conducts that banking business, and receives $10,000,000 deposits from various sources, and redeposits the same in other banks within the state, or mostly within the state, it would seem to a reasonable mind that the liability of the state of North Dakota for such deposits would be a mere contingent or formal responsibility. In other words, there would likely, in fact, be no debt, or indebtedness, thereby actually existing. For, it at all times has on redeposit the same amount of money which it received from the depositors to repay them, or it has the equivalent thereof, in assets worth a hundred cents on the dollar. The indebtedness, in these circumstances, would in all probability be properly denominated as merely nominal or formal.

In other words, the pertinent query is: If the state, in its sovereign capacity, doing a banking business, receives $10,000,000 of deposits, and retains the same, or redeposits it, and at all times has possession or control of it, or if part of it has been invested in gilt-edged assets, and it has those assets, all of which are equivalent to the $10,000,000, has the state incurred any indebtedness? This, and kindred questions, will be analyzed to their finality, when the question of the constitutional limitation of the state's indebtedness is presented in all its aspects. It is impossible and improper to go into that question in this case. It was not presented to the trial court, and is not in the record on appeal presented here. Further obiter discussion of that subject would be useless.

The issues presented in this case are simple and clearly defined. They should not be obscured by the introduction of extraneous questions in no way involved in the case.

But Justice Birdzell has also filed a long opinion on rehearing, in which he introduced severel additional constitutional questions, none of which are involved in this case. Nor are they contained in the record, nor presented in the appeal. All of them are absolutely extraneous to the questions involved in this case, and which are presented by the record. As above stated, the only effect of introducing such extraneous questions is to obscure the real questions involved in this case, which are only two, as shown in my former dissent.

Should the final decision of this case be delayed a few days longer,

it would appear that some of the majority will have, perhaps, discussed in their opinion almost every provision of the Constitution and the amendments. All such discussion is merely obiter in this case, and nothing less.

Justice Birdzell, in his discussion, uses the following language, in his obiter discussion relating to future indebtedness, and we may examine it by further obiter discussion:

"A concrete example may serve to illustrate the fallacy of the argument. If the funds on deposit, public or otherwise, in the Bank of North Dakota seemed to the management to justify it, the bank might purchase $5,000,000 of the bonds of the mill and elevator series. It would still owe to the depositors the amount of deposits thus invested, but the state would owe the bank a like sum. Then the bank might borrow $4,000,000 elsewhere, pledging these bonds as collateral, in which event the state, if petitioner's argument is sound, becomes indebted to the extent of $9,000,000, only $5,000,000 of which is represented by bonds. Then this $4,000,000 could be used to buy more bonds to serve as collateral for another loan, and so on. What, then, has happened to this provision of the Constitution:

"No future indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes?"

Our learned justice is confounded in two regards: First, as we view it, in his arithmetic, and, second, as to the matter of indebtedness. It is our view, under § 185 of the Constitution as amended, and chapter 147 of the Laws of 1919, and laws supplementary thereof, that the state, in its sovereign capacity, is doing a banking business. This is the fact, and, with this fact in mind, we will analyze Justice Birdzell's "concrete example."

Now, if the state of North Dakota, in its sovereign capacity, doing business as the Bank of North Dakota, purchases $5,000,000 of the bonds of the mill and elevator series, it has received thereby property just as valuable as the money with which it parted. It did not, in fact and in reality, thereby create any indebtedness. The state of North Dakota would owe the depositors the $5,000,000, but it has then in its possession $5,000,000 of assets, the mill and elevator bonds so purchased. Then, supposing the state of North Dakota, doing

business as the Bank of North Dakota, should, as the concrete example assumes, borrow $4,000,000. It then has received, and again has in its possession $4,000,000, and the party from whom it borrowed that $4,000,000 yet has $1,000 of the state's property, in the form of bonds, in excess of the $4,000,000 which he loaned to the state. In other words, the state still has, and owns, just as much property and money as it invested in the bonds in the first place.

To make the illustration plainer, we will assume that the state should take the $5,000,000 of mill and elevator bonds, which it so purchased, and use them as collateral, and borrow $5,000,000 on them. It would, then, have $5,000,000 in its possession, which would be the same amount it invested in the mill and elevator bonds. How, in all of these transactions, has the state increased its indebtedness?

In all such transactions, or assumptions, it must be assumed and conceded that the bonds so purchased would be of the value of 100 cents on the dollar, so that a thousand dollar bond is equal in value to a thousand dollars in money. In other words, has the state increased its indebtedness by the transaction? Is there, in fact and reality, any indebtedness, or increase of indebtedness, except as a matter of bookkeeping?

The bonds assumed to be purchased must be rated at their par value. Otherwise, the state would not purchase them. If they are worth their face value, would the mere re-exchange again of them, for money, increase the state's indebtedness? If there were, in fact and reality, no increase in indebtedness, could the provision of the Constitution referred to be invoked? Would there not have to be an actual, real, and bona fide increased indebtedness, and not a mere bookkeeping indebtedness, before that provision of the Constitution would be set in motion?

The trouble with arguments such as are contained in Mr. Justice Birdzell's opinion, in the regard above stated, is the same trouble that occurs in Mr. Justice Bronson's opinion. They do not seem to concede that the state of North Dakota, under § 185 of the Constitution, is actually engaged, in its sovereign capacity, in the banking business. They do not seem to properly discuss or construe or notice, the part of § 185 of the Constitution as amended, which authorizes the

state to engage in any industry, enterprise, or business not prohibited by article 20.

But that provision is a part of the Constitution, and equally as important as other provisions of it, and this is a subject we will consider a little later, in connection with what Justice Bronson has to say in his opinion, with reference to § 185 of the Constitution as amended; or rather with what he has not to say in that regard, and our reasoning there will apply to more of Justice Birdzell's opinion.

In the majority opinion on rehearing, we find the following:

"The dissenting justice refers to § 185 of the Constitution, which provides that the state may not loan or give its credit in aid of any individual, association, or corporation. The Bank Act, however (§ 15), states that the Bank of North Dakota may make loans to an individual, association, or private corporation. Is this section of the act unconstitutional because the bank is the state, or rather is it to be said that this agency, as an agency, possesses the function so to make loans?"

Certainly, that statement does no justice to the erudition of the learned justice who penned that language. He has forgotten to consider that § 185 as amended authorized the state of North Dakota to engage in industry and enterprise. It is thus authorized to engage in the enterprise of banking, and while engaged in that enterprise, it may, in strict pursuance of the constitutional right secured to it under § 185 as amended, make loans to individuals, associations, or private corporations.

But, if § 185 as amended is erroneously construed, or if not given force nor effect, then the right and authority of the state to loan its credit or money to a private individual, association, or corporation, no longer exists. But if, as we believe, the original majority opinion holds that the Bank of North Dakota, is a private bank, or a private institution, and that is the universal construction placed upon that opinion, how, then, can the majority of this court who signed that opinion justify the state in loaning to their so-called private association or bank or institution, $2,000,000? That would be the loaning of the money and credit of the state to a private institution (if the majority opinion is correct, which it is not), in contravention not only of § 185 as amended, but in contravention of it before it was amended. The

state, in its sovereign capacity doing a banking business, has a constitutional right to loan its credit to private individuals, associations, or corporations, for it is authorized constitutionally to engage in the banking business, by § 185 as amended.

When the state of North Dakota, in its sovereign capacity, doing business as the Bank of North Dakota, loans its money or credit to private individuals, associations, or corporations, it does so in strict accordance with said § 185 of the Constitution as amended. That is its constitutional authority for so doing, and it is done in pursuance of that section of the Constitution.

But, it may be asked, if that be true, what is the meaning of the balance of § 185 as amended, which says:

"But neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association, or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

The first part of that section is as follows:

"Section 185 in article 12 as amended by article 18 of amendment. The state, any county or city may make internal improvements *and may engage in any industry, enterprise* or *business* not prohibited by article 20 of the Constitution." (article 20 relates to prohibition.)

Now, are these provisions in any way in conflict? We think not, and we will endeavor, to the best of our ability, to demonstrate that proposition.

When the state itself is engaged in business, it is engaged in it for a public purpose and a public use, and under that section of the Constitution as amended, it is constitutionally authorized to carry on that business, and it is not prohibited from giving its credit, but is authorized by that section of the Constitution to use its credit in carrying on that business.

But, notwithstanding this, it was just as necessary to retain the prohibition in that section against the state giving its credit to any private individual, association, etc., and we will endeavor to illustrate this by an example.

Let us assume that a private corporation was, in this state, organized for the mining and distribution of lignite coal. Let it be as-

sumed that such private corporation applied to the legislature for a loan or an extension of credit for the purpose of carrying on that private business, and that the legislature should, in compliance with that request, make an appropriation of $2,000,000, as a loan to that private corporation. Could the legislature do this? Could it thus give or loan its credit to this private mining corporation? Is it not prohibited by § 185 as amended, and as § 185 was before it was amended, from doing this, and is this not the reason why that provision is retained in § 185 as amended?

It must not be forgotten that the state is engaged in its sovereign capacity, only in a very limited number of businesses, principally these are the state of North Dakota, in its sovereign capacity, doing a banking business, and in that same capacity, doing a mill and elevator business; and these businesses it is doing for a public purpose and a public use.

But there are hundreds of other different kinds of business carried on in this state by private individuals, associations, corporations, etc., with which the state is in no way interested nor connected, so far as operating them is concerned. It is to prohibit these from applying to the state, through the legislature, to give its credit to them, that it is necessary to retain the prohibition in reference to the state lending its credit to private individuals, associations, or corporations.

It seems quite clear to us that the state of North Dakota, in its sovereign capacity, by § 185 as amended, was constitutionally authorized to engage in industry, enterprise, and business, and that, by that provision of the Constitution, and the laws which we have mentioned in our previous dissent, and other laws supplementary thereof, a few millions of dollars of bonds have been lawfully authorized to issue, for the purpose that the state, in its sovereign capacity, might carry on such businesses.

Great concern is manifested by some, that such bonds have been duly authorized to be issued. They seem to fear that the state will go bankrupt if the sovereign will of the people, approving these industries, is carried out. But we think it was the intention of the sovereign will of the people, by determining to go into these industries, to benefit all the people of this state, and to build up its credit and industries, and to prevent great and irreparable loss annually occurring

to the wealth-producing people of this state; and we think the taxes which the sovereign people have, by law authorized to provide for the payment of these bonds, would be small in comparison with some taxes of which we are about to speak, which are not levied by law, but in a way just as effective, so far as depleting the resources of the wealth-producing people of this state.

Let us assume that the legislature, at its session—assuming that it had the power to do so—had levied a tax of $200,000,000 on the wealth-producing people of this state for the year 1920, and by wealth-producing we mean principally the agricultural interests of this state, every one would be compelled to admit that such a burden would be seemingly unbearable, but we think it is practically common knowledge that such a burden has been imposed, though not by the legislature, on the farmers of this state in the year 1920.

Let us see. The wheat production of this state for that year was approximately 65,000,000 of bushels. At about harvest time, it was worth approximately $2.65 a bushel. The actual cost in raising that wheat was about $2.50 per bushel. In the fall and winter, when the time had arrived, after the farmer had done his plowing and threshing, for him to haul this wheat to market, it was, on the average, worth approximately about $1.25 a bushel.

In any event, he had lost at least a dollar a bushel. In other words, he was compelled to sell his wheat at a dollar a bushel less than it cost him to raise it. This would be about $65,000,000.

Now, in this state, in additon to wheat, the farmer raises oats, flax, barley, corn, potatoes, hogs, cattle, sheep, and many other articles of production not necessary to mention, all of which had a high market value about harvest time, but the prices of which, later in the fall, began to sink rapidly, until they had reached a very low figure. The loss in this regard may not be capable of definite ascertainment, but we do not think anyone who has any knowledge on those subjects would say the decrease in valuation on those articles, excepting wheat, has been less than a hundred millions of dollars, and perhaps was a great deal more than that amount. And we do not think it is an extravagant statement to say, that the farmer's loss, by decrease in value of his products, including wheat, an unnecessary and unwarranted decrease, during the fall of 1920, and later was approximately $200,-

000,000. This loss was an actual loss, being that much less than it cost him to produce those articles. In other words, the farmers of this state have $200,000,000 less after those articles were produced than it cost them to produce them. This, in the face of the admitted fact, that the demand for those articles was just as great at the time the prices of those articles were so reduced as it was at harvest time, when prices were what they should have been.

Can anyone say that in effect this is not a direct tax on the farmers of this state? Now, for twenty-five years or more this situation has existed in this state, and during that time the losses have been annually some greater, or some less, than for the year 1920. That same situation has been prevailing all over the United States, and, as a result of it, the farmers have been thus indirectly taxed out of the ownership of their farms, so that, to-day, approximately 50 per cent of the tillable land of the United States is occupied by tenants. In other words, that percentage of the farmers no longer own their farms.

In some states the percentage is a little less, and in some a little greater, than the amount above stated; and, as further proof of this, we find in the last census report that the population of the cities exceeds that of the country. In other words, a large percentage of the farmers, under this continual, annual loss of selling their products for less than it cost them to produce them, have become bankrupt and have moved to the larger cities, hoping there to settle with their families, and there all of them labor in order to gain the sustenance of life.

In order to prevent this loss, which is fast bankrupting the farmers of this state, the people, in their sovereign power, adopted § 185 of the Constitution as amended, and by laws duly passed by the legislature, referended, and again passed by the people, the state, in its sovereign capacity, is permitted to engage in business.

Our only duty is to construe and interpret those laws, and to try, to the best of our ability, to ascertain the meaning thereof. This, we have done, and we think our interpretation is the correct one.

We are not here going to give any additional extended discussion, with reference to the garnishment proceedings. The contentions which we have made with reference thereto, in our previous dissent, and the conclusions there arrived at in this regard, we think, in the circumstances of this case, are correct.

We conclude this further dissenting opinion by again stating, as we stated in our former dissent, that the real questions involved in this case are:

First, the status of the state of North Dakota; and, second, the right to avail of garnishment process in a proceeding against the state of North Dakota.

And those questions, and those questions only, are the ones which the writer hereof passes on and decides.

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BANKS AND BANKING.

1. Pursuant to constitutional and statutory enactments, the Bank of North Dakota, as an agency of the sovereign power, engaged in the banking business, has a distinct status separate and apart from that of the State itself; this status permits it to function as a distinct and separate agency of the sovereign power. Sargent County v. State, 561.

2. (a) A garnishment proceeding is an action: It creates no specific lien; it seeks to hold the garnishee to a personal liability and judgment, dependent upon his liability to the defendant. It is a remedy separate and distinct from attachment or execution.

(b) Section 8177, Comp. Laws 1913, which relates to executions against the state, has neither reference nor application to a direct garnishment proceeding ancillary to a suit against the Bank of North Dakota.

(c) Where a county has instituted action to recover deposits made in the Bank of North Dakota, and also garnishment proceedings against various state and national banks by reason of redeposits made by the Bank of North Dakota in such banks, it is held, pursuant to the express provisions of Sec. 22, Chap. 147, Laws 1919 (Bank of N. D. Act), that such garnishment proceedings are proper. Sargent County v. State, 561.

BILLS AND NOTES.

In an action upon a promissory note, where the plaintiff alleged that it was a holder in due course, and the defendant, having interposed a general denial, relied upon nonexecution as a defense, it is held:

1. Evidence showing that there was no consideration for the instrument in question has a circumstantial bearing on the issue of execution, and was properly admitted. First Nat'l Bank v. Gallinger, 489.

2. Where a witness for the plaintiff testified to the execution of the instrument by the defendant, evidence of the transaction out of which the note is claimed to have arisen and other transactions taking place at the same time between the witness and the defendant are admissible for their bearing upon the issue of execution. First Nat'l Bank v. Gallinger, 489.

CARRIERS.

In an action against a carrier for negligence in caring for cattle shipped over its line, where the defense was based upon the terms of a shipping contract, it is held:

1. The carrier may be held liable for negligence in an action ex delicto; and there is no failure of proof where there is sufficient evidence to prove breach of duty, and no substantial ground of error where it appears that the carrier was given the benefit of the valid and applicable limitations in the shipping contract. Werner v. U. S. Ry. Administration, 49.

DEPOSITARIES.

1. In an action upon a surety bond, where a bond was given to a county to secure the demand deposits of the county, with interest upon the average daily balances during each month at 3 per cent per annum, pursuant to the proposal of the bank, the county, after default of the bank, is entitled to recover interest upon the principal demand at the legal rate of 7 per cent per annum from the time of the demand made upon the surety until July 1, 1915, and thereafter at the rate of 6 per cent per annum. Stutsman County v. Dakota Trust Co. 228.

ELECTRICITY.

1. In an action by a public service corporation to recover for electric current furnished a city, where, pursuant to a contract for one year, made in 1912, the corporation has furnished electric current for street lighting from year to year and has accepted payment at the rate stipulated in such contract, although in 1914 the city council adopted a resolution canceling such contract and where, in February, 1918, the corporation gave notice of an increased or surcharge rate of 10 per cent upon the theretofore existing rate and continued to furnish such current for such purpose to the city without the city accepting or agreeing to pay such increased rate, and continued thereafter to receive payment for the current furnished under the contract rate stipulated, it is held that the original contract was continued and renewed by practical construction through the acts and conduct of the parties, and that the corporation is not entitled to recover the increased or surcharged rate. Western Elec. Co. v. City of Jamestown, 157.
2. In such action by a public service corporation to recover from a city for electric current furnished in operating city water pumps, where in the franchise to the corporation granted in 1902 it was provided that the corporation should pump water in the standpipe which the city has not located at the rate of $2.50 per 100,000 gallons, and where pursuant thereto until 1910 it furnished such power by means of a steam pump and thereafter, when the city had changed its wells and pumps, furnished electric current for their operation for a period of eight years, all at the rate stipulated in the franchise and at which rate it received payment, and where since August 1, 1918, it has furnished current and has sought to charge the city at the current rate charged to private consumers, all with full notice that the city claimed such service at the prescribed franchise rate, it is held:

   (a) That the corporation was obligated under the terms of its franchise to furnish such electric current at the agreed rate.

   (b) And that the Public Utilities Act (Laws 1919, Ch. 192), effective March 5, 1919, granting to the Board of Railroad Commissioners the power

GUARANTY.

1. The plaintiff is engaged in manufacturing certain medicines, extracts, etc., which it sells at wholesale price to those with whom it contracts, limiting the party, in making sales, to a specific territory. It made a contract with one R. C. Hill, who had theretofore had other contracts with it. The contract contained a provision to pay indebtedness arising under former contracts. At the time defendants signed it, the amount of past indebtedness was not inserted in it. There was a blank space in the contract, where it could be inserted. These defendants signed the contract as sureties. After the execution and delivery of the contract, without their knowledge or consent, the amount of the old debt was filled in the bank by plaintiff. Held: that this was a material alteration of the instrument, and operated to release defendants from all liability under it. Watkins Medical Co. v. Payne, 100.
2. It is further held, in such circumstances, the signing thereof, by defendants, without the statement of the amount of past indebtedness in the blank, did not authorize the plaintiff thereafter to insert it, and plaintiff having done so, the defendants are not estopped to deny their liability on the contract. Watkins Medical Co. v. Payne, 101.

HIGHWAYS.

1. In this case the board of county commissioners of Mercer County made an order establishing a highway. The highway as laid out deviated from the section line, and ran across lands owned by the appellant, Sailer. Sailer took an appeal to the district court from the order of the county commissioners. In his notice of appeal he asserted: (1) That the highway should have been laid out along the section line, and that it was unnecessary to deviate therefrom; and (2) that, in event the highway is laid out according to the order of the county commissioners, he (appellant) will sustain damages in the sum of $2,000, while the county commissioners were irregular or invalid for jurisdictional or procedural reasons. It is held: (1) That appellant cannot be heard to say on this appeal that the order made by the county commissioners was invalid on account of irregularities in the proceedings before the county commissioners. Mercer County v. Sailer, 203.
2. Under U. S. Rev. Stat. Sec. 2477, granting the right of way for highways over public lands not reserved for public use, and the act of the legislative assembly of Dakota territory (Laws 1871, chap. 33), declaring all section lines in the territory of Dakota to be public highways as far as practicable, public highways were located and established upon all section lines within the territory where it was practicable to construct highways. Huffman v. West Bay, 217.

INSURANCE.

JUDGMENT.

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