REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

April 26, 1916 to August 16, 1916.

H. A. LIBBY
REPORTER

VOLUME 34

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1917.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. ANDREW A. BRUCE, Chief Justice.[1]
HON. A. M. CHRISTIANSON, Judge.
HON. LUTHER E. BIRDZELL, Judge.[2]
HON. RICHARD H. GRACE, Judge.[3]
HON. JAMES E. ROBINSON, Judge.[4]

H. A. LIBBY, Reporter.
J. H. NEWTON, Clerk.[5]

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[1] Succeeds Hon. Charles J. Fisk, as Chief Justice.

Elected at the 1916 general election to succeed:

[2] Hon. Charles J. Fisk.
[3] Hon. Evan B. Goss.
[4] Hon. Edward T. Burke.

Appointed to succeed:

[5] R. D. Hoskins.

PRESENT JUDGES OF THE DISTRICT COURTS.

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

OFFICERS OF THE BAR ASSOCIATION.

HON. ROBERT M. POLLOCK, President, Fargo, N. D.
HON. FRED T. CUTHBERT, Vice President, Devils Lake, N. D.
HON. OSCAR J. SILER, Secretary and Treasurer, Jamestown, N. D.

Elected at the 1916 general election to succeed:
[1] Hon. Charles A. Pollock.

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

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

COUNTY COURTS.

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

Constitutional Provisions.

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

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

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

Statutory Provisions.

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

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

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

CASES REPORTED IN THIS VOLUME.

TABLE OF DAKOTA CASES CITED IN OPINIONS.

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

F

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

O. S. LEE v. IMPERIAL ELEVATOR COMPANY, a Corporation.

(157 N. W. 688.)

Trial court — nonsuit — reinstatement of case — discretion — action — dismissal of — relief.

Under the evidence in this case it is *held* that the trial court did not abuse his discretion in relieving the plaintiff from a nonsuit.

Opinion filed March 6, 1916. Rehearing denied April 26, 1916.

Appeal from the District Court of Nelson County, *Cooley*, J.

Affirmed.

H. A. Libby, for appellant.

Where an action set for trial for a day certain, in the district court, and counsel for both parties timely notified, and this at a general term of said court, is dismissed by plaintiff's attorney of record, without prejudice for failure of plaintiff to appear when the case is called for trial, defendant's counsel and witnesses being in court, and ready for trial, and the court so dismisses, and enters in his trial docket a record

of such fact, such dismissal operates to discontinue the case, put an end to it, and the trial court has no jurisdiction to reinstate the case thereafter upon request of plaintiff in person, or through other new counsel. The act of his attorney of record is binding upon him. Weeks, Attorneys, 2d ed. pp. 406, 415, 443, 444; Bradish v. Gee, 1 Ambl. 229, 1 Ld. Kenyon, 73; Gifford v. Thorn, 9 N. J. Eq. 722; Jones v. Williamson, 5 Coldw. 371; Wynn v. Wilson, Hempst. 698, Fed. Cas. No. 18,-116; Chester v. Apperson, 4 Heisk. 639; Shricker v. Field, 9 Iowa, 366; Winchester v. Grosvenor, 48 Ill. 517; Lewis v. Sumner, 13 Met. 269; Smith v. Bossard, 2 M'Cord, Eq. 406; Lawson v. Bettison, 12 Ark. 401; African Methodist Bethel Church v. Carmack, 2 Md. Ch. 143; Greenlee v. McDowell, 39 N. C. (4 Ired. Eq.) 481; Chambers v. Hodges, 23 Tex. 104; Sampson v. Ohleyer, 22 Cal. 200; Russell v. Lane, 1 Barb. 519; Wieland v. White, 109 Mass. 392; Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Jenney v. Delesdernier, 20 Me. 183; Rogers v. Greenwood, 14 Minn. 333, Gil. 256; McLeran v. McNamara, 55 Cal. 508; 1 Co. Litt. 52; Gray v. Gray, 2 Rolle Rep. 62; Coxe v. Nicholls, 2 Yeates, 546.

The order of the trial court so made cannot be revoked by the client. Weeks, Attorneys, pp. 446, 449; Brooks v. Cavanaugh, 11 La. Ann. 183; Weisse v. New Orleans, 10 La. Ann. 46; Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534; Thornton v. Tuttle, 20 Abb. N. C. 308; Harry v. Hilton, 11 Abb. N. C. 448, 64 How. Pr. 199; Bonynge v. Field, 81 N. Y. 159; Faviell v. Eastern Counties R. Co. 2 Exch. 344, 6 Dowl. & L. 54, 17 L. J. Exch. N. S. 297; Fake v. Smith, 7 Abb. Pr. N. S. 108, 2 Abb. App. Dec. 76; Tiffany v. Lord, 40 How. Pr. 481; Hoffenberth v. Muller, 12 Abb. Pr. N. S. 222; Shaw v. Kidder, 2 How. Pr. 244; Barrett v. Third Ave. R. Co. 45 N. Y. 628; Gaillard v. Smart, 6 Cow. 385; People v. New York, 11 Abb. Pr. 66; Bates v. Voorhees, 20 N. Y. 525; Lockwood v. Black Hawk Co. 34 Iowa, 225.

An attorney of record has power to discontinue a suit, and his act is binding on his client. Weeks, Attorneys, p. 447; Gaillard v. Smart, 6 Cow. 385; Davis v. Hall, 90 Mo. 659, 3 S. W. 382.

A plaintiff in a legal proceeding is entitled to control the disposition of his cause, where there is no counterclaim, or affirmative relief demanded by defendant. Nunn v. Givhan, 45 Ala. 370; Fowler v.

Lawson, 15 Ark. 149; Holcomb v. Holcomb, 23 Fed. 781; numerous cases cited on pp. 833–835, Vol. 6 Enc. Pl. & Pr., Mohler v. Wiltberger, 74 Ill. 164; Northwestern Mut. L. Ins. Co. v. Barbour, 95 Ky. 8, 23 S. W. 584.

At any time prior to final judgment or decree, a plaintiff may generally voluntarily dismiss his suit. 6 Enc. Pl. & Pr. pp. 836, 838; Washburn v. Allen, 77 Me. 344; Carrington v. Holly, 1 Dick. 280; Bettis v. Schreiber, 31 Minn. 329, 17 N. W. 863.

And the attorney of record may dismiss without special authority to do so. 6 Enc. Pl. & Pr. pp. 829, 855, 866; Crain v. Hilligrass, 21 Ind. 210; McLeran v. McNamara, 55 Cal. 508; Simpson v. Brown, 1 Wash. Terr. 247; Hunt v. Griffin, 49 Miss. 742; Corbin v. Cedar Rapids, I. F. & N. W. R. Co. 66 Iowa, 74, 23 N. W. 270; Mississippi C. R. Co. v. Beatty, 35 Miss. 668.

Such right exists in the attorney even though the court would expressly deny his application to dismiss. Noble v. Strachan, 32 Wis. 314; Bertschy v. McLeod, 32 Wis. 205.

The entry of the order dismissing, made in the docket by the trial judge, is a sufficient order or record. 6 Enc. Pl. & Pr. pp. 874, 885; Snell v. Dwight, 121 Mass. 348; Winslow v. Otis, 5 Gray, 360; Taft v. Northern Transp. Co. 56 N. H. 417; Dunham v. Carson, 37 S. C. 269, 15 S. E. 960.

Such act amounts to a withdrawal from the court. St. John's Lodge v. Callender, 26 N. C. (4 Ired. L.) 342; Juneau County v. Hooker, 67 Wis. 322, 30 N. W. 357; Peterson v. State, 45 Wis. 535; Schenck v. Fancher, 14 How. Pr. 95.

It is an abandonment of the cause by plaintiff, and carries him out of court and ends the action. 6 Enc. Pl. & Pr. p. 909; Holmes v. Chicago & A. R. Co. 94 Ill. 443; Pacific R. Co. v. Franklin County Ct. 55 Mo. 162; Keator v. Glaspie, 44 Minn. 448, 47 N. W. 52; Delano v. Bennett, 61 Ill. 83; Clark v. Dekker, 43 Kan. 692, 23 Pac. 956.

Such entry by the court is wholly sufficient, even though no formal judgment or dismissal is entered, and puts an end to the case up to that time. 6 Enc. Pl. & Pr. pp. 979, 983, 987, 997, 1002, 1003, and numerous cases; Harris v. Hines, 59 Ga. 427; Brooks v. Cutler, 18 Iowa, 433; Elston v. Drake, 5 Blackf. 540; Ringgold v. Emory, 1

Md. 348; Cartmell v. McClaren, 12 Heisk. 41; Loeb v. Willis, 100 N. Y. 235, 3 N. E. 177; Tootle v. Cahn, 52 Kan. 73, 34 Pac. 401; Heegaard v. Dakota Loan & T. Co. 3 S. D. 569, 54 N. W. 656; Koons v. Williamson, 90 Ind. 599; Wilde v. Hart, 24 Ark. 599; Kain v. Byrd, 1 Stew. (Ala.) 189; Dunkle v. Rotholz — N. J. L. —, 19 Atl. 260; besides numerous other cases cited from Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New York, Ohio, Tennessee and Texas; Evans v. Phillips, 4 Wheat. 73, 4 L. ed. 516; Corsor v. Reed, 21 L. J. Q. B. N. S. 18.

"A complaint once dismissed so far terminates the action that no motion or proceeding can be had in the case, except for the purpose of carrying into effect the order of dismissal." 9 Am. & Eng. Enc. Law, 2d ed. p. 505; Tillspaugh v. Dick, 8 How. Pr. 33; 2 Wait, Pr. p. 517; Greeley v. Winsor, 3 S. D. 138, 52 N. W. 674.

A. V. A. Peterson (*Frich & Kelly* and *S. G. Skulason* of counsel) for respondent.

"A motion to set aside a nonsuit or judgment for dismissal, and to reinstate the case, being in the nature of a motion for reconsideration, is addressed to and rests in the discretion of the court before whom the case was heard and by whom the action was dismissed, and such discretion will not be disturbed or controlled unless there is manifest abuse." 14 Cyc. 460.

"A dismissal or nonsuit will often be set aside where a suit is meritorious and it appears that plaintiff was not culpably negligent and no injury results to the defendant." 14 Cyc. 461; Bradley v. Slater, 55 Neb. 334, 75 N. W. 826.

After reinstatement of case for trial, and after defendant's special appearance and objections, which were overruled by the court, the defendant waived its special appearance and same was converted into a general appearance, by its appeal to this court, where it seeks affirmative relief. Miner v. Francis, 3 N. D. 549, 58 N. W. 343; Lyons v. Miller, 2 N. D. 1, 48 N. W. 514; Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605.

And the verdict here is amply sustained by the evidence, and the jury having passed upon same, its verdict is final. Nilson v. Horton, 19 N. D. 187, 123 N. W. 397, and citations.

BURKE, J. The facts leading up to this appeal are as follows: Plaintiff had brought suit against the elevator company to recover for the conversion of some grain hauled to the defendant's elevator by a tenant. This action and one against the St. Anthony & Dakota Elevator Company were set for trial in the district court at Lakota upon a date certain. Plaintiff was a resident of Glendive, Montana, but happened to be away from home when his attorney wired him this information. Plaintiff's wife, receiving the telegram, called plaintiff on the phone and notified him of its contents. He thereupon wired his attorney in care of the clerk of the district court of Lakota, and took a train for that place. The train upon which he was traveling was due to reach Lakota upon the morning of said day. The telegram, however, through the carelessness of the operator at Lakota, was not delivered for several days after it was received, and not until plaintiff had personally arrived. When the case was called for trial, therefore, neither the judge nor the attorneys had any knowledge of the whereabouts of plaintiff. Defendant was there ready with his witnesses for trial. The trial judge called plaintiff's attorney upon the telephone and asked him what he was going to do. The attorney replied that he had not yet received an answer to his telegram, and did not know the location of his client; that he did not know what he could do with the case, and that the only thing that could be done under the circumstances would be to dismiss both cases. That thereupon the judge made an oral order that the cases be dismissed without prejudice. That at 11:05 A. M. of that day the plaintiff arrived upon the train and advised the court of all the circumstances, including the nondelivery of the telegram, and thereupon the court reinstated the cases for trial, ordering the plaintiff to pay $25 in each case to reimburse the defendant for the delay. The cases then proceeded to trial and resulted in judgment in favor of the plaintiff. Defendant appeals, claiming that the court upon the oral order of dismissal had lost jurisdiction of the cases.

(1) We think it clear that the court had jurisdiction to change his rule and reinstate the cases under the circumstances outlined above. Plaintiff himself had done nothing to secure the dismissal, neither had his attorney, excepting to state that he did not believe he was in a position to go to trial and could do nothing else than to submit to the nonsuit. Neither plaintiff nor his attorney were in the least to blame, and

the application was made within an hour from the time when the court had ordered the cases dismissed. The rule is correctly stated at 14 Cyc. at page 460: "Discretion of court.—A motion to set aside a nonsuit or judgment of dismissal, and reinstate the case, being usually considered as in the nature of a motion for reconsideration, is addressed to, and rests in, the discretion of the court before whom the case was heard and by whom it was dismissed or the nonsuit granted, and such discretion will not be controlled unless manifestly abused. . . . Time for setting aside and reinstatement.—It is competent for a court to reinstate a case during the same term at which it was dismissed." At page 461 it is said: "A dismissal or nonsuit will often be set aside where a suit is meritorious and it appears that plaintiff was not culpably negligent, and no injury results to defendant, and it will not require so strong a ground to set aside a nonsuit as to grant a new trial. Thus, a case may be reinstated where there has been surprise, improvident consent to dismissal by attorney, or failure to give bond for costs through ignorance that it would be required." The cases cited fully bear out the text. Our own court in Colean Mfg. Co. v. Feckler, 16 N. D. 227, 112 N. W. 993, while not directly passing upon this point, strongly intimated that the trial court is vested with broad jurisdiction in relieving parties from defaults taken against them through inadvertence. They say, after setting out the facts upon which they acted: "In the light of the verdict it is too clear for discussion that the trial judge properly granted plaintiff's motion to vacate said default judgment." It is clear to us that the trial court in the case at bar acted within its jurisdiction.

On Petition for Rehearing, filed April 26, 1916.

PER CURIAM. Counsel for appellant has filed a petition for rehearing, which is entitled to brief notice. His major premise to the effect that plaintiff's attorney voluntarily dismissed the actions is, as we view it, unsound. It is in effect so stated in our opinion. Our reason for deeming it unsound is briefly that appellant's construction of what took place is unwarranted. A fair construction of the record discloses that plaintiff's attorney in effect merely informed Judge Cooley in their long distance 'phone conversation that under the circumstances there was nothing for him or his client to do but to submit to a dismissal. Why

should he be held under the facts to have voluntarily moved for a dismissal rather than merely submitting to what he deemed the inevitable, to wit, a dismissal by the court on its own motion for failure of plaintiff to appear and prosecute his case? Plaintiff's counsel had absolutely nothing to gain, and possibly something to lose, by putting his client in the situation of voluntarily dismissing the actions, rather than submitting to a dismissal by the court for nonappearance. But, even if counsel for plaintiff had been personally present in court and had formally moved to dismiss the actions, the result would be the same; for concededly no order or judgment had been entered on such motion, and no record made other than in the minutes of the court, and manifestly, therefore, the court still retained jurisdiction to deal with the situation as it did. It would be nothing less than a travesty on justice to hold that under the conceded facts in this record, the trial court was shorn of all power and jurisdiction to do justice between these parties by reinstating the actions for trial upon terms. The petition is denied.

JAMES SOULES and Roy Butler, Copartners, Doing Business under the Firm Name and Style of Soules & Butler, v. NORTHERN PACIFIC RAILWAY COMPANY, a Foreign Corporation.

(L.R.A.—, —, 157 N. W. 823.)

Opinion filed January 28, 1916.

Surface waters — drain — natural servitude — lower estate — rule — civil law — common law.

1. Both under the civil-law rule as to surface waters and under the so-called common-law or common-enemy rule, a natural drain way must be kept open to carry the water into the streams, and the lower estate is subject to a natural servitude for that purpose.

Note.—In addition to the note referred to in the opinion, 22 L.R.A.(N.S.) 789, which discusses the right of the owner of the lower tenement as against the right of the upper landowner to obstruct surface water in a natural drainage channel, see note in 21 L.R.A. 598, on the correlative rights as to obstruction of surface water.

On the right of lower proprietors to obstruct the flow of surface water, see note in 16 Am. St. Rep. 710.

Natural drain way — ditch — channel — surface waters — jury — findings of.

2. Proof that a drain or ditch receives the surface water of a drainage area of some 168 acres, is several feet in depth, has a well defined channel, and, though it has grass growing at its sides, has a space at the bottom which is worn away by the water to a breadth of 3 or 4 feet, and that such drain or ditch serves to convey the waters of the area into a river or stream, will justify the jury in holding that such drain or ditch is a natural drain way or drainage channel, and this though there is no evidence that the water ran in the same at all times, but merely that the drain or ditch served to convey the melting snows and surface waters.

Lower landowner — duty of — building structure across drain — obstruction.

3. It is the duty of a lower landowner who builds a structure across a natural drain way to provide for the natural passage, through such obstruction, of all of the water which may be reasonably anticipated to drain therein, and this is a continuing duty.

Natural drain way — obstructed — evidence of — by lower landowner — upper landowner — flooding of lands — damages — surface water — unnatural amount — occasioned by storm — proof — burden of.

4. Where there is evidence which tends to show that a drain way is a natural drain way, and that it has been obstructed by a lower landowner, and that such obstruction occasioned the flooding of and injuries to the property of an upper landowner, the burden of proof is upon the defendant or lower landowner, when sued for such damages, to prove that the storm which occasioned the flood was unprecedented; that it could not have been reasonably anticipated, and need not have been provided against.

Storm — unprecedented — evidence of — jury — question for.

5. Evidence examined, and *held* not to be such as to justify a holding, as a matter of law, that the storm in question was so unprecedented that it should not have been anticipated, but rather that the fact was one for the jury to pass upon.

Floods — unprecedented — unusual occurrence — anticipated — community — people — experience of.

6. Extraordinary or unprecedented floods are floods which are of such unusual occurrence that they could not have been foreseen by men of ordinary experience and prudence. Ordinary floods are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen.

Unprecedented flood — conditions — climatic — topographical — drainage basin — danger — anticipated — provision against.

7. In passing upon what is or what is not an extraordinary flood, or

whether it should have been anticipated and provided against, the question to be decided is: "Considering the rains of the past, the topographical and climatic conditions of the region, and the nature of the drainage basin as to the perviousness of the soil, the presence or absence of trees or herbage which would tend to increase or prevent the rapid running off of the water, would or should a reasonably prudent man have foreseen the danger and provided against it?"

Railway company — obstructing natural channel — instructions — damages — measure of — requests.

8. An instruction in an action against a railway company for negligence in obstructing a natural channel and thereby damaging plaintiff's goods, "that if you believe that the plaintiffs are entitled to recover as heretofore instructed, then it is your duty to determine the amount of damages sustained by reason of the flooding of these premises, and they are entitled to make matters whole," is sufficiently definite as to the measure of damages, in the absence of any requested instructions upon the subject.

Hardware — stock of — damaged — flood — value — witness — competency — manager — buying and selling — evidence.

9. One is sufficiently qualified to testify as to the value of a stock of hardware, and to the injury to it by flood and its depreciation in value, who is shown to have worked in a hardware store for at least seven years, to have been manager of such store during such time, and to have had charge of the buying of goods and the fixing of prices at which they should be resold, and to have been in charge of such goods since the damage was done.

Railway company — damages — culvert — insufficiency — drain — evidence — error — surface water — channel.

10. Where a railway company is sought to be held liable for damages by flooding occasioned by an insufficient culvert, it is not error to allow in evidence proof of the fact that prior to the construction of the culvert a pile bridge was maintained across the drain in question. Such evidence tends not merely to show the nature of the drain way, its necessity for the carrying away of the surface water which ran therein, but the fact as to whether the drain way was a natural channel or not.

Railway company — action — damages — culvert — inadequate — cost — proof of.

11. It is not error, in an action against a railway company for failure to maintain an adequate culvert, to allow proof that such culvert could have been provided at a reasonable cost.

Railway company — natural drainage — obstructing — culverts — other floods — other premises — proof of — competent.

12. Where a railway company is sued for obstructing a natural drain way, and not providing sufficient culverts for carrying off the water, it is not error

to allow proof that premises near those of the plaintiffs were flooded in the past, as such evidence tends to show the nature of the drainage district, the course of the water, and generally the necessity of providing for a sufficient outlet for the same.

Cumulative evidence — extent of — trial court — discretion — floods — other districts — drainage.

13. The extent to which cumulative evidence may be introduced is largely within the discretion of the trial court; and where there is much evidence in the record as to the nature of a downpour of rain, a case will not be reversed merely because a trial court has excluded evidence that the flood occasioned no injury to premises in a different hollow or drainage basin, although such hollow or drainage basin was close to the one in question.

Charge of court — considered as a whole — issues — judgment — reversal of — grounds for.

14. The charge to a jury must be taken as a whole, and where such charge as a whole clearly presents the issues of a case, mere technical defects in portions thereof are not grounds for a reversal of the judgment.

Expert evidence — conclusiveness — data — formula — basis — drainage — area — culverts.

15. The conclusiveness of expert evidence depends largely upon the similarity of the data or formula upon which it is based, and proof of the adequacy of a drain for a certain area and that a culvert was constructed in accordance with prescribed formula which were computed on areas of a certain size, is not conclusive as to the adequacy of such culvert unless it is shown that the topography of the drainage areas are similar, it being clear that the flowage even from the same downpour would be much greater in a given time in a hilly basin than on an almost level plain.

Opinion filed January 28, 1916.

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

Action to recover damages for the flooding of property occasioned by an insufficient culvert. Judgment for plaintiff. Defendant appeals. Affirmed.

Statement of facts by BRUCE, J.

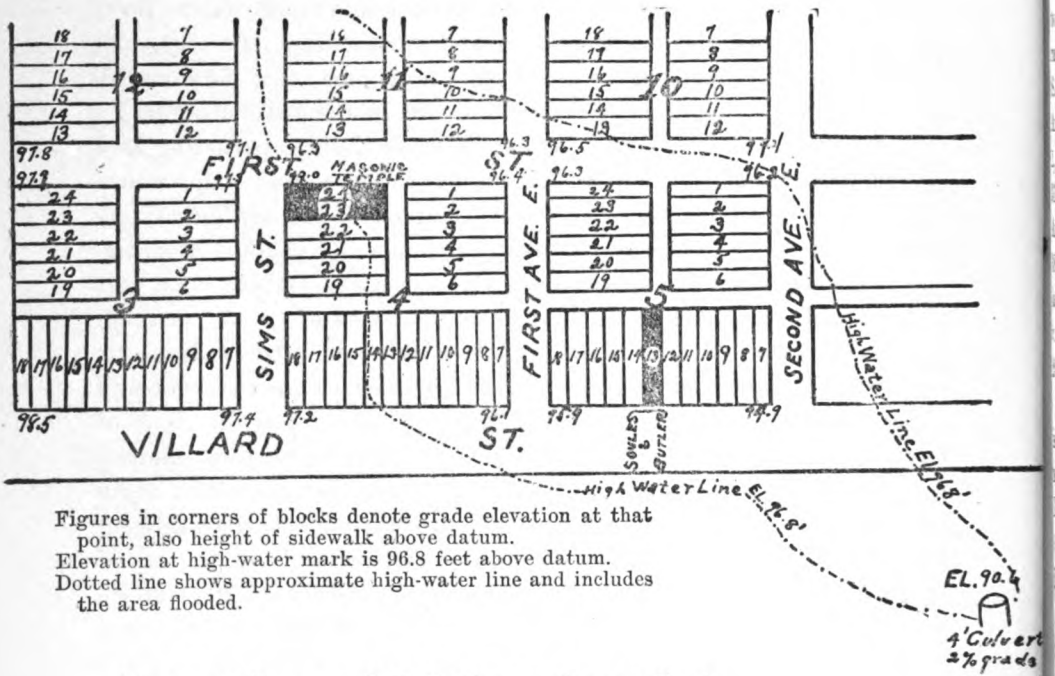
This is an action to recover damages for the flooding of the plaintiffs' stock of goods which were contained in a retail hardware store in the city of Dickinson, North Dakota. The complaint alleges that the defendant company "on July 28th and for a long time prior thereto owned, operated, and maintained a right of way for its

railroad extending in an easterly and westerly direction in the city of Dickinson; that upon said right of way on said date and for a long time prior thereto, the defendant maintained a high grade or embankment of earth rising several feet above the surrounding surface of the land; that said grade or embankment extended in a generally easterly and westerly direction through the city of Dickinson; that said grade or embankment crosses a natural water course between the freight depot and the passenger depot of the defendant company in such city; that said water course has a well-defined bed and banks, and a stream of water flowing through said water course; that said water course and bed thereof is the natural drainage for surface and storm waters for a large part of the city of Dickinson and surrounding territory, and drains the surface and storm water from a large area; that the premises of the plaintiffs, hereinbefore described, are in the basin drained by said water course; that the defendant company, in constructing said embankment through the city of Dickinson and across said water course and channel of drainage, unnecessarily, carelessly, and negligently entirely filled up and destroyed said water course and channel of drainage, and in the place and stead thereof put through its embankment, part way, a small crooked open ditch and the other part of the way a small iron culvert connecting with said ditch, which said ditch and culvert were entirely insufficient in size and failed to carry off the waters of said water course or storm waters of said drainage area or basin in times of rain, and were so carelessly and negligently constructed and maintained that it entirely failed to carry off said waters; that because of the negligent construction and maintenance of said embankment, the negligent construction and maintenance of said ditch and culvert, and the lack of size, fall, and capacity of said ditch and culvert, on July 28, 1914, storm waters dammed up against said embankment and flowed over and upon the hereinbefore described premises of the plaintiffs; that on July 28, 1914, and for a long time prior thereto, the defendant had notice and knowledge of the fact that said enbankment entirely destroyed said drainage channel, and that said ditch and culvert were insufficient to carry off the waters of said drainage basin and channel in times of rain."

The answer of the defendant was in all respects a general denial, but contained the added allegation and defense that "defendant alleges the fact to be that the damage and injury suffered by the plaintiffs

herein were occasioned and caused by an unusual and unprecedented storm and flood which occurred in the city of Dickinson and vicinity on or about the 28th day of July, 1914, and said damage was not in any manner caused through any negligence on the part of the defendant railway company." A verdict was rendered in favor of the plaintiff for the sum of $2,500, and from the judgment entered therein this appeal has been taken.

Plat of part of the city of Dickinson, showing area flooded July 28, 1914.



Figures in corners of blocks denote grade elevation at that point, also height of sidewalk above datum.
Elevation at high-water mark is 96.8 feet above datum.
Dotted line shows approximate high-water line and includes the area flooded.

Watson & Young and *E. T. Conmy,* for appellant.

The evidence shows that if any waters were obstructed by this defendant and thrown back on the property of plaintiffs, they were mere storm or surface waters, and the defendant cannot be held liable for any damage so caused. 30 Am. & Eng. Enc. Law, 330; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Hagge v. Kansas City Southern R. Co. 104

Fed. 391; Chadeayne v. Robinson, 55 Conn. 345, 3 Am. St. Rep. 55, 11 Atl. 592; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Gannon v. Hargadon, 10 Allen, 106, 87 Am. Dec. 625; Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946, 57 N. W. 522; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519; Edwards v. Charlotte, C. & A. R. Co. 39 S. C. 472, 22 L.R.A. 246, 39 Am. St. Rep. 746, 18 S. E. 58; Cass v. Dicks, 14 Wash. 75, 53 Am. St. Rep. 859, 44 Pac. 113.

In jurisdictions where the common-law rule obtains, it is applicable to the obstruction of the flow of surface waters in the construction of railroads. 30 Am. & Eng. Enc. Law, 332; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 1, 37 N. W. 717; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Brown v. Winona & S. W. R. Co. 53 Minn. 259, 39 Am. St. Rep. 603, 55 N. W. 123; Morrissey v. Chicago, B. & Q. R. Co. 38 Neb. 406, 56 N. W. 946, 57 N. W. 522; Baltzeger v. Carolina Midland R. Co. 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358; O'Connor v. Fond du Lac, A. & P. R. Co. 52 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287.

Under the civil-law rule as to surface waters, the lower landowner is bound to receive the waters which flow from the land above, and cannot cast it back upon his neighbor to his damages. 30 Am. & Eng. Enc. Law, 326, 329; Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Wharton v. Stevens, 84 Iowa, 107, 15 L.R.A. 630, 35 Am. St. Rep. 296, 50 N. W. 562.

The common-law rule seems to have been adopted in this state. Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 1, 37 N. W. 717; Missouri P. R. Co. v. Renfro, 52 Kan. 237, 39 Am. St. Rep. 344, 34 Pac. 802; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894; Albers v. Chicago, B. & Q. R. Co. 95 Neb. 506, 145 N. W. 1013.

Sloughs and ravines, through which waters collected from surrounding territory pass in times of freshets from rains and melting snow, but which at other times are dry, are not to be considered water courses. 30 Am. & Eng. Enc. Law, pp. 350, 351; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Ashley v. Wolcott, 11 Cush. 192; Hoyt v. Hudson, 27

Wis. 656, 9 Am. Rep. 473, 41 Wis. 105, 22 Am. Rep. 714; Angell, Watercourses, 5th ed., § 4; Barnes v. Sabron, 10 Nev. 218, 4 Mor. Min. Rep. 673; Howard v. Ingersoll, 13 How. 427, 14 L. ed. 209; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Weis v. Madison, 75 Ind. 241, 39 Am. Rep. 135; Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519.

There is no evidence to show that the damage which plaintiffs suffered was caused by the negligence of defendant, or that any act of defendant was the proximate cause of the injury. The defendant's only duty was to build a culvert in the ordinary and usual manner sufficient to take care of the ordinary storm waters which might accumulate or pass through it, through the hollow or ravine or drainage channel. Hughes v. Anderson, 68 Ala. 280, 44 Am. Rep. 147; Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412; Savannah, A. & M. R. Co. v. Buford, 106 Ala. 303, 17 So. 395; Alabama G. S. R. Co. v. Shahan, 116 Ala. 302, 22 So. 509, 115 Ala. 181, 67 Am. St. Rep. 20, 22 So. 449; Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33; Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 5 Am. St. Rep. 532, 15 N. E. 279; Philadelphia, W. & B. R. Co. v. Davis, 68 Md. 281, 6 Am. St. Rep. 440, 11 Atl. 822; Sullens v. Chicago, R. I. & P. R. Co. 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545; Harrison v. Great Northern R. Co. 3 Hurlst. & C. 236, 33 L. J. Exch. N. S. 266, 10 Jur. N. S. 992, 10 L. T. N. S. 621, 12 Week. Rep. 1081, 25 Eng. Rul. Cas. 411; Central of Georgia R. Co. v. Keyton, 148 Ala. 675, 41 So. 918; Matteson v. New York C. & H. R. R. Co. 40 Pa. Super. Ct. 234; Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; American Locomotive Co. v. Hoffman, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 Ann. Cas. 773; Illinois C. R. Co. v. Bethel, 11 Ill. App. 17; Dorman v. Ames, 12 Minn. 451, Gil. 347; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; State ex rel. Trimble v. Minneapolis, St. P. & S. M. R. Co. 28 N. D. 621, 150 N. W. 463; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 24, 37 N. W. 717.

The burden of proving negligence in a tort action is on him who asserts it, and such rule has full application here. Cameron v. Great Northern R. Co. 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927; Shearm. & Redf. Neg.

§§ 57, 58; Nason v. West, 78 Me. 253, 3 Atl. 911, 15 Am. Neg. Cas. 273; Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Fredericks v. Pennsylvania R. Co. 225 Pa. 23, 73 Atl. 965; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Treichel v. Great Northern R. Co. 80 Minn. 96, 82 N. W. 1110; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; Berninger v. Sunbury, H. & W. R. Co. 203 Pa. 516, 53 Atl. 361.

The acts charged here are not shown to have been the proximate cause of the injury. Karchner v. Pennsylvania R. Co. 218 Pa. 309, 67 Atl. 644; Oakley Mills Mfg. Co. v. Neese, 54 Ga. 459; Texas & P. R. Co. v. Padgett, 14 Tex. Civ. App. 435, 37 S. W. 92; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1012; Sheldon v. Hudson R. R. Co. 29 Barb. 228; Longabaugh v. Virginia City & T. R. Co. 9 Nev. 296; Smith v. Hannibal & St. J. R. Co. 37 Mo. 295; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 509, 53 N. W. 970; Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; White v. Chicago, M. & St. P. R. Co. 1 S. D. 330, 9 L.R.A. 824, 47 N. W. 146; Balding v. Andrews, 12 N. D. 277, 93 N. W. 305, 14 Am. Neg. Rep. 615; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A. (N.S.) 520, 122 N. W. 1000; Andrews v. Kinsel, 114 Ga. 390, 88 Am. St. Rep. 25, 40 S. E. 300; 8 Am. & Eng. Enc. Law 2d ed. 580.

A negligent act, which would not have resulted in injury except for the intervention of an independent cause, does not give rise to a cause of action. Schwartz v. California Gas & Electric Corp. 163 Cal. 398, 125 Pac. 1044; Baltimore & O. R. Co. v. Simpson, 31 Ohio C. C. 349; Coleman v. Kansas City, St. J. & C. B. R. Co. 36 Mo. App. 476; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; Meehan v. Great Northern R. Co. 13 N. D. 443, 101 N. W. 183; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000.

The lower property owner does not have to make provision to care for the waters of an extraordinary and unusual flood or storm. He is only required to provide a way or culvert sufficient to take care of the waters of the ordinary rain and snow. Such is the American doctrine. China v. Southwick, 12 Me. 238; Bell v. M'Clintock, 9 Watts, 119, 34 Am. Dec. 507; Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9, 26 Am. Dec. 111; Everett v. Hydraulic Flume Tunnel Co. 23 Cal. 225,

4 Mor. Min. Rep. 589; Hoffman v. Tuolumne County Water Co. 10 Cal. 413; Wolf v. St. Louis Independent Water Co. 10 Cal. 541, 10 Mor. Min. Rep. 636; Lapham v. Curtis, 5 Vt. 371, 26 Am. Dec. 310; Higgins v. Chesapeake & D. Canal Co. 3 Harr. (Del.) 411; Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457; Tenney v. Miner's Ditch Co. 7 Cal. 335, 11 Mor. Min. Rep. 31; Richardson v. Kier, 34 Cal. 63, 91 Am. Dec. 681, 4 Mor. Min. Rep. 612; Shrewsbury v. Smith, 12 Cush. 177; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 23, 37 N. W. 717; 1 Thomp. Neg. 2d ed. § 72; Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Chicago, R. I. & P. R. Co. v. Buel, 76 Neb. 420, 107 N. W. 590; Southern R. Co. v. Plott, 131 Ala. 312, 31 So. 33; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Price v. Oregon R. & Nav. Co. 47 Or. 350, 83 Pac. 843; Nashville & C. R. Co. v. David, 6 Heisk. 261, 19 Am. Rep. 594; American Locomotive Co. v. Hoffman, 105 Va. 343, 6 L.R.A.(N.S.) 252, 54 S. E. 25, 8 Ann. Cas. 773; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; Egan v. Central Vermont R. Co. 81 Vt. 141, 16 L.R.A.(N.S.) 928, 130 Am. St. Rep. 1031, 69 Atl. 732.

This rule is liberally construed and applied in case of railroads,—they not being held so strictly liable, because of the necessary construction of culverts and embankments, unless it is shown that they are improperly constructed. Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98; Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 24, 37 N. W. 717; Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894.

Especially is this true where the flood is caused by an unprecedented storm or downpour of rain, such a storm or condition as could not have been anticipated, or reasonably provided against. Greiner v. Alfred Struck Co. 161 Ky. 793, 171 S. W. 405; Palmyra v. Waverly Woolen Co. 102 Me. 317, 66 Atl. 646; Grand Valley Irrig. Co. v. Pitzer, 14 Colo. App. 123, 59 Pac. 420; Albers v. Chicago, B. & Q. R. Co. 95 Neb. 506, 145 N. W. 1013; Century Dig. "Waters & Water Courses," § 250; Decennial Dig. "Waters & Water Courses," § 179; Peterson v. Chicago, M. & St. P. R. Co. 19 S. D. 122, 102 N. W. 595; Egan v. Central Vermont R. Co. 81 Vt. 141, 16 L.R.A.(N.S.) 928, 130 Am. St. Rep. 1031, 69 Atl. 732; Pittsburg, Ft. W. & C. R. Co. v. Gille-

land, supra; Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529; Kansas City, P. & G. R. Co. v. Williams, 3 Ind. Terr. 352, 58 S. W. 570; Mulligan v. Pennsylvania R. Co. 225 Pa. 76, 73 Atl. 1058; Baltimore & O. R. Co. v. Sulphur Spring Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Vyse v. Chicago, B. & Q. R. Co. 126 Iowa, 90, 101 N. W. 736; Bristol Hydraulic Co. v. Boyer, 67 Ind. 236; Siegfried v. South Bethlehem, 27 Pa. Super. Ct. 456; Taylor v. Canton Twp. 30 Pa. Super. Ct. 305; Lyon v. Chicago, M. & St. P. R. Co. 45 Mont. 33, 121 Pac. 886; Karchner v. Pennsylvania R. Co. 218 Pa. 309, 67 Atl. 644; Ætna Mill & Elevator Co. v. Atchison, T. & S. F. R. Co. 89 Kan. 38, 130 Pac. 686; Brown v. Chicago, B. & Q. R. Co. 195 Fed. 1007; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 189, 190, 19 L. ed. 909, 912, 913; Harris v. Lincoln & N. W. R. Co. 91 Neb. 755, 137 N. W. 865; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78; Texas & P. R. Co. v. Padgett, 14 Tex. Cic. App. 435, 37 S. W. 92; Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; Duncan v. Great Northern R. Co. 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Bowman v. Eppinger, 1 N. D. 25, 44 N. W. 1000; Finney v. Northern P. R. Co. 3 Dak. 270, 16 N. W. 500; Pirie v. Gillitt, 2 N. D. 255, 50 N. W. 710; Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; McMillen v. Aitchison, 3 N. D. 183, 54 N. W. 1030; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Elliott v. Chicago, M. & St. P. R. Co. 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85; Reynolds v. Great Northern R. Co. 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808.

Opinion evidence is worthless when inconsistent with clearly proved facts or with reason and common sense as applied to other credible evidence. 2 Moore, Facts, § 1236; Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78.

Where there is an established rule of law as to the measure of damages in a particular class of cases, the court should inform the jury as to such rule, and a failure to do so is ground for a new trial. This is true even though no request was made. 2 Thomp. Trials, § 2188; Citizens' Street R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1085, 2 Am. Neg. Rep. 459; Houston & T. C. R. Co. v. Buchanan, 38 Tex.

Civ. App. 165, 84 S. W. 1073; Central of Georgia R. Co. v. Hughes, 127 Ga. 593, 56 S. E. 770; Western Maryland R. Co. v. Martin, 110 Md. 554, 73 Atl. 267; Jageriskey v. Detroit United R. Co. 163 Mich. 631, 128 N. W. 726; Burns v. Pennsylvania R. Co. 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; Otis Elevator Co. v. Flanders Realty Co. 244 Pa. 186, 90 Atl. 624; Baltimore & O. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052; Wilkinson v. North East, 215 Pa. 486, 64 Atl. 734; Quanah, A. & P. R. Co. v. Galloway, — Tex. Civ. App. —, 154 S. W. 53; Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632; Kansas City, M. & O. R. Co. v. Worsham, — Tex. Civ. App. —, 149 S. W. 755; Hazlewood v. Pennybacker, — Tex. Civ. App. —, 50 S. W. 199; Moore v. Booker, 4 N. D. 543, 62 N. W. 607; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685.

A witness to testify as to value of damaged hardware, as in this case, must be competent. He must show his knowledge, experience, and training along the line his testimony would cover. His testimony is sought and given as expert testimony. 17 Cyc. 109, 112; Tetrault v. O'Connor, 8 N. D. 15, 76 N. W. 225; Minneapolis Threshing Mach. Co. v. McDonald, 10 N. D. 408, 87 N. W. 993; Raymond v. Edelbrock, 15 N. D. 231, 107 N. W. 194.

Questions by counsel should not be permitted where the clear purpose is merely to create prejudice against a party. Tijerina v. State, 45 Tex. Crim. Rep. 182, 74 S. W. 913; Davy v. Great Northern R. Co. 21 N. D. 43, 128 N. W. 311.

The trial court should instruct fully on the law of the case, whether requested to do so or not. It is a duty to be performed. Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1; Owen v. Owen, 22 Iowa, 270; Forzen v. Hurd, 20 N. D. 43, 126 N. W. 224; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Putnam v. Prouty, 24 N. D. 531, 140 N. W. 93.

T. F. Murtha, Thomas Pugh, and *J. W. Sturgeon,* for respondent.

Where the waters from melting snows and rains have worn out for themselves a natural channel through which they drain in a visible stream, such natural channel may not be blocked or obstructed. Bischmann v. Boehl, 30 Ill. App. 455; Chicago, R. I. & P. R. Co. v. Carey, 90 Ill. 514; 3 Farnham, Waters, p. 2589.

The rule is that natural drains must be kept open to carry the water

into the streams, and that the lower estate is subject to natural servitude for that purpose. Albany v. Sikes, 94 Ga. 30, 26 L.R.A. 653, 47 Am. St. Rep. 132, 20 S. E. 257; Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755; Jungblum v. Minneapolis, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 971.

It is the duty of a railroad company to construct its culverts in such a manner as will not obstruct or block the natural flow of waters through natural channels or drains, or be cast back on the property of higher landowners. Blunck v. Chicago & N. W. R. Co. — Iowa, —, 115 N. W. 1013; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263, 1 Am. Neg. Rep. 312; Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213; 3 Farnham, Waters, pp. 2334–2709; Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508; Tretter v. Chicago G. W. R. Co. 147 Iowa, 375, 140 Am. St. Rep. 304, 126 N. W. 339; Jungblym v. Minneapolis, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 971; Sanguinetti v. Polk, 136 Cal. 466, 89 Am. St. Rep. 169, 69 Pac. 98; Launstein v. Launstein, 150 Mich. 524, 121 Am. St. Rep. 635, 114 N. W. 383; Pinkstaff v. Steffy, 216 Ill. 406, 75 N. E. 163 (1905); Fordham v. Northern P. R. Co. 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040; Chicago, R. I. & P. R. Co. v. Lynch, 163 Iowa, 283, 143 N. W. 1083; Feldkamp v. Ernst, 177 Mich. 550, 143 N. W. 887; Iske v. Missouri P. R. Co. 94 Neb. 9, 142 N. W. 671; Johnson v. Marcum, 152 Ky. 629, 153 S. W. 959; Thompson v. Mobile, J. & K. C. R. Co. 104 Miss. 651, 61 So. 596; Tranbarger v. Chicago & A. R. Co. 250 Mo. 46, 156 S. W. 694; Anheuser-Busch Brewing Asso. v. Peterson, 41 Neb. 897, 60 N. W. 373; Roe v. Howard County, 75 Neb. 448, 5 L.R.A.(N.S.) 831, 106 N. W. 587; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811; Parizek v. Hinek, 144 Iowa, 563, 123 N. W. 180; Alabama G. S. R. Co. v. Prouty, 149 Ala. 71, 43 So. 352; Gillham v. Madison County R. Co. 49 Ill. 484, 95 Am. Dec. 627; Foley v. Godchaux, 48 La. Ann. 466, 19 So. 247; Willis v. White, 150 N. C. 199, 134 Am. St. Rep. 906, 63 S. E. 942; Blue v. Wentz, 54 Ohio St. 247, 43 N. E. 493; Glass v. Fritz, 148 Pa. 324, 23 Atl. 1050; Lawton v. South Bound R. Co. 61 S. C. 548, 39

S. E. 752; Shane v. Kansas City, St. J. & C. B. R. Co. 71 Mo. 238, 36 Am. Rep. 480; Texas Trunk R. Co. v. Elam, 1 Tex. App. Civ. Cas. (White & W.) 201; 40 Cyc. 639–643; Boyd v. Conklin, 54 Mich. 583, 52 Am. Rep. 831, 20 N. W. 595; Barstow Irrig. Co. v. Black, 39 Tex. Civ. App. 80, 86 S. W. 1036; Shaw v. Sebastopol, 159 Cal. 623, 115 Pac. 213; Flesner v. Steinbruck, 89 Neb. 129, 34 L.R.A.(N.S.) 1055, 130 N. W. 1040; Trenton v. Rucker, 162 Mich. 19, 34 L.R.A. (N.S.) 569, 127 N. W. 39; Kelly v. Kansas City Southern R. Co. 92 Ark. 465, 123 S. W. 664; Jonesboro, L. C. & E. R. Co. v. Cable, 89 Ark. 518, 117 S. W. 550; McGehee v. Tidewater R. Co. 108 Va. 508, 62 S. E. 356; Perrine v. Pennsylvania R. Co. 71 N. J. L. 644, 62 Atl. 702.

There is no right resting in a lower landowner to dam back water which is flowing in a definite channel. The defendant here has so used its property as to unnecessarily injure its neighbor, and should respond in damages. Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884; Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755.

It is a sufficient showing of negligence, when plaintiffs prove conclusively that defendant's culverts failed repeatedly and on different occasions to carry off, or allow matters to flow through and not back up. Such is a sufficient showing that the culverts are not proper or adequate for the purpose necessary. Blunck v. Chicago & N. W. R. Co. — Iowa, —, 115 N. W. 1013, ¶ 3 of syllabus; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 698, 36 L.R.A. 417, 61 Am. St. Rep. 578, 70 N. W. 263; Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811, ¶ 4 of syllabus.

The question of an act of God is a matter of affirmative defense, and must be established by defendant that it could not, by ordinary care, have guarded against such act or occurrence. Missouri P. R. Co. v. Hemingway, 63 Neb. 610, 88 N. W. 673; 2 Sackett, Instructions to Juries, p. 1523, § 2362.

It is a question of fact for the jury to decide whether or not the storm was of such unprecedented character that defendant could not have anticipated and guarded against resultant damages. Wilson v. Boise City, 20 Idaho, 133, 36 L.R.A.(N.S.) 1158, 117 Pac. 115, 1 N. C. C. A. 203; Blunck v. Chicago & N. W. R. Co. supra; Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 56 L.R.A. 341, 88 N. W. 508; Gray v.

Harris, 107 Mass. 492, 9 Am. Rep. 61; Fairbury Brick Co. v. Chicago, R. I. & P. R. Co. 79 Neb. 854, 13 L.R.A.(N.S.) 542, 113 N. W. 535.

No more definite instructions were requested by defendant than were given by the court. Dissatisfaction on the part of the defendant should have led it to make requests of the court. Houghtaling v. Chicago G. W. R. Co. supra; Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884, ¶ 3 of the syllabus; Fordham v. Northern P. R. Co. 30 Mont. 421, 66 L.R.A. 556, 104 Am. St. Rep. 729, 76 Pac. 1040.

BRUCE, J. (after stating the facts as above). It is not, we believe, contended in this case that the flooding of the plaintiffs' premises in question was occasioned by the obstruction of a flowing stream, but rather by the obstruction of a natural water course which served as a natural drainage for surface and storm waters, and which on the occasion in question was flooded by a heavy rain storm which occurred on the night of July 28, 1914, and in the early morning of July 29, 1914.

"Under the common-law rule which exists in many jurisdictions, surface water is regarded as a common enemy, and every landed proprietor has the right, as a general proposition, to take any measures necessary to the protection of his property from its ravages, even if in doing so he prevents its entrance upon his land and throws it back upon a coterminous proprietor. The damage resulting in such case is regarded as *damnum absque injuria*, affording no cause of action." See 30 Am. & Eng. Enc. Law, 2d ed. 330; Walker v. New Mexico & S. P. R. Co. 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 421.

"Under the rule of the civil law . . . the right to drain surface waters is governed by the law of nature, as between the owners of adjacent lands, and the lower proprietor is bound to receive the surface waters which naturally flow from the land above, and cannot do anything to prevent such flow which will cast it back upon the land above." 30 Am. & Eng. Enc. Law, 2d ed. 326; Shahan v. Alabama G. S. R. Co. 115 Ala. 181, 67 Am. St. Rep. 20, 22 So. 449; Gillham v. Madison County R. Co. 49 Ill. 484, 93 Am. Dec. 627; Alton & U. A. Horse & Carrying R. Co. v. Deitz, 50 Ill. 210, 99 Am. Dec. 509; see also discussions in Hannaher v. St. Paul, M. & M. R. Co. 5 Dak. 1, 37 N. W. 717, and Carroll v. Rye Twp. 13 N. D. 458, 101 N. W. 894.

In North Dakota we have not as yet committed ourselves to either rule, as a choice has not as yet been necessary in any of the cases argued, and the court has naturally hesitated in foreclosing a question whose determination should depend upon considerations of public expediency and necessity, and be considered in the light of the peculiar topography and climatic conditions of the state, and to whose wise solutions every days brings more light and the results of a larger body of accumulated experience. The question, though, has been incidentally presented and discussed. See Hannaher v. St. Paul, M. & M. R. Co. and Carroll v. Rye Twp. supra.

Nor is it necessary to adopt either rule in the case which is before us, as we are convinced that there is in the record and that there was properly submitted to the jury, evidence which tends to show that the swale, depression, or whatever it may have been in the case before us, was a "natural drain way." If it was a natural drain way, it is immaterial whether the so-called common enemy or the civil-law rule as to surface waters prevails in North Dakota, as both "under the civil law and the English common . . . [enemy theories] the rule is that the natural drain ways must be kept open to carry the water into the streams, and that the lower estate is subject to a natural servitude for that purpose." 3 Farnham, Waters, p. 2555.

The building of the plaintiffs faced south on Villard street. Villard street runs east and west and a block or so north of and parallel to the railroad tracks. There is evidence in the record tending to show that the ditch or ravine which runs from Villard street to the railroad track, and which empties through the culvert of the railway company and underneath its tracks, had been in existence for some thirty years, and, although only extending a short distance north of Villard street and some three or four blocks north of the railroad track, served as a natural runway or drainage for a larger natural drainage basin of some 160 acres which extended to the northeast. There is also evidence which tends to show that this ditch has now, and for a long time prior to the flood in controversy had, a well-defined channel, and that though grass grew at its sides, that grass had at its bottom been worn away to a breadth of 3 or 4 feet by the running waters. It is true that there is no evidence or pretense that the water ran in this ditch all of the time or even usually ran in this ditch, but there is evidence that it ran therein whenever there

were heavy rains and when the snow melted in the spring. Such being the case, it is clear that the ditch or ravine, though not a stream, was nevertheless a natural drain way which drained a more or less extended area of land or drainage basin into the Heart river. It is clear, also, that though the railway company had the right to build an embankment across it, it nevertheless owed the duty to the landowners in the drainage basin to do so in such a manner that the water which could be reasonably anticipated to flow therein and to be drained thereby could be as well accommodated as before the construction of its improvements. This is true under both the civil law and the so-called common-enemy theory of surface waters. See Farnham, Waters, p. 2555. "In all broken country," says this author (page 2571), "there are gullies, ravines, or swales which in many cases, when the land was covered with woods, formed the beds of flowing streams which gradually dried up as the woods were cleared away, but which are natural drains in which water runs in every time of heavy rain. In case one of these drains is stopped, the natural result is to pond the water above the point of stoppage, and compel it to find another outlet, or to stand until it is absorbed or evaporates. This is a distinct injury to the upper owner without any corresponding benefit to the lower one, and it should not be permitted to be done." This is undoubtedly the prevailing rule in America, and is both the civil-law and the common-enemy rule, though not a few writers and courts have confused the terms "common enemy" with the term "common law," and have imagined that what is termed "the common-enemy theory," and which relates merely to what are, strictly speaking, surface waters and waters which do not flow in defined channels, applied at the common law generally to all non-navigable waters.

The reason for what may be termed the prevailing American rule, and which we here adopt in North Dakota, is well stated by Mr. Farnham on page 2599 of his excellent work on "Waters and Water Rights." "The question of the right to obstruct a natural drainage channel," he says, "has been needlessly complicated with the further question whether or not a water course existed. The rules with respect to water courses form a distinct class by themselves, and were formulated to conserve the interests of the riparian owners. On the other hand, the question of drainage involves not only the welfare of the individual landowner, but also that of the community in so far as its healthfulness and prosperity

depend upon relieving land of stagnant water and improving its productiveness. Before man owned any parcel of land, nature had impressed upon it certain characteristics. So far as these can be changed without interfering with the use or enjoyment of neighboring property, they may be changed at will. But, so far as one parcel has been subjected by nature to a servitude in favor of an adjoining parcel, the enjoyment of which will be materially injured by destroying the servitude, it would seem that the rule by which a purchaser of property is bound by its condition when he acquires title would prevent the destruction of such servitude. In order to be within the operation of this rule, . . . the great weight of authority is in favor of the proposition that a lower proprietor cannot place any obstruction in an obvious drainage channel which has been formed by nature and carries the water from a higher to a lower estate. Some courts have reached the same result by holding that channels formed by surface water might be water courses, and have applied to them the rule governing the obstruction of such courses, and in some cases there is no doubt that channels which now carry merely surface water were once living streams. When the country was covered with forest so that the ground was more nearly saturated with water, springs came to the surface and fed streams which flowed more or less constantly down these channels, but, as the land was cleared and brought under cultivation, the springs gradually lost their strength and finally disappeared, so that the channels which formerly carried the streams flowing from them now receive only the water which comes from surface drainage. But there is no reason why, if the rule of water courses rather than that of drainage is to be applied, it should not be applied to this class of channels. That these drainage channels cannot be obstructed is supported by the great weight of authority. It is the rule in England, Canada, Ireland, Alabama, California, Delaware, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Vermont, and West Virginia. And in Arkansas no obstruction to the flow of surface water is permissible if it can be avoided by reasonable care and expense. To reach their conclusions, some of the courts above named have attempted to show that the channels in which the water was running were water courses, but they were not water courses

within the rule governing riparian rights; and the attempt to demonstrate the existence of a water course was made necessary by the disastrous effects which would attend the opposite holding. In fact, when surface water has united to form a stream the effect of damming it back is temporarily as bad as the damming back of a water course, and similarity in the effect absolutely demands the application of the same rule to each. And, in order to do so, the courts which have not perceived the full meaning of the civil-law rule as to drainage have attempted the makeshift of bringing the particular stream within the rule governing the stoppage of water courses by showing that they were in fact such, whereas the only similarity was in the result of stopping a present flow. Practically all of the courts admit that there may be a flow of surface water of such magnitude that it cannot be stopped; but natural drainage channels are allowed to be closed by the Supreme Court of the United States when the question comes before it as a common-law question; and by the courts of Indiana, Kansas, Maine, Massachusetts, Missouri, New York, South Carolina, and Washington. The Kansas court has intimated that, if the channel approaches the nature of a water course, there is no right to dam it up. And in Missouri a statute has been passed giving the right to cast water into natural depressions which act as drains. Of the other courts above referred to, the Supreme Court of the United States and the courts of South Carolina and Washington placed their rulings expressly upon the ground that the common law had been adopted by statute, and that therefore there was a right to dam back the water. But, it having been demonstrated in a preceding section that by the common law there is no right to dam back the water which is flowing in a definite channel, those decisions are based upon a misconception and should have been the other way. Some courts have not yet expressed themselves upon this question, and some appear to be in a class by themselves, so that they are not properly included in either list. Among these is the Wisconsin court. The rule which obtains in that state, as well as the course of a decision in Minnesota, is treated in a separate section. This conflict in opinion arises in most cases out of a failure to understand the civil-law rule, and in attempting to determine drainage rights by the rules applicable to water courses. As has been seen, the civil-law rule is merely that when the water has its course regulated from one ground to another,—that is, when it has taken a

definite course in a definite channel,—it cannot be stopped up. Practically all the courts, except the Supreme Court of the United States and the courts of Indiana, New York, Missouri, Wisconsin, and the lower courts of New Jersey, agree in this rule, but, in applying it, they differ somewhat in their conclusions, the difference depending largely upon how far each court has embraced the idea that a water course must, in fact, exist before the rule can be applied. As will be seen in the succeeding sections, there is no right anywhere to the continued flow of water which has not taken a definite course, but which spreads out over the surface of the ground. And, if the courts would recognize the fact that the right to the flow of the water which has taken a definite course is a rule of drainage, and not of water courses, most of the difficulty which they have experienced would disappear. The rule of drainage applies if the water has taken a definite course, although the flow is not strong enough to cut the sod or form a trench in the soil, it is enough that a natural depression forms a channel for the stream." See also Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 120 N. W. 884, and note thereto in 22 L.R.A.(N.S.) 789; Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755.

Again, in Jungblum v. Minneapolis, N. U. & S. W. R. Co. 70 Minn. 153, 72 N. W. 971, which seemingly overruled the prior decisions of that tribunal, the supreme court of Minnesota said: "There was evidence given on the trial on behalf of the plaintiff tending to show that this depression was the usual and natural course or channel along which the surface water was accustomed to flow, before the roadbed was constructed, for a mile or two east of the roadbed, and that the channel bears marks of water having flowed through it. Whether this depression is a natural water course, within the strict definition of the term, we need not determine; for the evidence justifies a finding that it was the usual and natural channel for surface water, and offered a reasonable way for the defendant by the construction of a culvert to dispose of the surface water without injury to any landowner. The trial court submitted this question to the jury in these words: 'If the jury finds from the evidence that the defendant might reasonably have constructed a culvert through its roadbed, and thereby have conveyed the water in question through its natural and usual channel from its right of way, without injury to any other landowner, and that it neglected to do so,

but that it unnecessarily or unreasonably drained the water upon the plaintiff's land, to the plaintiff's injury, then the plaintiff is entitled to recover.' "

Being, then, a natural drain way, it was the duty of the defendant railway company to accommodate itself to and to provide for the undisturbed passage through it of all of the water which was or might be reasonably anticipated to drain therein, and this duty was a continuing duty. See State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 621, 150 N. W. 463. The question to be determined is whether there is competent evidence in the record, and which was properly submitted to the jury, which tended to show that this duty had not been complied with, and that the damage to the plaintiffs' and respondents' property was occasioned by this noncompliance, or whether, as contended by defendant and appellant, the uncontradicted evidence showed that the culvert was in every way adequate for all flowage that could or should have been anticipated, and that the flooding of plaintiffs' premises was either occasioned by an extraordinary downpour or cloudburst which it was not the duty of the defendant to anticipate, or by the blocking of the channel by a floating sidewalk or some other obstruction which it was not the duty of the defendant to guard against or to anticipate. We are satisfied that there was such evidence, and the trouble with defendant's defense is that, it once being established that the flooding of plaintiffs' premises was occasioned by the inability of the culvert to carry off the water, and of this we hardly think defendant will contend that there is not at least some evidence, the burden is upon it, and not on the plaintiff, to show that the storm was so unusual and extraordinary that it need not have been anticipated.

Even if we admit that the evidence of plaintiffs' witnesses as to the fact that in the past there had been downpours of equal violence is open to the objection that it was not given by scientific men and based upon scientific data, and that it must have been to a greater or lesser extent an expression of opinion merely, still defendant's nonscientific testimony was open to the same objection, and was equally unreliable. The fact remains that what little scientific data defendant did furnish was absolutely inconclusive, and could well have been repudiated by the jury. The defendant, in short, attempted to show, and no doubt did show, by the testimony of the superintendent of the weather bureau, that 4.03

inches of rain fell from 1 o'clock in the morning until 10 o'clock in the forenoon. It also showed that the weather bureau was first established at Dickinson in 1892, and that the largest quantity of rain that had ever fallen in any twenty-four hour period since that time was on May 22, 1903, when 2.6 inches fell; that the average annual precipitation in this vicinity was 15.4 inches and that the average rainfall per twenty-four hour period in the last ten years was $^{21}/_{100}$ of an inch, without counting the days it did not rain. The trouble with this evidence is that there are no records of the precipitation during any hour or series of hours during any of the years mentioned, but only the rainfall during twenty-four hour periods, and it may very well have been that, though the rainfall in 1914 during a twenty-four hour period was very much greater than that of any twenty-four hour period in the past; that in the past there had been during certain hours and for limited times much greater downpours. This is made perfectly clear by the testimony of the superintendent of the weather bureau to the effect that about two years before the trial there had been a downpour of 1½ inches of rain in a period of only fifteen minutes. It is also worthy of notice, and a fact that could well have been considered by the jury, that although it was admitted that official and scientific records were taken at the weather bureau at 6 o'clock in the morning, and although there was testimony to the effect that the flood had begun to abate after that time, in so far at least as plaintiffs' property was concerned, no attempt whatever was made to introduce these records in evidence, and the defendant, instead, merely relied for his scientific data on the remembrance of the witness Waldron as to the observations he had made four hours later and at 10 o'clock in the morning. Even if his remembrance and observations were correct, he testified merely as to the record of a nine-hour rainfall. The testimony of the witnesses Leonberger and Butler would lead us to believe, or at any rate the jury was justified in believing from this testimony, that the flood was at its height, as far as the storm was concerned, at about 3:30 in the morning, while the witness White testified for the defendant that there was an extra heavy rainstorm at 6 o'clock. It is also clear that records which were made at 6:30 A. M. could easily have been obtained, as the weather bureau was only 2 miles from the city of Dickinson, where the trial was held.

We hardly see, therefore, that the defendant has met the burden of proof; that is, of showing the extraordinary nature of the storm, and that the same could not have been anticipated.

We do not agree with its counsel, at any rate in this western country, that the fierceness and intensity of a storm must be determined by the amount of rain which falls in any given twenty-four hour period, or with his conclusion that because in the past, no such volume of rain had fallen in any twenty-four hour period as fell in the twenty-four period and prior to 6:30 o'clock in the evening of July 28, 1914, that there had not been prior to such times as equally violent storms or downpours extending over lesser periods, and it is a matter of common knowledge that it is the cloudburst or sudden downpour that taxes the requirements of drains and sewers.

As far as the severity of the storm is concerned and its unusual character, Nelson G. Lawrence testified for the defendant that he had lived in Dickinson since 1883; that he remembered the storm of July 28, 1914; that he got up at about 1 o'clock; that the water covered the streets; that it was the worst storm that he had ever known since he had been there. He, however, testified on cross-examination that he could remember nothing whatever of the storms of 1912 or 1909. He also testified that storms in the vicinity were usually of short duration.

Oliver Whaley testified that he had lived in Dickinson since January 1, 1911; that he got up in the neighborhood of 1 o'clock; that the water covered the sidewalks on Second avenue; that there was a recession of water about daylight, he thought; that there were three periods of severity between 1 and 7 o'clock; that it was an unusually severe rain storm; that he had never seen one that would compare with it for severity for the same length of time; that the storms were generally of short duration; that this storm was severe and of long duration; that he observed the storm between 1 and 8 o'clock. He, however, testified that in the past he had often seen the waters cover the crossings and come up on the sidewalk on the south side of his house, and this had been so during the last year, the water extending a distance of 10 or 12 feet north and about the same distance east on a low corner; that on the morning of the storm when he went down town, the crown or the center of the street was in view. The gutters were full of water; perhaps 10 feet of the center of the road was visible immediately in front of his residence and to the east of Second street.

The witness Bert A. Condit testified that he was a civil engineer; that the drainage area of the district was 168 acres; that the elevation in the center of Villard street was 99.75 feet and the elevation of the property line and the sidewalk in front of plaintiffs' store was 99.55 feet; that the elevation taken 15 feet to the west of the building was the same as in front of the store; that on account of the fact that the lot was somewhat lower than the center of the street the water coming down that street, if the gutter was overflowed, would cover the lots.

The witness F. J. Taylor testified that the tracks were constructed according to the most-approved method; that the 48-inch pipe which extended under the track was sufficient to take care of a rainfall of 3 inches per hour. That with a rain-fall of 3 inches per hour there would be a run-off of 123 cubic feet per second, and that the culvert in question would carry off 177 cubic feet per second. (See testimony given before.)

The witness Waldron also testified that he thought the precipitation for July 26, 1914, was 1.16 inches; that he could not say accurately, but he thought it rained two or three hours.

Q. Well, then, you do not know of your own knowledge how long a time it rained?

A. It could not have been much more than that. It commenced to rain at 1 or 2 o'clock in the afternoon. An observation was taken at 6.

Q. Were you out of town during the 28th?

A. Part of the time.

Q. What part of the time?

A. I got here on delayed No. 1, about 10 o'clock in the morning.

Q. About 10 o'clock?

A. No, it was earlier than that, about 9 o'clock or a little after nine.

Q. So that you weren't here during the early morning hours?

A. No, sir.

Q. From 12 to between 9 and 10?

A. No.

Q. Were you here during the 27th, the day preceding?

A. No, I wasn't, a part of the day I was.

Q. When did you leave?

A. I left on No. 8 in the morning. The train was on time.

The witness Kittleson testified that he had been in the country for seven years; that he got up on the morning of the 28th at about 1 o'clock and watched the rain; that he characterized the rain as compared to other rains as equal; that he would not testify that he had seen a rain of this amount and extending over this period of time in this country before; and in answer to the question, on cross-examination: "You mean to testify, don't you, Mr. Kittleson, that you have seen rains where the rain came down just as heavy at one time, is that what you want to testify? You don't mean to testify that you have seen a rain of this amount and extending over this period of time? A. No, sir." He specified that he had seen a similar rain and as heavy a downfall about July the 11th, 1912.

The witness Hughes testified that he had lived in Dickinson for nine years last past; that he observed the rain; that he had seen other rains where there was as much rainfall in the same length of time, on two occasions anyway—one in the summer of 1912—July, he thought. He did not measure the amount of rain that fell on these occasions; that he judged by the amount of water that was on the ground, but the storm in July, 1911, lasted about half an hour.

There is also evidence that the ditch or natural drain way before it enters into the culvert was about 2 or 3 feet at the bottom and 6 or 7 feet at the top, and that if the water was level and there was $1\frac{4}{10}$ feet of water at the property line in front of Soules & Butler's store, there would be a little better than 2 feet of water over the top of the culvert. Assuming this to be true, it is perfectly clear that if the original pile bridge had been maintained, or the culvert had approximated the size and volume of the original drain or ditch, that the water might very well have all been carried off. These facts were, at any rate, for the jury to pass upon, and we cannot say from the record that they were not right in holding that it was the lack of capacity in the culvert to carry off the water that was the proximate cause of the damage, or that similar downfalls of rain had not occurred in the past.

We have carefully examined the cases which are cited by counsel for appellant on the question of the proof and as to what constitutes unprecedented storms, but are merely convinced by them that in the case at bar the matter was one for the jury to pass upon. All that

the cases of Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98, and Ohio & M. R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, 32 N. E. 529, held was that it was error to instruct the jury that the fact that in the one case the three storms and in the other the two storms which occasioned the damage occurred in rapid sequence rendered them usual and not unprecedented, and with these holdings we can take no exception, as the courts in both cases expressly stated that the matters in controversy were for the jurors themselves to consider and to pass upon. In the case of Greiner v. Alfred Struck Co. 161 Ky. 793, 171 S. W. 405, the court held that the proof conclusively showed that the storm which had lasted for two days was so unusual or extraordinary that it could not have been guarded against by ordinary prudence. In it, however, although the witness testified that there had been as great a flood in a previous year, this evidence was not only disputed by the records of the weather bureau, but the witness himself admitted that in the preceding year the water course did not overflow its banks so that there was no reason for the defendant to anticipate that it would do so on this particular occasion. In the case at bar there is evidence which tends to show that on previous occasions there had been other floods, though not as extensive, in which the culvert had been insufficient.

All that the other cases cited by counsel for appellant do is to emphasize and repeat in various forms the general and well-established propositions that a railway company is not liable for damages occasioned by unprecedented storms; that even if a sewer is defective the defendant cannot be held liable unless that defect is the real and producing cause of the injury, and that even though there is negligence on the part of the defendant, if the act of God is so overwhelming as of its own strength to produce the injury, the defendant cannot be made responsible; that it is not the duty of the defendant to prepare against unprecedented storms, and that where it appears that the storm is unprecedented the burden of proof is upon the plaintiff to show that the damage would not have resulted except for defendant's negligence.

We may concede each and all of these propositions, yet that concession would not justify a reversal in the case which is before us. The cases cited by counsel themselves show that the burden of proof is upon the defendant to prove the unprecedented nature of the storm. See

Memphis & C. R. Co. v. Reeves, 10 Wall. 189, 19 L. ed. 912. And on this question there was a clear conflict in the evidence which left it for the jury. On the question of negligence and the adequacy of the culvert, there was also a conflict, and this was also a question for the jury. Almost all of the cases cited by counsel pass upon instructions which took these matters from the jury. None of them seem to cover a case such as that before us, where the jury was properly instructed and where there is a serious question as to whether the railway company has met the burden of proof of showing the unprecedented nature of the storm. The term "extraordinary floods" has been defined as meaning "such floods as are of such unusual occurrence as could not have been foreseen by men of ordinary experience and ordinary prudence. Ordinary floods are those the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where such floods happen." Gulf, C. & S. F. R. Co. v. Pool, 70 Tex. 713, 8 S. W. 535; 3 Words & Phrases, 2628. The question to be decided was: Considering the rains of the past, the topography and climatic conditions of the region, and the nature of the drainage basin, the fact that in the past heavy downpours had occurred and on one instance 1½ inches of rain had fallen in only fifteen minutes of time, the baked and arid nature of the district, its absence of trees or anything that would prevent water from rapidly running off, would and should a reasonably prudent man have foreseen the danger and provided against it? We cannot say that the proof was so conclusively in the negative that the question became one of law merely, which had to be decided in favor of the defendant, and that it was not one which was properly submitted to the jury.

Nor can we say that the proof otherwise shows that the culvert was sufficient, and that the flooding of the property of plaintiffs was, in fact, occasioned by the fact that the property was situated in a depression and lower than the street, and not by the smallness of the culvert. There is evidence, it is true, that the center of Villard avenue and in front of plaintiffs' property was some .21 of a foot above the property line of plaintiffs; and that the water coming down the street would, if the gutters were overflowed, flow upon plaintiffs' property. It is to be remembered, however, that west of plaintiffs' property was Second avenue East, east of their property was First avenue East,

and east of First avenue East, Sims street; that north of their property was First and Second streets. It was shown that there was a fall from the intersection of First avenue East and Villard avenue of some .6 of a foot to the block towards the east, and that there was no point in the street that was higher than First avenue and Villard avenue; that the intersection of First avenue and First street is .9 of a foot higher than Sims street; that along First avenue there is a large ditch about 2 feet below the curb line of the sidewalk; that the water at the time of the flood came above the property line of Soules & Butlers' about 11 inches. There is also evidence that from a short distance east of plaintiffs' property, clear on the east side of Second avenue East, which is about $\frac{2}{10}$ of a foot lower than plaintiffs' property line, most of the water coming down from the north, that is, coming down First avenue East and Sims street, does not travel straight down to Villard avenue, but turns east on First street and goes over to Second avenue East and then south, so that the bulk of the water from the territory west of Soules & Butlers' would flow along First street until it struck the street east of the lumber yard, then down and across the street and out through the culvert.

Nor can we say that the proof is by any means conclusive that the sewer was blocked by the culvert crossing, and that this was an obstruction for which the city, and not the railway company, would be responsible. Such obstruction, indeed, might possibly have existed, but the evidence seems to show that such was not the fact. On this question the witness Hughes testified positively that he saw the culvert at 5 o'clock in the morning, and that he saw one of the plank crossings that was used to cover the culvert between the streets, about 2 feet above the culvert and 2 feet back in an indent; that at the time there was too much water to see the culvert itself; that the plank or culvert crossing that he saw was slanting up against the bank, and that the water was holding it there.

Q. You could not see whether that portion was over the mouth of the culvert?

A. I couldn't see how it could lay over the culvert in the position it was laying. It was laying on a slant.

Exception is taken to the instruction to the jury that "if you believe that the plaintiffs are entitled to recover as heretofore instructed, then

it is your duty to determine the amount of damages sustained by reason of the flooding of these premises, and they are entitled to make matters whole. If you find in favor of the plaintiffs, then they are entitled to recover such damages as they have reasonably suffered by reason of the negligence of the defendant to provide a suitable and sufficient culvert to take care of the water that naturally, through its natural course, would drain through that territory." It is claimed that the above quotation comprises all the instructions to the jury on the measure of damages, and that no requests for instructions on the measure of damages were in this case submitted to the trial court by either plaintiffs or defendant. "It is our contention, however," says counsel for the defendant in his brief, "that the failure of the court to instruct the jury as to the measure of damages in this case, *i. e.*, how they were to ascertain the damage and what they had the right to consider, is fatal. And we contend this is error regardless of whether or not such instruction was requested." Defendant and appellant contends that "the rule in civil cases is that, where there is an established rule of law as to the measure of damages applicable to a particular case, the judge ought to inform the jury what the rule really is, and that a failure to do so is a ground for a new trial. So important is this rule that, although nondirection is in general no ground for a new trial in civil cases, unless a proper instruction is requested and refused, yet the failure to instruct the jury as to the rule of damages has been held ground for a new trial, even where the specific instruction was not asked." "A reading of the authorities above cited," counsel also says, "will show how logical the conclusion is. We had the right to expect that the court would give to the jury some little instruction on the measure of damages, the law of the case with reference to the damages, and did not have to take chances, because the failure to request instructions, that he would give the jury free rein, and let them do just as they pleased in determining the amount of plaintiffs' damage, or what they would be entitled to do to 'make matters whole.' Our complaint is that the jury should have been instructed as to how they could determine the amount of damages, if any, the plaintiffs were entitled to. And there is testimony in the record in regard to certain damage plaintiffs suffered, and there was no proof to show the amount of that damage."

There appears to be no merit in this objection. Almost identically the same instruction was given in the case of Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884, where the court held that, in the absence of any requested instruction on the subject, the measure of damages was sufficiently defined.

The next specification of error is that the court erred in allowing a certain witness to testify as to the value of the property injured and its depreciation in value on account of such injury, it being contended that he was not properly qualified to so testify. We think, however, that there is no merit in this objection. The witness had worked in a hardware store for at least seven and a half years; he was manager of the hardware store of the plaintiffs and had been such for some time. During such time he had done all the buying for the firm, and when new goods were received by them for sale, marked the new prices on them. He had been with the stock of goods all of the time, both before and after the flood. If such a man is not competent to testify as to the value of goods, either new or damaged, we do not know who would be. This, we must remember, is not such a case as that which was passed upon by us in Fisher v. Smith, 32 N. D. 595, 156 N. W. 242, and where the witness testified positively that he did not know the value of secondhand goods, and was hardly in a position to know such value.

The next specification of error relates to the admission in evidence of testimony in regard to the nature of a bridge which had formerly been constructed by the railway company over the swale or ravine, and which testimony, it is claimed, was not relevant or material, and did not tend to prove any issue in the case, and also to allowing evidence as to whether it would have cost any large sum to have constructed larger culverts; also whether it would have been a difficult engineering feat to do so. Counsel for defendant argues that "the above specifications, it will be noted, relate to testimony introduced by plaintiffs, both direct and on cross-examination, relating to the fact that some time ago the defendant had maintained a trestle bridge where the culvert in question now is, that the trestle bridge was 14 or 16 feet wide and always took care of the waters that came down, that it would not cost a great deal to put a few extra culverts under the track, and they could be put in without a great deal of difficulty. We submit that

the court erred grievously in letting such testimony as this go in over our objection, and that it was very prejudicial. The question at issue here is whether or not the culvert we had under the track on July 28, 1914, was adequate; and the size of a culvert kept there before, or the size of a trestle bridge kept there before, or the fact that such bridge was maintained there, or the fact that more culverts could be put in without much expense or without much trouble, was entirely immaterial and wholly collateral to the issue. And these points were touched upon and emphasized for the sole purpose of prejudicing the jury and giving plaintiffs something to argue to the jury. They went to the jury with the argument that if we had kept the trestle bridge, or put in a few more culverts at a few dollars' cost, these plaintiffs would not have suffered this great loss. This is an attempt to prove negligence by collateral matters, and every court in the land has said this is not permissible."

We can see no merit in this objection. One of the immediate elements of the case was whether the swale or ravine was a natural drain way, whether it drained the area in question, the amount of water which ran therein, and the topography generally of the locality. The fact that a trestle bridge had been constructed over the ravine and was necessarily constructed had much to do with proving this fact. Houghtaling v. Chicago G. W. R. Co. 117 Iowa, 540, 91 N. W. 811; Quinn v. Chicago, M. & St. P. R. Co. 23 S. D. 126, 22 L.R.A.(N.S.) 789, 120 N. W. 884. Although this evidence might have been improperly used in the argument, we do not find that any objection was made to that argument while it was being made, or that any instructions were asked thereon by the defendant. If every misuse of testimony which is made upon the argument can be made a ground for reversal when no objection is made thereto upon the trial and no instruction asked thereon, but few verdicts would stand.

As far as the cost of the culverts is concerned, we do not consider this testimony at all irrelevant. It all goes to show whether or not the defendant was guilty of negligence in not providing proper preventives against heavy downpours. Surely one should not be allowed to complain when sued for the failure to provide sufficient culverts, because proof is introduced which he is at liberty to repudiate that those culverts could have been easily furnished.

Counsel for defendant and appellant also objects to the admission of testimony that the premises of the plaintiffs were flooded prior to July 28, 1914. We can see no error in the admission of this testimony. It all went to show the necessity for a sufficient culvert, and although some of it relates to a period before the particular culvert was constructed, it none the less tends to prove that fact as well as the course of the flow of the water from the drainage district.

Objection is also made to the action of the court in sustaining plaintiffs' objection as follows:

Q. Do you remember whether or not that cistern was flooded by the surface waters on that day?

Counsel for plaintiffs: I object to that on the ground that it is entirely immaterial, unless it is shown to be in this drainage basin or some way connected with it.

The Court: Objection sustained.

And the question: You may now tell us whether or not this cistern was flooded by surface waters on the 28th day of July, 1914.

Counsel for plaintiffs: Objected to on the ground that it is wholly immaterial, and the comparison would be of no benefit to the jury.

The Court: Objection sustained.

This testimony was rejected by the trial court apparently on the theory that it was not competent because the reservoir in question was located in a different basin than the one in question, that is to say, located in a different hollow, although it was shown that the basins were topographically nearly the same. We are inclined to think that there is some merit in this objection. There must be some limits, however, to the proof in every case, and the evidence was merely cumulative, and all that it could possibly tend to show was the action of the water in the vicinity and the character of the storm. We can hardly reverse the judgment on this account.

Error is predicated on certain portions of the instructions in which the jury were told that "every owner of land may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of negligence in the manner of execution, will not be liable for an adjoining property. In other words, the railroad company has a right to fill a grade as it is done and established by the evidence

in this case, provided no damage results to the adjoining property by reason of such establishing of such grade," and: "The court instructs you as a matter of law that if the railroad company fills a grade over and across any natural drainage way, it is the duty of the railroad company to provide suitable and sufficient means for taking care of the water along such drainage way." Also: "Now you must determine whether or not in the construction of this grade and the culvert providing for the care of surface water, whether or not the company was negligent and failed to do something that an ordinary prudent man would not have done under the same or similar circumstances." And: "Gentlemen, the plaintiffs must establish that the defendant was negligent in establishing that grade and providing an insufficient culvert to take care of the ordinary drainage water under ordinary circumstances; and, second, that the culvert was not obstructed; and, third, that it was not an extraordinary freshet, and if you find those facts then your verdict must be in favor of the plaintiff, and then determine the amount of damage suffered, if any, by reason of the flooding of these premises and the injury to their property by reason of such flooding; but if you believe that the defendant is not guilty of any negligence in the construction of his right of way and culvert in question, and you believe that the damages was the result of an extraordinary freshet, then your verdict must be in favor of the defendant."

It is also claimed that the court erred in its instruction to the jury, "in that they did not cover the law of the case necessary so that the jury can intelligently decide the issues before them, and the said instructions are ambiguous and well calculated to mislead the jury." It is also claimed that "the court erred in that the instructions given did not fully cover the issues in the case, the court wholly failing to instruct, or not sufficiently instructing, on the following issues: (1) Upon the issue as to whether or not the swale or ravine in question here was a natural water course, no definition of a natural water course having been given them so they could determine this question intelligently. (2) Upon the question of the measure of damages, no instruction whatsoever having been given the jury as to what constituted the measure of damages, if any, plaintiffs had suffered, having been given."

We find no merit in these objections. As far as the natural water course is concerned, we are satisfied that the evidence is so conclusive

that the court would have been justified in peremptorily instructing the jury that the swale or ravine was a natural water course.

As far as the other alleged errors are concerned, including the one in which the court says: "In other words, the railroad company has a right to fill a grade as it is done and established by the evidence in this case, provided no damage results to the adjoining property by reason of such establishing of such grade,"—we do not believe that any prejudice was occasioned. The offending words were preceded by the instruction that the court "instructs you that every owner of land may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of negligence in the manner of execution will not be liable for an adjoining property," and were followed by the words: "The court instructs you as a matter of law that, if a railway company fills a grade over and across any natural drainage way, it is the duty of the railway company to provide suitable and sufficient means for taking care of the water along such drainage way. Now, in this particular case, the gist of the action is to determine whether or not, in the construction of the right of way and establishing the culvert in question, the company, the defendant in this action, was negligent in such construction. If the company is negligent then the verdict must be for the defendant. Negligence, as that term is used in this charge, means the failure to exercise ordinary care. Negligence consists in doing something which a person of ordinary prudence and care would not do or would not have omitted to do under like or similar circumstances. Now, you must determine whether or not, in the construction of this grade and the culvert providing for the care of the surface water, whether or not the company was negligent and failed to do something that an ordinarily prudent man would not have done under the same or similar circumstances. Now, in order to determine whether or not this defendant was negligent, it will be necessary to determine from the evidence the size of the culvert, and take into consideration the drainage area and all the circumstances surrounding as to whether or not such culvert would, under ordinary circumstances, take care of the water of an ordinary rain storm and without injury to the adjoining landowners. If you believe from the evidence, and it is required to be established, that the proximate cause of the injury to these plaintiffs was the result of this negligence of the defendant;

if you believe from the evidence that the culvert was capable and sufficient to take care of the water during this storm, and that by reason of the same being interfered with by an obstacle over the mouth of the culvert that the water was prevented from escaping through the culvert, —the defendant company is not liable for injuries resulting by the obstruction of the mouth of the culvert; and if that contributed and was the cause of the injury sustained by reason of the obstruction of the culvert, then the defendant company is not liable for what may have resulted to the plaintiffs by reason of that fact. Now, the next question to be determined is whether or not in the storm that occurred on July 28, 1914, at which time the plaintiffs are alleged to have suffered the injuries complained of, such storm was an extraordinary freshet; if you believe from the evidence that the storm of July 28 was an extraordinary freshet, then the company is not responsible for injuries sustained, it being contemplated under the law that it was an act of God, and the defendant cannot be held responsible, and the burden is thrown on the defendant to establish this fact by a fair preponderance of the evidence, and, as before indicated, we mean by a fair preponderance of the evidence a greater weight of the evidence; that the defendant must establish that it was in fact an extraordinary freshet. In that connection the jury are instructed that the burden then, as indicated, is upon the defendant to prove by a fair preponderance of the evidence that this was an act of God and was an extraordinary freshet, and was the entire cause of the plaintiffs' loss, which, if so, would in itself establish the absence of negligence on the part of the defendant company, and if the defendant proves by a fair preponderance of the evidence that this was an extraordinary freshet, then that shows that the defendant is free from negligence and is entitled to a verdict. Gentlemen, the plaintiffs must establish that the defendant was negligent in establishing that grade, and providing an insufficient culvert to take care of the ordinary drainage water under the ordinary circumstances; and, second, that the culvert was not obstructed; and, third, that it was not an extraordinary freshet; and if you find those facts, then your verdict must be in favor of the plaintiffs, and then determine the amount of damage suffered, if any, by reason of the flooding of these premises and the injury to their property by reason of such flooding; but if you believe that the defend-

ant is not guilty of any negligence in the construction of his right of way and culvert in question, and you believe that the damages was the result of an extraordinary freshet, then your verdict must be in favor of the defendant."

We do not very well see how these instructions could have been very much clearer. They made it absolutely clear to the jury that the railway company could only be held liable if guilty of negligence, and that the test of that negligence was the care of an ordinarily prudent man in similar circumstances. They made it clear that the defendant could only be held liable in case the storm was not unprecedented or extraordinary. The court clearly stated that "if you believe from the evidence that the storm of July 28th was an extraordinary freshet, then the company is not responsible for the injury sustained." In addition to this a special question was submitted to the jury on this very proposition. The instructions must be taken as a whole, and not in isolated sections, and the jury must be presumed to have been composed of intelligent men. Taken as a whole, the instructions were, in many respects, more favorable to the defendant than the law would warrant.

Nor can we hold, as a matter of law, with the contention of counsel for appellant, that "negligence was clearly disproved by their proof that the railroad tracks, embankments, etc., were constructed in the ordinary and usual manner, and in the most approved manner known to railroad engineers, and that the 40-inch pipe which extended under the track and constituted the culvert was sufficient to take care of the ordinary and usual rainfall in the drainage basin. In other words, that from a rainfall of 3 inches per hour, there would be a run-off of 320 cubic feet per second, and that the capacity of the culvert was 177 cubic feet per second." This testimony was, in fact, given, but the witness admitted that his computation as to the run-off from the drainage area was figured from a general formula merely; that it was based on soil in a dry condition when some of the water would be taken up by seepage, and on the presumption of ordinary street roads, and not roads which were hard and impervious to water. He specifically stated that he did not know without computing how many cubic feet of water would fall upon 168 acres of land if there was a rainfall of 3 inches of water per hour. This evidence would, of course, be con-

clusive if there was any proof of the amount of rain which actually fell during the hours in which the damage was done, and which actually fell during any similar period in the storms of the past, and that the areas from which the formula was taken were similar in topography and as to soil to that under consideration in the case at bar. It must be clear, however, that no general formula can be made to apply in such cases, as the drainage through a pipe or culvert from a drainage basin in a level district such as the Red River Valley would be entirely different from the drainage of a hilly basin such as that to be found at Dickinson. We believe that the case was properly submitted to the jury.

The judgment of the District Court is affirmed.

PER CURIAM (filed April 26th, 1916). After listening to a reargument in the above case, the court still adhere to the opinion above expressed.

MARTIN DERRINGER, a Minor, by John Derringer, His Guardian Ad Litem, v. HENRY TATLEY.

(L.R.A.1916, —, 157 S. W. 811.)

Passenger elevator — boy fourteen years old — injury to — protruding head through opening in door — duties — such action not required by — danger — open — obvious — contributory negligence — hazardous position — duty to observe — knowledge of plaintiff.

1. Plaintiff, a fourteen-year-old bell boy, was injured because of protruding his head through an opening in the door of a passenger elevator. His duties which he was performing did not require him to so endanger himself, and could have been performed without any risk. He understood the open and obvious danger that might be the consequence of his act. Assuming negligence in

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NOTE.—The duty of a master to warn a minor servant of dangers of which he is already aware is discussed in the note in 29 L.R.A.(N.S.) 111, referred to in the opinion of the above case.

In general on the question of warnings and instructions to infant employees, see

operating the elevator in the condition it was in, and conceding that the same was dangerous, it is, however, *held:*

Plaintiff is not exonerated from his contributory negligence simply because he did not realize his risk assumed, or did not think of what he was doing and observe the hazardous position in which he was placing himself. His employer had the right to expect that he would avoid such open and obvious danger, admittedly known to plaintiff to be such.

Mental capacity — proof of — contributory negligence — question of law — for court — recovery precluded.

2. Under the proof as to plaintiff's mental capacity, contributory negligence was a question of law for the court, and precluded his recovery.

Opinion filed March 4, 1916. Rehearing denied April 27, 1916.

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

Affirmed.

George M. Register, F. H. Register, and *S. E. Ellsworth,* for appellant.

The defendant was negligent in the employing of a young, incompetent, inexperienced boy, fourteen years old, to run or operate the elevator. This was not only negligence and in disregard of his duties to the public, but a direct violation of the statute of this state. Comp. Laws 1913, § 1412.

Public records kept under the law may be used to impeach the testimony of a witness on the question of his age, and are prima facie evidence of the facts therein recorded. Comp. Laws 1913, §§ 7917, 7918,

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also notes in 43 Am. Rep. 269, 1 Am. St. Rep. 28, and note in 44 L.R.A. 61, on minority as a special factor bearing on master's duty of instruction.

The liability of a master to a servant injured by an elevator is taken up in note in 56 Am. St. Rep. 806.

As to when the contributory negligence of children does not preclude a recovery for injuries to them, see note in 55 Am. Rep. 864.

A master's liability for injury to servant caused by an elevator uninclosed as required by statute or ordinance is discussed in note in 15 L.R.A.(N.S.) 784.

See also note in 29 L.R.A.(N.S.) 487, on presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger, and notes in 48 L.R.A. (N.S.) 667; 12 L.R.A.(N.S.) 461; and 20 L.R.A.(N.S.) 876, on whether one employing child under statutory age may rely on his contributory negligence to defeat liability for personal injuries sustained by him.

7919; Miller v. Northern P. R. Co. 18 N. D. 19, 118 N. W. 344, 19 Ann. Cas. 1215; 3 Wigmore, Ev. ¶ 2, §§ 1630, 1633; 1 Greenl. Ev. 16th ed. §§ 483, 484, 493; 1 Whart. Ev. §§ 347, 639; 9 Am. & Eng. Enc. Law, 2d ed. 882, 883; 17 Cyc. 306, and cases cited.

In personal injury action the question of the competency of the servant and whether the master was negligent in employing or retaining him with knowledge of his incompetency are questions of fact for the jury, where there is evidence to show such facts. 26 Cyc. 1476; Carlson v. Wilkeson Coal & Coke Co. 19 Wash. 473, 53 Pac. 725; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; Southern P. Co. v. Huntsman, 55 C. C. A. 366, 118 Fed. 412, 13 Am. Neg. Rep. 238; Mares v. Northern P. R. Co. 3 Dak. 336, 21 N. W. 5; Lee v. Michigan C. R. Co. 87 Mich. 574, 49 N. W. 909.

The court erred in admitting evidence over objection, tending to show that some time prior to the accident plaintiff showed evidences of intoxication. No witness pretended to testify as to his condition in this respect at the time he went on duty as a bell boy. Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269, 2 Am. Neg. Rep. 248; Gove v. Tacoma, 34 Wash. 434, 76 Pac. 73.

The defense that plaintiff assumed the risk incident to the employment is an affirmative defense, and should be specially pleaded. It can only be available when pleaded. 13 Enc. Pl. & Pr. 914, and cases cited under note 1; 14 Am. & Eng. Enc. Law, 844; Mayes v. Chicago, R. I. & P. R. Co. 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; Hulehan v. Green Bay, W. & St. P. R. Co. 68 Wis. 520, 32 N. W. 529; Louisville & N. R. Co. v. Orr, 84 Ind. 50; Oregon Short Line & U. N. R. Co. v. Tracy, 14 C. C. A. 199, 29 U. S. App. 529, 66 Fed. 931; Walker v. McNeill, 17 Wash. 582, 50 Pac. 518; Faulkner v. Mammoth Min. Co. 23 Utah, 437, 66 Pac. 799; Boin v. Spreckles Sugar Co. 155 Cal. 612, 102 Pac. 937; Mosher v. Sutton's New Theatre Co. 48 Mont. 137, 137 Pac. 534; Konig v. Nevada-California-Oregon R. Co. 36 Nev. 181, 135 Pac. 141; Sankey v. Chicago, R. I. & P. R. Co. 118 Iowa, 39, 91 N. W. 820.

Children after they have passed the age of seven years may be guilty of contributory negligence; but this fact is a question for the jury. Cleveland, C. C. & St. L. R. Co. v. Scott, 111 Ill. App. 234; 29 Cyc. 535, 540, 642 (2) (11), and cases cited; Tucker v. New York C. & H.

R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 32 Am. Rep. 413; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Atchison, T. & S. F. R. Co. v. Hardy, 37 C. C. A. 359, 94 Fed. 294; Washington & D. R. Co. v. Gladmon, 15 Wall. 401, 21 L. ed. 114; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; Northern P. R. Co. v. Heaton, 111 C. C. A. 550, 191 Fed. 24; Shebeck v. National Cracker Co. 120 Iowa, 414, 94 N. W. 930.

In the case of a child, it is the duty of the master to see that he does not assume risks outside of the scope of his employment. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; Thompson v. Johnston Bros. Co. 86 Wis. 576, 57 N. W. 298; Shebeck v. National Cracker Co. 120 Iowa, 414, 94 N. W. 932; Murray v. Chicago, R. I. & P. R. Co. 152 Iowa, 732, 133 N. W. 123; Barrow v. B. R. Louis Lumber Co. 14 Idaho, 698, 95 Pac. 682, 26 Cyc. 1454.

Niles & Koffel and *Miller & Zuger,* for respondent.

The complaint does not contain a statement of facts sufficient to constitute a cause of action. There is no allegation that the opening in the door of the passenger elevator was dangerous. It may have been so high as to be out of reach of persons standing on the floor, so far as is disclosed by the complaint. 14 Enc. Pl. & Pr. 340, note 1; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053.

Where the facts are clear, and where there is no controversy as to them, and from such facts it clearly appears what course a person of ordinary prudence will pursue under the circumstances, the question of negligence is purely one of law. Fernandez v. Sacramento City R. Co. 52 Cal. 45; Denver & R. G. R. Co. v. Ryan, 17 Colo. 103, 28 Pac. 79, 11 Am. Neg. Cas. 232; Flemming v. Western P. R. Co. 49 Cal. 253, 11 Am. Neg. Cas. 193; Donaldson v. Milwaukee & St. P. R. Co. 21 Minn. 293; Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165.

A person's youth does not necessarily absolve him from being charged with contributory negligence. Guichard v. New, 9 App. Div. 485, 41 N. Y. Supp. 456.

No actionable negligence on the part of defendant is shown. The injury is wholly the result of plaintiff's negligence. Knapp v. Jones, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306.

"Whenever a copy of a writing is certified for the purposes of evi-

dence, the certificate must state in substance that the copy is a correct copy of the original." The authority of the certifying officer is limited to this. Comp. Laws 1913, § 7920; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

The charge of the court did not relate to the assumption of the risk by plaintiff as to dangers inherent in his employment, but as to the assumption of risk relating to his act in protruding his head through the opening in the elevator door. Baltimore & O. R. Co. v. Depew, 40 Ohio St. 127; Day v. Toledo, C. S. & D. R. Co. 42 Mich. 523, 4 N. W. 203; Mackey v. Newbury Furnace Co. 119 Mich. 552, 78 N. W. 783; King v. Ford River Lumber Co. 93 Mich. 172, 53 N. W. 10; Monforton v. Detroit Pressed Brick Co. 113 Mich. 39, 71 N. W. 586; Borck v. Michigan Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254.

The court's action in directing a verdict for the defendant was proper. The evidence clearly shows that the alleged default of defendant was not the proximate cause of the injury. Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A.(N.S.) 1158, 123 N. W. 878; Heckman v. Evenson, 7 N. D. 178, 73 N. W. 427; Morrison v. Lee, 16 N. D. 377, 13 L.R.A.(N.S.) 650, 113 N. W. 1025; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 337, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390; McGinnis v. Canada Southern Bridge Co. 49 Mich. 466, 13 N. W. 819.

Plaintiff's want of ordinary care and prudence was the cause of the injury, and he cannot recover damages. Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Mau v. Morse, 3 Colo. App. 359, 33 Pac. 283; Omaha Horse R. Co. v. Doolittle, 7 Neb. 481, 4 Am. Neg. Cas. 824; Thomp. Neg. § 1104; Ballou v. Collamore, 160 Mass. 246, 35 N. E. 463; Hoehmann v. Moss Engraving Co. 4 Misc. 160, 23 N. Y. Supp. 787; Bremer v. Pleiss, 121 Wis. 61, 98 N. W. 945, 16 Am. Neg. Rep. 275.

Contributory negligence of the plaintiff, however slight, precludes his recovering damages, even though defendant was negligent. Bolin v. Chicago, St. P. M. & O. R. Co. 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911, 9 Am. Neg. Rep. 209; Toomey v. Eureka Iron & Steel Works, 89 Mich. 250, 50 N. W. 850; Redmond v. Delta Lumber Co. 96 Mich. 545, 55 N. W. 1004; Mitchell v. Chicago & G. T. R. Co. 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388, 4 Am. Neg. Cas. 37;

Stern v. Michigan C. R. Co. 76 Mich. 591, 43 N. W. 587; Schindler v. Milwaukee L. S. & W. R. Co. 77 Mich. 136, 43 N. W. 911; Smith v. Peninsular Car Works, 60 Mich. 501, 1 Am. St. Rep. 542, 27 N. W. 662, 16 Am. Neg. Cas. 42; Manning v. Chicago & W. M. R. Co. 105 Mich. 260, 63 N. W. 312; Arzt v. Lit, 198 Pa. 519, 48 Atl. 297; Patterson v. Hemenway, 148 Mass. 94, 12 Am. St. Rep. 523, 19 N. E. 15; Freeman v. Glens Falls Paper Mfg. Co. 70 Hun, 530, 24 N. Y. Supp. 403; McDonald v. Dutton, 198 Mass. 398, 84 N. E. 434; Ford v. Tremont Lumber Co. 123 La. 742, 22 L.R.A.(N.S.) 917, 131 Am. St. Rep. 370, 49 So. 492; Pilucki v. Detroit Steel & Spring Works, 117 Mich. 111, 75 N. W. 295; Borck v. Michigan Bolt & Nut Works, 111 Mich. 129, 69 N. W. 254; Monforton v. Detroit Pressed Brick Co. 113 Mich. 39, 71 N. W. 586; Journeaux v. E. H. Stafford Co. 122 Mich. 396, 81 N. W. 258; Thorsen v. Babcock, 68 Mich. 523, 36 N. W. 723; Prentiss v. Kent Furniture Mfg. Co. 63 Mich. 478, 30 N. W. 109; King v. Ford River Lumber Co. 93 Mich. 172, 53 N. W. 10; Jayne v. Sebewaing Coal Co. 108 Mich. 242, 65 N. W. 971; Lendberg v. Brotherton Iron Min. Co. 97 Mich. 443, 56 N. W. 846; Sakol v. Rickel, 113 Mich. 476, 71 N. W. 833; Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517; Perlick v. Detroit Wooden-Ware Co. 119 Mich. 331, 78 N. W. 127; Juchatz v. Michigan Alkali Co. 120 Mich. 654, 79 N. W. 907; Lindstrand v. Delta Lumber Co. 65 Mich. 254, 32 N. W. 427; Wilson v. Michigan C. R. Co. 94 Mich. 20, 53 N. W. 797; Johnson v. Hovey, 98 Mich. 343, 57 N. W. 172; Melzer v. Peninsular Car Co. 76 Mich. 94, 42 N. W. 1078; Mackin v. Alaska Refrigerator Co. 100 Mich. 276, 58 N. W. 999.

"A bright boy of fourteen years could see and appreciate the danger of being caught by a knife that moved slowly in plain view, as well as could an adult." Malsky v. Schumacher & Ettlinger, 7 Misc. 8, 27 N. Y. Supp. 331.

In his employment and the work he was to do, there were no dangers to which plaintiff was exposed, and defendant had performed every duty he owed to plaintiff. Guggenheim v. Lake Shore & M. S. R. Co. 66 Mich. 150, 33 N. W. 161; O'Leary v. Brooks Elevator Co. 7 N. D. 557, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451.

The burden of overcoming contributory negligence was on plaintiff. Rapp v. Sarpy County, 71 Neb. 385, 98 N. W. 1042, 102 N. W. 242;

Union Stock Yards Co. v. Conoyer, 41 Neb. 617, 59 N. W. 950; Omaha Street R. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007; Yerkes v. Sabin, 97 Ind. 141, 49 Am. Rep. 434.

The plaintiff was of sufficient age so that the law cast upon him the duty to guard against open and obvious dangers, and to use care and prudence. Especially is this true where such dangers are not in any way connected with his employment, or with any duty which his employer owed to him. Beghold v. Auto Body Co. 149 Mich. 14, 14 L.R.A. (N.S.) 609, 112 N. W. 691; Woods v. Kalamazoo Paper Box Co. 167 Mich. 514, 133 N. W. 482; Sterling v. Union Carbide Co. 142 Mich. 284, 105 N. W. 755; Woolf v. Nauman Co. 128 Iowa, 261, 103 N. W. 785, 18 Am. Neg. Rep. 405; Cress v. Philadelphia & R. R. Co. 228 Pa. 482, 32 L.R.A.(N.S.) 409, 77 Atl. 810, 21 Ann. Cas. 142; Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 128, L.R.A.1915A, 761, 147 N. W. 791; Haugo v. Great Northern R. Co. 27 N. D. 268, 145 N. W. 1053; Ewing v. Lanark Fuel Co. 65 W. Va. 726, 29 L.R.A.(N.S.) 487, 65 S. E. 200; McIntosh v. Missouri P. R. Co. 58 Mo. App. 281.

Goss, J. Action to recover damages alleged to have been received through the negligence of the defendant. The answer is a general denial with a plea of contributory negligence. The defendant, owner of the Grand Pacific Hotel in Bismarck, in September, 1912, installed therein a passenger elevator. Its use was begun September 30th and this accident occurred October 6th. On account of two glass panels or guards to be set in the two doors to the elevator shaft on each floor, not arriving, the elevator was operated temporarily without them. During such interval the plaintiff was injured in its operation. The complaint sets forth these facts with particularity, and that the elevator as so used "was highly dangerous and liable to cause serious injury to the body or limbs of any person coming in collision or close contact" with the steel elevator cage moving the elevator shaft; and negligence is charged in permitting it to be operated. It is charged that plaintiff was an employee of said hotel, and, while in the discharge of his duties, "plaintiff not knowing and without warning that he was through said barrier (the hole in one of the doors) passed his head beyond said opening in the upper part of said sliding door and within said elevator. While he was so stand-

ing and in the discharge of his duty, speaking to Peter Boehm (another bell boy, employee) said operator Stenberg (elevator boy) unskilfully, carelessly, negligently, and without any indication whatever to plaintiff of his intention, put said elevator in motion downwards toward the basement of said building, and the arch upon the front of the hood or upper part of said passenger elevator, descending with great speed and without warning to plaintiff, caught his head between said arch and the bar across the bottom of the open space in said sliding door, and with great force and violence crushed, tore, and lacerated plaintiff's head and face," inflicting permanent injuries described. The complaint also alleges that the elevator boy at the time was under the age of sixteen years, and that the statute prohibiting the employment of minors under sixteen years of age was being violated by the defendant at the time, and a recovery is sought on said grounds, as well as upon common-law negligence.

At the close of the evidence the court was requested to take the case from the jury and direct a verdict of dismissal on the grounds of failure of proof and because contributory negligence was established. This the court refused to do, preferring to submit all issues to the jury, and thereafter, if necessary, pass upon the question under a motion for judgment notwithstanding the verdict, should one be made. However, the jury failed to agree, whereupon the court granted the motion for a directed verdict of dismissal. From the judgment thereon plaintiff appeals.

The injury occurred on the ground floor of the hotel at the entrance to the elevator. Plaintiff, a boy past fourteen years of age, was severely injured. He had been employed around the hotel off and on for a year or more, and for six or seven months next prior to the accident had worked continuously as bell boy, except that some four weeks next prior to September 30th he had not been at work or around the hotel, having been temporarily absent. He thoroughly understood the hotel and his duties. He knew that the glass guards were not in the doors opening into the elevator shaft. He knew the operation of the elevator and understood the movement of the cage within the elevator shaft. His duties were those of the ordinary elevator bell boy; to answer calls, look after the convenience of guests, and work as otherwise directed. Three bell boys were employed, two at the time being on duty, this plaintiff

and one Peter Boehm. Peter had just a moment before gotten into the elevator at the third floor, and descended with the elevator boy to the ground floor *en route* to the basement in the performance of his duties, to there turn out the lights. It was between 8 and 8:30 o'clock in the evening of October 6, 1912. The hotel was filled with guests. It was the duty of Peter and Martin to answer bells, and in so doing to go to rooms registered on the indicator. Just at this time two bells rang in different parts of the house. Martin noticed the numbers indicated, tripped the indicator, and turned to give one of the numbers to Peter to look after while he answered the other. At that moment the elevator descended bearing Peter and the elevator boy, Henning Stenberg, and as it came to the floor Martin was either awaiting it or at that instant approached it. It stopped, but with the doors opening into the elevator remaining closed. But as the interior of the elevator cage was lighted, Martin knew it was down, and, while it was thus remaining stationery but with the doors into it closed, Martin stuck his head through one of the openings through the doors where the glass had not been installed. This aperture in the door began 42 inches from the floor, was 10 inches wide, and extended 36 inches upward, constituting an open panel 10x36 inches in size. The elevator cage that carried the passengers up and down had no door on it, the doors to the elevator shaft being the door to the elevator. When plaintiff protruded his head through the opening in the door, the elevator cage with the two boys, Peter and Henning in it, was stationery. Martin says the reason he approached there was to tell Peter the number of the bell for one of the rooms, and that he told him to attend to that room; and that he went close to the elevator because there were too many people around and it was too noisy to tell him without so doing, although he says he could have given him instructions without putting his head through the opening.

Concerning this he was asked and gave the following answer:

Q. Now was it necessary for you to insert your head in that closed door in order to get close enough to tell him that you had a call?

A. No, it wasn't necessary; I didn't realize any danger, though.

Peter refused to take the order to attend to the room mentioned and ordered the elevator boy to go on down to the basement.

Concerning this plaintiff testifies:

Q. Now I would like to know, and I would like to have you tell the jury, what particular thing it was that made you lean over and stick your head in between those bars?

A. To get closer to Pete.

Q. Well, Pete was just inside the bars, wasn't he?

A. He was in there about 3 feet.

Q. And the elevator was standing still?

A. Yes, sir.

Q. And so far as you knew there was no intention to move it, was there?

A. No, sir. Not then. But Peter said to Henning "let her down." That was right there at that time.

Q. That was after you had your head in there?

A. Yes, sir.

Immediately after this the cage descended and the top of it caught plaintiff's head at the back beyond the crown, and jammed his head and face down against the bar across the door, 42 inches above the floor. The cage was brought to a standstill, and plaintiff released severely injured. In explanation of why he had his head inside of the elevator shaft, plaintiff has testified that he did not know there was any danger there, and "did not know that his head was within that opening in the door as he stood there," and did not sense that such was the fact until the descending elevator struck his head. When asked, "Why didn't you take your head out?" he answers, " I didn't know I had my head in." The undisputed evidence shows that the top of the hood operates within, at the nearest, 3 inches to the inside of the door, so that his head could have been 3 inches within the elevator shaft and still not been touched by the descending elevator cage. As it was, his head must have protruded at least 10 or 12 inches inside the opening in the door and that far from the perpendicular. Plaintiff was 5 feet 3 inches, or 63 inches in height, so that exactly $\frac{2}{3}$ of his height was below the bottom of the opening, which was 42 inches above the floor upon which he was standing. The 21 inches of his head and shoulders above the bottom of the opening in the door and 42 inches from the floor then must have been bent or thrust at an angle of approximately 90 degrees into the

elevator cage. Otherwise, plaintiff would not have been caught at the place on the back of his head that was hit by the descending elevator. He could not have known but that his head was within the elevator shaft and in danger had he been thinking, or had he sensed the situation. In all probability he could not have gotten his head through this ten-inch opening and into the position it must have been in without some effort. The foregoing is based upon the plaintiff's testimony, and views the facts in the most favorable light to his cause. The following is the testimony of Stenberg, the elevator boy:

"Well, the elevator bell rang on the third floor, and I went up there, and it was Peter Boehm, and I took him down and was going down and I see Martin Derringer leaning up against the elevator,—against the wall there,—and I stopped and he started to talk to Peter about some bell, I think it was 118, and they were talking there, and pretty soon another bell rang, and Martin turned his head away, and I went down to the basement,—started down. I heard him holler, and reversed the elevator, and when I got up he was lying there on the floor." On cross-examination he states that Martin was standing in front of the opening when the elevator came down, and started talking with Peter about the bell at room 118, when the bell in another room rang and Peter told him (witness) to go on down, which he did.

Q. And you thought Martin had turned away?

A. Yes, sir.

Q. You didn't see him at the time you started down, that he had his head through the opening?

A. He didn't have his head in there.

Q. He didn't?

A. No.

Q. Well, you know a little later he got his head caught between the hood of the elevator and the bar on that door?

A. Yes.

Q. And you say he didn't have his head in there when you started down?

A. No, sir; didn't have it in there when I started down.

This testimony is entirely consistent with that of plaintiff as to the facts. Plaintiff understood the mechanism of the elevator and has de-

scribed how it was operated; he had been instructed in its operation and knew how to use it and had used it. It is also admitted that at the time in question it was not a part of his duty to use the elevator to answer calls to rooms, but instead that he had been positively forbidden to use the elevator for such purposes and ordered to use the stairs instead, as all the bell boys had been instructed to do. He has also testified that it was not part of his duties to give orders to Peter, and that the hotel clerks gave orders to the bell boys. But as perhaps the testimony is sufficient to establish that at the time in question he was performing a duty in directing Peter to answer the bell for room 118, it will be assumed that he was acting in the line of his duties in such respect.

The question first arising is whether plaintiff was guilty of contributory negligence in inserting his head through the opening in the door and within the elevator shaft, assuming that he did not realize either the danger or that he had protruded his head within the elevator cage. Resolving all reasonable inferences in his favor the facts of the situation speaking for themselves conclusively establish that, without thinking what he was doing or sensing the danger that was known and understood by him, or what should have been plainly apparent, he nevertheless voluntarily, though thoughtlessly, placed himself in the dangerous position described and in which but a moment later he was injured. Must plaintiff he held guilty of contributory negligence precluding his recovery? Every text writer and every adjudicated case anywhere nearly parallel on facts and on principle answer in the affirmative, and this, too, in spite of plaintiff's youthfulness. The opinion from Cronin v. Columbia Mfg. Co. 75 N. H. 319, 29 L.R.A.(N.S.) 111, 74 Atl. 180, is closely parallel in fact. It reads: "The plaintiff admitted in his testimony that he knew at the time of his injury that if he allowed his foot to extend beyond the guard it would hit the floor above when the elevator went up through, but he testified that he was not thinking of the situation at that time. He was a boy of average intelligence and about fourteen years of age, who it appears understood the situation and appreciated the danger. It was unnecessary, therefore, for the defendant to instruct him that it would be dangerous for him to allow any part of his person to extend beyond the guard when the elevator was in motion. Hicks v. Claremont Paper Co. 74 N. H. 154, 157, 65 Atl. 1075.

Knowing the situation and appreciating the danger, he must be held to have assumed the risk he incurred. His only excuse is that he *'did not think.'* But it was his duty to think, and, in view of his knowledge, to use such care including the mental operation of some thought as a boy of his intelligence would exercise under the circumstances. It was not the defendant's duty to tell him to think. Gorman v. Odell Mfg. Co. 75 N. H. 123, 71 Atl. 215. He was confessedly 'thoughtless and careless when his duty to the' defendant 'as well as to himself required him to be thoughtful and careful.' Gahagan v. Boston & M. R. Co. 70 N. H. 441, 446, 55 L.R.A. 426, 50 Atl. 146, 149. 'The obligation to exercise care is not satisfied by unexplained absence of action and thought in a situation of known danger.' O'Hare v. Cocheco Mfg. Co. 71 N. H. 104, 107, 93 Am. St. Rep. 499, 51 Atl. 257. The jury were not warranted in finding that he performed the duty of care imposed upon him, for it does not appear that he used any care with reference to his position in the elevator, which he knew, if he had thought about it, was attended with the special danger which caused his injury." This plaintiff did not, as he says, "realize the danger," or, in other words, "did not think" of what he was doing when he should have been intent upon it, accepting his own statements at face, and assuming that he was not partially intoxicated, as to which fact the evidence at least preponderates against him, and that he was intoxicated. Thompson in his Commentaries on the Law of Negligence has a chapter devoted to "Injuries from Elevators in Buildings," and §§ 1086, 1087 are particularly applicable. "It is contributory negligence as matter of law to put one's head into an elevator well for the purpose of shouting for the car to come down, or of seeing whether or not it is coming or who is in it; . . . for a boy eight years old who has been warned and who knows better to put his head over the gate of an elevator." Citing Ramsdell v. Jordan, 168 Mass. 50, 47 N. E. 244, 3 Am. Neg. Rep. 47; Mau v. Morse, 3 Colo. App. 359, 33 Pac. 283; Murphy v. Webster, 151 Mass. 121, 23 N. E. 842; Guichard v. New, 9 App. Div. 485, 41 N. Y. Supp. 456; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; Knapp v. Jones, 50 Neb. 490, 70 N. W. 19, 1 Am. Neg. Rep. 306. Section 1086, Thompson on Negligence, is now quoted from: "Where an errand boy twelve years of age, of more than ordinary intelligence, employed on the fourth floor of a factory build-

ing, on being sent down on an errand not relating to freight, leaned upon a chain hanging across the entrance to the shaft of the freight elevator to look for the elevator upon which he had no right to ride, and was injured by the giving away of the chain,"—recovery was barred by his contributory negligence. The same, "where one who had ridden upon an elevator put his head into the shaft through an opening in the upper part of the door and was killed by the elevator in its descent." Mau v. Morse, supra. Its facts are practically identical with the case at bar. Plaintiff contends that he should recover because the openings that were left in the doors rendered the elevator inherently dangerous. In Mau v. Morse, "the elevator did not have a screen above the window," so its entrance was less protected than in this case. Concerning this same contention the Colorado court says: "The negligence complained of is the failure to properly protect the entrance to the elevator which, when the elevator was not present, was also an entrance to the shaft." Deceased was killed while looking over the screen for the car, with his head in the elevator shaft. "It is true that if the opening had been so protected the deceased would probably have been unable to thrust his head into the shaft, but we are not sure that he could not have found some other means of equally unnecessary danger; and as to him with the knowledge of the situation which he possessed, or ought to have possessed, the failure of the defendants in that regard can hardly be said to be negligence. It is possible that while the opening was in the exposed condition described in the complaint, a case might have arisen in which the defendants would be held liable for a resulting injury, but such a case would differ widely in all its distinctive features from the one before us. If a man in his sound senses, with his eyes open, voluntarily and deliberately, even if carelessly, thrust himself into the jaws of death, we know of no theory upon which anyone can be held responsible for the consequences of his act but himself." Labatt on Master & Servant announces the same rule at § 1251. "The doctrine stated at the beginning of the last section has also been applied, as shown in the following paragraphs, to actions for injuries received under circumstances mentioned: . . . (2) taking a position in which there is danger from the movement of an elevator cage; and . . . (4) taking a position rendered dangerous by moving machinery; . . . (6) getting onto a stationery machine which may be

put in motion at any moment." The doctrine referred to in § 1250 is: "The general effect of the authorities upon this subject is that where the evidence shows that the injury complained of was due to the fact that at the time of the accident the servant was occupying a position which was obviously more dangerous than another which was available, a prima facie presumption of contributory negligence arises which will warrant a court in declaring as a matter of law that the action cannot be maintained." Hence, if plaintiff be considered as a servant discharging his duties as bell boy in giving orders to Peter, although he admits and the court would have been warranted in finding that he was without authority to give orders which would come from the hotel clerk instead, yet assuming the contrary, the plaintiff's own testimony, showing that he unnecessarily placed himself in a position of great danger in the performance of said duty, convicts him of contributory negligence for not giving orders from outside the elevator and without protruding his head into the elevator shaft.

In this connection it may be well to remark that there is a clear line of demarcation in the authorities between issues of negligence and contributory negligence considered as to those entering into or alighting from passenger elevators, and as to accidents occurring while the passenger is being carried therein, from cases like this at bar, where a person, whether a servant or would-be passenger, either understandingly or heedlessly thrusts head or limbs through an opening into an elevator shaft. A search has disclosed no case of the latter kind where contributory negligence was not imputed and precluded recovery as a matter of law.

And appellant's brief cites no authority to the contrary. However, he contends that, on account of plaintiff's minority, youth, and immaturity he should be measured in his conduct by what is usual to minors of his age and mental capacity, and asserts that when such a standard is applied an issue of fact upon contributory negligence necessarily arises to be decided as a question of fact by a jury, instead of resolving into a proposition of law. It is true that, in considering cases where an infant is to be charged with contributory negligence, the age and mental capacity are to be considered with all other attending circumstances. Where, in the light of human experience, the infant is so young as not to be presumed to sense or foresee danger liable to follow his acts, negli-

gence will not be imputed because he is *non sui juris*. And therefore there must be a zone between ignorance of and knowledge of impending danger, inability and ability to foresee and understand consequences. These considerations may be of fact for the jury to determine according to the state of the proof. Where the infant is of such tender years as usually to possess no such knowledge, ignorance is presumed, and the question is one of fact for the jury. And the same is true as to the other extreme, where the minor has so far reached maturity in understanding and comprehension as naturally to fully appreciate the danger that must follow his negligent act, the court must likewise act upon the proof of such ability, and direct the jury accordingly as a matter of law, instead of submitting to it an assumed issue of fact where there is none in the proof. Any other rule would result in making the employee of an intelligent minor of plaintiff's age and mental ability, beyond all doubt fully appreciative of any usual risks voluntarily and understandingly undergone by him, the insurer in damages of injuries resulting from the minor's recklessness, at the caprice of a jury viewing the facts sympathetically and with knowledge that its decision establishes liability. Concerning this the very recent work of Labatt on Master & Servant, § 1264, declares: "If he [the minor] has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible. In a recent decision of one of the Federal courts of appeals it was laid down that, after passing the age of fourteen years, a child is presumed to be capable of avoiding danger by the exercise of due care. And this is probably the rule in all jurisdictions."

An examination of the evidence discloses that plaintiff became fourteen years of age in July, preceding his injury on October 6, 1912; that he had worked as a bell boy in this hotel off and on for a year or more. He was of at least medium size for his age, and was bright and intelligent, and an eighth grade pupil when at school. He has given his testimony understandingly, and has evinced the knowledge of an adult at all times, of the situation concerning which he has testified. The elevator had been in operation one week, during which time he had learned to run it and understand its operation and mechanism, its horse power and velocity. He knew that it was unfinished. During

this time he had once had an accident with it, running it so far toward the roof as to cause it to automatically stall, as a result of which there is evidence tending to establish, although the fact is denied by him, that he was ordered to keep away from it and leave it entirely alone, except when he was taking up passengers or baggage, and at which time necessarily the elevator boy would operate the elevator. The rule of *res ipsa loquitur* applies and prevails. Shearm. & Redf. Neg. § 710a. Plaintiff knew, and must have known had he stopped to think of what he was doing, that by doing what he did he was placing himself in great danger. The only question in the lawsuit is whether he is excused as a matter of law from imputed contributory negligence in protruding his head within the elevator cage, simply because he "did not realize," *i. e.*, "did not think," of what he was doing, when, had he done so, he could not have avoided discovering his risk. Had he done so knowingly it would have been utter recklessness on his part. He had knowledge enough to foresee the danger and understand the risk. Under every authority he is not excused because of his minority solely, by reason of his failure to think when he should have done so. Possessing the knoweldge to appreciate the danger, understanding had he thought of the peril, his minority is not an excuse any more than it would have been had he been an adult. His employer had the right in law to assume that he would use that knowledge of understood and apparent peril to protect himself, instead of any assumption that he might take such hazards. The question here is not one of mental capacity, but of heedlessness. And the court was warranted in instructing a verdict upon the basis of his contributory negligence, notwithstanding his minority. Cronin v. Columbian Mfg. Co. 29 L.R.A.(N.S.) 111, and cases cited in the note thereto (75 N. H. 319, 74 Atl. 180) 29 Cyc. 541, "notwithstanding the immaturity of a minor, if it appears that he knew of the danger, he will be held guilty of contributory negligence," and cases cited sustaining the text; Binder v. Chicago City R. Co. 175 Ill. App. 503, where a recovery by a minor sixteen years of age at the time of the accident was set aside, and he was held guilty of contributory negligence as a matter of law in spite of his minority; Wilson v. Chicago City R. Co. 133 Ill. App. 433, where a child nine years old was held guilty of contributory negligence as a matter of law; Koehler v. Chicago City R. Co. 166 Ill. App. 571, where a boy ten years old was held

guilty of contributory negligence as a matter of law and a verdict set aside; Central of Georgia R. Co. v. Chambers, 183 Ala. 155, 62 So. 724; Jackson v. Butler, 249 Mo. 342, 155 S. W. 1071.

But appellant cites an excerpt from Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 309, 122 N. W. 390, wherein 29 Cyc. 540, is cited to the effect that "in every case the question of the intelligence of the child and the measure of his capacity should be left to the determination of the jury." The portion quoted is but part of a lengthy discussion of contributory negligence as applied to infants, and immediately following this excerpt Upthegrove v. Jones & A. Coal Co. 118 Wis. 673, 191 N. W. 385, 14 Am. Neg. Rep. 670, is also quoted as follows: "The true test as to whether a minor has assumed the ordinary risks of his employment or is guilty of contributory negligence is not whether he in fact knew and comprehended the danger, but whether under the circumstances he ought to have known and comprehended such danger. . . . . Where it appears from the undisputed evidence that the defect or danger is open and obvious, and such as under the circumstances ought to have been known and comprehended by the plaintiff, then he will be held to have assumed the risk as a matter of law." *This is the doctrine applied in this case at bar.* We quote again from Umsted v. Colgate Farmers' Elevator Co.: "A servant, although under age, assumes all patent and obvious risks of his employment *if he has sufficient intelligence to understand and appreciate it* (26 Cyc. 1220E), except where the child is so young as to be incapable of exercising judgment and discretion. The rule of contributory negligence applies where the person is an infant the same as where he is an adult." 29 Cyc. 535. And on the second appeal after retrial in Umsted v. Colgate Farmers' Elevator Co., it was held, quoting from the syllabus of 22 N. D. 242, 133 N. W. 61, "that it conclusively appears that plaintiff was not only guilty of contributory negligence, but that he assumed the risks incident to such experimental tests. Hence, his recovery cannot be sustained." Though plaintiff was a minor, it was held that he was guilty of contributory negligence as a matter of law, although the jury had found the contrary by their verdict; and it may be noted that the opinion in both cases is by the same justice. See also Krisch v. Richter, — Tex. Civ. App. —, 130 S. W. 186, where a boy sixteen years old was held bound to know and appreciate open and obvious danger. The

same was held in Herdt v. Koenig, 137 Mo. App. 589, 119 S. W. 56, in which the syllabus reads: "Plaintiff, a bright, intelligent boy ten and one-half years old, while leaning over a fence maintained as a barrier to a quarry, fell into the quarry because of the breaking of the fence. He had been warned repeatedly of the danger of playing near the quarry; had been driven away from it by a person living near; and had been whipped several times by his father for refusing to stay away. He admitted that he was entirely familiar with the danger of the place, and knew the defective condition of the fence and that the boards were rotten and the nails insufficient to hold the boards. Held, that he was negligent." A directed verdict of dismissal was sustained. In this case are cited the following cases, in all of which the plaintiff, although younger than this plaintiff, was held guilty of contributory negligence in every instance as a matter of law precluding recovery, *viz.*: Payne v. Chicago & A. R. Co. 136 Mo. 562, 38 S. W. 308, where the plaintiff was eleven years of age; Graney v. St. Louis, I. M. & S. R. Co. 157 Mo. 666, 50 L.R.A. 153, 57 S. W. 276, where plaintiff was eleven years and nine months of age; Walker v. Wabash R. Co. 193 Mo. 453, 92 S. W. 83, where the plaintiff was fourteen years of age; McGee v. Wabash R. Co. 214 Mo. 530, 114 S. W. 33, where plaintiff was a boy thirteen years of age; Mann v. Missouri, K. & T. R. Co. 123 Mo. App. 486, 100 S. W. 566, where plaintiff was a boy twelve years of age; Twist v. Winona & St. P. R. Co. 39 Minn. 164, 12 Am. St. Rep. 626, 39 N. W. 402, where the plaintiff was a boy ten and one-half years of age; Merryman v. Chicago, R. I. & P. R. Co. 85 Iowa, 634, 52 N. W. 645, where the plaintiff was a boy thirteen years of age; Carson v. Chicago, R. I. & P. R. Co. 96 Iowa, 583, 65 N. W. 831, where the plaintiff was a boy twelve years of age; Knox v. Hall Steam Power Co. 69 Hun, 231, 23 N. Y. Supp. 490, where the plaintiff was a boy twelve years of age; and Spillane v. Missouri P. R. Co. 135 Mo. 414, 58 Am. St. Rep. 580, 37 S. W. 198, where a boy nine years of age was held guilty of contributory negligence as a matter of law. This last case was distinguished in Herdt v. Koenig on the facts from Holmes v. Missouri P. R. Co. 190 Mo. 98, 88 S. W. 623, where it was held as to an eight-year old child under the proof of noncapacity, that contributory negligence was a question for the jury. But in Ridenhour v. Kansas City Cable R. Co. 102 Mo. 270, 13 S. W. 889, 14 S. W. 760, 4 Am.

Neg. Cas. 634, it is held "that it cannot be adjudged as a matter of law that a child of nine years of age is incapable of negligence." See 2 L.R.A.(N.S.) at page 759; 4 R. C. L. 559; 9 R. C. L. 1236, and 1258; Thompson, Commentaries on Law of Negligence, §§ 280–318, covering "injuries to children and others *non sui juris*" on negligence and contributory negligence, and particularly §§ 316–318.

This plaintiff acted recklessly and heedlessly, and should be bound by the consequences brought upon him by his own carelessness. He was guilty of contributory negligence as a matter of law. This holding decides the case adversely to appellant, and renders unnecessary an examination of any other assignments presented in his brief.

Appellant contends that the fact that the jury disagreed upon supposed questions of fact of negligence and contributory negligence submitted to it should be considered and taken as strong evidence that because of plaintiff's minority he was not guilty of contributory negligence. The answer is that in many of the cases cited verdicts were returned finding plaintiff not to be guilty of contributory negligence, but which were set aside and the contrary found as a matter of law. Plaintiff's argument carried to its logical conclusion would prevent any determination as a matter of law, that a plaintiff had been guilty of contributory negligence barring his recovery, where the court had erroneously submitted such questions to a jury, and it had happened to pass erroneously thereon, no matter how culpable and gross the plaintiff's negligence. In reading the record many matters are disclosed upon which a jury might disagree, and from conclusions upon a portion of the proof erroneously applied or omitted to be applied at all to the evidence surrounding contributory negligence, a disagreement might result on such supposed issue of fact. Plaintiff's intoxication or nonintoxication is an illustration. One can scarcely read the record without concluding that the preponderance of the evidence was to the effect that plaintiff was considerably intoxicated at the time of this accident, which alone would establish the reason why he did not think of what he was doing when he got his head in the path of the descending elevator. However, nonintoxication of plaintiff has been assumed as the fact, and upon that assumption the case is determined adversely to appellant. The judgment of dismissal is affirmed, with costs.

BRUCE, J. I dissent.

L. H. MILLER, George M. Miller, and A. S. Miller, Respondents, v. J. M. THOMPSON and Devils Lake State Bank, a Corporation, Defendants and J. M. Thompson.

(157 N. W. 677.)

Corporate stock — contract of sale — action to rescind — evidence — laches — estoppel.

Action to rescind a contract of sale of corporate stock. Evidence examined and *held*:

That upon plaintiffs' testimony they are estopped by their own laches from rescinding the contract.

Opinion filed March 25, 1916. Rehearing denied April 27, 1916.

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

Reversed.

Cuthbert & Smythe, for appellant.

The complaint does not show facts constituting a cause of action.

If plaintiff's cause be an action at law, there is no allegation of rescission. If an equitable action, there is no such allegation, nor any showing that plaintiff is ready, willing, and able to rescind. Iowa Nat. Bank v. Sherman, 23 S. D. 8, 119 N. W. 1010; Lovell v. McCaughey, 8 S. D. 471, 66 N. W. 1085; Coplay Iron Co. v. Pope, 108 N. Y. 232, 15 N. E. 335; Note to Katz v. Bedford, 1 L.R.A. 826; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; J. L. Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 523, 101 N. W. 903.

The stock of goods received by plaintiffs should have been returned by them before action, and their failure in this respect estopped them to bring action. 4 Thomp. Corp. pp. 3480, 3484; Rev. Codes 1905, § 5380, Comp. Laws 1913, § 5936.

It is immaterial whether or not the appellant was guilty of fraud. Fraud does not rescind a contract. It is merely a ground for rescission. To rescind, the party must return everything of value. McMahon v. Plummer, 6 Dak. 42, 50 N. W. 480; Bassett v. Brown, 105 Mass. 551; Conner v. Henderson, 15 Mass. 319, 8 Am. Dec. 103;

Morse v. Brackett, 98 Mass. 205; Eastabrook v. Swett, 116 Mass. 303; Snow v. Alley, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764.

Plaintiffs cannot retain the property acquired from defendant, and by a rescission secure a reconveyance of all the property transferred by them in part consideration therefor. Lovell v. McCaughey, 8 S. D. 471, 66 N. W. 1085; Anderson v. First Nat. Bank, 4 N. D. 192, 59 N. W. 1029; Comp. Laws 1913, §§ 3589, 3591; Northwestern Mut. Hail Ins. Co. v. Fleming, 12 S. D. 36, 80 N. W. 147; Smith v. Detroit & D. Gold Min. Co. 17 S. D. 413, 97 N. W. 19; Iowa Nat. Bank v. Sherman, 23 S. D. 8, 119 N. W. 1010; Liland v. Tweto, 19 N. D. 551, 125 N. W. 1032; J. L. Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78; Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 523, 101 N. W. 903.

Plaintiff's remedy, if any, was to sue for a breach of the contract. Rutland Marble Co. v. Ripley, 10 Wall. 353, 19 L. ed. 960, 3 Mor. Min. Rep. 291.

Certificates in the stock of a corporation while looked upon as property mainly for taxation purposes, yet they are not the stock, the goods and chattels, the property,—that which is really bought and sold. They are merely evidence of interests in the corporation. 4 Thomp. Corp. §§ 3470, 3471, 3480; Ex parte Willcocks, 7 Cow. 402, 17 Am. Dec. 525; Vail v. Hamilton, 85 N. Y. 453; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; State v. Ferris, 42 Conn. 560; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341.

Further, one may be a stockholder and his liability just as fixed as though the certificate had been issued and delivered without such issuance and delivery. Barron v. Burrill, 86 Me. 66, 29 Atl. 939; Holland v. Duluth Iron Min. & Development Co. 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Richardson v. Busch, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; Hutchins v. State Bank, 12 Met. 421; Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 627; Angell & A. Priv. Corp. § 560; Jellenik v. Huron Copper Min. Co. 177 U. S. 13, 44 L. ed. 651, 20 Sup. Ct. Rep. 559; 1 Cook, Corp. §§ 13, 485–488, inclusive; First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126; Basket v. Hassell, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415.

Plaintiffs took possession of the property of the corporation and retained same and exercised ownership over it, until it was lost, destroyed, or dissipated, and not even an offer of return of any of it. No matter what its value, they should have returned it, or shown an offer to return and refusal to accept. Blackburn v. Smith, 2 Exch. 783, 18 L. J. Exch. N. S. 187; Reed v. Blandford, 2 Younge & J. 278; Pharr v. Bachelor, 3 Ala. 245; State v. McCauley, 15 Cal. 458; Christy v. Arnold, 4 Ariz. 263, 36 Pac. 918; Shively v. Semi-Tropic Land & W. Co. 99 Cal. 259, 33 Pac. 848; Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; Moore v. Bare, 11 Iowa, 198; Murphy v. Lockwood, 21 Ill. 611; Gehr v. Hagerman, 26 Ill. 441; Wheeler v. Mather, 56 Ill. 241, 8 Am. Rep. 683; Wolf v. Dietzsch, 75 Ill. 205; Chance v. Clay County, 5 Blackf. 441, 25 Am. Dec. 131; Hendrickson v. Hendrickson, 51 Iowa, 68, 50 N. W. 287; Johnson v. Jackson, 27 Miss. 498, 61 Am. Dec. 522; Randlet v. Herren, 20 N. H. 102; Getchell v. Chase, 37 N. H. 110; Ayer v. Hawkes, 11 N. H. 148; Doughten v. Camden Bldg. & L. Asso. 41 N. J. Eq. 556, 7 Atl. 479; Pittsburgh & N. A. Turnp. Road Co. v. Com. 2 Watts, 433.

The plaintiffs here are estopped by their long acquiescence. Lowber v. Selden, 11 How. Pr. 526; 2 Pom. Eq. Jur. 499, 500; Cholmondeley v. Clinton, 2 Meriv. 171, 2 Jac. & W. 1, 4 Bligh, N. R. 1; Honner v. Morton, 3 Russ. Ch. 65, 27 Revised Rep. 15; Selsey v. Rhoades, 1 Bligh, N. R. 1, 30 Revised Rep. 1; Vigers v. Pike, 8 Clark & F. 650; Charter v. Trevelyan, 11 Clark & F. 714, 8 Jur. 1015; Odlin v. Gove, 41 N. H. 465, 77 Am. Dec. 773; Bassett v. Salisbury Mfg. Co. 47 N. H. 439; Peabody v. Flint, 6 Allen, 52; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Cobb v. Hatfield, 46 N. Y. 533; Lawrence v. Dale, 3 Johns. Ch. 23; M'Neven v. Livingston, 17 Johns. 437.

They are estopped because the parties are not left *in statu quo*. Clarke v. Dixon, 27 L. J. Q. B. N. S. 223, El. Bl. & El. 148, 4 Jur. N. S. 832.

They are estopped for laches. A defrauded party has but one election to rescind, and he must use that promptly upon discovering the fraud, and when once he has elected, he must abide by his decision. Bigelow, Fr. 436, 438; Williamson v. New Jersey Southern R. Co.

29 N. J. Eq. 319; Brown v. Mutual Ben. L. Ins. Co. 32 N. J. Eq. 809; Oakey v. Cook, 41 N. J. Eq. 350, 7 Atl. 495; 2 Pom. Eq. Jur. § 817; Baird v. New York, 96 N. Y. 567; Farlow v. Ellis, 15 Gray, 229; Lawrence v. Dale, 3 Johns. Ch. 23; M'Neven v. Livingston, 17 Johns. 437; Morgan v. McKee, 77 Pa. 231, 3 Mor. Min. Rep. 128; Pearsoll v. Chapin, 44 Pa. 9; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Leaming v. Wise, 73 Pa. 173, 7 Mor. Min. Rep. 41; Knuckolls v. Lea, 10 Humph. 577; Bassett v. Brown, 105 Mass. 551; 1 Story, Eq. Jur. 13th ed. 227; 2 Kent. Com. 11th ed. 637; Vigers v. Pike, 8 Clark & F. 562; Schiffer v. Dietz, 83 N. Y. 300.

W. M. Anderson, for respondents.

Failure to appeal for an order denying a new trial leaves such order *res judicata* as to all error that might have been urged against it. Hedderich v. Hedderich, 18 N. D. 488, 123 N. W. 276.

This is an equity case which was tried by a jury, and therefore it becomes a law case. Peckham v. Van Bergen, 8 N. D. 595, 80 N. W. 759; Comp. Laws 1913, § 7846; Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11.

Restoration means to turn back that which one receives. In this case it is what was received from Thompson, and not that which was received from the directors, that should be returned. Comp. Laws 1913, subdiv. 2 of § 5936.

Title is transferred by an executory contract for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it, and offered it to the buyer, with intent to transfer the title. Comp. Laws. § 5536.

Payments made prior to discovery of fraud do not prevent rescission. Grewing v. Minneapolis Threshing Mach. Co. 12 S. D. 127, 80 N. W. 176.

BURKE, J. The decision in this case rests upon a careful analysis of the facts. These are complicated, but not largely in dispute. The Anderson Mercantile Company was a corporation operating a general store at the village of Penn, North Dakota. Defendant is a banker of Devils Lake. The three plaintiffs lived near Penn. L. H. Miller, the father, had been in business in Grand Harbor for about fifteen years, but had later located upon a farm 4 miles from Penn, and he and one

of his sons, Alfred, engaged in the hardware business at Penn thereafter. The father testifies that he understood bookkeeping in his own way, and had kept the books when he was in business. One of the sons, Alfred, also a plaintiff, had been in partnership with his father in the hardware business about a year at the time the transactions involved in this suit took place. The other son, George, had worked in the mercantile business about eight years at Grand Harbor. The defendant, or his bank, had acquired fifty shares of the capital stock of the Anderson Mercantile Company as collateral to a loan made to a former manager of the company. The fifty shares were a majority of the whole stock, which consisted of eighty-eight or eighty-nine shares. A sale was finally effected of those fifty shares of stock to the three plaintiffs by the defendant, October 6, 1910. As this suit is an attempt to rescind said contract of sale, it becomes important to study said negotiations. We cannot set out all of the testimony, of course, and it is hard to set out extracts without appearing to do an injustice to one of the parties. We are therefore obliged to give somewhat our version of the conversations, supplemented by quotations from the testimony. Alfred Miller testified that Thompson came to him and offered him the stock and showed him an invoice of the goods belonging to the Mercantile Company and a list showing its debts. He testifies that defendant told him the shares were worth 65 cents on the dollar. Upon cross-examination he states that the negotiations had extended over quite a period of time, and that he and his father and brother had consulted about the proposition on one or more occasions. That he had been in the store frequently, and knew something at least about the business. He says that defendant stated as follows: "He said the liabilities had been reduced from $9,500 to $6,500. . . ." and: "He says 'you aren't taking any chances whatever as we are responsible.'" The other brother, George, testifies to the same conversation.

Upon cross-examination he stated:

Q. Mr. Thompson did tell you, did he not, that there might have been accounts outstanding that he had not gotten, but if there were he would be responsible for it? . . . That if there was anything over $6,500 indebtedness that he would be responsible for it?

A. Well, I do not know as he said it that way.

Q. Well, that was the substance of what he said, was it not?

A. To a certain extent.

. . . . . .

Q. Didn't Mr. Thompson tell you right there that night (at a later date) that he stood ready to make good for any accounts that figured up, on the 5th of October, 1910, to over $6,500?

A. I do not remember.

Q. He has told you that several times, has he not?

A. Well, to a certain extent he has.

Q. He has told you every time you talked to him about this indebtedness, has he not?

A. Yes, but he has never told us he would make it all good.

. . . . . .

And then on redirect examination he states, being examined by his own attorney:

Q. And when was it that he stated he would make good everything? Every item over $6,500 on indebtedness?

A. Well, that was the understanding all the time, that he was supposed to make good.

Q. Was it after or before this stock was sold?

A. As I take it, it was before and after. . . . The only time I remember of distinctly is before.

Q. And what did he say then?

A. Well, he said that anything that came up afterwards that they would make good. . . . He says that we were absolutely taking no chances at that time.

Q. And that they would make good?

A. Yes, sir.

The father also testifies to this conversation, and in substance said the same as the boys:

Q. He (Thompson) also told you in that conversation that there might be some other bills out that he did not know about,—he said that, did he not?

A. I do not remember that, no.

Q. You would not swear he did not say that, would you?

A. No, I would not say he did not, but I don't remember it.

Q. And he told you this was a safe deal, that if there was more than $6,500 debts he would make good, did he not? That he would pay it?

A. Yes, sir, he said that. He said, "We are good for it if there is anything wrong about it." . . .

Q. The fact is, it is not, that when he was talking about this $6,500, he told you there might be other bills that he had not got hold of?

A. I do not remember him mentioning that.

. . . . . .

Q. And he told you he was financially good in that; if there was anything wrong with this statement he would make it good?

A. I think he mentioned that he would make it good.

Mr. Thompson, defendant, offered no testimony at the trial. We will, therefore, for the purposes of this opinion, assume that the testimony of the plaintiffs is true regarding this feature of the case. No cash was paid for the stock, but two notes of $1,500 each were signed by the three plaintiffs and given to defendant. The actual shares of stock, however, were not delivered, it being defendant's theory that they were held as collateral to the notes, and plaintiffs claiming that when those shares were demanded defendant stated that he could not find them upon the moment, and put off their delivery from time to time upon this excuse.

At all events, plaintiffs entered into possession of the store and ran the same until the last part of January, 1912, when it went into the hands of a receiver. In the meantime a dispute had arisen as to the amount of the debts of the mercantile company. A careful examination of the testimony convinces us that this dispute occurred within a month after the sale, and continued at intervals during a period of nearly a year. Further we do not believe there was satisfactory evidence offered showing that the $6,500 limit was much exceeded. The two boys worked continuously in the store, and the father came in frequently to inquire about the business. It is the contention of plaintiffs that the books of the mercantile company nowhere showed the indebtedness of the concern, and that for this reason they did not immediately learn of the false representation made to them regarding the debts. Here again an examination of the testimony convinces us that as early as November 7, 1910, a month and a day after the sale, plaintiffs were in

possession of a complete list of the indebtedness of the mercantile company.

Upon cross-examination Alfred testifies:

Q. Now, refresh your memory and state if you paid the Janney, Semple, Hill, & Company's note on November 7, 1910.

. . . . . .

Q. So, as early as November 7, 1910, you had noticed that there were some outstanding accounts that were not included in the invoice, and you went immediately down to Mr. Thompson to see about it?

A. Well, we did not know for sure.

Q. Well, you went to see Mr. Thompson about it, did you not?

A. Yes, sir.

. . . . . .

Q. Now, you had received statements from practically all of the wholesale houses at that time, had you not?

A. No, I do not believe we had.

Q. Well, you received statements from every wholesale house unless there was some, where there was a note given?

A. Yes.

. . . . . .

Q. And you were receiving statements from that right along, were you not?

A. I do not just remember about that at all.

. . . . . .

Q. You took all of the wholesale houses that had accounts outstanding and took those bills—now did you find that the indebtedness exceeded $6,500?

A. Yes, sir.

It is thus evident that as early as November 7, 1910, plaintiffs claimed that the indebtedness exceeded the sum of $6,500. This is an important fact because no effort was made to rescind, on this ground at least, until one year two months and nineteen days thereafter, at a time when the mercantile company had become insolvent. Plaintiffs had also furnished evidence, at the time the mercantile company was turned over to them there was $800 in the bank to its credit. Thus, of the year and three months the plaintiffs were in control of the store,

all but about a month of that time they were aware of the ground which they now claim entitles them to rescind, but they took no action. This is the only inference that can be drawn from the testimony as a whole. We are not going to give the evidence regarding the disputes between plaintiffs and defendant that occurred during the year and three months of their ownership, but to show that this is the principal ground of complaint, we quote from the testimony of the son George:

Q. You accepted the invoice of August 3, did you not?
A. Yes, sir.
Q. Was it a correct invoice?
A. Yes, sir.
Q. And you never had any cause to complain about that?
A. No, we never made any complaint about that.
Q. The merchandise was all there that he represented to be there?
A. Yes.
Q. So the only complaint that you had was that there was a larger indebtedness outstanding than $6,500? That was your only complaint, was it not?
A. Well, we claimed,—our complaint was, that there was several items on it that he did not have on his statement.
Q. And that these items made the indebtedness more than $6,500?
A. Yes, sir.

The evidence also shows that Thompson at all times insisted that the indebtedness was not more than $6,500, but that if it was he would pay the overplus. January 28, 1912, after the mercantile company had gone into the hands of a receiver, two of the plaintiffs called upon defendant and demanded their notes.

The father testifies:
Q. Do you remember what date it was?
A. That was January 28th.

. . . . . .

Q. Who did you come with then?
A. George.
Q. Had you consulted a lawyer in the meantime?
A. Well, I think we had. Yes.

Q. After you had consulted your lawyer, then you went down and demanded your notes, did you not?

A. Yes, sir.

. . . . . .

Q. That is the time you told Mr. Thompson you did not think you got a consideration for the notes?

A. Yes.

In their brief plaintiffs state that the grounds of the rescission were as follows: "The plaintiffs claimed that Thompson agreed to sell fifty shares of stock in the Anderson Mercantile Company, and represented that it had an indebtedness of $6,500, and that that was all of the indebtedness that was against the company at the time, with the exception of two or three small accounts that did not amount to anything and were of no consequence; whereas, in truth and in fact, the indebtedness was much larger. That it amounted to something like $1,700 more at the time the deal was closed, and that the notes amounting to $3,000 were delivered to the defendant Thompson and the Devils Lake State Bank, with the agreement that the defendant was to deliver to them fifty shares of stock in the Anderson Mercantile Company, and that no stock had ever been delivered to them, although they had from time to time made a demand for this stock, and that the defendants had failed, neglected, and refused to deliver it to them; so that the issues presented by the complaint for the rescission are: First, fraud in misrepresenting the condition of the indebtedness; and, secondly, an absolute failure of consideration in not delivering the shares of stock to them. The case was brought on for trial, and was concededly an equity case. The trial judge, however, announced that he would call a jury to whom he would submit certain disputed questions of fact. Defendant objected to the jury upon the grounds that the same would deprive him of a trial *de novo* under the Newman act in the supreme court, because all of the evidence would not be received. He also objected to the jury upon the grounds that there were, or probably would be, no disputed questions of fact, only questions of law, and upon the grounds that the nature of the case was such that a jury could not be of any assistance. We prefer, however, to place our decision upon other grounds, thus ending the litigation. As already stated, the defendant offered no testimony. There was therefore no dispute as to the facts. The court, nevertheless, submitted six questions

to the jury which the defendant insists were questions of law. Upon the answer of these questions a rescission was ordered. Defendant appeals, specifying numerous errors. Several questions of practice have already arisen and been decided in this case, and we will give no further consideration to those technicalities. For the same reason we will not discuss defendant's contention that the complaint does not state a cause of action, nor the questions which he raises as to the impropriety of submitting questions of law to the jury for answer.

(1) An important point and one that will end the litigation will be taken up and decided. Accepting the testimony of the plaintiffs as true, it, to our mind, shows conclusively that they were estopped from rescinding the contract by their own laches. They acquiesced in the contract, and continued in possession of the store for more than a year after they learned that the indebtedness exceeded the amount represented, and for the same period after the defendant had neglected and refused to turn over to them the actual shares of stock. They sold goods from the store, and used up the $800 that had been left on deposit, and ran the business into bankruptcy before making their formal rescission. The father even paid $500 upon one of the $1,500 notes, and the interest on the other, and renewed the same. Upon this occurrence the defendant released the two sons from further obligation upon that note. They made no attempt to restore to the defendant the business in the condition in which they had received it. In fact, they could not have done so had they tried. They therefore could not rescind. This is elementary. 2 Pom. Eq. Jur. 499, 500; Clarke v. Dixon, 27 L. J. Q. B. N. S. 223, El. Bl. & El. 148, 4 Jur. N. S. 832; Oakey v. Cook, 41 N. J. Eq. 350, 7 Atl. 495; Rosenwater v. Selleseth, 33 N. D. 254, 156 N. W. 540.

The judgment of the trial court is reversed and the case is ordered dismissed.

CHRISTIANSON, J., disqualified; HANLEY, District Judge, sitting by request.

On Petition for Rehearing, filed April 27, 1916.

Upon petition for rehearing respondent insists that this court has no right to consider the insufficiency of the evidence because this appeal is

from the judgment, and not from the order denying appellant's motion for a new trial. We are cited to Hedderich v. Hedderich, 18 N. D. 489, 123 N. W. 276. An examination of this case, however, not only does not support respondent's contention, but shows exactly the opposite. At page 492 of the state report we find the following language: "It is respondent's contention that, in view of the fact that appellant urged on his motion for a new trial all the questions now urged on the appeal from the judgment, that the order denying such motion is, in effect, *res judicata,* and can be reveiwed by this court only on an appeal from the order. Numerous cases are cited and relied upon in support of such contention, but we find none directly in point, and we have been unable, through an extended research, to find any authority for such a rule. . . . (page 493) Our conclusion, therefore, is that the appeal from the judgment presents to this court the alleged errors of law occurring at the trial as preserved in the judgment roll, although such alleged errors were also urged as grounds for a new trial in the court below, and the order denying such new trial is unappealed from."

The petition for rehearing is denied.

ANNA BOOREN (Mrs. L. C. Britten) v. GEORGE E. McWILLIAMS.

(157 N. W. 698.)

Marriage — breach of promise — seduction — damages — action to recover — verdict — evidence — sufficiency.

1. In an action to recover for a breach of promise of marriage aggravated by seduction, evidence examined and *held* sufficient to justify the verdict.

Former appeal — evidence — holding on — substantially same as here — verdict supported by — decision — binding as the law of this appeal.

2. Having *held* on a former appeal that the evidence, which was substantially the same as on the present appeal, was sufficient to support the verdict, such decision is binding as the law of the case.

Verdict — setting aside — matter of discretion — evidence — character of — law.

3. The recovery is sustained as against an attack that the evidence is of such

a character that the verdict should be set aside as a matter of discretion; also as against an attack that the verdict is against law.

Verdict — amount of — sustained — as not excessive.

4. A verdict for $10,000 is sustained as not excessive.

Opinion filed March 24, 1916. Rehearing denied April 27, 1916.

Appeal from District Court, Towner County, *A. G. Burr,* Special Judge.

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

Affirmed.

Bangs, Netcher, & Hamilton, for appellant.

When an express promise of marriage is pleaded, as in this case, the promise or contract cannot be shown, inferred, or implied from acts and conduct. Reynolds v. Curry, 81 Kan. 443, 105 Pac. 437; Bleiler v. Koons, 132 Pa. 101, 19 Atl. 140.

Where conduct of parties is relied upon as establishing a promise, evidence is restricted and limited to open, visible, or public conduct of the parties toward each other. Wrynn v. Downey, 27 R. I. 454, 4 L.R.A.(N.S.) 615, 114 Am. St. Rep. 63, 63 Atl. 401, 8 Ann. Cas. 912; Button v. Hibbard, 62 Hun, 289, 64 N. Y. S. R. 80, 31 N. Y. Supp. 483; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

Mere attentions, although exclusive and long continued, are not enough to show a promise of marriage. Walmsley v. Robinson, 63 Ill. 41, 14 Am. Rep. 111; Burnham v. Cornwell, 16 B. Mon. 284, 63 Am. Dec. 529; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Espy v. Jones, 37 Ala. 379; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345; Standiford v. Gentry, 32 Mo. 477.

It is the tendency of the jury to lean to the side of the woman, in such cases, and if there is any evidence, by fact or circumstances, that tends to show this contract relation, the jury will follow it, however strong other evidence may be against it. Walmsley v. Robinson, 63 Ill. 41, 14 Am. Rep. 111.

A witness may testify as to the conduct, demeanor, or manner of another, and in so doing may use words which amount to characteriza-

tion of the same. 5 Enc. Ev. 674, and cases cited; McKillop v. Duluth Street R. Co. 53 Minn. 532, 55 N. W. 739; M'Kee v. Nelson, 4 Cow. 355, 15 Am. Dec. 384.

A contract of marriage is made up of mutual promises. There is no sufficient showing here of mutuality, to warrant a verdict for plaintiff. Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Burnham v. Cornwell, 16 B. Mon. 284, 63 Am. Dec. 530.

Professions of respect, attachment, or even of love, are not promises of marriage. Hinckley v. Jewett, 86 Neb. 464, 125 N. W. 1086.

Evidence of improper intimacy between the parties is not admissible to prove a promise or for any purpose. Felger v. Etzell, 75 Ind. 417; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

The plaintiff must show an unconditional promise of marriage. Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71, 20 Ann. Cas. 1350.

A promise of marriage in consideration that the promise should, before marriage, have sexual intercourse with the promisor, is void. Hanks v. Naglee, 54 Cal. 51, 35 Am. Rep. 67; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797.

If the promise is connected with or grows out of an immoral or illegal act, a court of justice will not enforce it. 2 Kent. Com. 460; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925; White v. White, 82 Cal. 427, 7 L.R.A. 799, 23 Pac. 276; McBean v. McBean, 37 Or. 195, 61 Pac. 418; Williams v. Williams, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98.

The consent of the woman induced by artifice or deceit is an essential element necessary to be shown in order to establish the fact of seduction. Lee v. Hefley, 21 Ind. 98; Bradshaw v. Jones, 103 Tenn. 331, 76 Am. St. Rep. 655, 52 S. W. 1072; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867.

She must show that she relied on the promise, and that it was because of the promise and her reliance thereon that she allowed the defendant to carnally know her. Baird v. Boehner, 72 Iowa, 318, 33 N. W. 694; Gover v. Dill, 3 Iowa, 337; Brown v. Kingsley, 38 Iowa, 220; Parker v. Monteith, 7 Or. 277; Patterson v. Hayden, 17 Or. 238, 3 L.R.A. 529, 11 Am. St. Rep. 822, 21 Pac. 129; Breon v. Henkle, 14 Or. 494, 13 Pac. 289.

The promise of marriage must be the moving cause of consent. Coop-

er v. State, 90 Ala. 641, 8 So. 821; People v. Wallace, 109 Cal. 611, 42 Pac. 159; Phillips v. State, 108 Ind. 406, 9 N. E. 345; People v. Hubbard, 92 Mich. 322, 52 N. W. 729; Loque v. Dejan, 36 L.R.A. (N.S.) 389, note.

The law looks with suspicion upon the testimony of a female claiming to have been seduced, and generally requires corroboration. Armstrong v. People, 70 N. Y. 38.

And circumstances shown by, or growing out of her own testimony, are not corroboration. State v. Kingsley, 39 Iowa, 439; State v. Painter, 50 Iowa, 317.

Where the verdict does not conform to the evidence, and is not supported by the evidence, and is contrary to law, the rule is that even though there is some conflict in the testimony it is the duty of the court to grant a new trial. Weisser v. Southern P. R. Co. 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636, 19 Am. Neg. Rep. 88; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848, 2 Am. Neg. Rep. 231; Dickey v. Davis, 39 Cal. 565; Clark v. Great Northern R. Co. 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760; Godfrey v. Godfrey, 127 Wis. 47, 106 N. W. 814, 7 Ann. Cas. 176; Phillips v. Laughlin, 99 Me. 26, 105 Am. St. Rep. 253, 58 Atl. 64, 2 Ann. Cas. 1; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911; McMahon v. Rhode Island Co. Ann. Cas. 1912D, 1226, note; Buck v. Buck, 122 Minn. 463, 142 N. W. 729; Woodbury Co. v. Dougherty & B. Co. 161 Iowa, 571, 143 N. W. 416; Bentley v. Hoagland, 94 Neb. 442, 143 N. W. 465; Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; Johnson v. Domer, 76 Wash. 677, 136 Pac. 1169; Carrier v. Donovan, 88 Conn. 37, 89 Atl. 894.

It is the duty of the court to weigh the evidence, on a motion for a new trial, and determine its sufficiency to sustain the verdict, and to say whether or not there is sufficient legal evidence to support the verdict. Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Erickson v. Sophy, 10 S. D. 71, 71 N. W. 758; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046; Comeau v. Burley, 24 S. D. 255, 123 N. W. 714; Stone v. Crow, 2 S. D. 525, 51 N. W. 335; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Dickinson v. Hahn, 19 S. D. 525, 104 N. W. 247; Morgan v. J. W. Robinson Co. 157 Cal. 348, 107 Pac. 695; Morgan v. Los Angeles Pacific Co. 13 Cal. App. 12, 108 Pac. 735; Re Martin, 113

Cal. 479, 45 Pac. 813; Drathman v. Cohen, 139 Cal. 310, 73 Pac. 181; Witter v. Redwine, 14 Cal. App. 393, 112 Pac. 311.

If it appears to the trial court that the jury have found against the weight of the evidence, it is his bounden duty to set the verdict aside. Kansas P. R. Co. v. Kunkel, 17 Kan. 145, 3 Am. Neg. Cas. 412; Williams v. Townsend, 15 Kan. 563; Johnson v. Leggett, 28 Kan. 590.

"A verdict which induces the belief that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside." Garfield v. Hodges, 90 Neb. 122, 132 N. W. 923; Tyler v. Hoover, 92 Neb. 221, 138 N. W. 129; Southard v. Behrns, 52 Neb. 486, 72 N. W. 860; American F. Ins. Co. v. Buckstaff Bros. Mfg. Co. 52 Neb. 676, 72 N. W. 1047; Symns Grocery Co. v. Snow Bros. 58 Neb. 516, 78 N. W. 1066; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Booth v. Andrus, 91 Neb. 810, 137 N. W. 884; Heink v. Lewis, 89 Neb. 705, 131 N. W. 1051; Shulze v. Shea, 37 Colo. 337, 86 Pac. 117; Furber v. Fogler, 97 Me. 585, 55 Atl. 514.

Where in an action for breach of promise of marriage the evidence is of doubtful merit, and in many respects improbable, a new trial should be granted. Hill v. Jones, 109 Minn. 370, 123 N. W. 927, 18 Ann. Cas. 359; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; Messenger v. St. Paul City R. Co. 77 Minn. 34, 79 N. W. 583; Harvey v. Atlantic Coast Line R. Co. 153 N. C. 567, 69 S. E. 627; 11 Current Law, 997; McCann v. McGuire, 83 Conn. 445, 76 Atl. 1003; Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; New York, C. & St. L. R. Co. v. Hamlet Hay Co. 149 Ind. 344, 47 N. E. 1060, 49 N. E. 269; People's Sav. L. & Bldg. Asso. v. Spears, 115 Ind. 297, 17 N. E. 570; Witter v. Redwine, 14 Cal. App. 393, 112 Pac. 311; Donelson v. East St. Louis & S. R. Co. 235 Ill. 625, 85 N. E. 914; Sylvester v. Olson, 63 Wash. 285, 115 Pac. 175; Fuller v. Northern P. Elevator Co. 2 N. D. 222, 50 N. W. 359; Harrison v. Sutter Street R. Co. 116 Cal. 156, 47 Pac. 1019, 1 Am. Neg. Rep. 403; Steinbuchel v. Wright, 43 Kan. 307, 23 Pac. 560; Libby v. Towel, 90 Me. 262, 38 Atl. 171; Bissell v. Dickerson, 64 Conn. 61, 29 Atl. 226; Averill v. Robinson, 70 Vt. 161, 40 Atl. 49; Maynard v. Des Moines, 159 Iowa, 126, 140 N. W. 208; Pleasants v. Fant, 22 Wall. 116, 22 L. ed. 780.

A verdict cannot be sustained on a scintilla of evidence. Fuller v.

Northern P. Elevator Co. 2 N. D. 220; Rosenbaum v. Hayes, 8 N. D. 469, 79 N. W. 987.

A verdict that must be either without support in the evidence or contrary to the instructions of the court cannot stand. McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Furber v. Fogler, 97 Me. 585, 55 Atl. 514.

A judicial discretion means an honest, unbiased judgment and exercise of power to see that justice is done. Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673; Root v. Bingham, 26 S. D. 118, 128 N. W. 132; Pugh v. Bluff City Excursion Co. 101 C. C. A. 403, 177 Fed. 399; Galvin v. Tibbs Hutchins Co. 17 N. D. 600, 119 N. W. 39.

The verdict of the jury bears upon its face the impress of sympathy, bias, partiality, passion, and prejudice, resulting in excessive damages. Union P. R. Co. v. Hand, 7 Kan. 380; Tunnel Min. & Leasing Co. v. Cooper, 50 Colo. 390, 39 L.R.A.(N.S.) 1064, 115 Pac. 901, Ann. Cas. 1912C, 504; F. M. Davis Iron Works Co. v. White, 31 Colo. 82, 71 Pac. 384; Cassin v. Delany, 38 N. Y. 180; Bass v. Chicago & N. W. R. Co. 39 Wis. 637; Baker v. Briggs, 8 Pick. 126, 19 Am. Dec. 311; Treanor v. Donahoe, 9 Cush. 228; Bell v. Morse, 48 Kan. 601, 29 Pac. 1086; Steinbuchel v. Wright, 43 Kan. 307, 23 Pac. 560; Atchison T. & S. F. R. Co. v. Dwelle, 44 Kan. 394, 24 Pac. 500; Davis v. Holy Terror Min. Co. 20 S. D. 399, 107 N. W. 374; Burdict v. Missouri P. R. Co. 123 Mo. 221, 26 L.R.A. 384, 45 Am. St. Rep. 528, 27 S. W. 453.

Exemplary damages are never allowed except where there is gross fraud, malice, or oppression. Chicago v. O'Brennan, 65 Ill. 164; Grable v. Margrave, 38 Am. Dec. 90, note; Lindblom v. Sonstelie, 10 N. D. 140, 86 N. W. 357; Hively v. Golnick, 123 Minn. 498, 49 L.R.A. (N.S.) 757, 144 N. W. 213, Ann. Cas. 1915A, 295; Vine v. Casmey, 86 Minn. 74, 90 N. W. 158; Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; Hughes v. Nolte, 7 Ind. App. 526, 34 N. E. 745; Dryden v. Knowles, 33 Ind. 148; Kurtz v. Frank, 76 Ind. 594, 40 Am. Rep. 275; Johnson v. Travis, 33 Minn. 231, 22 N. W. 624; Tamke v. Vangsnes, 72 Minn. 236, 75 N. W. 217.

The appellate court has the right and power to reduce the amount of the verdict to a sum that will compensate for the injury suffered, and, if not accepted, to grant a new trial. Gillen v. Minneapolis, St. P. &

S. Ste. M. R. Co. 91 Wis. 633, 65 N. W. 373; Baker v. Madison, 62 Wis. 151, 22 N. W. 141, 583; Rueping v. Chicago & N. W. R. Co. 123 Wis. 319, 101 N. W. 710; Heimlich v. Tabor, 123 Wis. 565, 68 L.R.A. 669, 102 N. W. 10; Burdict v. Missouri P. R. Co. 26 L.R.A. 384, also extension note, 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. 453; Sloane v. Southern California R. Co. 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, 8 Am. Neg. Cas. 76; Alabama G. S. R. Co. v. Roberts, 113 Tenn. 488, 67 L.R.A. 495, 82 S. W. 314, 3 Ann. Cas. 937; 18 Enc. Pl. & Pr. 125; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; Aronson v. Oppegard, 16 N. D. 595, 114 N. W. 377; Lohr v. Honsinger, 20 N. D. 500, 128 N. W. 1035; Mohr v. Williams, 95 Minn. 261, 1 L.R.A.(N.S.) 439, 111 Am. St. Rep. 462, 104 N. W. 12, 5 Ann. Cas. 303.

Cuthbert & Smythe and *L. H. Sennett,* for respondent.

On the question of the sufficiency of the evidence, the plaintiff has here produced the same evidence offered on the former trial of this cause, and the supreme court having held same sufficient, such holding becomes the settled law of this case on this appeal. Booren v. McWilliams, 26 N. D. 585, 140 N. W. 410, Ann. Cas. 1916A, 388.

The complaint does not allege an express promise of marriage. But even if it did, it is not necessary to prove it in direct terms, at least on the part of the woman. It is enough if circumstances are adduced from which a promise can with reason be inferred. 5 Cyc. 1016; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983.

Positive proof of request and refusal is never required; but they may be inferred from circumstances, and the request may be made by the father or friend whose authority may be inferred from existing relations. Morgan v. Yarborough, 5 La. Ann. 316; Wells v. Padgett, 8 Barb. 323; Daniel v. Bowles, 2 Car. & P. 553; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; Johnson v. Caulkins, 1 Johns. Cas. 116, 1 Am. Dec. 102; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; Johnson v. Leggett, 28 Kan. 590; Homan v. Earle, 53 N. Y. 267; Blackburn v. Mann, 85 Ill. 222; Thurston v.

Cavenor, 8 Iowa, 155; Coil v. Wallace, 24 N. J. L. 291; Chamness v. Cox, 131 Ind. 118, 30 N. E. 901.

An immaterial variance will be disregarded or an amendment allowed. 3 Enc. Pl. & Pr. p. 690.

A promise of marriage may be shown by the acts and conduct of the defendant, and by the close, intimate, and open relations of the parties, and in case of breach, accompanied with a seduction induced and brought about wholly under such promise, the injury is infinitely greater than where there is breach only. Wrynn v. Downey, 4 L.R.A.(N.S.) 616, and note, 27 R. I. 454, 114 Am. St. Rep. 63, 63 Atl. 401, 8 Ann. Cas. 912; Stokes v. Mason, 85 Vt. 164, 36 L.R.A.(N.S.) 388, 81 Atl. 162, Ann. Cas. 1914B, 1199; Leavitt v. Cutler, 37 Wis. 46; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Fleetford v. Barnett, 11 Colo. App. 77, 52 Pac. 293; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; McKinsey v. Squires, 32 W. Va. 41, 9 S. E. 55; Royal v. Smith, 40 Iowa, 615; Coolidge v. Neat, 129 Mass. 146; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Goodall v. Thurman, 1 Head, 209; Vanderpool v. Richardson, 52 Mich. 336, 17 N. W. 936; Fidler v. McKinley, 21 Ill. 308; Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441.

In this state appellate courts will not interfere with the verdict of the jury unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury, in the rendition of its verdict, was actuated and influenced by passion or prejudice. Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867; Wilson v. Fitch, 41 Cal. 386, 9 Mor. Min. Rep. 155; Harris v. Zanone, 93 Cal. 59, 28 Pac. 845; Wheaton v. North Beach & M. R. Co. 36 Cal. 590, 2 Am. Neg. Cas. 164; Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983; Aldrich v. Palmer, 24 Cal. 513; Lee v. Southern P. R. Co. 101 Cal. 118, 35 Pac. 572; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Lawyer v. Globe Mut. Ins. Co. 25 S. D. 549, 127 N. W. 615; Nilson v. Horton, 19 N. D. 87, 123 N. W. 397; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Casey v. First Nat. Bank,

20 N. D. 211, 126 N. W. 1011; Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441.

The jury in such cases has the right to consider the financial condition and circumstances of the defendant, as tending to show the plaintiff's reasonable expectations of wordly advantage resulting from the marriage. Collins v. Mack, 31 Ark. 685; Reed v. Clark, 47 Cal. 194; Wilbur v. Johnson, 58 Mo. 600; Royal v. Smith, 40 Iowa, 615; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 81; Fidler v. McKinley, 21 Ill. 308.

FISK, Ch. J. Action to recover damages for breach of promise of marriage aggravated by seduction. Plaintiff had judgment in the court below for $10,000, and costs. Defendant appeals both from the judgment and from an order denying his motion for a new trial. The cause was here on a former appeal, and for a general statement of the facts, see opinion in 26 N. D. 558, 145 N. W. 410, Ann. Cas. 1916A, 388.

Appellant relies upon the specifications urged on his motion for a new trial in the district court. These are four in number as follows:

"1. Insufficiency of the evidence to justify the verdict.

"2. That the evidence is of such character that the verdict should be set aside as a matter of discretion.

"3. The verdict is against law and contrary thereto.

"4. Excessive damages appearing to have been given under the influence of passion or prejudice."

We observe that appellant does not challenge the correctness of a single ruling of the trial court made during the lengthy trial; nor does he challenge in any way the instructions to the jury. We therefore have a right to assume, at least in so far as the presiding judge is concerned, that from defendant's viewpoint the trial was eminently fair and free from prejudicial error.

Counsel for appellant in their motion for a new trial set forth numerous particulars wherein they assert that the evidence is insufficient to justify the verdict, as follows:

"1. It is insufficient in this there is no evidence whatsoever showing or tending to show an express promise of the defendant to marry the plaintiff.

"2. It is insufficient in this, it shows no meeting of the minds, no

mutuality, no offer of marriage on the part of the defendant, no acceptance on the part of the plaintiff.

"3. The only evidence in this case as to direct promise of marriage is that testified to by plaintiff, that the night before defendant had sexual intercourse with the plaintiff, he said while hugging and kissing her, 'As we are going to get married, we might as well get acquainted.' The plaintiff made no response to this statement. Such statement does not establish or tend to prove an express, mutual, or implied promise of marriage. The verdict, therefore, does not conform to the evidence, but in fact conflicts therewith.

"4. It is insufficient in this, there is no evidence in the case from which an implied promise of marriage can be inferred or found, as none of the indicia usually and generally attendant upon an engagement of marriage shown or established by any evidence.

"The defendant never gave her any presents, never presented her with an engagement ring, never escorted her to any public place or to any entertainment, did not keep company with her, and was not seen in her company. Defendant never admitted to his or their acquaintances any engagement of marriage, and never introduced her as his betrothed wife.

"5. It is insufficient, in this, that the acts and conduct of the plaintiff, as disclosed by her own testimony, fail to establish any implied promise of marriage, and are inconsistent and in conflict with an engagement to marry, in this. She continued to work for the defendant for wages, after the acts of sexual intercourse testified to by her. She kept company with other men till toward the close of July. She went to dances with other men during the time she claimed to be engaged to the defendant, and stayed out all night long with other men during that same time. She went to public entertainments with other men, when the defendant attended the same entertainments in the company of others. She had other men call on her.

"The plaintiff claims that all acts of sexual intercourse between her and defendant took place in her own room, and that he slept with her in the month of May. The evidence shows that at that time Gladys Britten slept with plaintiff every night, she being a girl about eleven or twelve years of age.

"6. It is insufficient in that it fails to prove seduction of the plaintiff by the defendant.

"7. It is insufficient in that it fails to show that the sexual intercourse, if any, was subsequent to the promise of marriage alleged.

"8. It is insufficient in that it fails to show that plaintiff consented to sexual intercourse with defendant, *solely by reason of such promise.*

"9. It is insufficient in that it fails to show that there would have been no consent except for the promise.

"10. It is insufficient in that, it fails to show who was the father of the child born to plaintiff. The evidence of the plaintiff as to the paternity of the child is contradicted in every particular, and her testimony stands alone.

"11. It is insufficient in this, that evidence of sexual intercourse is incompetent and inadmissible to show a mutual or implied promise of marriage, and when such relations appear from the testimony, as in this case, to have been illicit, immoral, and illegal, in their inception, the evidence is incompetent and inadmissible to prove a contract of marriage, as a promise or a contract based on an immoral or illegal consideration is against public policy, is unenforceable, and absolutely void."

In their printed brief in this court they argue the above particulars under eight separate points or subheads, but we deem it sufficient to treat the matters together and only in a general way. It would serve no useful purpose to go into minute details in reviewing the testimony, or to quote at length therefrom. It is, in all essential particulars, substantially the same as disclosed by the record on the former appeal. If anything, it is a little stronger in respondent's favor on the present appeal than it was on the former one. On such former appeal the question of the sufficiency of the evidence was raised and elaborately argued, and we there held it sufficient for submission to the jury, and we see no good or sound reason for holding to the contrary on this record, even if we were free to do so. But the testimony being in substance and effect the same on both appeals, our decision on this point in respondent's favor on the first appeal became the law of the case, and, under a well-settled rule, was controlling on the district court at the last trial, and is controlling here on this appeal. 3 Cyc. 402; Street v. Chicago, M. & St. P. R. Co. 130 Minn. 246, 153 N. W. 518; Musser v. Musser,

98 Neb. 398, 152 N. W. 746. We need not rest our decision, however, on such rule alone; for an examination of the record serves to convince us that, while the testimony is in some respects weak and unsatisfactory, we think it was nevertheless clearly the duty of the trial court to submit the same to the jury. The distinguished counsel for appellant evidently thought likewise at the trial, or they at least recognized the force of the rule above mentioned; for they made no motion, either at the close of plaintiff's testimony or after both parties had rested their case, to exclude the same from the jury. They were therefore in rather poor position to urge their motion for a new trial in the court below on this point, and are in equally poor position to ask this court to now decide that the lower court, in denying their motion based on such ground, abused its discretion. By this we do not wish to be understood as holding that appellant is solely, by reason of such failure, now precluded absolutely from raising the question of the sufficiency of the evidence, but it is a circumstance entitled to be noticed in considering the merits under this specification.

Owing to the importance of the case, we have concluded to briefly state some additional reasons for holding that specification numbered 1 cannot be sustained. In the first place, this action has been tried three times in the court below, and on each trial a verdict was returned in respondent's favor. The second verdict was for $12,000, and was vacated by stipulation on the ground of a mistrial. The first and third verdicts were each for $10,000. It is a general rule that where two or more successive and concurrent verdicts have been returned, the appellate court will be strongly disinclined to interfere with the last one, if the evidence is conflicting and there is any evidence reasonably tending to support the verdict, even though it may not be entirely satisfactory or such as would lead the appellate court to the same conclusion upon an original consideration, unless it is plain that the verdict is based upon evidence which does not tend to prove a material fact necessary to a recovery, or is in palpable disregard of the evidence. 3 Cyc. 355, 356, and cases cited; see also the citations to recent cases in the 1916 supplement to Cyc.

It is contended that the evidence does not show an express promise of marriage, or that plaintiff gave her consent to marry defendant. This contention is overruled. The complaint does not allege an express prom-

ise, and all that it was incumbent on plaintiff to prove was a state of facts from which it might reasonably be inferred that a mutual agreement to marry was entered into. 5 Cyc. 1016; Green v. Spencer, 3 Mo. 318, 26 Am. Dec. 672; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Wightman v. Coates, 15 Mass. 1, 8 Am. Dec. 77; McConahey v. Griffey, 82 Iowa, 564, 48 N. W. 983. On the former appeal we held the evidence sufficient on this point, and it was in substance the same on this last trial.

Appellant's points 2 and 3 relate to the alleged insufficiency of the evidence to show an implied promise of marriage consented to by plaintiff, and they are already sufficiently answered.

Under point 4 appellant cites numerous authorities to the proposition that a promise of marriage based upon an immoral or illegal consideration such as illicit sexual intercourse is void as against public policy. These authorities, no doubt, correctly state the law, but they are not here in point, for under plaintiff's testimony, which the jury evidently believed to be true, they had a right to infer that a promise of marriage was made some time prior to the first act of sexual intercourse between the parties, and that the consideration for such promise was not the subsequent illicit relations. Plaintiff did not rely upon proof of such illicit intercourse to establish the promise of marriage, but she did rely thereon to show in aggravation of damages that defendant seduced her. We disagree with appellant's counsel in his statement under point 5, that there is no proof that the promise of marriage was the inducing cause which led to the sexual intercourse. It may be true that there is no direct testimony to this effect, but such proof was not required, as the jury were justified in inferring this from all the facts and circumstances. They were also justified in the inference that defendant promised to marry plaintiff without any intention whatever of keeping such promise, and with the corrupt intent of later using the promise in persuading plaintiff to yield her person to satisfy his lustful desires.

Points 6 to 8 inclusive have been considered and we deem them untenable. We do not question the correctness of the rules of law as announced by the authorities cited by appellant's counsel under these points, but we deem them not applicable or controlling under the record facts in the case at bar. Having reached the conclusion that the evidence is sufficient to support the verdict, and that the trial court did not

abuse his discretion in denying the motion for a new trial on the ground of alleged insufficiency of the evidence, nothing further need be said with reference to specifications numbered 1 to 3.

This brings us to the appellant's last specification, which is, "Excessive damages appearing to have been given under the influence of passion or prejudice." In support of this specification counsel cite numerous authorities upon the duty of the court in cases where it has arrived at the legal conclusion that the verdict is excessive and rendered through passion and prejudice. We need not cite these authorities in this opinion. They are, no doubt, sound, but they merely voice the plain rule of our statute, § 7660, Comp. Laws 1913. The question which we are here called upon to decide is whether, as a matter of law, we should hold that the verdict is excessive and apparently given under the influence of passion or prejudice. As before stated, the case has been tried three times, with the same result, except, at the second trial, the verdict was for $12,000. In the light of these facts when considered in connection with all the facts and circumstances disclosed by the record, it would be rather presumptuous on our part to say, what the trial judge refused to say, that these triers of the facts were actuated by prejudice or bias in assessing plaintiff's damages. Clearly we would not be justified in so holding. Nor are we justified, under the authorities, in saying as a matter of law that the verdict is excessive under the proof. It is well settled that an appellate court will not interfere in such cases, unless the verdict is so grossly and palpably excessive as to shock the moral sense and raise a reasonable presumption that the jury must have been influenced by passion or prejudice in arriving at the verdict. Lanigan v. Neely, 4 Cal. App. 760, 89 Pac. 441; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442, 4 N. W. 8; Marshall v. Taylor, 98 Cal. 55, 35 Am. St. Rep. 144, 32 Pac. 867; Cox v. Edwards, 126 Minn. 350, 148 N. W. 500, Ann. Cas. 1915D, 491. In the latter case a verdict for $17,425 was sustained, the defendant admitting that he was worth from $75,000 to $100,000. In Hess v. Zimmer, 152 Wis. 193, 139 N. W. 740, a verdict for $2,000 was held not excessive, defendant owning property worth but $12,000. In Liese v. Meyer, 143 Mo. 547, 45 S. W. 282, a verdict for $10,000 was held not excessive. See also Geiger v. Payne, 102 Iowa, 581, 69 N. W. 554, 71 N. W. 571, where a verdict for $16,000 was sustained as not ex-

cessive, the proof showing defendant's wealth to be from $50,000 to $75,000.

Numerous other examples of what are and what are not excessive verdicts in cases of this nature may be found in 41 L.R.A.(N.S.) 853, note; also 16 Ann. Cas. 981, note.

We feel constrained for the above reasons to overrule the various contentions of the appellant. The judgment and order are accordingly affirmed.

F. C. RISING v. D. O. TOLLERUD.

(157 N. W. 696.)

Action to recover for money claimed to be overpaid upon a threshing bill. Trial to court without a jury. Evidence examined and *held:*

Threshing bill — money overpaid on — action to recover back — trial to court — evidence — findings — grain threshed — amounts — testimony — preponderance.

1. That the finding of the trial court that there was not competent evidence introduced by the plaintiff to show any other amounts of grain threshed than shown by the tally is not against the clear preponderance of the testimony.

Payments — with full knowledge of all facts — action — evidence — recovery.

2. The evidence discloses that plaintiff paid said sums with a full knowledge of all of the facts now known to him, and for that reason should not recover in this action.

Opinion filed April 10, 1916. Rehearing denied April 29, 1916.

Appeal from the County Court of Benson County, *Comstock,* J. Affirmed.

R. A. Stuart, for appellant.

Where a party, with full knowledge of all the facts, pays a demand that is unjustly made against him, and to which he has a valid defense, and where there is no fraud, such payment is voluntary and cannot be

recovered back. But this is a harsh rule and has been harshly applied, and courts feel that it should not be twisted and distorted so as to apply to a case such as the one before us. The money was not paid voluntarily under the evidence here. Wiles v. McIntosh County, 10 N. D. 598, 88 N. W. 710; O'Neil v. Tyler, 3 N. D. 54, 53 N. W. 434; Lown v. Casselman, 24 N. D. 342, 139 N. W. 804.

Torger Sinness and *Clyde Duffy,* for respondent.

The question of voluntary payment would be before the court even though the amended answer were excluded. The payment must prove that the overpayment, if any, was not voluntarily made, as part of his case. Wessel v. D. S. B. Johnston Land & Mortg. Co. 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473.

A party should make all reasonable and necessary investigations before making payment of a demand about which he has any doubt. 2 R. C. L. 785.

It is of course settled that money paid with a full knowledge of all the facts, and where no fraud exists, cannot be recovered back. 2 R. C. L. 784; Wessel v. D. S. B. Johnston Land & Mortg. Co. supra; Dickinson v. Carroll, 21 N. D. 271, 37 L.R.A.(N.S.) 286, 130 N. W. 829; Kimpton v. Studebaker Bros. Co. 14 Idaho, 552, 125 Am. St. Rep. 185, 94 Pac. 1039, 14 Ann. Cas. 1126; New Orleans & N. E. R. Co. v. Louisiana Constr. & Improv. Co. 94 Am. St. Rep. 409, note.

BURKE, J. Plaintiff is a real estate dealer and loan broker with offices in several towns. He was also the owner of several farms. One F. A. Tollefson was associated with plaintiff at Minnewaukan, North Dakota. During the summer of 1914 one of Rising's farms was leased by one Heitkemper, who, during said season, grew thereon something over 1,000 bushels of wheat, around 900 bushels of oats, and something over 500 bushels of barley. The threshing was done by the defendant Tollerud. The agreed price was 10 cents for wheat, 7 cents for oats, and 8 cents for barley. The dispute in this case relates entirely to the number of bushels of each kind of grain that was actually threshed. Defendant, who was the separator man upon his own machine, testifies that the tally was correct and showed 1,409 bushels of wheat, 1,182 bushels of oats, and 782 bushels of barley. Part of

the wheat was hauled to an elevator at Esmond, and, according to the present claim of plaintiff, ran far short of the machine measure. Some of the oats were fed by the threshers and the remainder hauled into a granary. Plaintiff also claims that there was a shortage there, as also in the barley. Notwithstanding these facts, which were known to plaintiff's tenant and to his associate in business (Mr. Tollefson), and also brought to his own attention, the plaintiff Rising paid the full amount of the threshing bill to defendant. While plaintiff was not himself a witness at the trial, it was the theory of his counsel and witnesses that plaintiff believed that some of the grain had been stolen by his tenants, and that it would be necessary for him to pay for the entire threshing bill before taking suitable proceedings against the tenant. This action is brought to recover the amount of the threshing bill which plaintiff alleges was overpaid. The case was tried below in county court without a jury. The evidence offered by plaintiff tended to show that the elevator at Esmond allowed 1,077 bushels of wheat, instead of 1,409, and that, as already intimated, a measurement of the oats and barley showed a similar shortage. The elevator man was not called as a witness; nobody testified that the elevator weights were correct, and nobody testified as to the exact amount of oats that were fed or wasted by the threshers. The trial court found in favor of defendant. His finding, of course, has the weight of a special finding of a jury, and will not be disturbed unless clearly against the preponderance of the evidence. Defendant in this court offers several reasons why the findings of the trial court should stand. We will consider but two:

(1) There was no competent evidence introduced by plaintiff showing the actual number of bushels of any kind of grain threshed. While the tally is not conclusive, yet the fact that plaintiff was represented at the threshing machine and the evidence showing that the tallying apparatus was frequently examined is strong evidence that it was correct. There is also evidence given by one of plaintiff's witnesses that he (the witness) had checked one load as it was weighed in at the threshing machine and weighed out at the elevator and he was asked:

Q. How did it hold out?

A. I do not just remember. There was but very little difference.

Q. Just a few pounds?

A. I think so.

As already stated, the elevator man was not sworn; no one vouched for his scales or the correctness of his figures, and there is some evidence at least that all of the wheat was not delivered, to the elevator. That there had been some dispute amout the disposition of the wheat is shown from the following extracts of Tollerud's testimony. He says that the tenant and plaintiff's business manager came to his place and the tenant said: "Did you tell Rising I hauled wheat in to Van Leit's granary?" and I said, 'Yes, I did tell Rising of it,' and he said, 'You are a liar if you did,' and I told him he should not call me a liar—and he said, 'when you told Rising that I hauled grain in to Van Leit's granary, you are a liar,' and I said, 'That might be so now, I do not know whether it was you or some of the other boys, but I asked you at the separator if you were not hauling it there,—and you told me there was a deal you and Bill were fixing up.' About something like that we had it there."

This conversation was not denied by plaintiff's witnesses, although they did claim that the amount actually hauled to Van Leit's was about 9 bushels. The same reasoning applies to the weight of the oats. The only evidence as to the amount actually threshed, besides the evidence of the thresher who relies upon the tally, is the evidence of the tenant and his hired help that after the threshers had fed their teams from the oats for four days the balance was put into a granary and there measured. The amount in the granary, with an estimate of the amount of grain fed, was the only evidence offered on behalf of the plaintiff. Regarding the barley,—that was placed in bins and there measured by the tenant. Upon this state of the evidence which, of course, we cannot reproduce more fully here, it could not be said that the findings of the trial court are against a fair preponderance thereof.

(2) Another reason why defendant should prevail is that the payment made was voluntary, with the full knowledge of all of the facts.

As we have already stated, plaintiff was not a witness, but his business associate, Tollefson, testified as follows:

Q. And you found the wheat short according to his figures?

A. Yes, sir.

Q. And you found the oats short, according to his figures?

A. Yes, sir.

Q. And you informed Rising of this fact?

A. Yes, sir.

. . . . . .

Q. And it was quite a long time after that that you drew the check and Mr. Rising signed the check, which is now exhibit "1" and gave it to Tollerud in payment of the threshing bill?

A. That was a few days after Mr. Rising had gotten back from the West.

Q. At that time both you and Mr. Rising knew about this supposed shortage?

A. Yes, sir. . . . We paid it directly upon what he asked, because Mr. Rising figured he would have to pay him the full amount in order to get damages if he was going to get any damages.

In other words, Rising made this payment with full knowledge of every fact that he now claims to know, excepting possibly the amount of the grain appropriated by the tenant. That it was the duty of plaintiff to make a full investigation of this latter is shown by the text at 2 R. C. L. page 785, which reads: "Moreover, in the settlement of disputed questions where both parties have equal opportunities and facilities for ascertaining the facts, it becomes incumbent on each then to make his investigation, and not carelessly settle, trusting to future investigation to show a mistake of fact and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation, after witnesses have passed beyond the reach of the parties; the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all and a final and peaceful settlement thereof." Walser v. Board of Education, 160 Ill. 272, 31 L.R.A. 329, 43 N. E. 346; McArthur v. Luce, 38 Am. Rep. 204, and note, 43 Mich. 435, 5 N. W. 451; Behring v. Somerville, 63 N. J. L. 568, 49 L.R.A. 578, 44 Atl. 641; Wessel v. D. S. B. Johnston Land & Mortg. Co. 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922.

The other questions argued in appellant's brief are answered in those two propositions and are without merit. Judgment of the trial court is affirmed.

JOHN EWANIUK and Peter Strilczuk, Copartners Doing Business under the Firm Name and Style of Ewaniuk & Strilczuk v. JACOB ROSENBERG, Morris Rosen, and Ben Rosenberg.

(157 N. W. 691.)

Merchandise stock — sale of — action to avoid — sale in bulk — merchandise and fixtures — creditors — statutes — notice.

A party who seeks to avoid a sale of a stock of merchandise solely on the ground that such sale was made in violation of § 7224, Compiled Laws 1913, which provides that a sale 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, shall be void as against the creditors of the seller, unless the provisions of the law are complied with, must show that at the time of the sale or transfer he was an existing creditor of the seller and entitled to notice as such under the provisions of the law.

Opinion filed March 31, 1916. Rehearing denied April 27, 1916.

From a judgment of the District Court of Stark County, *Crawford,* J., defendants appeal.

Reversed.

W. F. Burnett (*H. J. Blanchard,* of counsel), for appellants.

The statute, § 7224 of the Revised Codes of 1913, known as the Bulk Sales Law, is unconstitutional. It applies only to merchants, and then to those who are able to pay, as well as to those who are insolvent. A good, responsible merchant cannot sell any considerable quantity or unusual amount of his stock without giving to the creditors the notice required by this statute. The law is unjust and unreasonable if intended to cover such a transaction. Everett Produce Co. v. Smith Bros. 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Bowen v. Quigley, 165 Mich. 337, 34 L.R.A.(N.S.) 218, 130 N. W. 690; Cooney, E. & Co. v. Sweat, 133 Ga. 511, 25 L.R.A.(N.S.) 758, 66 S. E. 257.

A statute that is inquisitorial in that it compels the divulging of business secrets which the parties have a right to keep to themselves is pernicious, and ought not to be sustained. Wright v. Hart, 182 N. Y. 350, 2 L.R.A.(N.S.) 338, 75 N. W. 404, 3 Ann. Cas. 263; Everett Produce

Co. v. Smith, 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Young v. Lemieux, 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452; Boisé Asso. v. Ellis, 26 Idaho, 438, L.R.A.1915E, 917, 144 Pac. 60; Williams & T. Co. v. Preslo, 84 Ohio St. 328, 95 N. E. 900, Ann. Cas. 1912C, 707; Wm. R. Moore Dry Goods Co. v. Rowe, 99 Miss. 30, 54 So. 659, Ann. Cas. 1913C, 1214; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 Ann. Cas. 558; McKinster v. Sager, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854; Block v. Schwartz, 27 Utah, 389, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 Ann. Cas. 550; Off v. Morehead, 235 Ill. 40, 20 L.R.A.(N.S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434.

The plaintiffs at the time of the sale of the stock in question were not creditors of the vendor, within the meaning of the Bulk Sales Law. "A creditor within the meaning of this chapter is one in whose favor an obligation exists by reason of which he is or may become entitled to the payment of money." Comp. Laws 1913, §§ 7216, 7285; Winans v. Beidler, 6 Okla. 603, 52 Pac. 405; Karst v. Gane, 61 Hun, 533, 16 N. Y. Supp. 385; Beers v. Hanlin, 99 Fed. 695; Hill v. Bowman, 35 Mich. 191.

C. H. Starke, for respondents.

The "Bulk Sales Law" of this state is constitutional. The law is intended to prevent fraudulent sales and to protect creditors, and the state, under police powers, has the right to enact such a law. Everett Produce Co. v. Smith, 40 Wash. 566, 2 L.R.A.(N.S.) 331, 111 Am. St. Rep. 979, 82 Pac. 905, 5 Ann. Cas. 798; Young v. Lemieux, 79 Conn. 434, 20 L.R.A.(N.S.) 160, 129 Am. St. Rep. 193, 65 Atl. 436, 600, 8 Ann. Cas. 452, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; Boisé Asso. v. Ellis, 26 Idaho, 438, L.R.A. 1915E, 917, 144 Pac. 6; Kidd, D. & P. Co. v. Musselman Grocer Co. 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606.

The plaintiffs at the time of the sale of the stock of merchandise were creditors of the seller. The goods were purchased with the understanding that if not satisfactory they could be returned. The purchaser is the sole judge in such cases, and if not satisfied he may return the goods. Garland v. Keeler, 15 N. D. 551, 108 N. W. 484; McCormick Harvesting Mach. Co. v. Okerstrom, 114 Iowa, 260, 86 N. W. 284.

It is in effect a mutual consent to rescission. Comp. Laws 1913, § 5934; 35 Cyc. 128; Alden v. Thurber, 149 Mass. 271, 21 N. E. 312.

Where goods so purchased are returned by the purchaser to the vendor, delivery to the carrier consigned to vendor is delivery to vendor. A. J. Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L.R.A. 534, 74 N. W. 670; Kelsea v. Ramsey & G. Mfg. Co. 22 L.R.A. 415, subject note; Comp. Laws 1913, chap. 111, § 7216; Soly v. Aasen, 10 N. D. 108, 86 N. W. 108; First Nat. Bank v. Calkins, 16 S. D. 445, 93 N. W. 646; Keel v. Larkin, 72 Ala. 493; Loughridge v. Bowland, 52 Miss. 546; Anderson v. Anderson, 64 Ala. 403; De Ruiter v. De Ruiter, 28 Ind. App. 9, 91 Am. St. Rep. 107, 62 N. E. 100.

The statute declares that a sale made of a stock of goods shall be void as against creditors of the seller, unless the seller shall, at least five days before the sale, make inventory, showing quality, cost price to seller, of each article included in sale. Also upon demand of the purchaser, a written list of the names of indebtedness to each, and certified by seller under oath. Comp. Laws 1913, § 7224.

CHRISTIANSON, J. On December 10, 1913, and for some time prior thereto, the defendant Jacob Rosenberg owned and operated a clothing store at Dickinson. The plaintiffs at this time were operating a store at Gorham. On December 10, 1913, the plaintiffs purchased from the defendant Jacob Rosenberg certain clothing, which they intended to place and did place on sale in their store at Gorham. The total price paid by plaintiffs, exclusive of all discounts allowed them, was $152.50. The plaintiff Strilczuk personally selected all the clothing so sold and paid for the same at that time. Upon the invoice of the clothing so sold the defendant made the following indorsement: "Agreed with Mr. Peter Strilczuk if any of the suits does not prove satisfactory should except back." The evidence does not show when these goods were placed in plaintiffs' store at Gorham, although Peter Strilczuk testifies that they kept these suits in their store and made efforts to sell them for a period of about fifteen days, and that during that time they tried to sell them to a number of people and found that they could not sell them owing to the fact, as he states: "The coat was too small and the pants too

big to make a fit." He further testifies that on December 30, 1913, he shipped these goods back to the defendant Jacob Rosenberg, from Belfield, North Dakota, to Dickinson, North Dakota, and wrote and informed him of such fact. There is no testimony showing when the goods arrived at Dickinson, nor is there any evidence whatever offered by the plaintiffs showing that the goods were returned in good condition, nor is there any evidence whatever showing the method of transmission of the plaintiffs' alleged notification to the defendant of the return of the goods. There is no evidence showing that any letter was mailed or any notice delivered to defendant personally or at all. There is no contention that the plaintiffs in any manner notified the defendant of their intention to return the goods at any time prior to their shipment.

In the meantime the defendant Jacob Rosenberg entered into negotiations with the defendants Morris Rosen and Ben Rosenberg to sell his business to them. The testimony shows that, in connection with these negotiations, they commenced taking stock or inventory about December 24, 1913, and completed the same a day or so thereafter, and that "right after Christmas" the deal was made, but that owing to some delay on the part of Morris Rosen and Ben Rosenberg in obtaining the necessary moneys to pay the consideration agreed upon, the deal was not consummated until on December 31, 1913, when they paid Jacob Rosenberg the agreed consideration in cash, and received from him a bill of sale for the entire stock of goods, and entered into possession of the business. The evidence shows that an inventory was made showing the value of the stock and fixtures at $11,464.66. It is also undisputed that Jacob Rosenberg stated that there were no creditors, and that the few outstanding bills would be paid by him. It is also undisputed that prior to the consummation of the deal Jacob Rosenberg made remittances in full to every creditor appearing upon his books.

The goods returned by the plaintiffs were not received at Dickinson until some time in January, 1914. The defendant Jacob Rosenberg was no longer there, and the defendants Morris Rosen and Ben Rosenberg refused the shipment, and caused the same to be returned to the plaintiffs, who have retained possession thereof since that time.

Plaintiffs thereafter brought this action upon the theory that the sale made by Jacob Rosenberg was void for failure to comply with the pro-

visions of the so-called "bulk sales law" of this state. The trial court rendered judgment for plaintiffs, and defendants have appealed from such judgment.

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 conditions 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 purpose of such legislation was pointed out by Vann, J., in a dissenting opinion delivered by him in Wright v. Hart, 182 N. Y. 350, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 Ann. Cas. 263. He said: "The object of the act was to suppress a widespread evil, well known to current history and condemned by repeated adjudications in this court and in all the leading courts of this state from time out of mind. That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that when a dealer has reached a point in his business career where he cannot go on owing to the claims of creditors, the temptation is strong and the practice common of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it."

In discussing the constitutionality of the Connecticut "bulk sales law," in Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174, the United States Supreme Court, speaking through the present Chief Justice White, said: "A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed."

There is no contention that Jacob Rosenberg was insolvent or financially embarrassed at the time of the transfer,—the evidence shows that he paid every one of his creditors in full. Nor is there any contention that Jacob Rosenberg actually transferred the property for the purpose of defrauding plaintiffs or anyone else. Such actual fraudulent intent is negatived by the undisputed facts in the case. The plaintiffs

rely solely upon the proposition that the transfer is fraudulent in law, and void under the terms of the statute above quoted.

The act under consideration merely avoids a sale made under the circumstances therein specified, and then only as against "the creditor" of the seller. Obviously the act applies only to creditors existing at the time of the transaction, and not to creditors whose claims came into existence subsequent to the sale or transfer. See Union Nat. Bank v. Oium, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; Putnam, Aldrich & Putnam v. McCormick, 159 Iowa, 702, L.R.A. —, —, 140 N. W. 886, Ann. Cas. 1915D, 31; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286. A party who seeks to invoke the benefit of this statute must bring himself within its terms and show that he was entitled to its protection.

It is one of the maxims of our jurisprudence that "interpretation must be reasonable." (Comp. Laws 1913, § 7276.) It is also well settled that, in determining the meaning of an ambiguous statute, "the object sought to be accomplished exercises a potent influence in determining the meaning of not only the principal, but also the minor, provisions of the statute. To ascertain it fully, the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment." Sutherland, Stat. Constr. 2d ed. § 456; see also 26 Am. & Eng. Enc. Law, 602.

The undisputed evidence shows that the plaintiffs purchased and paid for the goods in question on December 10, 1913. It also shows that plaintiffs personally selected these goods from Rosenberg's stock at Dickinson on that day; that the plaintiffs thereafter retained such goods in their store at Gorham until December 30, 1913. There is no contention that they notified defendant of any dissatisfaction with the goods until they returned them. There is not the slightest proof that Jacob Rosenberg had any notice or knowledge on December 31, 1913, or at any time prior thereto, that plaintiffs intended or desired to return the goods. In fact the evidence justifies a contrary conclusion. Therefore when Jacob Rosenberg negotiated and completed the sale to his codefendants, he had absolutely no reason to believe that the plaintiffs had or ever would have any claim against him. If Jacob Rosenberg, at the time of the taking of the inventory on December 24, 1913,

or at any time thereafter up to and including December 31, 1913, had made a list of his assets and liabilities from the knowledge that he then possessed, what possible reason would he have had for including among his assets the goods sold to the plaintiffs, or scheduling plaintiffs among his creditors? Obviously none. Plaintiffs were the owners of the goods unless they chose to return them. The right to return existed only in case the goods proved unsatisfactory. If the plaintiffs elected to return the goods, they were required to do so within a reasonable time, otherwise the right to return would be lost. 35 Cyc. 154. Until they exercised the option, and notified Rosenberg of their election to return, plaintiffs remained the apparent and presumptive owners of the goods. The evidence in this case shows that the plaintiffs had not imparted any notice to the defendant of any intention on their part to return the goods at the time the sale was made, and that during all of the negotiations for, up to and including the completion of, the transfer, defendants were fully justified in acting upon the assumption that plaintiffs were the owners of the goods, and in no manner creditors of Jacob Rosenberg. No duty or obligation rested upon Rosenberg to pay any moneys to the plaintiffs, at least until he was notified of the fact that plaintiffs desired to avail themselves of the option to return the goods. Even if Rosenberg, instead of paying off his creditors, had furnished a list thereof to this purchaser, plaintiffs would not have been included in such list. Hence, they would have received no notice. This being so, how were they prejudiced because such notices were not sent, and how can they assail the validity of the sale on this ground? He who is not entitled to notice can hardly complain because someone else was not notified. He whose rights are not affected by reason of the failure on the part of someone to perform an act can hardly be heard to complain of such nonperformance.

Plaintiffs cite and rely upon the decision of this court in Soly v. Aasen, 10 N. D. 108, 86 N. W. 108. In that case the issue was one of actual fraud, and it was undisputed that the conveyance assailed was executed several months after plaintiff had instituted an action for damages against the fraudulent grantor. We have no reason to doubt the correctness of that decision, but it has no application to the facts in this case.

The judgment appealed from is reversed, and the action ordered dismissed as against the defendants Morris Rosen and Ben Rosenberg.

STATE LOAN COMPANY OF MINNEAPOLIS, a Corporation, Respondent, v. WHITE EARTH COAL MINING BRICK & TILE COMPANY, a Corporation, Janney Semple Hill & Company, a Corporation, Ole Ellingson, John Fitzgerald, a Corporation, Smith Samson, Sol Thomas, John E. Elliott, E. J. Thomas, D. Winn, Everett Musselman, Defendants, and St. Anthony & Dakota Elevator Company, a Corporation, Appellant.

(157 N. W. 834.)

Action to foreclose real estate mortgage. The appealing defendant claims under a mechanic's lien. Trial *de novo*. The elevator company furnished lumber to the coal company under contract dated November 13, 1908, for buildings to be erected upon the N. W. ¼ of section 15, 156–94, which was owned by it and upon which it operated a coal mine. The openings of the coal mine, however, being some 80 feet over on section 16, the buildings were placed thereon from 80 to 200 feet from section 15. December 8, 1908, plaintiff took a $2,500 real estate mortgage upon the N.W.¼ of section 15. At the time the loan was made the manager of the coal company told the managing agent of the loan company that he needed the money to take care of some lumber bills in connection with the mine.

Real estate mortgage — action to foreclose — mechanic's lien — description — use of materials furnished — on land other than stated in contract — lien attached where materials were used.

1. Under our statutes, enumerated in the opinion, it is held that the lien attached to the N. W. ¼ of section 15, although the lumber was used in the erection of buildings upon section 16.

Mortgage — mechanic's lien — priority.

2. Under our statute, set forth in the opinion, it is held that the mechanic's lien is prior to, and superior to, the mortgage.

Trial court — equitable powers — debt — apportionment of — third persons —protection of — buildings — sale of — provision for — security on land — resort to.

3. Under general equitable powers the trial court has the right to apportion the debt in order to protect as much as possible the rights of third persons. Therefore, the trial court should make provision for the sale of the buildings upon section 16 before resorting to the security of the land upon section 15.

Opinion filed March 4, 1916. Rehearing denied April 27, 1916.

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

Modified.

C. Aurland, for appellant.

Under our statute a materialman has a lien upon the land to improve which the materials were furnished under a contract with the owner thereof, for the value of the materials furnished, though the same were not used for or in such improvement or at all. Rev. Codes 1905, §§ 6237, 6271, Comp. Laws 1913, §§ 6814, 6851; Totten & H. Iron & Steel Foundry Co. v. Muncie Nail Co. 148 Ind. 372, 47 N. E. 703; Schlosser v. Moores, 16 N. D. 185, 112 N. W. 78.

The materials were furnised by appellant in accordance with its contract with the landowner, and a lien was filed for security, as against said described land, but the materials were used by such owner in building improvements on another piece of land adjoining and near by. Such lien is valid. Frudden Lumber Co. v. Kinnan, 117 Iowa, 93, 90 N. W. 515; A. E. Shorthill Co. v. Ætna Indemnity Co. — Iowa, —, 124 N. W. 613.

The materials were used in improving defendant's coal mine, and a distance of only 200 feet from the line of section 15, described in the contract. These buildings were a necessary part of the equipment for the operation of its mine, and should be deemed a part of such improvements on the defendant's mining property. Stewart-Chute Lumber Co. v. Missouri P. R. Co. 28 Neb. 39, 44 N. W. 47.

The furnishing of the materials under the contract with the landowner gives the right to the lien; the filing of the statement in the clerk's office perfects the right and establishes the lien. Haxtun Steam Heater Co. v. Gordon, 2 N. D. 246, 33 Am. St. Rep. 776, 50 N. W. 708.

The including of a description of extra land is mere surplusage, and does not vitiate the lien. Rev. Codes 1905, § 6683, Comp. Laws, 1913, § 7270; North Star Iron Works Co. v. Strong, 33 Minn. 1, 21 N. W. 740; Smith v. Headley, 33 Minn. 384, 23 N. W. 550.

Appellant's lien is prior to plaintiff's mortgage, even as to section 16 of the land described;—plaintiff had notice thereof. Rev. Codes 1905, § 6242; Comp. Laws 1913, § 6822.

Palda, Aaker, & Greene, for respondent.

The plaintiff's mortgage attached and became a prior lien on the quar-

ter of land in section 15, and appellant's mechanic's lien is inferior thereto, if it be a lien at all on said land. Rockel, Mechanics' Liens, § 134; Smith v. Barnes, 38 Minn. 240, 36 N. W. 346.

BURKE, J. This is a trial *de novo,* and the facts upon which this opinion is based are either undisputed or determined by us. The defendant coal company at all the times hereinafter mentioned was the owner of the N. W. ¼ of section 15, 156–94, and apparently was the lessee of the N. E. ¼ of section 16, adjoining. This latter tract is a school section. On the 13th of November, 1908, the coal company made a contract with the St. Anthony & Dakota Elevator Company to furnish certain building materials to the value of $1,145.90, which were to be used in erecting buildings at or near the opening of the mine. The first of the lumber was furnished November 13th and the last, December 24, 1908. All of said lumber was used in the erection of a cook house, bunk houses, entrance shed, engine house, dining room, and barns, but said buildings were placed upon section 16, adjoining, being some 200 feet from the line. There is no evidence that any of the lumber was used in the coal mine upon section 15, the testimony being that native trees were cut for posts for this purpose. The first consignment of lumber was upon the grounds on the 13th of November, 1908. On the 8th of December, 1908, the coal company made, executed, and delivered a real estate mortgage upon said N. W. ¼ of section 15, securing the sum of $2,500. Through a clerical error the description was written the S. W. ¼ instead of the N. W. ¼, and the same was recorded with the register of deeds on the 11th of December, 1908. The managing agent of the loan company did not visit the premises before taking the loan, but testifies that he was vice president and treasurer of the plaintiff company; that he personally negotiated the loan represented by the note and mortgage in this case; that his negotiations were with Mr. Kay, the manager of the coal mine; that before making the loan he made no inspection whatever of the property.

He was then asked:

Q. Did you learn from Mr. Kay or anybody else at the time that the loan was made, that there was being material furnished by the defendant or anybody else for the construction of the buildings or other improvements on the N. W. ¼ of section 15?

A. Why, I understood that what he needed this money for was to take care of some little bills of that nature, possibly. (His attorney: Just a moment. Read the question.)

(The question was read.)

A. No, sir. I did not.

Q. You understood that there was being material furnished for the improvements on the mining property?

A. Yes, sir.

Q. And did you know, or were you informed at that time by Mr. Kay or anybody else, that a part of their mining property was in section 16 or any other than the land covered in the mortgage?

A. Yes, sir.

Q. When did you first see the mining property in question?

A. I think it was—it was the following spring or summer. The summer of 1909.

Q. You were out there, went in and saw the place?

A. Yes, sir.

Q. Did you go into the mine out there?

A. Yes, sir. I went all through it.

. . . . . .

Q. On either of these occasions what, if any, improvements in the way of buildings or other improvements in which building material of any kind was used did you find on the northwest quarter of 15?

A. There were no buildings or any improvements whatever on the northwest of 15 or any material was used outside.

Q. When you first visited the mining property or this property which you had this mortgage on in June, 1909, did you observe the buildings in connection with the mining camp there?

A. I did.

Q. In what direction from the northwest of 15 were the buildings of the mining company at that time?

A. West from the northwest quarter of 15.

. . . . . .

Q. When you were out there last Saturday, was it for the purpose of having the lines between these two quarter sections run, and determine on what property these buildings were?

A. Yes, sir.

. . . . . .

Q. I understand you that at no time during any of your visits to the property in question were there any buildings or improvements of any kind in which building material such as this statement discloses was on the northwest of 15?

A. No, sir.

Upon cross-examination:

Q. I believe you said at the time this mortgage was made you knew about the material being furnished to the coal mine, did you?

A. I didn't know exactly what material or what was being furnished.

Q. You knew some was being furnished?

A. I know that he had some bills that he had incurred that he had to pay with this money, but I didn't know what bills they were.

Q. Did Mr. Kay give you the name of any of the people whom he was owing?

A. I don't remember that he did.

Q. You remember he stated to you he was owing the St. Anthony & Dakota Elevator Company any money?

A. I don't think so, at that time.

Respondent insists that this evidence fails to show knowledge upon the part of Mr. Peck that materials were being furnished for which a lien might possibly be claimed upon section 15. It is true, Mr. Peck answers his own attorney to the effect that he did not know that a lien would be claimed on section 15, and he also testifies in the same manner that he did not know that any materials were being furnished for use upon the northwest quarter of 15. This comes a long way, however, from denying knowledge that materials were being used upon the coal mine, and, in fact, he so states in the testimony above quoted: "You understood that there would be material furnished for the improvement of the mining property? A. Yes, sir." His testimony as a whole convinces a majority of the court that he was in possession of such facts regarding this building material as constituted notice in law that a lien might be claimed. December 15th the mining company paid the elevator company $258.05, leaving a balance at that time of $887.85. No other payments have been made. On the 17th of February, 1909, the elevator company filed a mechanic's lien describing the property as "a certain shed adjoining to entrance to mine, an engine

house, a bunk house, barn buildings, cook and dining house, and repairs on said coal mine, upon the following described lands of which the said White Earth Coal Mining Brick & Tile Company was then and is now the owner; to wit, N. W. ¼ section 15, 156–94, and lessor of N. E. ¼ of 16, 156-94 . . . ; that under and by virtue of said contract the said . . . company furnished the necessary materials for the shed, adjoining to entrance to mine and engine house, bunk houses, barn buildings, cook and dining house, and repairs on said mine as specified in the annexed account. . . . For which a mechanic's lien is hereby claimed . . . upon said shed adjoining to entrance to mine and engine house, bunk houses, barn buildings, cook and dining house, and repairs on said mine, including the land upon which the same is situated, under chapter 77 of the Civil Code of the state of North Dakota." The buildings are conceded to be entirely on section 16. The elevator company had no knowledge of the existence of the mortgage until all the materials mentioned in its claim had been furnished. In 1912 the defect in the description of the mortgage was discovered, and it was corrected in an action wherein the coal company was the sole defendant. Neither the lien nor the mortgage has been paid. The mortgagee brings this action in foreclosure, making the elevator company one of the defendants. The main controversy arises over the priority of those two claims. The sections of our Code applicable are § 6237, Rev. Codes 1905, which has since been amended and is now § 6814, Comp. Laws 1913. Said section reads as follows: "Any person who shall . . . furnish any materials . . . for the erection . . . of any building or other structure upon lands or in making any other improvements thereon . . . under a contract with the owner of such land, . . . shall upon compliance with the provisions of this chapter have for his . . . materials . . . furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated, or to improve which said work was done or the things furnished. . . . " Section 6242, Rev. Codes 1905, Comp. Laws 1913, § 6822, reads as follows: " . . . Liens under the provisions of this chapter shall be preferred to all other liens or encumbrances upon such building, erection or other improvement, and the land on which the same is situated, or to improve which the labor was done or things furnished or either of them, filed or docketed subsequent to the commencement of such building, erection or

improvement." Section 6243, Rev. Codes 1905, Comp. Laws 1913, § 6823, reads: "The entire land upon which any such building, erection or other improvement is situated, or to improve which the labor was done or things furnished, including that portion of the same not covered therewith, shall be subject to all liens created by this chapter to the extent of all the right, title and interest owned therein, by the owner thereof for whose immediate use or benefit such labor was done or things furnished, and when the interest owned in such land by such owner of such building, erection, or other improvement is only a leasehold interest, the forfeiture of such lease for the nonpayment of rent or of noncompliance with any of the other stipulations therein shall not forfeit or impair such lien so far as it concerns such buildings, erections and improvements, but the same may be sold to satisfy such lien and be removed within thirty days after the sale thereof by the purchaser." Section 6238, Rev. Codes 1905, Comp. Laws 1913, § 6818, provides: "If labor is done or materials furnished under a single contract for several buildings, erections or improvements, the person furnishing the same shall be entitled to a lien therefor as follows:

"1. If such buildings, erections or improvements are upon a single farm, tract or lot, upon all such buildings, erections and improvements and the farm, tract or lot upon which the same are situated.

"2. If such buildings, erections or improvements are upon separate farms, tracts or lots, upon all such buildings, erections and improvements and the farms, tracts or lots upon which the same are situated; but upon the foreclosure of such lien the court may in the cases provided for in this subdivision, apportion the amount of the claim among the several farms, tracts or lots, in proportion to the enhanced value of the same produced by means of such labor, or materials, if such apportionment is necessary to protect the rights of third persons."

We have set forth these various statutory provisions because we believe much of the confusion upon the subject of mechanic-lien law arises over the failure to notice the distinction between statutes in the various states. The mortgagee in his brief states its claims as follows: "The position of the plaintiff is that if the elevator company has a lien on the N. W. ¼ section 15, it is inferior to the lien of plaintiff's mortgage, because the mortgage was taken in good faith without notice of any lien or any right to a lien in favor of the appellant."

(1) Logically the first question for consideration is whether the elevator company acquired any lien upon the N. W. ¼ of section 15. The mining company does not contest this point, and the mortgagee "concedes that, as between the coal mining company and the appellant, the latter may sustain and enforce a lien against the N. W. ¼ of section 15, provided, however, that it appears satisfactorily to the court, that the contract between the coal company and the appellant was sufficient to say that the building material was to be used for improvements on such tract of land." Two excellent notes, one at 26 L.R.A.(N.S.) page 831, and another at 31 L.R.A.(N.S.) page 746, cover the law upon this subject exhaustively. We will not try to recite here the authorities collected at those two notes. At page 749 of the 31 L.R.A.(N.S.) note it is said: "Since mechanics' liens are of legislative creation, it becomes important to note the phraseology of the statutes in the various jurisdictions, for a part of what has been frequently termed the conflict among the cases is indeed traceable to the varying statutory provisions." The cases are arranged in groups. At page 750 of the note is the group of cases construing statutes which give a lien for material furnished "for" structures. At page 750 is the group of cases construing statutes which give a lien for materials furnished *"for construction or erection of structures."* Two pages later is given a group of decisions under statutes giving liens for material *"used or to be used"* in the structure. And upon the last page of the note the following summary is given: "Broadly and briefly to summarize the foregoing cases . . . it may be fairly said that there is a conflict among the decisions construing statutes which provide for a lien for materials furnished 'for' a structure; that where the lien is given for materials furnished 'for the construction' of an improvement, the decided weight of authority inclines to the view that the actual use of the articles furnished is not necessary. That, likewise, the actual use of the materials is held unnecessary where the legislature has subjected buildings to debts contracted for materials furnished for or in the erection thereof; but that where the lien is given for furnishing material 'used' or 'to be used' in an improvement, the rule is that the use of the materials furnished is a prerequisite to the enforcement of a lien."

As already stated, our statute is more favorable to the lien than any of those announced in the notes; for it not only gives a lien for materials

used *"for the erecting"* of the building, but moreover provides that the lien shall attach to "the entire land upon which any such building, erection, or other improvement is situated, or *to improve which* the labor was done or the things furnished." The following are some of the cases nearest in point: Beckel v. Petticrew, 6 Ohio St. 247; Small v. Foley, 8 Colo. App. 435, 47 Pac. 64; Burns v. Sewell, 48 Minn. 425, 51 N. W. 224; Berger v. Turnblad, 98 Minn. 163, 116 Am. St. Rep. 353, 107 N. W. 543. At page 838, 26 L.R.A.(N.S.) is found a group of mining cases under statutes somewhat similar to, though of course not identical with, our own. The only testimony covering the nature of the contract made between the coal company and the elevator company was furnished by one Hanson, who made the sale of the lumber in question, who testifies that the lumber was all to be used on section 15. Construing the language of our own statute then, we have no hesitancy in holding that the lien attached to the N. W. ¼ of section 15, although the buildings were actually erected upon the adjoining land. In view of respondent's concession that upon the facts, as we find them, the lumber company has a lien against the land, and that the main issue is the priority of such lien and the mortgage, we will not devote further time to this question. If more were needed to show that the lien is prior to the mortgage, we have but to point to the fact that the lien was actually filed against the N. W. ¼ of 15, on February 17, 1909, and that the mortgage, through the clerical error, was not filed against the proper land until 1912. Thus the mortgagee at that time had the additional knowledge and notice that a lien had actually been claimed and filed. It is further undisputed that the elevator company had absolutely no knowledge whatever of the mortgage. Under those circumstances the reformation of the mortgage had the effect of creating a new lien so far as the rights of the lumber company were concerned. See Chapman v. Fields, 70 Ala. 403; Provost v. Rebman, 21 Iowa, 419; Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, L.R.A.1915E, 302, 149 N. W. 300.

(2) The next and most important question—the only one really argued in the briefs—is whether the mechanic's lien held by the lumber company is superior to the mortgage held by the loan company. We have already cited our statute, § 6242, Rev. Codes 1905, Comp. Laws 1913, § 6822, reciting that the lien shall be superior to all encumbrances filed or docketed subsequent to the commencement of such

building, erection, or improvement. This section is more favorable to the lienor than was § 5478, Comp. Laws 1887, upon which the decisions in Haxtum Steam Heater Co. v. Gordon, 2 N. D. 246, 33 Am. St. Rep. 776, 50 N. W. 708; James River Lumber Co. v. Danner, 3 N. D. 470, 57 N. W. 343; Bastien v. Barras, 10 N. D. 29, 84 N. W. 559; Turner v. St. John, 8 N. D. 245, 78 N. W. 340, were based.

From the first case we quote: "One lien or the other must be superior; and the legislature, in its wisdom, has seen proper to require that the mortgagee should take care of the mechanic's lien—usually insignificant in amount as compared with the mortgage—rather than that the mechanic, often a day laborer, should take care of the mortgage of the capitalist."

From the second case (Danner) we quote: "The strife is between a mortgagee of real property and the holder of a mechanic's lien thereon. So far, the mortgagee has been successful. . . . The appellant does not challenge the correctness of this ruling, so far as the land itself is concerned, but insists that his lien upon the building on the land is superior to that of the respondent's mortgage. . . . The statute gives the lien priority with respect to the entire erection." In the Barras Case the court says: "The sole controversy in the case is whether the mortgage constitutes a prior lien. . . . Plaintiff's mortgage was executed and recorded on February 24, 1897. A building known as The 'French College' was then in process of construction on the premises covered by such mortgage. The building was commenced on December 9, 1896, and was not completed until March 24, 1898. Three mechanics' liens were filed against the premises. They were filed approximately a year after plaintiff's mortgage was recorded,—the exact date not being material,—and were for labor and material furnished long subsequent to the recording of the mortgage. . . . If this were an action between the mortgagee and the lien claimants, in which the latter were seeking to make their lien relate back, the principle would be applicable, and, undoubtedly, such lien claimants could, by appropriate proceedings, have claimed and established their liens as prior to the mortgage upon the strength of the fact that the building was being erected when the mortgage was given."

From the St. John Case we quote: "It will be observed that the entire controversy is between parties asserting conflicting interests in the

same property, and is not between Turner, the creditor, and St. John, his debtor. . . . Actual work was begun March 4, 1891, and the building was completed January 3, 1892. January 11, 1892, Turner filed a mechanic's lien for an alleged unpaid balance of $22,680.25. . . . On June 1, 1891, he [St. John] executed a first mortgage for $40,000 on this property to the Security Trust Company. . . . Again, on November 27, 1891, St. John executed a second mortgage to the Security Trust Company for $10,000. . . . It is evident that these loans, which were negotiated by St. John, through Mr. Clifford, who was the secretary and general manager of the Security Trust Company, were made for purposes connected with the construction of this building. . . . It's lien is a valid lien, inferior to plaintiff's [Turner's], but superior to the interests of all the remaining defendants [the mortgagees]. . . . It is ordered and adjudged that the district court enter judgment of foreclosure and sale herein, establishing plaintiff's lien as a first lien upon the premises described in the complaint."

See also Kay v. Towsley, 113 Mich. 281, 71 N. W. 490; also four case notes as follows: 12 L.R.A. 33; 13 L.R.A. 705; 14 L.R.A. 306; 2 L.R.A.(N.S.) 615.

It follows that the mechanic's lien in the case at bar is superior to the mortgage if the mortgage was taken while the buildings were in course of erection. Upon this point we have already quoted the evidence. It is undisputed that the lumber was upon the ground on the 13th of November, 1908, almost a month before the mortgage was taken. We have also quoted the testimony of the managing agent of the loan company that, at the time the loan was made, he knew that buildings were being erected in connection with the coal mine, and that the property was on both 15 and 16. He also knew that the money was to be used in paying for these improvements. This, we think sufficient to show that the buildings were being erected at the time the mortgage was taken, and under the well-settled law the lien is superior to the mortgage.

(3) Section 6238, Rev. Codes 1905, Comp. Laws 1913, § 6818, above quoted, gives authority to the court, upon the foreclosure, to apportion the amount of the claim in proportion to the enhanced value of the tract if necessary to protect the rights of third persons. Whether the statute contemplates the assessment of a certain amount against the buildings when situated upon lands belonging to a stranger is not clear. However,

the general powers of a court of equity would allow such a holding. We therefore think that, in the sale of the premises to satisfy said lien, provision should be made that the buildings situated upon section 16 be first sold with the privilege of removal, and the balance, if any, due upon the lien be collected by sale of the land in 15. The trial court will modify its judgment to conform to the views herein expressed. Appellant will recover the costs of this appeal.

Goss, J. (dissenting, but concurring in result). Do not draw the same deductions from the testimony of the witness Peck as have the majority. This witness has denied explicitly all knowledge that material was being furnished for improvements upon the northwest of 15. And there is no proof of knowledge on his part that this land in 15, upon which he supposed he had taken his mortgage, was used in connection with and as a part of the mining property on 16, as both the entrance to and the dump of the mine and all buildings adjacent to it were entirely upon section 16. The finding of fact upon which is predicated the decision (to quote from the majority opinion)—"his (Peck's) testimony as a whole convinces a majority of the court that he was in possession of such facts regarding this building material as constituted notice in law that a lien might be claimed" upon the northwest quarter of section 15—seems to me to be utterly without foundation in the proof, unless the testimony be distorted and warped into something never intended by the witness. The simple fact that a loan of $2,500 was made by plaintiff upon this bare quarter section ought to be sufficient proof that plaintiff never suspected any possible facts existing that would warrant a claim by anybody of a mechanic's lien upon improvements on this land, notwithstanding that he may have understood that the elevator company had furnished material for the improvement of a mining property upon a different section altogether and upon which a miner's lien (as distinguished from a mechanic's lien) perhaps might have been filed. As for knowledge that the loan was to pay outstanding bills, any business man would have a right to assume that the reason a loan is made is that the mortgagee may pay up his indebtedness. Nor can I see anything in Peck's testimony to warrant any finding of evasiveness on his part, as would appear to be the conclusion of the majority from the emphasis that has been placed upon his statement that he did not know that a lien would be claimed on section *15*, the property upon which he took his

mortgage. Of course he did not think a lien could be claimed upon that property; otherwise, he never would have loaned the owner $2,500 upon it as security. The size of the loan would seem a prima facie sufficient refutation to any business mind of any such inferences. Peck in Kemmare, over a hundred miles distant by rail, may have been negligent in not examining the property to ascertain, before loaning upon it, that 15 was used with 16 as one mining property, if such was the fact, but he was no more negligent in this respect than was the elevator company and its agents in the village of White Earth, almost within sight of the mine, in selling this material as claimed for use upon 15, and yet remaining ignorant that all of it was being used in the erection of buildings upon 16, a different property entirely. And a month elapsed during which they were thus negligently delivering the materials and during which time all materials delivered were being diverted to other property. No reason existed in fact upon which to predicate notice to plaintiff company that the materials were being furnished for use upon 15 when concededly not a stick of this lumber was ever upon that section, and no notice is shown of the contract or of the fact that the northeast quarter of 16 was used with the northwest quarter of 15 as one mining property. Every inference of notice, actual or constructive, to plaintiff is wholly unwarranted and to that extent an injustice to it. It is also flatly contrary to the findings of the trial judge who heard the testimony and understood the facts.

Nor can I wholly agree to the construction of our mechanics' lien laws as based upon the assumed hypothesis of notice had by plaintiff that materials were being furnished. These statutes are broad enough without indulging in any presumption of fact upon which to further extend them. And the construction announced seems to me to be an enlargement upon the statute already sufficiently broad. "The laborer is worthy of his hire," and the materialman is likewise entitled to security for all improvements for which he has furnished materials, not only as against the purchaser of such materials, but as against those with actual notice of the source of such improvements, and also those who are by the improvements in course of erection constructively warned of the sale and use made of such materials; but further than this equity should not go toward awarding a preferential or privileged lien to the materialman. And as well illustrative of this, the only distinguishing feature

between actual confiscation of plaintiff's property and the administration of equity in this case under the construction given of the mechanics' lien laws is the wholly unwarranted assumption that Peck either had notice or should have known that materials were being furnished for improvements upon 15, although concededly no improvement was ever erected with said materials thereon, and the value of the property mortgaged was not increased by use of these materials used upon another property. While authorities are cited in the majority opinion, I believe an examination of them will disclose that none are applicable here. It is very significant that able counsel presenting this case have not cited in their briefs the four North Dakota cases to which considerable attention is given in the majority opinion. My conclusion is that they are applicable only because declared so by forced reasoning. *And none of the authorities cited go to the extent of holding that constructive notice of a contract to furnish materials is operative without either actual notice thereof or the use of the materials upon the premises for which they were sold for use.* The only underlying reason for priority of such liens over mortgages taken during the furnishing of materials is the enhancement by their use of the value of the premises mortgaged.

Under the proof and a proper construction of the mechanics' lien laws, I affirm that had plaintiff taken its mortgage upon the northwest quarter of 15 and recorded the same in order that the materialman might have had constructive notice thereof before it perfected its mechanics' lien thereon, the loan company's mortgage would have had priority over this mechanic's lien. Smith v. Barnes, 38 Minn. 240, 36 N. W. 346. A careful analysis of the very authorities cited in the majority opinion will refute the conclusions there drawn. L.R.A.1915E, 302, annotating Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N. W. 300, is cited in the majority opinion. It illustrates the application made of authority. The case cited shows the extremes to which constructions enlarging mechanic's lien laws may lead. Are we headed the same way and is this case not the opening wedge? The following is from the annotator's note thereto at page 302, *viz.:* "Under the rule adopted by the court in Thompson-McDonald Lumber Co. v. Morawetz, the owner is not safe unless he is protected by a bond, in settling with his contractor after ninety days (or other period for filing liens) has expired since the last delivery of material upon the premises, even if the record is

free from liens at the time. A lien may be filed later for material that he never saw and never heard of, and the lien may include the price of other material for which no lien could be filed on account of expiration of the lien period, but for the fact that it was furnished by the same materialmen who furnished the unheard of material. So, the owner takes the risk in settling without a bond, and a search of the mechanics' lien record is no protection to him. But if the interpretation is sound the practical business world, except bonding and surety companies, may have recourse to the legislature for relief."

But it was as unnecessary to construe the mechanics' liens laws in this case as it was to indulge in the assumption that the loan was made with notice of a right in the lumber company to an inchoate lien. The mechanic's lien was fully perfected without notice of the mortgage and before any mortgage as to the holder of it was either created or recorded. As to the mechanic's lien holder plaintiff's mortgage was not created until the recording of the decree of reformation in 1912, while the mechanic's lien had been perfected by filing the claim therefor in 1909. "The reformation (of a mortgage) was the creation of a mortgage as to the land which had been omitted from the mortgage as drawn," as to intervening bona fide lien holders without notice. Chapman v. Fields, 70 Ala. 403. In Provost v. Rebman, 21 Iowa, 419, it is said: "This right of redemption might arise and exist on the ground that, by reforming the mortgage so as to make it include property not before described in it there is in effect created a mortgage as to such property at least; and to hold that the prior decree of foreclosure barred the right of redemption would be to create a mortgage and cut off the equity of redemption at a single stroke. This a court of equity would not do." See also White v. Schaffer, 97 Md. 359, 54 Atl. 974; Wheeler v. Kirtland, 23 N. J. Eq. 13; Blodgett v. Hobart, 18 Vt. 414; Hawkins v. Pearson, 96 Ala. 369, 11 So. 304; Davenport v. Sovil, 6 Ohio St. 459; Van Thorniley v. Peters, 26 Ohio St. 471; Straman v. Rechtine, 58 Ohio St. 443, 51 N. E. 44. With the law established beyond possibility of question, that the mechanic's lien has priority over the mortgage because of the wrong description in the mortgage necessitating its reformation, making it as to the elevator company the subsequent creation of a mortgage thereby; and under the affirmative proof that the elevator company had no notice whatever that plaintiff had loaned upon the security of northwest quarter

of 15 and without any constructive notice thereof imputed, it was wholly unnecessary, as has been done, to construe the mechanics' lien laws in this case. "Sufficient unto the day is the evil thereof." This unnecessary holding, giving an extended construction to our mechanics' lien laws that may work virtual confiscation of prior mortgagee's rights, may prove a future embarrassment if its sting is not sooner removed by legislative action limiting and defining the limits of the land to which such a lien may attach. While for reasons herein stated, I concur in the judgment ordered, yet I insist that there was no need of any extension by construction of an already sufficiently wide open mechanic's lien statute. Concurrence is entered in the decision on the ground that the reformation of the mortgage was as to the materialman a creation of the mortgage subsequent to its liens. As to all else contained in the majority opinion, am forced to dissent.

JENS JOHNSEN v. S. L. WINEMAN.

(157 N. W. 679.)

Controversy — arbitration — parties may submit to — common-law right — remedies — cumulative.

1. Notwithstanding the provisions of the Code (Compiled Laws, §§ 8327–8347), parties in difference may agree orally to submit their controversy to arbitration. The common-law right to arbitrate is not supplanted by the Code, the remedies being merely cumulative.

Supreme court — trial de novo — mechanic's lien — action to foreclose — contract — extras furnished — arbitration — award — supersedes contract.

2. Upon a trial *de novo* in the supreme court, of an action to foreclose a mechanic's lien for an alleged balance claimed to be due plaintiff on a building

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Note.—Arbitration agreements, their validity, and binding force, are extensively discussed in note in 47 L.R.A.(N.S.) 337, and among other topics see page 346, taking up the matter of oral submissions and giving cases holding them valid; page 342, discussing the change of the court's early attitude of jealousy to the modern view and practice of the encouragement of the settlement of disputes by arbitration; and page 441, taking up the finality of the award made.

As to agreements to submit disputes to arbitration, see also notes in 14 Am. Dec. 296, and 2 Am. St. Rep. 566.

contract and for extras furnished, the undisputed proof discloses that the parties orally agreed to submit all their differences to three arbitrators, and that pursuant thereto all such matters of difference were in fact thus submitted, and the arbitrators rendered an award.

Held, that such award is valid and operated in law to supersede plaintiff's cause of action on the contract, and the action was therefore properly dismissed.

Arbitration — courts — favored by.

3. Settlement of disputes by arbitration is favored by the courts.

Arbitration — award — agreement to abide by — scope of — intention of parties.

4. After the award was made, but before it was published, the parties, without knowledge of its terms, signed a written agreement to abide thereby as follows: "We hereby agree to accept and abide by the above report rendered by the arbitrators in full settlement of contract extras and payments of claims arising from the same." The contention that in signing this the parties thought the award merely covered the extras is, for reasons stated, untenable.

Opinion filed March 24, 1916. Rehearing denied April 29, 1916.

Appeal from District Court, Ramsey County, *Buttz*, J.

From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

Laureas J. Wehe (*Chas. D. Kelso*, of counsel), for appellant.

An award of arbitrators that does not follow and comply with the law is not a valid statutory award. The award was not acknowledged. Gessner v. Minneapolis, St. P. & S. Ste. M. R. Co. 15 N. D. 560, 108 N. W. 786; Code of Civ. Proc. 1913, § 7321.

Arbitration and award constitute a contract. District of Columbia v. Bailey, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

From the agreement to submit must be gathered the contract of the parties as to the matters in dispute and actually submitted. Fooks v. Lawson, 1 Marv. (Del.) 115, 40 Atl. 661; 3 Cyc. 587, 588, 638, 639, 640, 670, "award defined."

A material mistake in the purpose of an award is ground for annulment. Donaldson v. Buhlman, 134 Wis. 117, 113 N. W. 638, 114 N. W. 431; Consolidated Water Power Co. v. Nash, 109 Wis. 490, 85 N. W. 485.

There was no statutory offer of judgment, and hence the rule that costs are denied when the recovery is not greater than the offer does not apply. Comp. Laws 1913, § 5815.

Conclusions of law must be drawn from and based upon true findings of fact. Seim v. Krause, 13 S. D. 530, 83 N. W. 583.

Middaugh & Hunt, for respondent.

The method of settling disputes by arbitration and award is favored by the law and by the courts. Comp. Laws 1913, § 8345; Caldwell v. Brooks Elevator Co. 10 N. D. 575, 88 N. W. 709; 2 Am. & Eng. Enc. Law, 2d ed. 766; New York Lumber & Wood Working Co. v. Schnieder, 119 N. Y. 475, 24 N. E. 4; Call v. Ballard, 65 Wis. 188, 26 N. W. 547; Hackney v. Adam, 20 N. D. 130, 127 N. W. 519.

Common-law arbitration, even where had in jurisdictions authorizing a judicial or statutory arbitration, is proper and valid. The remedies are merely cumulative. 3 Cyc. 800; Galloway v. Gibson, 51 Mich. 135, 16 N. W. 310; Foust v. Hastings, 66 Iowa, 522, 24 N. W. 22; Conger v. Dean, 3 Iowa, 463, 66 Am. Dec. 93; Fink v. Fink, 8 Iowa, 313; Love v. Burns, 35 Iowa, 150; Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740; Sawyer v. McAdie, 70 Mich. 386, 38 N. W. 292.

Arbitration and award supersede a contract upon which a mechanic's lien is based, and the action is properly brought on the award. New York Lumber & Wood Working Co. v. Schnieder, 119 N. Y. 475, 24 N. E. 4; People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 2 L.R.A. 180, 7 Am. St. Rep. 747, 18 N. E. 630.

The award is a bar to an action on the original claim. Wiberly v. Matthews, 91 N. Y. 648; Ott v. Schroeppel, 5 N. Y. 482; Unterrainer v. Seelig, 13 S. D. 148, 82 N. W. 394.

The terms of the award are sufficiently inclusive to indicate that the entire controversy was considered, and, in fact if the award itself did not indicate this, the evidence shows it and the discrepency is not material. 3 Cyc. 677–702.

Fisk, Ch. J. Action to foreclose a mechanic's lien. The complaint is in the usual form, claiming a balance due on the contract of $354.73 and $238.37 for alleged extras furnished at defendant's request, and praying for a foreclosure of the lien. The answer, among other things, alleges damages for delay in completing the contract at the rate of $5 per day from November 15, 1912, to April 1, 1913, or a total of $675, such damages having been stipulated for in the contract. It further alleges that pursuant to agreement all matters of difference between the

parties were submitted to arbitration, and an award was made finding a balance due plaintiff of only $1.14, which has been paid. The answer also contains a counterclaim for damages in the said sum of $675 for the delay in completing the contract as aforesaid, to which counterclaim plaintiff filed a reply denying the same.

At the conclusion of the trial the district court, among other things, found the following facts:

That on or about April 1, 1913, plaintiff and defendant being in controversy regarding the satisfactory condition of the work and completion of said contract, certain amounts claimed for extra work done upon said building by plaintiff, damages occasioned defendant by plaintiff's failure to complete the work in a satisfactory manner, and within the time required by the contract, and the amount claimed to be due plaintiff by defendant, and other differences and disputes arising between them, entered an agreement to submit the entire controversy and all differences between them to three arbitrators,—one to be selected by the plaintiff, one by defendant, and the third by the two first chosen, who should act upon all matters of difference between plaintiff and defendant arising out of said work, and strike a balance between them, and in pursuance of said agreement to submit to arbitration three arbitrators were chosen in the manner aforesaid, who fully and fairly considered all matters of difference and dispute between plaintiff and defendant, having listened to claims and complaints of each party, and having carefully inspected the work and all matters involved or growing out of said work and contract, and having completed their work, and on March 29, 1913, being in readiness to make an award which was then in writing but not disclosed to the parties, the plaintiff and defendant in their presence again agreed in writing to which their names were respectively subscribed by them (on the bottom of the same paper on which such award was written) to abide by and accept whatever award should be made by said arbitrators, both plaintiff and defendant agreeing and understanding that said award then in writing, to which they attached their agreement, should determine the entire matter of controversy between them, and said arbitrators did thereupon and on March 29, 1913, make an award, and notified plaintiff and defendant thereof, and published said award, by the terms of which it was found

that there was a balance due to the plaintiff from the defendant of the sum of $1.14, and the court finds that the amount so found to be due plaintiff by the arbitrators has been paid to plaintiff by defendant. That it was agreed by the parties that said arbitrators should decide and determine all questions and differences between them, and not the matter of extra work alone.

VII.

That the plaintiff performed extra work, for which he is entitled to reasonable compensation outside of the regular contract price; the nature and amount of said extra work and its reasonable value as found by the court is as follows, and, together with the contract price, shows the total credits due to the plaintiff in the account as stated by the court:

Contract price	$4,029.00
Boxing sewer pipe	3.64
Frame and door—switch—electric lights	3.60
Treads and raisers, front stairs	30.50
One screen door	2.50
Angle iron for windows	20.80
Hanging window, toilet room	2.00
Moving skylight, allowed at	10.00
Varnishing stairs	12.00
Total credits to Johnsen	$4,114.04

That the foregoing items of extra work include all additional or extra work and compensation, to which the plaintiff is entitled to a credit upon the contract; that the plaintiff claims to be entitled to other items of extra work, and the same are made a part of the statement of lien filed and claimed by him, but the court finds that none of said other items are proper credits to be allowed to the plaintiff.

IX.

The court finds as credits due the defendant, including the amount of payments on the contract for all of the foregoing, the following:

Payments made to date	$3,734.43
Damage to floor	100.00
Rental lost	150.00
Ceiling	15.00
Prism light over area not used	82.00
Total credits to Wineman	$4,081.43

And the court finds that, in addition to the said total sum of credits above, defendant is entitled to a balance for deficiency as above stated in iron stairway, bulletin board, and window areas which exceeds the balance of $2.61 in plaintiff's favor.

X.

That because of the submission to arbitration and the agreement to abide thereby, the award of the arbitrators and the acceptance and performance thereof by defendant, defendant is not indebted in any sum whatsoever to the plaintiff.

The court further finds that on the merits, and having examined the items of difference and claims of the respective parties, and stated an account between them, that the defendant is not indebted to the plaintiff in any sum whatsoever.

Pursuant to these findings the court made conclusions of law favorable to defendant and entered judgment accordingly. From such judgment plaintiff has appealed, specifying that he desires a trial *de novo* of the entire case in this court.

We are convinced, both on the merits and because of the award of the arbitrators, that the judgment is right and must be affirmed. We choose to place our decision, however, upon the latter ground only, and will proceed to give as briefly as possible our reasons for adjudging that

the award returned by the arbitrators constitutes a barrier to plaintiff's recovery. We take it to be well settled that the award, if valid, supersedes plaintiff's recovery on the contract or for extras. Wiberly v. Matthews, 91 N. Y. 648; New York Lumber & Wood Working Co. v. Schnieder, 119 N. Y. 475, 24 N. E. 4.

Is the award valid and enforceable? The answer depends upon whether in this state there may be a common-law arbitration, or, in other words, whether the statutory provisions are exclusive, it being conceded that the proceedings failed to conform with the statutory prerequisites. The question is one of first impression in this jurisdiction, but it has often arisen and been decided in the courts of sister states. The statutory provisions relative to arbitration are embraced in chapter 40, Code of Civil Procedure, being §§ 8327–8347 inclusive, Compiled Laws. It is important to note the provisions of § 8345, which reads as follows: "Nothing in this chapter shall be construed to impair or affect any action upon an award or upon any bond or other engagement to abide by an award."

It seems to be almost the unanimous voice of the authorities that the statutory provisions are not exclusive, but merely cumulative, to those at common law, and that an award will be upheld if it is sufficient at common law. We shall not attempt a citation of the many authorities. They may be found collected in 5 C. J. page 19, note 20. The author of the above article on Arbitration and Award, in this great treatise, says: "Usually the statutory provisions regulating the subject of arbitration in the various states refer to the remedy for the enforcement of the award, and, unless by express terms or necessary implication they abrogate the common law on the subject, parties are still at liberty to enter into a submission as at common law." Section 8345, Compiled Laws, supra, evinces a legislative intent in harmony with the general rule as announced by the authorities. We entertain no doubt that the statutory and common-law proceedings relating to arbitration and award are merely cumulative in this state, and we accordingly so decide. In addition to the above authorities, see: 2 R. C. L. page 353, and cases cited; 3 Cyc. 586; Lilley v. Tuttle, 52 Colo. 121, 117 Pac. 896, Ann. Cas. 1913D, 196.

We have considered the general Code provisions in § 7321, Compiled Laws, cited and relied on by appellant's counsel in support of his con-

tention, but we do not deem them controlling. Of course, wherever the common law necessarily conflicts with our Code, the latter must govern, but, as we view it, there is no necessary conflict between the Code and the common-law proceedings with reference to arbitration.

It is well settled that courts favor the settlement of disputes by arbitration. Hackney v. Adam, 20 N. D. 130, 127 N. W. 519; Caldwell v. Brooks Elevator Co. 10 N. D. 575, 88 N. W. 700.

But it is next asserted by appellant that the award cannot stand because it is broader than the subsequent agreement to abide thereby. Such contention must be overruled. The trial court found that the parties agreed to submit to the arbitrators all matters in dispute between them, and that in fact all such matters were considered and determined by them. Indeed, the testimony is undisputed that such was the agreement. Even plaintiff testifies that they submitted everything to the arbitrators for them to strike a balance. He contends, however, that the written agreement to abide by the award upon its face shows that they thought that it merely covered the extras. Such agreement was signed by both parties before the award was published or its contents made known to either party, and it is as follows: "We hereby agree to accept and abide by the above report rendered by the arbitrators in full settlement of contract extras and payments of claims arising from the same." This contention is likewise devoid of merit, and is evidently an afterthought. If a comma was inserted, as it should have been, after the word "contract," the real intent of the parties would perhaps appear more clearly. It is manifest that both parties intended that the award should settle all differences. Appellant's construction of the language leads to an absurdity. He would have us read the word "contract" as there used as though it were an adjective qualifying the noun "extras," but this construction is farfetched and unwarranted. The contract for the building did not stipulate for *"contract extras,"* to be furnished, but it merely anticipated a contingency whereby extras *might* be furnished.

Nor do we deem appellant's contention sound, to the effect that the arbitrators arrived at their award by allowing respondent credit under the forfeiture clause of the contract stipulating damages at the rate of $5 per day for the delay in completing the work. The testimony of the witness, Halliday, one of the arbitrators, negatives such fact. He

testified that they refused to abide by the forfeiture clause, and the amount of the award lends support to his testimony. In making the above statements we do not wish to be understood as holding that such so-called "forfeiture clause" is invalid. Whether it should, in a proper case, be enforced as a reasonable stipulation fixing the measure of damages for delay, we are not here required to decide, and we therefore withhold any expression of views thereon.

The contention that the award has not been paid is also without merit, the proof showing that respondent paid out for plaintiff, after the award was published, the fees of all the arbitrators, and was obliged to and did pay and satisfy certain other claims which plaintiff should have paid.

The judgment is correct, and is accordingly affirmed, with costs.

On Petition for Rehearing filed April 29, 1916.

Fisk, Ch. J. A petition for a rehearing has been filed, which, upon its face and at first blush, would appear to have some merit. However, upon mature reflection we are convinced that the points urged therein are wholly untenable; but in denying the petition we deem it proper to state our views briefly.

It will be noticed that we expressly based our decision upon the sole ground that, having submitted all their differences to arbitration and the award being valid, the parties are thereby forever concluded.

It is now strenuously insisted by counsel that we committed error in stating that, according to the testimony of the witness Halliday, the arbitrators in arriving at their award did not give respondent credit under the so-called forfeiture clause of the contract stipulating damages at the rate of $5 per day for delay in completing the contract; and we are also criticized for thus delving into the merits in the face of our holding that all controversy between the parties was foreclosed by the award. But the above statement was prompted by appellant's contention to the contrary, and all we meant was that the arbitrators, as a matter of fact, declined to allow the sum asked by respondent under such clause, and for such delay they merely allowed the sum of $150. The method by which they arrived at such allowance is not in the least material, there existing no ground for impeaching the award. The parties selected such

tribunal, and concededly submitted all matters of difference to it, and under the law the arbitrators were vested with jurisdiction to decide all questions of law, as well as fact, and even if they had allowed $5 per day for the full period of the delay, such allowance would, nevertheless, be binding in the absence of fraud or mistake. As stated in 2 R. C. L. 386: "Their decision on matters of fact and law is conclusive, and all matters in the award are thenceforth *res judicata*, on the theory that the matter has been adjudged by a tribunal which the parties have agreed to make final, a tribunal of last resort for that controversy." (Citing numerous cases.) See also 5 C. J. pages 179–183 and cases cited. Counsel cites six cases in his petition in support of his contention that the award will be avoided or may be modified for a mistake in law made by the arbitrators. We have examined these authorities, and, with the possible exception of one or two, they support the rule stated in Ruling Case Law and Corpus Juris, above cited. To substantiate this assertion we quote briefly from two of the authorities cited. Squires v. Anderson, 54 Mo. 193, contains the following statement in the opinion: "It is insisted by the plaintiff that the arbitrators had full power to judge and decide both as to the law and the facts of the case, and that their award is final and conclusive on the parties. This may be, and is, true in reference to matters coming within the scope of the authority given them by the submission. But if they assume to act on questions not submitted, or fail to follow the directions in the submission in a material point, their award in reference to such matters will not be binding, either on questions of law or of fact." In Walker v. Walker, 60 N. C. (1 Winst. L.) 259, the syllabus reads: "An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision. But when arbitrators act within the bounds of their authority, their decisions on questions of law and of fact are binding on the parties, unless the arbitrators acted corruptly or committed gross errors."

Counsel relies, all through his petition, upon the assumption that the clause stipulating for the allowance of $5 per day for delay in completing the contract is void because it provides for a penalty instead of for liquidated damages. While, as stated in the opinion, this question is not before us for decision, and we do not decide the point, we respectfully refer counsel to the authorities cited in the elaborate note to the

case of Webster v. Bosanquet, Ann. Cas. 1912C, 1019, and especially to the cases cited at page 1027. See also Ward v. Hudson River Bldg. Co. 125 N. Y. 230, 26 N. E. 256; and 8 R. C. L. 569.

The petition is denied.

J. A. GROFF v. GEORGE R. COOK.

(157 N. W. 973.)

Personal property — sale of — purchase price — action to recover — issues — agent — instructions — objections waived.

1. In an action to recover the purchase price of certain potatoes alleged to have been sold to defendant, the sole issue tried in the lower court was whether defendant purchased such potatoes or merely acted as agent in receiving and shipping the same, and the instructions of the court to the jury, as to which counsel expressly waived all objections, limited the jury to such issue. *Held*, that defendant was thereby precluded from urging other defenses.

Statute of fraud — urged for first time — in supreme court — not permitted — allegations — proof — necessity for.

2. The statute of frauds cannot be urged as a defense for the first time in the supreme court. Such defense must be both alleged and proved in order to be of any avail.

Evidence — verdict.

3. Evidence examined and *held* sufficient to sustain the verdict.

New trial — motion for — grounds for — newly discovered evidence — trial court — ruling on — discretion.

4. The motion for a new trial upon the ground, among others, of newly discovered evidence, was properly denied.

Opinion filed April 19, 1916.

Appeal from the District Court, Cass County, *C. A. Pollock*, J.

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

Affirmed.

Note.—The rule that unless the statute of frauds is presented as a defense in the trial court, that objection to the contract cannot be made for the first time on appeal, is discussed in note in 49 L.R.A.(N.S.) 29, and the case of GROFF v. COOK is in accord with the cases there cited.

Karl J. Hjort (*John Carmody,* of counsel), for appellant.

On a sale of personal property the acceptance by the buyer is just as vital to a recovery as is the existence of the contract to sell. Dinnie v. Johnson, 8 N. D. 157, 77 N. W. 612; Stone v. Browning, 51 N. Y. 211; Caulkins v. Hellman, 47 N. Y. 449, 7 Am. Rep. 461; Taylor v. Mueller, 30 Minn. 343, 44 Am. Rep. 199, 15 N. W. 413; Rindskopf v. DeRuyter, 39 Mich. 1, 33 Am. Rep. 340; Browne, Stat. Fr. § 138, E.; 20 Cyc. 249; Grimes v. Van Vechten, 20 Mich. 410; Webber v. Howe, 36 Mich. 150, 24 Am. Rep. 590; Smith v. Brennan, 62 Mich. 349, 4 Am. St. Rep. 867, 28 N. W. 892.

The carrier, the railroad company, had no independent or separate authority to act for defendant in receiving the goods for transportation. There is no proof of such condition in this case, and hence there is no such acceptance as will take the case out of the statute of frauds. Grimes v. Van Vechten, 20 Mich. 410; Smith v. Brennan, 62 Mich. 349, 4 Am. St. Rep. 867, 28 N. W. 892; Waite v. McKelvey, 71 Minn. 167, 73 N. W. 727; Fontaine v. Bush, 40 Minn. 141, 12 Am. St. Rep. 722, 41 N. W. 465; 23 Century Dig. title Stat. of Frauds; 20 Cyc. 249, and cases therein cited.

One seeking to charge the principal must prove the agent's authority. Kornemann v. Monaghan, 24 Mich. 36; Rice v. Peninsular Club, 52 Mich. 87, 17 N. W. 708.

The statements of one who assumes to act as agent do not constitute evidence of authority, nor are they proof of agency. Hirschfield v. Waldron, 54 Mich. 649, 20 N. W. 628; Grover & B. Sewing Mach. Co. v. Polhemus, 34 Mich. 247; Reynolds v. Continental Ins. Co. 36 Mich. 131; McDonough v. Heyman, 38 Mich. 334.

Entries made by a clerk or agent must have been made by the person while acting in the discharge of his duty or in the usual course of his employment, and under the authority of his employer, in order to constitute evidence. Kelley v. Crawford, 112 Wis. 368, 88 N. W. 296; Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628; 17 Cyc. 393; Carlton v. Carey, 83 Minn. 232, 86 N. W. 85; Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U. S. 593, 24 L. ed. 294; Union Electric Co. v. Seattle Theatre Co. 18 Wash. 213, 51 Pac. 367; 17 Cyc. 393.

The intention and understanding with which an admission is made may always be shown as affecting its weight. State v. Paxton, 65 Neb. 110, 90 N. W. 992.

Where a contract is pleaded, the proof must be directed to the establishing of that particular contract. The pleading and proof must be the same. Clarke v. Gray, 6 East, 567, 2 Smith, 622, 4 Esp. 177; Thornton v. Jones, 2 Marsh. 287, 6 Taunt. 581, Holt, N. P. 164; Greenl. Ev.; Colt v. Miller, 10 Cush. 51; Titus v. Ash, 24 N. H. 319; Gragg v. Frye, 32 Me. 283.

A verdict or decision that, under the evidence, is contrary to the law governing the case, must be set aside; also if a verdict is contrary to the weight of the evidence, it must fall. Benedict v. Lawson, 5 Ark. 514; Crocker v. Garland, 7 Cal. Unrep. 275, 87 Pac. 209.

This court has the right to set aside a verdict when only supported by a scintilla of evidence. It is in cases where there is a substantial conflict in the evidence, that courts refuse to interfere. Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359.

A statute authorizing a new trial "for insufficient evidence" confers power to grant a new trial where the verdict is against the weight of the evidence. McDonald v. Walter, 40 N. Y. 551; Inland & S. Coasting Co. v. Hall, 124 U. S. 121, 31 L. ed. 369, 8 Sup. Ct. Rep. 397; Metropolitan R. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; Fuller v. Northern P. Elevator Co. 2 N. D. 220, 50 N. W. 359; Reynolds v. Lambert, 69 Ill. 495; Fox River Mfg. Co. v. Reeves, 68 Ill. 403; Blake v. McMullen, 91 Ill. 32; Reid v. Colby, 26 Neb. 469, 42 N. W. 485.

Harry Lashkowitz, for respondent.

The statute of frauds cannot first be raised in the appellate court. It must have been approached by pleading and proof in the lower court. Willard v. Monarch Elevator Co. 10 N. D. 407, 87 N. W. 996; Prior v. Sanborn County, 12 S. D. 86, 80 N. W. 169; Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863; Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558; MacGregor v. Pierce, 17 S. D. 51, 95 N. W. 281; McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Schuyler v. Wheelon, 17 N. D. 161, 115 N. W. 259.

The transaction here involved is one of seller and purchaser of personal property, and there is no question of agency involved. Behling v. Wisconsin Bridge & Iron Co. 158 Wis. 584, 149 N. W. 487; Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690.

FISK, Ch. J. Action to recover the purchase price of three cars of potatoes alleged to have been sold and delivered by plaintiff to defendant at Gardner, this state, in the month of November, 1913. The facts are fairly stated by appellant's counsel and are substantially as follows: "Plaintiffs claims that the defendant purchased from him 1,428 bushels of potatoes at the agreed price of 60 cents per bushel,—total $856.80,—for which he has not received any compensation except a store account which he owed the defendant, amounting to $297.53, for which amount he has given the defendant credit, leaving a balance due the plaintiff of $559.27. Plaintiff claims his contract was completed when he delivered the potatoes in the cars at the tracks at Gardner, North Dakota, and that it then became incumbent upon the defendant to pay the sum due. Defendant's contention is that he shipped the potatoes for plaintiff to the Red River Valley Potato Growers' Association at Barnesville, Minnesota, and that he at no time offered or agreed to buy the potatoes, and denies exercising any ownership whatever over them. The evidence discloses that the defendant was the agent at Gardner for the Potato Company, at Barnesville, to which company the potatoes were shipped. The defendant denies the contention of the plaintiff, but does not deny the amount of bushels shipped, as he did not know how many were delivered at the cars at Gardner and is therefore not in a position to deny the plaintiff's computation as to amount. Plaintiff loaded the potatoes in three cars on or about November 17, 1913, and on or about November 19, 1913. Neither defendant nor plaintiff has received anything as compensation for the potatoes, and the question resolves itself into: (1) Whether or not these potatoes were sold by the plaintiff to the defendant, and delivered pursuant to the terms of sale and were received and accepted by the defendant; or (2) whether defendant merely shipped the potatoes either as agent for plaintiff or for the Potato Growers' Association, disclosing to plaintiff his agency for such association. . . .

"This case was tried to a jury, and a verdict rendered in favor of the plaintiff and against the defendant for the sum of five hundred fifty-nine and 27/100 ($559.27) dollars, with interest at 7 per cent from the 20th day of November, 1913. A motion for a new trial was made and denied, from which order and the judgment herein this appeal is taken."

The case was tried throughout in the lower court upon these clear-cut issues, and at the conclusion of the testimony the learned trial court

instructed the jury accordingly, having first submitted his instructions to counsel for both parties, who stated that they had no objection thereto. Such instructions are therefore the law of the case, and they very properly limited the jury to a consideration of the simple issues aforesaid.

We are asked to now reverse the judgment and order appealed from for three reasons: First, because the alleged contract of sale and purchase falls within the statute of frauds and is therefore not enforceable; second, because "the plaintiff has proceeded on the theory, both in his complaint and evidence, that there is no distinction between a sale and a guaranty, and that the pretended agreement was either a sale or guaranty or both;" third, because of alleged insufficiency of the evidence.

We deem each of the above contentions without merit. The first and second are foreclosed by the instructions, the correctness of which, as above stated, is conceded. Furthermore, the statute of frauds was neither alleged in the answer nor mentioned at the trial, and obviously it cannot be relied on as a defense for the first time in this court. It is elementary that such affirmative defense must be both alleged and proved in order to be of any avail. Not only this, but under the undisputed evidence there was a sufficient delivery of the potatoes to take the contract without the statute of frauds.

As to the alleged insufficiency of the evidence, all that need be said is that, after a careful reading of the testimony, we fully concur with the decision of the trial court in holding that there was such a conflict in the evidence as to not only justify, but require, its submission to the jury. Counsel for appellant evidently so viewed it at the trial, for he at no time there intimated a contrary view. There was a square conflict in the evidence as to whether there was a sale to defendant, or whether he acted merely as plaintiff's agent in handling the potatoes, and, this being true, we cannot disturb the verdict and judgment.

Appellant's contention that his motion for a new trial upon the ground of alleged newly discovered evidence should have been granted has been considered and deemed untenable. Finding no error, the judgment and order are hereby affirmed.

P. J. COSTELLO v. FARMERS BANK OF GOLDEN VALLEY, a Corporation.

(157 N. W. 982.)

Property owner — leaving excavation unguarded — negligence — what constitutes — legal duty — owing to plaintiff — must appear — breach of such duty.

1. To constitute negligence of a property owner in leaving an excavation on his premises unguarded, it must appear that such owner owed a legal duty to the plaintiff to thus guard it, and that he is guilty of a breach of such duty.

Trespasser — license — property owner — owes no duty to — protection from injury — wilful or wanton injury.

2. A property owner owes no duty to a trespasser or a mere licensee on his premises to protect him from injury, other than to refrain from wilfully and wantonly inflicting injuries to such person.

Lot — public streets — excavation — guarded by a fence.

3. Defendant caused a basement to be excavated on its lot, bounded on the north end and east side by public streets. Such excavation was adequately guarded by a fence across the north end and a row or pile of building rock along the east side.

Held, that defendant exercised due care to protect persons from injuries, and that it owed plaintiff no duty to place a guard along the south end, no implied invitation having been extended to the public to travel across the lot where the plaintiff was injured.

Plaintiff — negligence — matter of law — verdict — direction of.

4. Under the undisputed facts it is held that plaintiff, as a matter of law,

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Note.—Cases discussing the duty of an owner of land which licensees are accustomed to cross, to guard against injuries in consequence of changes in the condition, will be found collated in notes in 13 L.R.A.(N.S.) 1126; 39 L.R.A.(N.S.) 217; and it will be found that there are cases both for and against the liability of such owner for resulting injuries.

See also note in 39 L.R.A.(N.S.) 217, on the question of contributory negligence of person injured by falling into hole or excavation.

That the owner of private property is not obliged to make it safe for trespassers or even for mere licensees is in accord with the weight of authority as will be seen by an examination of the cases in notes in 26 L.R.A. 686; and 5 L.R.A.(N.S.) 733, on the liability for dangerous condition of private grounds lying open beside a highway or frequented path.

was guilty of negligence which directly contributed to his injuries. Hence, the trial court properly directed a verdict against him.

Opinion filed April 27, 1916.

Appeal from the District Court of Mercer County, *S. L. Nuchols,* J.

From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

F. E. McCurdy, for appellant.

It is true that a trespasser or mere licensee, going upon the premises of another, goes at his own risk, and the owner owes no duty to him to protect him from injury. But where defendant by his conduct has induced the public to use a way, in the belief that it is a street or highway, and where they suppose they will be safe, an exception to the rule above stated at once arises and renders defendant liable for injuries sustained by one so using such street or highway. 29 Cyc. 450, 451; 3 Shearm. & Redf. Neg. § 706; Black v. Central R. Co. 51 L.R.A.(N.S.) 1215, and case note, 85 N. J. L. 197, 89 Atl. 24; Case note to Habina v. Twin City General Electric Co. 13 L.R.A.(N.S.) 1126; Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Brinilson v. Chicago & N. W. R. Co. 144 Wis. 614, 32 L.R.A.(N.S.) 359, 129 N. W. 664; Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Barry v. New York C. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377; Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; DeBoer v. Brooklyn Wharf Warehouse Co. 51 App. Div. 289, 64 N. Y. Supp. 925; Larmore v. Crown Point Iron Co. 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Hanson v. Spokane Valley Land & Water Co. 58 Wash. 6, 107 Pac. 863; Phipps v. Oregon R. & Nav. Co. 161 Fed. 376.

In this case the general public were accustomed to use that portion of the north lot of the defendant's as a highway, and the defendant, making an excavation there, was bound to protect the people against injury. He owed them this duty. Lerner v. Philadelphia, 21 L.R.A.(N.S.) 630, note; Knoxville v. Cain, 48 L.R.A.(N.S.) 632, note; 25 Cyc. 643.

Newton, Dullam, & Young, for respondent.

Actionable negligence is simply a failure to exercise that diligence and skill which is imposed by some legal duty to the person injured. Where there is no such duty, there can be no negligence. O'Leary v.

Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699; Thomp. Neg. § 1228.

There is no such duty owing to a trespasser or mere licensee. In such case it is only necessary that one refrain from the wanton or wilful injury of another. Fisher v. Clark, 41 Barb. 329; Sweeny v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; Phillips v. Library Co. 55 N. J. L. 307, 27 Atl. 478; Cusick v. Adams, 115 N. Y. 59, 12 Am. St. Rep. 772, 21 N. E. 673; Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684.

When the owner of land makes an excavation thereon at some distance from the way and the person falling into it would be a trespasser upon the owner's land before he reached the excavation, there is no liability. Hardcastle v. South Yorkshire R. Co. 4 Hurlst. & N. 67, 28 L. J. Exch. N. S. 139, 5 Jur. N. S. 150, 7 Week. Rep. 326; Ryan v. Towar, 128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644; Briscoe v. Henderson Lighting & P. Co. 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600; Johnson v. Paducah Laundry Co. 122 Ky. 369, 5 L.R.A.(N.S.) 733, 92 S. W. 330.

Plaintiff here was a trespasser at the time of his injury. He was not invited to enter upon defendant's premises, either actually or by implication. An implied invitation to enter upon premises exists where benefit accrues to the one who extends such invitation, as where the property is designed or used by the owner for public purposes which are of interest or advantage to himself, and then used in seasonable hours. Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Trask v. Shotwell, supra; Thomp. Neg. §§ 985, 988, 990; Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492, 8 Am. Neg. Rep. 262; Hart v. Grennell, 122 N. Y. 371, 25 N. E. 354; Cowen v. Kirby, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; McClain v. Caribou Nat. Bank, 100 Me. 437, 62 Atl. 144; Zoebisch v. Tarbell, 10 Allen, 385, 87 Am. Dec. 660; Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 256; Walker v. Winstanley, 155 Mass. 301, 29 N. E. 518; Peake v. Buell, 90 Wis. 508, 48 Am. St. Rep. 946, 63 N. W. 1053; Flanagan v. Atlantic Alcatraz Asphalt Co. 37 App. Div. 476, 56 N. Y. Supp. 18, 5 Am. Neg. Rep. 694; Menteer v. Scalzo Fruit Co. 240 Mo. 177, 144 S. W. 833; Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899; Ryerson

v. Bathgate, 67 N. J. L. 337, 57 L.R.A. 307, 51 Atl. 708, 11 Am. Neg. Rep. 300; Watson v. Manitou & P. P. R. Co. 41 Colo. 138, 17 L.R.A. (N.S.) 916, 92 Pac. 17.

The plaintiff here was acting in his own interests, without inducement, and at his own peril, when he went voluntarily in search of the cashier. Gorr v. Mittlestaedt, 96 Wis. 296, 71 N. W. 656; Reeves v. French, 20 Ky. L. Rep. 220, 45 S. W. 771, 46 S. W. 217, 4 Am. Neg. Rep. 155; Thompson v. Baltimore & O. R. Co. 218 Pa. 444, 19 L.R.A. (N.S.) 1162, 120 Am. Rep. 897, 67 Atl. 768, 11 Ann. Cas. 894; Klix v. Nieman, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; Horstick v. Dinkle, 145 Pa. 220, 27 Am. St. Rep. 685, 23 Atl. 378; Breckenridge v. Bennett, 7 Kulp, 95; Mistler v. O'Grady, 132 Mass. 139; Howland v. Vincent, 10 Met. 317, 43 Am. Dec. 442.

There was no established way or path along the line traveled by plaintiff. Acquiescence in use does not grant right. Beck v. Carter, 68 N. Y. 282, 23 Am. Rep. 175; Habina v. Twin City General Electric Co. 15 Mich. 41, 13 L.R.A.(N.S.) 1126, 113 N. W. 586; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Thomp. Neg. 2d ed. 1050, note; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 684; Carleton v. Franconia Iron & Steel Co. 99 Mass. 216; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133.

The only thing that can here be said in favor of plaintiff's action in using the path is that defendant had never forbidden the public to use it. Under such circumstances plaintiff was a mere licensee, to whom defendant owed no duty, under the general rule. Brinilson v. Chicago & N. W. R. Co. 144 Wis. 614, 32 L.R.A.(N.S.) 359, 129 N. W. 664.

Plaintiff was guilty of contributory negligence. He had departed from the provided way of access. He was acting without defendant's inducement, voluntarily, in his own interests, and at his own peril. Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Greenwell v. Washington Market Co. 21 D. C. 298; Sweeney v. Barrett, 151 Pa. 600, 25 Atl. 148; Bridger v. Gresham, 111 Ga. 814, 35 S. E. 677, 7 Am. Neg. Rep. 524; De Graffenried v. Wallace, 2 Ind. Terr. 657, 53 S. W. 452; Downs v. Elmira Bridge Co. 179 N. Y. 136, 71 N. E. 743; Fox v. Warner-Quinlan Asphalt Co. 204 N. Y. 240, 38 L.R.A.(N.S.) 395, 97 N. E.

497, Ann. Cas. 1913C, 745; Polk v. Spokane Interstate Fair, 73 Wash. 610, 132 Pac. 401; McKenzie v. Lewis, 31 N. S. 408; Lanigan v. New York Gaslight Co. 71 N. Y. 29.

The mere fact that a person has had an opportunity to learn of a defect or danger is evidence of knowledge of it. La Riviere v. Pemberton, 46 Minn. 5, 48 N. W. 406; Hinz v. Starin, 46 Hun, 526, 10 N. Y. Supp. 671.

Plaintiff failed to use ordinary care to discover and avoid danger. Ramsdell v. Jordan, 168 Mass. 505, 47 N. E. 244, 3 Am. Neg. Rep. 47; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Johnson v. Ramberg, 49 Minn. 341, 51 N. W. 1043; Worthington v. Wade, 82 Tex. 26, 17 S. W. 520; Baumann v. Metropolitan Street R. Co. 21 Misc. 658, 47 N. Y. Supp. 1094; Cowen v. Kirby, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; Sickles v. New Jersey Ice Co. 153 N. Y. 83, 46 N. E. 1042, 2 Am. Neg. Rep. 410; Bentley v. Loverock, 102 Ill. App. 166; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385, 13 Am. Neg. Rep. 95; Kiander v. Brookline Gaslight Co. 179 Mass. 341, 60 N. E. 796; Campbell v. Abbott, 176 Mass. 246, 57 N. E. 462; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Massey v. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553; Sweeny v. Barrett, 151 Pa. 600, 25 Atl. 148; Forsyth v. Boston & A. R. Co. 103 Mass. 513; Steger v. Immen, 157 Mich. 494, 24 L.R.A.(N.S.) 247, 122 N. W. 104; Reed v. Axtell, 84 Va. 231, 48 S. E. 587, 10 Am. Neg. Cas. 346; Dailey v. Distler, 115 App. Div. 102, 100 N. Y. Supp. 679; Hammock v. Tacoma, 44 Wash. 623, 87 Pac. 924; Bills v. Salt Lake City, 37 Utah, 507, 109 Pac. 745; Lautenbacher v. Philadelphia, 217 Pa. 318, 66 Atl. 549; Glaser v. Rothschild, 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576; Dobbins v. Missouri, K. & T. R. Co. 91 Tex. 60, 38 L.R.A. 573, 66 Am. St. Rep. 856, 41 S. W. 62; Davis v. California Street Cable R. Co. 105 Cal. 131, 38 Pac. 647; Reynolds v. Los Angeles Gas & Electric Co. 162 Cal. 327, 39 L.R.A.(N.S.) 896, 122 Pac. 962, Ann. Cas. 1913D, 34; Anderson v. Northern P. R. Co. 19 Wash. 340, 53 Pac. 345, 4 Am. Neg. Rep. 235.

Fisk, Ch. J. Plaintiff received injuries by falling into an excavation on defendant's property, and he seeks to recover damages therefor. The facts, briefly stated, are as follows: The accident occurred between 6

and 7 o'clock in the evening of January 18, 1914, on lot 6 of block 3 of the town of Golden Valley, North Dakota. This town at that time was only about two months old, and the streets had not been graded nor sidewalks built, and there was nothing there other than the surveyors' stakes to mark the street and lot lines. Lot 6, aforesaid, is in the northeast corner of block 3. At the north is Main street and on the east, Central avenue. Defendant had a temporary bank building located adjacent to the line of Central avenue, which building faced north, the door being in the north end and at the extreme northeast corner of the building. The front of such building was 43 feet south of Main street. Sometime prior to January 18th, the date of plaintiff's injury, defendant caused a basement to be excavated for a new bank building on the north end of such lot. This basement was the full width of the lot and extended from Main street south to a point 22½ feet on the east line of such lot and 32 feet on the west line thereof, there being an "L" shaped jog in the southwest corner of such basement, 9½ by 13½ feet, commencing at a point 11½ feet west of Central avenue and 22½ feet south of Main street. Defendant had caused a fence to be built all along the north end of such excavation, and rock to be piled along the east side from the northeast corner of the lot to a point from 6 to 12 feet from the door of the temporary bank building, so that the only unobstructed entrance to the bank was from Central avenue on the east through the opening between the south end of the rock pile and the bank building. Plaintiff visited the bank in the afternoon of the 18th for the purpose of getting a check which was to be left there by one of his customers in payment for certain oil, plaintiff being at the time the employee of the Standard Oil Company engaged in distributing its products. At that visit he approached the bank from the south and returned the same way. He testified that at that time he did not notice the fence nor the pile of rock. He says that on said visit he told a Mr. Campbell, the assistant cashier, that he would be back to get the check after he unloaded the oil, and Campbell said, "all right." January 18th was Sunday. It appears that plaintiff had visited the town at previous times, but did not remember when his last visit occurred. He admits that he knew that some excavating had been done on the north part of lot 7, directly west of lot 6; but did not know of the excavation on defendant's lot. When he returned to the bank in the

evening it was dark and stormy, and, finding no one there, he started in search of Campbell, going diagonally from the bank in a northwesterly direction toward a printing shop, where he saw a light, and when he had proceeded about 20 feet from the door of the bank he fell into the excavation, receiving the injuries complained of.

At the close of the testimony the defendant moved for a directed verdict in its favor, which motion was granted. We here set out such motion in full, as it is a clear statement of the respondent's views:

"The defendant at this time moves for a directed verdict in favor of the defendant and against the plaintiff, upon the grounds and for the reasons, as follows:

"(1) That the plaintiff has failed to make out a prima facie case, and to furnish evidence in support of the material allegations of the complaint.

"(2) That it appears affirmatively from the plaintiff's testimony that he was on the premises as a trespasser at the time and place mentioned in the testimony, and at which the accident happened, or as a mere licensee; further, that the defendant owed no duty to him, either as a trespasser or as a licensee, except to refrain from wantonly or wilfully injuring him;

"(3) That there is no evidence of wantonness of wilfulness on the part of the defendant, and no acts of want of ordinary care on its part;

"(4) That if there is any evidence of an invitation to the plaintiff to come upon the premises, it appears conclusively that the purpose of the invitation was to transact business for his own convenience in the bank building, to which there was a well-defined entrance, and that at the time of the accident the plaintiff was not upon that part of the premises where he was expected to be to transact that business, if there was any invitation;

"(5) That the injury to the plaintiff does not appear to be one which the defendant, in the light of attending circumstances, might, in the exercise of ordinary prudence, have foreseen as probably occurring as a result of leaving this excavation unguarded upon the south side.

"(6) That there is nothing to show that the usual and ordinary approach to the bank was not in a safe condition;

"(7) It does not appear that the accident was the natural or probable consequence of the excavation, or of leaving the excavation unguarded;

"(8) It appears conclusively from the testimony that the plaintiff contributed to his own injury, and that his own negligence was the proximate cause of the injury sustained by him." Judgment was entered pursuant to such verdict, and plaintiff has appealed therefrom. Appellant's specifications of error are all aimed at the ruling granting the motion aforesaid, and we need not consider them separately.

There are really but two questions involved: First, Was defendant guilty of negligence which was the proximate cause of the injury? and, second, was plaintiff guilty of contributory negligence?

Taking up the first question, the inquiry logically arises as to what legal duty, if any, was owing by defendant to plaintiff; for in the absence of such duty and a breach thereof, of course no negligence can be properly charged to defendant, there being no claim of any wanton or wilful negligence on defendant's part.

Counsel for appellant very candidly admits that the settled rule of law is that, if his client in going where he did was a trespasser or merely a bare licensee, defendant owed him no duty, but he contends that the facts bring the case within a well-recognized exception to such rule, which he quotes from 29 Cyc. 450, 451, as follows: "There is a class of cases, however, which stand on a ground peculiar to themselves. They are where defendant by his conduct has induced the public to use a way, in the belief that it is a street or public way which all have a right to use, and where they suppose they will be safe. The liability in such a case is coextensive with the implied invitation."

While the above quotation, no doubt, embraces a sound statement of the law, we are unable to perceive its application to the facts in this record. Of course, if defendant through the conduct of its officers led the public to believe that they were privileged to use the north end of such lot as a public highway, or if such officers impliedly invited the public to thus use the same, it would necessitate on defendant's part the exercise of care for their safety corresponding with the extent of such implied invitation. In other words, its liability in that case would be coextensive with such implied invitation; but the record before us does not, in our judgment, warrant a finding of any such implied invitation. At the most, it merely discloses that prior to such excavation persons in going from place to place in the town traveled promiscuously without any heed being given to streets or private property, and that

this was true with reference to travel both from and to such bank between it and points northwest therefrom; but this was nothing more than the natural thing for people to do in a new town like Golden Valley, where, as before stated, there was nothing aside from the surveyors' stakes to mark the street and property lines, but we think this falls far short of establishing an implied invitation so to do on defendant's part, especially where, as here, the time during which such practice was pursued was such a brief period. Persons thus using private property, under the circumstances, must be deemed to have assumed the risks incident thereto. At the most, plaintiff was a mere licensee to whom defendant owed no duty. Furthermore, plaintiff did not visit the bank building on this Sabbath evening to transact business with defendant, nor had he any right to assume that the bank would be open for the transaction of business at that late hour. He was not invited by defendant to go there, but concededly went on a personal errand in no way concerning defendant bank, and consequently, as before stated, the latter owed him no duty. This being true, it follows that defendant was guilty of no negligence. Moreover, it appears that this excavation which had been made several weeks prior to the accident had been carefully guarded across the entire front and side thereof between the streets and basement by a fence and row or pile of building rock, and, in causing this to be done, we think defendant exercised due care as to all persons, even including its customers, and it cannot be charged with negligence in failing to do more.

Many authorities might be cited lending support to our views above expressed, but we content ourselves with a reference to the following: O'Leary v. Brooks Elevator Co. 7 N. D. 554, 41 L.R.A. 677, 75 N. W. 919, 4 Am. Neg. Rep. 451; Gramlich v. Wurst, 86 Pa. 74, 27 Am. Rep. 684; Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Cowan v. Kirby, 180 Mass. 504, 62 N. E. 968, 11 Am. Neg. Rep. 261; Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120; Schmidt v. Bauer, 80 Cal. 565, 5 L.R.A. 580, 22 Pac. 25; Habina v. Twin City General Electric Co. 150 Mich. 147, 13 L.R.A.(N.S.) 1126, 113 N. W. 586; Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 784; Redigan v. Boston & M. R. Co. 155 Mass. 44, 14 L.R.A. 276, 31 Am. St. Rep. 520, 28 N. E. 1133; Fox v. Warner-Quinlan Asphalt Co. 204 N. Y. 241, 38 L.R.A.(N.S.) 395, 97 N. E. 497, Ann. Cas. 1913C,

745; Brinilson v. Chicago & N. W. R. Co. 144 Wis. 614, 32 L.R.A. (N.S.) 359, 129 N. W. 664.

As we view it, there is another insuperable barrier to plaintiff's recovery in this action. His injury was the result of a want of ordinary care on his part, which directly contributed to cause the same. While the question of contributory negligence is usually one of fact for the jury, yet where—as in the case at bar—the facts are not in dispute, it becomes a pure question of law for the court. It is an established fact in the case that, for at least three or four days prior to the accident, such excavation had been completed, and, obviously, for sometime prior thereto travel across the north portion of defendant's lot had been abandoned, and persons leaving the bank were obliged to go east on to Central avenue. Both the ingress and egress provided for those visiting the bank were by way of such avenue lying directly east of the bank building. Plaintiff called at the bank in the afternoon when it was broad daylight, and should have discovered both the excavation and the guards at the north and east of it. At the time of the injury it was very dark, and, without any right to assume that it was a public way and free from obstructions, he hurriedly walked to the point where he was injured, without a lantern or any light, and apparently utterly heedless of dangerous pitfalls or other obstructions. Such conduct was not that of a reasonably prudent person. The fact that it was a very dark night, as well as the other surrounding circumstances, required of him the use of extra precautions, which he did not take, and under the law he cannot recover. Parker v. Portland Pub. Co. 69 Me. 173, 31 Am. Rep. 262; Rooney v. Woolworth, 74 Conn. 720, 52 Atl. 411; Bedell v. Berkey, 76 Mich. 435, 15 Am. St. Rep. 370, 43 N. W. 308; Bentley v. Loverock, 102 Ill. App. 166; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Daley v. Kinsman, 182 Mass. 306, 65 N. E. 385, 13 Am. Neg. Rep. 95; Campbell v. Abbot, 176 Mass. 246, 57 N. E. 462; Massey v. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553; Steger v. Immen, 157 Mich. 494, 24 L.R.A.(N.S.) 247, 122 N. W. 104; Reed v. Axtell, 84 Va. 231, 48 S. E. 587, 16 Am. Neg. Cas. 346. The case of Massey v. Seller, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553, is where plaintiff approached the outer door of defendant's premises, and, observing a dark corner, assumed that it was a water-closet, and walked into it to find that it was an elevator shaft. He

said he was not looking for a trap-door to fall into, but could see nothing. The Oregon court said: "If it was so dark in there that he could 'see nothing' it was certainly an act of folly on his part to enter on a cruise of exploration and discovery without stopping to determine whether it was safe to proceed. To bolt headlong into a place little known, and where the senses cannot take note of it, is not the act of a prudent man, and there is no chance for any other inference or deduction concerning it. Reasonable minds could not come to any other conclusion touching it, so that there is nothing for the jury to determine, and the trial court very properly declared the result as a matter of law." See also Anderson v. Northern P. R. Co. 19 Wash. 340, 53 Pac. 345, 4 Am. Neg. Rep. 235; Glaser v. Rothschild, 221 Mo. 180, 22 L.R.A.(N.S.) 1045, 120 S. W. 1, 17 Ann. Cas. 576; Davis v. California Street Cable R. Co. 105 Cal. 131, 38 Pac. 647; Reynolds v. Los Angeles Gas & Electric Co. 162 Cal. 327, 39 L.R.A.(N.S.) 896, 122 Pac. 962, Ann. Cas. 1913D, 34.

Judgment affirmed.

CARL J. SWANSTROM v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY.

(157 N. W. 976.)

Grove of trees — destruction of by fire — damages — action to recover — locomotive — sparks from — cause of fire — negligence — error — specifications of — new trial — motion for — grounds for — damages — excessive — jury — passion — prejudice.

1. In an action to recover damages for the destruction by fire of a grove of trees, which fire was negligently caused by sparks from defendant's locomotive, the specifications of error merely challenge the correctness of the trial court's order denying defendant's motion for a new trial. The sole ground of such motion was that the damages awarded by the jury are excessive and appear to have been given under the influence of passion and prejudice.

Evidence examined and *held* that the specifications are without merit.

Verdict — result of passion — determination of — province of court — evidence — weighing — grossly and palpably excessive verdict — moral sense of justice — presumption of passion — prejudice.

2. In determining whether the verdict was the result of passion and prejudice, it is not the province of this court to weigh the evidence further than to satisfy itself, as a matter of law, whether the jury must have been thus actuated in assessing the damages, and unless the verdict is so grossly and palpably excessive as to shock the moral sense of justice and to raise a reasonable presumption that the jury must have been influenced by passion or prejudice, an appellate court will not interfere.

Opinion filed April 27, 1916.

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

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

Affirmed.

John E. Greene and *Palda, Aaker, & Greene* (*Alfred H. Bright* and *John L. Erdall*, of counsel) for appellant.

Bowen & Adams for respondent.

Fisk, Ch. J. Plaintiff sued to recover damages in the sum of $1,150 alleged to have been sustained by him through a fire negligently started by sparks emitted from defendant's locomotive on October 23, 1913, and which fire he alleges destroyed his grove of trees of the value of $1,000 and his barn of the value of $150. A verdict was rendered in plaintiff's favor for the sum of $800 for injury to the grove and $20 for the injury to the barn. A motion for a new trial was made upon the sole ground of alleged excessive damages appearing to have been given under the influence of passion and prejudice, which motion was denied, and defendant appeals both from the order and the judgment entered pursuant to the verdict.

The negligence of the defendant in setting the fire is conceded, and also that such fire spread to plaintiff's premises causing some injury to his trees, but it is defendant's contention that the jury in assessing the damages was manifestly actuated by bias and prejudice. As before stated, this is appellant's sole ground of complaint, and his specifications on this appeal will accordingly be restricted to this one ground.

We deem appellant's specifications without merit. While, in view of

the testimony, the award of damages seems to be quite liberal, yet we are not justified in holding, as a matter of law, that it is so excessive as to disclose passion and prejudice on the part of the jury; nor are we justified in holding, as a matter of law, that the verdict is without support in the evidence. In justification of this conclusion, all we need do is to give a summary of the testimony of plaintiff and his witnesses as printed in appellant's brief.

It is as follows:

Carl J. Swanstrom.

I am an unmarried man; I live with my father 2 miles west of Newburg, about 5 miles from my land. On the 23d of October 1913, I was the owner of the southeast quarter of section 21, township 160, range 80, in Bottineau county. I have owned it since about 1902. The Soo railway runs through my land, east and west, pretty close to the middle. I have a grove on my farm, just about in the middle of the quarter. It runs north and south up to the railroad track. In the spring of 1908 I planted about 1,000 trees. During 1909, I planted about 3,000 trees. When planted, they were in height I should judge from 4 to 5 feet. The length of the grove was 80 rods. It begins pretty near the right of way. On the 23d of October a fire started on the right of way and burned southeasterly through my grove, striking the road a little ways from the northwest corner of it, probably about 6 or 7 rods from the northwest corner. It burned right through east. It burned clear through except one corner,—the southwest corner. I should judge there was left unburned a track about half the size of this court room, possibly a little bigger.

The first year I planted trees they were hoed by hand. After I planted trees in 1909, they were all hoed after the last planting. I disked through the grove a couple of times. I don't remember just how I did cultivate them in 1909. One year they got so full of thistles I could not get the horses in. The land is rather light there and the thistles grow very easy. The grove is planted on a kind of a ridge. I disked them in 1910. I am not certain whether I cultivated them in 1911. I know I took good care of them up to the time they got so full of thistles I couldn't get any horses in there. After the fire went through according to what I counted, I am not exactly sure, but my brother and

I tried to get it as close as possible, 3,713 had been burned. I didn't count the trees before the fire. There was not a large number dead before the fire, although there were some right in the center of the grove, perhaps between 200 and 300 trees actually dead before the fire. Most of the trees leaved out this spring, but gradually kept dying out. They didn't all of them live through the summer. The trees I planted were Golden Russian willow, Carolina poplar, white ash, and box elders. The value of the land before the grove was burned was about $4,000. After the fire had passed through the grove, I should judge the value of the land was about $2,700.

Cross-examination: I lived on the farm in the spring and fall. I was not living there at the time of the fire. The rows of trees were about 80 rods long, the rows were 10 feet apart. I don't remember the number of rows. I never counted them. I believe it was eighteen rows. The trees were around 10 feet apart in the rows. I don't know how many rows I planted in 1908. The willows were 4 to 5 feet high. The ash about 2 or 3 feet, box elders 4 or 5, and the Carolina poplars 4 or 5 feet. I don't know how big through they were, whether they were an inch or a quarter of an inch. I know they were over a quarter of an inch. I have no recollection of how large they were through. My recollection is not as good on that as it is on the height. I did not plant any more trees after 1909. I did not plant in or put others in to take the place of those that died. Some of those died, I couldn't say how many, and I couldn't say whether they died the first year or the second year or any other year. The disking between the rows was with an ordinary disk harrow. I never counted the trees before the fire. My brother and I counted them after the fire. The thistles commenced to grow up in them in about the third year, in about 1911. There might have been thistles in there in 1910. I couldn't say whether I disked or harrowed it then. I know I pulled weeds in there that year. Couldn't get in in 1912. There has been nothing done to them since 1911. I thought they were big enough to take care of themselves.

Q. I will ask you if, in the fall of 1913, after this fire had passed through, you would have been willing to accept $2,700 for that farm?

A. I expect that is all I could get.

Q. I am asking you if you would have been willing to accept that amount if you had been offered it?

A. Yes, I would.

The native grass around these trees was 2 and 3 feet high, but not all of it.

Andrew Vang: I know the grove that was on Mr. Swanstrom's land. My house is about 40 rods from the grove. I planted most of the grove myself, helped plant it. When they were planted the trees were between 2 and 6 feet high. The rows were 10 feet apart, and the trees were between 5 and 6 feet apart in the row. I saw the fire as it burned through this grove. I have been through the grove quite often. The trees were mostly all living. I don't know if I saw any dead ones. I did not help cultivate the trees. Might be some of the biggest trees were living after the fire. None of the trees were killed where the fire didn't go through. I think the value of this farm before the fire was about $4,000.

Q. What would it be worth since the fire went through in its present condition?

A. Oh, it won't be worth, I wouldn't think they would pay, I don't think they will give quite so much for it, $3,500 I guess.

Cross-examination: I went over to see this grove the next day after the fire. I don't know how long before the fire it was that I had been through the grove. I don't remember if it was very many times. I didn't pay very much attention to it. I knew there was a good deal of pretty tall grass in there, and possibly some thistles.

John Haugen: I have quite frequently passed by Swanstrom's place and am familiar with the grove. I saw the fire that burned through this grove. I did not go near the fire at all. After the fire I was up there some time in the fall. Before the fire went through I did not take any particular notice of Mr. Swanstrom's grove. From all appearances it looked like a nice grove. I have not observed it particularly since the fire went through, not any more particularly than I did before. It looks pretty bad. It is no good. The trees that are left look nice. I can't say how many are left. There does not seem there are as many left as there are gone. It is hard for me to say what percentage is left. Before this fire I should say the land was worth $25 an acre, and after the grove was burned I should say about $20 an acre or close to it.

It is apparent that the jury based its assessment of damage to the trees upon the testimony of the witness John Haugen who, so far as the record discloses, was an impartial witness, and who fixed the damage

at approximately $5 per acre on the entire quarter section. His testimony is very clear and positive, and apparently based upon a fair and impartial consideration of the condition of the grove both prior and subsequent to the fire. At any rate the jury was justified in accepting his estimate of the extent of the injury to the trees. Much of the brief argument of appellant's counsel consists of a discussion of the facts in an attempt to minimize the damage done to the trees, and to discredit the opinions of the witnesses. Such argument would perhaps be entitled to weight with the jury, but this court is concerned only with the question of law as to whether the verdict is so excessive as to require a holding that it was arrived at through passion and prejudice, and we feel obliged to answer such question in the negative. It is not our province to review the facts, excepting to the extent of enabling us to determine such question of law. Any views we might entertain as to the merits of the controversy are immaterial, provided the verdict has substantial support in the evidence, which, as above stated, we find it has.

Finding no error in the record, the judgment in order appealed from are hereby affirmed.

CHRISTIANSON, J., being disqualified, did not participate; HON. W. L. NUESSLE, Judge Sixth Judicial District, sitting in his stead.

D. S. B. JOHNSTON LAND COMPANY, a Corporation, Relator, v. H. D. CONVIS, as Treasurer of Bottineau County, North Dakota.

(157 N. W. 980.)

Mandamus to compel the county treasurer to issue tax receipts pursuant to a compromise of taxes on several hundred tracts made by relator and the board of county commissioners of Bottineau county by resolution of said board. The county treasurer refused to comply with the order of the board and accept less than the full amount of taxes due. *Held:*

County treasurer — issue tax receipts — mandamus to compel — taxes — compromise settlement — with board county commissioners — order of board — official proceedings — record of — compromise of taxes — grounds for — county treasurer — right to refuse to obey order — right of relator — must be established by action.

1. The record of official proceedings of the board of county commissioners

not showing affirmatively any valid ground for a compromise settlement of said taxes, the county treasurer, who is bound by law to collect the full amount of taxes due excepting where a valid compromise is made by the board of county commissioners, had the right to refuse to comply with the purported compromise settlement, and to require relator to establish by action a valid basis and cause therefor.

Mandamus — moving papers — no valid compromise shown — proceedings dismissed.

2. Upon the moving papers, no valid cause for compromise being shown, this proceeding in mandamus is dismissed.

Mandamus — moving papers — board of commissioners — proceedings of — tracts of land affected — description of — not shown — judgment — must be certain — definite.

3. Neither the moving papers nor the commissioners' proceeding describes the tracts upon which compromise of taxes was sought to be made, and as the issuance of tax receipts on certain specific tracts are asked to be compelled, relief by mandamus could not be granted, if otherwise proper, as any judgment to be entered against the treasurer must be definite and certain as to subject-matter.

Opinion filed April 28, 1916.

From a judgment of the District Court of Bottineau County dismissing this proceeding, *Buttz*, Acting Judge, Relator appeals.

Affirmed.

R. C. Morton and *W. E. Mohr* (*Lawrence & Murphy*, of counsel), for relator, appellant.

There is a distinction between the acts and duties of the county commissioners sitting as a board of equalization, and as the board of county commissioners sitting and acting under authority of a different statute. First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; Rev. Codes 1905, §§ 1553, 2722, Comp. Laws 1913, §§ 2165, 3646; Minot v. Amundson, 22 N. D. 236, 133 N. W. 551.

The board of county commissioners, acting as such, have the power to compromise taxes in instances like the case at bar. Hagler v. Kelly, 14 N. D. 218, 103 N. W. 629.

The fiscal affairs of the county are in the hands of the board of county commissioners, and they have power to abate or compromise a tax which became merged in a judgment if, in the fair exercise of

their discretion, such action was deemed advisable. Rev. Codes 1899, § 1907; Comp. Laws 1887, § 1616; Laws 1890, p. 398, chap. 132, § 56; Rev. Codes 1895, § 1243; Laws 1897, pp. 279, 280, chap. 126, §§ 59–61; Collins v. Welch, 58 Iowa, 72, 43 Am. Rep. 111, 12 N. W. 121; State v. Davis, 11 S. D. 111, 74 Am. St. Rep. 780, 75 N. W. 897.

Bowen & Adams, for respondent.

In an attempt of the board of county commissioners to abate or compromise a tax, the record should show the legal description of the real estate affected. No valid order could be made without this. The rule is clear that to compel a public officer, by mandamus, to perform an act, requires that there be an existing legal duty to perform such act, and that such legal duty be clear and positive, and that the facts existing clearly bring the applicant within the law prescribing such duty. Ward v. Beaufort County, 146 N. C. 534, 60 S. E. 418, 125 Am. St. Rep. 492, note; State ex rel. Wiles v. Albright, 11 N. D. 22, 88 N. W. 729; 26 Cyc. 157, 163, 165; 2 Bailey, Habeas Corpus & Spec. Rem. p. 799.

The board of county commissioners has no right to reduce an individual assessment. Minot v. Amundson, 22 N. D. 236, 133 N. W. 551.

Goss, J. An alternative writ of mandamus was issued, and upon motion was quashed and this proceeding dismissed. Relators appeal. Whether the matters recited in moving papers clearly entitle relator to the relief sought is the question presented.

The affidavit for the writ alleges that relator " is the owner of certain lots in the towns of Overly, Russell, Gardena, Eckman, Kramar, and Hurd, Bottineau county; that during the years 1911, 1912, and 1913 the relator, considering the taxes to be excessive on the lots owned by it in the aforesaid towns, refused to pay the said taxes, and that the said lots were thereafter advertised for sale as provided by law for the nonpayment of taxes thereon; that said lots were duly offered for sale as provided by law, and there being no bidders therefor the same were bid in by and for Bottineau county; that thereafter, on May 4, 1914, the relator, in accordance with the provisions of § 2165 of the North Dakota Revised Codes of 1913, did offer to compromise the amount of said taxes with the county commissioners of Bottineau county; that said board of county commissioners, after due consideration of relator's

offer, did on May 4, 1914, accept the relator's offer of a compromise settlement of the amount due as taxes on the aforesaid property, and then and there voted to accept 50 per cent of the amount due as taxes on said property, in full settlement of the same. That a record of said proceedings and resolutions appear in the commissioners' proceedings of Bottineau county in the following words, to wit: 'Attorney R. C. Morton, representing the D. S. B. Johnston Land Company, of St. Paul, appeared before the board and submitted an offer on behalf of said company of 37½ per cent in full settlement of taxes on lots in various towns for the years 1911, 1912, and 1913, amount of taxes to be based on statement rendered March 4, 1914. On motion the offer was rejected.

"'Motion by Commissioner Sidener, seconded by Commissioner Capes, that the board accept 50 per cent (plus 12 per cent from date of March 4, 1914) of the amount of taxes due for the years 1911, 1912, and 1913, as shown on statement submitted March 4, 1914, in full settlement of taxes due for said years on the various lots as assessed against the D. S. B. Johnston Land Company in Bottineau county.'" That this motion was carried by a majority vote. "That after the acceptance of relator's offer as aforesaid, said board of county commissioners ordered the respondent, treasurer of Bottineau county, to issue tax receipts to relator, showing full settlement of all taxes on the aforesaid lots owned by relator. That thereafter on May 18, 1914, relator demanded of said treasurer the tax receipts hereinbefore described, and tendered to said treasurer $2,546.96 in full payment of said taxes, and also tendered any further sum or sums which might be due said county under the terms of settlement by virtue of said compromise and as might be shown by the books of said county treasurer." That said treasurer retained a check for the above amount for three months, and then returned the same uncashed, and refused to issue and deliver said tax receipts or otherwise comply with said compromise settlement of taxes, and that relator has no speedy or adequate remedy at law, and therefore asks a writ of mandamus to compel obedience by the county treasurer with the purported compromise settlement of said taxes and the order of said board of commissioners made therein. The alternative writ recites substantially the same matters. Upon the hearing thereon the county treasurer moved to quash the writ and dismiss the proceeding "on the grounds that neither the said alternative writ nor the affidavit therefor

state facts sufficient to warrant the issuance of said alternative writ or the issuance of a peremptory writ, nor facts sufficient to warrant the court in granting judgment of any kind, except one of dismissal." This motion was granted. The court placed its order and judgment upon the ground "that neither said alternative writ, nor the affidavit and petition therefor, give, or pretend to give, any legal description of the town lots or other real property claimed by the relators to be owned by it in the six villages aforesaid; consequently, it is impossible to compel the respondent to issue to said relator tax receipts as prayed for in the petition for said writ." And the court was correct. Relator would supplement or enlarge the basis for their application by referring to the official minutes of the board of county commissioners wherein reference is made to "amount of taxes due to be based on a statement rendered March 4, 1914," and again, "the amount of taxes due for the years 1911, 1912, and 1913, as shown on statement submitted March 4, 1914." But as against this county official, required to act only pursuant to the valid order of the board of commissioners, assuming that order to be valid, the minutes and proceedings of said board cannot thus be enlarged or ingrafted upon. The county treasurer had the right to accept for his guidance the official record of commissioners' proceedings, and to refuse to act until authorized to do so by and under said record, and until the same was definite, certain, and complete. From said record it is wholly uncertain as to whether a compromise of taxes was made upon all lots owned by relator in Bottineau county, or for certain lots only. True, the resolution might be enlarged by reference to said statement if filed with said commissioners or the county auditor, their clerk, but there is no showing that any such statement was so filed. Nor does it appear who rendered said statement, except perhaps it may be inferred that it was one rendered by the county treasurer. The situation might be more definite if it was not for the statement of appellant's brief and on argument—a statement which is accepted as the fact, although it cannot supplement the affidavit or petition because not therein— that the taxes on some 600 lots or tracts were involved as compromised. True, the county treasurer has not answered explicitly stating that he refuses to comply with the resolution, because he does not know therefrom upon what tracts to figure taxes and to issue receipts, but it was unnecessary for him, a public official, to thus raise the question, as it is a matter nec-

essary to be determined in the awarding of judgment. Any indefiniteness in the basic resolutions can be challenged in this manner.

Before this writ should be issued it must appear that the plaintiff has a clear legal right to the relief demanded, or, if the matter be one of discretion, that the discretion as exercised against relator was abused in the premises. Under these principles relator has failed to establish either the right or any abuse of discretion. Its right to a writ must be clear. The subject-matter to be affected by the writ is shown to be indefinite. That alone is sufficient upon which to deny this relief. But a court should not compel an acceptance of taxes upon a 50 per cent compromise, if there be any doubt as to the authority of the board authorized to compromise to so act in the particular case. And glancing at the commissioners' proceedings, there at no place appears a recitation of the grounds or of any legal ground upon which the board here acted in compromise of these taxes. True, the affidavit of the relator discloses the situation to be one for which, upon a sufficient legal cause shown, the board was authorized to compromise these taxes under § 2165, Comp. Laws 1913. But it could not so act without legal cause. And neither in the report of commissioners' proceedings, nor in the affidavit and petition, is there disclosed any sufficient legal cause for the compromise attempted. Merely that the relator refused to pay its taxes upon the grounds, as it avers, that it, "considering the taxes to be excessive on lots owned by it in the aforesaid towns, refused to pay said taxes," and allowed them to go to sale and be bid in by the county, is no sufficient ground to authorize county commissioners to compromise said taxes. Every taxpayer may think his taxes excessive, and refuse to pay them, and ask that they be reduced by compromise. But such is not a legal cause as is contemplated shall be shown to empower said board to compromise taxes. Hence, the county treasurer rightfully refused to recognize a compromise made without a basis in law therefor. Had the petition described with particularity the lots involved, nevertheless the writ should not have issued. The judgment appealed from is therefore affirmed, with costs.

JAMES SEMPLE and W. W. McQueen v. R. T. BURKE and O. E. Thompson.

(157 N. W. 978.)

Upon hearing of the accounting of the receiver of a partnership certain objections were taken and overruled. On appeal it is *held:*

Accounting — partnership — receiver — objections — interest — computation and allowance — trust funds — used in private business.

1. That interest should have been allowed upon three items of $675, $400, and $2,115 of his trust funds used by the receiver, or under his direction in his private transactions for the period during which the same was so used, and while the receiver was within this state, he having during the receivership removed therefrom.

Receiver — removal from state — partnership members — duty to act — interest — allowance.

2. That upon the removal of the receiver from the state, the members of the partnership should have taken steps to require an accounting from the receiver. As they did not do so, and the receiver having left the funds within the state, interest for the balance of the time as against the receiver should not be allowed.

Receiver — interest — charged against — district court — judgment.

3. The interest allowed against the receiver on the above items aggregates $485. The judgment of the district court is ordered modified and interest to that amount allowed plaintiffs. All other items were properly disallowed. Plaintiffs will recover the costs.

Opinion filed April 28, 1916.

Appeal from an order and judgment of the District Court of Cavalier County, *Kneeshaw,* Judge.

Modified and affirmed.

Grimson & Johnson and *Joseph Cleary,* for appellants.

"Ordinarily the receiver is entitled to reasonable compensation for his services properly performed." 34 Cyc. 467; State ex rel. Pope v. Germania Bank, 103 Minn. 129, 114 N. W. 651; 23 Am. & Eng. Enc. Law, 1105; Sanford v. Carr, 8 Ky. L. Rep. 967; Speiser v. Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243; Carle v. Meyer,

51 App. Div. 5, 64 N. Y. Supp. 1077; McKennon v. Pentecost, 8 Okla. 117, 56 Pac. 958; United States Nat. Bank v. National Bank, 6 Okla. 163, 51 Pac. 124; 27 Am. & Eng. Enc. Law, 187.

But diligence is required of a receiver in handling and collecting the moneys due the estate, and he should not negligently allow accounts to outlaw. 34 Cyc. 253; Heffron v. Milligan, 40 Ill. App. 291; State Central Sav. Bank v. Fanning Ball Bearing Chain Co. 118 Iowa, 698, 92 N. W. 712; Bolles v. Duff, 54 Barb. 215.

"A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust in any manner." Comp. Laws 1913, §§ 6282, 6290; Patterson v. Ward, 6 N. D. 609, 72 N. W. 1013; Lay v. Emery, 8 N. D. 515, 79 N. W. 1053; 34 Cyc. 254, and cases cited; 39 Cyc. 422–424; Wobbe v. Schaub, 143 Ill. App. 361; Stanley v. Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Beach, Receivers, 270, and cases cited.

Mere ability and readiness to pay at any time did not absolve the trustee from payment of interest on moneys used by him and commingled with his own private funds. Lehmann v. Rothbarth, 111 Ill. 185; Kerr v. Laird, 27 Miss. 544; Wolfort v. Reilly, 133 Mo. 463, 34 S. W. 847; Re Stott, 52 Cal. 403; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 N. W. 74.

George M. Price, for respondent.

This is an equity proceeding, and the appeal should have been taken from the whole, and not from a part, of the judgment. This court has no jurisdiction to review the case on this appeal, only a fragment of the case is here presented. Prescott v. Brooks, 11 N. D. 93, 90 N. W. 131; Crane v. Odegard, 11 N. D. 342, 91 N. W. 962.

"The receiver occupies a position analogous to that of a plaintiff, and the report and exceptions thereto are said to stand as the complaint and answer of the respective parties." 34 Cyc. 454, 456; Johnson v. Central Trust Co. 159 Ind. 605, 65 N. E. 1028.

"Reasonable diligence in endeavoring to collect accounts that come into a receiver's hands is sufficient." 34 Cyc. 257; State ex rel. Pope v. Germania Bank, 106 Minn. 164, 130 Am. St. Rep. 599, 118 N. W. 683; Downs v. Allen, 10 Lea, 652; McDowell's Appeal, 4 Pennyp. 384, 42 Century Dig.

A receiver is not liable for interest upon the funds in his hands under

the order of the court appointing him. Comp. Laws 1913, § 7592; 39 Cyc. 422; Re Shotwell, 49 Minn. 170, 51 N. W. 910; Berry v. Evendon, 14 N. D. 1, 103 N. W. 749; Mathewson v. Davis, 191 Ill. 391, 61 N. E. 68.

Where the only duty of a person is to be always ready to pay over money whenever another is entitled to receive it, he is not ordinarily chargeable with interest. Meek v. Allison, 67 Ill. 46; Re Schofield, 99 Ill. 513; Rapalje v. Hall, 1 Sandf. Ch. 399; Jacot v. Emmett, 11 Paige, 142; Price v. Holman, 135 N. Y. 124, 32 N. E. 127; Beard v. Beard, 140 N. Y. 260, 35 N. E. 488; Re Nesmith, 140 N. Y. 609, 35 N. E. 942; Radford v. Folsom, 55 Iowa, 276, 7 N. W. 604; How v. Jones, 60 Iowa, 70, 14 N. W. 193; 34 Cyc. 273.

"In the absence of a statute or fixed rule of practice, the amount of a receiver's compensation is within the sound discretion of the court." 34 Cyc. 470, 472, 474; 39 Cyc. 496; Biddle's Appeal, 129 Pa. 26, 18 Atl. 474.

Goss, J. The issues involved arise upon objections by plaintiffs to the accounting of the receiver. The receiver was appointed in 1907 to wind up a partnership business and make the collections incident thereto while an accounting was pending between the partners, plaintiffs and the defendant. The receivership was continued pending decision on the accounting in the district and supreme courts. See Semple v. Burke, 26 N. D. 200, 114 N. W. 103, decided in 1913. Thereafter the receiver was ordered to account and did so. Objections were taken thereto, and as to those overruled this appeal is taken.

The receiver has accounted for $7,888 coming into his hands during his receivership. This does not include interest upon moneys commingled with the receiver's individual funds or otherwise used by him or by the bank in which it was deposited, and of which he was one of the acting officials. Concerning this the lower court made the following finding: "That during the receivership the receiver has used the funds of the receivership as follows: $675 on August 30, 1907; $400 on September 16, 1907; $2,115 on December 17, 1909," and that interest at 7 per cent upon said amounts during the time it was used by said receiver, or permitted by him to be used by others, amounted at date of judgment, April 24, 1914, to $1,142. But the trial court dis-

allowed this interest to plaintiff on the ground that the receiver had at all times been able and willing to account for said moneys; that he had been appointed by mutual consent of the parties; that the order appointing him did not require that he invest said funds or make interest thereon; that the parties to this litigation had a superior knowledge of its probable duration "and are negligent in not requiring the receiver to report the funds on hand to the court and secure a direction from the court to the receiver that the receiver make interest thereon." Misuse of the funds by the receiver is established beyond cavil.

Receiver Thompson testifies:

Q. Is it not a fact that you deposited in that bank while you were receiver, $7,957.21?

A. My report shows $7,887.91. . . .

Then the payment of claims is shown.

Q. And on the 30th of August, 1907, you issued a check for $675 against that account, did you not?

A. I think so.

Q. Was that for any transaction connected with the receivership?

A. No.

Q. On the 16th of December, 1907, you issued a check against this account for $400 did you not?

A. Yes, sir.

Q. Was that for anything connected with the receivership?

A. No.

Q. On the 17th day of December, 1909, you issued a check as receiver against this account for $2,115, did you not?

A. Yes, sir.

Q. Was that for any transaction in connection with the firm of R. T. Burke & Company or in which it was interested?

A. No.

Q. This latter item was for some transaction in the bank, was it not?

A. Yes, sir.

Q. Has that money ever been returned to you?

A. No.

Q. Has the $675 been returned?

A. Yes. . . .

Q. Now what was this $400 item for, as you recall?

A. I can't remember at this time.

Q. And the item of $675, do you recall that?

A. My recollection is that that was used temporarily in payment on a piece of land.

Q. Well, it was a private matter?

A. Yes, sir.

Q. And these three items that I have mentioned of $675, $400, and $2,115, were for private matters, all outside transactions?

A. The two smaller ones were for private transactions, yes.

Q. And the other one was for something in which the bank was interested?

A. Yes, sir.

Witness then testifies to having returned the items of $675 and $400 to Bain, cashier of the bank, upon Thompson's removal from the state in 1911, and that "I simply left them with him as trustee for the same until such time as the matter should be closed up.

Q. You mean the receivership matter?

A. Yes.

Q. And now as to the third item, $2,115, where is that?

A. That is in the First National Bank at Langdon.

Q. And was that left there for the same purpose as the other items?

A. It is not in the same condition, but they are responsible to me for it.

Q. These three items represent funds of the receivership do they?

A. They do.

The receiver was the cashier of said bank for over two years of his receivership, and he testifies that during the years from 1906 to 1910 that said institution was paying interest at 5 and 6 per cent on deposits for one year or more.

These funds were used by the receiver, or by the bank under his sanction, and probably by his direction. Whether they should have been invested at interest during said time is immaterial. They were used as money loaned of the partnership during these periods when they should have been kept as a trust fund either intact or at interest. "In the absence of any special directions of the court it is the duty of a

receiver to keep the funds instrusted to him entirely separate and distinct from his individual funds. If he deposits the money in bank for safe keeping, it should be deposited to a separate account in his name as receiver, so that the fund may at all times be traced and identified. And when, in disregard of this duty, the receiver violates his trust by mixing the trust fund with his own money, keeping the whole in one common bank account in his own name and using large sums as temporary loans from time to time, he is guilty of such a breach of trust as to render himself liable for interest upon the fund. And such interest will be charged him in the final settlement of his accounts, regardless of whether he himself derived profit from the fund or interest from the loans." High, Receivers, 4th ed. § 803. The receiver should be asked to pay interest at the legal rate during said periods while he was within this state and acting as receiver. The trial court adjudged that, because these plaintiffs were negligent in not exacting an accounting during the entire period from the time this money came into his possession until after the decision on the appeal, that interest should be disallowed. This conclusion as an equitable adjustment of rights is sustained to the extent only of holding the plaintiffs negligent in not exacting an accounting of the receiver upon his leaving the state in 1911. He should have been called to account within a reasonable time after that. It was negligence in the plaintiffs to suffer the receiver to leave the state without exacting from him an accounting. If the receiver and plaintiffs were the only parties interested, the reasons might not apply with the full force as here, where the evidence discloses that a bondsman of the receiver has already been called upon to respond for a portion of the funds already accounted for. Under the circumstances the receiver should account for interest on the $675 and $400 items from the dates of receipt in the fall of 1907, or for three and one-half years at 7 per cent per annum, or an allowance of $263 interest on said two items loaned by the receiver and at the end of that time replaced with Bain in said bank. The receiver has testified that he replaced them, and Bain has not denied it, and it will be assumed that said amount was replaced. Likewise, interest for the one and one-half years after December 17, 1909, on which date $2,115 was diverted from the receiver's trust account and before the receiver left the state should be charged at 7 per cent per annum, making an interest charge of $222 on that item,

aggregating a total allowance for interest of $485 chargeable against the receiver on his accounting.

It is also sought to charge the receiver with accounts to the amount of $2,016, which it is alleged he permitted to outlaw in his hands. This was properly refused by the trial court. There is no evidence upon which a finding of the amount of damage from this source could be based, assuming that it was otherwise valid. The testimony discloses the accounts in part were good and in part bad. That several hundred dollars of accounts were collected. That some effort was made toward collecting the balance. That $400 of these were accounts due from members of the partnership. Admitting the receiver did not sue or use due diligence to collect the $1,600 balance of old accounts, yet he cannot be held as a guarantor of these accounts. The value of them is not shown. It is impossible to fix the amount of any damages otherwise recoverable from this source.

As to the item of fees allowed the receiver, to which exception was taken on the ground that the receiver had not properly performed his duties and was not entitled to any payment, it would seem that the 5 per cent of total collections allowed him was not unreasonable. The matter is one largely in the discretion of the trial court.

A practice question is raised on appellants' appeal. Besides the usual notice of appeal from the order settling the account of the receiver, the appellant embodies in the notice, as a part thereof, what evidently were meant as specifications particularly designating the portions of the order that would be challenged on the appeal. Appellant did not thereby vitiate the notice of appeal, as respondent contends. The appeal is from the whole order and confers jurisdiction.

The judgment appealed from is modified to the extent of allowing a recovery by the plaintiffs from the receiver of said interest charge aggregating $485. As so modified, the order appealed from is affirmed. Plaintiffs will recover costs on this appeal, the modification of the order being in a substantial amount. Judgment will be entered accordingly.

JENS PETERSON v. EMMA BERTILSON.

(157 N. W. 984.)

Justice court — money due — action to recover — complaint in — oral or written — no particular form.

1. A complaint, in justice court, in an action for the recovery of money due upon an account, is not required to be in any particular form, and may be either oral or written.

Complaint — object of — susceptible of common understanding — claim — statement of.

2. The object of such complaint is fully accomplished when a person of common understanding is fairly apprised by it of the grounds of plaintiff's claim.

Trial court — action — dismissal — for want of complaint.

3. For reasons stated in the opinion it is *held* that the trial court erred in dismissing the instant case for want of a complaint.

Opinion filed April 29, 1916.

From a judgment of the District Court of Burke County, *Leighton,* J., plaintiff appeals.

Reversed.

V. E. Stenersen and *H. A. Hanson,* for appellant.

A pleading in a justice court is not required to be in any particular form, but must be so expressed as to enable a person of common understanding to know what is intended. It may be oral or written. Comp. Laws 1913, §§ 9039, 9044.

Proceedings before a justice of the peace should be construed with great liberality; substance, not form, being regarded. 12 Enc. Pl. & Pr. 695; Kelsey v. Chicago & N. W. R. Co. 1 S. D. 80, 45 N. W. 205; Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666; Jerome v. Rust, 19 S. D. 263, 103 N. W. 27; Sinkling v. Illinois C. R. Co. 10 S. D. 562, 74 N. W. 1029; Chamberlain-Wallace Co. v. Akers, 26 N. D. 395, 144 N. W. 715.

The statute directing oral pleadings to be reduced to writing by a justice is directory merely, and a party is not to be prejudiced by the failure of the justice to follow. 21 Enc. Pl. & Pr. 697, note; Houston

v. Walcott & Co. 1 Iowa, 86; Indianapolis & C. R. Co. v. Wilsey, 20 Ind. 229; Mansfield's Dig. (Ark.) 1892, § 4050; School Dist. v. Reeve, 56 Ark. 68, 19 S. W. 106; Sinnamon v. Melbourn, 4 G. Greene, 309; 24 Cyc. 638; 12 Enc. Pl. & Pr. 803; Kelsey v. Chicago & N. W. R. Co. 1 S. D. 80, 45 N. W. 205; Hartman v. Franks, 36 Ark. 501; Missouri P. R. Co. v. Ivy, 79 Tex. 444, 15 S. W. 692; Crapoo v. Grand Gulf, 9 Smedes & M. 205; Mitchell Planing Mill Co. v. Short, 58 Mo. App. 320; Applebaum v. Goldman, 155 Mich. 369, 121 N. W. 289; 24 Cyc. 729, 736; Comp. Laws 1913, § 9019.

But, if there was a defective complaint, or no complaint at all, defendant has waived such objection, because not made in the justice court. Defendant knew there with what she was charged by plaintiff, and this was sufficient for all steps in the case thereafter. 12 Enc. Pl. & Pr. 806, 818; Clow v. Murphy, 52 Iowa, 695, 3 N. W. 723; Comp. Laws 1913, § 7642; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; Johns v. Ruff, 12 N. D. 74, 95 N. W. 440.

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

On appeal from justice court, "the action shall be tried over in the district court in the same manner as if the action was originally commenced therein." Comp. Laws 1913, § 9172.

"Every pleading in a court of record must be subscribed by the party or his attorney." Comp. Laws 1913, § 7455.

A mere reference to recitals in a summons in justice court, entered in the justice's docket, is in no sense a complaint, either in substance or form. Hilliard v. Loeb, 31 S. D. 329, 140 N. W. 703; Jerome v. Rust, 19 S. D. 263, 103 N. W. 26; Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666.

In justice court, if the complaint is oral, an entry of the substance must be made by the justice in the docket. Kelsey v. Chicago & N. W. R. Co. 1 S. D. 80, 45 N. W. 204.

"The statute providing for oral pleadings in the justice court generally directs that the substance thereof shall be written down by the justice in his docket." 12 Enc. Pl. & Pr. 697, and cases cited; Steelman v. Owen, 8 Port. (Ala.) 562; Moffitt v. Bragg, 9 Port. (Ala.) 424; Simmons v. Titche Bros. 102 Ala. 317, 14 So. 786; Abbott v. Kruse, 37 Ill. App. 549.

The justice's return must state that the complaint annexed is the

one served, on which the judgment was rendered. Spring v. Baker, 1 Hilt. 526.

The record on appeal showing that there was no complaint in justice court, and the plaintiff not asking leave to file one upon defendant's objection, the action should be dismissed. Century Dig. Justices' Code, §§ 647, 651, 654; Swineford v. Pomeroy, 16 Wis. 553; Burnham v. Turner, 14 Wis. 622.

Lack of a complaint is just as fatal to the judgment as is want of evidence to support the judgment. Satterlund v. Beal, 12 N. D. 123, 95 N. W. 518; Bergman v. Margeson, 31 S. D. 1, 139 N. W. 374.

The purpose of pleadings is to present issues and to define their boundaries. Bergman v. Margeson, supra.

"Defendant, on appeal from a default judgment of a justice, may object to the absence of a complaint, as he could have done in the justice court." Hilliard v. Loeb, 31 S. D. 329, 140 N. W. 703.

A good complaint, either oral or written, is necessary to support a judgment. 24 Cyc. 555; 31 Cyc. 45; Baylies, Code Pl. § 2.

On appeal from a justice's judgment where the notice demands a new trial, the cause goes on the calendar of the district court to be tried anew. Meyers v. Mitchell, 1 S. D. 249, 46 N. W. 245.

Objections made on appeal to the district court, in the district court on the opening of the case, are timely. Century Dig. Justice of Peace, §§ 647, 651, 654.

CHRISTIANSON, J. This action was originally commenced in the justice court of Burke county. The justice issued a summons which, omitting certain formal parts, was in words and figures as follows:

The State of North Dakota Sends Greetings to Said Defendant: You are hereby summoned to appear before me at my office in the city of Bowbells, in said county, on the 12th day of April, 1912, at 10 o'clock in the forenoon of said day, to answer the complaint of the above-named plaintiff, who claims to recover of you the sum of one hundred seventy-six dollars and twenty-five cents, for work, labor, and services performed for you, and goods, wares, and merchandise and board and lodging furnished you and to you during the year previous to March 1, 1912, by one Mary Robbins, at your request at the agreed

price and reasonable value of said sum, no part of which has been paid although demanded: That said account, before the commencement of this action, was sold, transferred, and assigned by the said Mary Robbins to this plaintiff, for a valuable consideration, and that this plaintiff is now the owner and holder thereof.

And you are hereby notified that if you fail to appear and answer said complaint as above required, said plaintiff will take judgment against you for the said amount of one hundred seventy-six dollars and twenty-five cents, and interest thereon at the rate of 7 per cent per annum since March 1, 1912, together with the costs and disbursements of this action.

Given under my hand this 8th day of April, 1912.

C. F. Randall,
Justice of the Peace, within and for
Burke County, North Dakota.

To the Sheriff or any Constable of said Burke County, Greetings:
Make legal service hereof and due return.

This summons was duly served upon the defendant on April 8, 1912. On the return day, to wit, April 12, 1912, both parties to the action appeared by their attorneys, and the defendant filed an affidavit and motion for a change of venue. The case was then transferred to the justice court of J. L. Finke, and subsequently came regularly on for trial before said Finke on April 15, 1912, both parties appearing in person and by their attorneys. And the transcript of the justice's docket shows that the following proceedings were had at that time: "Plaintiff makes oral complaint alleging the facts set forth in the summons, and prays for judgment against the defendant for the sum demanded therein with interest and cost."

The defendant in no manner assailed the sufficiency of the complaint in the justice court, but interposed an oral answer thereto which was entered by the justice upon his docket as follows: "Comes now the defendant, and, in answer to the complaint of the plaintiff, denies each and every allegation, matter and thing therein contained. Further answering, defendant alleges that at all times mentioned in the complaint of the plaintiff, that the defendant and Mary Robbins were in partnership, that no accounting has been had or demanded in regard

to said partnership, wherefore defendant demands judgment for the dismissal of the plaintiff's complaint, and that she have her costs and disbursements herein."

The case was thereupon fully tried upon these pleadings. Evidence was offered by both parties, and the cause submitted on its merits, and resulted in a judgment in plaintiff's favor. The defendant thereafter appealed to the district court of Burke county from the judgment rendered by the justice of the peace, and demanded a new trial in the district court. The cause was continued over the July, 1913, term of the district court upon the application of defendant. No attack was made on the complaint until the action was called for trial on July 7, 1914, at which time the attorneys for the defendant moved for a dismissal on the ground that there were no pleadings before the court, and that no complaint had ever been made. This motion was denied and a jury was impaneled to try the cause. No further objection was made to the sufficiency of the complaint, but both parties introduced evidence, and the cause was fully tried and submitted, and the jury returned a verdict in favor of the plaintiff. The defendant subsequently, pursuant to notice, moved the court for a dismissal of the action and for judgment notwithstanding the verdict on the grounds that no complaint had ever been made or filed, and that there never had been any complaint in the action. This motion was granted and judgment was entered for a dismissal of the action, and the plaintiff has appealed from this judgment.

The only question presented on this appeal is whether the trial court erred in granting defendant's motion for a dismissal of the action and for judgment notwithstanding the verdict. We are of the opinion that this question must be answered in the affirmative.

Under the laws of this state, "a pleading in a justice's court is not required to be in any particular form, but must be so expressed as to enable a person of common understanding to know what is intended. The pleadings may be oral or written, and need not be verified unless otherwise specially prescribed." (Comp. Laws 1913, § 9039.)

The sufficiency of an oral complaint in justice court was considered by this court in Chamberlain-Wallace Co. v. Akers, 26 N. D. 395, 144 N. W. 715. In that case the docket entry of the justice of the peace read as follows: "Plaintiff, by its attorney, made a verbal complaint

herein, which, in addition to alleging that the plaintiff is a corporation, alleges substantially as shown by the summons herein." In that case defendant assailed the complaint in the justice court, both by motion to dismiss and by general demurrer. The attack was renewed in the district court, but this court held the complaint to be sufficient. In discussing this question this court said: "The justice of the peace, by inserting upon his docket the notation that the complaint was oral, and giving reference thereafter to the summons, which itself was very complete, supplied everything that was needed in the line of a complaint, so far as the justice court was concerned." In the case at bar no objection was made in the justice court. The summons in the case at bar is very full and complete, and unquestionably sufficient to enable a person of common understanding to know what is intended. The docket entry of the justice of the peace shows that the oral complaint alleged the facts set forth in the summons, and the defendant's answer indicates that both parties fully understood the matters at issue between them. Obviously if the complaint construed in Chamberlain-Wallace Co. v. Akers was sufficient, the complaint in the case at bar was sufficient.

A similar question was considered by the supreme court of Michigan in the case of Wilcox v. Toledo & A. R. Co. 43 Mich. 584, 5 N. W. 1003. In that case the declaration was oral, and entered by the justice on his docket as follows: "On the common counts in assumpsit, and on note or contract, now here filed as a part of the declaration, and claims damage, $300." The plaintiff also notified defendant that the paper writing was the sole cause of action. The defendant challenged the sufficiency of the declaration by motion for nonsuit. The motion was denied and plaintiff had judgment. In discussing the question of the sufficiency of the complaint, in an opinion written by the celebrated jurist, Judge Cooley, the court said: "It is no new thing to have an objection of this sort to the pleadings in justices' courts raised before us. As the proceedings in those courts are commonly managed by parties unlearned in the law, defects in their allegations, when tested by the rules of art, are to be expected in almost every case which is at all complicated. If every such objection were disregarded, pleadings in justices' courts would, in effect, be dispensed with. Every plaintiff might allege as much or as little as he pleased, and recover without re-

gard to his allegations. If every one were sustained which would be good if made to pleadings in courts of record, the parties in justices' courts would be driven to the employment of legal assistance in every case, and these courts, which are intended for the easy and inexpensive redress of wrongs not of great magnitude, would cease to accomplish their purpose.

This court has adopted neither the one course nor the other. It has required the plaintiff in justice's court to apprise the defendant fairly of the cause of action relied upon, but when this has been done the court has refused to regard formalities or technicalities. The object of the declaration is fully accomplished when the defendant is fairly apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial."

In Swineford v. Pomeroy, 16 Wis. 553, the supreme court of Wisconsin said: "Great liberality is exercised in construing pleadings in justice's court, and they are invariably sustained when they are good in substance, and are not objected to because not technically formal or correct. It was in the power of the defendants to have required a written complaint in the county court, if they were in doubt what really constituted the plaintiff's cause of action. But they were probably not in the dark upon that point, as their full answer shows." See also Sinkling v. Illinois C. R. Co. 10 S. D. 560, 74 N. W. 1029; Hanson v. Gronlie, 17 N. D. 191, 115 N. W. 666; Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676.

The respondent relies largely upon the decision of the supreme court of South Dakota in the case of Hilliard v. Loeb, 31 S. D. 329, 140 N. W. 703. In that case, however, the justice's docket failed to show that any complaint, either oral or written, had been made. The court said: "There is no suggestion or statement among the recitals in the docket entries that the pleading was oral or that a written complaint was filed. The necessary conclusion is that no complaint, oral or written, was ever made in that court." The court also said: "The sufficiency of a pleading and the absence of any pleading present entirely different questions." Even with the conditions existing in that case, two members of the South Dakota court dissented from the conclusions reached by the majority. And even the majority members held that "the trial court

had authority to permit the filing of pleadings, and, upon request, should have permitted pleadings to be filed." It is unnecessary for us, however, to either approve or disapprove the decision of the South Dakota court. Obviously the facts distinguish it from the case at bar, and it is not authority in favor of respondent's contention herein.

We are agreed that the trial court erred in dismissing the action for want of a complaint. The judgment appealed from is therefore reversed and the cause is remanded for further proceedings in conformity with this opinion.

STEVEN ALLEN v. F. R. CRUDEN, Frank C. Davies, H. Peoples, Peter Prader, and James G. Daily.

(157 N. W. 974.)

Appeal from an order overruling demurrer to complaint and from the judgment thereafter rendered. The grounds of the demurrer taken are (1) improper joinder of causes of action, and (2) insufficiency of facts pleaded to constitute a cause of action. *Held:*

Demurrer to complaint — order overruling — appeal from.

1. That the complaint is not vulnerable to demurrer upon either ground.

Rule of construction — application of.

2. Stark County v. Mischel, 33 N. D. 432, applied and followed as to the first ground of demurrer.

Conversion — complaint discloses — defendants — joint act of — action lies against both.

3. *Held* that the complaint discloses the conversion to have been the joint acts of the defendants, Cruden and Davies, and the action will lie against both jointly.

Proof — sufficiency of — variance of — with pleading — appearance at trial — default — damages — proof of — on trial — no error raised — cannot be reviewed on appeal.

4. Appellants are in no position to question the sufficiency of the proof upon the alleged variance between the complaint and the proof, they having defaulted in appearance at the trial of the issue of damages, standing upon their demurrer, and not participating in the trial. They have therefore in

the trial court raised no error of law on the proof of damages, and there is no error of law to review touching the same upon this appeal.

Opinion filed April 29, 1916.

From a judgment of the District Court of Foster County, *Coffey*, J., defendants appeal.

Affirmed.

Geo. H. Stillman and *Edward P. Kelly*, for appellants.

There is a misjoinder of causes of action. Some of the defendants are charged with a cause growing out of a contract, and one defendant with a cause as for a tort. They are not all affected in a like manner, nor are the so-called causes connected. Jasper v. Hazen, 2 N. D. 401, 51 N. W. 583; Swedish American Nat. Bank v. Dickinson Co. 6 N. D. 222, 49 L.R.A. 285, 69 N. W. 455; Mares v. Wormington, 8 N. D. 329, 79 N. W. 441; First Nat. Bank v. D. S. R. Johnson, Land Mortg. Co. 17 S. D. 522, 79 N. W. 748; Henney Buggy Co. v. Higham, 7 N. D. 45, 72 N. W. 911; Niven v. Peoples, 23 N. D. 202, 136 N. W. 73; Howse v. Moody, 14 Fla. 59; Clark v. Holbrook, 146 Mass. 366, 16 N. E. 410; White v. Preston, — Tex. App. —, 15 S. W. 712; Haskell County Bank v. Bank of Sante Fe, 51 Kan. 39, 32 Pac. 624; Hendrix v. Fuller, 7 Kan. 331; Atchison, T. & S. F. R. Co. v. Sumner County, 51 Kan. 617, 33 Pac. 312; Hentig v. Southwestern Mut. Ben. Asso. 45 Kan. 462, 25 Pac. 878; Addicken v. Schrubbe, 45 Iowa, 315; St. Joseph's Orphan Soc. v. Wolpert, 80 Ky. 86; Preston v. Davis, 8 Ark. 167; Jackson v. Bush, 82 Ala. 396, 1 So. 175; Kennedy v. Stallworth, 18 Ala. 263; Johnson v. Kirby, 65 Cal. 482, 4 Pac. 458.

A statement of fact in an exhibit attached to and made a part of a pleading cannot supply a necessary allegation omitted therefrom. McPherson v. Hattich, 10 Ariz. 104, 85 Pac. 731; Sim v. Hurst, 44 Ind. 579; Union Sewer Pipe Co. v. Olson, 82 Minn. 187, 84 N. W. 756; Sweeney v. Johnson, 23 Idaho, 530, 130 Pac. 997; Malheur County v. Carter, 62 Or. 616, 98 Pac. 489; Sumner v. Griffin, 130 Ky. 323, 113 S. W. 422; Hoopes v. Crane, 56 Fla. 395, 47 So. 992; Standard Lumber Co. v. Colwell, — Ky. —, 117 S. W. 286; Bank of Anderson County v. Foster, 146 Ky. 179, 142 S. W. 225; Panhandle Teleph. & Teleg. Co. v. Amarillo, — Tex. Civ. App. —, 142 S. W. 638; Aldrich v.

Amiss, 178 Ind. 303, 99 N. E. 419; First Nat. Bank v. Dakota F. & M. Ins. Co. 6 S. D. 427, 61 N. W. 439.

Exhibits attached to and made a part of the pleading are to be treated as in aid of or as elucidating the allegations of the pleading; but never to supply a necessary allegation. Burks v. Watson, 48 Tex. 115; Wynne v. State Nat. Bank, 82 Tex. 378, 17 S. W. 918; Milliken v. Callahan County, 69 Tex. 206, 6 S. W. 681; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227.

When the exhibit is repugnant to the pleading, the pleader will be held most strongly to the exhibit. Marshall v. Hamilton, 41 Miss. 233; C. Aultman & Co. v. Siglinger, 2 S. D. 442, 50 N. W. 911; Wright v. Sherman, 3 S. D. 292, 17 L.R.A. 792, 52 N. W. 1093; First Nat. Bank v. Dakota F. & M. Ins. Co. 6 S. D. 424, 61 N. W. 439.

Where the pleadings and proof differ upon material matters, matters necessary to plead and prove as the basis of a valid judgment, such variance is fatal. Quarles v. Littlepage, 2 Hen. & M. 401, 3 Am. Dec. 637; Walsh v. Gilmore, 3 Harr. & J. 383, 6 Am. Dec. 502; Bellas v. Hays, 5 Serg. & R. 427, 9 Am. Dec. 385; Curley v. Dean, 4 Conn. 259, 10 Am. Dec. 140; Baldwin v. Munn, 2 Wend. 399, 20 Am. Dec. 627; Fowler v. Austin, 1 How. (Miss.) 156, 26 Am. Dec. 701; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543; Didrell v. Miller, 8 Yerg. 476, 29 Am. Dec. 126; Avery v. Lewis, 10 Vt. 332, 33 Am. Dec. 203; Spangler v. Pugh, 21 Ill. 85, 74 Am. Dec. 77; Dougherty v. Matthews, 35 Mo. 520, 88 Am. Dec. 126; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; St. Louis, A. & T. H. R. Co. v. Linder, 39 Ill. 433, 89 Am. Dec. 319.

W. O. Lowden and *S. E. Ellsworth,* for respondents.

Where a party voluntarily suffers judgment to be entered by default, he is in no position to ask relief at the hands of this court on appeal, on the ground that the judgment is not warranted by the complaint. The default could have been opened on motion, and suitable relief obtained in the lower court. Port v. Parfit, 4 Wash. 369, 30 Pac. 328; State ex rel. Shepherd v. Simpson, 69 Or. 93, 137 Pac. 750, 138 Pac. 467.

Where an appeal is sought from a judgment and an order, the undertaking must refer to each of the appeals. If it recites but one, the appeal from the other is not effectual. Sucker State Drill Co. v. Brock, 18 N. D. 598, 120 N. W. 757.

The right of the plaintiff in an action against a public officer for malfeasance in office, to join with him the sureties upon his official bond, is so well settled that it needs no comment. Lee v. Charmley, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448; Works v. Byrom, 22 Idaho, 794, 128 Pac. 551; 35 Cyc. 1803; Rice v. Wood, 61 Ark. 442, 31 L.R.A. 609, 33 S. W. 636; Murray v. Evans, 25 Tex. Civ. App. 331, 60 S. W. 786.

"Where an exhibit attached to a complaint, and made a part of the pleading, negatives or contradicts allegations in the complaint founded on it, the exhibit will control. Johnson v. Kindred State Bank, 12 N. D. 336, 96 N. W. 588; First Nat. Bank v. Dakota F. & M. Ins. Co. 6 S. D. 424, 61 N. W. 439; Cranmer v. Kohn, 11 S. D. 245, 76 N. W. 937; Carson v. Hastings, 81 Neb. 681, 116 N. W. 673.

But where both construed together fairly apprise the defendants of plaintiff's cause or claim, it is sufficient. Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147; Long v. Shepard, 35 Okla. 489, 130 Pac. 131.

Goss, J. The complaint is for a joint conversion by a sheriff and another defendant. The sheriff's bondsmen on his official bond are also joined as defendants. To the complaint a demurrer was interposed and overruled. The issues of law thus presented are first for consideration.

After describing the property and stating its value on September 19, 1910, and averring its ownership as in one Olson, the complaint alleges, *viz.*:

"II.

"That prior to said 19th day of September, A. D. 1910, the defendant Frank C. Davies had been duly elected sheriff in and for the county of Eddy and state of North Dakota, and on the 4th day of January, A. D. 1909, filed his official bond duly approved by the board of county commissioners of said county, with the county auditor of said county, with the defendants H. Peoples, Peter Prader, and James G. Daily, as his sureties thereon. A duly certified copy of which bond is hereto annexed and made a part of this complaint and marked exhibit 'A.' That the said Frank C. Davies then duly qualified as and became sheriff in and for said county, and at the time hereinafter mentioned was acting sheriff in and for said county.

"III.

"That on or about the 19th day of September, A. D. 1910, the defendant F. R. Cruden and the defendant Frank C. Davies by virtue and under color of his office aforesaid, without the consent of the said Oscar Olson and without leave, license, or authority from him, forcibly and unlawfully seized upon said personal property all and singular, and took the same from the possession of the said Oscar Olson, and have unlawfully converted and appropriated said personal property all and singular in their own use and in derogation of the rights of said Oscar Olson and to his damage in the sum of seven hundred dollars ($700).

"IV.

"That by reason of said unlawful seizure and conversion of the said above-described personal property by the said defendants F. R. Cruden and Frank C. Davies, the said Oscar Olson has been put to trouble, inconvenience, costs, and expense and has been damaged thereby in the sum of five hundred dollars ($500).

"V.

"That prior to the commencement of this action the said Oscar Olson duly sold, assigned, and transferred to this plaintiff, Steven Allen, all his rights, title, claim, and interest in and to the said property, or his right to damages therefor and the value thereof, by reason of the unlawful taking, detention, and conversion thereof by the said defendants F. R. Cruden and Frank C. Davies, and which said assignment was for a valuable consideration, and that plaintiff is now the owner and holder of said claim.

"VI.

"That plaintiff has demanded and caused to be demanded from said defendants F. R. Cruden and Frank C. Davies, the return to him of said property seized and taken by said defendants as aforesaid, but that the said demand has been by the said defendants refused, and the

said personal property all and singular has been at all times since said taking and now is detained and withheld by said defendants and by them converted and appropriated as aforesaid."

The exhibit A referred to "as hereto annexed and made a part of this complaint" is the official bond, in statutory form and amount, of the sheriff, with defendants Peoples, Prader, and Daily as sureties thereon. Attached thereto is the oath of office taken by Davies, as sheriff, together with indorsements showing the filing of said official bond and oath with the county auditor. The grounds of demurrer taken are (1) improper joinder of causes of action, and (2) insufficiency of facts stated to constitute a cause of action.

Beyond controversy the complaint states a cause of action in conversion against the sheriff, Davies. Lee v. Charmley, 20 N. D. 570, 33 L.R.A.(N.S.) 275, 129 N. W. 448; Welter v. Jacobson, 7 N. D. 32, 66 Am. St. Rep. 632, 73 N. W. 65. And stating a cause of action against that official, one is charged against the bondsman if a breach of the official bond is disclosed, and said sureties may be joined with the principal in the same action. Lee v. Charmley, 20 N. D. 570, 30 L.R.A. (N. S.) 275, 129 N. W. 448; Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931. As to the sheriff a cause of action in conversion is alleged. And where the same wrongful acts constituting the conversion are joined in and committed jointly by the official and another or others, all may be joined in one action to recover the damages suffered by the joint act of all, as each is responsible for the act of his joint tort-feasor, and either or all of said joint participants may be sued in one action where the rights to be vindicated all spring from and have origin in said joint act as the one transaction. This is the settled law of this jurisdiction under Stark County v. Mischel, supra. The test, then, is not whether Cruden can be joined with the sheriff where the two acting conjointly wrongfully converted the property of another, but instead is whether the complaint sufficiently states such joint and wrongful conversion by the two acting conjointly. As to this, appellant argues that Davies is alleged to have converted as sheriff, while Cruden appropriated as an individual, and hence they could not jointly convert this property because they were acting in different capacities. The reasons for their wrongful acts, conceding that their acts were wrongful, are immaterial. The owner of the property converted suffers damages be-

cause of the conversion, irrespective of the reasons actuating the converters. The test is whether the two could act and did act conjointly, and so acting did those things sufficient to amount to the conversion of this property. Does the complaint, standing admitted in the face of the demurrer, sufficiently charge such acts and consequences? The natural import of the language is sufficient to charge a joint conversion. It alleges that "the defendant Cruden and the defendant Davies, by virtue and under color of his office aforesaid, without the consent of said Olson and without leave, license, or authority from him, forcibly and unlawfully seized upon said personal property all and singular and took the same from the possession of said Olson, and have unlawfully converted and appropriated said personal property all and singular to their own use and in derogation of the rights of said Oscar Olson and to his damage in the sum of $700." Similar allegations are contained in every succeeding paragraph of the complaint; as, for instance, in the 5th paragraph, the "detention and conversion thereof by the said defendants Cruden and Davies" is charged and a demand for return is pleaded as having been made upon Cruden and Davies and refused, and that the property is "withheld by said defendants and by them converted and appropriated as aforesaid." A joint conversion by these two defendants is stated as plainly as can be done without the use of the word "joint" to characterize their acts; and the use of that word would in nowise change the meaning or strengthen the pleading where the two, as here, are charged to have at all times, and in the commission of every essential to constitute conversion by both jointly, acted together.

Appellant urges that "no facts are pleaded from which it can be inferred that the acts done by the sheriff constituted a breach of the obligation of the undertaking of the defendants," the sureties. If a conversion is alleged against the sheriff, a cause of action is thereby stated against the bondsmen, as the statutory official bond by law obligates the sureties to respond for damages occasioned by a wrongful conversion. Such is the very purpose and fundamental reason for requiring such official bond. A cause of action is stated against the sheriff and a breach of the bond thereby charged.

But the sufficiency of the charge of a cause of action against the bondsmen is also attacked under demurrer by the contention that the exhibit cannot be looked to as supplying a necessary averment of

the complaint, and that, although the bond is alleged to have been the official bond of the sheriff, given on his qualification for office, and a certified copy thereof attached to the complaint as an exhibit, that the same cannot be taken as the equivalent of an allegation in the complaint that the undertaking has been breached. True, the complaint does not charge in specific language that by the conversion the sheriff breached his bond. But that follows as a necessary conclusion of law from the conversion pleaded, the conversion constituting a wrongful act is alleged to have been performed by virtue of his office as sheriff, and is the equivalent of a statement that the bond was thus breached. The facts admitted by the demurrer would be amply sufficient to sustain a judgment against the sureties as for a breach of their bond by their principal.

Another specification of error challenges the sufficiency of the proof to sustain the judgment. The appeal is from the judgment. Appellants are not in position to challenge the sufficiency of the evidence to support the verdict, for the following reasons: Appellants admit in their brief that they stood upon their demurrer, and, as a condition precedent to their right to withdraw answers previously filed that they might interpose demurrer, agreed with opposing counsel and the court that, if allowed to demur, they would stand upon their demurrer, and not answer over. The answers were withdrawn and the demurrer interposed just before trial and under this condition. This stipulation was made and acted upon to obviate any delay. The demurrer was overruled and properly so. The defendants were in default in answer. A jury was called to which was submitted the issue of damages resulting from the admittedly joint conversion. Defendants were in default on the trial of said issue of fact, and did not participate therein. On an appeal from the judgment they challenge the sufficiency of the proof made on grounds of an alleged variance between the complaint and the proof. The complaint described some of the horses as mares and some as horses and as of certain ages, and the proof did not in all particulars correspond therewith as to sex and ages of the animals. The variance was immaterial, and, so far as the proof is concerned, there was no variance in a legal sense, and evidence was sufficient to sustain a recovery for the property shown to have been converted. Defendants are not in position to raise any such question of variance as long as the evidence fairly supports the judgment rendered. To permit them to do

so would allow them to raise a new question on this appeal not presented to the trial court, and not ruled upon by it. Errors of law only are passed upon here. The proof being ample to support the judgment rendered, there is no error of law for review on appeal from the judgment. Another practice question is raised by the respondent's motion to dismiss the appeal from the judgment. It is unnecessary to pass upon this question, as the assignments of error taken in the brief of the appellants are all passed upon adversely to them. The order and judgment appealed from are affirmed with costs.

BRUCE, J. I dissent for the reasons stated in my dissent in Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931, to which views I still adhere.

BURKE, J. I dissent as to sufficiency of complaint to state a conversion by defendant Cruden. As to them, believe the demurrer should have been sustained. Otherwise, I approve of Judge Goss's opinion.

JOHN T. BRIGNALL v. DAVID HANNAH, William Turnbull, et al.

(157 N. W. 1042.)

Meandered lake — bed of — land constitutes — evidence — government survey — surveyors — shore lines — established by — no fraud or mistake.

1. Evidence examined, it is *held* that the land in controversy constitutes the bed of a meandered lake, and was covered with water at the time of the government survey of the surrounding lands, and that in making said survey the United States government surveyors intentionally and deliberately, and without fraud or mistake, established the shore lines by meander lines, and intentionally separated and set apart, as a lake, the land permanently covered by water from the land abutting thereon.

Areas — meandered lake — so designated by surveyor — errors — mistakes — facts — questions for courts.

2. The question whether certain areas designated and meandered by a government surveyor as a lake were in fact dry, agricultural lands, erroneously or fraudulently omitted from the survey, is one properly determinable by the courts.

Meander lines — purpose of — general rule — non-navigable lakes — ponds — not boundary lines.

3. As a general rule the meander lines run along the margin of non-navigable lakes or ponds, are not intended as boundary lines, but are run for the purpose of determining the quantity of land for which the purchaser must pay.

Patentee from United States — title — adjoining submerged lands — law of state — where located — governs.

4. Whether the patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies.

Riparian rights — owners — non-navigable lakes or ponds — common-law rules — governed by — in this state.

5. The rights of riparian owners with respect to non-navigable lakes and ponds in North Dakota rest upon and are controlled by the rules of the common law.

Common law — meandered lake or pond — owners of abutting lands — take title in severalty — to center-point.

6. Under the common law the owners of land abutting upon a meandered, non-navigable lake own the lake bed in severalty, their respective titles extending to the center of the lake.

Opinion filed May 1, 1916.

From a judgment of the District Court of Cavalier County, *Cooley*, Special Judge, defendants, William Turnbull, Levi Bell, George Bell, and Samuel Connor, appeal.

Affirmed.

Joseph Cleary and *Grimson & Johnson*, for appellants.

The existence of a lake or fast dry land is a political question to be decided by the land department. Chapman & D. Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Re California & O. Land Co. 21 Land Dec. 344; Re Goose Lake, 7 Land Dec. 527.

These meandered lines form the boundary lines of the fractional section, and will not be considered as merely indicating the quantity of upland to be paid for, where the patents conveyed only the land surveyed and make the meander lines the boundary. Re Hemphill, 27 Land Dec. 119; Re McClennen, 29 Land Dec. 514; Horne v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988; Lammers v. Nissen, 4 Neb. 245; Bissell v. Fletcher, 19 Neb. 725, 28 N. W. 303; Niles v. Cedar Point Club, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45.

The government may subsequently survey such lands and grant them to another person. Smith v. Miller, 105 Iowa, 688, 70 N. W. 123, 75 N. W. 499; Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. ed. 662, 24 Sup. Ct. Rep. 425; French-Glen Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; Horne v. Smith, 159 U. S. 40–45, 40 L. ed. 68–70, 15 Sup. Ct. Rep. 988.

The lands occupied by these appellants were omitted islands,—were dry at the time of the survey and are not the result of accretions. They remained the property of the government and subject to disposal under its laws. Scott v. Lattig, 227 U. S. 229, 57 L. ed. 490, 44 L.R.A. (N.S.) 107, 33 Sup. Ct. Rep. 242; United States v. Mission Rock, 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606; Kirwan v. Murphy, 189 U. S. 53, 47 L. ed. 704, 23 Sup. Ct. Rep. 599.

The prevailing parties in the court below claim title to a large tract of land, and this in addition to their regular homesteads of 160 acres each. This is contrary to law. U. S. Rev. Stat. §§ 2259, 2298, 2465, 2476, Comp. Stat. 1913, §§ 4557, 4918; United States v. Mission Rock, supra; Whitney v. Detroit Lumber Co. 78 Wis. 240, 47 N. W. 425; Stoner v. Rice, 121 Ind. 51, 6 L.R.A. 389, 22 N. E. 968.

W. A. McIntyre and *Watson & Young* and *Horace C. Young,* for respondent.

"The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. They are not boundary lines." Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; St. Paul & P. R. Co. v. Schurmeier, 7 Wall. 272, 19 L. ed. 74; Kirwan v. Murphy, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 278; Sizor v. Logansport, 151 Ind. 628, 44 L.R.A. 815, 50 N. E. 377; Schlosser v. Cruickshank, 96 Iowa, 418, 65 N. W. 345; Lamprey v. State, 52 Minn. 192, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1140; Mendota Club v. Anderson, 101 Wis. 490, 78 N. W. 189; Poynter v. Chipman, 8 Utah, 448, 32 Pac. 691; Mitchell v. Smale, 140 U. S. 407, 35 L. ed. 443, 11 Sup. Ct. Rep. 819, 840; Ex parte Davidson, 57 Fed. 885; Coburn v. San Mateo County, 75 Fed. 530; Barringer v. Davis, 141

Iowa, 419, 120 N. W. 65; Niles v. Cedar Point Club, 29 C. C. A. 5, 54 U. S. App. 668, 85 Fed. 45, affirmed in 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124; Horne v. Smith, 159 U. S. 40–43, 40 L. ed. 68–70, 15 Sup. Ct. Rep. 988; Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104; Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Knudsen v. Omanson, 10 Utah, 124, 37 Pac. 250; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Cawlfield v. Smyth, 69 Or. 41, 138 Pac. 227; Everson v. Waseca, 44 Minn. 247, 46 N. W. 405; Brown v. Dunn, 135 Wis. 374, 115 N. W. 1097; Johnson v. Brown, 33 Wash. 588, 74 Pac. 677; Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60; Pere Marquette Boom Co. v. Adams, 44 Mich. 403, 6 N. W. 857.

The fact that the deed or patent contains a statement of the quantity of land conveyed is not controlling. Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Everson v. Waseca, 44 Minn. 247, 46 N. W. 405; Tucker v. Mortenson, 126 Minn. 214, 148 N. W. 60; Heald v. Yumisko, 7 N. D. 427, 75 N. W. 808; Olson v. Huntamer, 6 S. D. 372, 61 N. W. 481.

The presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water,—that is, to point in the center, or equidistant from the land on either side. Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; St. Paul & P. R. Co. v. Schurmeier, 7 Wall. 272, 19 L. ed. 74; Gouverneur v. National Ice Co. 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388, 16 N. E. 817; Ledyard v. Ten Eyck, 36 Barb. 102; Ridgway v. Ludlow, 58 Ind. 248; Warren v. Chambers, 25 Ark. 120, 4 Am. Rep. 23, 91 Am. Dec. 538; Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270; Rev. Codes 1905, §§ 4752, 4930, Comp. Laws 1913, §§ 5295, 5473; Flisrand v. Madson, 35 S. D. 457, 152 N. W. 796.

The riparian shore owners of such non-navigable or non-public ponds or lakes have absolute ownership of the entire bed and shore of such lakes and ponds. Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; Shell v. Matteson, 81 Minn. 38, 83 N. W. 491; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Ledyard v. Ten Eyck, 26 Barb. 102; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep.

393; Cobb v. Davenport, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718; Lembeck v. Nye, 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; Clute v. Fisher, 65 Mich. 48, 31 N. W. 614; Ridgway v. Ludlow, 58 Ind. 252; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Gouverneur v. National Ice Co. 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; Smith v. Rochester, 92 N. Y. 463, 44 Am. Rep. 393; Rice v. Ruddiman, 10 Mich. 125; Clute v. Fisher, 65 Mich. 48, 31 N. E. 614; Indiana v. Milk, 11 Biss. 197, 11 Fed. 389; Luce v. Carley, 24 Wend. 451, 35 Am. Dec. 637; Ex parte Jennings, 6 Cow. 518, 16 Am. Dec. 447; Mott v. Mott, 68 N. Y. 247; Rhodes v. Cissel, 82 Ark. 367, 101 S. W. 758; Scheifert v. Briegel, 90 Minn. 125, 65 L.R.A. 296, 101 Am. St. Rep. 399, 96 N. W. 44; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; 3 Farnham, Waters, § 843, and cases cited; Little v. Williams, 88 Ark. 37, 113 S. W. 340; Johnson v. Elder, 92 Ark. 30, 121 S. W. 1066; Stoner v. Rice, 121 Ind. 51, 6 L.R.A. 389, 22 N. E. 968; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139.

"Unless the contrary appears, a grant of land bounded by a water course conveys riparian rights, and the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; 40 Cyc. 636, 637; Knudsen v. Omanson, 10 Utah, 124, 37 Pac. 250; Tucker v. Mortensen, 126 Minn. 214, 148 N. W. 60; Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104; Lembeck v. Nye, 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; Smith v. Robertson, 92 N. Y. 463, 44 Am. Rep. 393; Conneaut Ice Co. v. Quigley, 225 Pa. 605, 74 Atl. 648; Poynter v. Chipman, 8 Utah, 448, 32 Pac. 692; Bristow v. Cormican, L. R. 3 App. Cas. 641; Harrison v. Fite, 78 C. C. A. 447, 148 Fed. 781; Carr v. Moore, 119 Iowa, 152, 97 Am. St. Rep. 292, 93 N. W. 52; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; Gouverneur v. National Ice Co. 134 N. Y. 355, 18 L.R.A. 695, 30 Am. St. Rep. 669, 31 N. E. 865; Flisrand v. Madson, 35 S. D. 457, 152 N. W. 796; Scheifert v. Briegel, 90 Minn.

125, 65 L.R.A. 296, 101 Am. St. Rep. 399, 96 N. W. 44; Hanson v. Rice, 88 Minn. 273, 92 N. W. 982; Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Hinckley v. Peay, 22 Utah, 21, 60 Pac. 1012; Stoner v. Rice, 121 Ind. 51, 6 L.R.A. 389, 22 N. E. 968; Boorman v. Sunnuchs, 42 Wis. 233; Fuller v. Shedd, 161 Ill. 462, 33 L.R.A. 146, 52 Am. St. Rep. 380, 44 N. E. 286; Heald v. Yumisko, 7 N. D. 422, 75 N. W. 807; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Gould, Waters, § 4; Angell, Watercourses, §§ 1–4; Green Bay & M. Canal Co. v. Kaukauna Water Power Co. 90 Wis. 370, 28 L.R.A. 443, 48 Am. St. Rep. 937, 61 N. W. 1121, 63 N. W. 1019, and cases cited; Rev. Codes 1905, §§ 4707, 4798, Comp. Laws 1913, §§ 5250, 5341.

Lands so meandered are never reserved to the government to be afterwards granted out to other persons, to the injury of the original grantees. Their title is not limited by such lines run along or near the margin of such waters. Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Bates v. Illinois C. R. Co. 1 Black, 204, 17 L. ed. 158; Lindsey v. Hawes, 2 Black, 554, 17 L. ed. 265; St. Paul & P. R. Co. v. Schumeir, 7 Wall. 272, 19 L. ed. 74; St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co. 26 Minn. 31, 49 N. W. 303; Knudsen v. Omanson, 10 Utah, 124, 37 Pac. 250; Hinckley v. Peay, 22 Utah, 21, 60 Pac. 1012; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563.

Christianson, J. This is an action to quiet title to certain lands in Cavalier county which constituted a portion of the bed of a nonnavigable body of water known as Rush lake. The land contiguous to Rush lake was surveyed by the United States government in 1884 and 1885, at which time the lake was meandered. The evidence clearly shows that the meander line around the lake followed closely to the water's edge as it existed at the time of the survey. It appears that when the original survey was made there was a small island in the lake, which throughout the litigation was designated as Gordon's island. This island was omitted when the original survey was made, but in 1903 it was meandered by the government as omitted land; that is, as upland which had been omitted when the original survey was made. This island contains 64.04 acres, and is occupied by the defendant Hilton R. Brignall under a homestead entry. The waters in the lake gradually

receded, and as a result thereof a large part of the lake bed became dry land. Plaintiff is the owner of certain lands contiguous to, and abutting upon, the meander line, and claims that his land abutting upon said lake extends to the center of the lake, and that the entire lake bed within the meander line, with the exception of Gordon's island, belongs to the abutting or riparian owners. All the abutting owners were made parties defendant, and interposed answers and counterclaims in conformity with the theory adopted by the plaintiff, and asserted their riparian ownership to proportionate portions of the lake bed. Certain persons had entered into possession of portions of the lake bed, and these were also made defendants, and in their answers they assert that they are qualified entrymen under the homestead laws of the United States of America; that the title of the land occupied by them is in the United States government and part of the public domain, and hence subject to entry under the land laws of the United States, and that the persons so occupying said premises are entitled to possess the same as squatters.

Upon the trial all conflict among the different abutting owners, and between such owners and Hilton R. Brignall, the occupant of Gordon's island, was eliminated, and the controversy in the court below and on this appeal is solely between the abutting owners, who claim title to the lake bed as riparian owners and the persons claiming a right to occupy the premises as squatters. The trial court made findings of fact in favor of the abutting owners, and ordered judgment "that the title to said lake bed was originally in the United States government, and passed from it by conveyance to the several abutting owners as grantees or successors in interest to the grantees of the United States as an incident to the grants of abutting lands by it, and that said plaintiff and said defendants (abutting owners) are the owners of said lake bed, and all of it, but not including the tract contained therein, which has been surveyed, meandered, and is known in the records of this case as Gordon's island." The so-called "squatters" have appealed, and demanded a trial *de novo* in this court.

(1) Appellants' first contention is that the land within the meandered lines of survey was never a lake in the proper sense of the word, such as to give occasion for application of the doctrines applicable to riparian ownership. Funk & Wagnall's New Standard Dictionary

defines a lake as an inland body of water or natural inclosed basin serving to drain the surrounding country. According to Webster's International Dictionary a lake is a considerable body of standing water in a depression of land; and when a body of standing water is so shallow that aquatic plants grow in most of it, it is usually called a *pond*; when the pond is mostly filled with vegetation it becomes a *marsh*.

Among the witnesses who testified upon the trial were two of the men who assisted in making the survey for the government, and a careful examination of all the evidence leads us to the conclusion that the tract meandered was in fact a lake not only at the time of the survey, but continued to be so for some time subsequent thereto, and that the land involved in this controversy became dry land by reason of the gradual recession of the waters in the lake.

(2) Appellants' second contention is that the land occupied by the appellants as squatters was high, dry land at the time of the survey, and omitted therefrom by mistake or neglect on the part of the surveyors. There was some evidence offered by the appellants tending to sustain this contention. Upon this question the trial court, among other things, found "that the various tracts of land hereinbefore described and bordering on the meander line of what has heretofore been known as Rush Lake were settled and filed upon by the various parties to whom patent was issued subsequent to the survey and meander of said Rush Lake as shown by the government surveys, and that the various tracts conveyed to the state of North Dakota were conveyed subsequent to the surveying and meandering of said Rush Lake by the United States government; that the real estate bordering on what is known as Rush Lake was surveyed under the direction of the United States government many years prior to the entries, sales, and transfers from the United States hereinbefore referred to, and plats and maps of said government surveys were duly returned and filed and approved by the proper authorities; that in making said surveys for the United States government its surveyors intentionally and deliberately, and without mistake or fraud, established the shore lines by meander lines, and intentionally separated and set apart the waste land contained in the lake bed of said Rush Lake from the upland or grazing land, which was deemed fit and suitable for agricultural purposes and for sale. . . . That at the time of the original survey and meandering, the adjacent

country was entirely unsettled and was for a number of years thereafter; that said adjacent lands have been settled from year to year and brought under cultivation until they are practically all under cultivation now; that as a result of such cultivation and settlement and the breaking up of such lands and the introduction of drainage, the waters have gradually receded until within the last few years, and at the present time, a very large part of said lake bed is now out of water and a considerable part thereof is, and has been, fit for agricultural purposes and the growing of grain, and other portions of the same have become adapted for grazing and the cutting of hay, and only a comparatively small part thereof, and that in the southern part, is at the present time continuously under water." We are satisfied that this finding is supported by a preponderance of the evidence.

(3) It is next asserted that the lands occupied by these appellants are not the result of accretion or reliction, but were dry lands at the time of the survey, and omitted therefrom through the mistake or fraud of the surveyors. The trial court decided this proposition adversely to appellants, and found that all of the land in controversy was under water at the time of the survey, and that the surveyors intentionally and deliberately, and without mistake or fraud, established the shore lines by meander lines. And an examination of the evidence in this case leads us to the conclusion that the trial court's finding is correct.

(4) Appellants next contend that the question of whether the land in controversy was in fact a lake or dry land omitted from the survey is a political question to be determined by the commissioner of the General Land Office and the Secretary of the Interior, and cannot be determined by the courts. Appellants' contention is untenable. Plaintiff does not ask this court to interfere with the Land Department in the administration of the land, nor does he seek the determination of an issue within its jurisdiction. The sole question in this case is one of title to real property. Obviously this is a legal question, and properly determinable by the courts. This has been so repeatedly and uniformly recognized by the courts of this country that citation of authority is unnecessary.

The argument of appellants' counsel is based upon the same basic reasoning applied by the supreme court of Washington in Gauthier v. Morrison, 62 Wash. 572, 114 Pac. 501, wherein the court held "that

the exclusive control of public lands vests in the Interior Department until patent is issued, and, where plaintiff alleged that through fraud or mistake of a government surveyor certain agricultural lands which were subject to homestead entry were designated as a lake; that plaintiff had settled thereon in good faith as a homestead settler; and that defendant had wrongfully occupied the land,—the state court had no jurisdiction to grant relief and adjudge plaintiff entitled to possession."

The decision of the Washington court was overruled by the United States Supreme Court in Gauthier v. Morrison, 232 U. S. 452, 58 L. ed. 680, 34 Sup. Ct. Rep. 384. In its decision the Federal Supreme Court said: "It is true that the authority to make surveys of the public lands is confided to the Land Department, and that the courts possess no power to revise or disturb its action in that regard; but here the court was not asked to make a survey or to revise or disturb one already made. As has been indicated, the land in question was not surveyed, but left unsurveyed. . . .

"Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public land laws, and that they are to be deemed in process of administration until the proceedings for the acquisition of the title terminate in the issuing of a patent. But no interference with that Department or usurpation of its functions was here sought or involved. It has not been invested with authority to redress or restrain trespasses upon possessory rights, or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs may be restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public-land states, but also recognized and approved by this court."

It may also be noted that in the case at bar the respondents do not assail any act or determination of the Land Department. On the contrary, they base their rights upon the proposition that the government surveyors, so far as the land in controversy is concerned, made a correct survey. Nor has the Land Department ever questioned the correctness of the survey, or sought to bring the lands in controversy under the

dominion of the Land Department as part of the public domain, but the Land Department has rather recognized the fact that such lands were not omitted from the original survey. If appellants' contention is correct, then in 1903, at the time of the survey of Gordon's island, not only Gordon's island, but all of the lands involved in this controversy, constituted dry land omitted from the original survey. Hence, it would be rather an anomalous proceeding to survey and meander the irregular tract known as Gordon's island, if as a matter of fact the tract so surveyed and meandered in reality was located in the interior of a larger unsurveyed tract.

(5) Appellants next contend that the United States government never parted with the title to the land in controversy, and consequently that the same constitutes part of the public domain. The question of the rights of riparian owners under patents or grants from the United States has frequently been considered by the Supreme Court of the United States. A review of the various decisions upon this question would serve no useful purpose, still, as said by Mr. Justice McReynolds (Producers' Oil Co. v. Hanzen, 238 U. S. 325, 59 L. ed. 1330, 35 Sup. Ct. Rep. 755), these decisions "unquestionably support the familiar rule . . . that, in general, meanders are not to be treated as boundaries." See Hardin v. Jordan, 140 U. S. 371, 372, 35 L. ed. 428, 430, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Kean v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651.

They also establish the principle that the question "whether the patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies." Hardin v. Shedd, 190 U. S. 508, 519, 47 L. ed. 1156, 1157, 23 Sup. Ct. Rep. 685; Whitaker v. McBride, 197 U. S. 510, 512, 49 L. ed. 857, 860, 25 Sup. Ct. Rep. 530.

"The rules of law, as established by the numerous decisions of the Supreme Court on that subject," said Trieber, District Judge (United States v. Wilson, 214 Fed. 630, 638), "may be epitomized as follows: If there were no mistakes made in the survey, and a permanent body of non-navigable water was properly meandered, the ownership of the meandered tract is controlled by the laws of the state in which the

lands are situated, and if they hold that such an owner is entitled to claim ownership to the center of the lake, the national courts will follow that rule. If, on the other hand, the surveyors were mistaken or acted fraudulently, and there was at the time of the survey a large tract of land beyond the meander lines, uncovered by permanent bodies of water (exceptional dry seasons, of course, excepted), purchasers of the fractional tracts bounded by the meander lines are not entitled to the land not included in the survey, the meander lines constituting, in that case, boundaries."

The next question which necessarily presents itself for our consideration, therefore, is, What title, if any, does a patentee or grantee of realty abutting upon a non-navigable lake acquire to the bed of the lake, under the law of this state? There is no express constitutional or statutory declaration upon the subject, hence, we are required to ascertain and apply the rules of the common law. Sections 4328–4331, Compiled Laws; Reeves & Co. v. Russell, 28 N. D. 265, L.R.A.1915D, 1149, 148 N. W. 654. See also McKennon v. Winn, 22 L.R.A. 501, and note (1 Okla. 327, 33 Pac. 582).

"The disposal of the present case, therefore, seems to us to require, further, only an answer to the single question, 'What is the common law in regard to the title of fresh-water lakes and ponds?' And on this subject we think there can be but very little difference of opinion." Hardin v. Jordan, 140 U. S. 371, 388, 35 L. ed. 428, 435, 11 Sup. Ct. Rep. 808, 838.

The common-law rules as approved by the United States Supreme Court in Hardin v. Jordan, supra, are stated in Cyc. (40 Cyc. 636–638), as follows: "Land underlying the water of an inland non-navigable lake is the subject of private ownership, and title thereto may be acquired by adverse possession. Where several owners front on the lake, they own the bed of the lake in severalty, their title extending to the center; and the boundary lines of each abutting tract are to be fixed by extending, from the meander line on each side of the tract, lines converging to a point in the center of the lake. But the owner of lands bounding on large navigable lakes and 'great ponds' takes title only to low-water mark."

"The owner of land fronting on a lake or pond is entitled to any land added to his frontage by accretion, or by the recession and withdrawal

of the waters, provided that the process in either case, whether of accretion or reliction, was gradual and imperceptible, and that his land was not originally separated from the water's edge by the intervening property of any other person."

The rules announced in Cyc. are in harmony with our statutory enactments regarding the ownership of the bed of non-navigable streams (Section 5476, Comp. Laws. See also § 5473, Comp. Laws, and Heald v. Yumisko, 7 N. D. 422, 75 N. W. 806), and have the support of the overwhelming weight of authority. See Gouverneur v. National Ice Co. 18 L.R.A. 695, and extended note (134 N. Y. 355, 30 Am. St. Rep. 669, 31 N. E. 865); Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479; Flisrand v. Madson, 35 S. D. 457, 152 N. W. 796; Knudsen v. Osmanson, 10 Utah, 124, 37 Pac. 350; Little v. Williams, 88 Ark. 37, 113 S. W. 340; Lamprey v. State, 52 Minn. 181, 18 L.R.A. 670, 38 Am. St. Rep. 541, 53 N. W. 1139; Lamprey v. Mead, 54 Minn. 290, 40 Am. St. Rep. 328, 55 N. W. 1132; Shell v. Matteson, 81 Minn. 38, 83 N. W. 491; Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046: Tucker v. Mortensen, 126 Minn. 214, 148 N. W. 60; Conneaut Ice Co. v. Quigley, 225 Pa. 605, 74 Atl. 648; Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 227, 25 L.R.A. 815, 47 Am. St. Rep. 516, 60 N. W. 681; Lembeck v. Nye, 47 Ohio St. 336, 8 L.R.A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; Farnham, Waters, § 58a.

(6) The trial court adjudged the abutting owners (the respondents) to be the owners of the lands in controversy, but, owing to the fact that the center or centers of the lake had not been determined, the court did not fix the exact amount, or define the boundaries, of the particular tracts belonging to each owner, but left this question open for future determination. The trial court, however, did determine the issues in the action, and adjudged the abutting owners to be the owners of the land in controversy by virtue of their riparian rights. The owners do not complain of the judgment, but appellants assert that the trial court should have determined the exact quantity, and defined the boundaries, of the particular tracts belonging to the various owners. It is difficult to understand why appellants should complain. They have no interest in these lands, and are not concerned with the subdivision thereof.

(7) Appellants assert that there is collusion between the plaintiff and the various abutting owners named as defendants. This assertion is based upon the ground that there is in effect no contest between these parties, and that they were represented by the same attorneys. The contention is untenable. So far as the issues litigated in this action are concerned, the interests of the various abutting owners were identical.

The judgment appealed from is affirmed.

FRED W. FITCH v. HENRY ENGELHARDT.

(157 N. W. 1038.)

Plaintiff owned land mortgaged to the American Mortgage & Investment Company of St. Paul, Minnesota. Soon after taking it the mortgage had been assigned to Engelhardt. For four years the interest coupons had been collected by the mortgage company for said assignee. In May, 1912, upon maturity of the mortgage, upon receipt from the company of notice to pay interest and principal, plaintiff paid the company the amount of the mortgage and last instalment of interest. The company then failed without remitting said payment to defendant, holder of the mortgage, and without delivering to plaintiff the mortgage securities or a satisfaction of them. Plaintiff brings this action to quiet title and cancel the mortgage as paid. The issue of fact is whether the proof establishes authority in the mortgage company from Engelhardt to collect said interest and principal. *Held:*

Real estate mortgage — principal and interest — collection of — agency — authority of agent — payment to — securities — possession of — proof of agency and authority — methods of.

1. Authority in an agent and the fact of agency to receive payment of a mortgage for the holder thereof may be shown by other proof than that of the possession of the securities. And such authority may be established though

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Note.—Authority to collect a security not in possession of the person collecting may be established by showing general agency, express, apparent, or ostensible authority to collect, and also facts to raise an estoppel. For authority in accord with this proposition, see notes in 23 L.R.A.(N.S.) 414; L.R.A.1916B, 860; and 16 Am. St. Rep. 493, on the effect of fact that agent does not have possession of securities upon the question of his authority to receive payment thereof.

the mortgage securities were not in the possession of the collecting agent or exacted by the mortgagor on or prior to payment.

Agent to collect — authority — proof of.

2. Agency and authority in the mortgage company as the agent of Engelhardt to collect the amount due on said mortgage is sufficiently established by the proof.

Agency — supreme court — prior holdings on proof of — facts — each case — governs.

3. Prior holdings upon proof of agency and authority to collect are distinguished and *held* not controlling under the facts.

Opinion filed May 1, 1916.

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

Affirmed.

Henry Moen (*McDowell & Fosseen,* of counsel), for appellant.

The mortgage company was not an ostensible agent. An agent has only such authority as the principal actually or ostensibly confers upon him. Code 1913, § 6324; Mechem, Agency, § 744, p. 528.

Ostensible agency is one by estoppel, and should be restricted to cases where the agency is not real, but apparent. Harris v. San Diego Fluen Co. 87 Cal. 526, 25 Pac. 758; Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Mechem, Agency, §§ 934–945; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546; Trowbridge v. Ross, 105 Mich. 598, 63 N. W. 534.

Agency will never be presumed, and where it is claimed and relied upon, and is disputed, the burden of proof is upon him who affirms its existence, and the proof must be clear and convincing. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Busch v. Wilcox, 82 Mich. 336, 21 Am. St. Rep. 563, 47 N. W. 328; Farrington v. South Boston R. Co. 150 Mass. 406, 5 L.R.A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; Moore v. Skyles, 33 Mont. 135, 3 L.R.A.(N.S.) 136, 114 Am. St. Rep. 801, 82 Pac. 799; Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928.

Francis J. Murphy, for respondent.

Faber was the general agent of the defendant, and, as such, had full authority to collect, receive, and receipt payment, and his acts are bind-

ing on defendant. He sold the loan to defendant; he had the rightful possession of the securities; he caused some of the coupons to be collected, and defendant's own testimony shows him to have been acting as such agent. Mechem, Agency, 2d ed. § 737; Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928; Martinson v. Kershner, 32 N. D. 46, 155 N. W. 37; Weigell v. Gregg, 161 Wis. 413, L.R.A.1916B, 856, 154 N. W. 645; 2 C. J. 625.

Goss, J. Plaintiff, the owner of land mortgaged to the American Mortgage & Investment Company of St. Paul, Minnesota, and assigned by it before maturity to the defendant, Engelhardt, upon maturity of the mortgage in May, 1912, sent the principal, $800, and the interest, $48, to the mortgage company at St. Paul, Minnesota, at which place the mortgage and notes stipulated for payment. Very soon thereafter the company failed. The money paid it as payment of this mortgage and last instalment of interest and owned by the defendant, its assignee, was never paid to him, and upon his refusal to satisfy the mortgage, plaintiff began this action to quiet his title as against it. Defendant in answer denies payment of the principal and last interest instalment, and asks foreclosure accordingly. The trial court held in plaintiff's favor, and found "that on the 6th day of May, 1912, the plaintiff, Fitch, fully paid all indebtedness secured by and described in said mortgage to the American Mortgage & Investment Company, a corporation, *which said corporation was then and there the agent of the defendant, Engelhardt, to receive such payment.*" Defendant appeals. Upon the sufficiency of the proof to establish the italicized portion of this finding, this decision turns. If the corporation was Engelhardt's agent to receive such payment, it was because of actual authority to collect given it by one Faber, cashier of a bank at Mendota, Illinois, the town in which defendant resides and the bank with which he did his business. And Faber's authority in the premises in turn depends upon actual authority received by him from defendant concerning the loan and its collection. As cases of this nature are usually close ones upon the

facts, with the law settled, that portion of the testimony relative to the authority of Faber and the investment company will be detailed.

Fitch had bought this land from a grantee of the original mortgagors, Brust and wife, with two years' interest then paid on the mortgage, leaving three interest instalments and principal remaining. These he assumed. They were held by Engelhardt. The mortgage company also held a second mortgage for 2 per cent of the interest rate, which was not assigned. Upon April 10, 1910, plaintiff received a notice addressed to him at Boone, Iowa, reading:

Interest on your loan on [land described] Ward county, becomes due May 11th, and as it is important that payment reaches the holder of the mortgage on the day it is due we would ask you to kindly send us draft for the amount shown below before due.

Amount, $64. Exchange, $.25, Total, $64.25.

American Mortgage & Investment Company.

Upon remitting to said company pursuant to such notice, two interest coupons for $48 and $16 respectively were returned to plaintiff. The larger one as material to this inquiry bears the stamp across the face of "Paid, May 13, 1910. American Mortgage & Investment Company, St. Paul, Minnesota." This coupon bore on the back the indorsement of said company to the defendant without recourse, but is not indorsed by the defendant. A year later, upon similar notice, plaintiff remitted to said company for interest due, and again received two interest coupons, the $48 one of which is similarly stamped across the face as "Paid. American Mortgage & Investment Company." This has the indorsement of the defendant on the back thereof as well as that of the "First National Bank of Mendota, Illinois, Gilbert Faber, Cashier." In May, 1912, plaintiff remitted to said company at St. Paul $864 in payment of the $800 principal and the two remaining interest coupons. He did not receive in return the first mortgage papers or coupon, but a satisfaction of the second mortgage, and presumably the second mortgage and $16 coupon. The company wrote him: "We acknowledge receipt of your favor of the 5th inst., inclosing draft for $864 in payment of the Walter J. Brust mortgage covering land in Ward county, N. D. We will send for the papers and forward to you by early mail." Thereafter he received a letter from Faber, bearing

date of June 16, 1912, and addressed to Fitch at Tagus, North Dakota, concerning which plaintiff testifies: "It was forwarded back to me, so I thought there was some crookedness on the part of Faber, and I went down there to Mendota, Illinois."

Concerning what happened there, he says: "When I went up to Engelhardt's house I asked Engelhardt if he had any land or any holdings there in North Dakota, and he said he did. He had some mortgages up there, and I asked him if he had collected the interest, and he said he had not, that Mr. Faber said the crops was poor and they could not get their interest now. I asked him if he did his own business, and he said that Mr. Faber transacted all of his business. So I could not get much satisfaction out of him. He did not know anything about the matter. We went down to see Faber.

Q. In that conversation did Mr. Faber state to you that, in substance, that he had notified the American Mortgage Company *to collect the money on this note?*

A. He said he had but had not received any.

Q. At the time you paid the money to the American Mortgage & Investment Company, did you pay it—did you believe that it was the agent of the holder of the mortgage or note?

A. I thought they were their agents, as I did all my business through them. I had no reason to believe otherwise.

The papers did not arrive from the mortgage company, and on June 16, 1912, before plaintiff went to Illinois, he received the following letter addressed to him at Tagus, North Dakota, under date of June 16, 1912:

I understand you are the present owner of a farm in Ward county, N. D., formerly owned by Walter J. Brust. A client of mine holds a mortgage on this land for $800 which matured on May 11, 1912. I have not received the interest due on that date, nor any reason why the mortgage was not paid when due May 11th. Kindly let me hear from you at once. My client expected the loan to be paid promptly when due. I also wrote the American Mortgage & Investment Company, of St. Paul, who made this loan for Brust, long before the loan was due, telling them it should be paid when due.

Yours truly,
Gilbert Faber.

Thereafter and under date of August 4, 1912, plaintiff received the following letter addressed to Boone, Iowa:

"Your favor of the 31st inst. at hand. I am very much surprised at the conditions of matters in the loan of $800. I wrote Mr. Strum, Pres., long before that loan matured that my client expected prompt payment of the same at maturity. I wrote him a number of times asking why the loan, and especially the interest, were not paid, and demanded an explanation. I received no reply. My client has been impatient for some time. The papers have never been called for. I have had them here all the time. I still have them, including the interest coupon. I have learned now that the American Mortgage & Investment Company, of St. Paul, have gone into the hands of a receiver. How did Fitch ever come to pay his money without getting the papers? He should have asked to have the papers sent to his bank so he could have had them upon payment. My client wishes me to hand the papers to an attorney for collection or foreclosure. I do not like to do this on account of the additional expense for Mr. Fitch. I shall be glad to send the papers to your bank for payment, however, and thus save the expense of a foreclosure. I do not know what would be the best way for Mr. F. to proceed against the St. Paul people. Kindly let me hear from you at once. Kindly address me in this matter, and not the bank, nor me as cashier, and I will get your letters more promptly.

Yours truly,
Gilbert Faber.

The deposition of Faber was taken. He testifies: That he had for some years sold or placed on commission to himself mortgages of said mortgage company, and had sold this one to defendant, and had taken care of the collections of interest when due, as a matter of accommodation to the defendant as a client of the bank. He admits having written these letters, and that his interest in doing so was to collect the money for Engelhardt that he might use it in the purchase of another loan for him, out of which he, Faber, would presumably obtain a commission. He admits that the mortgage in question was left by defendant with him to look after, and that he may have himself detached interest

coupons from it as it matured, and had them collected through the American Mortgage & Investment Company, which company "remitted and the money was handed to Engelhardt;" that some loans had been collected through the company the same way, witness testifying, "I do not recall now that the company collected more than two or three loans."

After his attention had been called to the fact that the mortgage note was payable at the office of the mortgage company, in St. Paul, he was asked:

Q. Did you expect Fitch to send you the amount of the loan here for Engelhardt?

A. No, I expected him to have me send the mortgage where he could pay the loan and have the papers.

Q. Didn't you state on direct examination that these loans were paid sometimes at the mortgage company's office?

A. I think I did.

Q. You have had it done that way, haven't you?

A. A few times.

Q. Under what circumstances was that done?

A. My recollection is that the company wrote me the mortgagor was ready to pay the loan and send them the papers for that purpose.

Q. Did they write you any such letter in connection with this Brust loan?

A. No.

Q. Did they ever have any correspondence after the loan became due?

A. I cannot recall.

Q. You wrote them, didn't you, after the loan was due?

A. I think I did.

Q. Did they reply to you?

A. I cannot testify now whether they did or not.

Q. Will you say that they didn't?

A. No, they may have.

Q. But you don't recall what was in those letters, do you?

A. I do not.

This testimony was given by deposition at Mendota on January 25, 1913, following these events the summer before.

The witness was also asked this question:

Q. Was at the maturity of this mortgage the note and mortgage sent anywhere by you for collection?

A. Not that I remember now.

And witness also testifies:

Q. You had written some letters a few months prior to the date the mortgage was due to the investment company, and also to Fitch, hadn't you?

A. I think I had. I am not positive as to Fitch as before maturity.

And the following:

Q. Now, Mr. Faber, when the interest notes become due, what was done with them?

A. They were usually sent on for collection.

Q. Where did Engelhardt leave these papers, including the mortgage and notes?

A. Most of the time they were in the bank in an envelop with his name on the outside.

Q. Who detached the coupon notes and collected the interest?

A. I don't remember who cut off the coupons. Often I do for our customers of the bank.

Q. Do you recall having detached any of the coupons to the mortgage in question?

A. I cannot remember any definite time, but I think I have cut off some of the coupons.

Q. Then these coupons were sent to the mortgage company for collection?

A. Some were. I am not certain as to whether all of them were.

Q. Please explain how the interest on the mortgage was collected and by whom?

A. They were *usually sent on to the company for collection,* and they remitted, and the money was handed to Engelhardt.

Respondent claims that the testimony of Engelhardt, that *all* of his business was left to Faber to transact, taken in connection with Faber's testimony as to his *usual* course of dealing in collection of interest coupons by transmitting them to the investment company for *collection,* thus constituting the company the mortgage holder's agent for col-

lection to that extent, together with his admission that the principal on at least two or three similar loans had been collected in the same way as these coupons, coupled with the fact that the physical possession of these notes and mortgage was with Faber and therefore at all times subject to his delivery, all of which is corroborative of the defendant that this business was left with Faber to transact; considered with the statements in his letters to Fitch that he had written the mortgage company "telling them it should be paid when due," and that he had written the president of the company "a number of times asking why the loan and *especially the interest* were not paid," and all taken together,—is sufficient to warrant the finding that the mortgage company had been authorized by Engelhardt, acting through Faber as his general agent in all matters concerning this mortgage, *to make this collection* of principal and interest. This is sufficient evidence to warrant this finding.

The case is different on facts from Trubel v. Sandberg, 29 N. D. 378, 150 N. W. 928; Martinson v. Kershner, 32 N. D. 46, 155 N. W. 37, and earlier similar cases, in many particulars involving proof of agency there lacking, and here present. The authority given by the holder of the mortgage to Faber to transact all business concerning it is greater than in either or any of those cases of the authority of the holder to the corresponding intervening party. It must be remembered that Engelhardt told him that "Faber transacted all his business" is not denied, and is strongly corroborated by the facts as recited by Faber, who admits having possession of the papers, the clipping of coupons and their collection, and does not hint that in so doing he was following directions given him by the holder of the mortgage, but on the contrary it appears he was looking after the matter with Engelhardt's tacit consent as though it was his own. And Faber's testimony also establishes a likelihood of the mortgage having been once transmitted for collection in the same course as the coupons had been collected. His memory on this was strangely faulty, though at the time of the giving of his deposition it was upon a matter comparatively recent. And his answer to the question as to whether this note and mortgage "was at the maturity of this loan sent anywhere by you for collection" is equally guarded by the answer, *"Not that I remember now."* Whether the witness feared being confronted by some letter to the mort-

gage company authorizing collection and transmitting the papers influenced this answer is problematical, but considering his admission that some loans similarly negotiated for this same company for which he was interested in selling loans had been collected through it, the mortgagee, renders it quite probable that the same course of dealing might have been attempted here. And this is strengthened by the apparently studied attempt in the letter of August 4, 1912, as a careful examination will show to impress upon Fitch that Faber has "had them here *all* the time," and his inquiry "how he ever came to pay his money without getting the papers," while at the same time a month after the maturity of the mortgage Faber was addressing Fitch at Tagus, North Dakota, when admittedly he knew and must have known at that time that he was a resident of Boone, Iowa. That this letter was written soon after the mortgage company went into the receiver's hands is significant. All taken together, these seem to be evidencing something out of the ordinary. Besides the testimony of the plaintiff must not be overlooked.

He gave this testimony:

Q. In that conversation did Faber state to you that, in substance, he had notified the *American Mortgage Company to collect the money on this note?*

A. *He said he had* but had not received anything.

This coupled with the statement of Engelhardt to the witness "that Faber transacted *all of his business,*" taken in connection with the fact that defendant is an old German gentleman who knew nothing about what Faber had done toward collecting the principal, and stated that Faber had said "the crops were poor and they could not get their interest now," considered with Faber's testimony of how he had transacted his business, is sufficient to warrant the finding that the mortgage company had been instructed and authorized by Faber, as plaintiff testifies Faber said they had, "to collect the money on this note," and in doing which they were the agents of Engelhardt under authorization given by Faber handling Engelhardt's business under authority of defendant.

The general rule is that a mortgagor should not part with his money until the mortgage is produced. Appellant lays great stress thereon. Yet that rule is not without its exception. And this case on facts is

within the exception. And that exception was declared by this court in the opinion on rehearing in Martinson v. Kershner, 32 N. D. 46, 155 N. W. at page 35, in the following language: "Plaintiff's counsel has cited numerous authorities to the effect that express authority to receive payment may be shown by *other proof than the possession of the securities. We have said nothing to the contrary.* We do not contend that want of possession is conclusive evidence of want of authority; but we do hold (and this rule is recognized by all the authorities cited by plaintiff's counsel) that as possession of evidences of indebtedness, in the absence of countervailing facts, clothes the agent with apparent authority to collect the indebtedness, so want of possession of such papers, *while not conclusive,* is evidence of great importance tending to show want of authority." But shall we conclude that, when the investment company made this collection, it did not have these mortgage papers ready for delivery had plaintiff in person appeared and demanded them? We have no right to indulge in any such conclusion when Faber does not remember whether he sent them or not, and has collected the interest coupons through the investment company, and admittedly collected other mortgages by sending them to the original mortgagee for collection. And another significant fact. This investment company held a second mortgage arising out of this same loan transaction. Faber was placing their loans on commission from them. Having many dealings with them, it was all the more probable, especially if known to him that they had an interest by way of second mortgage due at the same time in the collections to be made of the same mortgagor, that at the maturity of the loan, not the fifth-interest coupon alone, but the principal also, would be sent along with it to the mortgage company in whom he had faith evidenced by much dealing. An admitted course of dealing in accord with convenience, and many circumstances and testimony of admission as well, all taken together, are sufficient to sustain the finding that the mortgage company were authorized to collect both principal and interest, and that the mortgage indebtedness is paid. And under a record such as here, no presumptions of fact should be indulged to the disadvantage of the mortgagor. The judgment is affirmed, with costs.

BURKE, J. (dissenting). I desire most strenuously to dissent. This case is almost identical in facts with Trubel v. Sandberg, 29 N. D. 378,

150 N. W. 928, and Martinson v. Kershner, 32 N. D. 46, 155 N. W. 37. In each of the three cases Faber had acted as the agent of the American Mortgage & Investment Company and sold mortgages to his neighbors in Illinois. In each of the cases said clients desired their money from the mortgagors, but had retained possession of the notes and mortgages. In each of the cases the mortgagor paid the money to the investment company, who embezzled the same. In two of the cases this court held that there was an entire lack of evidence of actual agency upon the part of the investment company to receive the money, and yet in this case—identical in facts—the majority of this court desires to overrule the law to which they have subscribed within a year. In the majority opinion it is said, and correctly, that Mr. Fitch paid his money to the American Mortgage & Investment Company without receiving his notes, and that the burden of proving the authority of said investment company to receive the money was upon him. The burden, indeed, is stronger than the majority opinion states it to be. Ostensible agency cannot be claimed; it must be actual agency. Upon what evidence does the majority find such agency? Let us see. Fitch never heard of Engelhardt, nor Engelhardt of Fitch, so far as this evidence shows; nor is there any evidence to show that Engelhardt ever heard of the investment company. After the money had been paid and embezzled, Fitch hired an attorney and went to Illinois to see Engelhardt and Faber. Absolutely the only testimony upon which they rely to show agency is Fitch's recollection of this conversation with those two parties. Both of these conversations were after the payment. Fitch says that he called upon Engelhardt and "asked him if he did his own business, and he said that Mr. Faber transacted all of his business. So, as I could not get much satisfaction out of him,—he did not know anything about the matter,—we went down to see Mr. Faber." This is every iota of testimony upon which the majority finds that Faber was Engelhardt's agent. Fitch then proceeded with his attorney to interview Faber, and he testifies:

Q. In that conversation did Mr. Faber state to you that in substance he had notified the American Mortgage & Investment Company to collect the money on this note?

A. He said he had, but did not receive anything.

This is every syllable of the testimony that is relied upon to show that Faber appointed the investment company agent for Engelhardt to collect the money. I insist that this is obviously inadequate evidence to show the positive agency of the investment company for Engelhardt. Plaintiff took Faber's deposition, and I set forth the substance of his testimony:

"It (the note) was delivered to me as such by the said American Mortgage & Investment Company *for whom I was selling these loans.*"

At page 21 of the abstract he testifies:

Q. It was Mr. Engelhardt's money with which you bought this mortgage, wasn't it?

A. It was Mr. Engelhardt's money in payment *for the loan which I sold him.*

. . . . . .

Q. You have been acting for him since this controversy has arisen, haven't you?

A. Only in a limited way.

. . . . . .

Q. For whom were you acting when you wrote those letters to Mr. Fitch?

A. For myself. I had not been requested by anyone to do so.

. . . . . .

Q. Did you receive any commission for negotiating this loan?

A. I did.

Q. From whom?

A. From the American Mortgage & Investment Company.

. . . . . .

Q. Now you handled this money for Mr. Engelhardt, didn't you?

A. Not entirely.

Q. In what particulars did anyone else have anything to do with it?

A. *To the extent that I was selling those loans for the Mortgage & Investment Company.*

Nowhere from the beginning to the end of the abstract does Faber either say that he was agent for Engelhardt, or that he represented him in any manner. On the contrary he asserts over and over again that he was the agent of the American Mortgage & Investment Company

and received commission for making the sale of the loan in question to Engelhardt, who paid him nothing. True, he testifies that Engelhardt left the mortgage and notes in the *bank* of which Faber was cashier, in an envelop upon which his name was written. There is no evidence under what conditions they were left; whether in a safety deposit box, or as collateral or for convenience. I do not believe the incident furnishes any authority for the bank (and much less Faber) to act as his agent, and certainly gave the bank no authority to appoint still another agent to act for him.

I insist that there is not a shred of evidence showing that Englehardt gave the bank authority to act as agent for him, but, even assuming that he did, there still remains the open break in the evidence whereby the bank or Faber appointed the American Mortgage & Investment Company as Engelhardt's agent to make the collection. Upon one or two occasions coupons were sent to the mortgage company for collection. Was this sufficient to constitute the mortgage company Engelhardt's agent? The authorities say not. In Hollinshead v. John Stuart & Co. (Hollinshead v. Globe Invest. Co.) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89, the authorities are reviewed, and it is clearly held that the collection of *interest* does not show authority to collect the *principal.* See also Mechem on Agency, §§ 934–945; Stolzman v. Wyman, 8 N. D. 108, 77 N. W. 285; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; and also the late case of Martinson v. Kershner.

Let us examine Faber's evidence further:

Q. When those other mortgages, you spoke of in your direct examination for which you had made loans, became due, how were they collected?

A. Usually they were sent to a *local bank for collection.* . . . I do not recollect now that the company collected more than two or three of these loans.

. . . . . .

Q. Did you expect Mr. Fitch to send you the amount of the loan here for Mr. Engelhardt?

A. No, I expect him to have me send the papers where he could pay the loan and have the papers.

. . . . . .

A. I expected the mortgage company to instruct me where to send

the papers in this loan for collection, as they had done on several other loans which had matured and had been paid. . . . I did not expect them to enforce payment or make collection.

Q. If you didn't expect them to make collection, why did you send the interest note to them?

A. If I had expected the company to make collection of the loans, I should have sent the papers in the loan the same as I sent them the coupons for collection.

The law is correctly stated in Martinson v. Kirshner, 32 N. D. 46, 155 N. W. 37, as follows: "(1) Agency will not be presumed, and where its existence is denied the burden of proof is upon him who asserts its existence. (2) The mere fact that the assignee and owner of a negotiable note and mortgage, while retaining possession of such securities, permits the original mortgagee or the loan broker who negotiated the loan, to collect the interest instalments, does not confer upon such person, without possession of the securities, authority to collect the principal. (3) The extent of an agent's authority depends upon the will of the principal, and the latter will be bound by the acts of the former only to the extent of the authority, actual or apparent, which he has conferred upon the agent."

For the foregoing reasons, I respectfully dissent, and am authorized to state that Judge Christianson joins.

MINNEAPOLIS PAPER COMPANY, a Corporation v. B. L. MONSEN.

(157 N. W. 1031.)

In taking an appeal from a justice court, jurisdictional papers were first filed with the clerk and then withdrawn and served, and an admission of service indorsed thereon by the appellee within the statutory thirty days for appeal. The papers with said proof of service were returned to the clerk of the district court after said period for appeal had expired, so that the proof of service was not filed until after expiration of the statutory period for appeal; but, upon its being filed, it disclosed affirmatively that filing and service had both been made within the time allowed for appeal. ***Held:***

Justice court — appeal from — jurisdictional papers — service of — clerk — filing with — statutory time — proof of service — not jurisdictional.

The filing of proof of service within the thirty-day period for appeal is not a jurisdictional prerequisite. Jurisdiction is vested by the filing and service of appeal papers within the statutory period. Proof thereof may be filed after expiration of said period, and the appeal will be valid and sustained as against a motion to dismiss subsequently made, when the facts of such timely service and filing affirmatively appear upon the record on appeal.

Opinion filed May 4, 1916.

An appeal from an order of the District Court of Sheridan County, *Nuessle,* J.

Reversed and appeal ordered reinstated.

Peter A. Winter, for appellant.

In appeal from justice court, the first step necessary to be taken is the service of the notice of appeal and undertaking, and the next, the filing of the notice and undertaking with the clerk or in his office. Eldridge v. Knight, 11 N. D. 552, 93 N. W. 860.

If the papers are actually served and filed in time, proof of service is not a jurisdictional prerequisite, but such proof may be made after the time for appeal has expired. 24 Cyc. 655; Thompson v. Fargo Heating & Plumbing Co. 14 N. D. 405, 104 N. W. 525; Hall v. Superior Ct. 68 Cal. 24, 8 Pac. 509; State ex rel. Jones v. Brown, 30 Nev. 495, 98 Pac. 871.

Geo. Thom, Jr., for respondent.

The mere filing mark by the clerk, of appeal papers, will not constitute a filing unless authorized by law. Eldridge v. Knight, supra; Thompson v. Fargo Heating & Plumbing Co. 14 N. D. 405, 104 N. W. 525.

Proof of service of the notice of appeal and undertaking must be produced and filed with such papers also, in order to give the district court jurisdiction. Rev. Codes 1905, § 677.

Goss, J. The district court dismissed a justice court appeal upon the following record: The justice court judgment was entered in plaintiff's favor December 23, 1913, by default after due service of summons. On January 14, 1914, or twenty-two days after the entry of judgment,

defendant filed in the office of the clerk an original notice of appeal, undertaking on appeal, and an answer; but none of said papers when so filed had been served on the plaintiff or its attorney. The notice of appeal, undertaking, and answer was then withdrawn from the files and served the next day, January 15, 1914, upon the attorney for plaintiff, who, on that day and of that date, indorsed his admission of service on all of said papers, and immediately served written notice of exception to the appellant's sureties. Notice of justification of sureties was then given, and at the time set therefor a new and sufficient undertaking on appeal was then given January 27, 1914. But the original notice of appeal, undertaking on appeal, and answer filed January 14, 1914, were not returned to the clerk's office until January 30th, or thirty-seven days after the entry of the justice judgment appealed from. As a result of such failure to return the files or refile said papers within the thirty days from date of entry of said judgment, no proof of service of the undertaking on appeal, notice of appeal, and answer was filed until after the expiration of the thirty-day period for appeal. This omission is the important and controlling fact on this appeal. Plaintiff promptly moved to dismiss the appeal, supporting the same by the files and an affidavit establishing that no proof of service of such jurisdictional documents was filed with the clerk of the district court until after the expiration of the period for appeal, and thereupon moved to dismiss the appeal for want of jurisdiction in that "defendant and appellant had failed to perfect his appeal within thirty days after rendition of the judgment herein." The district court granted said motion and dismissed the appeal for want of jurisdiction. Defendant appeals from the judgment entered thereon.

The papers when returned for filing after the expiration of the thirty-day limit for appeal disclosed by the admission of service on them that they had been served January 15, 1914, within the thirty-day period. This was the record when the motion to dismiss was made and granted. So the sole question presented on this appeal is whether the filing of proof of service within the thirty-day period for appeal is a jurisdictional requisite. If so, no jurisdiction vested in the district court. If not, jurisdiction vested on the filing and the subsequent service of said appeal papers within the statutory period. Our statute, § 9163, Comp. Laws 1913, defines the manner of taking an appeal

in the following language: "The appeal is taken by serving the notice of appeal on the adverse party or his attorney and by filing the notice of appeal together with the undertaking required by law, with the clerk of the district court of the county in which the appeal was taken." Sections 9165–9169 require the service and filing of the undertaking and the answer, judgment appealed from having been entered by default. No statutory provision requires, unless it be by inference only, that the proof of service be filed within the thirty-day period. The cases uniformly hold that to vest jurisdiction on the appeal the statute must be substantially complied with; but a distinction is drawn as to jurisdictional necessity of the return or proof of service between those statutes reciting it as a step in appellate proceedings and within the thirty-day period, and those statutes that do not expressly so require. Ours is in the latter classification. Under statutes similar to ours it is generally held that the jurisdictional requisite is the fact of service within the statutory time. Service in time having been had, proof thereof can be filed after expiration of the period for appeal, where it is not in express statutory terms required to be made within the time for appeal. "Return or proof of service of the notice of appeal must be made, served, and filed in accordance with statutory requirements. Where required by the statute, it must accompany and be filed with the notice and within the time prescribed, and it must show by positive statement that all the statutory requisites as to service have been complied with." 3 C. J. 1237. The converse must be true where not specially required by statute. A search of the cases discloses that many states, like those of Oregon and Minnesota, by statutes expressly require the proof of service to be filed with the other papers and within the statutory period for appeal. On the other hand, some statutes, like Washington, expressly provide that proof of service may be made, under certain circumstances, after the period for appeal. The question is an open one in this state. It is of more importance that the rule be settled than the way it is settled. Our statutes not requiring the filing of proof of service of jurisdictional appeal papers within the statutory time for appeal, the proof of the fact of such service within the period allowed for appeal may be made subsequent to the expiration of said period. The order of taking of the steps necessary for an appeal is immaterial so long as all jurisdictional steps are taken within the stat-

utory period for appeal; and when all are so taken within time jurisdiction is thereby vested in the district court. Of course proof of service must be made and filed, as service will not be presumed. Proof that the jurisdictional steps have been taken in time must affirmatively appear upon the record. Otherwise, the appeal is properly dismissed where the fact of service in time is not brought upon the record as a defense to a motion to dismiss for want of proof of service. But in this case at the time of the hearing upon the motion the record affirmatively disclosed that the jurisdictional papers had been both filed and served within the statutory period therefor. The appeal should not have been dismissed upon this record. The judgment appealed from, therefore, is ordered set aside, and likewise the order of the dismissal of the appeal on which it is based, and the District Court will reinstate said appeal. Appellant will recover costs upon this appeal.

STATE BANK OF MAXBASS, a Corporation, v. HONORA HILEMAN and G. C. Hileman, Her Husband, and John D. Gruber Company, a Corporation.

(157 N. W. 971.)

Mortgage — real estate — foreclosure — mistake in amount — second foreclosure — abandonment of first — sheriff's certificate — redemption — right of — sheriff's deal — on abandoned foreclosure — subsequent encumbrancers — right to redeem — not cut off.

Where the owner of a $750 first mortgage and $250 second mortgage upon a piece of land forecloses said first mortgage by advertisement, but through some mistake states in his notice of sale that the sum due is only $310, and himself purchases the sheriff's certificate at said sale and for said price, and afterwards, and for fear that the mortgagor and subsequent encumbrancers may seek to redeem from him for said sum, reforecloses said first mortgage by action, and also forecloses and in the same action, his second mortgage, and in his complaint treats said prior foreclosure as a nullity, stating that "plaintiff is the owner and holder of said promissory note and the said real estate mortgage securing the same, and no part of the same has been paid," and "that no proceeding, at law or in equity, have been had for the recovery of said indebtedness except that on March the 5th, 1912, a purported foreclosure of said mortgage was attempted to be made by advertisement, but

through inadvertence or mistake the amount set forth in the notice of sale was stated as being the sum of $310.15," and files a *lis pendens*, and himself testifies that he would not have accepted a redemption under the former certificate and for the sum which it represents if it had been offered to him, such person cannot, within two months of the beginning of such action and the institution of such second foreclosure and during the pendency of said action, obtain a sheriff's deed of said land under said prior foreclosure sale and by means of said deed, and, in an action to quiet title thereunder, deprive the mortgagor and subsequent encumbrancers of the right to thereafter redeem from his said first mortgage and under the second foreclosure which he himself has instituted.

Opinion filed May 4, 1916.

Action to quiet title to land.

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

Judgment for defendants. Plaintiff appeals.

Affirmed.

Opinion of the court by BRUCE, J., filed subsequent to petition for rehearing.

Albert Weber, for appellant.

A mortgage foreclosure sale will not be set aside without some good reason. It will be set aside whenever debtor has been misled in any way by the mortgagee or the purchaser and thereby prevented from protecting his interests at the sale, and property sold greatly below its value. Jones, Mortg. § 1676; Haines v. Taylor, 3 How. Pr. 206; Rigney v. Small, 60 Ill. 416, 8 Mor. Min. Rep. 217.

When foreclosure proceedings are entirely regular and free from fraud, they cannot be disturbed or set aside without some other legal reason. McCotter v. Jay, 30 N. Y. 80; Wyandotte State Bank v. Murray, 84 Kan. 524, 114 Pac. 847.

Where property is regularly advertised and fairly sold, such sale will not be set aside in order to protect parties against the consequences of their own negligence, where they were competent to protect themselves. American Ins. Co. v. Oakley, 9 Paige, 496, 38 Am. Dec. 561; Warren v. Foreman, 19 Wis. 35; Colonial & U. S. Mortg. Co. v. Sweet, 65 Ark. 152, 67 Am. St. Rep. 910, 45 S. W. 60; Comp. Laws 1913, § 8085; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694.

Parties desiring to redeem must act within one year from sale, or

bring a direct action to have sale set aside. Powers v. Andrews, 84 Ala. 289, 4 So. 263.

A party failing through his own negligence to exercise his right of redemption is not entitled to relief in equity. Parker v. Dacres, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433; Burgess v. Ruggles, 146 Ill. 506, 34 N. E. 1036.

A. Woodward (*Cowan & Adamson* and *H. S. Blood,* of counsel), for respondent.

At the time of taking the sheriff's deed on the first foreclosure, plaintiff claimed that the mortgage lien was still in force, and claimed that it still had the right to a foreclosure of its said lien. It is thus estopped to assert its deed and its validity as against the subsequent encumbrancers. Carpenter v. Plagge, 192 Ill. 82, 61 N. E. 536; Cassem v. Heustis, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 292.

Where the mortgagor has suffered his right of redemption to lapse in consequence of fraud practised upon him, or through ignorance of his rights, he may maintain a bill in equity to redeem. 27 Cyc. 1847, and cases cited.

BRUCE, J. This is an action to quiet title to a quarter section of land in Bottineau county, North Dakota, and comes to us for a trial *de novo*. The controversy is mainly between the plaintiff, the State Bank of Maxbass, which claims under a sheriff's deed issued to it on an alleged foreclosure of its first mortgage, and the defendant John D. Gruber Company, the holder of a third mortgage, and which claims that such foreclosure was waived and abandoned by the plaintiff and is therefore a nullity, and that it still has a right to redeem within a year after the sale under a second foreclosure of the same first mortgage, which was subsequently commenced by the plaintiff bank and which is still pending.

It appears from the record that in January, 1912, the plaintiff bank foreclosed its first mortgage for $750 by advertisement, but through inadvertence and mistake stated in its notice of sale that the amount due was only $310, whereas the actual amount so due was $939.15, and itself purchased the sheriff's certificate at said sale for said first-named amount; that later and on January 17, 1913, on discovering its mistake and in order to prevent a redemption from it by the holders of subsequent encumbrances at the said sum of $310, it commenced another

action for the foreclosure of the same first mortgage and of its second mortgage for $250, and in which second action both the mortgagors and the John D. Gruber Company were made defendants, and, though no service was made or attempted to be made on the latter, an answer was interposed by it as well as by the mortgagors; and that at or about the same time a *lis pendens* was also filed. It also appears that in a verified complaint in this foreclosure action the plaintiff, after setting forth its $750 mortgage, expressly alleged "that no proceedings, at law or in equity, have been had for the recovery of said indebtedness except that on March 5, 1912, a *purported* foreclosure of said mortgage was *attempted* to be made by advertisement, but through inadvertence and mistake the amount set forth in the notice of sale was stated as being the sum of $310.50, whereas the sum actually due thereon at said date was the sum of $939.15 exclusive of the costs and disbursements of such foreclosure sale." And, after setting forth its $250 mortgage, expressly stated "that no *proceedings,* at law or in equity, have been had for the recovery of said indebtedness." The record also shows that notwithstanding the allegations of this verified complaint, and notwithstanding the fact that the vice president of the plaintiff bank positively testified upon the trial that he commenced the second action because he "didn't intend to take any chances" and "meant to get the amount due on the mortgages," and "after that action was commenced would not have taken the amount of money that the certificate of sale shows to have been coming to him during the year of redemption," the plaintiff bank at the end of the year from the issuance of the sheriff's certificate on the former foreclosure, and within two months after instituting the second, obtained from the sheriff a deed on such sale, and it is under this deed that it now seeks to quiet title.

We do not believe that this can be done. Before the expiration of the year of redemption both the mortgagors and the third mortgagee were expressly told that the plaintiff had abandoned his prior foreclosure. Plaintiff not only swore, or allowed his attorney to swear, that such prior proceeding was a nullity, but himself positively swore on the trial that he would not have accepted a redemption thereunder; the defendants positively swore that if it had not been for this second action they would have redeemed from the prior sale, and yet a court of equity is asked to cut off that opportunity for redemption. This it will

not do. We do not care whether the prior sale was a nullity or not. It is sufficient to say that plaintiff chose to treat it as such. We do not care whether the filing of a *lis pendens* is provided for by our statute or not. Plaintiff filed one and for no other purpose than to induce the mortgagor and the defendant the John D. Gruber Company not to redeem from the prior sale.

It is the purpose of our redemption laws to make the land of a debtor go as far in the payment of his debts as is possible, and if the plaintiff is enabled to recover the amount of its loans, with interest, it will have little ground for complaint. This opportunity the decree of the District Court gives to it, and it is therefore in all things affirmed.

CHRISTIANSON, J., being disqualified, did not participate. Hon. JAMES M. HANLEY, Judge of the Twelfth Judicial District, sat in his stead.

ELIZA SHUMAN v. JOHN LESMEISTER.

(158 N. W. 271.)

New trial — motion for — statutory time — court — postponement of hearing by — appearance — participating on motion — jurisdiction — last urged for first time on appeal — objection waived.

1. Where a motion for a new trial was noticed by plaintiff for hearing within the statutory time, but the hearing thereon was by the district judge postponed from time to time for a period of about six months without notice to defendant, but for the accommodation of the court,—because of other official engagements,—and the record disclosing that defendant appeared and resisted the motion on the merits without objection, he will not be permitted on appeal to urge for the first time that the court had, by such postponements, lost jurisdiction to entertain such motion.

Evidence — insufficiency — failure to point out — moving party — in lower court — waiver — rule — object of — statutes.

2. The failure of the moving party to point out in the court below the particulars wherein the evidence is deemed insufficient to sustain the verdict cannot be urged for the first time in the appellate court. The statutory rule requiring such particulars to be pointed out was designed for the information and assistance of the court and the opposing party, and will be deemed waived when not urged in the court below. On this point the present statute (§ 4,

chap. 131, Laws of 1913), for reasons stated in the opinion, differs from the prior law as contained in Rev. Codes 1905, § 7058, Comp. Laws 1913, § 7655.

New trial — trial court — order on motion for — presumptions — correctness.

3. Every presumption will be indulged in favor of the correctness of the trial court's order granting a new trial.

New trial — ground — insufficiency of evidence — verdict — statement of case — evidence — must be made a part of.

4. An order granting a new trial upon the ground of the insufficiency of the evidence to sustain the verdict will not be disturbed in the Supreme Court where the appellant has failed to incorporate in, and make a part of, the settled statement of case, the evidence introduced at the trial below.

Opinion filed May 10, 1916.

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

From an order granting plaintiff's motion for a new trial, defendant appeals.

Affirmed.

R. E. Menzel, for appellant.

Where a motion for a new trial is noticed to be heard at a time certain, and the court, of its own motion, postpones the hearing and it is not brought up for six months thereafter, or after the expiration of sixty days after the verdict or decision, and no cause shown for such extension, and no memorandum decision filed, the court lost jurisdiction. Session Laws 1913, chap. 131, §§ 2, 4, 6, 8; Feil v. Northwest German Farmers' Mut. Ins. Co. 28 N. D. 355, 149 N. W. 358.

B. L. Shuman, for respondent.

The *ex parte* orders of the court were never objected to by any party, in writing or otherwise, and there has been no showing of error on the part of the court in making them. Further, participation on the hearing waived all objections. Rev. Codes 1905, § 7666, Comp. Laws 1913, § 8301; Johnson v. Northern P. R. Co. 1 N. D. 354, 48 N. W. 227; Tuttle v. Pollock, 19 N. D. 308, 123 N. W. 399; Tilton v. Flormann, 22 S. D. 324, 117 N. W. 377; Bishop & B. Co. v. Schleuning, 19 S. D. 367, 103 N. W. 387; O'Brien v. Miller, 4 N. D. 308, 60 N. W. 841; Session Laws 1913, chap. 131, § 6.

The minutes of the court constitute the courts record. Submission of

matters, on the minutes, affords a speedy and inexpensive way of hearing the matter after the trial. Distad v. Shanklin, 11 S. D. 1, 75 N. W. 205; 14 Enc. Pl. & Pr. 915; 17 Enc. Pl. & Pr. 908.

When a new trial is denied, the burden is upon the appellant to comply strictly with all statutory requirements, and the showing that the lower court abused its discretion must be clear before the appellate court will interfere. Jackson v. Ellerson, 15 N. D. 533, 108 N. W. 241; Bertelson v. Ehr, 17 N. D. 339, 116 N. W. 335; State v. School Dist. 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555; Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505; F. A. Patrick & Co. v. Nurnberg, 21 N. D. 377, 131 N. W. 254.

The court may grant a new trial on grounds not expressly named in the application. 14 Enc. Pl. & Pr. 718, subdiv. 2.

The discretion of the trial court in granting a new trial will not be questioned without a clear showing of abuse. 14 Enc. Pl. & Pr. 960-962; House v. Wright, 22 Ind. 383; Shepherd v. Brenton, 15 Iowa, 84; McNair v. McComber, 15 Iowa, 368.

FISK, Ch. J. Defendant appeals from an order granting plaintiff's motion for a new trial. Such motion was based upon the minutes of the court. After the order was granted, defendant's counsel prepared and caused to be settled, pursuant to law, a statement of case for use on the appeal.

The specifications of error are as follows: (1) The court erred in considering plaintiff's motion for a new trial at all; and (2) the court erred in granting plaintiff a new trial upon the grounds stated in the order for a new trial.

We deem the first specification without merit. It is predicated upon an alleged unwarranted delay in bringing the motion on for hearing, and it is asserted that the various *ex parte* orders continuing such hearing from time to time from June, 1914, to January, 1915, and also the various *ex parte* orders continuing the stay of proceedings from time to time until a decision could be had of such motion, were unwarranted because made without any showing of good cause therefor, and that for these reasons the court lost jurisdiction to entertain such motion. It appears from the record, however, that respondent is not chargeable with such delay, and that the various postponements and extensions were

necessitated because—owing to other engagements—the court was unable to entertain the motion for a new trial at an earlier date. In view of this, we cannot hold that respondent lost his right to have such motion considered. But furthermore, the record fails to disclose that any objection whatever was made by appellant to the consideration of such motion, and, manifestly, he cannot urge such objection for the first time in this court. It is true that, in appellant's brief, counsel states that he orally objected to such consideration, but he concedes that the record fails to disclose the objection. Such omission is fatal to appellant's contention under his first specification.

Appellant's second specification of error must also be overruled. While as one of the grounds of the motion for a new trial, plaintiff, as stated, challenged the sufficiency of the evidence to support the verdict, but failed to point out any particulars wherein the evidence thus failed, still in so far as the record discloses no objection whatever was urged by defendant to such practice, and the trial court, notwithstanding such omission, considered and decided the motion. This being true, we do not think appellant is in a position to now urge the point covered by such specification, especially in view of his failure to incorporate in his statement of case the testimony introduced at the trial.

It is well settled that every presumption prevails in favor of the correctness of the conclusions reached by the trial court. Also that a stronger case must be made to justify interference on appeal from an order granting a new trial, than where such relief has been denied. And in the absence of a clear showing of an abuse of the sound judicial discretion vested in the trial court, this court will not reverse an order granting or denying a motion for a new trial (Bristol & S. Co. v. Skapple, 17 N. D. 271, 113 N. W. 841; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765), and when a new trial is granted, the order of the lower court will be affirmed if any ground for sustaining it is found in the record. Gooler v. Eidsness, 18 N. D. 338, 121 N. W. 83. When the motion is based upon several grounds the question, on appeal from an order granting a new trial, is not whether the trial judge was warranted in granting it upon a particular ground referred to in the order, but whether, upon the whole record and upon any of the grounds urged, it should have been granted. Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314.

In this connection, it should be noted that error is not specified as to the making of the order generally, but merely as to the granting of a new trial "upon the ground stated in the order for a new trial," which ground is the alleged insufficiency of the evidence.

Appellant directs our attention to § 4, chapter 131, Laws of 1913, and to the case of Feil v. Northwest German Farmers' Mut. Ins. Co. 28 N. D. 355, 149 N. W. 358, construing the same. That statute, it is true, requires a specification of insufficiency of the evidence to point out wherein the evidence is insufficient; and while, as we stated in the syllabus in the above case, "such statutory rule is . . . designed to inform the court and respondent's counsel of the particulars relied on as to the alleged insufficiency, and a substantial compliance therewith will be exacted," we did not there hold that the trial court, as well as counsel for whose benefit the rule was prescribed, could not—if they saw fit—waive a compliance with its terms. Such a waiver will be implied under the record before us. Such rule is not as stringent as the former rule found in § 7058, Rev. Codes 1905, Comp. Laws 1913, § 7655, which provided that "if no such specification is made, the statement shall be disregarded on motion for a new trial and on appeal." Under such a statute, appellant's contention might be upheld.

There were five other grounds alleged in the motion, but as none are challenged by the specifications of error we will not consider them.

In conclusion, it is sufficient to say that, after considering the two specifications urged, we deem them without merit. The order appealed from is affirmed.

L. O. JACOBSON v. MOHALL TELEPHONE COMPANY, a Corporation.

1916 F 532

(L.R.A. —, —, 157 N. W. 1033.)

Money — paid in ignorance of the law — or mistake of law — voluntary payment — full knowledge of all facts — absence of fraud — moral obligation — in satisfaction of — action to recover — will not lie.

An action will not lie to recover money which is alleged to have been

Note.—On avoidance of contracts for mutual mistake of facts, see note in 45 Am. Dec. 631.

paid under a mistake or an ignorance of the law, where such payment is voluntarily made, and with full knowledge of all the facts, and is not induced by any fraud or improper conduct on the part of the payee, and where such payment is made in satisfaction of a moral obligation to such payee or of a contingent liability.

Opinion filed April 5, 1916.

Action to recover money claimed to have been paid on account of a mistake of law.

Appeal from the District Court of Renville County, *Leighton,* J. Judgment for defendant. Plaintiff appeals.

Affirmed.

F. B. Lambert, for appellant.

The contract and bond in this case bound plaintiff to make good all defalcations of the office, by whomsoever made.

"The control of papers as securities implies such a possession thereof under a delivery to the holder, and such acceptance as will perfect the security." Bank of Monroe v. Gifford, 79 Iowa, 300, 44 N. W. 558; Sencerbox v. First Nat. Bank, 14 Idaho, 95, 93 Pac. 369.

"A conveyance with a power to hold and control the property involves the custody and possession of the trust property, both real and personal." Ure v. Ure, 185 Ill. 216, 56 N. E. 1087; Rev. Codes 1905, § 5347, Comp. Laws 1913, § 5903.

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Code, §§ 5351–5353.

"Particular clauses of a contract are subordinate to those of general intent." Code, § 5354.

"A contract should be so construed as to carry out the intention of the parties, even though it is necessary to depart from the strict letter." Conn v. Lewis, 5 Litt. (Ky.) 66; Hildrith v. Forrest, 4 J. J. Marsh. 217; Shultz v. Johnson, 5 B. Mon. 497; Ross v. Garlick, 10 Rob. (La.) 365; Marcotte v. Coco, 12 Rob. (La.) 167; Salmon Falls Mfg. Co. v. Portsmouth Co. 46 N. H. 249; Hunter v. Miller, 6 B. Mon. 612; Clay v. Ballard, 9 Rob. (La.) 308, 41 Am. Dec. 328; Coghlan v. Stetson (C. C.) 22 Blatchf. 88, 19 Fed. 727; Williams v. Glover, 66 Ala. 189; Robinson v. Stow, 39 Ill. 568; Franklin L. Ins. Co. v. Wallace, 93 Ind.

7; Wagner v. Kenner, 2 Rob. (La.) 120; Erwin v. Greene, 5 Rob. (La.) 70; Kinney v. Hamilton County, 8 Ohio C. C. 433, 4 Ohio C. D. 448; Royalton v. Royalton & W. Turnp. Co. 14 Vt. 311; The Ada, 2 Ware, 408, Fed. Cas. No. 38; Livingston v. Arrington, 28 Ala. 424; Barney v. Newcomb, 9 Cush. 46; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Otis v. United States, 20 Ct. Cl. 315; Norton v. Brophy, 56 Ill. App. 661; Donahoe v. Kettell, 1 Cliff. 135, Fed. Cas. No. 3,980; Chase v. Bradley, 26 Me. 531; 11 Century Dig. § 746, Contracts, col. 737, and cases cited; Pillow v. Brown, 26 Ark. 240; Bradley v. Marshall, 54 Ill. 173; Bobbitt v. Liverpool & L. & G. Ins. Co. 66 N. C. 70, 8 Am. Rep. 494; Smith v. Turpin, 20 Ohio St. 478; Byrne v. Marshall, 44 Ala. 355; Vaugine v. Taylor, 18 Ark. 65; Doe ex dem. Caillaret v. Bernard, 7 Smedes & M. 319; Munson v. Osborn, 10 Ill. App. 508; Morss v. Salisbury, 48 N. Y. 636.

"A contract will, where there is a doubt as to its true meaning, be construed most strongly against the party responsible for its language." Christian v. First Nat. Bank, 84 C. C. A. 53, 155 Fed. 705.

Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens within its terms. 32 Cyc. 73; Jenkins v. Phillips, 18 Ind. App. 562, 48 N. E. 651; Rev. Codes 1905, § 5346, Comp. Laws 1913, § 5902; Red River Valley Nat. Bank v. Barnes, 8 N. D. 432, 79 N. W. 880; D. M. Osborne & Co. v. Strinham, 4 S. D. 593, 57 N. W. 776; 15 Cyc. 497, 498.

"Possession of the property by the defendant is distinguished from its mere custody, and, being one of the constituent elements of the offense, must be alleged in the indictment or information." 15 Cyc. 518, 526, and cases cited; State v. Kasper, 5 Wash. 174, 31 Pac. 636; United States v. Bornemann, 36 Fed. 257; Whitney v. State, 53 Neb. 287, 73 N. W. 696; State v. Wine, 7 N. D. 30, 72 N. W. 905; Krump v. First State Bank, 8 N. D. 75, 76 N. W. 995; Fegan v. Great Northern R. Co. 9 N. D. 30, 81 N. W. 39.

"The fact that plaintiff had the means of knowledge of facts at his command, and negligently failed to avail himself thereof, will not defeat his recovery, where no loss has resulted to defendant." James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; Fagan v. Great Northern R. Co. 9 N. D. 30, 81 N. W. 39.

"Voluntary" means, "by the free exercise of the will; by design; purposely, without being moved, influenced, or impelled by others." 8 Words & Phrases, 7356, 7357; 40 Cyc. 220; Comp. Laws 1913, §§ 5487, 5846; 14 Cyc. 1123; Page, Contr. § 1246; Cooley, Torts, 506; 1 Parsons, Contr. 393.

The mistake here is one largely of fact, and money paid out by mistake of fact may be recovered back. Gregory v. Clabrough, 129 Cal. 475, 62 Pac. 72; Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104, 44 Pac. 484; Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552; Kreutz v. Livingston, 15 Cal. 346; 1 Chitty, Pl. 362, note 2; Moses v. Macferlan, 2 Burr. 1012, 1 W. Bl. 219; Lockwood v. Kelsea, 41 N. H. 187; Wilkins v. Stidger, 22 Cal. 231, 83 Am. Dec. 64; 30 Cyc. 1316, note 14; 15 Am. & Eng. Enc. Law, 2d ed. 676, 1003, 1005, 1006, 1007, and cases cited; 30 Cyc. 1318, note 17; 30 Cyc. 1320, 1321, and cases cited; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; Rutherford v. McIver, 21 Ala. 750; Brown v. College Corner & R. Gravel Road Co. 56 Ind. 110; Koontz v. Central Nat. Bank, 51 Mo. 275; Douglas County v. Keller, 43 Neb. 635, 62 N. W. 60; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; National L. Ins. Co. v. Jones, 1 Thomp. & C. 466, affirmed in 59 N. Y. 649; Altston v. Richardson, 51 Tex. 1; Neal v. Read, 7 Baxt. 333; Barth v. Jester Bros. 3 Tex. App. Civ. Cas. (Willson) 267; Rev. Codes, §§ 5391, 5711, Comp. Laws 1913, §§ 5947, 6280.

Money paid under a mutual mistake of fact may be recovered back. Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132; Merchants' Bank v. M'Intyre, 2 Sandf. 431; Goddard v. Merchants' Bank, 2 Sandf. 247, affirmed (1850) 4 N. Y. 147; Guild v. Baldridge, 2 Swan, 295; Tybout v. Thompson, 2 Browne (Pa.) 27; United States v. Onondaga County Sav. Bank, 39 Fed. 259; United States v. Barlow, 132 U. S. 271, 282, 33 L. ed. 346, 351, 10 Sup. Ct. Rep. 77; Brown v. Tillinghast, 84 Fed. 71; Kelly v. Solari, 9 Mees. & W. 54, 11 L. J. Exch. N. S. 10, 6 Jur. 107; Ely v. Padden, 13 N. Y. S. R. 53; Lyle v. Shinnebarger, 17 Mo. App. 66; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 452, 3 Am. Rep. 718; Duncan v. Berlin, 60 N. Y. 151; Lawrence v. American Nat. Bank, 54 N. Y. 432; National Bank v. National Mechanics' Bkg. Asso. 55 N. Y. 211, 14 Am. Rep. 232;

Mayer v. New York, 63 N. Y. 455; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952.

Swenson & Rodsatter and *Bradford & Nash,* for respondents.

The contract here is in writing. Under the law, preliminary negotiations cannot be reviewed or considered to contradict or vary the terms of a written contract. 6 R. C. L. p. 228, and cases cited; Comp. Laws 1913, §§ 5897, 5898.

The payment here made was voluntary and cannot be recovered back. There was no fraud or duress. There was no mistake of fact. Comp. Laws 1913, § 4876; 3 Words & Phrases, 2272; 30 Cyc. 1306; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; Holt v. Thomas, 105 Cal. 273, 38 Pac. 891; Kohler v. Wells, F. & Co. 26 Cal. 606; Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Bucknall v. Story, 46 Cal. 589, 13 Am. Rep. 220.

If any mistake was made, it was one of law, and the parties are bound and no one can complain. Comp. Laws 1913, § 5855; Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561; Dill v. Shahan, 25 Ala. 694, 60 Am. Dec. 540; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137.

BRUCE, J. This is an action to recover money alleged to have been paid by mistake. The gist of the complaint is that the plaintiff on the 2d day of June, 1913, was employed by the defendant under a written contract as manager, lineman, and repairer of its telephone system, and that at about the same time the plaintiff gave to the defendant a bond to secure the said defendant against any personal dishonesty on the part of the plaintiff, but which bond did not contain any provision guarantying the honesty or integrity of any other employee of the company; that the plaintiff was not well versed in the construction of written contracts, and, when the written contract and bond were made, did not go over the same with sufficient detail to remember all the terms thereof; that the bond and contract were prepared by the defendant, and that the bond (though not the contract) was thereafter kept by the defendant alone; and that the plaintiff never thereafter saw such bond until after the 1st day of March, 1914; that on the 17th day of February, 1914, the officers of the company examined its books, and reported to the plaintiff that his office was $505 short in its account with the company, saying that

the plaintiff as manager was liable for all shortages, and that the bond secured the defendant against losses and for every dollar of such shortage, and that, if said sum of money was not paid, defendant would forthwith bring action on said bond to recover said amount; that the plaintiff, relying on said statement on the part of the officers and directors of the defendant, and fearing the result of such litigation on his future reputation with such bond companies, the possibility of his arrest and conviction of what, from their report, he supposed was a crime, and not having in his possession and control the bond above described, and knowing nothing of its contents except such as was told him by such officers, at once complied with their demands, and on the said 17th day of February, 1914, paid over to the bank at Mohall to the credit of the defendant the sum of $505, which said sum was then and there received and accepted by the defendant; that the payment of said sum was paid through a mistaken belief on the plaintiff's part that he was liable to defendant for such an amount, and the same was received by the defendant either through its mistake as to the terms of said bond and the proper meaning and construction thereof, or through fraud on the part of the officers of said defendant and the defendant itself through a misrepresentation to the plaintiff as to his liability thereon.

The evidence bore out the main allegations of the complaint, but failed entirely to prove any fraud on the part of the defendant, or any real threats, coercion, or duress, and that the money was paid over instantaneously and without due opportunity for consideration and the obtaining of legal advice. It showed that the plaintiff was twenty-one years of age, and although prior to the entering into the contract the defendants had written that "the operators do all the collecting and book work," the contract, which he always retained and kept, expressly provided that "the party of the second part (the plaintiff) hereby hires himself to the party of the first part on the terms and conditions hereinbefore set forth, and agrees to the conditions herein set forth, and *in addition to the foregoing duties agrees to look after all collections of all the accounts due and owing to the said party of the first part, and to deposit the proceeds in bank, and to keep a true and accurate set of books of all accounts and transactions of the said first party, and render statements whenever called upon by said first party, and to account at all times to said first party for all moneys that may come into his hands or*

under his control in the performance of his duties and in connection with his position." The contract also provided that the party of the second part was authorized to employ necessary help for constructing lines and designated and employed the plaintiff as "manager, lineman, and repairer" of the telephone system. The evidence showed that the plaintiff immediately entered upon his employment under the contract, but did not look after the collections except to a very limited degree. He did not obtain or seek to obtain the combination of the safe. He did not keep a set of books and, in short, seems to have taken no part in the management of the office or of the operators, but allowed the operators to have full charge thereof with practically no supervision by him, and to make all of the deposits. It showed that in the month of November, 1913, or thereabouts, the directors checked over the office, and it was agreed between them and the plaintiff that the office was $505 short. The directors did not claim to know who had taken the money, though the inference seems to have been that it was taken by one of the operators. The plaintiff asserted that he was not guilty, and at no time did the directors claim that he was. They merely took the position that he was liable for the shortage under his contract and also under his bond. The situation was fully and clearly talked over between the parties, in December, 1913, and February, 1914, on both of which occasions the plaintiff offered to give the company a note for the amount. This offer, however, was declined, and plaintiff was told that unless the money was forthcoming the directors of the company would have to take the matter up with the bonding company for investigation and settlement. Plaintiff testifies that he was afraid that the bonding company would prosecute him criminally if such action was taken, but nowhere is there any proof that any such criminal action was threatened. The proof is positive, in fact it is admitted, that the directors were a kindly body of farmers who were merely anxious to clear up the matter, as they were responsible to the stockholders, and who honestly believed that the plaintiff was liable both under his contract and under his bond, although they suspected that the actual theft was committed by one of the operators, and who made no threat except to refer the matter to the bond company, and who were absolutely without guile or malice. The testimony then shows that, after consulting an attorney at Mohall, who told him that the contract was binding, the plaintiff raised the money

and deposited it in the bank to the credit of the company, having first stipulated that the operator should be discharged; that the operator was discharged, and that the plaintiff then remained in the employ of the company for about a month, and then after consulting his present attorney, not as to the liability of the company to him, but as to the possibility of collecting the money from the operator, and being told by such attorney that he could recover the money from the company itself, he brought the present suit.

The question to be determined is whether the payment was voluntarily made or was made under a mistake of fact or under such a mistake of law that it can be recovered. It must be conceded that no liability was proved under the bond, as the bond merely secured the personal honesty of the plaintiff, and there is no proof or claim of personal dishonesty. There can, in our opinion, however, be no doubt as to his probable liability to some extent, at any rate, under the contract, which clearly made it his duty to supervise the office, and though not necessarily to himself collect the money or make the deposits, or keep the books, to supervise the work, and to see that it was properly and honestly done. The evidence is clear that he practically paid no attention whatever to this part of the business, and it is also quite clear that a part of the loss, at any rate, could have been prevented if he had not neglected his duty.

It is perhaps true that, as the facts turned out, he was not liable under his bond. It is however probably true that he was liable, to some extent at least, under the contract; that there was a shortage in the office; that the directors did not actually know who was responsible therefor; that it was a case in which, if he himself had been dishonest or implicated, the bondsmen would have been liable, and in which mere business prudence on the part of the directors would have required calling upon such bondsmen and asking them to make an investigation, if to do nothing more, and there can, therefore, be absolutely nothing in the contention that fraud was perpetrated or duress involved in their demand for the money, and statement that if it was not forthcoming they would report the matter to the surety company. Plaintiff says that he was afraid of a criminal prosecution, that might be brought by the bonding company. The fear, however, was merely in his own mind. The directors of the telephone company had waved no club over his head, and had made no

threats of such prosecution. He was liable, to a certain extent at least, under his contract. There may have been a mistake of law, both on the part of the directors and himself, as to his liability under the bond. There was no mistake as to his liability to some extent under the contract, and, if he himself had embezzled the money, of his liability under the bond.

The rule seems to be almost universally established that a mistake of law, even though mutual, will not of itself entitle one to sue to recover money which has been voluntarily paid. 30 Cyc. 1314; 7 Mod. Am. Law, 77–81, 421–432; 15 Am. & Eng. Enc. Law 2d ed. 1102.

All of the authorities also seem to hold that neither a mistake of law nor of fact will justify a recovery if the defendant can equitably and in good conscience retain the money. Under this rule the case would not be different if we held that the evidence showed that there was a mistake of fact as to the terms as well as of the legal effect of the bond. The most liberal of the courts indeed, and even the few which refuse to recognize any distinction between a mistake of law and a mistake of fact, or which limit the rule to an ignorance of public rights and duties rather than of private rights, go no further than to say: "That whenever, by a clear and palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without cause or consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it was and ought to be recovered back." Ray v. Bank of Kentucky, 3 B. Mon. 514, 39 Am. Dec. 479; Underwood v. Brockman, 4 Dana, 309, 29 Am. Dec. 407; Louisville v. Zanone, 1 Met. (Ky.) 151; Rupple v. Kissel, 24 Ky. L. Rep. 2371, 74 S.W. 220; 30 Cyc. 1314.

Even if we concede that in the case at bar there was a mistake of mixed law and fact, and that the plaintiff was ignorant not merely of the legal effect of the bond, but of its exact wording, and that the ignorance of its wording was the ignorance of a fact, can we say that "the money was paid without cause or consideration, which in law or honor or conscience was not due and payable, and which in honor or good conscience ought not to be retained?"

There can, to our mind, be no doubt that it was the duty of the plaintiff under his contract to act as manager of the office, and not as line

repairer merely. No matter what may have been his liability under the bond, it is perfectly clear that under his contract (a copy of which he had at all times retained) he expressly agreed "to look after all collections . . . and to deposit the proceeds in bank and to keep a true and accurate set of books of all accounts and transactions of the said first party, and render statement whenever called upon by said first party, and account at all times to said first party for all moneys that may come into his hands or under his control in the performance of his duties and in connection with his position." There can be no question that that position was that of manager as well as lineman, for that term was expressly used in the contract. There can be no question that the written contract superseded all prior letters in conversations. There can be no question that he alone of the employees was required to furnish a bond, which would have hardly been the case if the others were to be equally responsible with him for the receipts of the office and for its management. There can be no question that he paid no attention whatever to the business side of the office and to the safety of its funds. It is proved that, prior to his taking charge of the office, $40 had been misappropriated, and that this misappropriation was apparent upon the face of the books. And that if, upon taking charge of the office, he had supervised the books and accounts, much, if not all, of the subsequent loss and defalcation could have been prevented. Can there be any contention that his payment was entirely without consideration?

The rule also seems to be established that money paid under a mistake even of fact is not recoverable in equity if it is clear that the party making the payment intended to waive all inquiry into the fact. Neal v. Read, 7 Baxt. 333.

It seems quite apparent from the record before us that the plaintiff made all the investigations that he desired prior to paying the money, and that on two occasions he offered to give his note for the amount. He consulted an attorney in regard to the contract, and the attorney told him that the contract was good. He at no time asked to see the bond. Neither he nor the directors at any time pretended to know all of the law. All that the directors stated was that they had to arrive at some settlement, and that they were of the opinion that the plaintiff was liable under his contract and under his bond. All they proposed to do was to report the matter to the bonding company, so that an investigation

might be made and the liability of the plaintiff under bond and under his contract be determined. Rather than have this investigation made the plaintiff chose to pay the money over. He may have been mistaken as to the law as far as the bond is concerned and in regard to his liability thereunder, but he himself chose to prevent an inquiry. Money as a rule can only be recovered when paid by mistake and when there is no obligation to pay. In the case at bar there was an apparent obligation to pay at least a part of the amount.

We find nothing in our statutes which seems to change the general rule in regard to such matters. It is true that § 5844, Comp. Laws 1913, in dealing with contracts and in speaking of the general subject of consent, says that "an apparent consent is not real or free when obtained through duress, menace, fraud, undue influence or mistake;" and that § 5855 provides that mistake, within the meaning of this chapter, only arises from: 1. A misapprehension of the law, by all parties, all supposing that they knew the law and understood it, and all making substantially the same mistake as to the law. We do not understand, however, that these sections apply to voluntary payments, but merely relate to the consent to an agreement, and that the law of voluntary payments is as it was before the Code was adopted. That law, as we have before intimated, is that a voluntary payment can never be recovered when the payee can retain it in good conscience, and that, in order to justify a recovery in such a case on the ground of ignorance or mistake of law, some improper conduct must be able to be imputed to the payee.

We have carefully read the cases which are cited by counsel for appellant, but none of them seem to be controlling. The case of Gjerstadengen v. Hartzell, 9 N. D. 268, 81 Am. St. Rep. 575, 83 N. W. 230, was one in which the act sought to be pleaded as an estoppel to a personal claim of the plaintiff was done by him while acting as an administrator of an estate, and in executing a deed of land to which neither he nor the estate had any title, and by a deed which contained no covenants of warranty, either personal or otherwise, and on account of an ignorance of law which was shared in by all of the parties.

In the case of Gregory v. Clabrough, 129 Cal. 475, 62 Pac. 72, the mistake of law relied upon was caused by a misunderstanding of the law which was induced by the defendant's own attorney, and where the de-

fendant had no moral or legal right to the money paid or to any part thereof.

The case of Griffing v. Gislason, 21 S. D. 56, 109 N. W. 647, relates to the rescission of an executory contract, and not to the recovery of money which was paid upon a contingent liability.

The case of James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952, was one in which "plaintiff's bank in good faith, and by mistake of *fact,* parted with money to which defendant was not entitled either legally or morally."

We do not here say that a mistake such as here occurring, if mistake there was, could not be pleaded as a defense in an action to enforce a contract in relation to which the mistake had been made. The courts, however, seem to have quite uniformly adopted the rule, and we must here adopt the rule, that an independent action will not lie to set aside a consummated act on the ground of mistake of law, unless special circumstances, such as undue influence, misrepresentation, or misplaced confidence, are shown; and no such special circumstances are shown, in the case at bar. See Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561; Dill v. Shahan, 25 Ala. 694, 60 Am. Dec. 540; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137; Erkens v. Nicolin, 39 Minn. 461, 40 N. W. 567.

The judgment of the District Court is affirmed.

Goss, J. (concurring specially). Concur in affirmance. But that conclusion is reached under a somewhat different course of reasoning than that adopted by Justice Bruce. The complaint asks a recovery for money paid either under mutual mistake of fact or fraud induced by the defendant. There is no sufficient proof of fraud, so that alternative is eliminated. The answer is, in effect, a general denial as to the payment having been made under mutual mistake of fact or fraud. And coupled therewith, "as a further defense to plaintiff's complaint," facts establishing a liability of plaintiff to defendant under a breach of contract to supervise the corporate business and accounts, superintend collections, and the deposit of its collections in the bank, and a shortage arising between the collections made and the deposits placed in the bank is set forth in detail and as arising upon a contract and bond made, executed, and delivered by the plaintiff to the defendant company. This

affirmative defense is in the nature of a counterclaim against any liability that plaintiff may establish under his complaint, alleging payment by him under mutual mistake of fact. The answer then is the equivalent of a denial that the payment was made under a mutual mistake of fact, coupled, however, with a counterclaim based upon breach of contract arising out of the transaction should the court find with plaintiff that the payment was made under a mutual misapprehension and mistake of fact.

The law seems to be well settled that "a voluntary payment, with a knowledge of all the facts, cannot be recovered back, though there was no debt. But a payment under a mistake of fact may be. Adams v. Reeves, 68 N. C. 134, 12 Am. Rep. 627; Pool v. Allen, 29 N. C. (7 Ired. L.) 120; Newell v. March, 30 N. C. (8 Ired. L.) 441; Lyle v. Siler, 103 N. C. 261, 9 S. E. 491; Worth v. Stewart, 122 N. C. 258, 29 S. E. 579; Macon County v. Jackson County, 75 N. C. 240; Pearsall v. Mayers, 64 N. C. 549. In Pool v. Allen, 29 N. C. (7 Ired. L.) 120, Ruffin, Ch. J., states the reason for this principle with his usual force; 'There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary it was clear that the money was paid out and received in discharge of a debt then believed to subsist. In that, there was a total mistake on the part of the person making the payment and probably on that of the receiver also; and it is plain that money thus got under a mistake and for no consideration cannot be kept *ex equo et bono*.'" The foregoing, from the opinion in Simms v. Vick, 151 N. C. 78, 24 L.R.A.(N.S.) 517, 65 S. E. 621, 18 Ann. Cas. 670, so clearly states the rule and the law to be examined under these facts that no better can be done than to set it forth. See also note appended thereto, citing cases from many states. As to the former proposition, that money paid with knowledge of all the facts cannot be recovered back, see the decision of our own court in Dickinson v. Carroll, 21 N. D. 271, 37 L.R.A.(N.S.) 286, 130 N. W. 829. Even though, as in that case, it was the payment of accommodation paper held by a third person for which the maker received nothing. It is equally well settled in this state that a payment made under a mistake of fact may be recovered by action. James River Bank v. Weber, 19 N. D. 792, 124 N. W. 952, citing, applying, and explaining Fegan v. Great Northern R. Co. 9 N. D. 30, 81 N. W. 39.

With the law settled, the facts in the case under the proof and the issues presented in the pleadings are next to be considered. First, was the payment made under a mutual misapprehension of the facts? It would seem so. The plaintiff has testified that though he received a copy of the contract and bond in June previous to the payment of the money in February, yet they were not accessible, and he did not become familiar with the contract and bond to know its contents until some little time after he had made the payment herein sought to be recovered, and that he made the payment under the misapprehension that the bond made him liable for the misappropriation of the office employees in the local telephone exchange over which, according to his contract, he was manager. The bond in nowise makes him liable for these shortages, which, if they exist at all, must be embezzlements of some of the employees other than the plaintiff. The bond merely insures his personal honesty, and it is admitted that only a small percentage of the money was received or went through his hands, and that he has accounted for all of that. The basis of liability lies in whether he was responsible for the defalcations of others. And it is impossible to believe that he would have made this payment had he not understood that he was bonded to make it, and, under the bond, was surety for the defalcations of the entire office force. And it is plain that the directors and officials of the telephone company knew of his misapprehension in this particular, or else assumed that he construed the bond contrary to its express provisions or in connection with the contract. If the recovery turned upon the question of whether this payment was made under mutual mistake of fact alone, or, in other words, upon the complaint and a general denial thereto, the plaintiff should recover.

But we now reach the affirmative defense, *i. e.*, in substance that the money, although paid under mistake of fact, should be retained as the payment for and settlement of plaintiff's liability to defendant company under the terms of the contract of employment, independent of and additional to any liability on the bond. This defense, as heretofore stated, is in the nature of a counterclaim or additional defense as termed, and therefore the burden of its proof under a fair preponderance of the evidence is upon the party asserting it, the defendant. And there is substantial proof of plaintiff's liability to the telephone company under that contract. The proof of shortage is conceded by all parties. There

is no dispute in the amount. It is shown by the difference between receipts of the office, according to the office books, and the deposits made in the bank. It amounts to nearly $100 a month during the time of such superintendency of the financial affairs of the company and the discovery of any discrepancy. To be true he was employed according to the contract to do well-nigh the impossible, *i. e.*, build telephone lines, be away from the office a week at a time as construction manager at a time when he has contracted "to look after all collections of all accounts due and owing," "and to account at all times for all moneys that may come into his hands or under his control in the performance of the duties and in connection with his position" as "manager, lineman, and repairer of its telephone system." But he has unmistakably contracted to do this. And concededly he has failed to even realize his duties, not to mention performing them, and a loss has resulted to the telephone company therefrom. This loss, while perhaps debatable as a liability against plaintiff, is one dependent upon the proof and the construction to be given to the contract. If the contract is open to two constructions, one supporting and the other negativing liability, resort may be had as to how the parties have construed it as between themselves. The officials for the defendant have testified that this liability was considered and discussed during the settlement under which this money was paid. Even though plaintiff paid under a mistake of fact on his part, apparently the payment was received in settlement of this contingent liability, and to that extent it was not both paid and received under mutual mistake of fact. And the trial court, under a double motion for directed verdict, has passed upon the facts adversely to plaintiff in this respect. In so doing it has held the counterclaim supported by a fair preponderance of the evidence. Its findings have the force of a special verdict, and must prevail unless clearly contrary to a preponderance of the evidence, this being a jury case. Under this rule the finding must be sustained and the judgment affirmed.

FISK, Ch. J. (dissenting). I am unable to concur in the above opinion. It seems to be the theory of my associates that the action will not lie because there was some liability on plaintiff's part to respond in damages to defendant corporation for a breach of the contract of employment, it being conceded that there was no such liability under the

bond. This reasoning, to my mind, is fallacious. It is predicated, I think, upon a mistaken view both of the law and the facts. The opinion states: "That no liability was proved under the bond, as the bond merely secured the personal honesty of the plaintiff, and there is no proof or claim of personal dishonesty. There can, in our opinion, however, be no doubt as to his probable liability to *some extent,* at any rate, under the contract," etc. There are two sufficient answers, as I view it, to the conclusions of the majority. First, the money was paid under a mutual mistake, both parties believing that there was a liability under the bond, there being no claim or suggestion of liability under the contract. Second, there was, in fact and law, no liability to any extent under the contract; but if there was liability "to some extent" this would not justify defendant in retaining the full sum of $505. The opinion does not enlighten us as to the amount of such liability, but it appears to be assumed therein that if any liability whatever existed under the contract that this will defeat plaintiff's action. I confess my inability to perceive just how defendant could, under the facts, establish a cause of action against plaintiff for a breach of the contract.

To my mind the appeal presents the simple question as to whether, in equity and good conscience, the plaintiff is entitled to the repayment of this money. It was paid, manifestly, through a mutual mistake as to defendant's legal rights and plaintiff's liability. No such rights and corresponding liability existed, and the money was paid without any consideration whatever. Under these facts it is elementary that plaintiff, in equity and good conscience, ought not to be permitted to retain such money. I think the judgment should be reversed and a new trial ordered.

CHARLES F. HELMAN v. MYRA STRONG.

(157 N. W. 986.)

Promissory note — action on — note marked "paid" — delivered to defendant by plaintiff — prior to maturity — evidence of relations between parties — intimate and friendly.

1. In an action to recover upon a promissory note executed and delivered to

plaintiff by defendant, it is conceded that the note was marked paid by plaintiff, and delivered to the maker prior to its maturity, and at the trial plaintiff sought to show that notwithstanding these facts the note was still an existing, unpaid obligation, while defendant contended that it had been paid in full. Certain oral testimony as well as letters written by defendant to plaintiff were received in evidence over defendant's objection, which testimony tended to show plaintiff's infatuation for defendant, and intimate, friendly relations existing between them, even to the extent of marriage negotiations. *Held*, not error to receive such testimony.

Prior relations — existing between the parties — competent — jury — issues of fact.

2. Evidence tending to show prior relations existing between litigants is usually competent, for what it is worth, to aid the jury in determining the issues of fact in dispute.

Promissory note — voluntary cancelation of — by plaintiff holder — obligation — discharge of — defense of — lower court — not urged there — cannot be in supreme court.

3. Appellant seeks on this appeal to urge the defense that plaintiff, under the conceded facts, voluntarily canceled the note in suit by marking it "paid," and delivered same to defendant, thereby discharging her from liability on such note, but it is held that such defense is not available, it not having been urged in the lower court.

Opinion filed April 27, 1916.

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

From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

"If there is a presumption of payment, either from lapse of time or from the possession of the evidence of the indebtedness by the debtor, the burden of showing nonpayment is on the debtor." 30 Cyc. 1265.

It is the settled law in this state that a trial court in charging a jury must cover the law of the case, at least in a general way, to the end that the jury may receive reasonable aid and enlightenment upon the essential and controlling questions in controversy. Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Moline Plow Co. v. Gilbert, 3 Dak. 241, 15 N. W. 1; Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224.

"It is presumed that an obligation delivered up to the debtor has been paid." Comp. Laws 1913, § 7935, subdiv. 9; Turner v. Turner, 79 Cal.

565, 21 Pac. 959; First Nat. Bank v. Harris, 7 Wash. 139, 34 Pac. 466; Jones v. Hill, 62 Or. 53, 124 Pac. 207; 30 Cyc. 1265.

Edward P. Kelly, for respondent.

"When note sued on is in possession of defendant, plaintiff's remedy is complete at law." McClusky v. Gerhauser, 2 Nev. 47, 90 Am. Dec. 512.

"Possession of a note by the maker, after it is matured, raises the presumption of payment, but one that may be rebutted by evidence that such possession was acquired without payment." Rock Island Plow Co. v. Balderson, 26 S. D. 399, 128 N. W. 482; Dan. Neg. Inst. § 1228; Jones, Ev. § 43; Turner v. Turner, 79 Cal. 565, 21 Pac. 959; Potts v. Coleman, 67 Ala. 221; Callahan v. Bank of Kentucky, 82 Ky. 231.

The court fully covered the law applicable to the case, in his general charge, and, if defendant desired further or more explicit instructions on the subject, he should have requested the court in proper manner, to give them. Not having done so, he cannot complain. Carr v. Minneapolis, St. P. & S. Ste. M. R. Co. 16 N. D. 217, 112 N. W. 972; 11 Enc. Pl. & Pr. 261, note 7; McCummins v. State, 132 Wis. 236, 112 N. W. 25.

Fisk, Ch. J. Action to recover upon a $300 note executed and delivered by defendant to plaintiff; also to recover $400 and interest on account for moneys claimed to have been loaned by plaintiff to defendant. Plaintiff had judgment in the lower court, pursuant to the verdict, in the sum of $700 with interest at 8 per cent on the note only, and for costs. The reason that interest was not allowed on the $400 item evidently is because of an erroneous instruction to the effect that the allowance of interest thereon was a matter of discretion with the jury. The giving of such instruction was no doubt the result of mere inadvertence on the part of the learned trial court, and had his attention been called thereto, as it should have been, he undoubtedly would have corrected the error. The respondent, however, is the party prejudiced thereby, and he has not seen fit to complain or to ask the trial court to amend the verdict and judgment so as to include interest thereon at the legal rate.

The specifications of error are all aimed at rulings and instructions appertaining to the first cause of action, which involves the $300 note. Hence the verdict and judgment, in so far as the second cause of action is concerned, cannot be disturbed. True, near the close of appellant's brief, counsel say: "It is true that the note constituted but one of the

causes of action alleged in plaintiff's complaint. Both causes were, however, submitted to the jury at the same time, and the verdict is for a lump sum, from which it is impossible to calculate just how much was allowed upon the note and what sum upon the account for money loaned. The bundle of letters was also entirely irrelevant to the issues presented by the second cause of action; and deficiency in the charge of the court on that point would be as prejudicial to defendant upon the second cause of action as the first." We deem this contention unsound. The verdict clearly discloses that but $400 was allowed on the account, while the full amount of the note ($300) and interest thereon were allowed on the first cause of action. The bundle of letters referred to was, as counsel state, entirely irrelevant to the issues under the second cause of action, and, this being true, we are unable to perceive just how the instruction relative to such letters could have operated to prejudice defendant in her defense as against the second cause of action, and counsel fails to enlighten us on this point by argument or otherwise. We shall therefore confine ourselves to a consideration of the alleged errors in so far only as they have a bearing on the first cause of action, and the specifications need be treated only in a general way.

We are convinced that the rulings admitting the oral testimony and also the letters tending to show the relations existing between these parties were proper. While such testimony was entitled to but little weight upon the issue as to whether the note was "past due and payable, and that no part of the same has been paid," as alleged in the complaint, still we deem such testimony proper to go to the jury for what it was worth to be considered in connection with the other evidence in the case.

This brings us to a consideration of the remaining specifications. It is well at this point to refer to the issues, and to the proof offered in support thereof. As to the cause of action on the note the complaint, after alleging in the usual manner the execution and delivery thereof by defendant to plaintiff, alleges in paragraph 2 the following: "That said note is now past due and payable, and that no part of the same has been paid; that notwithstanding the fact that said note is now in the possession of the defendant, this plaintiff is the owner and holder thereof, and the indebtedness therein represented is due and owing to this plaintiff." The answer puts in issue by a specific denial everything alleged in the said paragraph 2, and also affirmatively alleges "that said note has long

since been paid in full by said defendant to said plaintiff, and that said defendant is in no wise indebted to said plaintiff thereon." It would appear therefore that two issues were intended to be raised regarding such note. First, whether the same, at the time of the commencement of the action, was a live and existing obligation, or in other words, whether plaintiff, as alleged, "is the owner and holder thereof, notwithstanding the fact that said note is now in the possession of the defendant;" and, second, whether the same has been paid.

The proof offered at the trial on the part of both parties, however, seems to have been directed to the single inquiry as to whether the note had in fact been paid. Counsel for both parties evidently proceeded upon the theory that a recovery might be had on the note, even though the payee had voluntarily canceled the same and delivered it to the maker, provided plaintiff could successfully meet the burden of proving nonpayment, which burden was cast on him by the presumption created by Compiled Laws 1913, § 7963, subdiv. 9. Such statute creates a presumption of payment from the mere fact that the note was delivered up to the debtor. But here it is conceded that plaintiff voluntarily and intentionally *canceled* the note by marking it "paid," and delivered such canceled obligation to his debtor, and this was done long prior to its maturity. It is not contended that he was induced to do so either through fraud or mistake. Whether this operated to discharge liability on the note we do not here determine as such defense was not properly raised. On this point, however, see Compiled Laws 1913, § 7004, subdiv. 3. This section provides: "A negotiable instrument is discharged . . . by the intentional cancelation thereof by the holder." See also 7 Cyc. 1048 and numerous cases cited. 3 R. C. L. 1270; Whitcomb v. National Exch. Bank, 123 Md. 612, 91 Atl. 689; Union Trust Co. v. Evans, 52 Pa. Super. Ct. 498, 501; McCormick v. Shea, 50 Misc. 592, 99 N. Y. Supp. 467; Schwartzman v. Post, 94 App. Div. 474, 84 N. Y. Supp. 922; Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

Such defense, however, was not raised in the court below, nor in this court until raised by appellant's counsel in a supplemental brief filed since the oral argument, and the query is whether in presenting it for the first time in this court he is too late? This query must be answered in the affirmative. The case was tried in the court below upon the theory

that the only defense was a plea of payment. The only issue which the parties required the trial court to determine was whether the note had been paid. This question was submitted to the jury under full and fair instructions, and they found that the note had not been paid. In no manner did defendant's counsel assert that the note was discharged under the provisions of § 7004, subdiv. 3, Compiled Laws 1913, by the intentional cancelation thereof by the plaintiff. The defense was never suggested in the court below. The defendant neither moved for a directed verdict nor for a new trial. Neither was this defense even suggested by any specifications served with the notice of appeal. To permit this defense to be asserted at this time would be permitting defendant not only to change the theory of the defense, but in effect to assert for the first time in the appellate court a defense never thought of in the court below. This is not permissive. A contrary decision on this question would directly conflict with repeated decisions of this court, and would do violence to well-settled legal principles uniformly adopted by the courts of this country. See Peterson v. Conlan, 18 N. D. 205, 119 N. W. 367; Movius v. Propper, 23 N. D. 452, 136 N. W. 942; Ugland v. Farmers' & M. State Bank, 23 N. D. 536, 137 N. W. 572; Harris v. VanVranken, 32 N. D. 238, 155 N. W. 65, 72; Felton v. Midland Continental R. Co. 32 N. D. 223, 155 N. W. 23; Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648; 3 C. J. § 590, 618 et seq.

It follows that the judgment is correct, and the same is accordingly affirmed.

ENOCH MOWER v. CHARLES RASMUSSON.

(158 N. W. 261.)

Lease — conditions — tenant — growing timber — not to cut — provision — material — violation — ground for cancelation.

1. A condition in a lease which provides that the tenant shall not cut growing timber is a material provision, and a violation thereof may be made a ground for the cancelation of such lease and a demand for the surrender of the premises.

The term "lease" — imports a contract — possession — lands — chattels.

2. The term "lease" imports a contract by which one person devests himself of, and another person takes possession of, lands or chattels for a term.

Contract — parties — designation of — owner of land — provisions as to working land — lease — violation of terms — cancelation — forcible entry and detainer — action in — justice's court.

3. A contract which designates the party of the second part as owner of a certain farm, and provides that the party of the first part shall have the use and occupancy thereof for a certain term and shall have the right to pasture a horse and cow thereon, and shall sow and plant the land in such crops as the owner may direct and furnish all labor and machinery necessary thereto, though the owner is to furnish the seed, and which further provides that the title to the said crops shall remain in the owner of the land until the division thereof, and that, upon the faithful performance of the covenants and agreements of the party of the first part, the owner will give and deliver to him upon said premises one half of the grain raised and pay one half of the thresh bill, is, as to the land and buildings, a lease, and a violation of the terms thereof, which is therein made a ground for a cancelation thereof, will after such cancelation, justify an action in forcible entry and detainer in a justice's court for the possession of said land and buildings under the provisions of ¶ 4 of § 9069 of the Compiled Laws of 1913.

Lessee — denying owner's title — estoppel.

4. A lessee is estopped from denying the title of his lessor.

Opinion filed May 20, 1916.

Appeal from the District Court of McHenry County; *A. G. Burr,* J.

Action in forcible entry and detainer in justice's court under the provisions of § 9069, Compiled Laws of 1913. Judgment for defendant. Plaintiff appeals.

Reversed.

Albert Weber, for appellant.

"A contract must be interpreted so 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; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101; Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803.

No particular words are necessary to create a lease, and whatever is sufficient to explain the intent of the parties that one shall devest him-

self of the possession, and the other come into possession, for a determinate time, amounts to a lease. See 24 Cyc. 894, 896.

Possessory actions, as between landlord and tenant, are, as a rule, within the jurisdiction of a justice of the peace, and, in this case, an action in forcible entry and detainer lies. See 24 Cyc. 454, 1399, 1401; Murry v. Burris, 6 Dak. 170, 42 N. W. 25; McDonald v. Stiles, 7 Okla. 327, 54 Pac. 487; McLain v. Nurnberg, 16 N. D. 144, 112 N. W. 243; Wood v. Garrison, 139 Ky. 603, 62 S. W. 728; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027.

D. J. O'Connell, for respondent.

In ascertaining the nature of a written instrument, and its meaning, the writing itself must control. McNeal v. Rider, 79 Minn. 153, 79 Am. St. Rep. 441, 81 N. W. 830; Strangeway v. Eisenman, 68 Minn. 395, 71 N. W. 617; Bowers v. Graves & V. Co. 8 S. D. 385, 66 N. W. 931.

The respondent here was only a "cropper," and there was no relation of landlord and tenant. In case of a "cropper" the landowner has title to the crops until division, where a "tenant" has the right of property and makes the division between himself and landlord. Taylor v. Donahoe, 125 Wis. 513, 103 N. W. 1099; Kelly v. Rummerfield, 117 Wis. 620, 98 Am. St. Rep. 951, 94 N. W. 649.

If the relation of landlord and tenant did not exist by virtue of the contract, then a breach of its terms would not create such relationships, and warrant an action in entry and detainer. Bowers v. Graves & V. Co. 8 S. D. 385, 66 N. W. 933.

The relation of master and servant only existed here. Taylor v. Donahoe, supra; Strain v. Gardner, 61 Wis. 174, 21 N. W. 35; Kelly v. Rummerfield, 98 Am. St. Rep. 951, and notes; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415.

A "cropper" is not a tenant, and the laws regulating the relation of landlord and tenant are not applicable to the relationship between landowner and cropper. Cedarberg v. Guernsey, 12 S. D. 77, 80 N. W. 159.

BRUCE, J. Although this appeal is from a judgment of the district court of Towner county, it really involves the correctness of the ruling of the justice court in overruling a demurrer to the complaint. The

action was one in forcible entry and detainer for the immediate possession of real property, and damages for the detention thereof, and was brought under § 9069 of the Compiled Laws of 1913. The sole questions involved are whether the contract under which the defendant held the land was a lease, and such a one as would support an action of forcible entry and detainer, and if so, whether the acts of the defendant complained of constituted grounds for a forfeiture of the same and a recovery of the possession. These acts were the violation of the terms of the contract by "cutting down growing timber, and, instead of using the manure to fertilize the soil, wilfully throwing the same into a river which ran through the premises, and polluting the same, and allowing the buildings to become out of repair."

The contract or lease which was involved provided, among other things, that the defendant should till the farm in a good and husband-like manner; that the defendant should have the use and occupancy of the premises except one room, which the plaintiff reserved to himself for storage purposes; that the plaintiff should have the right to turn a horse and cow into the pasture during the summer time; that the defendant would commit no waste upon such premises, and that he would properly care for and keep all buildings, fences, timber, and shrubbery upon said land, and would not remove any of the straw and manure from said farm, but use the same to the best advantage in fertilizing the land; that the defendant should have the right to use all down dead wood, but not to cut down any of the standing timber.

In addition to this the contract or lease provided that the defendant would sow and plant the land in such crops as the plaintiff might direct; that the plaintiff was to furnish all seed necessary to sow and plant said land, though the defendant was to clean the same; that the defendant should furnish, at his own cost and expense, all proper and convenient tools, teams, farm implements, and machinery, and labor to cultivate said farm, and should furnish and provide all proper assistance and hired help in and about the cultivation and management of the same. It further provided that until the division the title of the crops should remain in the owner of the land, but that upon the prompt and faithful performance of all the foregoing agreements and conditions by the defendant, the plaintiff should give and deliver upon said premises one half of the grain raised thereon, the plaintiff to take his half of said

crops at the machine and to pay one half of the thresh bill; the defendant to furnish all fence posts standing in the timber, and the wire necessary to keep up and maintain the fences upon said premises, and to do the work; that the defendant was to have the 1913 crop of hay grown on said lands at $1.75 per ton, and the plaintiff the 1916 crop unless the defendant should rerent the premises.

The contract also proided that upon the breach of any of the terms of the contract, the plaintiff might enter upon said premises and take full and absolute possession of the same.

The defendant and respondent denies in his brief that the acts complained of, namely, the cutting of the timber and the throwing of the manure into the river, and the allowing of the buildings to become out of repair, justify the re-entry or demand of possession by the plaintiff. This point does not appear to be seriously argued. At any rate there is no merit in it. The cutting of standing timber in North Dakota at any rate, to say nothing of the wasting of the manure or the neglect of the buildings, is surely the breach of a material part of a contract, and will certainly justify a cancelation of a lease and a demand for the return of the premises. See Wood v. Garrison, 139 Ky. 603, 62 S. W. 728; Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027.

Counsel for respondent and defendant, however, argues that even if this be so, the contract was not a lease, and that the action of forcible entry and detainer would, therefore, not lie, and the justice of the peace had no jurisdiction.

He is no doubt correct in his contention that unless force, fraud, intimidation, or stealth has been shown in the act of acquiring the original possession, or the use of force in the keeping of it after possession has been peaceably obtained, or the holding is in defiance of the right of a purchaser under a mortgage or judicial sale, the action of forcible entry and detainer will not lie in a justice's court, except in the case of a lease, under the clause of § 9069 of the Compiled Laws of 1913, which authorizes it "when a lessee in person or by subtenant holds over after the termination of his lease or the expiration of his term, or fails to pay his rent for three days after the same shall be due." He is in error, we believe, however, when he contends that the relationship of the parties, in so far as the land was concerned, was not that of landlord and tenant, and that the contract was not a lease.

Counsel confuses the interest in the crops with the interest in the land, and it is not necessary for us to pass upon the former question. No matter what may have been the interest of the parties in these crops, and even though as to them the defendant may have been a mere cropper, a tenant in common, or a party in a joint adventure, and on this point we express no opinion, as to the land and buildings he was a tenant. "He took under a contract for a year or more. He occupied the house He had an interest or estate in the land. He paid the rent in grain. He might bring his own cattle on the premises and derive exclusive benefit therefrom." Jackson ex dem. Colden v. Brownwell, 1 Johns. 267; Strain v. Gardner, 61 Wis. 174, 21 N. W. 35.

These facts would, under the authorities and in all reason and logic, make him a lessee as to the land and the buildings, and bring him within the provisions of the statute which is before us. "The word 'lease' has a settled technical import. It imports a contract by which one person, either natural or artificial, devests himself or itself of, and another person takes possession of, lands or chattels, for a term." 3 Words & Phrases, 2d series, 54; Moorshead v. United R. Co. 203 Mo. 121, 100 S. W. 611. The contract in question comes within this definition.

We realize that the policy of the law and of our statute is not to allow such complicated and important matters as the title to land to be adjudicated in justice's court. Here, however, the title to land was not involved, but the right to the possession merely. The title in the plaintiff indeed had to be recognized and admitted by the defendant by his mere act of signing the lease and entering into the possession thereunder, and he was thereafter estopped to deny it. Strain v. Gardner, supra; 24 Cyc. 454.

We have carefully read the cases cited by respondent, but, with one exception, none of them involve the right to the possession of land, and merely involve the right to and the interest in the crops grown thereon.

The one case excepted is the case of Strain v. Gardner, supra, which we have just cited. Rather than holding for the defendant, this case holds directly contrary to his contentions.

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

E. T. TURNER v. JULIUS AFFELDT.

(158 N. W. 263.)

Contract — breach of — damages — action to recover — consideration — material and labor — heating plant — measure of damages — stipulated price — cost of performance.

In an action to recover damages for the breach, by defendant, of a contract by which plaintiff, for a stated consideration, was to furnish the material and labor necessary for the installation of a heating plant and certain plumbing in defendant's residence, the measure of damages is the excess, if any, of the stipulated price over the cost to plaintiff of performing the contract on his part.

Opinion filed May 20, 1916.

Appeal from County Court, Wells County; *Fred Jansonius,* J.

From a judgment in plaintiff's favor, defendant appeals.

Reversed.

Maddux & Rinker, for appellant.

The complaint fails to state facts sufficient to constitute a cause of action. Plaintiff cannot recover for loss or destruction of the materials he had provided. His damages are limited to the profit he would have made had the contract been completed. Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250; Code, 7146, and cases cited; Davis v. Tubbs, 7 S. D. 488, 64 N. W. 534; Hickok v. Adams Co. 18 S. D. 14, 99 N. W. 77; Jewett v. Wilmot, 51 Neb. 700, 71 N. W. 775; Bates v. Diamond Crystal Salt Co. 36 Neb. 900, 55 N. W. 258; Cargill v. Thompson, 57 Minn. 534, 59 N. W. 638.

Instructions must be considered as a whole. Buchanan v. Minneapolis Threshing Mach. Co. 17 N. D. 343, 116 N. W. 335; McBride v. Wallace, 17 N. D. 495, 117 N. W. 857.

Appeal must be determined on the sufficiency of the complaint. Krug v. Kautz, 21 S. D. 461, 113 N. W. 623; H. C. Behrens Lumber Co. v. Lager, 25 S. D. 139, 125 N. W. 574.

No appearance or brief by respondent.

Fisk, Ch. J. This is an appeal from a judgment of the county court of Wells county. The case was tried to a jury and a verdict returned in

plaintiff's favor for damages in the sum of $250, upon which judgment was entered, and from which this appeal is prosecuted.

The facts, briefly stated, are substantially as follows: Plaintiff seeks to recover damages from the defendant for the breach of an alleged agreement, dated April 14, 1914, whereby the latter, for a consideration named, engaged plaintiff to install a heat and water plant in defendant's residence, pursuant to which contract plaintiff claims to have ordered, and caused to be shipped from Minneapolis, the materials and supplies necessary to install such plant, to the railway station nearest defendant's residence, the invoice for same being dated May 29, 1914. Defendant refused to permit plaintiff to install such plant, claiming that the alleged contract was secured through fraud, by writing the alleged contract above defendant's signature without his knowledge or consent, and that he signed the contract in blank at plaintiff's request upon being assured by plaintiff that his signature was to be used only for the purpose of securing a list of persons who were in the market for heating plants. A formal notice by letter, dated May 28th, of his repudiation of the contract was mailed to plaintiff in Fessenden.

Upon the trial in the court below plaintiff offered no evidence showing a loss of profits suffered by him by being deprived of the right of installing the plant as per the alleged contract, he being content to allege and prove upon the trial, over the objections of defendant, that plaintiff incurred a loss of a stated amount by thereafter using the material or most of it in installing a plant for one Ole Bakken. Defendant objected to the introduction of any evidence under the complaint, upon the ground that it fails to state facts sufficient to constitute a cause of action, which objection was overruled. He also moved to strike out the evidence at the close of plaintiff's case relative to the cost of securing a new contract and the installing of the plant elsewhere, which motion was also overruled, and at the close of the entire testimony he moved for a directed verdict, which motion was likewise overruled. Appellant complains of these rulings and also of certain instructions relative to the measure of damages. The specifications of error in the main relate in their final analysis to the question of the proper measure of damages arising from defendant's breach of the contract. Plaintiff was permitted, over defendant's objection, to show that he installed the plant for Bakken at a certain sum much less than the consideration

which he claimed the defendant agreed to pay him. This, for reasons hereafter stated, constituted prejudicial error necessitating a new trial.

No proof whatever was offered by plaintiff to establish the value to him of the alleged contract with defendant, had it been fulfilled. In other words, it is nowhere made to appear that the plaintiff would have made a profit had he installed the plant pursuant to contract. In so far as the evidence discloses he might have suffered a loss instead of a profit by fulfilling such contract. Manifestly the damages sought to be recovered by plaintiff for the breach by defendant cannot be properly stated to have been in the contemplation of the parties at the time the contract was entered into. Plaintiff was entitled to the benefit of his bargain,—nothing more,—and in order to recover he must establish what, if anything, such bargain was worth to him. It was therefore incumbent upon him to prove what sum the labor and materials necessary for the installment of the plant would reasonably cost him at or about the time the plant was to be installed, and his damage would be the excess, if any, of the contract price above such sum. Sedgw. Damages, 9th ed. § 614, and numerous cases cited, including Peck-Hammond Co. v. Heifner, 136 Ala. 473, 96 Am. St. Rep. 36, 33 So. 807; Swanson v. Andrus, 83 Minn. 505, 86 N. W. 465; Kreamer v. Irwin, 46 Neb. 827, 65 N. W. 885. See also Jewett v. Wilmot, 51 Neb. 700, 71 N. W. 775; Harness v. Kentucky Flour Spar Co. 149 Ky. 65, 147 S. W. 934, Ann. Cas. 1914A, 803 and cases cited. See also 8 R. C. L. pages 454, 501, 504, and especially 511, as to the manner of determining the amount of profit and extent of recovery.

The above rule is too firmly settled to require further discussion.

In view of another trial we deem it proper to state that the ruling holding that the complaint states a cause of action, and also the ruling denying defendant's motions for a directed verdict, were technically correct, for the reason that such complaint and the evidence introduced thereunder disclose a contract and its breach by defendant. Hence a cause of action was alleged, and plaintiff was entitled to recover nominal damages in the absence of proof of his actual loss under the proper measure of damages.

The judgment appealed from is reversed and the cause remanded for further proceedings according to law.

A. R. SMYTHE, as Trustee of the Hilmen Mercantile Company, a Corporation, Bankrupt, v. JOHN J. MURI.

(158 N. W. 264.)

Claim and delivery — mortgagee — suit by — prematurely brought — chattels — possession of — mortgagor — default by — prior to trial — verdict for mortgagor — for full value — mortgage debt disregarded — contrary to law.

1. Where a mortgagee prematurely sues in claim and delivery through which he obtains possession of the chattels covered by his mortgage before he is by the terms thereof entitled to such possession, but thereafter and prior to the trial of the action the mortgagor defaults in payment of the debt, a verdict finding that the defendant, mortgagor, is entitled to the possession of the chattels, and awarding him the full value thereof regardless of the mortgage debt, is contrary to law.

Claim and delivery — action in — gist of — possession of property — at commencement of action — right to — change of — before trial — verdict and judgment should adjust equities — recovery by defendant — actual damages only.

2. While the gist of the action in claim and delivery is the right of the plaintiff to the immediate possession of the property at the commencement of the action, yet if the right of possession changes between the commencement of such action and the date of trial, the verdict and judgment should adjust the equities between the parties as such equities exist at the time of the trial. It is accordingly held under the established facts in the case at bar that defendant was entitled to recover from the plaintiff only his damages for the unlawful detention of the property and costs of the action.

Opinion filed May 22, 1916.

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

From an order denying plaintiff's motion for a new trial, he appeals.

Reversed.

Victor Wardrope (*Cowan & Adamson* and *H. S. Blood*, of counsel), for appellant.

A mortgagee of personal property has the right of possession at any time, under a mortgage which provides that the mortgagee may take possession "whenever it may choose to do so," upon exercising such right. Jones, Chattel Mortg. p. 191; Russell v. Fillmore, 15 Vt. 130; Comp.

Laws 1913, §§ 6740, 6758; Wells v. Chapman, 59 Iowa, 658, 13 N. W. 841; Rich v. Milk, 20 Barb. 616.

Where the mortgage contains the usual "insecure clause," the mortgagee may take possession. 7 Cyc. 13, and cases cited.

The mortgagee's right to possession came into existence, in any event, before the trial of the action, and at the time of trial the mortgagee was entitled to possession. Therefore, verdict and judgment on trial in favor of the mortgagor were and are contrary to law. See Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 835.

Even if defendant had been entitled to a verdict for possession, the alternative part of the verdict should have been only for the value of defendant's interest therein, and not for the full value of the property. Code, § 7635; 7 Cyc. 17, and cases cited; Lovejoy v. Merchants' State Bank, 5 N. D. 623, 67 N. W. 956, and cases there cited; Force v. Peterson Mach. Co. 17 N. D. 220, 116 N. W. 84; Comp. Laws 1913, §§ 6721, 7635; Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Wadsworth v. Owens, 17 N. D. 173, 115 N. W. 667; Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 837; Cushing v. Seymour, S. & Co. 30 Minn. 301, 15 N. W. 249; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550.

Where the complaint sets forth an indebtedness in a certain amount, a general denial simply denies the same in the amount set forth. Callanan v. Williams, 71 Iowa, 363, 32 N. W. 383; Dillon v. Spokane County, 3 Wash. Terr. 498, 47 Pac. 889; Higgins Carpet Co. v. Latimer, 165 Pa. 617, 30 Atl. 1050; Edgerton v. Power, 18 Mont. 350, 45 Pac. 204; Hall v. Huffman, 32 Mo. 519.

W. M. Anderson, for respondent.

After the execution of a chattel mortgage, the mortgagor may agree to a change of possession of the property without a new consideration. This means that when the mortgage is made, the mortgagor is entitled to the possession of the property. A mortgagee cannot take possession whenever he may choose to do so. Comp. Laws 1913, § 6740; Humpfner v. D. M. Osborne & Co. 2 S. D. 310, 50 N. W. 89; 7 Cyc. 12 b; Nash v. Larson, 80 Minn. 458, 81 Am. St. Rep. 272, 83 N. W. 451.

Complaint as to instructions cannot be made where, before they were given, they were submitted to counsel for both parties for inspection and examination, and no objection was made, or request for further or

other instructions. State v. Fujita, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159; Speer v. Phillips, 24 S. D. 257, 123 N. W. 722.

No question not presented to the lower court in some form at the trial, and some ruling had thereon, can be raised on appeal. McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341; Hatcher v. Northwestern Nat. Ins. Co. 106 C. C. A. 225, 184 Fed. 23; Poirier Mfg. Co. v. Kitts, 18 N. D. 556, 120 N. W. 558.

Nor will a judgment be disturbed or reversed on any theory not advanced and relied upon in the trial court. McPherson v. Julius, 17 S. D. 98, 95 N. W. 428; Delaney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499; also Houghton Implement Co. v. Vavowski, 19 N. D. 594, 125 N. W. 1024.

Fisk, C. J. Plaintiff, as trustee in bankruptcy of the Hilmen Mercantile Company, brought this action to recover the possession of certain personal property covered by a chattel mortgage given by defendant to such company. The action was instituted in June, 1913, and the promissory notes, aggregating the sum of $2,700, which were secured by such mortgage, were on their face not due until October 1, 1913. In his complaint plaintiff asserted his right to the immediate possession of the securities under the usual insecurity clause in the mortgage authorizing the mortgagee to take possession and foreclose whenever it deemed itself unsafe or insecure. The mortgage contains other stipulations authorizing the mortgagee, for stated reasons, to accelerate the due date of the indebtedness at its option; but neither by the complaint nor the proof are such grounds relied on, and we for that reason do not consider them. The sole theory upon which the case appears to have been tried by plaintiff in the lower court is that the mercantile company as such mortgagee had reason to deem, and in fact did in good faith deem, said debt unsafe and insecure, and acting on the authority given in the mortgage it elected to treat the indebtedness as due, and to foreclose its mortgage; the object of this action being to recover possession of the chattels for the purpose of such foreclosure. Indeed the only issue contested at the trial was plaintiff's right to proceed under such insecurity clause, and under the well-settled rule of this court the parties will not be permitted to now raise other questions or to advance new theories.

The cause was not tried until about February 1st, 1915, being sixteen

months after the maturity of the debt. The jury found in defendant's favor, and in accord with the court's instructions returned a verdict finding that he is entitled to the possession of the property described in the complaint, and fixing the value, at the time of the taking by the plaintiff, at the sum of $1,100. This, in the face of the established fact that the Mercantile Company at that time held a past-due mortgage thereon upon which there was owing a sum considerably more than double the value of such chattels. Upon such verdict a money judgment was ordered and entered in defendant's favor for $1,100 and costs.

Plaintiff moved for a new trial on the grounds of insufficiency of the evidence to sustain the verdict and that the verdict is against law; also errors in law occurring at the trial, which motion was denied, and the appeal is from the order denying such motion.

We are agreed, for reasons hereinafter stated, that the learned trial court erred in denying such motion. Briefly stated, our reason for this conclusion is that the verdict is clearly against law. In the light of the above facts the verdict and judgment are manifestly unjust and inequitable, and cannot be sustained. Conceding, as was found by the jury, that plaintiff was not, at the date of the commencement of the action, entitled to the possession of these chattels, still at the date of the trial it was established beyond peradventure that he was entitled to such possession, and in view of the fact that the indebtedness far exceeded the value of such personalty, the only proper verdict and judgment which could have been rendered in defendant's behalf was for such damages as he may have sustained for the unlawful detention of the property up to October 1, 1913, the maturity of the mortgage debt, and the costs of the action. This is too firmly settled to be now open to serious controversy. See McDonald v. Schantz, 44 Okla. 648, 146 Pac. 36; Brook v. Bayless, 6 Okla. 568, 52 Pac. 738; Deal v. D. M. Osborne & Co. 42 Minn. 102, 43 N. W. 835; Chase Bros. Piano Co. v. Conners, 182 Ill. App. 418; Farwell v. Hanchett, 120 Ill. 573, 11 N. E. 875; Wildman v. Radenaker, 20 Cal. 616; Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Cobbey, Replevin, 2d ed. §§ 1124 and 1148, and cases cited. See also note to Steidl v. Aitken, 30 N. D. 281, L.R.A.1915E, 192, 152 N. W. 276; and State Bank v. Hurley Farmers' Elevator Co. 33 N. D. 272, 156 N. W. 921.

We quote from McDonald v. Schantz, 44 Okla. 648, 146 Pac. 36, as

follows: "The court found, and so instructed the jury, that at the commencement of the action the plaintiff was entitled to the immediate possession of the property and to damages for the wrongful detention thereof. Subsequent to the commencement of the action, but before trial, the plaintiff made default in the payment of the debt secured by said mortgage. The defendant was therefore entitled to possession of said property in order to satisfy his lien. It would have been inequitable for the court to have refused to allow the defendant to assert his right to the possession of the property, and to have compelled him, immediately after the termination of this action, to institute another action to replevin the property, in order to subject it to his lien. True, the gist of the action is the right of the plaintiff to the immediate possession of the property at the commencement of the action, but if the title or right of possession to the property changes subsequent to the commencement of the action, and prior to the date of the trial, the judgment should adjust the equities between the parties as such equities exist at the time of the trial; the adjustment of such equities being necessary for a final and complete determination of the controversy."

In Brook v. Bayless, 6 Okla. 568, 52 Pac. 738, the supreme court of Oklahoma also said: "Even though the rights of the defendants in error to the possession of the property terminated before the trial of the cause, if they were entitled to the possession when the action was commenced and the property was at and before the commencement of the action wrongfully withheld from them by the plaintiff in error, they were entitled to a verdict, not for a return of the property, but for the value of their interest therein and for damages and costs. (Cobbey, Replevin, § 1124.)

"The judgment in the replevin should, so far as possible, adjust all the equities which arise between the parties to the suit in its progress. (Cobbey, Replevin, § 1148.) The gist of the action of replevin, and that which determines the right of the plaintiff to a judgment, is his right to the immediate possession of the property at the commencement of the action, and if the title or rights of the parties to the property should change *pendente lite,* the judgment should adjust the equities between the parties, as such equities stand at the time of the rendition of the judgment."

And in Deal v. D. M. Osborne & Co. we quote from the Minne-

sota court as follows: "In replevin, where a plaintiff's title or right of possession is legally devested after suit brought, and before trial, he can, as against the owner or person entitled to the possession, recover nothing beyond costs, and such damages as he may have sustained up to the time his title or right of possession was devested, and the court will always hear evidence to show such change in the ownership or right of possession, which makes it improper to award a return, or full value as damages for a failure to make return. But even if the execution of the Cater mortgage did not give defendants the right to the possession of the property, yet clearly the alternative value which plaintiff was entitled to, in case a return could not be had, was not the full value of the property, but merely of her interest in it, which was the value less the amount of defendants' mortgages, analogous to the rule which obtains in actions for wrongful conversion. Cushing v. Seymour, S. & Co. 30 Minn. 301, 15 N. W. 249; Torp v. Gulseth, 37 Minn. 135, 33 N. W. 550. Otherwise a plaintiff, in case he collected the judgment for the alternative value, would have the full value of the mortgaged property without having paid the mortgage. Of course, if he had a return of the specific property, he would hold it, as before, subject to the lien of the encumbrance. For this error in the charge of the court a new trial must be had."

The above authorities are in harmony with the rule of our Code § 7635, Compiled Laws, which provides: "In an action for the recovery of specific personal property the jury must find by their verdict the facts as the case may be as follows. . . . 3. In case they find against the plaintiff and the property has been delivered to him, and the defendant in his answer claims a return of the property, they must find the value thereof, *or of the defendant's interest therein, if less than its full value,* at the time of the taking, and they must also assess the damages, if any are claimed in the answer, which the defendant has sustained by reason of the taking and detention of such property."

They are also in harmony on principle with the somewhat analogous and well-settled rule that where a mortgagee has converted the security, he may, in an action for such conversion, plead and prove, in mitigation of damages, the amount of the mortgage indebtedness at the date of the conversion.

It is for the above reasons entirely clear, we think, that even if

the action was prematurely brought and defendant thereby wrongfully deprived of the possession of his property from June until October, 1913, still at the time of the trial and for a long time prior thereto his right to such possession had ceased. Hence he was at the date of the verdict and judgment neither entitled to a return of the property nor to its value, but only to damages for its unlawful detention and to costs as above stated.

There is considerable force to appellant's contention that the evidence is insufficient to support the verdict upon the question as to whether at any time plaintiff's possession was wrongful. However, we deem the evidence sufficient to require its submission to the jury, and we are not prepared to decide that the trial court abused its discretion in refusing to interfere with the verdict on such ground. In view of another trial at which the evidence may not be the same as at the last trial, we deem it unnecessary to say more on this point; nor do we deem it necessary to notice the other specifications, as the questions involved are either eliminated by our holding herein, or they will probably not arise on the next trial.

The order appealed from is hereby reversed and the cause remanded for further proceedings according to law. Appellant to recover his costs of the appeal.

C. E. BLACKORBY v. W. G. GINTHER.

(158 N. W. 354.)

Proof — proper order of — witnesses — examination of — form of questions — court — discretion of — rulings on — not disturbed — except for abuse.

1–2. Matters pertaining to the proper order of proof, the mode of examination of witnesses, and the form of questions, rest largely within the discretion of the trial court, and its rulings will not be disturbed except for abuse of discretion.

Rulings of court — evidence — admission or rejection of.

3–5. Certain rulings upon the admission and exclusion of evidence considered, and, for reasons stated in the opinion, *held* to be proper.

Deposition — use of by counsel — in argument to jury — memory — to refresh.

6. No error was committed by permitting counsel to use a deposition for the purpose of refreshing his memory during his argument to the jury.

Trial court — remarks of — on trial.

7. Certain remarks of the trial court are held to be nonprejudicial.

Verdict — evidence — substantial support in — conflicting evidence — court will not weigh — insufficiency of evidence — new trial — denial of — order — not disturbed.

8. Where a verdict has substantial support in the evidence, the supreme court will not weigh conflicting evidence; nor will it disturb such verdict or an order denying an application for a new trial based upon alleged insufficiency of the evidence.

New trial — grounds — surprise — granting or refusing — trial court — discretion — supreme court — will not disturb — except for abuse.

9. The granting or refusing of new trials on the ground of surprise rests in the sound judicial discretion of the trial court, and its ruling will not be disturbed by the supreme court except for abuse of discretion.

Opinion filed May 31, 1916.

Appeal from District Court of Ramsey County, *Buttz*, J.

From a judgment and an order denying a new trial, defendant appeals.

Affirmed.

Cuthbert & Smythe, for appellant.

The refusal of the trial court to allow cross-examination of a witness upon matters brought out on direct examination and relevant to the issue is a denial of an absolute right. Abbott, Civil Jury Trials, 3d ed. p. 220; Graham v. Larimer, 83 Cal. 173, 23 Pac. 286; Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985; United States v. Knowlton, 3 Dak. 58, 13 N. W. 573; Reeve v. Dennett, 141 Mass. 207, 6 N. E. 378; Lynch v. Free, 64 Minn. 277, 66 N. W. 973; Prout v. Bernards Land & Sand Co. 25 L.R.A.(N.S.) 683, and note, 77 N. J. L. 719, 73 Atl. 486; Sayres v. Allen, 25 Or. 211, 35 Pac. 254; Yarborough v. Davis, — Tex. App. —, 15 S. W. 713.

Immaterial questions propounded to a witness in an insulting, insolent manner, and tending to confuse and embarrass the witness, and apparently with only such purpose, are objectionable, and when proper objection is made, it is error to allow such questions. State v. Taylor,

118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; Clink v. Gunn, 90 Mich. 135, 51 N. W. 193; People v. Durrant, 116 Cal. 179, 48 Pac. 75, 10 Am. Crim. Rep. 499; Heffernan v. O'Neill, 1 Neb. (Unof.) 363, 96 N. W. 244.

It is the plain duty of the court where negative testimony is introduced to call the attention of the jury thereto. Jones, Ev. 2d ed. § 898; Farmers' & M. Bank v. Champlain Transp. Co. 23 Vt. 186, 56 Am. Dec. 78.

"The debtor may subject the chose in the hands of the assignee to all equities against the assignor and all defenses he had against the assignor, prior to the time when he received notice of the assignment, but as to equities arising thereafter, the rule is otherwise." 4 Cyc. 89, 90.

Declarations of the assignor of a chose in action, affirmatively shown to have been made while he was the owner thereof and before the assignment and notice to the debtor, are competent evidence against the assignee and all claiming under him; but declarations of the assignor are not competent in favor of himself, or his assignee. 16 Cyc. 993.

It is prejudicial and reversible error for the court to permit counsel in addressing the jury to reread a deposition already offered and read as evidence. It is also prejudicial error for the court to reprimand or criticize a witness while on the stand and apparently trying to give his testimony in an honest, fair manner. Zink v. Lahart, 16 N. D. 56, 110 N. W. 931; note in 42 L.R.A.(N.S.) 430, under title of "remarks of counsel."

Where there is conflict in the evidence upon which the verdict is based, and the trial court has refused to set it aside, the verdict will not be disturbed by the appellate court. But a verdict must be based upon "legally sufficient evidence." F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011.

Flynn & Traynor, for respondent.

Under the American rule, the cross-examination of a witness is limited to an inquiry as to the facts and circumstances connected with the matters stated in his direct examination. In the applica-

tion of this rule much is left to the discretion of the trial court. Abbott, Civil Jury Trials, 3d ed. p. 220.

Where a party feels that the instructions as given the jury by the trial court are not sufficiently clear, or that they do not state all the law applicable, or that there is some special phase of case neglected or overlooked, it is his duty to call the court's attention to any such matter, and to request instructions. Jones, Ev. 2d ed. § 898.

"A party who offers the declaration of an assignor as against an assignee or subsequent holder has the burden of showing affirmatively that the statement was made before the assignment. The application of the rule is not affected by the fact that the assignor is a party to the record. Only declarations made by him while he possessed the substantial interest are competent as against an assignee for whose benefit the suit is brought." 16 Cyc. 994; 1 Enc. Ev. p. 535; Reinecke v. Gruner, 111 Iowa, 731, 82 N. W. 900; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917; Jonas v. Hirshberg, 40 Ind. App. 88, 79 N. E. 1058; Jones, Ev. §§ 242, 245.

"The court may permit counsel in argument to read to the jury a transcript of the stenographer's notes of the testimony, but not from the transcript of the testimony given on a former trial. For the purpose of argument and comment counsel may read such part of the testimony of a witness as he desires to read, and it is error to require him to read the whole of the testimony of a witness." 38 Cyc. 1483.

The finding of the jury on all questions of fact in a cause properly submitted is binding and conclusive. F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109; Nilson v. Horton, 19 N. D. 187, 123 N. W. 397; Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Acton v. Fargo & M. Street R. Co. 20 N. D. 434, 129 N. W. 225; Heffernan v. O'Neill, 1 Neb. (Unof.) 363, 96 N. W. 244.

CHRISTIANSON, J. In the year 1912 one Carl Schootz leased certain farm lands belonging to the defendant, Ginther. The lease or farm contract was in writing, and provided for a division of the crop between Schootz and the defendant in equal parts. It also provided that title to the crop should remain in Ginther until such division was made. The agreement further provided that in case Schootz failed to perform any

of the terms and conditions thereof to be by him kept and performed, Ginther might enter into possession of the premises and do and perform all acts agreed to be performed by said Schootz and charge all labor so performed and expenses so incurred to the said Schootz, and deduct the same from the proceeds of the crops that would have belonged to said Schootz if he had complied with the conditions of said agreement. Owing to illness on his part, Schootz became unable to fully perform all the terms of the agreement, and Ginther thereupon took possession of the premises and performed the remainder of the things which Schootz had agreed to perform. Ginther also held certain hay land under a lease from the state which he sublet to Schootz by a verbal agreement. The terms of such oral agreement are in dispute, and constitute one of the issues presented in this action. On December 21, 1912, the plaintiff obtained an assignment in writing from Schootz of all claims of said Schootz against the defendant Ginther arising out of the farming of said land during the year 1912, and, about the same time, the plaintiff obtained a bill of sale from Schootz of the hay cut and stacked by Schootz upon the land leased by Ginther from the state and sublet by him to Schootz.

Plaintiff brings this action as assignee of Schootz, and asks to recover from defendant the amount claimed to be due to Schootz from Ginther under said written and verbal agreements. The defendant, in his answer, denied that he was indebted to Schootz in any amount. The defendant further asserted, by way of counterclaim, that Schootz had failed to perform the terms of the verbal agreement under which he cut and stacked the hay, and that by reason of such nonperformance defendant became the owner thereof; that plaintiff, acting under the assignment from Schootz, had taken and removed hay of the value of $66.50. The counterclaim set forth in the answer was denied by reply. Upon demand of plaintiff, defendant furnished a bill of particulars of the claims which defendant had, or claimed to have, against Schootz. Some of the items so claimed are not denied, whereas other items are denied in whole or in part. The cause was tried to a jury, which returned a verdict in favor of the plaintiff for the sum of $207 and interest from December, 1912. The defendant moved for a new trial, and the appeal is taken from the judgment and the order denying a new trial.

(1) Certain assignments of error are predicated upon rulings of the court in sustaining objections to certain questions propounded to the plaintiff upon cross-examination. Defendant asserts that the cross-examination was unduly restricted, and that the rulings complained of constitute prejudicial error. An examination of the record upon which the assignments are based, however, discloses that the various questions to which objections were sustained did not relate directly to the facts or circumstances connected with the matters gone into on the direct examination, but related to matters more properly a part of defendant's own case. And in this connection it may be mentioned that in one of its rulings the trial judge expressly stated that he would permit the defendant to recall plaintiff for further cross-examination upon the matters defendant sought to inquire into, if defendant desired to recall him, when defendant's evidence was being introduced. The logical method of presenting issues in a lawsuit is necessarily a matter in which the trial court must be invested with wide discretionary powers. 40 Cyc. 2506; 3 Enc. Ev. 860. See also 3 Enc. Ev. 822. And in this case we are unable to see wherein defendant was prejudiced by the trial court's rulings, or wherein such rulings deprived him of the right of cross-examination, nor do we see wherein defendant was in any manner prevented by these rulings from presenting to the jury all the material facts in dispute between the parties.

(2) Appellant next asserts that the court erred in permitting plaintiff's counsel to propound the following question to the defendant upon his cross-examination, viz.: "Q. You think because while you were looking after your own interests, because you happened to take off your white shirt for a while and went to work, that you are entitled to charge Mr. Schootz for that?" The defendant was being cross-examined with respect to certain items charged by him against Schootz. The particular question related to a charge for labor performed in shoveling wheat at the time the grain was threshed. The defendant's answer to the question immediately preceding the question objected to was as follows: "I was there simply to look things over; that was what I was there for." And defendant's answer to the question under consideration was as follows: "Any time I shovel grain on any of the three farms when they are short of help, I get pay the same as any other man that is working there; that is all there is to that." The defendant

further testified that he shoveled grain for three days while the threshing was going on and charged Schootz the regular going wages for such work. The question doubtless could have been couched in different language and some of the statements properly eliminated therefrom, but it is inconceivable how defendant could have been prejudiced or denied a fair trial by reason of the court's ruling on this question. Trial courts necessarily must be, and are, invested with a great deal of discretion in matters of this kind. "Matters pertaining to the examination of witnesses rest largely within the discretion of the trial court, which, in the exercise of such discretion, may determine the order in which evidence shall be introduced by the parties, the time and mode of examining the witness, the form and propriety of questions, the manner in which questions may be put, the extent to which a witness may be examined, especially with respect to collateral matters, the length of the examination, the use of memoranda by a witness, directing a witness to ascertain some fact in order to be able to testify to it, the reception of answers not responsive to the questions, or the postponement of the examination of a witness. The rulings of the trial court will not be interfered with unless an arbitrary abuse of discretion appears." (40 Cyc. 2408.)

The objection made is that the question was argumentative and contained insinuations prejudicial to the defendant. It is not contended that the matter under consideration was not a proper subject for cross-examination, but the objection relates solely to the form of the question. This, as we have already stated, was a matter resting peculiarly within the discretion of the trial court, and this court will not interfere unless a manifest abuse of such discretion appears. No abuse of discretion is shown here.

(3) Defendant also complains of the court's ruling excluding certain slips of paper alleged to show the quantity of certain grain hauled and delivered at a certain elevator. The slips themselves are not contained in the record. Plaintiff testified that he received them either from the bank at Sarles or from the elevator company's agent. Plaintiff admitted that he was not present at the time the grain was hauled and weighed. He also admitted that he had no personal knowledge of the correctness of the slips. The elevator agent who weighed the grain and prepared the slips was not called, nor his absence accounted for. And

it seems clear that the plaintiff, having no personal knowledge of the amount of grain delivered at the elevator, could not be permitted to testify in regard thereto by reason of oral or written statements made to him by the elevator agent. It may, also, be mentioned that Schootz, who testified by deposition, admitted that he hauled and sold two loads of grain, and there is nothing to indicate that the slips contained different or larger amounts than those mentioned by Schootz. We believe that the trial court properly excluded the evidence under consideration.

(4) Among the items which defendant sought to charge against Schootz was one for $15 for destroying Canadian thistles. Schootz denied any indebtedness for this service, and for the purpose of rebutting defendant's testimony, plaintiff called one Barker, who testified that he was familiar with the land, had been so during the year 1912, and for a number of years prior thereto. Barker also testified that he was the manager of the threshing machine which threshed the grain involved herein in the fall of 1912; that he was about such threshing machine at the time the threshing was done, and that he did not observe any Canadian thistles in such grain at that time, nor did he ever observe any such thistles in the fields upon the land during the year 1912. This testimony, while negative in character, was entitled to go to the jury for what it was worth. Of course, the weight to be given thereto was a matter for the jury. In fact, defendant does not seriously contend that the testimony was inadmissible, but his principal complaint seems to be that the court failed to give proper instructions for the jury's guidance in considering such negative testimony. It is a sufficient answer to the latter contention to say that no request for such instruction was made. See also Remington v. Geiszler, 30 N. D. 346, 152 N. W. 661.

(5) Among other defenses interposed was that the defendant had made a full and complete settlement with Schootz. This settlement, however, was denied by Schootz. The defendant, for the purpose of corroborating the defendant's testimony, called one Templeton to show that Schootz in a conversation with him (Templeton) had made certain statements tending to show that Schootz and the defendant had made such settlement. As already stated, plaintiff obtained an assignment from Schootz on December 21, 1912. The witness Templeton admitted that he could not recall, and was unable to state, whether the conversa-

tion between himself and Mr. Schootz was had before or after December 21, 1912. The trial court ruled that the evidence was inadmissible unless it was shown that such conversation took place prior to the time of the assignment by Schootz to the plaintiff. Apparently no serious contention was made that this ruling was incorrect, because the record shows that questions were propounded to Templeton endeavoring to elicit testimony from him to the effect that such conversation was had prior to December 21, 1912. At the time the rulings were made by the court there is no serious question but that the record failed to show that such conversation was had prior to December 21, 1912. There is, however, some subsequent testimony which defendant's counsel contends would justify the conclusion that such conversation must have been had prior to that time. Even conceding that this contention is correct, still we are satisfied that at the time the rulings were made the trial court was justified in rejecting the evidence offered. The other testimony upon which reliance is placed was offered by another witness, and it is only by a combination of testimony from different parts of the record and argumentative deduction drawn therefrom that appellant's counsel justifies the conclusion that such conversation must have taken place prior to December 21, 1912. These facts, however, were not called to the attention of the trial court, and in fact did not exist at the time the rulings were made, because, as already stated, some of the testimony was subsequently introduced. The record does not show that any attempt was made thereafter to have the testimony of Templeton admitted, and, hence, we are satisfied that the court correctly excluded this testimony. See also 16 Cyc. 994; 1 Enc. Ev. 535.

(6) Error is also predicated upon the alleged fact that plaintiff's counsel in his argument to the jury read certain portions of the deposition of the witness Schootz. The record, however, does not sustain this contention. The trial court in its rulings upon the objection made expressly stated that counsel was permitted to use the deposition for the purpose of refreshing the memory. Counsel's argument is intended to aid the jury in arriving at the truth, and we are aware of no reason why counsel might not be permitted to state portions of the evidence, and if evidence is given by deposition, there seems no valid reason why counsel may not be permitted to refer to the deposition in his argument to the jury. See 38 Cyc. 1483.

(7) Appellant also predicates error upon certain remarks made by the court to the defendant while he was being examined as a witness. The general tenor of the remarks is requests on the part of the court to the defendant Ginther to speak louder so that the jury may hear his testimony. There is no contention that the trial court in making these requests or remarks acted in an improper manner. The statements made are not contained in the record, nor were any affidavits submitted tending to show any misconduct on the part of the trial court. The assignment rests solely upon the statement of the trial judge appended to the statement of the case, wherein he certifies that some such remarks were made by him, and that such remarks were occasioned by the fact that the defendant spoke in such a low tone that the court, jury, court reporter, and counsel on both sides were unable to hear him, and repeatedly made requests that he speak louder; and that the court reporter, who sat only about 4 feet away from the witness, was unable to hear him. These facts are not disputed. The assignment of error is wholly without merit.

(8) Appellant also contends that the evidence is insufficient to sustain the verdict. There is no dispute as to the amount of money realized by defendant from the crop and hay. It is conceded that he received in all $489.70, proceeds of the grain, and $71.50, proceeds from the sale of hay, which moneys would have belonged to Schootz if he had fulfilled his agreement with the defendant. The questions in dispute were (1) whether Schootz had complied with the terms of the verbal agreement under which he rented the hay land, so as to become the owner of the hay; and (2) what items was the defendant entitled to charge against Schootz by reason of his (Schootz's) failure to comply with the terms of the cropping contract. The evidence was in conflict upon the first question, and several of the items which defendant sought to charge against Schootz were also in dispute. The case was tried upon the theory that the defendant was entitled, under the terms of the cropping contract, to perform those portions thereof which Schootz had failed to perform, and charge and retain the amount of such expenses and the value of such services against the moneys which Schootz would be entitled to receive from the proceeds of the grain. No exception was taken to any of the court's instructions. Hence they are presumed to be correct. Defendant's counsel argues that the testimony

of Schootz, taken by deposition in Indiana, ought not to be given the same weight as the testimony of the defendant and his witnesses, who appeared and testified orally upon the trial. This contention is without merit. The question of weight to be given to the testimony of the different witnesses was a matter for the jury. 38 Cyc. 1516, 1518. The trial court, who heard and saw the witnesses, has refused to set aside the verdict. The verdict has substantial support in the evidence, and, hence, this court will not endeavor to determine the weight of the conflicting evidence, nor will it disturb the verdict based thereon, or the order denying a new trial. Rickel v. Sherman, post, 298, 158 N. W. 266. See also Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690; Hayne, New Trials & App. Rev. ed. § 97; 29 Cyc. 1009, and note.

(9) In support of the motion for a new trial, defendant submitted certain affidavits for the purpose of showing accident and surprise. The substance of the affidavits was to the effect that the witness, Templeton, in conversations prior to the time he was called as a witness, had informed defendant that the conversation which Templeton had with Schootz occurred at some date prior to December 21, 1912, and that the inability of Templeton to recall whether such conversation occurred before or after December 21, 1912, was due to physical disability at the time he testified. Counter affidavits were submitted by the plaintiff tending to show that at the time of the trial the witness, Templeton, although ill, was in full possession of all his mental faculties, and that his mind was in no manner affected. The affidavits also show that Templeton is dead and that consequently his testimony could not be procured upon a new trial of the action.

A new trial will ordinarily not be awarded where it would be ineffectual, or if there is no reasonable prospect that the result would be different upon a retrial, and it is therefore incumbent upon the party who moves for a new trial on the ground of accident or surprise to show upon his motion for new trial that he will probably be able to avoid the difficulty upon a new trial. Hayne, New Trials & App. Rev. ed. § 85. Whether the ends of justice required that a new trial be had on the ground of surprise was a matter which rested largely within the trial court's second judicial discretion. 29 Cyc. 1009, and note; Hayne, New Trials & App. Rev. ed. § 86. And "the function of this court on

this appeal is merely to review the ruling of the trial court on this motion, and this review is limited to a determination of the question of whether, in denying a new trial, the trial court abused its discretion, and thereby effected an injustice. The discretion vested in the trial court should always be exercised in the interests of justice. The presumption is that it was properly exercised." State v. Cray, 31 N. D. 67, 153 N. W. 425.

The trial judge, who saw and heard all the witnesses, including Templeton, and who was familiar with all the incidents of the trial, as well as with different affidavits submitted for, and in opposition to, the motion for a new trial, was of the opinion that a new trial ought not to be had. There is nothing to justify this court in saying that the trial court erred or abused its discretion in so holding. See Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; State v. Cray, supra; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261.

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

STATE BANK OF VERONA, a Corporation, Respondent, v. CHAS. MAIER, Defendant, and W. C. Mowery and C. C. Lory, Appellants.

(158 N. W. 346.)

Action — properly triable by jury — tried by court — trial de novo — not had in supreme court — findings of the trial court — presumed correct — error — burden of proof — on appellant to show — evidence.

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

Evidence — trial court — judgment — guarantors.

2. Evidence examined and held sufficient to warrant the trial court in awarding judgment against the appellants as guarantors.

Opinion filed May 31, 1916.

From a judgment of the County Court of La Moure County, *Thomas,* Special Judge, defendants Mowery and Lory appeal.

Affirmed.

Davis & Warren and *S. E. Ellsworth,* for appellants.

Testimony by parol may be received to explain or modify a writing purporting to be a guaranty, and to show the intention of the parties and the purpose of its making. 20 Cyc. 1423.

It is always proper to look to the surrounding circumstances in order to discover the subject-matter and the intention of the parties. Smeltzer v. White, 92 U. S. 390, 23 L. ed. 508.

The same rules applicable to the construction of other contracts obtain here. People v. Backus, 22 N. Y. S. R. 445, 4 N. Y. Supp. 729; Krakauer v. Chapman, 16 App. Div. 115, 45 N. Y. Supp. 127; Graham v. Farmers' & M. Bank, 116 Cal. 463, 48 Pac. 384; John A. Tolman Co. v. Griffin, 111 Mich. 301, 69 N. W. 649.

The true rule of construction is to give the instrument that effect which best accords with the intention of the parties, taken in connection with the subject-matter. Mussey v. Rayner, 22 Pick. 223; Belloni v. Freeborn, 63 N. Y. 383; McCasland v. O'Brien, 57 Ill. App. 636; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Rindge v. Judson, 24 N. Y. 70; Gates v. McKee, 13 N. Y. 232, 64 Am. Dec. 545; Dobbin v. Bradley, 17 Wend. 422; Evansville Nat. Bank v. Kaufmann, 93 N. Y. 273, 45 Am. Rep. 204.

When a guaranty is entered into at the same time with the original, or with the acceptance of the latter by the guarantee, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation. Comp. Laws 1913, § 6653; 20 Cyc. 1413, 1417; 6 Enc. Ev. 279–283; Bank of Carrollton v. Latting, 37 Okla. 8, 130 Pac. 144, 44 L.R.A.(N.S.) 481; cases cited at p. 482 in the L.R.A. brief attached to the case last cited; First Nat. Bank v. Hawkins, 73 Or. 186, 144 Pac. 131; Cobban v. Hyde, 212 Fed. 480; Drovers' Deposit Nat. Bank v. Tichenor, 200 Fed. 318; First Nat. Bank v. Nakdimen, 111 Ark. 223, 163 S. W. 785, Ann. Cas. 1916A, 968; Delinsky v. Brodow, 113 N. Y. Supp. 7.

Hutchinson & Lynch, for respondent.

Resort cannot be had to parol evidence to incorporate conditions into

or limitations upon a contract of guaranty or as affecting the liability of the guarantor, in a manner not appearing from the face of the instrument. Jones, Ev. 2d ed. art. 495.

Under our law, there was a sufficient consideration for the guaranty. Comp. Laws 1913, § 6653.

CHRISTIANSON, J. The plaintiff is a banking corporation organized under the laws of this state, and, during all the times hereinafter mentioned, it was engaged in the banking business at Verona in La Moure county in this state. The Farmers and Merchants' Bank was also engaged in the banking business at Verona from 1909 until its consolidation with the plaintiff bank in 1913. The defendants Lory and Mowery were, respectively, the president and cashier of said Farmers & Merchants' Bank, and also the holders of more than two thirds of its capital stock. The financial condition of the latter bank became somewhat involved, and certain negotiations were had between Lory and Mowery and the officers of the plaintiff bank for the purpose of effecting a consolidation of the two banks and the taking over by the plaintiff bank of the business of the Farmers & Merchants' Bank, and as a result of such negotiations the following preliminary agreement was entered into on January 18th, 1913, to-wit:

This agreement, entered into this 18th day of January, 1913, by and between C. C. Lory, president, and W. C. Mowery, cashier and secretary of the Farmers and Merchants' Bank of Verona, Verona, North Dakota, and Charles F. Krueger, president, and R. M. Crichton, cashier and secretary of the State Bank of Verona, Verona, North Dakota, witnesseth, that the said C. C. Lory and W. C. Mowery do hereby agree for themselves and for the stockholders of the Farmers and Merchants' Bank of Verona, North Dakota, to transfer and set over to the State Bank of Verona, Verona, North Dakota, the business and good will of the said Farmers and Merchants' Bank, on the following terms and for the herein stated consideration; the State Bank of Verona agrees to take over the furniture and fixtures of the Farmers and Merchants' Bank at and for the sum of $1,600, also the

lot owned by the Farmers and Merchants' Bank, and described as lot 12 in block 2 original town of Verona, North Dakota, at and for the sum of $600.

W. C. Mowery agrees to take up certain notes now carried in the books of the Farmers & Merchants' Bank to the sum of $3,000, on or before the 28th day of January, 1913.

The said W. C. Mowery agrees, as cashier for the said F. & M. Bank, to carry all interest accounts to profit and loss, to carry the exchange to profit and loss, and to charge the expense account to profit and loss.

The said C. C. Lory and W. C. Mowery agree to guarantee the payment of all paper of a doubtful nature to the complete satisfaction of the officers of the said State Bank of Verona. And they further agree to turn over to the order of the said State Bank of Verona all cash on hand and all credit balances with their various correspondents.

The State Bank of Verona agrees to take over the above-described real estate and the furniture and fixtures of the F. & M. Bank for the above-mentioned consideration, and they further agree to assume and pay the liabilities of the said F. & M. Bank, consisting of deposits, both check and time, and bills payable.

As a consideration for the capital stock and surplus of the F. & M. Bank of Verona, the said C. C. Lory and W. C. Mowery are to take over the $3,000 represented by the other real estate acct. and the remainder of the impaired capital in bills, res, and notes at the selection of the officers of the State Bank of Verona, Verona, North Dakota.

It is mutually agreed that the certificates of deposit and the check deposits and cashier's checks must agree with the amount as carried on the books of the F. & M. Bank, and each and every account must be proven and agree with the respective amounts as shown by the books of the bank.

It is further agreed that the officers of the F. & M. Bank will facilitate the transfer of the business in every way possible and not later than the 10th day of February, 1913. They further agree to give the State Bank of Verona their good will and full support as long as they shall continue business at Verona or in that vicinity.

In witness whereof we have hereunto affixed our seals the day and year above written;

Farmers & Merchants' Bank of Verona, North Dakota.
C. C. Lory, Pres., W. C. Mowery, Cashier.
State Bank of Verona.
By C. T. Krueger, Pres., R. M. Crichton, Cas.

A meeting of the stockholders of the Farmers and Merchants' Bank was called for the purpose of effecting the consolidation and making the proposed transfer of the assets and business of the Farmers & Merchants' Bank to the plaintiff bank binding upon all the stockholders of the former bank. Following such stockholders' meeting the following written agreement was executed:

This agreement, made and entered into this 5th day of February, 1913, by and between C. C. Lory and W. C. Mowery as a committee duly elected by the stockholders of the Farmers & Merchants' Bank, of Verona, North Dakota, for the purpose of effecting an agreement for the consolidation of said bank with the State Bank of Verona, parties of the first part, and R. M. Crichton and William Huntington as representatives of said State Bank of Verona for the purpose of effecting said agreement on behalf of said State Bank of Verona, parties of the second part,

Witnesseth, that for and in consideration of the consolidation of said Farmers & Merchants' Bank with said State Bank of Verona, in pursuance of the resolution of the stockholders of said Farmers & Merchants' Bank this day adopted at a special meeting thereof duly called and held for the purpose of voting upon the question of such consolidation, and of the assumption of all of the liabilities of said Farmers & Merchants' Bank by said State Bank of Verona do hereby authorize and direct the assignment to said State Bank of Verona the assets and property of said Farmers & Merchants' Bank listed and described in the schedule thereof hereto annexed, marked exhibit "A" and made a part hereof; and for the purpose of securing said State Bank of Verona for liability upon any and all obligations of said Farmers & Merchants' Bank not now apparent upon its books and rec-

ords and covered by the schedule of such liabilities, also hereto annexed, do hereby also authorize and direct the pledging of all the remaining assets of said Farmers & Merchants' Bank to said State Bank of Verona, and hereby constitute such pledge thereof a lien upon such remaining assets prior and paramount to the claim and lien of the stockholders of said Farmers & Merchants' Bank thereon.

In consideration whereof, the said State Bank of Verona through and by the said parties of the second part, its representatives aforesaid, do hereby assume all the liabilities of said Farmers and Merchants' Bank listed and described in the schedule thereof hereto annexed, marked exhibit "B," also all other liabilities of said Farmers & Merchants' Bank not now disclosed upon the books and records thereof and covered by said schedule.

In witness whereof, both parties have hereunto set their hands in triplicate this 5th day of February, 1913.

C. W. Davis
Geo. P. Jones

C. C. Lory
W. C. Mowery
R. M. Crichton.

The testimony shows that such agreement was signed late at night, in fact, about 2 o'clock A. M. on February 6th, 1913. The undisputed evidence also shows that on the hearing following, i. e. on the morning of February 6th, 1913, the defendants Lory and Mowery guaranteed payment of all the notes involved in the transfer, with one or two exceptions. Among the notes so guaranteed was one executed by the defendant Chas. Maier. On the back of this note the defendants Lory and Mowery affixed their signatures immediately below the following guaranty: "For value received, I hereby guarantee the payment of the within note at maturity or at any time thereafter with interest at the rate of 10 per cent per annum until paid, waiving demand, notice of nonpayment and protest."

It is undisputed that this guaranty had been stamped upon the note prior to the time the signatures of the defendants Lory and Mowery were affixed thereto. This fact is admitted by both of these defendants. The evidence also shows that the defendants Lory and Mowery, as a part of the transactions had about February 5th, 1913, assigned their corporate stock in the Farmers & Merchants' Bank to the officers of the

plaintiff bank; that a meeting of the new stockholders of the Farmers & Merchants' Bank was subsequently held, at which meeting the officers of the plaintiff bank were elected officers of the Farmers & Merchants' Bank, and that the actual transfer of the assets and papers of the Farmers & Merchants' Bank to the plaintiff bank was not accomplished until some days later, and that such transfer was actually made by Mr. Crichton, the cashier of the plaintiff bank.

On April 5th, 1913, the cashier of the plaintiff bank granted Maier an extension of payment of the balance remaining due upon the former note, and took a renewal note, payable to the order of the plaintiff bank, due September 15, 1913, for such balance, with the understanding, however, that such renewal note would be accepted only in case Lory and Mowery guaranteed its payment. The renewal note was presented to Lory and Mowery and they guaranteed payment of such renewal note, the guaranty being in the same language as that upon the back of the original note. The note not being paid, the plaintiff on November 6th, 1914, instituted the present action in the county court of La Moure county, against Maier as maker, and Mowery and Lory as guarantors. Maier defaulted, but the defendants, Lory and Mowery appeared and asserted by way of defense that the indorsements or guaranties on both the original and extension notes were made by such defendants in their capacity as officers of the Farmers & Merchants' Bank for the sole purpose of assigning such notes to the plaintiff corporation pursuant to the terms of the said consolidation agreement, and not for the purpose of creating any liability either on the part of these defendants as individuals or on part of the said Farmers & Merchants' Bank.

Appellants assert two reasons why the judgment should be reversed: (1) That the court erred in holding that the defendants Lory and Mowery indorsed the notes in their individual capacity, or for any purpose other than to transfer title to said notes to the plaintiff; (2) That the court erred in holding that such indorsements were made for a valuable consideration.

The testimony in this case shows that Mowery had been cashier of the Farmers & Merchants' Bank since 1909, and that the defendant Lory in addition to being a banker is also an attorney. And the testimony of both appellants discloses that they were entirely familiar, not

only with the banking business, but with the use and effect of qualified indorsements on commercial paper.

The defendant Lory testified:

Q. You are pretty well acquainted with what indorsements are, are you, Mr. Lory? You know what the indorsements are, "Without recourse," do you not?

A. I have pretty good knowledge of what it is.

Q. And when you want to merely transfer the title of a paper, you indorse it in that manner, do you not?

A. Certainly, I do.

The evidence also shows that these defendants permitted judgment to go against them by default in an action brought by plaintiff upon another note guaranteed by them at the same time that they guaranteed payment of the original note herein.

Both the original note and the renewal note were offered in evidence, the original note being identified as plaintiff's exhibit "A," and the renewal note as plaintiff's exhibit "B."

The defendant Mowery testified with reference to the indorsements as follows:

Q. Now, you was a banker a number of years, were you, Mr. Mowery?

A. For a few years.

Q. You understand indorsements, don't you, what they mean?

A. I do.

Q. You understood the meaning of this indorsement on the back of plaintiff's exhibit A when you signed it?

A. I did.

Q. I call your attention to the indorsement on the back of plaintiff's exhibit B and ask you if you signed that indorsement also?

A. I did.

Q. Was the rubber stamp written—appearing above the indorsement there?

A. It was.

Q. And you knew what that indorsement was, did you?

A. Yes, sir.

Q. You knew what this note was when you indorsed it?

A. An extension, yes.

Q. And you understood the meaning of the indorsement at the time you indorsed it?

A. It was to comply with the wind-up.

Q. It was to comply with the wind-up?

A. Yes.

Q. It was made some months after the wind-up, was it not?

A. It was an extension of time, that is all.

He also testified as follows:

Q. Was anything said with reference to your guarantying the notes?

A. There was, yes.

Q. Now, when was that said?

A. At the first agreement.

Q. Was there anything said after that?

A. There was not, no.

Q. Nothing?

A. No.

Q. But, as a matter of fact, at the time of the transfer, you did indorse the two notes, plaintiff's exhibit A and B, as appears on the back thereof?

A. Yes, that was according to agreement.

Q. And that was according to this agreement here?

A. Well, it was according to the last agreement of transfer.

Q. According to the last agreement of transfer?

A. Yes.

The defendant Lory also testified that nothing further was said in regard to Lory and Mowery guarantying the note, except the discussion had prior to the execution of the agreement dated January 18th, 1913. It is conceded that the defendants made no objection to signing the guaranty, and no fraud or undue influence is claimed. Appellants were the principal stockholders, as well as officers in a bank financially embarrassed. They were vitally interested in the sale of the interests in such bank. They entered into an agreement whereby the terms of sale were outlined. It is true it was necessary to call a meeting of the stockholders in order to bind the stockholders, and make the transaction that of the corporation. But it is equally true that the

appellants had such control of the corporate stock that it was wholly within their power to carry such agreement into effect by the adoption of proper resolutions at the stockholders' meeting.

The agreement dated February 5, 1913, was executed by the appellants in their capacity as representatives for all of the stockholders of the Farmers & Merchants' Bank. The agreement dated January 18, 1913, while executed in the name of the bank, expressly recited that it was also the agreement of appellants individually. In that agreement they agreed to guarantee payment of certain notes. According to the testimony of Crichton, plaintiff's cashier, the notes involved herein were guaranteed in accordance with such agreement. The agreement dated February 5, 1913, does not pretend to contain any individual undertaking on the part of the appellants. No reference is made to the notes to be guaranteed. There is nothing to indicate that any of the parties deemed the promise on the part of the appellants to guarantee certain notes waived or abandoned. The fact that they were requested to, and did, guarantee a large number of the notes shows clearly that all parties considered the agreement on part of the appellants to guarantee payment of such notes to be in full force and effect.

As already stated, the case was tried to the court without a jury. Under a stipulation between the parties, the court did not rule upon the admissibility of evidence as it was offered, but all evidence was received in the same manner as in equity cases properly triable to the court without a jury. A considerable portion of appellants' brief is devoted to an argument of the proposition that parol evidence was admissible for the purpose of showing that the guaranty signed by the defendants was in reality a guaranty of the Farmers & Merchants' Bank; that they signed their names thereto as officials of such bank, and that it never was the intention of the parties that the appellants should be held responsible individually as guarantors. It is unnecessary for us to pass upon this question. (See however Jones, Commentaries on Ev. § 496.) The findings of the trial court come here with all the presumptions in favor of their correctness, "and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and where the finding is

based upon parol evidence, it will not be disturbed, unless clearly and unquestionably opposed to the preponderance of the testimony." Jasper v. Hazen, 4 N. D. 1, 5, 23 L.R.A. 58, 58 N. W. 454. See also Griffith v. Fox, 32 N. D. 650, 156 N. W. 239, and authorities cited in supplemental opinion on petition for rehearing. We have no hesitancy in holding that the findings of the trial court have ample support in the evidence; such findings are not clearly or at all opposed to the preponderance of the evidence.

Judgment affirmed.

J. D. McLENNAN v. F. A. PLUMMER.

(158 N. W. 269.)

Notes and securities — contract — rescission — action for — trial de novo — fraud — consideration — failure of — findings and conclusions — trial court.

1. On a trial *de novo* of an action brought to rescind a contract and to have certain promissory notes and securities canceled upon the alleged ground of fraud and failure of consideration, the findings and conclusions of the trial court in defendant's favor are sustained.

Corporation — capital stock — assignment of — title.

2. A formal written assignment of an interest in the capital stock of a corporation which has issued no certificates of stock is not essential to pass title as between the parties.

Corporation — capital stock — oral agreement for sale — fully executed — written assignment — no agreement for — vendee — recognized as owner — equity — court of — rescission.

3. Where an oral agreement for the sale of an interest in the capital stock of a corporation has been fully executed, without anything having been said with reference to a written assignment, and the vendee has for over a year been recognized by all concerned as the owner thereof, a court of equity will not adjudge a rescission merely because of a subsequent refusal by defendant to give such formal assignment.

Fraud — never presumed — must be proved — evidence — clear and satisfactory.

4. Fraud is never presumed, and its existence must be established by clear and satisfactory proof in order to justify a court in rescinding a sale on such ground.

Trial de novo — supreme court — evidence — examination of — fraud — consideration — failure of.

5. Upon a trial *de novo* in the supreme court, evidence examined and held insufficient to establish either actual or constructive fraud or failure of consideration.

Opinion filed April 19, 1916.

Appeal from the District Court, Cavalier County; *W. J. Kneeshaw*, J.

From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

Grimson & Johnson, for appellant.

"Although the by-laws of a corporation require the entry of transfers on the stock register, yet if none is kept and a transfer by the subscriber to the capital stock is entered according to the custom of the company on the subscription list, the same is sufficient." 10 Cyc. 593.

And this is true even where the statute requires the entry of such transfer of stock to be valid as to third persons, and a simple notation in the stock book showing that certain stock has been assigned is sufficient. 10 Cyc. 588.

The novation agreement partakes of the nature of an implied contract. An implied contract is one the terms of which are to be inferred from the conduct of the parties. Comp. Laws 1913, §§ 5085, 5903, 5907, 5915.

When, through fraud, mistake, or accident, a contract fails to express the real intention of the parties, such intention shall be regarded. Comp. Laws 1913, §§ 5900, 5947.

The mistake of one party, when combined with the inequitable conduct of the other party in respect to the matter, is fraud sufficient to entitle the injured party to ask for rescission. 18 Enc. Pl. & Pr. 782, and cases cited.

W. A. McIntyre, for respondent.

"A subscription right in a proposed corporation is assignable by parol, and ownership passes immediately on consummation of the sale and by force thereof, and not by operation of law." Manchester Street R. Co. v. Williams, 71 N. H. 312, 52 Atl. 461; Lipscomb v. Condon, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 946, 49 S. E. 392.

As between vendor and vendee transfer of the stock on the books of the corporation is not necessary to protect an equitable title in the vendee. Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; Johnston v. Laflin, 103 U. S. 800, 26 L. ed. 532; Re Argus Printing Co. 1 N. D. 435, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

An oral contract for the sale of shares of stock where payments are made on the purchase price is valid. Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323; Sprague v. Hosie, 155 Mich. 30, 19 L.R.A. (N.S.) 875, 130 Am. St. Rep. 558, 118 N. W. 497; First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

There is no valid ground for rescission. There is no fraud, deceit, or mistake. Comp. Laws 1913, §§ 5850, 5944; Sioux Falls Bkg. Co. v. Kendall, 6 S. D. 543, 62 N. W. 377; Cook, Corp. § 374; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; Re Argus Printing Co. 1 N. D. 435, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 347.

"A court of equity will not set aside a contract obtained through fraud unless it be productive of injury." 1 Story, Eq. Jur. § 203; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Nelson v. Grondahl, 12 N. D. 133, 96 N. W. 299; Hairalson v. Carson, 111 Ga. 57, 36 S. E. 319; San Diego Flume Co. v. Souther, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164; Ada County v. Bullen Bridge Co. 5 Idaho, 188, 95 Am. St. Rep. 180, 47 Pac. 824.

A failure to fully comprehend the legal effect of a contract is no ground for rescission, or for setting it aside, when it appears that there was no fraud or imposition in procuring its execution. Korne v. Korne, 30 W. Va. 1, 3 S. E. 17; Perkins v. M'Gavock, Cooke (Tenn.) 415; Pearce v. Suggs, 85 Tenn. 724, 4 S. W. 526; Brooks v. Hamilton, 15 Minn. 26, Gil. 10; Spitze v. Baltimore & O. R. Co. 75 Md. 162, 32 Am. St. Rep. 378, 23 Atl. 307; Albrecht v. Milwaukee & S. R. Co. 87 Wis. 105, 41 Am. St. Rep. 30, 58 N. W. 72.

The supreme court will not disturb the trial court's findings on the question of fraud. That is a question of fact, and the findings are conclusive. Castle v. Kemp, 124 Ill. 307, 16 N. E. 255; Hoobler v. Hoobler, 128 Ill. 645, 21 N. E. 571; Ruettell v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; Dowagiac Mfg. Co. v. Hellekson, 13

N. D. 257, 100 N. W. 717; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952.

FISK, C. J. Plaintiff by this action seeks to rescind a contract whereby a former mutual rescission of a prior agreement was had, and he prays for the cancelation of certain notes given by him to the defendant pursuant to the terms of the last contract. Plaintiff relies for relief upon the grounds both of fraud and failure of consideration. Trial was had in the district court of Cavalier county, and resulted in a judgment dismissing the action. We are asked on this appeal to try the case *de novo*.

The facts necessary to an understanding of the issues involved are in the main as follows: In the fall of 1912 plaintiff exchanged certain interests held by him in the J. D. McLennan Company, a corporation located at Sarles, for defendant's one-half interest in a half section of land owned jointly by these parties, and transfers were made pursuant thereto. Thereafter defendant, for some reason not here material, became dissatisfied with the trade and brought an action in March, 1913, for a rescission of the contract and the recovery of his land. Pending such action the witness Elves, a mutual friend of the parties, interceded, and caused to be consummated an oral contract of settlement of all differences between them. According to the terms of such oral agreement, plaintiff was to retain the land theretofore transferred to him, he to execute and deliver to defendant as payment therefor, in lieu of the stock in the McLennan Company, the two promissory notes mentioned in the complaint, it being tacitly or impliedly understood, although nothing was expressly mentioned to that effect, that plaintiff was to be thereby reinvested with the interest which he had theretofore assigned to defendant in the corporation aforesaid. No certificates of stock were ever issued by such corporation, and when the first trade was consummated plaintiff executed and delivered to defendant a formal written assignment of his stock interests in such corporation, and it seems to be the contention of appellant that defendant owed to plaintiff a legal duty to retransfer such stock to him by means of a like formal written assignment, although no express understanding that he should do so is claimed. This entire controversy grows out of such alleged duty and the breach thereof by defendant, it being con-

tended that defendant, in failing and refusing to make such retransfer, was actuated by fraud, either actual or constructive, and, further, that such breach of duty operated to cause a failure of consideration for the notes executed pursuant to the settlement contract.

We are unable to uphold appellant's contention. The trial court was, we think, clearly correct in refusing to adjudge a rescission of the contract upon the grounds urged. Defendant, at no time after the last contract was entered into, asserted any interest whatever in the corporate stock; while perhaps he was somewhat arbitrary and even stubborn, we are not prepared to hold that he was actuated either by actual or constructive fraud. While, as stated by appellant's counsel, respondent is more or less inconsistent in his answer and testimony relative to the facts and to his attempted justification of his acts and conduct, we are satisfied from the record that he at no time sought or intended to take any undue advantage of appellant. As above stated, he at no time asserted any interest in such corporation, and we are convinced that at all times he honestly believed that a formal written assignment was not essential to a full realization by appellant of the fruits of the oral agreement of settlement. Indeed, at the time such settlement was made, apparently neither party deemed such formal assignment of the interest in the McLennan Company essential, for it was not then exacted, nor was the matter mentioned at that time nor, in fact, until more than a year thereafter, according to plaintiff's testimony. This being true, we fail to see how it can be held that the notes and security were obtained through fraud as alleged. The settlement was consummated in September, 1912, at which time the notes were given to take the place of the corporate stock. Appellant testifies: "I did not receive at that time any assignment from Plummer of the interest in the McLennan business. Never did receive an assignment of that interest from Mr. Plummer. After these notes had been delivered I stayed at Sarles until about the first day of May, and then went to Edmondton, Canada, and came back the third of September, 1913. After I came back I had some conversations with Mr. Elves and Mr. Plummer about the assignment of this stock in the McLennan Company. Sometime the latter part of September or the first part of October, as near as I can remember, I mentioned the fact to Mr. Elves that I did not receive—I asked Plummer to give me an assign-

ment of the stock in the hardware business and harness business, and he refused to do it. There wasn't very much said. The assignment was written out and he was asked to sign it. He said he never had any interest in the business and refused to sign it." It is quite evident that there was considerable friction existing between the parties, which no doubt accounts very largely for such refusal. The witness Elves was a friend of each and acted as peacemaker in bringing about the settlement, and had he, in plaintiff's behalf, asked for such assignment at that time when settlement was made, it no doubt would have been given. He completely exonerates respondent from the imputations of fraud.

He testifies:

Q. You don't think any fraud was intended on the part of Mr. Plummer when he refused to give this assignment, do you?

A. No, I don't think Mr. Plummer had any idea it would be a fraud not to sign that assignment.

. . . . . .

Q. You considered that Mr. Plummer was acting in the best of faith at the time the notes were given?

A. Yes, I did.

Q. What did Mr. Plummer say when exhibit "F" was presented to him and Mr. McLennan asked him to sign it in the hardware store at that time?

A. He said, "No, I have nothing to assign." I think the words he used were, "I never had nothing to assign."

It nowhere appears that plaintiff was injured in the least because of the fact that no formal assignment was given. Nor does it appear that plaintiff has not, during all times since such settlement was made, exercised full and complete dominion over, and ownership in and to, the stock aforesaid, and that his ownership thereof was, and has been at all times, recognized by the officers of such corporation. No contention is made that defendant asserted any claim to such stock since the date of such settlement. In the absence of proof to the contrary, we deem it fair to assume that during the year which elapsed after the settlement was made and before such formal written assignment was demanded or requested by plaintiff, and ever since, he exer-

cised full and unmolested ownership in the stock of such corporation. In the light of these facts we think the learned trial court very properly declined to find that there was any fraud or misrepresentation on defendant's part as alleged.

As we view the case it is not very material or controlling as to whether the notes sought to be canceled were given by plaintiff as the agreed purchase price of the interest in the McLennan Company or as the purchase price of the land theretofore transferred by defendant to plaintiff, and we need not concern ourselves with the dispute over this question. However, we think there was a mutual rescission of the former deal, and that the notes were intended to represent the purchase price of the land, as found by the trial court. Conceding, however, as claimed by appellant, that the notes represent the purchase price of the interest in the McLennan Company, which plaintiff originally owned and traded to defendant under the first contract, and which by the last agreement was to be reinvested in plaintiff, still we fail to discover any sound reason why a court of equity should, under the facts, adjudge a rescission of such latter agreement. The necessary inference to be drawn from the transactions of the parties is, we think, to the effect that by the oral agreement plaintiff became the owner of the interest in the McLennan Company without a written assignment, through the mutual rescission of the first trade; but if defendant be deemed a vendor of such interest, the result must be the same, for there was no fraud, and plaintiff got all he bargained for, to wit, a perfect equitable title which no one has ever questioned. That a written assignment is not essential to transfer a good title is well settled. Cook, Corp. 6th ed. § 374; Manchester Street R. Co. v. Williams, 71 N. H. 312, 52 Atl. 461; Lipscomb v. Condon, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 946, 49 S. E. 392; Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032; Re Argus Printing Co. 1 N. D. 435, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 347; Berwin v. Bolles, 183 Mass. 340, 67 N. E. 323; First Nat. Bank v. Holland, 99 Va. 495, 55 L.R.A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

If correct in the views above expressed, and we think we are, it follows that the agreement whereby plaintiff reacquired such interest in the McLennan Company was fully executed, and therefore the consideration for the notes did not fail.

Fraud, of course, is never presumed, and in order to justify a rescission for fraud the proof thereof should be established clearly and satisfactorily. Plaintiff has failed to meet such requirement. Defendant's refusal, over a year after the transaction occurred, to give plaintiff a formal assignment running to Arthur Daugherty, Robert Conn, and James Bevan, falls far short of constituting or disclosing fraud on his part at the date the contract was entered into and the notes given. The record is devoid of any proof showing, or tending to show, that defendant made a promise to transfer the interest in such corporation to plaintiff by a written instrument, and that defendant corruptly and fraudulently made such promise with the intent of not keeping the same. Hence, § 5944, subd. 4, Compiled Laws of 1913, which is cited, has no application.

There was no constructive fraud within the meaning of subd. 1, § 5850, Compiled Laws of 1913, which reads: "Constructive fraud consists: 1. In any breach of duty which without an actually fraudulent intent gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him." As before stated, respondent gained no advantage by his refusal to execute the formal assignment, nor was appellant misled to his prejudice. We have examined the other provisions of our statute cited by appellant, but deem them not applicable.

Finding no error in the record and deeming the findings of fact and conclusions of law of the trial court correct, it follows that the judgment should be affirmed, and it is so ordered.

THOMAS L. COMEFORD v. C. N. MORWOOD.

(158 N. W. 258.)

Jurors — challenge — peremptory — right to — juror accepted — by both parties — not permitted — discretion of court.

1. A party is not entitled as a matter of right (and without cause shown), to challenge, peremptorily, a juror who has been accepted by both parties. Under such circumstances it is, ordinarily, a matter resting within the trial court's discretion, whether a party should be permitted to submit such challenge,

and error cannot be predicated upon the denial of such challenge unless it is shown that the trial court's ruling amounted to an abuse of discretion.

Probable cause — undisputed facts — question for court — substantial dispute as to facts — question for jury.

2. What facts, or whether all or sufficient undisputed facts, constitute probable cause, is a question of law to be determined by the court; but when there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is, and whether the circumstances relied on as a charge or justification are sufficiently established.

Prosecution — malicious — question of fact — ordinarily.

3. Whether a prosecution was malicious is ordinarily a question of fact to be determined by the jury.

Opinion filed June 10, 1916.

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

From a judgment and an order denying an alternative motion for judgment notwithstanding the verdict or for a new trial, defendant appeals.

Affirmed.

Weeks & Moum, for appellant.

Each party to a civil action is entitled to three peremptory challenges. Comp. Laws 1913, § 7615; Silcox v. Lang, 78 Cal. 120, 20 Pac. 297.

Such challenges are made without assigning any reason, and the right of such challenge, within the limited number, is absolute, and cannot be abridged or impaired by any arbitrary rule of court. 24 Cyc. 351, 367; Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909.

To make out a cause of malicious prosecution, malice and want of probable cause must concur. 26 Cyc. 23.

In criminal prosecutions, probable cause means reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the accused is guilty of the offense charged. 26 Cyc. 24.

The burden of proving malice and want of probable cause is on the plaintiff. 26 Cyc. 86.

The mere fact that there was an acquittal, or dismissal of the crimi-

nal proceeding, is not evidence of want of probable cause. Decen. Dig. p. 1970, and cases cited; 26 Cyc. 40; Bekkeland v. Lyons, 96 Tex. 255, 64 L.R.A. 474, 72 S. W. 56; Lindsey v. Couch, 22 Okla. 4, 98 Pac. 973, 18 Ann. Cas. 60; Kansas & T. Coal Co. v. Galloway, 71 Ark. 351, 100 Am. St. Rep. 79, 74 S. W. 521; Thompson v. Beacon Valley Rubber Co. 56 Conn. 493, 16 Atl. 554; Herbener v. Crossan, 4 Penn. (Del.) 38, 55 Atl. 223; McBean v. Ritchie, 18 Ill. 114; Hurd v. Shaw, 20 Ill. 354; Anderson v. Friend, 85 Ill. 135; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Philpot v. Lucas, 101 Iowa, 478, 70 N. W. 625; Stephens v. Gravit, 136 Ky. 479, 124 S. W. 414; Sundmaker v. Gaudet, 113 La. 887, 37 So. 865; Laing v. Mitten, 185 Mass. 233, 70 N. E. 128; Davis v. McMillan, 142 Mich. 391, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 105 N. W. 862, 7 Ann. Cas. 854; Shafer v. Hertzig, 92 Minn. 171, 99 N. W. 796; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. 223; Morgan v. Stewart, 144 N. C. 424, 57 S. E 149; Britton v. Granger, 7 Ohio C. D. 182; Eastman v. Monastes, 32 Or. 291, 67 Am. St. Rep. 531, 51 Pac. 1095; Fox v. Smith, 26 R. I. 1, 57 Atl. 932, 3 Ann. Cas. 110; Catzen v. Belcher, 64 W. Va. 314, 31 Am. St. Rep. 903, 61 S. E. 930, 16 Ann. Cas. 715.

Probable cause may also be shown by implied admissions of the accused; waiver of examination by the accused has generally been regarded as such an admission, and prima facie evidence of probable cause. 26 Cyc. 38; Barber v. Scott, 92 Iowa, 52, 60 N. W. 497; Vansickle v. Brown, 68 Mo. 627; Jones v. Wilmington & W. R. Co. 125 N. C. 227, 34 S. E. 398; Hess v. Oregon German Baking Co. 31 Or. 503, 49 Pac. 803; Brady v. Stiltner, 40 W. Va. 289, 21 S. E. 729.

Where a statement of a matter of fact is made in the presence or hearing of a party, so that he understands it, regarding a fact affecting him or his rights, and is of such a serious nature as to call for a reply, and the party is possessed of knowledge concerning the matter mentioned, his failure to make reply is admissible in evidence as tending to show an admission of the truth of the statement. 16 Cyc. 956; Murphey v. Gates, 81 Wis. 370, 51 N. W. 573; O. S. Paulson Mercantile Co. v. Scaver, 8 N. D. 215, 77 N. W. 1001; 1 Enc. Ev. 367.

Primarily, that which constitutes probable cause is a question of judicial opinion. What facts, and whether all or sufficient undisputed

facts, constitute probable cause, is to be determined by the court. 26 Cyc. 106.

Cowan & Adamson and *H. S. Blood,* for respondent.

CHRISTIANSON, J. Plaintiff recovered a verdict against defendant for $500 in an action for malicious prosecution of a criminal action. The principal facts out of which this litigation grew are as follows: The plaintiff, Comeford, was indebted to the defendant, Morwood, on an unsecured promissory note for $41, and an open book account for $159.60. In settlement of this indebtedness the plaintiff, on November 16, 1912, executed and delivered to the defendant, Morwood, a promissory note for $200.60, payable December 16, 1912, and secured the payment of said promissory note by chattel mortgage on two horses, a set of harnesses, and the 1912 crops on certain lands in Bottineau county. Upon the execution and delivery of such note and chattel mortgage, Morwood delivered the unsecured promissory note for $41 to Comeford.

A few days after this transaction, Comeford went to Minot, North Dakota, and the defendant, Morwood, claims that upon investigation he learned that Comeford did not have any grain at the time the mortgage was given, and that the horses were of small value; that he thereupon consulted with his attorney, one Soule, who maintained an office at Westhope, where defendant also resided, and was advised by his said attorney to have Comeford arrested for obtaining property by false pretenses. Thereafter, on November 15th, 1912; the defendant, Morwood, made a complaint before a justice of the peace charging Comeford with the crime of obtaining property by false pretenses; a warrant was issued upon said complaint, and Comeford was arrested at Minot on December 10, 1912, and soon thereafter brought before the magistrate at Westhope, whereupon he waived a preliminary examination and was held to the district court. On December 16th, 1912, an information was filed in the district court charging defendant with the crime of obtaining property by false pretenses. Upon being arraigned, Comeford entered a plea of not guilty. When the case came on for trial, the trial court in its rulings on the admission of evidence held that the chattel mortgage did not constitute a valid mortgage on grain in the bin, and following such ruling the criminal action was dismissed

on motion of the state's attorney. Plaintiff thereafter brought this action to recover damages for malicious prosecution.

Only two errors are assigned and argued on this appeal. The first assignment of error is based upon the alleged refusal of the trial court to allow defendant's challenge to a juror. The following constitutes the entire record of the proceedings upon which this assignment of error is based:

Mr. Blood (plaintiff's attorney): We will challenge Mr. Smithson for cause, at this time, he being at the present time a magistrate.

The Court: The challenge is denied.

Mr. Blood: We will pass for cause.

Mr. Weeks (defendant's attorney): Pass for cause.

Mr. Weeks: *Pass for cause, and pass peremptory.*

Mr. Weeks: We have exercised a peremptory, call another juror.

Mr. Blood: Pass peremptory.

Mr. Weeks: We have exercised our second peremptory; call another one.

(At this time the jury was completed, and the court asked the clerk to call the names of those excused, which was done, and the following proceedings were had:)

Mr. Blood: The plaintiff at this time objects to the defendant's third peremptory challenge, Mr. John L. Edwards, for the reason that the defendant waived peremptory as to all of the jurors; that is, as to the first twelve men called, so that the defendant would have a right to peremptorily challenge only the jurors called after the waiver, and John L. Edwards is the third juror called.

Mr. Weeks: *I believe counsel is right about that;* Mr. Soule made the challenge, but I think he is too late at this time to make the objection.

Mr. Blood: If the court please, the counsel had no knowledge as to what juror was in fact challenged until he just now got the list from the clerk.

Mr. Weeks: I think the names were stricken off by Mr. Soule at the clerk's desk at each time.

The Court: Who was the man called in his place?

Mr. Blood: It was the last man called.

The Court: Mr. Bales, you mean?

Mr. Blood: Yes.

The Court: Well, to obviate any difficulty here, do you consent to the withdrawal of Mr. Bales, and the substitution of Mr. Edwards, the man who was stricken off?

Mr. Weeks: We are perfectly satisfied with the jury as it now stands. It was an oversight on our part, and it is unfair to take advantage of it at this time; it should have been objected to at that time.

Mr. Blood: If the court please, it was objected to as soon as we received knowledge as to what juror was in fact stricken off, and I think the challenge was made simply by noting it on the list the attorney had, and took it as a matter of course that it was the last juror that was called that was stricken off until I walked over to the clerk's desk and saw the third peremptory challenge was the third man called.

The Court: You ask now that Mr. Bales be withdrawn and that Mr. Edwards be placed on the panel?

Mr. Blood: Yes, sir.

The Court: All right, I will withdraw Mr. Bales, and Mr. Edwards may take his place in the jury box.

Mr. Weeks: Exception.

The record above set forth shows that defendant's counsel passed the juror Edwards both for cause and peremptorily. It also shows that he conceded that he had waived his right to peremptorily challenge this juror, and asserted that the challenge should be permitted to stand because plaintiff's objection to such challenge was not sufficiently timely. The record, however, discloses that the objection was made before the jury was sworn to try the case, and it also indicates that the objection was made as soon as plaintiff's counsel became aware of the fact that defendant's counsel had attempted to challenge a juror who previously had been accepted by both parties. It is not contended that Edwards was in any manner disqualified, or that any reason existed which might render him partial or unfair. Obviously a party who, after due examination or opportunity to examine, accepts a juror, cannot afterwards be permitted, as a matter of absolute right, arbitrarily, to change his mind and insist upon the discharge of such juror. The defendant was afforded full opportunity to exercise the statutory chal-

lenges to the different jurors. He accepted Edwards as a satisfactory juror. It seems self-evident that he was not entitled, as a matter of right, to challenge such juror peremptorily at the time the challenge was submitted, but permission to do so was a matter resting peculiarly within the trial court's discretion, and in no event can error be predicated upon the court's ruling unless it is shown that it constituted an abuse of discretion. In this case the trial judge, who saw and heard both attorneys and jurors, and was familiar with every incident of the proceedings, decided that no reason existed for permitting defendant's counsel to peremptorily challenge the juror whom he had previously accepted, and upon the record before us it seems too clear for argument that abuse of discretion has not been shown.

"No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn. It is enough that it appears that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others not qualified has been purposely created. Thus in the process of impaneling, no party is entitled, as of right, to have the first juror sit who has the statutory qualifications; though there are authorities to the contrary, chiefly based on exaggerated views of the rights of the accused in criminal trials. . . . Finally, it is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges; if his peremptory challenges remained unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint." Thomp. Trials, 2d ed. § 120. See also Comp. Laws 1913, § 7615, and Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

Defendant's next assignment of error assails the court's rulings in denying his motion for a directed verdict. This assignment is based solely upon the contention that the evidence was insufficient to show that the criminal action was instituted maliciously and without probable cause. Defendant's contention is untenable. The criminal prosecution was based principally upon the alleged fact that Comeford had

represented to Morwood that he (Comeford) owned some grain described in the mortgage, whereas in truth and in fact Comeford did not have any such grain. It is conceded that the mortgage is in defendant's handwriting. Upon the trial of this action plaintiff testified that at the time he signed the mortgage it did not cover the crop, but that this portion of the mortgage was inserted after its execution and delivery. The defendant on the other hand contended that the mortgage was not altered after its execution and delivery, but that it covered the grain at the time of its execution by the plaintiff. Hence one of the disputed questions for the jury to determine was whether the mortgage at the time of its execution covered the crop. If this clause was afterwards inserted by the defendant, then it is self-evident that defendant must have known that there was no foundation for the prosecution, and the statement which he made to his attorney Soule was neither complete nor accurate. Under these circumstances it was for the jury to say whether the defendant caused the criminal action against the plaintiff to be instituted by reason of malice and without probable cause. For "the general rule is that where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is, and whether the circumstances relied on as a charge or justification are sufficiently established, and for the court to decide whether they amount to probable cause." 26 Cyc. 107. As a general rule the question whether a prosecution was malicious is one of fact to be determined by the jury. 26 Cyc. 109. And the jury, having found that the criminal action was instituted without probable cause, might, and ordinarily would, draw the inference that the defendant was actuated by malice in causing the plaintiff's prosecution for an alleged crime which there was no probable reason to believe that plaintiff had committed. Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. 558; 26 Cyc. 51; 19 Am. & Eng. Enc. Law, 678.

The record shows that the various questions of fact involved in this action were submitted to the jury under full and fair instructions. The verdict has substantial support in the evidence, and is binding on this court.

The judgment and order appealed from are affirmed.

On Petition for Rehearing.

Appellant has filed a petition for rehearing. Such petition does not question the correctness of those portions of the opinion which deal with the propositions set forth in paragraphs 2 and 3 of the syllabus, but is directed exclusively at that portion of the opinion relating to the proposition set forth in paragraph 1 of the syllabus. A consideration of the petition for rehearing only tends to confirm our belief that appellant's contention is wholly without merit. But in view of the fact that appellant asserts that we were mistaken in the statement of facts upon which this portion of the opinion is based, and in order to eliminate any question regarding the facts, we have rewritten the opinion and inserted a literal statement of the proceedings had in the court below as shown by the statement of case. In order to avoid any misunderstanding, it may be stated that the former opinion has not been reported, and the foregoing opinion constitutes the decision of this court in this case.

L. D. TUBBS v. CHRIST SATHER.

(158 N. W. 276.)

Mortgagee — action by — against mortgagor — for possession of property — under mortgage — for purpose of foreclosure — redelivery bond — by mortgagor — death of, before trial — no administrator — third person — substitution of, as defendant — by stipulation — technicalities — waiver of — as to defect of parties — effect of stipulation — of substitution — judgment on — valid — revival of action — personal representative.

1. Where an action is brought by the mortgagee against the mortgagor for the possession of a chattel for the purpose of foreclosing the mortgage on the same, and the mortgagor retains the possession of the article and gives a redelivery bond, but dies before the trial, and no administration is had of the estate, and after his death a third person marries his widow and files a stipulation in the district court by which he agrees that he may be substituted as the defendant in the action in the place of the deceased, and if the plaintiff recover in the action he will answer to the judgment and be bound thereby, and will waive all

technicalities as to the defect of parties or wrongful or illegal substitution, and an order is entered substituting said third person as the defendant in the case, the said order and stipulation will have the same effect as if the complaint had been amended, and a judgment rendered thereon will be valid and binding as against the substituted defendant, and as between him and the said plaintiff, even though no attempt has been made to revive the action that was first brought, and as against the personal representative of the said deceased.

Old district — causes pending in — new district — transferred to new district — judge of new district — on order of.

2. After the formation of the ninth judicial district the cases theretofore pending in the counties of Bottineau, McHenry, and Pierce could, on order of the judge of said new district, and under the provisions of § 757, Compiled Laws of 1913, be entitled and heard in the ninth judicial district, and no prior order of the second judicial district was necessary for the purpose.

Opinion filed May 25, 1916. Rehearing denied June 13, 1916.

Appeal from the District Court of Pierce County; *C. M. Cooley,* Special Judge.

Motion to reinstate a judgment improperly satisfied. Order and judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action for the recovery of a certain horse or for the value thereof, the possession being sought for the purpose of foreclosing a chattel mortgage, and the original defendant, Ole Romfo, having given a redelivery bond and having retained the property.

The action was originally brought in the district court for the second judicial district, and was entitled L. D. Tubbs v. Ole Romfo. All of the proceedings that seem to have been had, however, in the district court for the second judicial district, were the filing of the pleadings, the service and filing of the summons, the seizure of the horse, and the giving of the redelivery bond by the defendant, said summons being served on May 10, 1904.

Thereafter, however, and on the 21st day of June, 1909, the following stipulation was made and entered into and filed in the district court for the ninth judicial district:

State of North Dakota, } ss.: In District Court,
County of Pierce, } Ninth Judicial District.

L. D. Tubbs, Plaintiff,
v.
Ole Romfo, Defendant.

Stipulation.

It is stipulated between L. D. Tubbs, plaintiff, Christ Sather, and L. N. Torson, attorney of record for the defendant in above-entitled action, the defendant died intestate, and there has been no administration of the estate of the defendant.

And whereas the said Christ Sather is interested in the said estate of the said Ole Romfo, and there being no cause other than that presented by this action, that the expense of administration of the said estate be incurred.

Now for the purpose of avoiding such expense and for the purpose of expediting the disposition of this action, which has been for a long time pending in the court,—

It is agreed that Christ Sather may be substituted as the defendant in this action, and that action proceed against him as it would have proceeded against the defendant, Ole Romfo, if he were still living. And if the plaintiff recover in this action, the said Christ Sather answer to the judgment, and he shall be bound thereby in the same manner as would Ole Romfo if he were still living, and no objection shall be made on the ground of defect of parties or wrongful or illegal substitution of parties in this action.

Dated Jan. 21, 1909.

L. D. Tubbs, Plaintiff.
By A. E. Coger, Attorney for Plaintiff.
Christ Sather, Party Subst.
L. N. Torson, Attorney of Record for Defendant.

No order seems to have been made in the district court of the second judicial district transferring the cause from the second to the ninth judicial district, but in the ninth judicial district the following order was entered:

State of North Dakota, } ss.: In District Court,
County of Pierce, } Ninth Judicial District.

L. D. Tubbs, Plaintiff.
v.
Ole Romfo, Defendant.

Upon reading the stipulation hereto attached it is ordered that Christ Sather be substituted as defendant in the above-entitled action pursuant to, and under the terms and conditions of, said stipulation.
Dated Jan. 23, 1909.

By the court:
A. G. Burr, Judge.
Filed in open court by order of the court this 22d day of Jan. 1909.
(Seal) George Watson, Clerk.

Thereafter the case was submitted to a jury, and though a verdict was rendered for the defendant, Christ Sather, the form of verdict being "L. D. Tubbs v. Christ Sather. We, the jury, find for the defendant," —such verdict was on motion set aside by the court, and judgment for the plaintiff and against the said Christ Sather entered in spite thereof, said judgment being as follows:

State of North Dakota, } ss.: In District Court,
County of Pierce, } Ninth Judicial District.

L. D. Tubbs, Plaintiff.
v.
Christ Sather, Defendant.

Judgment.

The above-entitled action having been commenced by the personal

service of the summons and complaint in this action upon Ole Romfo, the original defendant, and thereafter and prior to the trial of this action said Ole Romfo having died, and the defendant Christ Sather having been, by written stipulation and order of this court duly filed herein, substituted as defendant in the place of said Ole Romfo, and this cause having been regularly placed upon the calendar for the January, 1909, term of this court, and having been reached in its regular order for trial on the 22d day of January, 1909, and having been tried before the Honorable A. G. Burr and a jury, and Albert E. Coger appearing as attorney for the plaintiff, and L. N. Torson appearing as attorney for the defendant, and the jury having returned a verdict in favor of said defendant and against said plaintiff therein, for the possession of the personal property described in the complaint or for the value thereof, and judgment having been ordered on January 30th, 1909, in accordance with said verdict, and judgment on said verdict and order thereafter having on the 24th day of February, 1909, been entered and docketed in favor of said defendant and against said plaintiff, and the plaintiff having on the 23d day of January, 1909, and immediately after the return into court of the verdict of the jury, made and served his motion in due form of law for a judgment in favor of said plaintiff notwithstanding the verdict of the jury therein, on the following grounds; to wit,

First. That said verdict is contrary to law.

Second. That said verdict is contrary to the evidence.

Third. That the court erred in not granting plaintiff's motion for a directed verdict herein; and said motion having been continued from time to time by stipulation of counsel, and having by consent of all parties come on for hearing and argument at chambers of the above-named court in the city of Rugby in said county and state on the 13th day of November, 1909, Albert E. Coger appearing as attorney for plaintiff in support of said motion, and L. N. Torson appearing as attorney for defendant in opposition thereto, and said matter having been heard on all the pleadings and proceedings in said action, the verdict, the order for judgment, and judgment heretofore entered herein in favor of the defendant and on the statement of the case herein duly settled on the 13th day of November 1909, and prior to the hearing of said motion, and the court being fully advised in the premises, and having made its order for judgment herein,—

Now, on motion of Albert E. Coger, attorney for said plaintiff, and pursuant to said order for judgment, it is hereby adjudged and determined that the verdict returned and entered herein on the 22d day of January, 1909, be and the same is hereby set aside, annulled, and vacated, and it is further adjudged and determined that the order for judgment entered herein on February 24th, bearing date January 30th, 1909, and the judgment dated and entered herein on the 24th day of February, 1909, be, and each and both of them are, hereby set aside, annulled, and vacated.

And it is further adjudged and determined that the plaintiff, L. D. Tubbs, do have and recover of and from the defendant, Christ Sather, judgment for the recovery of possession of the property described in the complaint; to wit, one stallion, white face, white hind foot; or for the sum of $300, the value thereof at the time of taking, May 9th, 1904, with interest thereon at 7 per cent per annum from and since May 9th, 1904, amounting to $116.40, and making a total judgment of $416.40 for damages and interest, and for the costs and disbursements of this action, and the costs and disbursements of the motion for judgment notwithstanding the verdict herein taxed by me at $129.70, and making a total judgment in favor of plaintiff and against defendant of five hundred forty-six and 10/100 dollars ($546.10).

It is further adjudged and determined that upon the expiration of the time for appeal herein, if no appeal is taken, this judgment shall operate as a satisfaction of record of the judgment dated and entered herein on February 24th, 1909, in favor of defendant and against plaintiff.

Witness, The Hon. A. G. Burr, Judge of the Ninth Judicial District Court in and for the County of Pierce and State of North Dakota, and my hand and the seal of said court at Rugby, N. D., this 7th day of December, 1909.

(Seal) George Watson, Clerk of the District Court.

No appeal was taken from this judgment, and in the fall of 1909 the defendant, Christ Sather, gave notice to the attorney for plaintiff of his willingness to tender the horse, though no actual tender was made. Thereafter, and in 1910, the judgment was satisfied of record pursuant

to an order of the district court, said satisfaction being on motion of the defendant, and the affidavit and order being as follows:

State of North Dakota, } ss.: In District Court,
County of Pierce, } Ninth Judicial District.

L. D. Tubbs, Plaintiff,
v.
Christ Sather, Defendant.

State of North Dakota, } ss.: Affidavit.
County of Pierce, }

L. N. Torson, being first duly sworn, says he is attorney for the defendant in the above-entitled action.

That on December 7th, 1909, judgment in favor of the plaintiff and against the defendant was entered in the office of the clerk of the district court of Pierce county, North Dakota, in the above-entitled action, for and to recover the possession from the defendant that certain personal property described as follows; to wit, one stallion, white face, white hind foot; or for the sum of $300, the value thereof, with interest, together with the cost of the action, taxed and allowed at $129.70.

That afterwards, to wit, on the 2d day of February, 1909, the defendant, Christ Sather, paid into court the amount of judgment for costs together with interest; to wit, the total sum of $131.20.

Affiant further states that heretofore; to wit, on the 4th day of December, 1909, the defendant tendered, offered, and attempted to deliver to the plaintiff the personal property described in said judgment; to wit, the stallion, white face, and white hind foot, being the same stallion whose possession was ordered and adjudged in said judgment to belong to the plaintiff.

That affiant further states that at that time and ever since the defendant has been ready to deliver said personal property to the plaintiff at Rugby, Pierce county, North Dakota, free from all encumbrance, charges, liens, and claims whatsoever. That said offer of delivery was

made to A. E. Coger, attorney for the plaintiff, and that defendant did not offer to deliver said personal property to the plaintiff in person for the reason that plaintiff's residence is not known, and cannot be ascertained by this affiant or by the defendant.

That affiant is informed and verily believes that the plaintiff is a resident of the state of Wisconsin.

That affiant makes this affidavit for the purpose of obtaining an order to show cause, directed to the plaintiff, why the judgment entered in the above-entitled action on the 7th day of December, 1909, in favor of the plaintiff and against the defendant, should not be satisfied and discharged of record.

L. N. Torson.

Subscribed and sworn to before me this 3d day of February, 1910.

(Seal) R. G. Lander, Notary Public, N. D.

State of North Dakota, } ss.: In District Court,
County of Pierce, } Ninth Judicial District.

L. D. Tubbs, Plaintiff,
v.
Christ Sather, Respondent. } Order.

In the above-entitled action, the property mentioned in the judgment having been returned to plaintiff by defendant, and defendant having paid the costs in the action and demanded a release of said judgment, and the plaintiff having insisted on the collection of the money judgment and refused to receive the property therein mentioned tendered him by the defendant,—

Now, therefore, it is hereby ordered that upon the delivery of the horse in question by defendant to plaintiff or a tender thereof made, and proof of such tender or delivery being filed with the clerk satisfying him that the same has been done, the clerk of this court is directed to, on defendant's demand, thereafter satisfy said judgment of record in his office by indorsing on his judgment docket a statement that the same has been paid in full and so adjudicated by the court and the judgment

satisfied accordingly under this order of court, which order is directed to be placed with the files in said action.

Dated November 22d, 1910.

By the Court,

E. B. Goss,

Judge of the Eighth Judicial District acting for and at the written request of the Honorable A. G. Burr, Judge of the Ninth Judicial District of North Dakota, and under stipulation of counsel herein.

Thereafter, and on the strength of this order and this order alone, the clerk of the court satisfied the judgment.

About three years after this satisfaction the plaintiff, L. D. Tubbs, appealed to the supreme court from the order authorizing the same. This appeal was dismissed on account of the fact that it was made to appear that no tender of the horse had actually been made, but merely a notice of a willingness to tender it, and that the horse had died prior to the making of the order appealed from, and that such order was conditional and only provided for such satisfaction upon the delivery or tender of the animal in question. The supreme court, in short, held that the order never did, and never could, become effective, and that the clerk of the district court had therefore satisfied the judgment under an erroneous interpretation of the provisions of the order, and that appellant had therefore an ample remedy by motion in the district court, to reinstate the judgment. See Tubbs v. Sather, 29 N. D. 84, 149 N. W. 567.

Thereafter the plaintiff, Tubbs, applied to the district court for an order reinstating the judgment of February 24th, 1909, and which had been erroneously satisfied, and also for an order permitting copies of the original pleadings to be filed, such pleadings having, according to defendant and appellant's counsel, never been filed in said court, and having been lost, but, according to plaintiff and respondent's counsel, lost merely.

From an order granting this motion and allowing such pleadings to be filed *nunc pro tunc,* and from the order and judgment reinstating the original judgment, defendant and appellant has now appealed.

Cowan & Adamson and *H. S. Blood,* for appellant.

Where an action is pending, and before trial defendant dies, and no personal representative or successor in interest is substituted as defendant, the court cannot proceed to trial until substitution of the proper party is made, and the trial, verdict, and judgment had and made without such substitution are void. Code Civ. Proc. Comp. Laws 1913, § 7408; McCormick Harvesting Mach. Co. v. Snedigar, 3 S. D. 625, 54 N. W. 814; O'Neill v. Murray, 6 Dak. 107, 50 N. W. 619.

Where the sale party dies during the pendency of an action, though the cause of action continue in favor of or against some other person, still nothing can be done in the action, nor can any trial be had, until the person in whose favor or against whom the cause of action survives is brought before the court in some proper proceeding. 1 Cyc. 84, cases "16;" 18 Enc. Pl. & Pr. 1124, title Revivor of Suits; Moore v. Rand, 1 Wis. 245; Durbin v. Waldo, 15 Wis. 353; Tarbox v. French, 27 Wis. 651; Kingsbury v. Lane, 21 Mo. 115; O'Neill v. Murray, 6 Dak. 107, 50 N. W. 619; 19 Enc. Pl. & Pr. 1132; Stephens v. Magor, 25 Wis. 533; Dick v. Kendall, 6 Or. 166; Lee v. O'Shaughnessy, 20 Minn. 173, Gil. 157; Stocking v. Hanson, 22 Minn. 542.

In an action involving the right of possession of personal property, where a party dies before trial, it is necessary to revive such action, and the bill for such purpose can be filed only by the legal representative of such deceased person, according to the subject-matter of the action. Hawkins v. Chapman, 36 Md. 83; Russell v. Craig, 3 Bibb, 377.

If personalty, the executor or administrator must be substituted; if the subject-matter is real property, then the heirs alone are the proper parties to be substituted. Frowner v. Johnson, 20 Ala. 477; Bettes v. Dana, 2 Sumn. 383, Fed. Cas. No. 1,368; Russell v. Craig, supra; Glenn v. Smith, 17 Md. 260; Lanning v. Cole, 6 N. J. Eq. 102; Bowie v. Minter, 2 Ala. 406.

Where a statute allows the suggestion of the death of a party, the failure to make the suggestion will invalidate any judgment subsequently rendered. Gowings v. Loyd, 4 Tex. 483; Young v. Pickens, 45 Miss. 553; Burke v. Stokely, 65 N. C. 569; Sargeant v. Rowsey, 89 Mo. 617, 1 S. W. 823; Murphy v. Redmond, 46 Mo. 317; Prior v. Kiso, 96 Mo. 303, 9 S. W. 898.

In this case the summons and complaint were never filed with the

clerk, and, therefore, even with the proper party defendant substituted, still the judgment is void, being a judgment *in personam* and not *in rem*. Moore v. Stone, 5 Ark. 256; White v. Lewis, 2 A. K. Marsh. 123.

The word "pleading" in law signifies the science and course of allegations by which a party presents his demand or defense, and means a record. Kansas City v. O'Connor, 36 Mo. App. 594.

Coger & Nelson, for respondent.

The pleadings were originally filed and the district court had settled the statement of the case. But even if this were not the case, still the court would have the power to make, and it should make, the order of substitution on the stipulation and consent of the interested party. 8 Enc. Pl. & Pr. 925–927; Rice v. Colton, 126 Iowa, 654, 100 N. W. 634; 1 C. J. 253.

The lower court's orders were merely formal orders on matters of practice, and this appeal should be dismissed for the reason that the orders made are nonappealable. 3 C. J. 517, 541.

The representative of a deceased party, either plaintiff or defendant, may come voluntarily into court and make himself a party to the suit. 1 C. J. 238.

"Consent of appearance operates as a waiver of a notice of revivor." 1 C. J. 230, 247, 252, 253.

The stipulation in this case making substitution is reasonable, and not in contravention of public policy or of good morals, and the defendant is bound by it. 20 Enc. Pl. & Pr. 607.

A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith, to the prejudice of the adverse party. 16 Cyc. 798, 799; 36 Cyc. 1280.

Any matter which involves the individual rights of the parties to a cause may properly be made the subject of stipulation. 36 Cyc. 1236.

BRUCE, J. (after stating the facts as above). We are unable to see any merit in this appeal. In the prior case of Tubbs v. Sather, 29 N. D. 84, 149 N. W. 567, we held that the order of the trial court, which was entered on the order to show cause and which directed the clerk to satisfy the judgment of record, never did and never could

become effective, because it provided that such judgment should be satisfied upon the delivery or tender of the horse, and that such was impossible as the animal had died before the making of the order. We therefore dismissed the appeal, as it merely involved a moot and academic question. We intimated, however, that the record could be cleared by a motion in the district court to reinstate the judgment. Here we have an appeal from an order reinstating that judgment, or, if we please, from a judgment reinstating that judgment. This judgment or order merely put the parties in the same position they were in before the erroneous act of the clerk, based upon the inoperative order of the district judge. The act of reinstating the judgment merely cleared the record of errors, and set aside acts which we held to have been unauthorized and nugatory. The important thing then and now is the validity of the original judgment against Christ Sather, the cancelation of which this court held to have been inoperative. That judgment has never been appealed from.

That judgment was not void. Surely a man may make what contracts he pleases, as long as the public safety or morality is not injuriously affected.

The record shows that Christ Sather married the widow of the original defendant, Ole Romfo. This fact and the stipulation itself show that he was interested in the estate of the deceased, and that, apart from this lawsuit, there was no reason why an administration should be had. It is, in fact, unnecessary for us to determine whether the estate or the heirs had any interest in the litigation over the horse. They were not made parties to any proceeding; no judgment was rendered against them; they were not parties to any action. An action merely was brought against the deceased, Ole Romfo, for the possession of a horse. He died pending the same, and the defendant, Sather, agreed to take the action upon his own shoulders, and if Ole Romfo was liable for the retention of the same, to stand in his shoes and to be substituted for him. This is evidenced by the written stipulation which was filed in the proceeding, and upon which all of the orders of the district court are based. No matter what the original pleadings may have been, the parties stipulated and agreed that the action should proceed as if Sather were the defendant and had stepped into the shoes of Romfo, and not only was the case tried upon this theory, but the

judgment was afterwards recognized by the said Sather by paying the costs of the action and attempting to satisfy the same.

The stipulation, indeed, after having been filed in the case, not merely constituted an appearance on the part of Sather, but practically amounted to an amendment of the complaint so as to make him the defendant therein. If there was any variance in the proof, it cannot be taken advantage of here, as no appeal has been taken from the judgment against him.

Much has been said about the rights of the estate of Ole Romfo, that the action abated upon his death, and that this judgment is not binding upon his estate or his heirs, and that they may have had rights in the horse. All this may have been, but of what import is it? They are not parties to any of the proceedings, and are nowhere heard to complain. No recovery has been sought against them, and their rights have in no way been litigated. Nor do we find any error in the action of the court in allowing the pleadings to be filed *nunc pro tunc,* nor any ground for the reversal of the order or judgment reinstating the prior judgment, on account of the fact that those pleadings were entitled L. D. Tubbs v. Ole Romfo. It is clear to us from the record, indeed, that the complaint was filed at the time of the original action, and, whether filed or not, that it formed the basis of the proceeding, as it was expressly referred to in the instructions that were given by the court to the jury. It was, as we said before, practically amended as to parties by the stipulation, and that stipulation waived all technical defenses. It is too late now for the defendant to complain.

Nor was there any merit in the proposition that no order was entered in the district court for the second judicial district transferring the cause to the court of the newly created ninth district. As we construe § 757, Compiled Laws of 1913, all that was necessary was the entry of an order in the ninth district, and this order was regularly entered.

The judgment of the District Court is affirmed.

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

On Petition for Rehearing.

BRUCE, J. Defendant and appellant urges in his petition for re-

hearing that this court has erroneously held that the defendant, Christ Sather, by marrying the widow of Ole Romfo, acquired a legal interest in his estate. We, of course, held no such thing. When we used the words, "that he was interested in the estate of the deceased," all we intended to say was that on account of the fact that he had married the widow and the heir of the deceased, it was natural that he should desire that unnecessary expenses of administration should be avoided.

Appellant next urges that "the court has overlooked the fact that respondent acquiesced in the order of Judge Goss by accepting the sum of $129.70 costs ordered to be paid by Sather to Tubbs, and hence cannot accept the benefits of the order and repudiate the balance."

There is no merit, however, in this point. In the first place there is nothing in the record to show that the $129.70 costs were ever paid to the respondent or ever accepted by him. In the second place, even if accepted by him, there would be no waiver of plaintiff's rights. The costs were paid by the defendant, Sather, on the 2d day of February, 1909. The affidavit on the motion to show cause why the judgment should not be satisfied was not subscribed to until February 3, 1910, nor was the order of Judge Goss made until the 22d day of November, 1910. As a matter of fact no tender of the horse was ever made, and even the affidavit does not claim that it was made before the 4th day of December, 1909. It is thus clear that the costs were paid long before the tender or pretended tender of the horse. At the time of the payment of the costs, therefore, the plaintiff had judgment against the defendant for the return of the horse or in default thereof for the sum of $300, the value thereof, and in addition for the costs mentioned. It cannot possibly be claimed that when one has a judgment against another for the return of a horse and for costs, and he accepts the payment of the costs which are paid to the clerk, he thereby relinquishes his claim to a return of the animal. Of course, he might do so and accept the payment of the costs as a full satisfaction of his claim, but there is no such proof in the record that this was done.

Counsel also urges that we have overruled various provisions of the Probate Code. We have done no such thing. All we have held is that a man is a free moral agent; that if an action is brought against one man, or even an estate, and another person chooses to substitute himself as defendant, and agrees to be bound by the judgment and to

waive all technicalities, he may be permitted to do so and may be taken at his word, and that if he has submitted to the jurisdiction of the court, allowed a jury to be impaneled and the case to be tried, has taken no appeal, has given notice of his willingness to abide by the judgment, and to tender the property and has acquiesced in the judgment by paying the costs and by asking for its satisfaction, he cannot, more than three years afterwards, question that judgment, set aside his stipulation, and deny the jurisdiction in which he has so long acquiesced.

The petition for a rehearing is denied.

K. W. RICKEL v. S. F. SHERMAN.

(158 N. W. 266.)

Verdict — evidence — substantial support — supreme court — will not weigh evidence — new trial — order denying — ground — insufficiency of evidence.

1. Where a verdict has substantial support in the evidence, the supreme court will not weigh conflicting evidence; nor will it disturb such verdict, or an order denying an application for a new trial based upon alleged insufficiency of the evidence.

Civil action — variance between pleading and proof — where material — misleading — prejudicial — action — defense.

2. Under § 7478, Compiled Laws 1913, a variance in a civil action is not material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense.

Pleading and proof — variance — failure of proof — waiver — question — must be raised — on trial.

3. A variance between the pleading and the proof, not amounting to a failure of proof, is waived unless such question is raised seasonably, in an appropriate manner upon the trial of the cause.

Opinion filed May 13, 1916. Rehearing denied June 13, 1916.

Appeal from District Court, Cass County; *Pollock,* J.

From a judgment and an order denying a new trial, defendant appeals.

Affirmed.

Pollock & Pollock, for appellant.

Plaintiff sued upon an express contract, and he failed to show performance on his part. He cannot rely upon the contract in part, and repudiate it in part. 7 Mod. Am. Law, foot page 447–449, 4 Cyc. 326; Wernli v. Collins, 87 Iowa, 548, 54 N. W. 365; Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686; Boyce v. Timpe, — Iowa, —, 89 N. W. 83.

W. J. Courtney, for respondent.

The finding of the jury upon conflicting evidence is conclusive upon the appellate court, or on motion for a new trial. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Muri v. White, 8 N. D. 58, 76 N. W. 503; Howland v. Ink, 8 N. D. 63, 76 N. W. 992; Becker v. Duncan, 8 N. D. 600, 80 N. W. 762; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Magnusson v. Linwell, 9 N. D. 154, 82 N. W. 746; Flath v. Casselman, 10 N. D. 419, 87 N. W. 988; Drinkall v. Movius State Bank, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; State v. Montgomery, 9 N. D. 405, 83 N. W. 873; State v. Howser, 12 N. D. 495, 98 N. W. 352.

Where it appears that there is substantial conflict in the evidence, a motion for a new trial will be denied. Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Casey v. First Bank, 20 N. D. 212, 126 N. W. 1011; Lowry v. Piper, 20 N. D. 637, 127 N. W. 1046. A strong case see Galvin v. Tibbs, H. & Co. 17 N. D. 600, 119 N. W. 39.

CHRISTIANSON, J. Plaintiff, in his complaint in this action, alleges that he was employed by the defendant, Sherman, on or about April, 1913, to do certain breaking in Cass county, in this state, and that said defendant agreed to pay plaintiff $3 per acre for such breaking; that under the terms of said agreement the plaintiff broke 515 acres of said land in the spring of 1913, and that defendant has

refused and failed to pay therefor. The defendant's answer was a general denial. The case was tried to a jury and resulted in a verdict for plaintiff. Defendant moved for a new trial, which was denied, and he has appealed to this court from the judgment and the order denying a new trial.

The only question argued by appellant is that the evidence was insufficient to justify and support the verdict. This argument is based upon the theory that the contract proven was different from that alleged. Appellant's counsel in their brief say: "The plaintiff alleged in his complaint a certain contract and proved an entirely different one.

"The contract alleged was for breaking alone, and no reference in the allegations of the complaint is made to any other employment under it, or any bargain between the plaintiff and defendant for any other work of any kind, character, or description.

"The proof offered at the trial in support of the allegations of the complaint are of a contract or oral bargain, not alone for the breaking, but also for the seeding, harvesting, threshing, and delivery of the crop, etc."

It is true the evidence showed that the contract between the plaintiff and defendant embraced other things besides breaking. But it is also true that the evidence showed that the only point in dispute between the parties respecting the terms of the contract was whether defendant agreed to pay plaintiff $3 per acre for breaking the land. The other provisions of the contract were not disputed. Both parties testified that plaintiff was to sow flax upon the land broken, and harvest, thresh, and deliver the same at the elevator. Both parties conceded that under the terms of their agreement plaintiff was entitled to receive one half of the net proceeds of such flax. Defendant claimed that this was the only compensation which plaintiff was to receive, but plaintiff claimed that defendant also agreed to pay plaintiff $3 per acre for the land broken and seeded to flax. Hence, as already stated, the only point in dispute between the parties was whether defendant agreed to pay plaintiff $3 per acre for the land so broken and seeded to flax, and the case was tried upon the theory that this was the sole point at issue. The evidence showed that the plaintiff not only broke the land, but seeded it to flax and harvested

and threshed such flax crop and caused the same to be delivered at the elevator, and that defendant received the proceeds thereof, but no issue was presented by either party regarding the division of such proceeds.

It was conceded that plaintiff had actually broken 490 acres, that he had been paid nothing therefor and that, if he was entitled to recover at all, he was entitled to recover $1,470. The jury was fully instructed upon this question, and directed to find upon this issue alone. No exceptions were taken to these instructions, and they are concededly correct. The record shows that at the close of the testimony a colloquy took place between the court and counsel of which the following is a part:

The Court: Gentlemen, I would like to hear what you are going to present to this jury; what theory you are going to the jury on. I must confess I am a little confused as to what your respective desires are under the testimony as now offered?

Defendant's Counsel: We have been trying just one question, your Honor, we had, of course, to go into various things that were mere side lights, and that perhaps we should not have gone into, but it seems to us there is just one question to be submitted to this jury, and that is the issue in this case and the only issue, was or was there not a contract?

The Court: Well, suppose the jury find against you on that, and find that there was a contract for $3 an acre, then what?

Defendant's Counsel: We have no counterclaim.

The Court: I know that; but do you concede then, if, under the condition of this record, the jury find that there was a contract for $3 an acre, then the judgment must go against you for the $3 an acre?

Defendant's Counsel: He must show a contract and a performance on his part in order to recover, and his recovery, if he is entitled to recover on a contract made and performed, is $3 an acre; I don't know how it can be anything else.

The record shows that there was a square conflict in the evidence upon the question of whether the defendant agreed to pay plaintiff $3 per acre for the breaking. This being true, neither the verdict nor the court's ruling in denying the application for a new trial on the

ground of the alleged insufficiency of the evidence will be disturbed, as "the rule is firmly settled that this court will not weigh conflicting evidence, nor disturb the order of a trial court granting or denying a new trial, where there is substantial conflict in the testimony." Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Black v. Walker, 7 N. D. 414, 75 N. W. 787.

The record also shows that defendant's counsel made no objection to the evidence offered by plaintiff on the ground of variance; neither did they move for a nonsuit or a directed verdict on the ground of failure of proof, but they permitted the case to be submitted to the jury upon the theory that the only question involved was whether defendant had agreed to pay plaintiff the sum of $3 per acre for breaking the land.

Under the provisions of the Code of Civil Procedure (Comp. Laws 1913, § 7478), a variance is immaterial unless actually and prejudicially misleading, and shown to the satisfaction of the court to be so. The effect of these statutory provisions was considered by this court in Halloran v. Holmes, 13 N. D. 411, 416, 101 N. W. 310, wherein this court, speaking through Mr. Justice Engerud, said: "Under the provisions of the Code of Civil Procedure, a variance, unless it amounts to a failure of proof, is not material, unless 'it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits.' If the objecting party asserts that such is its effect, 'the fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as shall be just.' Rev. Codes 1899, § 5293. 'When the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.' Rev. Codes 1899, § 5294. The effect of these provisions is to make the materiality of a variance depend upon satisfactory proof that it has actually misled the adverse party to his prejudice. Unless such proof is furnished the variance must be deemed immaterial and be disregarded. Washburn v. Winslow, 16 Minn. 33, Gil. 19; Catlin v. Gunter, 11 N. Y. 368, 62 Am. Dec. 113; North Star Boot & Shoe Co. v. Stebbins, 3 S. D. 540, 54 N. W. 593. In this case, although the defendants objected to the evidence in question on the

ground of variance, they did not support their objection by proof, or offer of proof, that they were prejudicially misled by the variance in maintaining their defense on the merits. In the absence of such proof, an objection for variance is unavailing, unless the variance is of such a degree as to be a failure of proof, as defined in § 5295, Rev. Codes 1899. Under that section a failure of proof results only 'when . . . the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning.'" See also Robertson v. Moses, 15 N. D. 351, 108 N. W. 788; Maloney v. Geiser Mfg. Co. 17 N. D. 195, 115 N. W. 669.

In the case at bar the evidence offered by the plaintiff did not leave the allegation, plaintiff's cause of action, unproved "in its entire scope and meaning," or even in any particular, but such evidence tended to establish every fact alleged in plaintiff's complaint, and tended to show an agreement on the part of the defendant to pay plaintiff $3 per acre for the breaking of the land. Obviously the variance did not amount to a failure of proof. The objection now presented could have been obviated by an amendment to the complaint. Defendant does not contend that he was misled to his prejudice in maintaining his defense upon the merits. Under these circumstances we have no hesitancy in holding that the defendant cannot now be heard to assert that the evidence established a contract variant from that alleged in the complaint, but that such objection (if tenable) was waived by failure to raise the same seasonably in the trial court. 22 Enc. Pl. & Pr. 629–640; 13 Enc. Ev. 740 et seq.; Adams v. Castle, 64 Minn. 505, 67 N. W. 637; see also 3 C. J. §§ 720 et seq.

The judgment and order denying a new trial are affirmed.

On Petition for Rehearing.

A petition for rehearing has been filed wherein it is asserted that plaintiff has failed to establish a cause of action, and that consequently he was not entitled to recover against the defendant. Appellant's proposition is stated in the petition for rehearing as follows: "The defendant alleged a contract for the breaking of certain lands at $3 per acre. He proved that he had made a contract not only for the

breaking of the land, but for the seeding of it, harvesting, and threshing of a crop to be grown thereon; that it was one entire, comprehensive, and complete contract covering all of the work so to be done. He failed to prove that he had performed the conditions of the contract other than for the breaking on his part to be performed and done. We are endeavoring to contend for the principle that in order to recover upon a contract a party must, as a part of his burden of proof, show performance on his part of all the conditions on his part to be done and performed as a condition precedent to any recovery."

In our former opinion we set out a portion of a colloquy had between court and counsel at the close of the testimony. The record also shows that toward the end of such colloquy, the following statements were made by the court and respective counsel, viz.:

The Court: Now, do I understand you, Mr. Pollock, that if the jury finds against you, and find that the contract was that he should receive $3 an acre for the breaking, that it then follows that they must give a judgment against you for $1,470?

Mr. Pollock: No; I think probably they should go a step further and show that it has not been paid; to show that that is the contract, and that he has performed it, and that he has not had his money.

The Court: That brings up the further question then, Do you claim that these advances were paid on the plowing?

Mr. Pollock: No; we don't claim there was any obligation on our part to pay for the plowing.

The Court: I know you don't, but suppose the jury finds against you, then what?

Mr. Pollock: Will the court suggest what he wants me to say; they sue on a contract and they allege it has not been paid and that they performed the contract.

The Court: They say they have received nothing, and you haven't put in any evidence that you have paid for the plowing.

Mr. Pollock: We deny that we made any contract to pay for the plowing.

The Court: *Then I don't see on that theory that there is anything here to go to the jury except the one question, if the contract was as they claim, $3 an acre, then they must have a verdict for $1,470 and interest; if they find, however, that there was no contract to pay for*

the breaking then they must find for the defendant. Is that your understanding Mr. Courtney?

Mr. Courtney: That is the theory. . . .

The Court: It is a very simple matter that way; that is the easier way for me to write the charge; that is the path of least resistence.

The obvious purpose of the court's inquiry was to ascertain what questions of fact were actually in dispute between the parties. After such inquiry the trial court arrived at the conclusion "that there was nothing to go to the jury except the one question, if the contract was as plaintiff claims, then he must have a verdict for $1,470 and interest; but if the jury find, however, that there was no contract to pay for the breaking, then they must find for the defendant." Neither party disputed the correctness of such conclusion. The trial court instructed the jury in accordance therewith. No exceptions were taken to such instructions. No motion was made for a directed verdict. Nor was the sufficiency of the evidence questioned in any manner upon the trial.

The case was tried upon the theory that the controlling question at issue was whether defendant had agreed to pay plaintiff $3 per acre for breaking the land. Plaintiff asserted that such agreement had been made, whereas defendant claimed that he never agreed to pay plaintiff anything for the breaking. Both parties to the litigation treated this as the point at issue. Defendant's counsel was aware that the trial court believed this to be the only disputed question. In the order denying a new trial, the trial court said: "It will suffice to say that the record shows the case was tried upon the theory of a 'contract for breaking' alone. I remember the court was at first perplexed as to the true nature of the action, but very soon made a statement which indicated what was in his mind (Transcript 17, Line 8). 'You allege a contract for the breaking of the land at $3 an acre, and he is trying to show that was not the contract.' After the evidence was all in and both parties rested, the court, to make sure of the issues, had a long colloquy with counsel (pages 114 to 118), and finally, without objection, placed the one issue before the jury. Upon the ground in point one, therefore, even if tenable, the granting of a new trial would it seems to me be an abuse of discretion."

The rule is well settled that where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom on a motion for new trial or in the appellate court. And *"where a case is tried without objection, upon the theory that the only issue is as to one question of fact, a party cannot urge, in the appellate court, that the evidence upon some other question of fact was insufficient to justify the verdict.* And when parties submit a cause upon a single hypothesis, and expressly or impliedly agree that that point shall be the only one for the jury, they cannot insist that the court erred in excluding testimony not pertinent to the question, *or that evidence as to some other question was not introduced."* (3 C. J. § 623, p. 729.) See also Montana Eastern R. Co. v. Lebeck, 32 N. D. 162, 155 N. W. 648.

This language is directly applicable to the proposition presented by the petition for rehearing. The cause was tried and submitted in the court below upon the theory that the question of plaintiff's right to recover was dependent upon whether defendant had agreed to pay $3 per acre for the breaking. Having tried the case upon the theory that this was in reality the only question at issue, he cannot, after having been defeated upon this issue, assert that plaintiff was also required to establish other facts.

The petition for rehearing is denied.

ROBERT WILMOTT v. JACOB KOLLER.

(158 N. W. 257.)

Civil action — justice court — judgment — appeal from — either party may take.

1. Under § 9163, Compiled Laws of 1913, any party dissatisfied with a judgment in a civil action may appeal therefrom to the district court; hence, where but one party appeals, the other will be deemed to be satisfied with the justice's judgment.

Judgment — justice of peace — appeal from — effect of — does not vacate — suspends during appeal.

2. An appeal from the judgment of a justice of the peace does not vacate such judgment altogether, but merely suspends it pending the appeal.

Justice of peace — judgment — appeal — dismissal — consent of other party — respondent — counsel for — consent to dismissal — power to — or payment of amount.

3. A party appealing from a judgment of a justice of the peace may dismiss or discontinue his appeal without the consent of the adverse party. This being true, it is held that counsel for such adverse party has authority to consent to a dismissal or discontinuance of the action upon payment of the full amount due on the judgment.

Opinion filed May 20, 1916. Rehearing denied June 14, 1916.

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

From an order vacating a judgment of dismissal of the action, defendant appeals.

Reversed.

Cowan & Adamson and *H. S. Blood*, for appellant.

The order vacating the judgment of dismissal of the appeal, and reinstating the appeal, cannot stand. The judgment from which appeal was taken had been paid, and the amount thereof accepted by plaintiff prior to his application for reinstatement, by payment to plaintiff's attorney in the case. This was payment to plaintiff. See 2 Cyc. 162, and cases cited; Larson v. Vinje, — Iowa, —, 109 N. W. 786; Horton v. Emerson, 30 N. D. 258, 152 N. W. 529.

"The right to accept the fruits of a judgment or order, and the right to appeal therefrom, are not concurrent, but wholly inconsistent, and an election of either is a waiver of the other." San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047; Spelling, New Tr. & App. Pr. § 652, and cases there cited.

The payment of money to an attorney of record in satisfaction or partial satisfaction is acceptance by his client, and binds him. Newman v. Kiser, 128 Ind. 258, 26 N. E. 1006; 2 Cyc. 654, and cases cited; Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764.

In the absence of notice of substitution or order to that effect, the first attorney remains the attorney of record, and payment to him is payment to his client. 4 Cyc. 596; John Miller Co. v. Minckler, 30 N. D. 360, 152 N. W. 664.

A party cannot retain payment and at the same time ask to have his appeal reinstated and continued in his behalf. Such acts would be in-

equitable. Noble v. McIntosh, 23 N. D. 59, 135 N. W. 663; Tee v. Noble, 23 N. D. 225, 135 N. W. 769; Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764.

A party cannot set up such pay claim as a defense in a new action between same parties. 2 Cyc. 659, and cases there cited.

Flynn & Traynor, for respondent.

The Indiana decisions holding that a party cannot appeal after receiving money paid on the judgment are based upon a statute of that state to that express effect, and are therefore not controlling in this state. McCracken v. Cabel, 120 Ind. 266, 22 N. E. 136.

Where the pleadings admit a certain amount due, and such sum has been voluntarily paid or tendered on the judgment, and accepted by the prevailing party, such tender or payment and acceptance do not constitute a waiver of the right to appeal. Citing Embry v. Palmer, 107 U. S. 8, 27 L. ed. 348, 2 Sup. Ct. Rep. 25; Upton Mfg. Co. v. Huiske, 69 Iowa, 557, 29 N. W. 621; see also United States v. Dashiel, 3 Wall. 688, 18 L. ed. 268.

On such an appeal from the judgment of a justice court to the district court, the action shall be tried anew in the district court in the same manner as actions originally commenced in district court. Comp. Laws 1913, § 9173; Keehl v. Schaller, 1 S. D. 290, 46 N. W. 934.

The dismissal of the complaint and the dismissal of the appeal are two different proceedings, not alike in effect. To dismiss the complaint is to dismiss the action; the dismissal of the appeal has no such effect. Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

A perfected appeal from justice court to the district court, entirely removes the cause from justice court, and only the appellate court thereafter has jurisdiction. The judgment of the justice court is not merely suspended, but it is vacated and set aside pending the action of the district court. Thornton v. Mahoney, 24 Cal. 569; People v. Treadwell, 66 Cal. 400, 5 Pac. 686; Rossi v. Superior Ct. 114 Cal. 371, 46 Pac. 177; Peterson v. Frey, 109 Mich. 689, 67 N. W. 974; Fogarty v. Battles, 145 Iowa, 61, 123 N. W. 953; Swantek v. Jarmoszki, 162 Mich. 617, 127 N. W. 800; Mayott v. Knott, 16 Wyo. 108, 92 Pac. 240; Hosoda v. Neville, 45 Mont. 310, 123 Pac. 20; Huffman v. Ellis, 52 Neb. 688, 73 N. W. 10.

An attorney without express authority has not the right to accept money in payment of a judgment, unless the entire amount claimed by his client is tendered or paid. Comp. Laws 1913, § 796, subdiv. 3; Granger v. Batchelder, 54 Vt. 248, 41 Am. Rep. 846; Preston v. Hill, 50 Cal. 43, 19 Am. Rep. 647; Kilmer v. Gallaher, 112 Iowa, 583, 84 Am. St. Rep. 358, 84 N. W. 697; Rhutasel v. Rule, 97 Iowa, 20, 65 N. W. 1013.

"The general employment of an attorney to prosecute an action does not confer on him the power to dismiss it," and "the reinstatement of an action dismissed by an attorney, without authority, is in the discretion of the trial court." 4 Cyc. 945, ¶ 3; Fetz v. Leyendecker, 157 Mich. 355, 122 N. W. 100; Fleishman v. Meyer, 46 Or. 267, 80 Pac. 209; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Budlong v. Budlong, 31 Wash. 228, 71 Pac. 751; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924; Smith v. Jones, 47 Neb. 108, 53 Am. St. Rep. 519, 66 N. W. 19; Hamrick v. Combs, 14 Neb. 381, 15 N. W. 731; Bigler v. Toy, 68 Iowa, 687, 28 N. W. 17; Gibson v. Nelson, 31 L.R.A.(N.S.) 523, and numerous cases cited in the note following, 111 Minn. 183, 137 Am. St. Rep. 549, 126 N. W. 731; Paulson v. Lyson, 12 N. D. 356, 97 N. W. 533, 1 Ann. Cas. 245; Olson v. Sargent County, 15 N. D. 148, 107 N. W. 43; Noble v. McIntosh, 23 N. D. 59, 135 N. W. 663; Tee v. Noble, 23 N. D. 225, 135 N. W. 769.

A showing of merits is not necessary on a motion to reinstate a cause dismissed without authority. Martinson v. Marzolf, 14 N. D. 309, 103 N. W. 937; Williams v. Fairmount School Dist. 21 N. D. 204, 129 N. W. 1027; Gilbreath v. Teufel, 15 N. D. 152, 107 N. W. 49.

Fisk, C. J. This litigation originated in justice court, where plaintiff had judgment for $35.63. An appeal was prosecuted to the district court, defendant demanding a trial *de novo,* and giving a stay bond. Thereafter the following stipulation was entered into by counsel for the respective parties: "It is hereby stipulated and agreed by and between plaintiff and defendant herein, that in consideration of the sum of $37 this day paid by defendant to plaintiff, that the above-entitled action be, and the same is, hereby dismissed with prejudice and without costs to either party, and that pursuant to this stipulation for dismissal the court may enter its order accordingly."

Pursuant to such stipulation, the sum of $37 was paid to plaintiff's counsel, and an order dismissing the action was made, and judgment entered accordingly. Thereafter the judgment of dismissal was vacated and the cause set for trial, and the appeal is from the order thus vacating said judgment.

We are confronted on this appeal with the question whether plaintiff's counsel, as such, had authority to bind his client by the stipulation aforesaid, respondent's contention being that under the appeal transferring the cause to the district court for trial *de novo,* plaintiff's rights thereafter were precisely the same as they would have been had he, in the first instance, instituted the litigation in that court. If correct in such contention, it might logically follow that counsel for plaintiff would not be authorized to accept less than the full amount of plaintiff's claim without express authority from his client. In other words, plaintiff's contention is that the appeal operated in law to wholely vacate and supplant the justice's judgment, and consequently there existed no judgment which could be paid to, and satisfied by, plaintiff's counsel.

In support of this contention, respondent calls attention to § 9172, Compiled Laws of 1913, which reads: "The action shall be tried anew in the district court in the same manner as actions originally commenced therein." Also to § 9173, which reads: "When an appeal to the district court is dismissed . . . a certified copy of the order dismissing the same shall be filed in the justice's court in which the judgment was rendered and there after the judgment appealed from shall have the same force and validity, and be enforced in the same manner as if no appeal had been taken." In support of his contention, counsel for respondent also cites numerous cases from the states of California, Michigan, Iowa, Montana, Nebraska, and Wyoming. We think most of the statutes in these states will be found, on examination, to differ somewhat from our own. However this may be, there appear to be two rules deduced from the authorities. As stated in 24 Cyc. 695: "In most jurisdictions a regularly perfected appeal from the judgment of a justice of the peace vacates the judgment, while in others the judgment is merely suspended during the pendency of the appeal." The authorities in support of each rule may be found col-

lected in the notes to the above text and also in the supplements to this work.

As we construe our statute, the appeal to the district court did not operate to vacate the justice's judgment, but the giving of the supersedeas undertaking operated merely to *suspend* such judgment pending the appeal. The statute is clear that where a supersedeas bond is not given, the justice's judgment is not even suspended, but may be enforced, pending appeal, and yet in such a case the action is also tried *de novo* in the district court in the same manner as actions originally commenced therein. We find nothing in our Code to warrant a holding differentiating, in this regard, appeals where supersedeas bonds are given, from those where no such bonds are given. If correct in this conclusion, it follows that the justice's judgment being merely suspended, pending the appeal, would on the termination or dismissal thereof become reinstated.

As stated by the court in Gregory v. Hough, 171 Ill. App. 334: "We do not think that when a case is appealed from a justice of the peace to the circuit court, it can be said that the judgment of the justice of the peace is vacated upon the perfecting of the appeal, because if the appeal, for any reason, is dismissed and a procedendo awarded, the efficacy of the judgment in the justice court is immediately re-established." And as also stated by the Missouri court in Leonard v. Security Bldg. Co. 179 Mo. App. 480, 162 S. W. 685: "It is no longer held that an appeal from the judgment of a justice of the peace vacates the latter altogether, as has been said in some of the cases. . . . But that the judgment of the justice remains suspended pending the outcome of the appeal. . . . From the language of the supreme court in Pullis v. Pullis Bros. Iron Co. 157 Mo. 565, 57 S. W. 1095, it appears that a dismissal of the appeal 'revivifies' the judgment of a justice. This may be quite true without in any manner affecting the real question before us. It is immaterial that the judgment may thus be revived and again become in force. But unless it is so revived by the dismissal of the appeal, it never again acquires any force; for the case will otherwise proceed *de novo* in the circuit court as though it had been originally instituted there, and the circuit court will ultimately enter its judgment therein, unless the plaintiff should exercise his right to dismiss the cause or take a non-

suit, in which event the case is taken out of court and the judgment of the justice thereby vacated." But, as we view the case, it is not of controlling importance as to whether by an appeal the justice's judgment is vacated or merely suspended, for in either event, under the great weight of authority, the appellant had a right to dismiss his appeal, even against the plaintiff's objection. 24 Cyc. 711, citing the following, among other authorities: Maplewood Coal Co. v. Phillips, 206 Ill. 451, 69 N. E. 514; Kansas City, Ft. S. & G. R. Co. v. Hammond, 25 Kan. 208; Lee v. Kaiser, 80 Mo. 431; Dobry v. Northern Mill. Co. 3 Neb. (Unof.) 67, 90 N. W. 757; Eden Musee Co. v. Yohe, 37 Neb. 452, 55 N. W. 866; Darlington-Miller Lumber Co. v. Hall, 4 Okla. 668, 46 Pac. 493; Jameson v. Smith, 19 Tex. Civ. App. 90, 46 S. W. 864; Hart v. Minneapolis, St. P. & S. Ste. M. R. Co. 122 Wis. 308, 99 N. W. 1019, 2 Ann. Cas. 793. See also: 2 Enc. Pl. & Pr. 351; Donaghy v. McCorkle, 118 Tenn. 73, 98 S. W. 1050.

That defendant had the right to dismiss his appeal seems plain. Plaintiff should have also appealed if he desired to insure a trial *de novo* in the dictrict court. By not appealing, he must be presumed to be satisfied with the judgment which he obtained below. The opinion of Marshall, J., in Hart v. Minneapolis, St. P. & S. Ste. M. R. Co. 122 Wis. 308, 99 N. W. 1019, 2 Ann. Cas. 793, is, we think, sound, and in point. We quote: "Is it proper for a circuit court to permit an appellant thereto, from a judgment rendered in a justice court, to dismiss his appeal against objection by the opposite party? That is the question for solution upon this appeal. Section 3753, Rev. Stat. 1898, gives the privilege of appealing from a justice's judgment, to any party thereto. Sections 3767 and 3768 provide that in certain cases the trial of such an appeal shall be had in the appellate court on the justice's return, and in others the same as in actions originally brought there. . . . Whether a party may dismiss his own appeal, in the absence of any other guide than statutory authority, should be resolved, it would seem, in favor of the right, since the statute plainly gives the privilege of appealing to the party in whose favor, as well as the party against whom, the judgment was rendered. That indicates that each party who deems himself aggrieved by a justice's judgment, in order to control the same for the purpose of securing a redress of

such grievance upon appeal, must act by resorting to the appeal remedy; that if one appeals and retains the cause in the appellate court till a trial occurs, his supposed grievance and that of his adversary as well, if any, are to be redressed if found real; but the latter, not having appealed, upon the former's application to dismiss his appeal, is deemed to be satisfied with the judgment which the dismissal would reinstate." To the same effect are the holdings in the other cases last above cited.

In view of defendant's right to control his appeal, we deem it clear that plaintiff's counsel had authority, on payment of the full amount of the judgment with interest, to stipulate for a dismissal of the action, for the same result could have been accomplished without plaintiff's consent by a formal dismissal of the appeal.

The fact that the stipulation called for a dismissal of the action rather than the appeal is not controlling, for, clearly, if defendant had the right to terminate the action in the district court by a dismissal of his appeal, the same result could be accomplished through the stipulation dismissing the action upon payment of the amount due on the judgment.

It follows that the order appealed from is erroneous, and the same is accordingly reversed.

A. B. HERRMANN v. STATE BANK OF ROLLA, a Corporation, et al.

(158 N. W. 986.)

Appeal from an order refusing to vacate a default judgment.

Mortgage — bank — complaint — lien — payment — trustee of funds — service of process — default — judgment — presumptions.

1. The complaint alleged that one M. had executed to the defendant bank certain real estate mortgages with which defendants' lien upon said premises should be paid; that by reason of these facts the bank became the trustee of funds raised by said mortgage, and that the same should be applied in the payment of plaintiff's claim. The relief demanded was that the bank be required to pay over such trust funds to the plaintiff. No answer was made by the bank, although the cashier was personally served with the summons. *Held*, that all presumptions are in favor of the validity of said judgment, and that the same was not such a nullity as could be set aside as absolutely void.

Evidence — laches — defendant's judgment — vacation of — application for.
2. Evidence examined and *held* insufficient to excuse defendants' laches under an application to vacate said judgment pursuant to § 7483, Comp. Laws 1913.

Opinion filed March 6, 1916.

Appeal from the District Court of Rolette County, *Buttz,* Judge.
Affirmed.

Cowan & Adamson and *H. S. Blood,* for appellant.

"A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Comp. Laws 1913, § 5841; Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Bray v. Booker, 6 N. D. 526, 72 N. W. 933.

"A voluntary trust arises out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another." Comp. Laws 1913, § 5703; Perry Tr. 6th ed. § 21, and 1 Lewin, Tr. § 19; 3 Pom. Eq. Jur. 3d ed. § 981, p. 1835.

Where a trust is alleged to exist, it is the duty of the court to determine whether the evidence is sufficient to create such trust, and to render its judgment accordingly. Brown v. Spohr, 87 App. Div. 522, 84 N. Y. Supp. 995; Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370; Weer v. Gand, 88 Ill. 490.

Where the complaint wholly fails to state a cause of action against a party and judgment is taken by default, the proper remedy for that party is to move to vacate it as to him. The doctrine of laches and estoppel has no place in this case. Freeman v. Wood, 14 N. D. 95, 103 N. W. 392; Beach v. Beach, 6 Dak. 371, 43 N. W. 701; Stahl v. Chicago, St. P. M. & O. R. Co. 94 Wis. 315, 68 N. W. 954; Mason v. Kansas City C. R. Co. 58 Kan. 817, 51 Pac. 284.

"Estoppel by laches consists of a neglect to do something which one should do, or to seek to enforce a right, at a proper time." Hunt v. Reilly, 23 R. I. 471, 50 Atl. 833.

Flynn & Traynor, for respondent.

The application and motion to vacate the judgment being an appeal to the favor of the court, the defendant cannot attack the sufficiency of

the pleadings or findings, or the judgment, on this motion. Oakes v. Ziemer, 62 Neb. 603, 87 N. W. 350.

If there was any infirmity in the judgment by reason of a defective complaint, the remedy of the defendant was by appeal from the judgment. Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778.

Where there is great delay in moving to vacate a judgment or to take other proper steps, the most liberal rule of construction is applied, and every reasonable presumption in favor of the judgment should be indulged. Kubesh v. Hanson, 93 Minn. 259, 101 N. W. 73; Sweet v. Ward, 43 Kan. 695, 23 Pac. 941; Ex parte Bigelow, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; Selby v. Pueppka, 73 Neb. 179, 102 N. W. 263; Grannis v. Superior Ct. 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; Olson v. Mattison, 16 N. D. 231, 112 N. W. 994.

Errors of law cannot be corrected by motion to vacate, nor can a review of the case be had. A motion for a new trial or appeal is the proper remedy. State ex rel. McClory v. Donovan, 10 N. D. 203, 86 N. W. 709; Whitney v. Ritz, 24 N. D. 576, 140 N. W. 676; State ex rel. Noggle v. Crawford, 24 N. D. 8, 138 N. W. 2; Strecker v. Railson, 19 N. D. 677, 125 N. W. 560.

In the first instance, where a pleading is attacked for insufficiency, either by motion or by demurrer, the objections must be specific. When they come after judgment, this rule is much more rigid. 31 Cyc. 761; Chilson v. Bank of Fairmount, 9 N. D. 96, 81 N. W. 33; Schweinber v. Great Western Elevator Co. 9 N. D. 113, 81 N. W. 35; James River Nat. Bank v. Purchase, 9 N. D. 280, 83 N. W. 7; Pine Tree Lumber Co. v. Fargo, 12 N. D. 384, 96 N. W. 357.

The defendant is estopped by its own laches, and failure to pursue the proper remedy at the proper time. In this case defendant should have timely proceeded by motion for a new trial, to correct any error which it deemed to exist. Freeman v. Wood, 14 N. D. 95, 103 N. W. 392; Cline v. Duffy, 20 N. D. 525, 129 N. W. 75; Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 226, 130 N. W. 228; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Keeney v. Fargo, 14 N. D. 419, 105 N. W. 92; Minnesota Thresher Mfg. Co. v. Holz, 10 N. D. 16, 84 N. W. 581.

Great delay after knowledge of the judgment will bar defendant from

the right to vacate. McClymond v. Noble, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; 3 mo. 2 days; Council Improv. Co. v. Draper, 16 Idaho, 541, 102 Pac. 7; 2 mo. 9 days; De Laittre v. Chase, 112 Minn. 508, 128 N. W. 670; 7 mo.; McMurran v. Meek, 47 Minn. 245, 49 N. W. 983; 2 mo.; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; nearly 5 mo.; Seibert v. Minneapolis & St. L. R. Co. 58 Minn. 72, 59 N. W. 828; 6 mo.; Coast Land Co. v. Oregon Colonization Co. 44 Or. 483, 75 Pac. 884; 4 mo.; Smith v. Pelton Water Wheel Co. 151 Cal. 394, 90 Pac. 934; 4 mo.; California Casket Co. v. McGinn, 10 Cal. App. 5, 100 Pac. 1077, 1079; 6 mo.; 23 Cyc. 909; Wheeler & W. Mfg. Co. v. Monahan, 63 Wis. 194, 23 N. W. 109; 27 Cyc. 857.

"A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind the same." McArthur v. Dryden, 6 N. D. 443, 71 N. W. 125; Code of 1899, § 3840, Comp. Laws, 1913, § 5841; Smith v. Pfluger, 126 Wis. 253, 2 L.R.A.(N.S.) 783, 110 Am. St. Rep. 911, 105 N. W. 476.

"The person whose confidence creates a trust is called the truster; the person in whom the confidence is reposed is called the trustee, and the person for whose benefit the trust is created is called the beneficiary." Comp. Laws 1913, § 6274.

This trust or relationship may be taken advantage of at any time prior to its rescission. Comp. Laws 1913, § 6296.

Courts will not assume that a bank has disobeyed the law, or that its officers have committed a crime. *Ultra vires* is always a matter of defense, and one desiring to take advantage of it must plead it. 10 Cyc. 1155; Iowa Business Men's Bldg. & L. Asso. v. Berlau, 125 Iowa, 22, 98 N. W. 766; Arizona L. Ins. Co. v. Lindell, 15 Ariz. 471; 140 Pac. 60; Citizens' State Bank v. Pence, 59 Neb. 579, 81 N. W. 623; Belch v. Big Store Co. 46 Wash. 1, 89 Pac. 174.

"A judgment will not be opened or vacated because founded on an illegal or fraudulent consideration, if the party knew of this objection and might have set it up in defense of the action." 2 Purdy's Beach, Priv. Corp. § 912; 23 Cyc. 928.

BURKE, J. This is an appeal from an order refusing to vacate a default judgment. The facts as they appear to us are as follows: The Murrays, husband and wife, were the owners of the farm in Rolette

county. The land was encumbered as follows: $3,500, first mortgage, payable to one Maher; second mortgage, controlled by O'Laughlin, $398; a judgment for $495, owned by the plaintiff, Herrmann; a mortgage to one Gilhully, the son of Mrs. Murray, and one or two other liens subsequent to those enumerated. In September, 1912, the second mortgage for $319 was foreclosed, and the holder thereof attempted to take up the first mortgage and add it to his claim, thus selling the land for the sum due upon both mortgages of $4,093. Herrmann, this plaintiff, applied to the court for permission to redeem from the second mortgage only, and joined in this action the defendant State Bank of Rolla, as will be hereinafter mentioned. Obtaining the relief asked, he redeemed from the second mortgage, paying about the sum of $653. Gilhully thereupon redeemed from him. Herrmann was still entitled to redeem on his judgment, but in the meantime other complications had arisen which he claims influenced him to allow the redemption period to expire without action upon his part. Those circumstances are as follows: A few days after the foreclosure the Murrays went to the First State Bank of Rolla and executed to it their notes for $6,300 secured by mortgages upon the land. It was their understanding that this loan was to take up all of the outstanding encumbrances and become a first mortgage upon the premises. There was some hitch, however, in the proceedings, and plaintiff did not receive the sum due him upon his judgment, although other encumbrances were paid by the bank. As already intimated, plaintiff, when he brought his action to be allowed to redeem, joined the defendant bank and asked that they be required to pay over to him the amount due upon his judgment upon the theory that they held the same in trust for him,—the allegations of his complaint, outside of the formal parts, being that "on the 25th day of September, 1912, the defendants Murrays made, executed, and delivered to the defendant State Bank of Rolla two certain mortgages on said premises, one for $5,000 . . . and one for $1,300. . . . That the two mortgages mentioned in the last paragraph were given to the state bank for the purpose of obtaining funds with which to pay the amount claimed by said defendant O'Laughlin on said foreclosure, and other liens then of record against the said premises. . . . That by reason of the delivery of the mortgages described in paragraph number six of this complaint, the said defendant State Bank of Rolla became

the trustee of the funds raised by said mortgage; to wit, $6,300 to be applied to the payment of the encumbrances against the said premises, including the claim of the plaintiff; and the said State Bank of Rolla is still the trustee thereof, and the same should be applied in the payment of the plaintiff's said judgment. Wherefore, plaintiff prays judgment as follows: . . . and the defendant State Bank of Rolla be declared to be the trustee of the sum of $6,300 and interest from September 25, 1912, . . . and that judgment be entered requiring the defendant State Bank of Rolla to pay same out of said trust fund." This complaint was served personally upon the cashier of the bank on the 19th day of September, 1913. The bank, however, made no answer thereto, and judgment was entered against it by default on the 28th of October, 1913, declaring the money to be trust fund belonging to the Murrays and by them directed to be paid in liquidation of plaintiff's claim. Judgment was entered directing the bank to pay part of the same to Herrmann. On the 8th of December, plaintiff went personally to the bank and talked with the cashier about the matter, fully apprising him of the entry of the judgment. On the 9th of December, the following day, an attorney, William Bateson, also interviewed the cashier of the bank and asked the cashier what the bank was going to do about it. The cashier informed him that he did not believe the bank would do anything about it. Plaintiff's attorney also wrote several letters to the bank, the first letter being on September 2, 1913, before the entry of judgment. In reply to this letter the bank wrote that as soon as their attorney returned from the city he would take up the matter and advise them. It is claimed that this same attorney later advised plaintiff that the bank had no defense, but this may have been a misunderstanding. On September 9, 1913, plaintiff's attorney talked to the cashier over the long distance telephone about the matter, wherein the cashier stated that he would first have to see Mr. Murray, before paying said lien. Other letters and conversations took place between the bank and the persons representing plaintiff, the last being on the 1st of September, 1914, when the cashier stated that the bank would pay the judgment if given time, and suggested that plaintiff take a 5 per cent certificate of deposit in place of cash. Plaintiff says that in reliance upon his judgment against the bank and its subsequent conduct with respect thereto, he allowed the time of redemption to expire. On

the 28th of July, 1914, application was made to vacate the said judgment against the bank on the ground that there was no service made of the summons and complaint upon the said bank, and other enumerated grounds. There was no affidavit of merits accompanying this application. The matter was brought on for hearing on the 20th of August, 1914, and was denied by the court. No appeal was taken from this order. But on the 15th day of September, 1914, a new application was made by other attorneys to vacate and set aside the judgment on the ground of surprise and upon the ground that the complaint was insufficient to support the findings of fact and judgment of the trial court. This motion was accompanied by an affidavit of merits and a proposed answer stating in effect that upon investigation the bank found that the encumbrance against the Murrays' land amounted to $7,000 and that it therefore had refused to pay plaintiff and other beneficiaries of the agreement, until an additional amount of money was raised to clear title and allow their $6,300 mortgage to become a first lien. After hearing, at which affidavits covering the facts above mentioned and others were filed, the trial court declined to vacate the judgment and this appeal follows. The briefs of the two parties are somewhat at cross purposes. Appellant states his position as follows: "The only matter we need consider at all is if the giving of the two mortgages by the Murrays on the land, to the bank, subsequent to the plaintiff's judgment lien, to raise funds to pay for the encumbrance, gave Herrmann a right to a judgment against the bank. Before the plaintiff has such right, it must be shown either that the giving of the mortgages was done by the plaintiff for the express benefit of the defendant, or that such act constituted the bank a trustee of the consideration of the mortgages for the plaintiff's benefit. The complaint wholly fails to show that the bank made any promise to or contract with the Murrays for the express benefit of the plaintiffs." They further state: "Where the complaint wholly fails to state a cause of action against a party, a judgment is taken by default; the proper remedy with that party is to move to vacate as to him. . . . Hence the doctrine of estoppel and laches has no place in this case and no application to the facts." In other words, the defendant does not strenuously deny its laches, but insists that the judgment should be vacated as a nullity, because the complaint fails to state

a cause of action. Respondent's brief on the contrary is devoted largely to the question of laches.

(1) The first question for decision is whether the judgment rendered was void because the complaint failed to state a cause of action. If we answer this in the affirmative, the judgment should have been vacated. Van Woert v. New York L. Ins. Co. 30 N. D. 27, 151 N. W. 29; Black, Judgm. 2d ed. § 347. If the judgment is not a nullity, then the application to vacate the same comes under § 7483, Comp. Laws 1913, and defendant must excuse his laches as well as show a meritorious defense. Black on Judgments, 2d ed. § 313, says: "But if the party actually knows that a judgment has been rendered against him and the judgment is not simply and merely void, it is the undoubted rule that he must exercise reasonable diligence in procuring its vacation, and that his unexcused laches or delay, unduly protracted, will preclude him from obtaining the relief sought." We have already set forth extracts from the complaint showing the basis of the claim made against the bank. Section 5841, Comp. Laws 1913, states: "Beneficiary may enforce.—A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Section 6274, Comp. Laws 1913, reads: "The person whose confidence creates a trust is called the truster; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary." The complaint stated that the mortgages were given to the bank for the purpose of obtaining funds with which to pay plaintiff's lien and other claims. This was certainly enough to apprise the bank of the nature of the demand. The prayer for relief also apprised the bank that if an answer were not made application would be made to the court for judgment that the bank be required to pay plaintiff's claim out of the funds in the hands of the bank. The only objection to the complaint urged by appellants was that the complaint failed to show that the *bank had made any promise,* and that the transaction was between the Murrays and the bank; and that if the bank failed to pay the Murrays, they alone could complain. And furthermore that the complaint failed to state a cause of action because it was not affirmatively shown that the $6,300 loan was one that the bank might lawfully make. It is hardly necessary to state that, in considering the complaint from this remote angle, all the pre-

sumptions will be in favor of its validity. Those questions were not raised by demurrer nor even by answer, and judgment was allowed to go by default, and the judgment recites that the same were made upon due proof produced at the hearing. There is no question that the trial court had full jurisdiction of the subject-matter of the action. The rule is stated by Cyc. as follows: "A judgment will not be set aside on account of defect or insufficiency in the pleadings, especially where the alleged fault was amendable." 23 Cyc. 929.

In the case before us we have no means of knowing what evidence was produced. The presumption is that it was sufficient to sustain the findings of the trial court. We are clear that the judgment was not such a nullity as would justify the district court in setting it aside as void.

(2) The next question, then, is whether defendant has presented a meritorious defense and has excused his laches. We will not devote much time to this. The facts already stated show negligence wholly unexcused. Plaintiff might easily have been misled to his prejudice, and the discretion of the trial court in this matter will certainly not be disturbed. This court has so often and so fully gone into this question that we need but refer to the authorities. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, collects the cases up to that time. The cases since decided do not change the rules announced. Judgment of the trial court is in all things affirmed.

STATE OF NORTH DAKOTA EX REL. ANDREW MILLER, as Attorney General, and Thomas F. Marshall v. ALFRED BLAISDELL, Secretary of State of the State of North Dakota.

(159 N. W. 401.)

Primary election law — United States Senator — petition — candidate for — two vacancies — full term — unexpired term.

1. Under chapter 109, Laws of 1907, known as the primary election law, the petition of a candidate for United States Senator must specify the particular term of the office which he is a candidate for, where there are two vacancies to be filled at the same time, one for a full term, and one for an unexpired part of a term.

Vacancies — when deemed to exist — vote for two candidates — not an expression of choice — for office.

2. In such a case the vacancies are deemed to exist in two independent offices, made so in the case of United States Senators by reason of the expiration of the terms at different times, and a vote for two candidates in such a case is not an expression of choice so far as the term of the office is concerned.

Office — title — tenure — term — name of office — relation.

3. The title of an office, as used in § 9 of that act, includes within its meaning the tenure or term thereof, and the word does not merely relate to the name of the office.

United States Senator — office of — vacancies — legislature — filled by — voters — permitted to express opinion — choice — members of party.

4. Under chapter 109, Laws of 1907, vacancies occurring in the office of United States Senator by reason of death, or otherwise, are to be filled by the legislature, but preliminary to such election the voters are permitted to express their choice for that office, as members of a party, the same as in other cases.

Primary election law — liberally construed — remedial purposes.

5. The primary election law should be liberally construed to effectuate its remedial purposes.

Opinion filed May 18, 1910.

Application for writ of injunction.
Writ granted.
Guy C. H. Corliss, for plaintiffs.
Ball, Watson, Young, & Lawrence, for defendant.

MORGAN, Ch. J. The relator, Thomas F. Marshall, applies to this court for an injunction against the defendant as secretary of state, and bases such application on the following facts set forth in his affidavit:

That he is a candidate for the office of United States Senator for the term which will begin March 4, 1911, and end March 3, 1917.

That at the next session of the legislature of this state, two United States Senators are to be elected, as follows: One for the term which will begin March 4, 1911, and end March 3, 1917; and one for a term which will end March 3, 1915.

That the reason for the election of a Senator for the term which

will expire on March 3, 1915, is, that Hon. M. N. Johnson, who was elected to said office for the term ending March 3, 1915, died while in office, and therefore it will become the duty of the next legislature to elect a Senator for the unexpired part of his term.

That one A. J. Gronna is a candidate for said office for the term which will expire March 3, 1915.

That one Edward Engerud has filed with the defendant, as secretary of state, a petition duly signed by the requisite number of legal voters, requesting him to become a candidate for nomination to said office at the primary election to be held in June, 1910.

That in said petition said Engerud sets forth the title of the office to which he aspires merely as the office of United States Senator, and does not designate therein the particular office or term for which he is a candidate, and files such petition and accompanying affidavit without designating therein whether he is a candidate for said office for the term which expires on March 3, 1915, or for the term which expires March 3, 1917.

That the defendant will, unless enjoined by this court, certify to the various county auditors of the state the name of said Engerud without designating the particular term of said office for which he is a candidate.

That the relator has filed a petition for nomination as a Republican candidate for the office of United States Senator for the term which ends March 3, 1917, with the defendant, as secretary of state.

That said petition is in all things regular, and signed by the requisite number of legal voters of the Republican party.

That all of said candidates for nomination for said office are candidates at the primary election to be held in June next, as members of the Republican party.

That said relator claims the right to have his name, and the names of all other Republican candidates for nomination to said senatorial office, voted on by the legal voters of the Republican party at said primary election, as candidates for a particular term thereof, and that the voters at said primary election will be confused and deceived to the prejudice of said relator if said Engerud or any other candidate for said office is permitted to file a petition for such nomination gen-

erally, and without designating the particular term for which he is a candidate.

The relator asks that an injunction be issued commanding the defendant to strike from the files of his office the petition of said Engerud, and that the defendant be enjoined from certifying his name to the various county auditors of this state as a candidate for the office of Senator, without a particular designation in his petition, as to the particular term of Senator for which he is a candidate, and that the defendant be commanded to certify relator's name as prayed for in his petition.

Said Edward Engerud appeared, by consent of the relator, on the return day of the order to show cause, and demurred to the showing made in the affidavit, on the ground that the facts stated are insufficient to justify the issuance of an injunction against him. On the demurrer, oral arguments were submitted on behalf of the relator and on behalf of Judge Engerud.

The questions of law presented are to be determined from a construction of what is known as the primary election law of this state, being chapter 109, Laws of 1907. This law provides for the nomination of all state, district, and county officers at a primary election to be held in June next preceding the regular biennial November elections. This law also provides for a nomination, by the voters of a party, of candidates for the House of Representatives, and Senators of the United States. It also provides that all candidates for the state legislature must file, with their petitions for nomination, a pledge to support the choice of the voters of the party to which they belong, for United States Senator, and that in case no candidate of the party receives 40 per cent of all the votes cast for United States Senator by the party, then, and in that case, he pledges himself to vote for the candidate of his party who receives the highest number of votes at the general election succeeding such primary election.

This pledge feature of the act was declared unconstitutional by this court, as contravening the provisions of § 211 of the state Constitution, in that it was an exaction of a pledge from the candidate, inconsistent with that section.

State ex rel. McCue v. Blaisdell, 18 N. D. 55, 24 L.R.A.(N.S.) 465, 138 Am. St. Rep. 741, 118 N. W. 141.

Although this pledge cannot now be exacted from a candidate for the legislature as a prerequisite to filing a petition under this law, the provision is here referred to as it may have some bearing on other provisions of the law relating to the question under consideration.

This brings us to the precise question involved on this application, and all questions involved are to be decided on the application. The question is whether the petition of the voters to the secretary of state, requesting Judge Engerud to become a candidate for United States Senator, and his affidavit accompanying the same, must state what particular term of said office he is a candidate for. In another form the question is, Is the petition, as filed, in compliance with the statute, inasmuch as it only asks, generally, that he become a candidate for the office of United States Senator, without designating the particular term of office for which he is to become a candidate?

Before considering the primary election law as bearing on this question, it may be stated, as having some bearing upon the question, that under § 3, art. 1, of the United States Constitution, the Senators from each state are placed in three classes in that body, so that the terms of approximately one third of them, only, expire at the same time, and that the Senators thereafter remain in these classes, and that the two Senators from each state are never placed in the same class. As far as each state is concerned, the same classification is continued, regardless of however many vacancies may occur in these offices. In consequence of this classification, the terms of office of the two Senators from each state do not ever regularly end at the same time. Under such classification, as soon as made, the terms of the two Senators under an election do not ever, and cannot ever, expire at the same time. It therefore follows that the two Senators from each state do not, strictly speaking, fill the same office, but distinct and independent offices. Although the same so far as duties are concerned, and in every other respect, the terms thereof are not the same, as they do not expire at the same time. This fact constitutes them different offices so far as the question at issue on this application is concerned.

In reference to the question whether the primary law applies to the filling of vacancies in the office of United States Senator, the attorneys do not disagree. It is conceded that the law does apply to the filling of vacancies where a part of the term has not expired. This law specifies

for a nomination to that office "in the year previous to his election by the legislative assembly." The United States Constitution provides for a temporary appointment by the governor of the state to fill a vacancy "until the next meeting of the legislature, which shall then fill such vacancy." It therefore seems clear that the provisions of the primary law, considered in connection with the Federal Constitution, include the matter of voting for a candidate to fill all vacancies in the office of United States Senator whenever or however such vacancies may occur. The law, however, does not specify the procedure to be followed so far as the contents of the petitions, form of ballot, and other matters, in cases of an election when two senators are to be elected at the same time, are concerned. For instance, there is no provision in that law that enacts expressly that the petition on behalf of a candidate for United States Senator, or his accompanying affidavit, shall designate what particular term of that office, so far as the expiration thereof is concerned, he is a candidate for. This absence of express provision in that regard does not, in our judgment, reasonably lead to the conclusion that no designation could have been contemplated by the lawmakers. It is evident that the terms of the act should be so construed as to further its purposes, so far as the same reasonably appear from its provisions. In this regard its purpose is to give the voters the right to express to the legislature their choice for United States Senator, whenever, an election is about to occur. When two Senators are to be elected at the same election, and one necessarily for a longer term than the other, it is easily seen that there can be no choice expressed, so far as the term is concerned, when two Senators are voted for, where the particular office is not designated by each candidate.

It is true that such a vote may express the voters' choice so far as the two candidates best fitted for such places are concerned, but it expresses nothing as to which vacancy each shall fill. The primary law, however, was designed to give each voter a chance to express his choice to fill any vacancy about to occur in the Senate. If there is to be no designation of the term, then the voter is deprived of expressing a choice on this matter, which may be of great importance so far as the state and its citizens are concerned.

The contention on behalf of Judge Engerud is that the act only intended a general expression of choice for Senators when two are to

be elected, and that it does not show that it was intended that there should be a designation of the particular term of each candidate when two are to be elected, and that this court cannot properly supply an omission by the legislature to express such intent. It is further contended by him that if it is not held that the court should not supply this omission of the legislature, yet, under the general principle that the intent of the legislature as expressed in the act should be carried out, the court would not be justified in saying that it was the legislative intent that there should be a designation as to what particular office the candidate applies for. We will briefly consider these propositions.

The argument advanced, that it is always entirely immaterial to the voter which candidate shall be elected for the long term or the short term, is not necessarily true. However, the question here is, Does the statute give the voter the right to express a choice on the question of the term of office to which a candidate aspires? If so, no candidate should be permitted to file a petition which necessarily denies that right to the voters.

Reliance is placed on § 12, of the Act, which prescribes that "where there is more than one person to be elected to the same office, the persons to the number to be elected receiving the highest number of votes cast for such office shall be declared the nominees of the party for such offices." In view of what we have before stated, this section can have no application to the question before us. The offices to be voted for are different, inasmuch as they are not for the same term. Therefore this section is not applicable to a case where, strictly speaking, different offices are to be voted for. Giving the law a reasonable construction with a view to carrying out the intent thereof, which is to secure an expression of the voters' choice for the United States Senator, we are convinced that it indicates an intent, and therefore must have been intended, to call for an expression of the voters' choice, so far as the tenure of the office to be filled is concerned. The intent of the law was to place the voters in the position of members of the legislature, and permit them to express their choice for United States Senators at any primary election, whenever one or two are to be elected at the next session of the legislature.

It is contended with great force and plausibility that the will of the voter may be thwarted entirely if voters are compelled to specify the

particular term for which they desire a person to become a candidate. The point of this contention is that the candidate receiving the next highest vote for the long term may receive a larger number of votes than the highest number of votes cast for any candidate for the short term, and that the person receiving the next highest number of votes for the long term may be, and probably would be, the choice for the short term, if they are permitted to express themselves generally. In consequence of this possibility, it is urged that the construction contended for by the relator would result in defeating the will of the majority of the voters as to first choice for the short term of the candidate receiving the next highest vote for the long term. It is therefore contended that the legislature could not have intended to deprive the voters of the right to express their choice as between all candidates as to the long and the short term.

It is not denied that such a result might possibly follow, but that it is probable, or will ever actually arise, is doubtful. From a legal standpoint, however, there is nothing on which to base an assumption that the voters for the next highest candidate for the long term would vote for him for the short term. However that may be, we do not think it should result in laying down a rule of construction against what we deem an expression of the legislative intent as to this matter, and certainly as against the clear spirit of the law. This law contemplates the election by the legislature of a candidate having the highest number of votes if no candidate receives 40 per cent of the votes cast. In a case where two Senators must be elected, and their names are submitted without designation of the term of each, it will be impossible for the legislature to say that the candidate having the highest vote is the choice for the long term. To say that would be purely speculative; and it cannot be truly said, either, that the candidate receiving the next highest number of votes was the choice for the short term, as there has not been any expression on that question. If this be true, the construction contended for on demurrer necessarily defeats the intent of the law calling for an expression of a choice for United States Senators by the voters when two are to be elected at the same session.

Obviously no designation is necessary when there is only one to be elected, as there is only one vacancy to be filled, and no question can arise as to what the voters' choice is.

This law also provides that in case one candidate receives 40 per cent of the entire vote cast at the June primaries, such candidate shall be the choice of his party for United States Senator. In a case where there are two vacancies to be filled, and one candidate only receives 40 per cent of the vote, it would be impossible for the legislature to determine for which term the voters intended that the candidate receiving 40 per cent should be elected. There is no escape from the conclusion that the construction contended for in support of the demurrer would result in depriving the legislature of the advisory instruction as to what candidate was intended by the voters to be elected to fill the long term or the short term.

It does not answer the argument as to the importance, under this law, of an expression by the voters of their choice for United States Senator, to say that the ultimate choice is with the legislature, notwithstanding any expression of the voters' choice. It is necessarily true, of course, that the legislature cannot be legally bound by any vote on this matter, but the law provides for an expression of a choice by the voters, and this expression should be made in accordance with its provision, although it may have no further effect than as a mere expression of a choice. If the inevitable result or tendency may be, in certain cases, to deprive the voters of expressing a choice for the short term, it is a matter for further legislation, or, perhaps, a different petition. All that is now decided is that the law does not contemplate a general petition without specifying the term or particular office where two Senators are to be elected.

Counsel insists that it would be a flagrant instance of legislation by this court to say that § 9 of the Act can be construed to refer to an expression of choice as to the term of office to be filled where two Senators are to be elected at the same time. That section provides that "at the left of each group shall be placed the title of the office, etc., etc." The word "title" as used in that section is construed by us to include within it the term of the office. This construction gives the word "title" no new meaning. It necessarily includes within its meaning the tenure of the office. 6 Words & Phrases, p. 4923.

This construction of this section gives effect to the act, and limiting the word "title" in this connection to mean one office, without designation of the term, would render the act nugatory under the present situation.

Further, § 9, of the Act provides what the form of the ballot shall be, and indicates, in the form, that the voter is to "vote for one" United States Senator. On the theory that no designation is intended, this could not be done, and the voter's choice for two candidates expressed by the ballot. As before stated, a vote for two would not express any choice so far as the tenure is concerned. If the petition and ballot show what term the candidate wishes, the form of the ballot and the instruction to "vote for one" have force, and can be given effect.

No cases were presented, and none have been found, directly in point in this case. Cases holding, generally, that courts have no right to supply an intent not expressed in the act, and that it is the province of the court to follow the legislative intent as expressed in the act, have been cited. Of course there is no conflict as to the general principles applicable in such cases. We have followed the rules thus announced as we construe the act and the objects intended to be gained by its enactment.

Cases are also cited by the relators to the effect that where officers are to be elected for different terms, petitions for nomination which fail to designate the term of office are void for uncertainty. These cases are collected in 15 Cyc. 349.

See also: Remster v. Sullivan, 36 Ind. App. 385, 75 N. E. 860; Milligan's Appeal, 96 Pa. 222.

The writ will issue as prayed for.

All concur.

STATE OF NORTH DAKOTA EX REL. J. C. JOHNSON v. THORWALD MOSTAD, Oliver Saugstad, and D. J. Mahoney, as Directors of School District No. 10 in and for said Ward County, North Dakota.

(158 N. W. 349.)

Statutes — construction of — school boards — common school districts — children — school accommodation for — distance to travel — measured how — roads passable and usually traveled.

1. In construing § 1188 of the Compiled Laws of 1913, which provides that

the school boards of the various common school districts shall, upon the petition of those charged with the support and having the care and custody of nine or more children of school age, furnish school accommodations for such children within a distance of 2½ miles of their homes, such 2½ mile distance is to be measured by the roads which are actually opened and passable, and not as the crow flies, or by taking into consideration section lines which are set apart by § 1920 as highways, but which are not in their present condition passable and have not been actually opened for travel.

School boards — children of adjacent districts — may allow to attend school — not compulsory — defense — other districts.

2. Although, under the provisions of § 1179 of the Compiled Laws of 1913, a school board of one district may allow the children of an adjacent one to attend its school, such board cannot be compelled to do so, and it is no defense to an action which is brought under the provisions of § 1188 of the Compiled Laws of 1913, to compel the furnishing of an additional schoolhouse for the accommodation of children who are more than 2½ miles from the nearest school in a district, that said children live within a distance of 2½ miles of a school which is in an adjacent one.

Furnishing additional schoolhouse — action to compel — defense — school sites — how selected — number of children — accommodation of.

3. It is no defense to an action which is brought under the provisions of § 1188 of the Compiled Laws of 1913, to compel the furnishing of an additional schoolhouse for the accommodation of childen who are now more than 2½ miles from the nearest school, that on account of the broken nature of the country no site can be chosen which will be within 2½ miles of the residences of all of the petitioners, provided that a site can be chosen which will be within that distance of the homes of at least nine children of school age, and who are now outside of that limit from any school within the district.

Opinion filed June 1, 1916.

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

Special proceeding brought under § 1188 of the Compiled Laws of 1913 to compel the directors of a school district to erect a school to accommodate children now distant more than 2½ miles from any school in said district. Judgment for plaintiff. Defendants appeal.

Affirmed.

Halvor L. Halvorson, for appellants.

W. H. Sibbald, for respondent.

BRUCE, J. This is a special proceeding to compel the directors of school district No. 10 of Ward county to furnish a school to accom-

modate twenty-two children of school age living in sections 5, 6, and 7 in said district, and is brought under the provisions of § 1188 of the Compiled Laws of 1913.

Section 1188 provides that "if a petition signed by the persons charged with the support and having the custody and care of nine or more children of school age, all of whom reside not less than 2½ miles from the nearest school, is presented to the board, asking for the organization of a school for such children, the board shall organize such school and employ a teacher therefor, if a suitable room for such school can be leased or rented at some proper location not more than 2½ miles distant from the residence of any one of such children, and if no suitable room for such school can be leased or rented, the board shall call a meeting of the voters of the district for the selection and purchase or erection of a schoolhouse, as provided for in § 1185. If at such meeting no such site is selected, or if it is not voted to erect or purchase a schoolhouse for such school, the board shall select and purchase a schoolhouse site and erect, purchase, or move thereon a schoolhouse at a cost of not more than $1,200 for such schoolhouse and furniture therefor; Provided, that the provisions of this section shall not apply in instances where schools have been consolidated in accordance with the provisions of § 1190."

It would appear from the record that the petition required by the above section was filed; that an election was held and a vote taken on the question of the removal or erection of a school as provided for in § 1185 of the Compiled Laws of 1913, and that at said election forty-three votes were cast against the erection of a new schoolhouse, and nine votes in favor of it. That thereafter an election was held for the removal of the schoolhouse, and that only eleven votes were cast for its removal. It also appears from the record that after submitting these questions to a vote of the people, the directors of school district No. 10 refused on their own authority and on the authority granted by § 1185 of the Compiled Laws, to choose a site and erect a building, the reason assigned for said refusal being that none of the children of the petitioners lived more than 2½ miles from the schoolhouse now standing and maintained in district No. 10. It also appears that the children of all of the petitioners reside more than 2½ miles distant from the school as now constructed, if the distance is measured along the highways,

and from such highways are taken those along several of the section lines which run through deep ravines, and have not been opened on account of the rugged nature of the country, and are now practically impassable.

The sole and only questions involved are therefore:

1. Whether, in computing the distance a pupil is from a school, one should measure:

(a) In a straight line and as the bird flies;

(b) By the roads which are fit for or have been rendered fit for travel;

(c) Or by the roads which are actually laid out and are fit for travel, and in addition the section lines which, though designated by the statute to be highways, have not been laid out as such, and are not reasonably passable.

2. Whether the statute, in providing for a schoolhouse for pupils who live more than 2½ miles from the nearest school, is limited in its meaning to schools in that particular district, and in that district alone.

On the first question submitted, we are of opinion that the legislature could not have possibly intended that the distance should be measured in a straight line or as the bird flies. As counsel for respondent has suggested, the straight line theory would mean that a community on one side of the Missouri river might be deprived of school facilities merely because a school happened to be located across the stream. This the legislature could never have intended.

Nor can we hold that the building of a schoolhouse in a particular district is not required where a school in another district is accessible. It was evidently the intention of the legislature that the school districts should be sufficient in themselves, and though under the provisions of § 1129 one district may accommodate the children of another, it cannot be compelled to do so. If the adjacent district could not be compelled to accommodate the children of school district No. 10, the fact that some of the children in the district last mentioned lived within reach of the school which was located in the former would hardly justify the directors of the latter in failing to furnish accommodations for their own children, and especially so when, as appears to be the fact in the case at bar, the adjacent district refuses that accommodation.

When we come to the question, however, whether the distance is to

be measured by the roads which are actually in use, or which could actually be traveled, or by those and, in addition, by the section lines which are set apart by the statute as highways, even though the authorities have refused to put any work on them and to lay them out so that they are in their present condition impassable,—we meet with a more serious question. We are, however, of the opinion, and hold, that the measure of distance must be determined by the roads which are actually traveled or at present capable of travel, and that if the school directors desire the criterion of the section line to be used, they or somebody else must exercise the political pressure which is necessary to have them opened.

We are of the opinion, indeed, that the pronounced policy both of our legislature and of the framers of our Constitution is that popular education shall be encouraged, and that, as a state, we have come to the opinion that intelligence is our greatest asset, and that the promulgation of it is a matter which is of the greatest importance. We are satisfied that the policy which is expressed in § 1188 of the Compiled laws of 1913 is that no child shall be deprived of that education and of an equal opportunity to the same, and this, even though the taxpayers of a certain district are unwilling to specifically vote to build or remove a school site. In these particulars, indeed, the interests of the parent state are paramount to those of the locality. Children in short are of more importance than highways, and popular education cannot wait on road building.

The meaning of § 1188 of the Compiled Laws of 1913 is clear. It is that the voters of a district may by popular vote, and if they choose, erect a schoolhouse of any value they desire, and provided they do not exceed the constitutional debt limit; but they cannot on the other hand, by vote or otherwise, refuse the necessary accommodations. If they refuse to authorize the same by vote, the school directors themselves, and on the petition of those charged with the custody and care of nine or more children, may, as guardians of the children and as representatives of the sovereign people of the whole state, furnish the same, though at a limited cost of $1,200.

The principal idea, then, being the furtherance of popular education, and there being no statutory means or authority by which the directors can force the county or township officers to construct roads along the

section lines and against the will of the majority of the voters, we are unable to believe that the legislature intended that education should wait on road building, but rather that it should be paramount thereto.

Nor is there any merit in the contentions of counsel for appellants that the judgment should be reversed on account of the fact that the condition of the roads and highways is such that it is impossible to locate a school which will be within a distance of 2½ miles of all of the petitioners. This question does not seem to have been raised or argued in the court below, and whether it is true or not we are unable to definitely determine from the record which is before us. One thing, however, is certain, and that is that a school can be established which will accommodate more than nine of the children of the petitioners, and who are now outside of the 2-mile limit. This at any rate can be done, and is in itself sufficient to justify the issuance of the writ of mandamus which was prayed for. All that the writ commands is a compliance with the statute, and since the law does not seek to compel impossibilities, this is all that the statute seems to require.

The judgment of the District Court is affirmed.

M. J. SHOBE v. J. H. SMITH.

(158 N. W. 1065.)

On appeal from a judgment of dismissal entered upon a motion for judgment for defendant notwithstanding the verdict for plaintiff, the evidence is reviewed, and it is *held:*

Judgment — appeal — motion for judgment — verdict — notwithstanding — evidence — action — cause of — executed sale — lands — proceeds — application of.

That the testimony of plaintiff and his witnesses wholly fails to establish any cause of action in plaintiff, and affirmatively discloses an executed sale of land at a specified price per acre, with proceeds of purchase price to be applied upon an existing indebtedness owing defendant from plaintiff. Upon his own testimony and that of his witnesses, his cause of action should have been dis-

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Note.—Upon the question of right to judgment *non obstante veredicto* because of failure of proof, see note in 12 L.R.A. (N.S.) 1021, where cases are collected showing the relation of the common-law rule that a motion for such a judgment was never permissible on the part of the defendant.

missed at the close of the case, as there was no issue of fact for submission to the jury. As there was nothing upon which to base the verdict in plaintiff's favor, judgment for defendant notwithstanding said verdict was properly ordered.

Opinion filed June 8, 1916.

From a judgment of the District Court of Ramsey County, *Buttz*, Judge, dismissing plaintiff's action, he appeals.

Affirmed.

W. M. Anderson and *Fred R. Stevens*, for appellants.

The law of this state is settled, that before a judgment notwithstanding the verdict can be entered, the defense or cause of action must be defective in matter or substance, and beyond the power of amendment. Richmire v. Andrews & G. Elevator Co. 11 N. D. 454, 92 N. W. 819; 2 Enc. Pl. & Pr. 912, and cases cited; Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299; Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396; Pease v. Magill, 17 N. D. 166, 115 N. W. 260; Johns v. Ruff, 12 N. D. 74, 95 N. W. 440; Ætna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024.

A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by a judgment therein as to the parties and those in privity with them. 23 Cyc. 1215; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503; Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841.

Middaugh, Cuthbert, Smythe, & Hunt, for respondent.

"Where it is clear upon the whole record that the moving party is entitled to judgment as a matter of law," the motion should be granted. Richmire v. Andrews & G. Elevator Co. 11 N. D. 453, 92 N. W. 819; 2 Enc. Pl. & Pr. 912, and cases cited; Cruikshank v. St. Paul F. & M. Ins. Co. 75 Minn. 266, 77 N. W. 958; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Bragg v. Chicago, M. & St. P. R. Co. 81 Minn. 130, 83 N. W. 511; Merritt v. Great Northern R. Co. 81 Minn. 496, 84 N. W. 321, 9 Am. Neg. Rep. 61.

A motion for judgment will never be granted where there was or is an issue for the jury to pass upon. There must, however, be some substantial fact, one of some probative force. Mt. Adams & E. P. Inclined

R. Co. v. Lowery, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; Felton v. Spiro, 24 C. C. A. 321, 47 U. S. App. 402, 78 Fed. 576, 2 Am. Neg. Cas. 682; Travelers' Ins. Co. v. Randolph, 24 C. C. A. 305, 47 U. S. App. 260, 78 Fed. 754; Minahan v. Grand Trunk Western R. Co. 70 C. C. A. 463, 138 Fed. 37; Coulter v. B. F. Thompson Lumber Co. 74 C. C. A. 38, 142 Fed. 706; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659.

A mere scintilla of evidence is not sufficient to require the submission of a case to the jury. People v. People's Exch. 126 Ill. 466, 2 L.R.A. 340, 18 N. E. 774; Grube v. Missouri P. R. Co. 98 Mo. 330, 4 L.R.A. 778, 14 Am. St. Rep. 645, 11 S. W. 736; Finney v. Northern P. R. Co. 3 Dak. 270, 16 N. W. 500; Orleans v. Platt, 99 U. S. 677, 25 L. ed. 404; Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420, 13 Mor. Min. Rep. 32; Marion County v. Clark, 94 U. S. 278, 284, 24 L. ed. 59, 61; Hendrick v. Lindsay, 93 U. S. 143, 23 L. ed. 855; Akin v. Johnson, 28 N. D. 205, 148 N. W. 535; Pleasants v. Fant, 22 Wall. 116, 121, 122, 22 L. ed. 780, 782, 783.

Where the evidence shows conclusively that on a new trial plaintiff would be unable to establish that he ever had the ability required to perform the contract, the motion was properly granted. McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028; Miller v. Bank of Harvey, 22 N. D. 538, 134 N. W. 745; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Meehan v. Great Northern R. Co. 13 N. D. 432, 101 N. W. 183; Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396; Ætna Indemnity Co. v. Schroeder, 12 N. D. 120, 95 N. W. 436.

Goss, J. This is an appeal from a judgment of dismissal entered upon a motion for judgment *non obstante* after a verdict for the plaintiff. If there was any substantial conflict in the testimony properly receivable upon the issues for trial, dismissal was error.

The complaint recites that for a cause of action on July 15, 1911, plaintiff was the owner and in possession of two tracts of land, a half section in twenty-eight, and 133 acres in section twenty-seven, in a township in Ramsey county. "That plaintiff was owing defendant various sums of money, and defendant made an offer to the plaintiff that if he would give him a deed to the half section and re-

linquish his interest to the other tract and one half of the crop raised on said land for that year, defendant would assume all of the debts of every description which said plaintiff owed *on the land and to the defendant,* and pay plaintiff *in addition thereto the sum of $900,* as a settlement in full of their mutual accounts, when transfer was made of said land. That plaintiff immediately accepted said offer, and on October 6, 1911," conveyed the same to defendant. "That by reason thereof there is now due and owing from the defendant to the plaintiff $900, of which payment has been demanded and refused." The answer is a general denial coupled with an allegation of purchase of said land by defendant at $27.50 per acre for the half section, and $30 per acre for the 133-acre tract; that encumbrances in the sum of $3,230.47 were against the half section, which left a balance of $5,569.53 to be applied upon plaintiff's indebtedness to defendant; that upon the 133-acre tract there was due to others $2,929.48, leaving the value of plaintiff's equity therein $1,060.52 at the contract price of $30 per acre, or $3,990 therefor. Further, on the transfer of said land to him, defendant credited plaintiff on debts owing him specified certain amounts, which still left a balance due defendant from plaintiff of $2,814, for which a note dated January 2, 1912, was given and secured by chattel mortgage. As a matter of counterclaim, defendant alleges plaintiff executed his note to him for $45 and interest from July 11, 1912, which is due and unpaid; and that between May 10, 1912, and January 24, 1914, various loans and advances on account were made by defendant to plaintiff in the further sum of $424.73. He demands judgment for the amount of said counterclaims and for a dismissal of plaintiff's cause of action.

Is there any substantial proof that the contract of sale was made as is set forth in plaintiff's complaint, for a satisfaction of "all of the debts of every description which said plaintiff owed *on the land and to the defendant,* and to pay the plaintiff in addition thereto the sum of $900, as a settlement in full of their mutual accounts;" or does the uncontradicted evidence establish that the sale was for so much per acre, to be applied upon indebtedness owing by plaintiff to defendant, as claimed by defendant.

Plaintiff's version of the transaction, on direct examination, is given by him in the following language:

Smith "said, 'I come up here for the purpose of seeing if you wanted

to sell that land,' and I told him I did. 'Well,' he says, 'I tell you what I will do; I have got it all figured out here, and I tell you what I will do,—I will clear your personal property,' he says, 'that I hold against you and I will also give you $900 in money,' he says; and I sanctioned it. He said I could have half the crop and he would take the other half. There was a mortgage against my horses for about $2,800 or $2,730 and interest. He made a memorandum at the time, had it with him, and took it away with him. He made no statement as to how much he claimed I was owing him; that we didn't need to be in a hurry about drawing the deeds up. He would let me know when he wanted to draw the deeds. The Missus and Claude and Lena, my two children, were present at the house when this deal was made. In October, 1911, my wife and I went to defendant's bank and executed the deeds. Then he says, 'That old mortgage I will hold for you in order to keep other men from coming in and taking your property away from you,' and I thanked him for it. I delivered to Smith one half of the crop that was raised on the land that year, and relinquished to him the Bursell land" (the 130-acre tract held under contract). Cross-examination brought out the fact that plaintiff was owing many other people considerable amounts.

And testifying as to the transactions at the time of the transfer, the following questions were asked and answers given:

Q. However, Mr. Smith was to clean up all your mortgage indebtedness, was he not?

A. Yes.

Q. That is the deal as you understand it?

A. That is correct.

Q. Then he was to clean up all of your mortgage indebtedness, was he?

A. Yes.

Q. At the time you and Smith were talking over this deal, was there not any understanding, Mr. Shobe, about how much an acre this was going to amount to?

A. Yes.

Q. What was it?

A. $27.50 for the two home quarters, and $30 for the Bursell quarter, as we always called it.

Q. Smith agreed to give you, or allow you, $27.50 for the one-half section?

A. Yes.

Q. And $30 an acre for the 133 acres, or Bursell land?

A. Yes.

Q. When you had this talk with Smith and he agreed to give you the $27.50 for the half section, and the $30 an acre for the 133 acres, did you also figure over the indebtedness you had?

A. Well, I didn't. He did. That is he said he did.

Q. You had debts aside from those that you were owing Smith, did you not?

A. Yes.

Q. And you know whether or not Smith at that time, when he was figuring over this deal with you, in June, 1911, knew of these debts and obligations you owed?

A. Well, I can't say positively, but I judge he did; they were all in Crary.

Q. Didn't you have a pencil and paper there doing any figuring on this deal?

A. No.

Q. Didn't you keep any memorandum of account of these transactions with Smith during all these years?

A. No, sir. I am a man that can't figure. Smith kept the books.

Then testifying next morning in response to questions asked him by the court before his own testimony in his main case was finished, he gives another altogether different version of the sale, upon a price per acre basis, in the following testimony:

Examination by the court:

Q. Mr. Shobe, I want to get this clear in my mind. You say the offer that Mr. Smith made you about buying you out was made in 1911 the day he came out there, early in the morning?

A. Yes, 1911.

Q. And now that was the first talk you had with him about his buying, was it?

A. Yes.

Q. He came out there,—and what was the talk again between you and him, and what did he say to you, and what did you say to him? Tell the talk back and forth now as you remember it.

A. He says, "I come out here and I thought if you still wanted to sell this land, I would take it," he says. "I will give you $27.50 an acre," he says, "for the two home quarters, and I will give you $30 an acre for the Bursell quarter;" and he says, "That will clean up everything that I have against you." He says, "And I will give you $900 on the Bursell quarter," "and," he says, "you can live on it and pay the debts you have, too," and I says, "Yes, sir." He says, "Remember that I get my half the crop," and then we went into the house.

Q. I thought you testified last night that the conversation was that Mr. Smith said he would take your stuff and give you $900; take your property and half the crop, and give you $900,—isn't that what you testified to last night?

A. Take my half the crop.

Q. Didn't you testify last night that he was to have your property and half the crop and give you $900?

A. Yes, sir. He was to release my stuff that he had a mortgage on it.

Q. But didn't you testify that way last night?

A. *No, sir; I don't think I did.*

Examination by the court was followed by cross-examination; viz.

Q. The first thing Smith said to you after he started to talk to you about the land deal was that he would give you $27.50 for the half section, and $30 for the Bursell land?

A. Yes.

Q. And that he thought that would clean up all your deals and leave you some money?

A. Smith didn't say he thought.

Q. He didn't?

A. No.

Q. How did Smith know of your other debts here?

A. *He didn't agree to clear my other debts.*

Then the payment by defendant of certain debts of plaintiff in considerable amounts was gone into, and plaintiff was excused without in any way qualifying the foregoing testimony as to the transaction, except that he testified that after the transfer the note for $2,814 was given to cover up his property therein mortgaged to hinder other creditors in the collection of their claims, not that he owed that amount to Smith.

Mrs. Shobe, plaintiff's wife, was then called, testified to the defendant's dealing for the land at their home with herself, her husband, son, and daughter present.

She gives her version of the transaction as follows:

Q. Now, what talk was it that Smith had with you and your husband at that time?

A. Well, he says, "I came out this morning," he says, "and we have got this deal all figured out." "Now," he says, "I will explain it. Now, I want you to listen and understand it," and he says, "now, I will clear all your stuff, you will have that clear, and I will give you $900 *out of the Bursell quarter,* and your half the crop." And he says, "Now, what do you think about it Mrs. Shobe?" And I says, "Well, Mr. Smith, I hate to give up my home, but to get this big burden off our hands I am willing to do it. I certainly am because it worries me."

Q. What, if anything, did he say about closing the deal?

A. Well, he says, "You folks can come down and we will close the deal at that figure."

Later in the fall they went to his office at the bank.

Q. And what did you do and what was said between Mr. Smith, you, and Mr. Shobe (in the bank)?

A. Well, we simply signed our rights away to the farm, and we had a friendly conversation, and that was about all. Smith says, "If you can sell this land now, all of it, for $30 an acre, I will get you the finest dress you ever had."

Q. Did he say anything about the mortgage, the chattel mortgage?

A. Well he said he still held this "to keep your creditors off, so that they can't come in and take anything from you," "your outside creditors," he called them.

The following is the entire cross-examination of Mrs. Shobe:

Q. You were present, Mrs. Shobe, were you not, when Mr. Smith told Mr. Shobe, as he testified to here on the stand, that Mr. Smith would give him $27.50 an acre for the half section?

A. Yes.

Q. And that he would give him $30 an acre for the Bursell land?

A. Yes.

Q. And that is what Smith said he would give you for that land, isn't it?

A. Yes, it is.

The daughter, Lena Shobe, was next called, and testified to the offer of Smith to Shobe at the farm, as explained to her mother by Smith, to be as follows:

So, after that Smith says, "Now, Mrs. Shobe, the two home quarters I will take at the consideration of $27.50 per acre, and the Bursell quarter at $30 an acre," and then he says, "I will clear all the debts you owe me personally and I will give you $900 besides." "Now," he says, "do you think that would—this would fix it all right? that you can get along with that?" And mama said she thought they could and would be pleased to do that,—that, of course, it was hard to give up the home.

Q. And was there anything said about the crop at that time?

A. Not in my presence or at my recollection.

Q. You don't remember that?

A. No, I do not.

Witness then testifies to an occurrence in May, 1913, six or seven months after the transfer had been made, when Shobe gave Smith a chattel mortgage to secure the $2,814 note, in which Smith said in the presence of the witness: "'Well, our mortgage has expired and had you better not renew the mortgage.' He said, 'And I will hold it for you so as to prevent other outside creditors from coming in and trying to take any of the things or securing a mortgage on them,' and papa considered it a favor of him; he said that he would renew the mortgage to Smith, and Smith says, 'Now, not that you owe me,' he says, 'but simply to hold off the other creditors.' So brother and I signed the mortgage (as witnesses) under those circumstances and to that effect."

Under cross-examination Lena testified as follows:

Q. Smith did say he would give you a consideration of $27.50 an acre for the half section,—that was the home place, wasn't it?

A. Yes.

Q. And that he would give you $30 an acre for the Bursell land?

A. Yes.

Q. Did Smith tell any of you there at your place how much your father owed him at that time?

A. Not in my recollection.

Q. He didn't say how much?

A. Not that I remember.

Q. Did they talk over the debts that your father owed to the other people aside from Smith?

A. No, they did not in my presence that I remember of.

The son, Claude Shobe, present at the time of the transaction, gave the following testimony:

Examination by the Court:

Yes, just give the conversation back and forth, and then the jury can say just what agreements they did make.

He (Smith) said, "Mr. Shobe, I come out this morning to see if you would be satisfied to sell the two home quarters for $27.50 an acre, and the Bursell quarter for $30 an acre. And that will clear up all your debts that I have against you, and I will give you $900 on the Bursell quarter."

Q. Was there anything said about half the crop?

A. Yes. He said that Pa would have his half of the crop that was on the land.

His cross-examination was as follows:

Q. Smith said that he would give your father $27.50 for the half section?

A. For the home, yes, sir.

Q. Half section?

A. Yes.

Q. And that he would give your father $30 an acre for the Bursell land?

A. Yes.

Q. Did I understand you to testify that Smith was to give your rather $27.50 for this half section?

A. Yes.

Q. And $30 an acre for the Bursell land?

A. Yes.

Q. And that in addition to that he was to take care of all indebtedness and liens against this property?

A. No, sir. He was just—in order—the way that father sold Smith that land was to clean up *what father owed Smith.*

Q. What was said, if anything, with respect to mortgages and liens, etc., that were against this property?

A. Yes, sir. That it would clean up those mortgages that was *against the property;* that father would be clear with them.

Q. That Smith was to pay those out of this money, is that it? That is, the consideration was $27.50 an acre, and $30 an acre so far as you know?

A. Yes.

Q. What did Smith say about the mortgages, if anything?

A. Well, all that I heard Smith say was that he would clean up everything that father owed him and give him $900 in money and his half of the crop for that year.

Q. I thought he was to give your father $27.50 an acre for the half section?

A. Yes, he was.

Q. And $30 an acre for the 133 acres?

A. Yes.

Q. That was the basis of the deal, was it?

A. Yes.

Q. And you are positive that was all that was said about the real property mortgages and the balance due on the Bursell contract?

A. Yes.

Q. And all that was said about the mortgages and account that your father owed Smith.

A. Yes.

Thereupon plaintiff rested his case.

Smith, in defense, testifies that in the year of 1911 "I offered him

$27.50 on the half section on which he was living, and $30 an acre for the 133 acres. I was to take it and pay off all indebtedness and liens there were against it, and credit the balance to what he was owing me." There was no agreement with regard to the crop. He produced his books and proved that the full amounts of the contract prices of these tracts had been applied upon debts owing him from plaintiff and upon liens and encumbrances upon the land paid to perfect title. The proceeds of two carloads of wheat sold that winter were also applied on plaintiff's account. That at the request or order of Shobe, $2,681 of the latter's debts to other parties, particularly specified, were paid by Smith and charged to Shobe's account, leaving a balance owing by Shobe to Smith on January 24, 1912, of $2,814, for which amount a note dated January 2, 1912, was subsequently taken. That $6,614.57 was owing by Shobe in encumbrances on the land; that from the Bursell land plaintiff received a credit on his indebtedness of $1,060.52 for his equity therein, on the half section $5,567.53 for the purchase price over encumbrances; that plaintiff was owing defendant on open account over $1,100, inclusive of interest, which, together with twenty-seven other items of bills paid to others and cash advanced to plaintiff, left plaintiff owing defendant $2,814 in January, 1912. Plaintiff's books of account were produced and examined for years back, or since 1904, and were checked as correct by plaintiff's attorney as defendant was cross-examined by him. That on May 22, 1912, a chattel mortgage was given by Shobe to Smith securing the note for $2,814, dated January 2, 1912.

The trial court submitted the case to the jury and in doing so outlined the plaintiff's claim as follows: "The claim of the plaintiff is this: That on or about the month of July, 1911, he made a contract with Smith whereby he agreed to transfer all of his title to three quarter sections of land to Smith, and as a consideration for that transfer that Smith was to assume and pay all of the debts of whatever description against the land, and that he was to release all of the debts which Shobe owed him personally, and that he was to give Shobe $900 in money in addition to that, and that Shobe was to give him half of the crop raised on the land in 1911; and that Shobe says that Smith has failed to pay him the $900 in money."

The question presented is whether under this testimony as narrated,

which fully reflects the issue, there is any proof sufficient to sustain a verdict that there was such an agreement as is set forth in plaintiff's complaint. Did defendant agree to take this property and satisfy his liens and indebtedness against the property and give plaintiff $900 more in any event? The learned trial court who heard the proof, upon a careful consideration of all the testimony, held that there was no evidence upon which to base the finding of the jury in plaintiff's favor that such was the contract. And we come to the same conclusion. All parties agree that the sale was made at a stipulated price per acre as to each particular tract; that no computation of indebtedness of Shobe to Smith was made at that time; that $900 would be about the amount that would be left over from the equity in the Bursell land, and when considered with the fact that the witnesses were testifying to matters occurring between three and four years before, and taken in connection with the admitted credits given for the full amount due under the contract; that defendant at plaintiff's request had subsequently paid $2,681 of Shobe's debts to others in excess of the stipulated price per acre, and that the full amount for which the note is given, $2,814, is owing; that the many items making up said indebtedness are admittedly debts of Shobe; that the question of accounting also enters in as a part of the transaction as a contemporaneous interpretation by the parties of their transaction; that the testimony of the plaintiff, as given on his cross-examination by the court, is in virtual agreement with that of his wife, his daughter, and his son; and that all are in entire harmony with the defendant's version of the basis of the purchase being a stipulated price per acre. True, plaintiff and his witnesses testified Smith also stated, "I will give you $900 on the Bursell quarter" and "the half of the crop." This statement may have been made by Smith. It does not alter the situation. About that amount in fact would be coming from the proceeds of the Bursell quarter and be about what would be left Shobe from the sale, inasmuch as the equity from the half section just about squared accounts and the amount of plaintiff's equity in the Bursell quarter was but little in excess of $900. As to the half of the crop incident, two carloads of wheat were delivered that winter and are accounted for, assuming that this agreement took place, which the daughter did not hear. This statement of these two circumstances, though made, cannot be considered in the light of all the facts as suffi-

cient to sustain the jury's verdict in plaintiff's favor, finding to the effect that this land was not sold at a stipulated price per acre as a basic price or consideration for the sale, with the proceeds to be applied on an uncalculated and concededly large indebtedness owing defendant; but instead was a sale to square accounts for an unspecified amount, but with $900 over to be paid in any event as found by the jury. Much is made by plaintiff of the testimony given by him and his family that after the transfer the note and mortgage for $2,814 were taken to cover up Shobe's property, that his "outside creditors" could not collect of him; that Smith took this note and mortgage to help Shobe beat his creditors instead of for any debt Shobe owed Smith. Shobe and his wife both place it as taking place at the bank when the transfer had been made, in October, 1911. Lena has it occurring at the farm in May, 1912, the date of the mortgage. In any event, concededly it was four to ten months after the contract in July, 1911, was made for the sale of the farms, and goes only to a matter long subsequent to the entering into of the contract, the terms of which contract are the matter for determination. Such an agreement has no bearing whatever upon Smith's liability or nonliability under the contract of sale. If he has defrauded Shobe since the latter sold him his land, Shobe has his remedy in an action for an accounting for transactions occurring subsequently to and wholly independent of the sale of this land, and apart from the present issue of what were the terms of that contract. True, the parties evidently have submitted all matters between them, and have on argument asked that we determine whether the $2,814 note is bogus, or was given for that amount as a consideration; but such issues are foreign to the real issue, except as incidentally brought in collateral to defendant's explanation of where the consideration for the purchase went and to whom it was paid. We may in justice to Smith state that if we were to pass upon the validity of said note for $2,814, the testimony upholds it as against the conclusions or inferences testified to by plaintiff and members of his family to the contrary. Admittedly Shobe owed the items of debt of $2,681 going to make up that amount and paid by defendant after the transfer, and when under the plaintiff's own complaint defendant had not agreed to pay them, inasmuch as none of them were owing to Smith and were not liens against the land purchased. Plaintiff testified: "He (Smith) didn't agree to clear my other

debts," aside from those secured on the land and owing Smith. Yet Shobe complains that his note is without consideration, when Smith, at his request as a favor to him, has taken up and paid $2,681 of such outstanding debts, which Smith's land deal in nowise obligated him to pay. If it be assumed that one was for a mechanics' lien for $171, still $2,510 of other debts were paid by Smith for which he has not been repaid. Shobe, without denying that he owes these amounts for which account had been rendered him by Smith years before this suit was brought, nevertheless contends that the note given for their payment is without consideration,—a claim well-nigh preposterous if any regard is had to the evidence. Plaintiff admits he cannot figure. He "never got to go to school." His counsel reiterate his statement, "I am a man that can't figure," yet not a single transaction is shown where he has been overreached or defrauded. On the contrary, Smith has fully accounted for everything and traced to the origin every claim, until counsel has admitted that his accounts year by year since 1904, nearly up to this transaction in question, are correct. When everything is considered, there is no substantial or tangible proof on plaintiff's side of the issue. The judgment is affirmed.

E. O. HAGEN v. NELS O. GRESBY.

(L.R.A.—, —, 159 N. W. 3.)

Summons — name of attorney — and address — printed on by typewriter — at his request — general custom of his office — not a nullity — sufficient compliance with statute.

A summons is not a nullity on which the name of the attorney for the plaintiff, together with his address, is printed by his clerk on the typewriter at his request and instruction, and in accordance with a general custom of the office, and such signing is a sufficient compliance with § 8944 of the Compiled Laws of 1913, which provides that the summons "shall be subscribed by the plaintiff or his attorney, who must add to his signature his address, specifying a place within the state where there is a postoffice."

Opinion filed June 13, 1916.

Appeal from the County Court of Ward County, *Murray*, J.

Proceedings to set aside and declare null and void a judgment obtained by default. Judgment for defendant. Plaintiff appeals.

Reversed.

F. B. Lambert, for appellant.

If it is necessary, under our statute, for an attorney to write his name to a summons with pen and ink, it is just as necessary for him to so write his address thereon, for both are equal requisites under the law. Comp. Laws 1913, §§ 7421, 8944.

The object of our statutes upon this subject is to give to a defendant notice of the pendency of the action, and where the attorney's name and address are typewritten on the summons by his direction, this is a sufficient compliance with the law. Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 381.

The term "signature" includes any name, mark, or sign, intended to and which does authenticate the instrument in writing. Comp. Laws 1913, § 10366.

"Writing" includes "printing" or "typewriting." Comp. Laws 1913, § 10367; Ligare v. California Southern R. Co. 76 Cal. 610, 18 Pac. 777; Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299; 1 Ops. Atty. Gen. 670; Ardery v. Smith, 35 Ind. App. 94, 73 N. E. 840; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841, 33 N. W. 849; Henshaw v. Foster, 9 Pick. 312; Black's Law Dict.; Wild Cat Branch v. Ball, 45 Ind. 213; Davis v. Shields, 26 Wend. 341; Webster's New Int. Dict.; Mezchen v. More, 54 Wis. 214, 11 N. W. 534, 1 Am. Rul. Cas. 154, 157, note; Loughren v. Bonniwell, 125 Iowa, 518, 106 Am. St. Rep. 319, 101 N. W. 287; Cummings v. Landes, 140 Iowa, 80, 117 N. W. 22; Carton Toy Co. v. Buswell Lumber & Mfg. Co. 150 Wis. 341, 136 N. W. 147, and cases cited; Zacharie v. Franklin, 12 Pet. 161, 9 L. ed. 1035; Shank v. Butsch, 28 Ind. 19; Den. ex dem. Compton v. Mitton, 12 N. J. L. 70; Vines v. Clingfost, 21 Ark. 312; Hawkins v. Chase, 19 Pick. 504; Brown v. Butchers' & D. Bank, 6 Hill, 443, 41 Am. Dec. 755; Harvey v. Chicago & N. W. R. Co. 148 Wis. 391, 134 N. W. 839; Bennett v. Brumfitt, L. R. 3 C. P. 28, 37 L. J. C. P. N. S. 25, 17 L. T. N. S. 213, 16 Week. Rep. 131, Hopw. & P. 407; Berryman v. Childs, 98 Neb. 450, 153 N. W. 486; Dreutzer v. Smith, 56 Wis. 292,

14 N. W. 465; Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Nye v. Lowry, 82 Ind. 316; Croy v. Busenbark, 72 Ind. 48.

The signature to a note by a rubber stamp is sufficient. Carroll v. Mitchell-Park Mfg. Co. 60 Tex. Civ. App. 263, 128 S. W. 446; Weston v. Myers, 33 Ill. 424; Grieb v. Cole, 60 Mich. 397, 1 Am. St. Rep. 533, 27 N. W. 579; Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 299.

Defendant's application constituted a general appearance, and all the court had authority to do was to open up the case for trial on its merits. Comp. Laws, 1913, §§ 7438, 7485; Gans v. Beasley, 4 N. D. 140, 59 N. W. 714; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708; Burdette v. Corgan, 26 Kan. 102; Cohen v. Trowbridge, 6 Kan. 385; Raymond v. Nix, 5 Okla. 656, 49 Pac. 1110.

Halvor L. Halvorson, for respondent.

The signing and issuing of a summons in district court in this state means something more than the use of a stamp or sign. It imports individuality,—an act performed by the attorney. A summons is court process, and has an important office or function to fulfil. Comp. Laws 1913, § 11177; Mills v. Howland, 2 N. D. 30, 49 N. W. 413.

An appearance for a motion to vacate a void judgment, coupled with a request for permission to answer, does not amount to a general appearance. Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095; Raymond v. Nix, 5 Okla. 656, 49 Pac. 1110.

BRUCE, J. This is an appeal from a judgment of the county court of Ward County, setting aside and declaring null and void a judgment entered and obtained by default. Two questions are presented: whether the summons to which the name of the plaintiff's attorney was printed with a typewriter, and which was not subscribed by said attorney in his own handwriting, was a nullity, and whether, if a nullity, the defendant entered a general appearance in his motion to set aside the judgment.

The summons was in the regular statutory form. At the bottom there was written in typewriting "F. B. Lambert, attorney for plaintiff, P. O. Address, Minot, North Dakota."

The order setting aside the judgment was as follows: "That said

judgment be opened up and vacated and set aside, and that all proceedings had thereunder be likewise vacated, annulled, and set aside, and that said judgment is void, a nullity, and of no force or effect whatsoever, the same having been entered by default in an action wherein no summons had been issued as provided by law."

On the hearing on this motion the plaintiff produced the affidavit of F. B. Lambert, his attorney, which, among other things, stated: "That both the summons and complaint in this action were properly subscribed by affiant in the usual and ordinary way; that the signature of affiant made to said summons and complaint was made in typewriting by Wade A. Beardsley, the clerk and associate of affiant, *at affiant's request and instruction;* and the same was adopted by this affiant as his signature, and acted upon as such, and was acted upon also by the defendant; that this affiant has been an active practitioner in this court and in all the courts of the state, both state and Federal, since April, 1896, and has never, during said twenty years, ever signed a summons with pen and ink; that, previous to that time, this affiant was employed as stenographer and clerk for the law firm of Messrs. McCumber & Bogart, at Wahpeton, North Dakota, for a number of years, and during all said time signed with a typewriter every single summons issued out of said office in the name of said firm of McCumber & Bogart; that in all proceedings in the supreme court of this state the affiant has invariably caused his name to be signed by his then clerk or stenographer in affiant's name; that numerous judgments, both default and in contested cases, have been entered in this court and in the district courts of this state on summons signed in this way by the name of this affiant; that to open up the judgment entered in this case and allow the defendant to answer would be a great injustice to the plaintiff, not only in expense, but in time and delay."

The summons was not a nullity. Section 8944 of the Compiled Laws of 1913, provides that "the summons must contain the title of the action, specifying the court in which the action is brought, the name of the parties to the action, and shall be subscribed by the plaintiff or his attorney who must add to his signature his address, specifying a place within the state where there is a postoffice. The summons shall be substantially in the following form, the blanks being properly filled." This is the section which is applicable to procedure in the county court. The

requirements in regard to the summons, however, in the district court, are identically the same, save for the days given in which to answer. See §§ 7421, 7422, and 7423 of the Compiled Laws of 1913, and which, now, under the amendment made by chapter 62 of the Laws of 1915, are the same, even as to the days in which to answer.

Under all these statutes it is required that the summons "shall be subscribed by the plaintiff or his attorney, who must add to his signature his address." The question, therefore, is whether this statute is complied with when the name of the attorney is attached by his clerk at said attorney's request and instruction, and in accordance with a general custom which prevails in such office.

We can see much in the argument that the subscription should be made in the actual handwriting of the plaintiff or his attorney, and yet the general practice which prevails in this state, the injury to business and to land titles that would follow such a holding, as well as the wording of the several statutes, must lead us, as it has led practically all of the courts of the country that have passed upon the question, to a different conclusion.

Section 10,366 of the Compiled Laws of 1913 provides that "the term 'signature' [as used in the Penal Code] includes any name, mark or sign, written with intent to authenticate any instrument or writing;" while § 10,367 provides that "the term 'writing' including printing and typewriting." Forgery, therefore, can be committed of a printed signature as well as a written one, or by printing a signature as well as by writing it. In the case of Ligare v. California Southern R. Co. 76 Cal. 610, 18 Pac. 777, the court says: "It is said that the summons was not signed by the clerk. The statute requires that it should be so signed. (Code Civ. Proc. § 407.) But we think the affixing by the clerk of the seal of the court to a form to which was appended his printed name was an adoption of the printed signature which, for the purpose in hand, was sufficient."

In the case of Williams v. McDonald, 58 Cal. 529, the court says: "This is an appeal from a judgment and order denying a motion for a new trial in a street assessment case. The appellant Quackenbush presents three points for our consideration; viz., the resolution of intention was not signed by the clerk. Upon this point the testimony of the clerk of the board of supervisors was: 'I have adopted a form for

my signature; there is a printed signature adopted by me for all resolutions and orders. The name "John A. Russell" is, as you see, printed at the bottom of the paper. I never actually signed it, but I adopted the printed signature. I always kept blanks for resolutions in my office, with my signature printed at the bottom for convenience.' He further testified that when the resolution in question was adopted by the board, he filled in the date and placed it in the proper place, and caused it to be published in the proper papers. The act in question says, 'signed by the clerk.' We see no objection to the clerk adopting a printed signature."

In the case of Hancock v. Bowman, 49 Cal. 413, the court held, without discussion, "that a judgment was not void or erroneous because the name of the plaintiff's attorney, attached to the complaint, was printed instead of being written." See also Dreutzer v. Smith, 56 Wis. 292, 14 N. W. 465.

In the case of Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 259, the court said: "Section 1669, Rev. Stat. 1881, provides that after an indictment has been found by a grand jury 'it must be signed by the prosecuting attorney;' and where an indictment is returned without his signature, § 1670 makes it the duty of the court to require the prosecuting attorney to sign it. Section 240 of the same revision of statutes, which prescribes certain rules for the construction of the statutes of this state, declares that 'the words "written" and in "writing" shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the *written signature* of any person is required, the proper handwriting of such person, or his mark, shall be intended.' The word 'sign' as a verb has several shades of meaning, and hence a statutory requirement that an instrument in writing or pleading shall be 'signed' by some person or officer to make it complete is much more general and comprehensive than a similar requirement that such an instrument or pleading must be 'subscribed' by the person or officer. . . . On the same principle the 'signing' of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his 'written signature' to it implies. When a person attaches his name, or causes it to be attached, to a writing, by any of the known modes of impressing his name upon paper with the intention of signing it, he is

regarded as having 'signed' the writing. . . . As the prosecuting attorney is required to sign the indictment as a matter of verification merely, there is no reason for enforcing a more rigid rule as to the validity of his signature than in cases of ordinary business transactions to which the authorities above cited mainly have reference. . . . If, therefore, the name of the prosecuting attorney is legibly attached to an indictment by his consent, whether express or implied, it is a sufficient 'signing' by him, within the meaning of the statute, and when the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority."

In the case of Mezchen v. More, 54 Wis. 214, 11 N. W. 534 the court said: "The learned circuit court held the proceedings were void because the summons in the action was not subscribed in the handwriting of the attorney who issued the same. The statute, §§ 2629, 2630, Rev. Stat. provides that a civil action shall be commenced by the service of a summons, and after describing what it shall contain, says: 'It shall be subscribed by the plaintiff or his attorney, with the addition of his postoffice address, at which papers in the action may be served on him by mail.' It is insisted by the learned counsel for the respondent, and was held by the circuit court, that this provision of the statute requires the summons to be subscribed by the party or his attorney in his own proper handwriting, and that if not so signed, it is absolutely void. We think the learned counsel and the court erred in giving the statute this restricted construction. The summons is not a writ or process of the court, but is simply a notice to the defendant that an action has been commenced against him, and that he is required to answer to the complaint, which is either attached thereto or is or will be filed in the proper clerk's office. Porter v. Vandercook, 11 Wis. 70; Rahn v. Gunnison, 12 Wis. 529; Johnston v. Hamburger, 13 Wis. 176. It is substantially the same method of commencing an action which was long practised in the state of New York before the adoption of the Code; viz., by filing a declaration with the clerk of the court in which the action was commenced, and entering a rule requiring him to plead, and then serving upon the defendant a copy of the complaint and a notice of such rule. The summons is, in fact, a notice to the defendant that an action is commenced against him, and that he must answer the complaint within a certain time or judgment will be taken

against him. The only object of requiring it to show the name of the attorney or party who commences the action, and his postoffice address, is that the defendant may know upon whom and at what place he may serve his answer and other papers in the action. 'That this is the object is apparent from the fact that the same section provides that the summons shall state the title of the cause, the court in which the action is brought, the county where the action is to be tried, and the names of the parties.' These facts give the defendant all the knowledge necessary to enable him to plead to the action, except the knowledge of the person upon whom and the place where his answer and other papers must be served. This object is certainly as well accomplished when the name of the party or attorney is printed at the end of the summons as when it is written there; and unless the statute is imperative in requiring the signature in the handwriting of the attorney or party, there does not appear to be any reason for giving it that construction."

We are not unmindful of the statement made by this court in the case of Mills v. Howland, 2 N. D. 30, 49 N. W. 413, that "a signature means a person's name as set down by himself." In that case, however, no question was raised as to how the signature should be made.

Nor are we unmindful of the force of the argument that such signatures, if authorized in the case before us, might be inoperative as a justification for the payment of checks by banks. We have no question, however, that if a depositor authorized his name to be signed to a check by a clerk on a typewriter, a bank would be protected in paying the same when so signed. We do not, however, pass upon this question, nor is it necessary. Deeds and checks differ from summonses. A deed or a check serves to convey or assign property. A summons does not. A summons is merely a notice. It conveys nothing. It is merely a notice that, at a certain time and place, a judgment will be asked of a court against the defendant. If the defendant is properly informed of such hearing and has an opportunity to attend, why should he complain of the nature of the signature? Mezchen v. More, supra.

Nor does the fact that the statute of North Dakota uses the word "signature" as well as the word "subscribed" make any difference. The word "subscribed" is more restricted than the word "signature." The word "signature" in its origin involves merely a sign. The word "subscribed" involves a writing. If, therefore, we construe the word

"subscribed" to include a writing by means of a typewriter as well as by the pen, we decide the whole case. The distinction, indeed, is clearly between a statute which provides that a notice shall be signed or subscribed, and one which provides that it shall be subscribed in the personal handwriting of the party, in person. Hamilton v. State, 103 Ind. 96, 53 Am. Rep. 491, 2 N. E. 259.

We are not unmindful of § 7311 of the Compiled Laws of 1913, which provides that the words "write" and "written" include "printing" and "printed" except in the case of signatures, and when the words are used in the way of contrast to printing, and on which emphasis is laid by counsel for respondent. We do not see, however, that this statute is controlling in the case before us. The words "write" and "written" are not used in § 8944, which relates to summonses. All that that section provides is that the summons "shall be subscribed by the plaintiff or his attorney, who must add to the signature his address." See Hamilton v. State, supra. The section clearly only applies where a signature is required to be in writing.

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

S. H. CRANMER, E. A. Cranmer, F. W. Cranmer, L. E. Powers, and James H. Welch, as Trustees of the Union Banking Company, a Corporation, dissolved, v. S. S. LYON, as Administrator of the Estate of John A. Paine, Deceased, and Emma S. Paine, N. Emmons Paine, Howard S. Paine, Clarence N. Paine, and Emily Paine Howe, Heirs at Law of John A. Paine, Deceased.

(158 N. W. 272.)

Evidence examined and it is *held* that plaintiffs have failed to establish any right of recovery.

Opinion filed May 13, 1916. Rehearing denied June 13, 1916.

From a judgment of the district court of Nelson County, *Cooley*, J. plaintiffs appeal.

Affirmed.

Pfeffer & Pfeffer, Crofoot & Ryan, and *S. H. Cranmer,* for appellants.

A purchaser at a tax sale acquires an estate or interest in real property. It is inchoate, in that it may be defeated by redemption; but if no redemption, it will ripen into a complete title upon the issuance of a tax deed. Clark v. Darlington, 7 S. D. 148, 58 Am. St. Rep. 835, 63 N. W. 771; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Brace v. Van Eps, 12 S. D. 195, 80 N. W. 197; Eaton v. Manitowoc County, 44 Wis. 492; Horn v. Garry, 49 Wis. 469, 5 N. W. 897; Smith v. Clarke, 7 Wis. 551; Whitney v. State Bank, 7 Wis. 620; Mowry v. Wood, 12 Wis. 414; Dodge v. Silverthorn, 12 Wis. 645; Jarvis v. Dutcher, 16 Wis. 308.

The assignment of the tax certificates as collateral security for a debt is analogous to an assignment by the vendee of his interest in a contract for the sale of land, for a like purpose, and makes the assignee an equitable mortgagee. Lamm v. Armstrong, 95 Minn. 434, 111 Am. St. Rep. 479, 104 N. W. 304, and note the same case in 5 Ann. Cas. 420; Colebrooke, Collateral Securities, § 87, and note 2; Brown v. Tyler, 8 Gray, 135, 69 Am. Dec. 239; Whipple v. Blackington, 97 Mass. 476; Montague v. Boston & A. R. Co. 124 Mass. 245; Stevens v. Dedham Inst. for Sav. 129 Mass. 549.

In actions where a corporation is a party, the subject-matter of the testimony forbidden by the statute is limited "to any transaction had with the testator or intestate," and does not include a "statement" by the testator or intestate, relating to testimony by parties. St. John v. Lofland, 5 N. D. 140, 64 N. W. 930; First Nat. Bank v. Warner, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Witte v. Koeppen, 11 S. D. 598, 74 Am. St. Rep. 826, 79 N. W. 831; Snyder v. Fiedler, 139 U. S. 478, 35 L. ed. 218, 11 Sup. Ct. Rep. 583; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949; Wis. Laws 1907, chap. 197; McNaughton's Will, 138 Wis. 179, 118 N. W. 997, 120 N. W. 288; 7 Thomp. Corp. § 8460; Fearing v. Glenn, 19 C. C. A. 388, 38 U. S. App. 424, 73 Fed. 116; 3 How. Anno. Stat. § 7545; Brennan v. Michigan C. R. Co. 93 Mich. 156, 53 N. W. 358; Wallace v. Fraternal Mystic Circle, 121 Mich. 263, 80 N. W. 7; Krause v. Equitable Life Assur. Soc. 105 Mich. 329, 63 N. W. 440.

As a general rule, a trustee will not be allowed to acquire an interest adverse to the trust, and when he purchases in his own name an outstanding title, encumbrance, or other interest in the trust property, such purchase will be held to inure to the benefit of the *cestui que trust.* Berry v. Evendon, 14 N. D. 1, 103 N. W. 748; Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256; Krause v. Krause, 30 N. D. 54, 151 N. W. 991; Gates v. Kelley, 15 N. D. 639, 110 N. W. 770; McCormick v. Ocean City Asso. — N. J. Eq. —, 18 Atl. 112; Vulcan Detinning Co. v. American Can Co. 72 N. J. Eq. 387, 12 L.R.A.(N.S.) 111, 67 Atl. 339; Sorenson v. Davis, 83 Iowa, 405, 49 N. W. 1004; Fulton v. Whitney, 66 N. Y. 548; Deegan v. Capner, 44 N. J. Eq. 339, 15 Atl. 819.

Outside of proper compensation and expenses, any advantage gained by a trustee, either by performing his duty or by betraying his trust, inures to the benefit of the beneficiary or principal, while such trust relation exists. Dodd v. Wakeman, 26 N. J. Eq. 484; Lafferty v. Jelley, 22 Ind. 471; Moinett v. Days, 1 Baxt. 431; Nebraska Power Co. v. Koenig, 93 Neb. 68, 139 N. W. 839; Sawyer v. Issenhuth, 31 S. D. 502, 141 N. W. 378; First Nat. Bank v. State Bank, 15 N. D. 594, 109 N. W. 61; Holridge v. Gillespie, 2 Johns. Ch. 33; Marshall v. Thompson, 39 Minn. 137, 39 N. W. 309; 2 Perry, Tr. § 864 and cases cited; Philippi v. Philippe, 115 U. S. 151, 29 L. ed. 336, 5 Sup. Ct. Rep. 1181, and cases cited; Wadsworth v. Adams, 138 U. S. 389, 34 L. ed. 987, 11 Sup. Ct. Rep. 303; Holterhoff v. Mead, 36 Minn. 45, 29 N. W. 675; Holt v. Wilson, 75 Ala. 64; Maul v. Rider, 59 Pa. 171.

Appellants were not obliged to examine the records to ascertain if deeds had been recorded. The record of deeds was not even constructive notice to the *cestui que trust.* Duxbury v. Boice, 70 Minn. 119, 72 N. W. 838; Bailey v. Galpin, 40 Minn. 324, 41 N. W. 1054; Berkey v. Judd, 22 Minn. 299; McCarthy v. McCarthy, 74 Ala. 555; 20 Am. & Eng. Enc. Law, 596.

A *cestui que trust* may convey to the trustee his interest in the trust estate, but he must know that he is doing so. His title cannot be obtained by mistake or by any trick. Yonge v. Hooper, 73 Ala. 119; Pearce v. Gamble, 72 Ala. 341; Johnson v. Johnson, 5 Ala. 90; Chalmer v. Bradley, 1 Jac. & W. 51, 37 Eng. Reprint, 294, 20 Revised Rep. 216; Smith v. Townshend, 27 Md. 388, 92 Am. Dec. 637; Cumberland

Coal & I. Co. v. Sherman, 20 Md. 117; Irwin v. Longworth, 20 Ohio, 581; King v. Remington, 36 Minn. 15, 29 N. W. 352; Berry v. Evendon, 14 N. D. 1, 103 N. W. 748; Perry, Tr. §§ 8, 129, 179, 184, 204, 209, 210; Dobson v. Racey, 3 Sandf. Ch. 61.

The modern rule is that no one occupying a position of confidence to the ultimate owner of the property, whether the relation be that of trustee and *cestui que trust,* attorney and client, principal and agent, guardian and ward, or even friend and adviser, can, during such relationship, become in any way the absolute owner of the property, as against the other party to such relationship. Van Epps v. Van Epps, 9 Paige, 238; 1 Perry, Tr. § 433; King v. Remington, 36 Minn. 15, 29 N. W. 352; Berry v. Evendon, 14 N. D. 1, 103 N. W. 748; Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256; 7 Mod. Am. Law, 279; Davoue v. Fanning, 2 Johns. Ch. 262; Munro v. Allaire, 2 Cai. Cas. 183, 2 Am. Dec. 330; Rogers v. Rogers, Hopk. Ch. 526; Hubbell v. Medbury, 53 N. Y. 98; Case v. Carroll, 35 N. Y. 388; Baldwin v. Allison, 4 Minn. 25, Gil. 11; Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751; Fox v. Mackreth, 2 Cox, Ch. Cas. 320, 30 Eng. Reprint, 148, 2 Bro. Ch. 400, 29 Eng. Reprint, 224; Re Taylor Orphan Asylum, 36 Wis. 552; Cook v. Berlin Woolen Mill Co. 43 Wis. 433; Gillett v. Gillett, 9 Wis. 194.

The legal rate of interest was 7 per cent. S. D. Rev. Civ. Code 1903, §§ 1416, 1421; Hovey v. Edmison, 3 Dak. 449, 22 N. W. 594; Goodale v. Wallace, 19 S. D. 405, 117 Am. St. Rep. 962, 103 N. W. 651, 9 Ann. Cas. 545; Hinrichs v. Brady, 23 S. D. 250, 121 N. W. 777.

Absence from the state tolls the statute of limitations and prevents it commencing to run against the bringing of an action against such absent defendant. Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; Colonial & U. S. Mortg. Co. v. Flemington, 14 N. D. 181, 116 Am. St. Rep. 670, 103 N. W. 929; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; Code Civ. Proc. Rev. Codes 1905, § 6827, Comp. Laws 1913, § 7415; Proctor v. Proctor, 215 Ill. 275, 69 L.R.A. 673, 106 Am. St. Rep. 168, 74 N. E. 145, 2 Ann. Cas. 819; Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, 23 L.R.A.(N.S.) 924; Bommer v. American Spiral Spring Butt Hinge Mfg. Co. 12 Jones & S. 454.

Foreign statutes must be pleaded. The statute of limitations is a defense that must be specifically pleaded. 31 Cyc. title, Pleading, 47.

A limitation statute begins to run from the time the cause of action accrues, unless tolled by some circumstance provided by statute. Wilson v. Shocklee, 92 Ark. 370, 123 S. W. 403.

In the absence of statutory provision, a judgment rendered against a corporation after its dissolution is absolutely void, the same as a judgment against a natural person after his death, and is therefore subject to collateral attack. 2 Clark & M. Priv. Corp. § 329; Greely v. Smith, 3 Story, 657, Fed. Cas. No. 5,748; Mumma v. Potomac Co. 8 Pet. 286, 8 L. ed. 947; Root v. Sweeney, 12 S. D. 43, 80 N. W. 149; Pendleton v. Russell, 144 U. S. 645, 36 L. ed. 576, 12 Sup. Ct. Rep. 743; Murphy v. Missouri & K. Land & Loan Co. 28 N. D. 519, 149 N. W. 957; Insurance Comr. v. United F. Ins. Co. 22 R. I. 377, 48 Atl. 202.

Pollock & Pollock, for respondents.

A lien upon, or encumbrance, or an interest in real estate, does not constitute real estate. Such interests are mere chattels real. Tax-sale certificates are liens only until the period of redemption has expired, and the holders have only an interest in real estate. Cruser v. Williams, 13 N. D. 284, 100 N. W. 721; Darling v. Purcell, 13 N. D. 288, 100 N. W. 726; Comp. Laws 1913, §§ 7309, 10369.

"A land certificate, while it symbolizes the right to acquire land, is in itself personal property." 32 Cyc. 668; Collins v. Durward, 4 Tex. Civ. App. 339, 23 S. W. 561; Barker v. Swenson, 66 Tex. 407, 1 S. W. 117; Groesbeck v. Bodman, 73 Tex. 287, 11 S. W. 322; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338; Winterberg v. Van Devorste, 19 N. D. 417, 122 N. W. 866; Clapp v. Tower, 11 N. D. 556, 93 N. W. 862; Comp. Laws 1913, § 6774; Berry v. Evendon, 14 N. D. 1, 103 N. W. 748; Cruser v. Williams and Darling v. Purcell, supra.

An express trust cannot be created by parol. Comp. Laws 1913, § 5365; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088.

Statements of a party as to what he was promised, before he signed a written instrument, are not admissible to change or qualify the instrument itself. Rutherford v. Massachusetts Mut. L. Ins. Co. 45 Fed. 712; Eighmie v. Taylor, 98 N. Y. 288; Deposition of Jimella S. Wiest, p. 22; Lance v. Bonnell, 58 N. J. Eq. 259, 43 Atl. 288.

A party to an action against legal representatives of a deceased person cannot testify, either to the transaction itself, or to circumstances surrounding the transaction. Regan v. Jones, 14 N. D. 591, 105 N. W. 613; Larson v. Newman, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 202; Peterson v. Merchants' Elevator Co. 27 L.R.A.(N.S.) 816, note; Tecumseh Nat. Bank v. McGee, 61 Neb. 709, 85 N. W. 949.

The rule that lapse of time will never bar the enforcement of an express trust is applicable to those cases where there has been no repudiation of the trust, or where the beneficiaries have no reasonable ground to believe that the trust has been or will be denied. Wood v. Carpenter, 101 U. S. 135, 141, 25 L. ed. 807, 809; Oliver v. Piatt, 3 How. 333, 411, 11 L. ed. 622, 657; Hunt v. Patchin, 13 Sawy. 304, 35 Fed. 816; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 391.

Even though it be conceded that the pledgeor-pledgee relation still exists, they have failed to do equity and are therefore barred to demand equity. Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338.

The recitals in a deed as to consideration are not conclusive, but the true and actual consideration may be shown by proof *aliunde*. Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Smith v. Gaub, 19 N. D. 337, 123 N. W. 827.

An action barred by the statute of a foreign state is barred here. New York Code Civ. Proc. chap. 4, § 388; Roberts v. Sykes, 30 Barb. 173; 18 Am. & Eng. Enc. Law, 724; Rathbone v. Coe, 6 Dak. 91, 50 N. W. 620; Allen v. Allen, 95 Cal. 184, 16 L.R.A. 646, 30 Pac. 213.

One seeking to redeem from the mortgagee in possession, which is clearly analogous to a pledgee in possession, without paying the debt, does not come into equity with clean hands. Tracy v. Wheeler, 15 N. D. 248, 6 L.R.A.(N.S.) 516, 107 N. W. 68; Boschker v. Van Beek, 19 N. D. 104, 122 N. W. 338; Norton v. Baxter, 41 Minn. 146, 4 L.R.A. 305, 16 Am. St. Rep. 679, 42 N. W. 865; Tuthill v. Morris, 81 N. Y. 94; Larsen v. Breene, 12 Colo. 480, 21 Pac. 498; Talty v. Freedman's Sav. & T. Co. 93 U. S. 321, 23 L. ed. 886.

And an offer to pay is not equivalent to a tender. Cumnock v. Newburyport Inst. for Sav. 142 Mass. 342, 56 Am. Rep. 679, 7 N. E. 869; Tuthill v. Morris, 81 N. Y. 94.

Actions of this nature are prosecuted in this state under a special

statute which provides the practice fully. Comp. Laws 1913, §§ 8144, 8165.

"Any defendant in default for want of an answer, or not appearing at the trial, shall be adjudged to have no estate or interest in, or lien or encumbrance upon, the property." Comp. Laws 1913, § 8153.

These parties were in default; a judgment was rendered; there has been a judicial determination; and an estoppel arises by force of and resides in the judgment so rendered. Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; 23 Cyc. 1218.

It matters not that the judgment was obtained against a corporation after it had been dissolved; the action was brought for the benefit of these plaintiffs, and if a mistake was made, they cannot now complain. They had their remedy. Murphy v. Missouri & K. Land & Loan Co. 28 N. D. 519, 149 N. W. 957; 23 Cyc. 1245, ¶ 3; Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515; Cheney v. Patton, 144 Ill. 373, 34 N. E. 416; Southern P. R. Co. v. United States, 168 U. S. 1, 48, 42 L. ed. 355, 377, 18 Sup. Ct. Rep. 18; Norton v. House of Mercy, 41 C. C. A. 396, 101 Fed. 382.

CHRISTIANSON, J. The controversy involved in this action grew out of the following undisputed facts: In 1888 the Union Banking Company was organized as a private corporation under the laws of the then territory of Dakota, its principal place of business being at the city of Aberdeen. Upon the subsequent division of the territory of Dakota, its corporate existence continued under the laws of the state of South Dakota. The corporation, among other things, was engaged in the business of loaning money and buying and selling securities. Between the 25th day of November, 1890, and the 1st day of July, 1891, one J. A. Paine loaned to the said Union Banking Company four several sums of money, amounting in the aggregate to $5,600. The Union Banking Company issued to said Paine for each of said several sums a certificate of deposit payable in five years from the date thereof, with semiannual interest at the rate of 10 per cent per annum. As collateral security for the payment of such certificates of deposit the Union Banking Company delivered to said J. A. Paine certain tax-sale certificates equal in face amount to the amount of said certificates of deposit. Said tax-sale certificates were unassigned and remained in the name of the

Union Banking Company. With each of said certificates of deposit the parties made an agreement in writing, signed by them, agreeing, among other things, that, in case of default in payment of principal or interest of said certificate of deposit for a period of sixty days after the maturity thereof, said J. A. Paine might collect or sell the securities and apply the proceeds to the redemption of said certificate of deposit and interest, and further providing that in case said Union Banking Company should elect at any time during the life of said agreement, it might recall any particular certificate so deposited with said Paine, first having deposited to replace the same a bond and mortgage or tax-sale certificate of like amount and based upon equally good security.

The various tax certificates (so far as this action is concerned) covered certain lands in Dickey, McIntosh, Nelson, and LaMoure counties in this state, and were based upon tax sales held in such counties in the years 1890 and 1891. The Union Banking Company became financially embarrassed, and reached a point where it was unable to meet and consequently defaulted in the interest payments upon all the certificates of deposit held by Paine; it was unable to perform its part of the contracts accompanying the certificates of deposit for the reason that it had no tax certificates to substitute for or replace any tax certificate which it might desire to recall, and it was without funds with which to make purchases of tax-sale certificates. This condition existed on July 6th, 1893, at which time the said Union Banking Company, by its president, S. H. Cranmer, the first-named plaintiff in this action, made, executed, and delivered to said J. A. Paine an absolute assignment of each of the said several tax-sale certificates theretofore delivered to him as collateral security, as aforesaid. At all times subsequent to the making and delivering of such full and complete assignment, the said J. A. Paine made collections of the amounts which were paid for redemption of such tax-sale certificates as the same were redeemed, and retained the moneys so collected and the title to the real estate so procured, as his own; procured the issuance to himself of tax deeds for such lands as were not redeemed, and fortified such tax titles by purchase of subsequent tax certificates and the procuration of tax deeds thereon; contested the claims of numerous and divers persons with reference to such titles, and defended suits brought to set aside tax titles so procured as

aforesaid, various features of such litigation having from time to time been appealed to this court (see Paine v. Dickey County, 8 N. D. 581, 80 N. W. 770; Galbraith v. Payne, 12 N. D. 164, 96 N. W. 258; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322), and treated the said moneys and lands as his own at all times subsequent to the time of making said absolute assignments, July 6th, 1893, until the time of his death, which occurred on July 24th, 1912.

The Union Banking Company made no payments, either for principal or interest, upon any of the certificates of deposit held by Paine at any time after July 6th, 1893; nor did the plaintiffs in this action make any tender or offer of payment of the indebtedness represented by such certificates of deposit prior to the commencement of this action. The Union Banking Company made no claim against Paine or against the administrator of his estate until in March, 1914, at which time it brought an action to determine adverse claims to the lands involved in this suit and certain other lands. S. H. Cranmer, the first-named plaintiff in this case, appeared as one of the attorneys of record for the Union Banking Company in such action and personally verified the complaint therein. The action to determine adverse claims came on for trial in September, 1914, and resulted in a judgment in favor of the defendants on account of the plaintiff therein defaulting.

The charter of the Union Banking Company expired on April 2, 1908, and the plaintiffs, who were the directors of said corporation at the time of the expiration of its corporate existence, bring this new action as trustees by operation of law of said corporation, and assert that they, as such trustees, are the owners and entitled to possession of certain lands in Dickey, McIntosh, Nelson, and LaMoure counties in this state, by reason of the fact that Paine obtained tax deeds for said tracts upon some of the tax certificates which he received from the Union Banking Company. The defendants asserted several defenses, among others, the statute of limitations, former adjudication, and laches.

The trial court made findings of fact and conclusions of law in favor of the defendants which may be epitomized as follows:

That the plaintiffs have failed to establish a cause of action against the defendants, or any of them.

That the several assignments of the tax-sale certificates executed and delivered by the Union Banking Company on or about July 6th, 1893, were absolute and unconditional, and transferred to said Paine all the right, title, and interest of said Union Banking Company in and to said tax-sale certificates.

That plaintiffs' cause of action, if any they had, was barred by the statute of limitations.

That the Union Banking Company had prosecuted a prior action against the defendants to quiet title to the several tracts involved in this action, wherein a final judgment was entered in favor of the defendants, and that such judgment is a bar to this action.

That plaintiffs have failed to show payment or tender to said Paine or his representative, of the moneys represented by the certificates of deposit, and that payment or tender of such indebtedness is a necessary pre-requisite to the maintenance of plaintiffs' action.

That plaintiffs have been guilty of gross laches, and that any cause of action which they might have had is barred and plaintiffs are estopped to assert any right, title, or interest in the real estate involved herein.

Plaintiffs have appealed and demanded a trial *de novo* in this court.

The trial court, among other things, found that the Union Banking Company practically terminated and went out of active business in or about the year 1893, and has not since been engaged in business, and that since that time its correspondence, papers, and records have in the main been scattered, lost, and destroyed, and have not been preserved, and that it is not made to appear that any special care for the preservation thereof has been taken by the plaintiffs. The plaintiffs complain of this finding and point to the testimony of S. H. Cranmer, the former president of the Union Banking Company, wherein he stated that he continued to reside in Aberdeen, South Dakota, until 1908, and that stockholders' meetings for the election of directors were held during the various years, and that the last meeting of stockholders for the election of directors was held in June, 1907, at which time the plaintiffs were elected directors. The directors were all relatives of S. H. Cranmer. The plaintiff F. W. Cranmer being his daughter; E. A. Cranmer being his wife; L. E. Powers, his brother-in-law, and James H. Wells, his wife's brother-in-law,—the latter two being residents of Iowa.

Upon the trial plaintiffs offered the oral testimony of S. H. Cranmer,

and the deposition of one Jimella S. Wiest, who was a bookkeeper and probably assistant cashier of the Union Banking Company at the time the transactions in question were had with Mr. Paine. The purpose of this testimony was to show that the assignments of the tax certificates made on July 6th, 1893, were not intended to be absolute, or to transfer the ownership of the tax certificates to Mr. Paine, but that such assignments were made merely for the purpose of enabling Mr. Paine to obtain the redemption moneys paid to the various county treasurers, and that it was the intent of the parties that such certificates should remain the property of the Union Banking Company, and that therefore Mr. Paine merely held the same as collateral security for the payment of the certificates of deposit. Mrs. Wiest testified that she severed her connections with the Union Banking Company in the fall of 1894 or the spring of 1895, and since that time has had absolutely no connection with the company. It is shown by the testimony of Mrs. Wiest that the arrangement with Mr. Paine was made wholly through correspondence. Plaintiffs failed to produce such correspondence and sought to establish the contents thereof by Mrs. Wiest. As a foundation for such secondary evidence, Mr. Cranmer testified that he left Aberdeen in 1908, and was gone for some time; that before going away he placed such correspondence with the records and books of the corporation in an attic in his residence, and that on his return, he found the correspondence and same of the records missing. The defendants objected to all such evidence on various grounds, among others, on the ground that the same related to a transaction with a deceased person and hence was inadmissible under the provisions of § 7871, Comp. Laws 1913, we do not deem it necessary to pass upon the admissibility of this testimony. Neither do we find it necessary to discuss any of the other questions of law argued by appellants' counsel.

Concededly plaintiffs had the burden of proof, and were required to establish their cause of action by competent evidence. The trial court held that they had failed to do this, and in this conclusion we concur. Under the laws of this state it is presumed that a thing delivered by one to another was due to the latter; that a person owns the things which are possessed by him; and that a person who exercises acts of ownership over property is its owner. Comp. Laws, § 7936, subdivs. 8, 11, 12. It is also presumed that private transactions have

been fair and regular; that the ordinary course of business has been followed, and that a person takes ordinary care of his own concern. Comp. Laws, § 7936, subdivs. 19, 20, and 24.

The plaintiff, S. H. Cranmer, was the president and principal stockholder of the corporation. He was the directing spirit and most vitally interested in the safeguarding of any property belonging to the corporation. The directors, as already stated, were his near relatives. He was a banker and a lawyer. The books offered in evidence show that records were kept of the various tax certificates purchased by the company, and that the corporation purchased large numbers of tax certificates in various counties in the territory of Dakota and in the states of North and South Dakota. S. H. Cranmer, the president and managing officer of the corporation, knew that, under the laws of North Dakota, tax certificates issued on any subsequent tax sales would cut off all rights under the tax certificates assigned by the corporation to Paine. He knew that unless the lands covered by such tax certificates were redeemed within two years from the dates of the respective tax sales, the holders of such tax certificates might apply and receive tax deeds for the lands described in the certificates. Comp. Laws 1887, § 1638; Rev. Codes 1895, § 1267. He also knew that, under the laws of North Dakota, the tax certificates assigned to Paine would be extinguished and become null and void unless the holder thereof took possession of the premises or obtained tax deeds on such certificates on or before July 1st, 1906. Comp. Laws, 1913, § 2199.

Cranmer, the lawyer, familiar with the tax-title business, says that his corporation owned the tax certificates assigned to Paine, and yet, if his testimony is true, the Union Banking Company continued a going concern until 1907, with Cranmer, the president, in charge of its books, records, and correspondence at Aberdeen, South Dakota. We then have a condition where Cranmer, in charge of the affairs of the Union Banking Company for a period of about thirteen years, permitted Mr. Paine to retain the property of the Union Banking Company and treat it as his own. It is conceded that the Union Banking Company neither received nor requested any report from Paine, nor did it have any communication with him of any kind since 1894. Appellants' counsel assert that the officers of the Union Banking Company were under no legal obligation to make inquiry of Paine. We do not care to discuss the

proposition. Because, conceding that no legal duty rested upon the plaintiffs to make inquiry from Paine, the fact still remains that their conduct must be considered in determining the ownership of the tax certificates. Is it reasonable to believe that if these certificates did in fact remain the property of the Union Banking Company, that S. H. Cranmer, the lawyer and tax-title broker, would have permitted Paine, the New York minister, to retain these valuable properties for this long period of time without even an inquiry as to their status? Was Cranmer's conduct that of a man believing himself the owner of these certificates? The answer seems obvious.

In the meantime Paine (who, according to the records offered in evidence, was a minister residing at Tarrytown, New York) was not only exercising the right of ownership over the tax certificates, but he was vigorously asserting or defending such rights in the different courts of this state, as evidenced by the reported decisions of this court. The conduct of Paine was that of a man asserting or defending his own property rights, and is consistent only with the theory that he believed himself to be the owner of the tax certificates. The conduct of Cranmer was not that of a man who believed himself to be the owner of valuable property rights possessed by another. If claims such as presented by the plaintiffs in this case could be deemed established by evidence of the nature here presented, when viewed in the light of the conduct of the principal plaintiff, the administration of justice would indeed be a mockery, and estates of decedents become the easy prey of ingenious and unscrupulous claimants.

The judgment appealed from is affirmed.

On Petition for Rehearing (filed June 13, 1916).

A petition for rehearing has been filed herein, wherein, among other things, it is asserted that, in our former opinion, we erroneously assumed that the Union Banking Company was financially embarrassed and unable to perform its contract with Paine at the time it assigned to him the tax certificates involved herein on July 6, 1893. Plaintiffs' principal witness was Jimella S. Wiest, the stenographer and bookkeeper of the Union Banking Company, and in her testimony she states, among other things: "As I remember, we wrote and told him (Paine)

that we were short of funds and would not be able to get money from eastern investors with which to buy new tax-sale certificates. . . ." She also testified: "We had no ready cash to buy new certificates to replace those in his hands. . . ."

Mrs. Wiest's testimony relates to, and purports to describe, the conditions existing immediately prior to and on July 6, 1893. As stated in our former opinion, the Union Banking Company had been unable to pay certain interest instalments then past due upon the certificates of deposit held by Paine. Such interest instalments aggregated in all $280. An examination of the records of the Union Banking Company, offered in evidence, shows that no new transactions were entered into by this company subsequent to July 6, 1893. The various gold bonds and certificates of deposit shown upon the books of the company were all issued at prior dates. Its record of tax certificates purchased in the various counties in North and South Dakota shows that all tax-sale certificates were purchased prior to that time. In fact, the evidence convinces us that the trial court very properly found "that the said Union Banking Company practically terminated and went out of active business in or about the year 1893, and has not since engaged in business."

The petition for rehearing also asserts that in our former opinion we overlooked the fact that, at the time the assignments were made, several of the tax certificates so assigned had already been redeemed, and that the redemption moneys which had been paid in to redeem such tax-sale certificates, and then in the hands of the several county treasurers, amounted in all to exceed the sum of $1,900. In our former decision we recited certain undisputed and controlling facts, which, in our opinion, justified the trial court in finding that the plaintiffs had failed to establish a cause of action by sufficient competent proof. While the facts recited in our former decision, in our opinion, justified the trial court's finding and were sufficient by themselves to require an affirmance of the judgment rendered by the court below, still, in arriving at our former decision, due consideration was given to all the evidence offered by plaintiffs and to every fact and circumstance developed or sought to be established by such evidence, including the evidence offered by plaintiffs relative to the matter under consideration. We are, however, wholly unable to understand how the fact that a number

of the tax certificates had actually been redeemed at the time the assignments were executed and delivered to Paine can possibly aid the plaintiffs. The plaintiffs base their cause of action primarily upon the proposition that the assignments of tax certificates executed to Paine on July 6, 1893, while absolute on their face, and pretending to vest absolute title in Paine, were, as a matter of fact, not intended to constitute absolute assignments, but that such assignments were made solely for the purpose of enabling Paine to obtain the redemption moneys from the county treasurers direct, as the certificates might be redeemed.

The evidence shows that Paine held certificates of deposit aggregating in all $5,600: $3,000 of which was payable November 25, 1895; $600 payable January 1, 1896; and $2,000 payable July 1, 1896. The Union Banking Company, on July 6, 1893, was indebted to Paine for past-due interest instalments on such certificates of deposit in an amount aggregating in all $280. This was the only sum it was required to pay at that time. It is a matter of common knowledge that in July, 1893, and for some time prior, as well as subsequent, thereto, this country was in the midst of a financial panic. Money was difficult to obtain. Investments and securities of all kinds could be purchased at the lowest imaginable prices. The Union Banking Company was in financial straits. Yet it is contended that at this time it knowingly and intentionally assigned to Paine over $1,900 in cash then in the hands of the different county treasurers as collateral security for certain certificates of deposit. In our opinion this evidence, instead of supporting plaintiffs' claim, rather tends to establish the fact that the assignments made by the Union Banking Company to Paine on July 6, 1893, were absolute, and intended to transfer to Paine the absolute title to such tax certificates and all moneys or properties which might be derived therefrom or acquired thereby.

As stated in our former opinion, the plaintiffs in this action assert that they, as trustees of the Union Banking Company, a dissolved corporation, are the owners and entitled to possession of the lands described in the complaint. They were required to establish this fact by satisfactory, competent evidence. The evidence shows that Paine never was in Aberdeen, South Dakota, in connection with the business dealings between himself and the Union Banking Company, but that such business transactions were carried on exclusively by correspondence.

Plaintiffs sought to prove the contents of such correspondence by the testimony of Mrs. Wiest, the stenographer and bookkeeper of the Union Banking Company. As stated in our former opinion she severed her connection with the company in the fall of 1894 or the spring of 1895, and since that time she has had absolutely nothing to do with the company or its affairs. She has subsequently married and resided in Minnesota and Oregon, and is at the present time a resident of British Columbia. Her deposition was taken in Seattle in August, 1915, or more than twenty-two years after the correspondence between the Union Banking Company and Paine was had. The plaintiff, S. H. Cranmer, appeared as attorney for the plaintiffs at the time of the taking of the deposition and personally conducted her examination. As stated in our former opinion, the correspondence between Paine and the Union Banking Company was not produced, and, so far as the record shows, Mrs. Wiest had no notes or memoranda, stenographic or otherwise, from which to refresh her memory so far as the contents of the correspondence is concerned, but she pretends to testify thereto solely from memory.

Assuming (but not deciding) that this testimony is admissible, it by no means convinces us that plaintiffs, as trustees of the Union Banking Company, are owners of the lands involved in this litigation. When all the evidence adduced by the plaintiffs is considered in light of the undisputed facts and circumstances in the case, we are led to the irresistible conclusion that plaintiffs have failed to establish any right to recover. The former decision will stand.

A rehearing is denied.

LESLIE STINSON et al. v. P. O. THORSON et al.

(158 N. W. 351.)

School board — Grand Forks Independent School District — erection of high school building — contract for — action to restrain — school funds — diversion of — from one purpose to another — debts — constitutional limit of — teacher's wages fund — transfer of moneys from — to General Fund — permissible.

Action to restrain the school board of Grand Forks Independent School Dis-

trict from carrying out a contract for the erection of a high school building, because certain funds had been diverted from the purpose for which they had been levied, and that, without such funds, said contract creates a debt in excess of the constitutional limit.

Held, that the transfer of funds from the teachers' to the general fund in this case is not prohibited by § 175 of the Constitution of North Dakota.

Opinion filed April 26, 1916. Rehearing denied June 20, 1916.

Appeal from the District Court of Grand Forks County, *Pollock*, J. Reversed.

McIntyre & Burtness, *V. R. Lovell*, and *L. E. Birdzell*, for appellants.

Appellants insist that under our constitution and statute law the school board of the Independent School District of Grand Forks have the right to use money raised and levied for a certain purpose, for other school purposes, and when such money is not needed for the specific purpose for which it was raised, to divert it, and use it for other immediate school purposes, and that money raised for teachers' wages, when not so needed, may be diverted and transferred over into the general fund of the district for general purposes, including the erection of a school building and the use of said fund towards the payment of the bills in connection therewith. Nor is such school board required to specifically levy for as many funds as there are purposes enumerated for which levies may be made. Comp. Laws 1913, §§ 1297, 1298; Const. § 175; State v. Klectzen, 8 N. D. 291, 78 N. W. 984, 11 Am. Crim. Rep. 324; State ex rel. Reed v. Merriam County, 21 Kan. 436.

The law prescribes the same fiscal regulations for this district as for common and special school districts. Comp. Laws 1913, §§ 1212, 1297, 1298, ¶ 7.

School districts are required to keep only a state tuition fund, a general fund, and a sinking fund, and the Constitution is satisfied when these funds are kept. Comp. Laws 1913, § 1212; Const. § 175.

Section 1298 of the Compiled Laws of 1913 does not define funds, but only provides the form of the levy. 2 Dill. Mun. Corp. 5th ed. ¶ 860; School Dist. v. Western Tube Co. 13 Wyo. 304, 80 Pac. 155; Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982; Dakota County v. Bartlett, 67 Neb. 62, 93 N. W. 192; Thomas Kane & Co. v.

Hughes County, 12 S. D. 438, 81 N. W. 984; Comp. Laws 1913, § 1298; Thomson v. Harris, 88 Hun, 478, 34 N. Y. Supp. 885.

The proceeds of the levy must be used for the prospective needs of the district in contemplation when the levy was made, unless otherwise authorized by law. Comp. Laws, 1913, §§ 1298, 1308; N. D. Const. §§ 130, 174; Cooper v. Wait, 106 Ky. 628, 51 S. W. 161.

Section 175 of our Constitution does not prohibit transfer of unexpended balances for a purpose not in contemplation at the time the tax was levied. Field v. Stroube, 103 Ky. 114, 44 S. W. 363; Whaley v. Com. 110 Ky. 154, 61 S. W. 35; State ex rel. Jackson v. Butler County, 77 Kan. 507, 94 Pac. 1004; Miller v. Merriam, 94 Iowa, 126, 62 N. W. 689; Howard v. Huron, 6 S. D. 180, 26 L.R.A. 498, 60 N. W. 803.

This section is satisfied when the revenue raised for a particular purpose for a given year is employed to meet the obligations of that year. Cooper v. Wait, supra; Fuller v. Heath, 89 Ill. 311; Com. v. Brown, 91 Va. 762, 28 L.R.A. 115, 21 S. E. 357; People ex rel. Burrows v. Orange County, 27 Barb. 575, 17 N. Y. 235; People v. National F. Ins. Co. 27 Hun, 188.

The designation of a fund has no relation to the object of a tax, but is a mere accounting device. Com. v. Brown, 91 Va. 762, 28 L.R.A. 110, 21 S. E. 357; 2 Lewis's Sutherland, Stat. Constr. 2d ed. §§ 443, 448; Conn v. Cass County, 151 Ind. 517, 51 N. E. 1062; Cincinnati v. Connor, 55 Ohio St. 82, 44 N. E. 583; Chalfant v. Edwards, 176 Pa. 67, 34 Atl. 922.

Practical construction of a statute by officers whose duty it is to administer the law is admissible in aid of construction. Garr, S. & Co. v. Sorum, 11 N. D. 174, 90 N. W. 799; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 474; § 710, 1895 Code with § 710, 1899 Code; Comp. Laws, 1913, §§ 1208, 1212; Bryan v. Board of Education, 7 Okla. 160, 54 Pac. 409; Hickman College v. Colored Common School Dist. 111 Ky. 944, 65 S. W. 20.

The assets of the municipal corporation not specifically required or appropriated to meet anticipated expenditures are available to accomplish any authorized object. Miller v. Merriam, 94 Iowa, 126, 62 N. W. 689; 1 Abbott, Mun. Corp. §§ 146, 411; 3 Abbott, Mun. Corp. § 1071.

Section 1298 of our Compiled Laws is not absolutely mandatory as

to the manner in which taxes are to be levied and accounts kept. It merely conveys authority to levy taxes. It does not prescribe a fiscal system. The purpose for which one annual levy is made is entirely distinct from that for which another annual levy is made. Each one is made to provide revenue to meet obligations of the district for a distinct and separate current year. Cooper v. Wait, 106 Ky. 628, 51 S. W. 161; 2 Dill. Mun. Corp. 5th ed. ¶ 860.

Section 1298 of our 1913 Laws does not rise to the dignity of a mandatory statute, even as applied to the levy of the taxes, much less as applied to the method of accounting. Thomson v. Harris, 88 Hun, 478, 34 N. Y. Supp. 885; School Dist. v. Western Tube Co. 13 Wyo. 304, 80 Pac. 155.

If respondents are correct in their interpretation of this law, then whatever authority is given in the statute to raise and apply money in a certain way or direction, the implication would follow that such moneys would constitute a fund, and a warrant drawn upon this fund would not be payable out of the general fund. This is not the law. Thomas Kane & Co. v. Hughes County, 12 S. D. 438, 81 N. W. 894; Dakota County v. Bartlett, 67 Neb. 62, 93 N. W. 192; Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982.

Bangs, Netcher, & Hamilton, Murphy & Toner, and *Bangs & Robbins,* for respondents.

These school districts are agencies created by the state to carry out its educational purposes, and are vested with limited corporate powers. They are a species of public corporation resembling counties, townships, and road districts, and are in no true sense municipal corporations. Sanders v. Independent School Dist. 35 S. D. 48, 150 N. W. 473; People ex rel. Cairo & St. L. R. Co. v. Trustees of Schools, 78 Ill. 136; People ex rel. Biddison, v. Board of Education, 255 Ill. 568, 99 N. E. 659; Heller v. Stremmel, 52 Mo. 309; Thogmartin v. Nevada School Dist. 189 Mo. App. 10, 176 S. W. 473; Madden v. Lancaster County, 12 C. C. A. 569, 27 U. S. App. 528, 65 Fed. 188; Wharton v. School Directors, 42 Pa. 358; Freeland v. Stillman, 49 Kan. 197, 30 Pac. 235.

Aside from bond issues, the revenue of the school district is derived from the following sources: Tax Levied by the Board (§ 1298); State Apportionment (§ 1208); County Apportionment (§ 1224).

The question at issue is whether or not this county apportionment fund is appropriated by §§ 1297 and 1298 to the payment of teachers' salaries, or is it of a floating character, and may it be devoted to building or other purposes, thus augmenting the amounts raised therefor by taxation. If the diversion theory is not adopted, it is clear that this county apportionment fund cannot be diverted to the building fund, or used for building purposes. Comp. Laws, 1913, §§ 1298, 1302; State Const. § 175.

The school board cannot make a levy for one purpose and then divert the funds raised thereby to another and wholly different purpose. Neither can the board raise taxes faster than they are needed for the purposes levied. Comp. Laws 1913, §§ 1297, 1298, 1301 and 1302; Midland Twp. v. Roscommon Twp. 39 Mich. 424; Michigan Land & Iron Co. v. L'Anse Twp. 63 Mich. 700, 30 N. W. 331; Keystone Lumber Co. v. Bayfield, 94 Wis. 491, 69 N. W. 162; Vreeland v. Bayonne, 58 N. J. L. 126, 32 Atl. 68; Allen v. Peoria & B. Valley R. Co. 44 Ill. 85; 2 Cooley, Taxn. 1435.

The very purpose of this restriction is to prevent deception and furnishing money that might by some indirection be used for objects not approved or intended. Westinghausen v. People, 44 Mich. 265; State ex rel. Lima v. Pohling, 1 Ohio C. C. 486, 1 Ohio C. D. 271; State ex rel. Nieman v. Fangbouer, 14 Ohio C. C. 104, 12 Ohio C. D. 801, 7 Ohio Dec. 334.

Every law imposing a tax shall state distinctly the object of the same, to which it shall be applied. Kan. Const. 1855, art. 11, § 3; Northup v. Hoyt, 31 Or. 528, 49 Pac. 754; Bowers v. Neil, 64 Or. 104, 128 Pac. 433; Ark. Const. 1860, § 5, art. 10 adopted the 1858, Kan. and 1851 Ohio section in toto as § 11, art. 16.

The Kansas law has been adopted here, together with its interpretation. N. D. Const. § 175; S. D. Const. § 8, art. 11; Wash. Const. art. 7, § 5; Wyo. Const. Art. 15, § 13; State ex rel. Reed v. Marion County, 21 Kan. 419, Anno. ed. 308; National Bank v. Barber, 24 Kan. 543, Anno. ed. 382; State v. Emporia, 57 Kan. 710, 47 Pac. 833; Smith v. Haney, 73 Kan. 506, 85 Pac. 550.

Wisconsin, without the aid of a constitutional provision, denies the right to divert such funds. Weik v. Wausau, 143 Wis. 645, 128 N. W.

429; Rice v. Milwaukee, 100 Wis. 516, 76 N. W. 341; State ex rel. Board of Education v. Haben, 22 Wis. 660.

The same is true of Minnesota. Mitchell v. St. Paul, 114 Minn. 141, 130 N. W. 66.

Section 1212 has reference to the funds of the Common School Districts which are authorized by § 1222, but such tax is a general tax for all purposes.

This law does not apply to Independent School Districts. Comp. Laws 1913, §§ 1298, 1301 and 1308; Price v. Fargo, 24 N. D. 440, 139 N. W. 1054.

BURKE, J. Trial *de novo*. The complaint alleges that those defendants who comprised the Board of Education of the Independent School District of the city of Grand Forks have made a contract with the other defendants for the erection of a new high school building; that, under § 183 of the Constitution, and § 1303, Comp. Laws 1913, the total debt limit of said district was 5 per cent of the 1914 assessed valuation of $4,737,845.00, or $236,892.25; that the said district was already bonded in the sum of $175,000; that there were available assets not to exceed $114,916.09; that "by reason of the fact as hereinbefore set forth, the contracts set forth in ¶¶ 8, 9, and 10 hereof are illegal, null, and void, and are without any valid or binding force, and are in excess of the constitutional and statutory limitations upon the debt of said Independent School District." Judgment of the court was asked restraining the defendants from proceeding further under the terms of said contracts. The school board answered admitting the execution of the contracts, but in smaller sums than alleged in the complaint, and alleged that the total cost of said building, complete and fully equipped, will not exceed the sum of $180,000, not more than $160,000 of which will be due or payable until after July 1, 1916; that at the time the said contract was let the defendant board had, and now has, cash on hand, together with the 1915–16 tax levy anticipated and other assets, a sum exceeding the amount of said contracts. In allowing the temporary injunction the trial court filed a memorandum decision from which we quote: "It is but just, at the outset, for me to say that no charge of corruption, intentional wrongdoing, or personal gain was made against any of the defendants. In fact, counsel for plaintiffs stated in open

court that, in so far as they knew, the present board, including the secretary, as well as its predecessors, were men and women of the highest character and of known probity. That many of the errors complained of, especially as to methods of procedure, have been inherited from the past; that the system in vogue at the present time has been in continuous use for many years. Notwithstanding these facts, the plaintiffs allege that the method of making levies and of keeping the accounts are and have been illegal and void, and that no contract could be of binding force under the present state of affairs. The affidavit of Mr. Burchard, secretary of the board, among other things admits the following: 'That the moneys levied by and received by such board have not at any time been kept in a separate and distinct fund, either on the books of the treasurer of said board or in the books kept in the secretary's office; but that said moneys have always been kept as, and have been considered and used by, the board as moneys of the board which were available to be used for any expenditure which the board might authorize or direct (including new expenditures made for the erection of several new school buildings), and have been made out of said general fund. . . . That the money received by the board has on its records been kept in one general fund, showing, however, the source of the receipt of the same, and that the same is true of the records of the treasurer of the board; that the disbursements have been entered on the treasurer's books under the two heads of teachers' fund and general fund, and that no other subdivision or classification of said disbursements has been made or attempted to be made on the treasurer's books.' "

The trial was had to the court, resulting in about 275 pages of evidence. The trial court made the injunction permanent, and in doing so used, in part, the following language: "I think I will give you my view of the matter right here and now. In the first place, I want to say that § 130 of our Constitution was not called to my attention at the former hearing, neither by counsel in argument nor in brief presented, and so, if that section had anything to do with the decision in this case on the preliminary hearing,—I mean if it should have had anything to do with it,—it did not have anything to do with the decision on the preliminary hearing. . . . They come into this court and say that, in one or two instances, in the neighborhood of $10,000 were levied for one purpose and not used, and can be turned over to

another purpose at the close of the year, because, forsooth, that fund has served its purpose for that given year. I do not believe the law contemplates anything of that kind. . . ."

Findings of fact and conclusions of law were prepared from which we quote: "That the contract entered into by the said defendants, the Board of Education of Independent School District, with the defendants, W. J. Edwards, Healy Plumbing & Heating Company, Gray Construction Company, are, and at all times since the attempted entering of them, have been void and of no effect." The defendant school board appeals to this court, demanding a trial *de novo*. We have set out the trial court's memorandum opinion and the conclusion of law showing its theory of the case and its reason for granting the injunction. Respondents in their brief define their position as follows: "There is but one major question in this case and it may be stated substantially as follows: Has the board of education the right to divert moneys raised by taxation for the purpose for which the tax was levied? Preliminary thereto there is the question whether or not the statute requires the board to levy taxes for specific purposes, and in connection therewith we call attention to the statutes which are quoted and summarized as follows: (§§ 1289–1296, inclusive)." And again: "And so the question of law is here squarely presented: Can the board make a levy for one purpose and then divert the funds raised thereby to another and totally different purpose?" And at the very last of his brief he says: "It is very clear that the appellants have not complied with the law and that the contracts are illegal and void." We have set forth those extracts from respondent's brief because they set a limit upon the questions which we will consider. An examination of the evidence leaves us in much doubt as to the facts. The school district has been in operation under one name or another for more than thirty years. During that time the law has been materially changed and more divisions required in the moneys levied by taxation. Acting upon a suggestion of the trial court the secretary of the school board had a partial examination made of the books covering the years 1904–14. This statement was offered in evidence, but, having started at the beginning of the year 1904, is of little use to us. It is made the basis, however, of respondent's claim that at that time (1904) the building fund was overdrawn more than $13,000, and that moneys levied during succeeding years for building

purposes should now be used in paying this overdraft, and, therefore, be unavailable for the contemplated building. This evidence is so unsatisfactory, however, that we do not believe it sufficient to support a finding to that effect.

For example the secretary, in his testimony, was asked:

Q. Now, how much of the county apportionment fund did you have to make use of in order to bring the teachers' fund up to an apparent balance?

A. Well, if you go back to 1903, the time I started, we had used something like—in round numbers—$28,000.

In view of the fact that in the early days the funds were not kept separate, we do not believe we can hold that there was an overdraft in 1910 in the building fund. At least, it is not established by competent evidence. Another question of fact which we may as well consider here is whether the school board, during the years 1910–14, levied money for the teachers' fund with the intent to divert said fund to building uses. While respondent makes this accusation, he furnishes us but scanty proof. To be true, the tax actually levied during those years for teachers' purposes exceeded the amount used for payment of the teachers, but that is fully explained by the superintendent of schools, who gave the following explanation: ". . . It has always been the theory of the board that any balance of money they had went into the general fund. They have only recognized the general fund. And I know that when we have met to make these levies, that we have felt that we could not know definitely just how much money we were going to get from the different funds, the county tuition fund or the state apportionment funds,—or, at least, that has been the talk,—and we have made the levy ample to cover not only the payment of teachers, but we felt that if there was anything over, that it would go into the general fund, and I am absolutely sure that the board had no intention—because we had never levied to the limit on the building fund—no intention of putting that money in there for the purpose of a new high school building, only the purpose that, if there was anything left over there, that it could go into the general fund. And we have always built our school buildings here out of the general fund. We have never

had any building fund." Respondent concedes that if the board in good faith over-levies in the teachers' fund, and there remains an inconsequential sum, the law (not taking notice of trifles) will allow the transfer of said sum when the purpose for which it has been levied has been accomplished. Section 175, of our Constitution reads as follows: "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." This section has been before this court in State v. Kleetzen, 8 N. D. 286, 78 N. W. 984, 11 Am. Crim. Rep. 324, and in the recent case of State ex rel. Linde v. Packard, 32 N. D. 301, 155 N. W. 666. Similar constitutional provisions have been construed in other states and the interpretation placed thereon by the various courts is thus treated at 37 Cyc. 728: "The constitutions of several states provide that every law imposing a tax shall state distinctly the object of the same to which only it shall be applied. It is held, however, that this applies only to the ordinary and general taxes for state purposes, and such as are imposed generally on all the taxable property in the state, and not to local taxes for local purposes, or to special taxes on peculiar kinds of property, or such as are in the nature of license or occupation fees; nor does the provision apply to laws which merely provide or regulate the machinery for assessing and collecting the tax. An exact enumeration of all the items of expenditure to which the revenue of the state may be applied is neither practical nor required by such a constitutional provision; it is sufficient if the tax law states in general terms that the taxes are to be applied to 'ordinary and current expenses of the state,' or to its 'general fund,' without further detail."

Cooley on Taxation, 3d ed. vol. 1, pages 549–557, treats the subject in the following words: "There are similar provisions in the Constitutions of other states. . . . Provisions like the one recited may, nevertheless, prevent some abuses, and considerable importance has been attached to them. But the purposes of government are so infinite in variety that the specification must, for the most part, be very general or the Constitution could not be complied with; and in New York it has been held that a statement in a tax law, that the money to be raised is to be paid into the treasury, to the credit of the general fund, is a sufficient compliance with the requirement. . . . The provision

applies only to annually recurring taxes and taxes imposed generally upon the entire property of the state, and is not applicable to successive taxes upon legacies or to local county taxes, or to laws authorizing the citizens of towns to impose taxes for bounties, or to statutes authorizing special local assessments."

Numerous citations are appended to those two texts. See: Miller v. Henry, 62 Or. 4, 41 L.R.A.(N.S.) 97, 124 Pac. 197; Jones v. Chamberlain, 109 N. Y. 100, 16 N. E. 72; Re McPherson, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685. Not only the authorities but the dictates of common sense impel us to hold, as we do, that incidental balances levied in good faith and for the same general purpose, when the original purpose has been served, may be transferred from one minor account to another without violating § 175 of our Constitution. For instance, if a certain school board made a levy of $1,000 for repairs for the current year, and thereafter a fire occurred, doing damage to the amount of $2,000, would it be contended that the school building must remain unrepaired for another year, until $1,000 in addition could be levied and raised, while there was $1,000 surplus in the teachers' fund, accumulated in good faith and not needed for that purpose? Furthermore, if the strict construction demanded by plaintiffs were allowed, it would prevent the transfer of moneys levied to pay the teachers in 1914 into a fund to pay the same teachers in 1915. It must be kept in mind also that this is not an action to enjoin the levy of a tax nor to prevent its collection, but is an action to restrain the fulfilment of a contract made by the board for the erection of a school building. Section 130 of the Constitution—which, by the way, is not found in all of the states having a section similar to § 175—reads: "The legislative assembly shall provide by general law for the organization of municipal corporations restricting their powers as to levying taxes and assessments, borrowing money and contracting debts, and money raised by taxation, loan or assessment for any purpose shall not be diverted to any other purpose except by authority of law." If this section applies to school corporations,—and we believe it does,—it, and not § 175, governs this case.

It is our conclusion, therefore, that § 175 of the Constitution does not apply to cases like the present. Therefore, a court of equity ought not, and will not, in this case, interfere. Judgment of the trial court is reversed.

On Petition for Rehearing (filed June 5, 1916. Rehearing denied June 20, 1916).

FISK, Ch. J. A petition for rehearing was filed by respondents and the same has received the attention which the importance of the case demands. More mature deliberation has served to convince us that while the reasons given for our first decision are not in all things tenable, the result arrived at is correct. We adhere to our former views only in so far as they are in harmony with this supplementary opinion.

As we construe the law, it was not incumbent upon the board to keep a separate and specific fund corresponding with each of the various purposes named in § 1298, for which the tax levy is therein authorized; nor do we construe such statute as requiring a separate levy for each of the five purposes therein stated. Respondents' able counsel has pointed to certain language in our school law which tends to lend some support to their contention, but we are satisfied that the legislative intent, as disclosed by the entire law, was in harmony with our conclusions. It is, no doubt, true that the levying resolution should properly set forth the amount deemed necessary by the board for each of the enumerated purposes stated in the statute. In other words, it is in the nature, and should properly be in the form, of a budget, but the levy should be made in a gross sum sufficient to meet the contemplated needs of the district, as enumerated in § 1298. Section 1301 recognizes this by providing that the auditor shall *calculate* and extend upon the assessment roll and tax list "the *tax* so levied by such board, and such *tax* shall be collected as other county taxes are collected." When such tax is collected it all properly goes into the general fund of the district. In fact, there are legally but two funds, aside from the general fund, which are required to be kept; namely, the sinking fund, when such fund is necessary, and the state tuition fund. When the latter fund is exhausted, and not before, the general fund may properly be drawn upon for the payment of teachers' salaries. In brief, Comp. Laws, § 1212, is general in its application, and clearly was intended to apply to all school districts, whether common, special or independent.

Respondents very forcibly contend that § 1298 provides for as many separate levies as there are purposes to be served; and, predicating their arguments upon such erroneous contention, they seek to apply the in-

hibition contained in § 175 of our Constitution in support of the ruling of the learned trial court. But the fact that the legislature enumerated in § 1298 the different purposes for which taxes may be levied, and provided in subsequent sections that the board shall cause the amount for such purposes to be certified to the county auditor, and restricted the amount to be raised for teachers' salaries and contingent expenses, as well as limited the taxes for the purchasing, leasing, or improving of sites, and the building, etc., of schoolhouses, to 20 mills on the dollar of the assessed valuation, does not warrant the contention that the board must keep a separate fund corresponding with each of such enumerated purposes. As before stated, the revenue derived from such levy all properly goes into the general fund and may be expended for any legitimate school purpose. It by no means follows from this that the board has a free hand, or is justified in raising a sum for teachers' salaries and contingent expenses grossly in excess of the amount believed to be "sufficient to maintain efficient and proper schools in the district," as prescribed in § 1302, but, as the language in § 1298 clearly indicates, the sum to be raised from time to time for the various enumerated purposes is left to determination by the board within its wise discretion as necessary and proper, and a gross and wilful abuse of such discretion may be remedied only at the polls, or possibly by removal from office pursuant to Compiled Laws, § 1326. The object of § 1311, requiring a report of the treasurer to be published just prior to the annual school election, containing a detailed statement of all moneys received and expended, is for the evident purpose of acquainting the electors of any such dereliction of duty on the part of the members of the board, and with a view of enabling such electors to seek a remedy at the polls by electing others in their stead.

The only qualification necessary to the above is the restriction contained in § 1302, limiting to 20 mills on the dollar the amount to be raised for the purchasing, etc., of sites, and building, etc., of schoolhouses. For a violation of such restriction any taxpayer would, no doubt, have a suitable remedy in the courts. It is not contended in this case, however, that such restriction has been violated, it being merely contended at the most that the board intentionally overlevied for the purpose of teachers' salaries with the intent of diverting the surplus to building purposes. Such overlevy did not in any year, however, ex-

ceed the limit of 20 mills aforesaid, and therefore it might legally have been raised directly for such building purposes. For the purposes of this case we are not called upon to decide whether the method pursued in raising the funds on hand applicable to meet payments under the contracts was proper and in strict conformity with the statute. It is enough to decide, as we do, that, being on hand in the general fund, and not being necessary for other school purposes, such balance may properly be considered in determining the vital issue in this lawsuit, as to whether, in entering into the contract in question, the board exceeded the constitutional debt limit.

As stated in the first opinion, § 175 of the state Constitution has no application whatever to this case. That section, in so far as it requires taxes to be applied to the object for which they are imposed, has to do only with taxes *imposed by law for general state purposes.* See Miller v. Henry, 62 Or. 4, 41 L.R.A.(N.S.) 97, 124 Pac. 197; 37 Cyc. 728. The decisions from Kansas, cited by respondents, are not in point, as the Kansas Constitution under which they were decided (1859, art. 11, § 4) differs materially from ours. It, like several others, and especially that in Kentucky (Const. 1890, § 180) requires not only that every law imposing a tax, but also every ordinance and resolution passed by any subordinate political subdivision levying a tax shall specify distinctly the purpose for which such tax is levied, and no tax levied and collected for one purpose shall be diverted to another. It is true, the Kansas Constitution is not as definite as the Kentucky Constitution on this point, but its language means the same thing, as construed by the Kansas court, while, as before stated, our Constitution in this respect is limited to state-wide levies made directly by the legislature.

It may be true, as respondents contend, that, even in the absence of a constitutional mandate such as they claim exists by force of § 175, the law would prohibit the diversion of taxes from the purpose for which they were levied to another purpose or object. Conceding this, our answer is that appellants are not seeking to thus divert the school revenues to another object. On the contrary, they seek merely to use them solely for legitimate school purposes and objects. For these reasons, briefly stated, the petition for rehearing is denied.

LAKE GROCERY COMPANY v. LORETTA CHIOSTRI.

(158 N. W. 998.)

Action for goods sold and delivered. Proof shows deliveries at business places to those in charge. Defendant denies ownership of or interest in said business places formerly managed by her husband, now deceased. The issue was whether defendant was or was not financially interested. Defendant's name was and and had been used for years on checks in paying firm debts; the firm account was kept in her name, as was the bakery bank account; she knew of this, and knew that her husband had used the firm name in buying goods; she had at times made objection; her husband had been some years ago in financial trouble, and she thought the use of her name in the business in this manner might make her trouble. She disclaimed any interest in the bank account and had never placed any of her money in it. She knew one of said places was owned by a partnership and run under the firm name of "L. Chiostri & Andrei," the first name being hers; the other was known as "Otto's Bakery." She knew that these places of business were dealing with plaintiff on account, and she herself had, at the order of her husband, Otto Chiostri, drawn checks in her name on the bank account in payment of goods purchased, but had never done so except as ordered by her husband, who, she claims, was the real owner of both places of business. During the time in suit Andrei retired from the partnership running one of the places. Plaintiff offered to show that Andrei had executed and delivered a bill of sale to defendant of his partnership interest, and that said bill of sale had been filed with the register of deeds, and this during the time this account was running. Defendant denied any knowledge of the bill of sale, but stated that she knew the partner had retired from the business, and in which business her name had been used for years, and that the business continued thereafter to be run in her name. The bill of sale was excluded on defendant's objection. Plaintiff also offered to show that its agents, when investigating the financial condition of said business as to whether to grant extensions of credit for the goods sold on account, had conversed with defendant's husband, Otto Chiostri, then in charge and managing said places, and he then had told them for plaintiff that his wife, and not he, owned the places of business; that he had insured his life in her favor for $8,000, "which would go to the wife when he died, and which could be used to pay any bills:" "that plaintiff relied thereon," and sold on account these goods to these places of business. These statements were excluded on defendant's objection. *Held:*

Goods sold and delivered — action to recover price — delivery — business — ownership or interest in — defendant denies — bill of sale — evidence — jury.

1. The bill of sale and the fact of its filing were admissible in evidence to be considered by the jury under proper instructions.

Declarations of party — proof of — evidence — foundation laid — agency — declarations of agency — by agent.

2. A sufficient basis was laid for the reception in evidence of these declarations of Otto, though tending to make proof of agency by declarations of the agent.

Statements of agent — not alone proof of agency — prima facie case — made as part of case — business relations — connected with.

3. While without other basic proof, statements of the agent are not competent to prove the agency, yet where a prima facie case of agency has been made out independent of any statements of the agent, such declarations by the agent, made in the prosecution of and relative to the business contemplated by such agency, are admissible against the principal on questions of agency and ownership of the business.

Prima facie case — when established — independent of agent's statements — matter of law for court — jury — findings of — sustained without agent's statements — principal bound by — when.

4. The question of when a prima facie case has thus been established by proof independent of statements of the agent is a matter of law for the court to determine, with the test being whether there is sufficient evidence of agency without said declarations to sustain a jury's finding of such agency. Where such a finding would be sustained, a prima facie case of agency has been established and the declarations and statements of the agent when so made are admissible against the principal.

Deceased person — transactions with — testimony of — statute.

5. Such statements offered were not within the bar of the statute excluding testimony of transactions with a person since deceased, under subd. 2, § 7871, Comp. Laws 1913.

Ostensible agency — proof of — estoppel — liability by.

6. The proof may be sufficient to establish an ostensible agency and yet be insufficient to establish a liability by estoppel.

Bookkeeping — method of — owner of business — evidence of — delivery — acceptance.

7. The method of bookkeeping and the charges made upon the books is but one element of fact in the case. Defendant might be held as the real owner of the business and as the person to whom the goods were really sold, even though, at the time of the sale, the goods were charged to another, where the delivery was made to the person in charge of the place of business as to the ownership of which the issue of fact arises.

Goods sold — complaint as for — person — partnership.

8. A recovery cannot be had upon the complaint as for goods sold to the defendant for those goods sold and delivered to the partnership.

Running account — payment on — balance due — direction as to.

9. Payments made upon the running account could be applied upon the balance due, where no direction was made as to application of payments.

Directed verdict — motion for — by both parties — dismissal — evidence — preponderance — procedure.

10. Upon motions by both parties for directed verdict, one of dismissal was directed, the court stating that "if there is any question of fact left in the case, I resolve that in her favor." Defendant contends that, even though proof was erroneously rejected, the verdict should be sustained unless the court's ruling is against the fair preponderance of the evidence. This position is untenable, as, had the rejected testimony been received, a verdict could not have been directed without passing thereon, and there is no certainty that the same procedure would have been had or the same result arrived at had the testimony erroneously rejected been received.

An appeal from the District Court of Ramsey County, *Buttz,* Judge.

Reversed and new trial ordered.

Middaugh & Hunt, for appellant.

Among cases in which, primary evidence being unavailable, unsworn statements give rise to an inference of their truth, are declarations of third persons, not witnesses, which are opposed to the pecuniary and proprietary interests of the declarant. 16 Cyc. 1217.

Such statements, otherwise relevant,—the primary evidence being unattainable,—are competent. 16 Cyc. 1219, 1220; Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394; Dixon v. Union Ironworks, 90 Minn. 492, 97 N. W. 375; Wilson v. Albert, 89 Mo. 537, 1 S. W. 209; Quinby v. Ayers, 1 Neb. (Unof.) 70, 95 N. W. 464; Wilson v. Simpson, 80 Tex. 279, 16 S. W. 40; Dean v. Wilkerson, 126 Ind. 338, 26 N. E. 55; 1 Elliott, Ev. § 441.

Evidence of a conspiracy, combination, or common design may establish a relation of agency so as to make the statements of one party competent against the others concerned, provided such statements are made within the scope of the common enterprise. 1 Lewis's Greenl. Ev. § 153; 16 Cyc. 983, 1281; Riehl v. Evansville Foundry Asso. 104 Ind. 70, 3 N. E. 633.

Plaintiff should have been permitted to testify and show upon what facts it based its credit. Missouri, K. & T. R. Co. v. Yale, 27 Tex. Civ. App. 10, 65 S. W. 57; First Nat. Bank v. Bakken, 17 N. D. 224, 116 N. W. 92; 17 Cyc. 215, note.

Where a wife was held out as the owner of a business and another was induced to perform labor for her on the strength of her ownership,

she should and would not be permitted to deny it. Multz v. Price, 91 App. Div. 116, 86 N. Y. Supp. 480; Missouri, K. & T. R. Co. v. Yale, supra.

Defendant is estopped to deny ownership. Walter Moise & Co. v. Krug, 72 Neb. 42, 99 N. W. 816; Blanke Tea & Coffee Co. v. Trade Exhibit Co. 5 Neb. (Unof.) 358, 98 N. W. 714; Sinclair v. Investors Syndicate, 125 Minn. 311, 146 N. W. 1109; Triller v. Sadle, 92 Neb. 579, 138 N. W. 728; Minneapolis Threshing Mach. Co. v. Humphrey, 27 Okla. 694, 117 Pac. 203; Long v. Thayer, 150 U. S. 520, 37 L. ed. 1167, 14 Sup. Ct. Rep. 189; Southern Oil Works v. Jefferson, 2 Lea, 581; Hatch v. Taylor, 10 N. H. 538; Best v. Krey, 83 Minn. 32, 85 N. W. 822; Columbia Mill Co. v. National Bank, 52 Minn. 224, 53 N. W. 1061.

The courts of our own state have also jealously guarded the doctrine of estoppel, and look with disfavor upon any attempt to narrow its scope. Peabody v. Lloyds Bankers, 6 N. D. 27, 68 N. W. 92; Comp. Laws 1913, §§ 6336, 6338.

The general rule is that a creditor may apply a payment voluntarily made by the debtor without any specific appropriation, where there are two or more debts, to which ever debt he pleases. 30 Cyc. 1233, 1235.

Cowan & Adamson and *H. S. Blood,* for respondent.

The goods were not charged on plaintiff's books to defendant, nor delivered to her, but to another. The delivery of the goods and the charging to another show that plaintiff did not extend the credit to defendant, or transact the business with her. Harris v. Frank, 81 Cal. 280, 22 Pac. 856; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. 622; 20 Cyc. 181, and cases cited.

Any undertaking on the part of defendant to pay for the goods, under such circumstances, would be collateral and within the statute of frauds, and would have to be in writing. 20 Cyc. 181, and cases cited; Code, § 5888, subd. 2.

Every general partner is liable to third persons for all the obligations of the partnership jointly with his copartners.

Under the common law all partners, at the time of the contract by and on behalf of the partnership, must be joined as defendants. 15 Enc. Pl. & Pr. 868, and cases cited.

"The great weight of authority is to the effect that the facts consti-

tuting an estoppel *in pais,* to be available, except in a few cases, must be specially pleaded." 8 Enc. Pl. & Pr. 7 and cases cited; Parliman v. Young, 2 Dak. 184, 4 N. W. 139, 711.

"Should not estoppels in all cases be pleaded, that the opposite party may know what he has to meet before the case is submitted to the jury?" Taylor v. Patton, 160 Ind. 4, 66 N. E. 91; Union Street R. Co. v. First Nat. Bank, 42 Or. 606, 72 Pac. 586, 73 Pac. 341; Nebraska Mortg. Loan Co. v. Van Kloster, 42 Neb. 746, 60 N. W. 1017.

Estoppel should be pleaded. Homberger v. Alexander, 11 Utah, 363, 40 Pac. 261.

"Agency cannot be proved by the declarations of the agent, and no agency had been shown when the ruling was made." Q. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569, 75 N. W. 923; Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556; Davis v. Henderson, 20 Wis. 521.

Goss, J. The complaint contains two causes of action for goods sold and delivered on account by plaintiff to defendant. The first was for goods sold to her between November 15, 1913, and February 16, 1914, of the agreed value of $508.83, and delivered at a place known as Otto's restaurant in Devil's Lake. The second cause of action was for goods sold to her of the agreed value of $172.71, delivered at a place known as Otto's bakery, between February 26th and March 26th, 1914. The answer is a general denial. Defendant, Loretta Chiostri, was the wife of Otto Chiostri. He died March 31, 1914. For seven years the restaurant had been operated under the name of Otto's restaurant, and for a year or two before Otto's death, the bakery was operated at "Otto's Bakery." One Arturo Andrei had for some years been interested as a partner in the restaurant, which was conducted in the firm name of "Chiostri & Andrei." He sold out about December 1st, 1913. Andrei never had any interest in the bakery. After Otto's death plaintiff sued his widow, the defendant, on these two accounts. From December 1st, when Andrei withdrew, the restaurant was operated until after Otto's death. The bakery was also running. The basic question of fact is as to who owned these places of business during that time; *i. e.,* whether they belonged to Otto or to his wife. He is dead. Plaintiff would hold her as the owner, with Otto as her managing agent. She denies owner-

ship or any interest in them at that or any other time. The trial court found for her by directing a verdict of dismissal at the close of the case. Plaintiff appeals. The facts are much in dispute. The testimony has been closely examined, and portions of it, where the contentions in the briefs conflict, will be given.

Defendant testifies that her husband ran the business during the seven years, and for several years was associated with Andrei. She was then asked:

Q. You know, do you not, Mrs. Chiostri, that the business was run under the name of 'L. Chiostri & Andrei?'

A. I couldn't help but see that it was.

Also:

I see letters coming under that heading, but I wasn't allowed to open his mail. I never opened his mail.

Q. You knew, did you not, that Andrei and your husband were using the name 'L. Chiostri & Andrei' in that business?

A. Yes, sir.

Q. And that was true, was it not, during the period from November 15, 1913, to March 26th, 1914, *i. e.*, up until the time he died, practically?

A. Why, I knew nothing further than he used my name right through.

Question by Mr. Cowan: In what?

A. Why, in signing checks.

She could not tell when Andrei left Devil's Lake, but "I certainly do remember of hearing that he had dissolved partnership with Mr. Chiostri." "It was some time in December," 1913. She knew nothing about a bill of sale having been executed by Andrei to her. She knew that her husband was keeping the bank account in her name and checking upon it, and knew the bank it was in. He did not consult her about it, or did she know any of the details of the business other than that payments were made by checks on the account in her name in the bank. She cannot tell the date when this began, but presumes it was "from the time he undertook to use my name." "I said one time I wanted to know why he used my name, and he said, 'Well, he had reasons of

his own and that it was his business, and that I shouldn't interfere in the business in any way.'" "That was about five years ago." She was asked whether she knew her husband had transferred his business to her name and operated it under that name to avoid paying his creditors, and replied, "I couldn't say for sure that that was his reason." Her husband did not tell her that such was the fact. She was then asked: "You know he had had trouble before he came there, did you not? A. I knew he had had trouble, yes sir." She had not talked over the trouble with him.

Q. Did you ever say anything to him except for that one time about his using your name?

A. That was about the only time that I put in any objections that I thought he ought to use his own name and not bring me into any trouble.

Q. You were afraid it might get you into trouble?

A. Why, I didn't know whether it would or not, but I figured it might. He was in trouble at the time. . . . He went into the Aberdeen hotel business four years ago; didn't know he had rented the hotel or gone into the hotel business until after he had done it, but knew it shortly afterwards.

Q. And you knew that he used your name, did you not?

A. Yes, sir.

Q. And you say you didn't know anything about the bill of sale by Andrei to you?

A. It was not until after he died. Not until after Mr. Chiostri died.

The cancelled checks or vouchers from the bank were not returned to her. She had never had any active part in handling the business in either place.

Q. You knew he was using your name in buying goods from different people?

A. Yes, sir.

Q. You never made any objection to it, did you?

A. Yes, sir.

Q. Those people from whom he was buying goods?

A. No, sir, because I never knew who he was buying from; that is, I knew of some.

Q. You never took any pains to inquire?

A. No, sir.

Q. Didn't you think it might get you into some trouble, his buying goods from different people, using your name?

A. No, sir; I never did.

Q. Did you know that Otto was buying any goods or doing any business with the Lake Grocery Company?

A. Yes. That was before this account began that was sued on.

Q. And you knew then the Lake Grocery Company were carrying his account with Otto's restaurant and Otto's bakery, did you?

A. Why, just the same as the other business houses, I presume.

Q. Did you ever take any pains to tell the Lake Grocery Company that you were not responsible for that account?

A. No, sir.

Q. And yet you knew your name was being used right along, did you not?

A. The only thing I know is my name was used in signing the checks, and how the account stood I couldn't say, because I never attended to any of the business or looked at any of his bills.

Q. State whether or not, when Andrei dropped out of the business, you knew that your husband, Otto, was using your name alone?

A. No, sir. I couldn't say I did know; I know he signed the checks as Loretta Chiostri, but as to the business, I don't know.

She never signed a note to settle any accounts or gave any checks herself in payment of accounts, except just before Otto's death, at his order to her and to the bank she had signed some checks to the plaintiff in payment of bills for goods sold these two business places; that the account in her name in the bank was checked upon with the signature "Loretta Chiostri, by O.," the initial standing for Otto; and during this time before his death she had for these purposes checked upon it, adding underneath her name her initial "L." Printed upon the checks across the end were the words "Loretta Chiostri, Restaurant and Bakery," and at the bottom of the checks were printed the words

"Loretta Chiostri, by ————." When a check was signed this blank was filled in "Loretta Chiostri, by O.," meaning Otto. Another check, in usual form, without such indorsements, bearing date of May 14, 1913, to plaintiff, for $50, signed by "Loretta Chiostri, by L.," and on a different blank form, is in evidence. This check witness explains was given by her at a time when Otto was sick with erysipelas, and also was given at his order. She testifies: "I signed no checks for the Lake Grocery Company only while he was sick with erysipelas, until after he died. Took no active part in the business." She was asked: "Q. Didn't you frequently use to call up the Lake Grocery Company and order goods? A. Yes. sir." But whether these were goods for the two places of business in question does not appear, except later, in defendant's main case, she denies ever ordering any goods for said places of business. When her husband died he had no property in his name that she knew of. He had on his death $8,000 life insurance, which went to her as beneficiary. In her defense she testified that she had never before seen the bill of sale purporting to run from Andrei to her for his interest in said restaurant business, and stipulating that she would assume all the debts and liabilities, and that possession of the property was delivered to her as of date of December 1, 1913, and signed by Andrei and witnessed by her husband and another party, and which had been filed in the register of deeds' office December 5, 1913, according to the certified copy thereof offered in evidence, but not received. She testifies that she never had any property except her own personal belongings, as clothing and the like; that she had not authorized her husband to buy goods on credit for her, or known of the same being done, or known that she was in partnership with Andrei. That she had never bought any of the goods in Otto's restaurant or in Otto's bakery, or agreed to pay for any, or authorized any purchase on her account or credit for either place, nor had she ever been in either of the two places to take charge of anything until after he died, or to order anything from either place or for either place. That no claim had ever been made of her that the goods sold on account were charged against her or that she was liable for them until some time in September after her husband's death in March. That the only knowledge she had that accounts were run in her name came from a letter addressed to her that she had opened some years before, and that she had inquired of

her husband what it meant, and he said "that was his business and I was not to interfere with it."

Q. You stated that you did know that he kept his bank account in your name?

A. Yes, sir.

Q. And signed his checks in your name "by O." or by some designation of himself?

A. Yes, sir.

Q. Did you know of him doing anything else in connection with his business except that, in your name?

A. No.

She never put a dollar into that bank account and never drew upon it, except at the times stated, and at one other time, when, with his consent, she drew a check for $4.80 for charity. "I did know that he signed the checks 'Loretta Chiostri,' and that he did so when drawing checks for partnership business."

She was asked:

Q. You know he signed 'Loretta Chiostri,' but did you know he ever signed your name in drawing on the bank account, together with Andrei's name?

A. Yes, sir.

That, when testifying that the business was run under the name of "Loretta Chiostri & Andrei" she had meant "the checks was done that way, but so far as buying anything, or anything like that, I don't know whether it was put in that way or not." That her knowledge was limited to the way the bank account was handled. This fairly illustrates and condenses the proof of the respective parties, except as to that offered by the plaintiff as to its manner of making sales and its method of bookkeeping and the charge made in its books as to these accounts. It had done business with the restaurant for years. At every order for goods a sales slip was made and the party in charge of the restaurant, usually Otto, receipted thereon for the goods delivered. These orders, taken during the period from November, 1913, to March, 1914, are in

evidence. From these slips the ledger account was compiled by merely adding to the old running accounts against the partnership and the bakery. The ledger account was carried in the name of "Chiostri & Andrei" as to the restaurant, and "Chiostri Bakery" as to the bakery. The ledger account, as so kept for years, as simply added to from the slips, and opposite each item as charged the amount due as carried forward was shown under the word "balance." A continuous running account is shown, with the balance due carried forward from a time long prior to the commencement of the account sued on. This is mentioned because of the emphasis placed upon it in the brief of the defendant's attorneys as tending to show that it was charged continuously against a partnership; or, as to the bakery, against persons not designated, and not against this defendant. This is but a circumstance, because, irrespective of the charges made on the books, if the places of business were owned by the defendant, and the goods delivered to those places, she must pay for them whether her ownership was known to plaintiff or not. Lindquist v. Dickson, 98 Minn. 369, 6 L.R.A.(N.S.) 729, 107 N. W. 958, 8 Ann. Cas. 1024. However, the manner of charging is important to be considered on the fact of ownership, but is for the jury exclusively. But if, on the contrary, these places were owned by her husband or the partnership, with him using her name without her consent or knowledge of it or of facts sufficient to impute knowledge thereof to her, she cannot be held, except as ostensible owner, if at all.

The plaintiff proved the delivery of the goods at these places, offered in evidence the checks bearing her name, some signed in her name as drawee by "O." and others by "L.," and which canceled checks were received. Plaintiff then offered to show that during or prior to the running of these accounts, and when plaintiff's agents were inquiring of Otto at the different places of business for the purpose of extending credit on said sales, and carrying his overdue account as to his financial circumstances, that he, Otto, stated to them in the course of said business transactions that he did not own these places of business, but that they belonged to his wife; that this information was acted upon as a basis for extending credit to said places of business, and that it had done business with him upon the assumption that he was but the agent of the owner, the defendant, and that "on one or two occasions in connection with and as a part of the contracting of this account and the

transactions between the parties in conversation with the agents of the plaintiff over extension of credit, Otto stated to them that they were perfectly safe in extending this credit as he had six or eight thousand dollars worth of insurance which they could rely upon as taking care of the indebtedness in case of his death; that they did rely upon said statement; that said insurance was payable to her, defendant." Plaintiff also offered in evidence a bill of sale, heretofore described, of Andrei to her. In connection with this the following appears in the record: Mr. Cowan: "Defendant does not make any question but that the signature 'Arturo Andrei' on exhibit 80 (bill of sale) is the signature of Arturo Andrei and purports to be the same." Mr. Hunt: "Is there any question made but that the 'Arturo Andrei' that signed the instrument is the Andrei whose name has been brought into this case as being associated with Mr. Chiostri in Otto's restaurant?" Mr. Cowan: "No." All of this proof was offered both by question and by offers of proof, but was excluded, except the court permitted the witness to testify that Otto had said that he did not own these places of business, but struck from the record the statement coupled therewith that his wife, this defendant, owned them. If the exclusion of this testimony was error, it was certainly prejudicial.

Taking up first the admissibility of the bill of sale. Its exclusion was error. While it may have been hearsay or not as to the defendant, according as the jury might determine the fact of her interest and knowledge of the bill of sale, yet a sufficient basis under all the circumstances shown to exist had been laid for its admission as proof of an independent fact, *i. e.*, that it had been given and placed of record even though delivered by Andrei to Otto with defendant in utter ignorance of it, as she claims to have been, until after Otto's death. Like proof, the running of the restaurant, admissible as an independent fact in the case, whoever owned it, proof of the bill of sale is admissible as a fact and circumstance bearing upon the situation. Whether the bill of sale conveyed title to the defendant or merely to Otto, using her name as a dummy owner, would be for the jury's determination as a fact to be found under the claims of the respective parties and under proper instructions.

As to the statements of Otto that he did not own the business, but that the restaurant and bakery belonged to his wife, its admissibility

depends upon the state of the proof at the time it was offered. Proof of the fact of agency cannot be established by the statements of the agent to third persons. But when the record discloses substantial proof of agency amounting to prima facie proof of it without considering denials by the alleged principal, or, in other words, sufficient proof is made to sustain a verdict or finding of the existence of an agency, independent of said statements, a basis is laid for their receipt under proper instructions. "The correct rule is this: if there is no proof whatever tending to prove the agency, the act may be excluded from the jury by the court. But if there is any evidence tending to prove the authority of the agent, then the act cannot be excluded from them, for they are the judges of the sufficiency and weight of the testimony." McClung v. Spotswood, 19 Ala. 165–170, quoted and applied in South & North Ala. R. Co. v. Henlein, 52 Ala. 606, 23 Am. Rep. 578, where the following from page 611 is found applicable to defendant's denials of interest. "It [certain testimony] was contradictory of the fact that the person to whom the offer was made was the agent of the appellees; but the fact that evidence is in conflict with or contradictory of other evidence is not involved in an inquiry as to its admissibility. Its credibility and sufficiency is affected by such conflict or contradiction, and there the duty of the jury intervenes to determine the weight it should receive in view of the conflict." "After the party alleging the agency has made a prima facie case of agency against the principal, any declarations made by the agent in the prosecution of and relative to the business contemplated by such agency are admissible against the principal." Peck v. Ritchey, 66 Mo. 114, 118. Also Francis v. Edwards, 77 N. C. 271. Acts of an alleged agent pertaining to the business of the agency, as well as his declaration that he is acting as agent, are competent evidence against the principal when there is independent evidence tending to prove the agency." Werth v. Ollis, 61 Mo. App. 401.

The following, from page 208, vol. 1 of the 2d edition of Mechem on Agency, after declaring the general rule as to inadmissibility of statements and acts of agent as proof of agency, contains the following: "His [alleged agents] acts and statements cannot be made use of against the principal until the fact of the agency has been shown by other evidence." Under the note, citing many cases, is found the following: "What is meant by showing by other evidence.—When it is said

that the agent's statements, admissions, and declarations cannot be made use of until the fact of his agency has been shown by other evidence, it is, of course, not meant that there must be a separate verdict found establishing that fact; what is meant is that there must first be some competent testimony offered tending to prove the fact." And under the same note on the succeeding page is found: "It is said in several cases that after other evidence of agency has been offered, the agent's statements may then be used in corroboration . . . or may be received for the purpose of showing what induced the other party to deal with the agent." These notes cite many cases sustaining them. "An agency, like any other fact, may be proved by circumstances and the conduct of the parties and the relation that had previously existed between them. Whenever there is independent evidence tending to prove an agency, it is competent to prove all the acts of the alleged agent pertaining to the business as well as his declarations that he was acting as agent in the particular transaction." 2 Jones, Ev. § 256. This court has held to the same effect in Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, at 503, 150 N. W. 736, where it is stated: "It will be noticed that the statement made by Jones was not that he was an agent of the company, or authorized by it to issue this paper. Short v. Northern P. Elevator Co. 1 N. D. 159 at 163, 45 N. W. 706. Instead, it is a declaration of independent facts 'not including the terms of his authority, but upon which his right to use his authority depends,' and which this agent, his vice presidency, directorship, and charge of defendant's offices having been shown, had authority to make under the express provisions of § 5772, Rev. Codes 1905, Comp. Laws 1913, § 6340. Such is the law independent of statute. Mechem, Agency, §§ 714, 715; Clark & S. Agency, §§ 466, 467; North River Bank v. Aymar, 3 Hill, 262, at page 266."

These offers were all renewed toward the close of the trial, when all the facts bearing upon ownership had been brought out, and after the defendant had testified to her knowledge of the situation, so far as she knew it,—after proof had been made of the way the bank account was carried in her name for the firm, and drawn upon in her name to pay firm debts, and her knowledge of it for years; her fears that it might get her into trouble with creditors; after proof of knowledge of facts

at least sufficient to put her upon inquiry as to how far her husband had used her name in business transactions and how far he was incurring liability purporting to bind her, and her neglect to ascertain these facts. That she had drawn checks upon that bank account in payment of the plaintiff, and knew that these places of business were being furnished goods upon account by plaintiff and others. That she knew the partnership had been terminated; that she had some reason to believe that her husband had used her name as a member of that firm, and that to avoid payment of his debts, is apparent from her own testimony and admissions, or, at least, is sufficient to warrant a jury finding such to have been the fact. Another fact is the relationship of the parties,—a strong circumstance, under her own admissions, as to knowledge, and under her denials of matters surrounding her for years from which a strong inference could always exist that she was interested in the business from the use of her name in the firm bank account and on checks drawn upon it. She stands in the same position in law as though she was not related to the deceased, yet it is a circumstance to be considered that the relationship made it much easier for ambiguous transactions to be conducted as they were. That title ostensibly came to her of the partner's interest when he retired, and that the bill of sale was filed to proclaim that fact and operate as constructive notice of it to the world is a circumstance notwithstanding her denials of knowledge of it,—a matter for the jury to pass upon. These are circumstances that may or may not be considered prima facie proof of ownership in defendant, according as the jury should determine. No appellate court would, under this proof, set aside a finding of ownership in defendant. Hence, all these facts are a sufficient setting for the proffered testimony of the statement of the husband, made under the circumstances, and it should have been received. Likewise should his statements have been admitted concerning life insurance, also made in a business transaction to obtain credit, and a circumstance bearing upon the plaintiff's contention that defendant was the real owner.

An objection was taken to the statements of the husband and to the offer of proof of them on the ground that he was dead, and that the transactions were inadmissible as within the bar of subd. 2 of § 7871, Comp. Laws, 1913. This action is not against any party within the purview of the statute, nor is a judgment sought against any such party.

The statements of the husband, as managing agent for the wife's property, as contended by the plaintiff, are on no different footing as to admissibility than would have been those of Andrei had he, instead, been such managing agent. This statute has no application.

Appellant has also briefed the question of ostensible agency, based upon an assumed ownership in the defendant with the husband as her managing agent. It is unnecessary to consider that question. If the defendant was the owner, either actually or ostensibly, she is liable. If she knowingly permitted herself to be held out as owner, she is precluded from denying ownership to defeat the claims of creditors, who became such in reliance upon her ostensible ownership. And this is true independent of any acts or statements of herself to the creditor. And this is in no sense a creation of liability by estoppel, as might arise upon any representations she made or any acts done by her, causing dealers to advance credit to the business in reliance upon such acts or representations. For an estoppel to arise there must be such a basis therefor. But for a liability to accrue from her to creditors parting with goods upon an ostensible ownership in her of the business, the liability is based upon the holding out by her of herself as owner, whether in person or by agent, if knowingly done, and is independent of and entirely distinct from liability through estoppel. This is thoroughly discussed in Grant County State Bank v. Northwestern Land Co. 28 N. D. 479, at page 508, 150 N. W. 736 et seq. What is there said is unnecessary to be repeated. Perhaps on a retrial of this case that issue should be submitted under proper instructions, as well as any question of estoppel; or, as it is sometimes termed, agency by estoppel, should the issue of ownership also be submitted.

Defendant would avoid the effect of any error in the exclusion of testimony under the claim that the proof shows that the goods were sold to the partnership, and that the charges were made against the partnership in order to hold Andrei responsible, and that no claim was made against defendant until long after Otto's death; all tending to disprove any claim of liability as for goods sold to her. This has a bearing upon any claim of ostensible ownership and might defeat, under certain circumstances, a recovery on that ground. But if the defendant was in fact the true owner, she could be held as having contracted with defendant as purchaser of the goods, even though at the time of the sale

plaintiff believed it was selling the goods to the person in charge of the place of business, and made charges accordingly upon its books. Lindquist v. Dickson, 6 L.R.A.(N.S.) 729, and note, 98 Minn. 369, 107 N. W. 958.

As to those sales made to the partnership during the life of the partnership, plaintiff cannot recover upon its complaint as for goods sold to the defendant. Any liability for the partnership debt must be claimed as such or as assumed, and must be proven accordingly to warrant a recovery.

In the application of this holding as precedent, it may be well to remark that this is not a proceeding directed at the property, or to follow it and subject it to the seller's claim. It is an action to recover a debt for goods sold and delivered. The rules announced in Wipperman Mercantile Co. v. Robbins, 23 N. D. 208, 135 N. W. 785, Ann. Cas. 1914D, 682, as to declaration and statements of the party in possession, do not apply to the declarations of the husband here offered, for the reason that he is not a party in interest and his statements cannot be considered as against interest. In the language of § 1458 of Wigmore on Evidence: "But they could not be received to prove the matter as to which they were not against interest." If it was to charge the property, Wipperman Mercantile Co. v. Robbins, supra, might be precedent.

One other matter needs mention. Defendant contends that all goods delivered after dissolution of the partnership have been paid for because of payments made during the period of delivery. This involves application of payments. The plaintiff would have the right to apply said items upon the running account, in the absence of notice, where the payments were made upon a continuous and running account with a considerable balance always owing. The payments were made to apply upon the account of the place of business under the proof, with no direction other than that as to application.

As heretofore stated, the verdict was directed. Respondent argues "that plaintiff is not entitled to a reversal unless the ruling is against the fair preponderance of the evidence, because, in directing the verdict, the court stated that 'if there is any question of fact left in the case, I resolve that in her favor.'" The verdict was directed after motions for directed verdict had been made by both parties. But respondent's contention omits to consider that evidence which should have been

received, bearing strongly upon the questions of ownership and agency, had been rejected. Therefore, had the trial court made findings upon the proof received, it would have made its findings upon only a portion of the competent proof offered. It was in the same position as the jury would have been in passing upon the same matters under the same proof. The important fact remains that a decision has been made, based upon only a portion of the competent and material proof offered, when it should have been only after consideration of all of it. This is true whether the judgment be taken as entered upon the verdict, or as entered upon the equivalent of findings and conclusions. Whatever the basis for the judgment, it is upon only a portion of the admissible evidence offered. Had findings been made, the judgment nevertheless should be reversed for error in the exclusion of testimony. As there was sufficient evidence to authorize submission to the jury of the issues of fact, it was error to direct the verdict for the defendant. This passes upon all assignments and questions raised necessary of decision. For errors in the exclusion of testimony, a new trial is granted. It is so ordered.

JOHN KRETCHMER, William Flora, Mose Wharton, and Carl Newman, on Their Own Behalf and Acting for all Others Like Interested, v. THE SCHOOL BOARD OF DISTRICT NO. 12, BARNES COUNTY, NORTH DAKOTA, situated in Noltimier and Weimer Townships of said County, and F. C. Schroeder, C. A. Fisher, and John Salzman, School Directors of said District, and Members of said Board, and Henry Deitmier, Clerk of said Board, and George Raveling, Treasurer of said Board, and Each and All of Them.

(158 N. W. 993.)

School district — taxpayers of — plaintiffs — officers of district — injunction — high school — maintaining — defendants — denials of — issues — trial de novo — supreme court.

Plaintiffs, as taxpayers of school district No. 12, Barnes county, seek to enjoin the defendants as officers of such school district from establishing and maintaining a district high school therein without first submitting the question to a

vote of the electors. Defendants answered, denying that they have established or are attempting to maintain such high school. The issues were resolved by the trial court in defendants' favor, and the injunction prayed for was denied. Upon a trial *de novo* in the supreme court the judgment is, for reasons stated, reversed, and the relief prayed for in the complaint is granted. Christianson and Bruce, JJ., dissenting.

Opinion filed April 27, 1916. Rehearing denied July 12, 1916.

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

From a judgment in defendants' favor, plaintiffs appeal.

Reversed.

Lee Combs and *L. S. B. Ritchie,* for appellants.

School districts can only have and exercise such powers as are expressly granted by the law providing for their creation. They are created for special purposes, and have only such powers as are granted by legislative enactment. Capital Bank v. School Dist. 6 Dak. 248, 42 N. W. 774; Farmers' & M. Nat. Bank v. School Dist. 6 Dak. 255, 42 N. W. 767; 35 Cyc. 849, 925.

"Where the question of the creation of a district high school is by the statute to be submitted to the voters in the territory which is to be affected, such statute is mandatory, and must be followed to effect a legal establishment of a district high school." Ping v. Keith, 150 Ky. 452, 150 S. W. 523; 35 Cyc. 849, 1050.

M. J. Englert, for respondents.

The real point in controversy here is whether or not the board had authority under our statute to hire a teacher to teach the eighth grade work and additional subjects prescribed by the board with the approval of the county superintendent. Comp. Laws 1913, §§ 1173, 1178.

The legislature has delegated this power to school boards, and such boards have power also to make all necessary repairs to school buildings, to provide fuel and supplies, and janitor service. Sinnott v. Colombet, 107 Cal. 187, 28 L.R.A. 594, 40 Pac. 329; Comp. Laws 1913, § 1175.

The fact that the school is conducted in a separate building, does not violate the statute. Powell v. Board of Education, 97 Ill. 375, 37 Am. Rep. 123; Board of Education v. Welch, 51 Kan. 792, 33 Pac. 658; W. P. Myers Pub. Co. v. School Twp. 28 Ind. App. 91, 62 N. E. 67; Sinnott v. Colombet, 107 Cal. 187, 28 L.R.A. 594, 40 Pac. 329.

FISK, Ch. J. This is an appeal from a judgment of the district court of Barnes county, and comes here for trial *de novo*. The facts are substantially as follows: Plaintiffs, as citizens, residents, and taxpayers of school district No. 12, which includes the township of Noltimier and Weimer in Barnes county, seek to enjoin the defendants, who are members of the school board, and also the clerk and treasurer of such school district, from maintaining an alleged high school therein without first submitting the question of such additional school to the voters of the district. At and prior to the time this litigation arose there were but three schoolhouses in the district, and but three schools had been conducted therein. During the years preceding the commencement of this action about nineteen pupils attended school No. 1, ten attended school No. 2, and about twenty-two attended school No. 3. In all there were about seventy-seven children of school age in the district. The three school buildings were conveniently located, and no question had ever been raised as to the sufficiency of accommodations afforded by these three buildings and the schools maintained therein. In so far as schools were concerned no friction arose until about September 15, 1914, when a committee consisting of four women of the district appeared before the school board at a special meeting thereof and asked that a high school be established on the northeast quarter of section 23, known as the Will Porter Farm. The defendants Schroeder, Fisher, and Salzman comprised the directors and members of the board. The defendant, Deitmier was acting clerk of the board, and Raveling the treasurer of the district, respectively. All were present at such special meeting.

The proceedings at such meeting are best disclosed by the minutes of the board shown by exhibit "A," as follows:

Clerks Record of Proceedings of the School Board of Special Meeting, School District No. 12, County of Barnes, State of North Dakota.

September 15th. Meeting held, Henry Deitmier, Clerk, A. D. 1914. Present: All members.

The committee, which consisted of Mrs. F. Montgomery, Mrs. Geo. Stillman, Mrs. F. C. Schroeder, and Mrs. H. R. Bruns, appeared before the board to ask for a high school to be held at northeast quarter of section 23, known as the Will Porter's Farm.

Motion made by C. A. Fisher, seconded by F. C. Schroeder, who va-

cated the chair to second the motion for the board to go ahead and hire a teacher and pay for same out of the general fund.

John Salzman acted as chairman at the time.

The motion was brought before the board.

On roll call—C. A. Fisher and F. C. Schroeder voted Yes, John Salzman voted No.

Motion was carried by majority.

John Salzman made motion to pay $150 for expenses out of general fund. If parents of children attending said high school pay balance. No second to the motion.

Motion made by C. A. Fisher, second by John Salzman, for children to furnish their own books.

Motion made by C. A. Fisher, second by John Salzman that parents of said children haul fuel, bank up building. No further business. Board adjourned.

Henry Deitmier.

On October 6, 1914, the board held another special meeting, and a petition signed by a majority of the voters of the district demanding an opportunity to vote upon the subject of the establishment of a high school was presented and filed, but such petition was ignored by the board. Notwithstanding such protest a majority of the members of the board proceeded to establish a school in the farmhouse known as the Will Porter house on section 23 aforesaid, and hired a young lady by the name of Miss Smith to teach the same.

It is conceded that there were but three schools in the district at that time, and that board was neither petitioned to call nor did it call a meeting of the voters of the district as provided in §§ 1192, 1184 and 1185 of the Compiled Laws, to determine the question of establishing a high school or another school in said district. The witness Deitmier, who was clerk of the board, among other things, testified in substance that the directors Schroeder and Fisher consulted Miss Nielson, the county superintendent of schools, and all agreed that there should be a high school established. Thereafter Miss Smith was hired as a teacher, and she proceeded to teach the school. This was about October 6, 1914. The witness was requested to give her a contract at certain wages but he declined so to do upon the ground that no taxes had been levied for

the purpose of maintaining a high school. Soon thereafter a majority of the board declared his office vacant.

Such attempted removal of Deitmier as clerk is disclosed in the following minutes of the meeting of the board:

Ex. C. Clerk's Record of Proceedings of the School Board of ———— School District No. 12, County of Barnes, State of North Dakota.

Special meeting held, Henry Deitmier's, November 2, A. D. 1914.

Present: All members.

Special meeting was held November 2, 1914.

The meeting was called to order by F. C. Schroeder, and was for the purpose of issuing an order for the high school teacher, Miss E. Smith. The clerk refused to issue the order, whereupon C. A. Fisher moved to declare the clerk's office vacant. No second to the motion. C. A. Fisher further made a motion to appoint H. R. Bruns to fill the vacancy. F. C. Schroeder vacated the chair to second the motion. John Salzman took the chair as the motion was brought before the board in this form.

All in favor of H. R. Bruns being appointed as clerk, manifest by saying I! Whereupon C. A. Fisher and F. C. Schroeder voted I. There was no contrary vote.

The clerk refused to turn over the books on the ground that it was not legal to issue a warrant to the said high school teacher, as there was no money levied for that purpose.

No further business, and board adjourned to take further steps in the business.

Henry Deitmier, Clerk.

Miss Smith conducted school at the Stillman residence for a brief period and afterwards at the Porter farmhouse, as stated in the record. Defendant Fisher testified, among other things, that the board hired a teacher and furnished the fuel for heating the building, and that it kept the school and maintained it under the direction of said teacher from October 15, 1914, until the time of the trial, and that the board agreed to pay the teacher for her services from the funds of the district. The witness, Miss Smith, testified on behalf of the defendants as follows: "I taught two weeks in the Stillman house and then the school was moved to the Porter house. I had eight pupils in attendance. They ranged from

thirteen to eighteen years of age. I was hired to teach arithmetic, civics, spelling, United States history, algebra, geometry, ancient history, German I. and II, and English I. and II. These subjects are taught in the high school. I also have one pupil taking studies in the eighth grade now. There were three taking eighth grade work when I began, but the others have finished. Algebra, geometry, ancient history, German I. and II. and English I. and II. were not in the regular eighth grade course. They are first and second year high school work."

As before stated this action is based upon the alleged ground that the defendants had established, and are maintaining, a high school or extra school in the district at the expense thereof, and without first complying with the statute in reference thereto, there being but three schools in the district, and no petition had been presented for the calling of an election, and no opportunity had been given the voters upon the question of establishing another school or a high school in the district.

The trial court made findings of fact and conclusions of law favorable to the defendants, holding that the proceedings of the board were in all things lawful, and it entered judgment in defendants' favor. From such judgment this appeal is prosecuted.

The issues are clearly defined and not difficult of solution. The fact that a new school of some kind was established in the fall of 1914 and that a teacher was employed therefor is unquestioned. It is also a conceded fact that prior thereto but three schools had been maintained therein, and, further, that the question of establishing such new school was never submitted to the voters of the district, although the board was petitioned so to do, and in fact a majority of the electors filed with the board a protest against its acts in establishing and maintaining such additional school without first submitting the question to a vote of the electors of the district.

Did the board in fact establish, or attempt to establish, either a high school for the district as alleged by the plaintiffs, or an additional common school therein? As we read and understand the record before us we are constrained to differ from the views of the learned trial judge, and to hold that the clear preponderance of the evidence sustains the allegations of the complaint. Whether a high school was in fact intended by a majority of the directors to be established is not, for reasons hereafter stated, of controlling importance to our decision, but we

are nevertheless agreed that such was clearly the intention of the board as disclosed by the evidence. Indeed we are unable to construe the testimony in any other light. The minutes of the proceedings of the board meetings, which were put in evidence, as well as the oral testimony of the clerk of the board and several others, including the testimony of Miss Smith, the teacher employed, all tend to support plaintiffs' contentions. The minutes of the various meetings of the boards with reference to this matter are shown by exhibits A, B, C, and D, Exhibit A is as follows: "September 15, meeting held at Henry Deitmier's, clerk, A. D. 1914. Present: all members. The committee, which consisted of the Mesdames Montgomery, Stillman, Schroeder, and Bruns, appeared before the board to ask for a high school to be held on the N. E. ¼ of section 23, known as the Will Porter farm. Motion made by Fisher, seconded by Schroeder, who vacated the chair to second the motion for board to go ahead and hire a teacher and pay for same out of the general fund. Motion was carried by majority. Salzman made motion to pay $150 for expense out of the general fund, if parents of children attending said high school pay balance. No second to the motion."

Exhibit "B." "Special meeting held at Henry Deitmier's, October 6th, A. D. 1914. Present: all members. There was a protest presented to the school board by a majority of the voters of school district No. 12, who demanded a voice in the high school question. The board would not grant the request. No further business. The board adjourned. Signed, Henry Deitmier, Clerk."

Exhibit "C" has already been quoted.

Exhibit D is the protest against the high school and the petition asking the board to submit the question to a vote of the electors of the district. It bears the names of thirty-four persons. Plaintiff John Kretchmer testified: "I am a farmer and live in Weimer township, married; I live with my family, have been a county commissioner of Barnes county for the past two years. I have school children residing at my home. I live in district No. 12. The school board has undertaken to establish and operate a high school in the district. I have heard the testimony of Deitmier with respect to attendance and the accommodation, and the facts as stated by him are true. I never heard any complaint of lack of accommodation in the schools we already had."

Plaintiff Carl Newman testified: "I am a farmer and live with my family in district No. 12, Noltimier township, where I have lived for eleven or twelve years. I have children of school age residing at home with me. I talked with the defendants Fisher, Salzman, and others about this proposed high school. I said it was not fair to establish the high school and levy a tax on the taxpayers for it. They called it a high school Mr. Fisher told me that himself. That is all it was called. I talked to John Salzman. I told him we wanted to have a vote by the people on the question of whether we should have a high school or not. It was called a high school in that conversation. Salzman, Fisher, Schroeder, Bruns, and others were there. We told them it was not fair because we should have a vote. They should give the people a chance to vote on it. I mean the question of whether we should have a high school or not."

Defendant Raveling, treasurer of the district, testified: "I am a farmer living with my family on a farm in district No. 12, in Noltimier township, and am the treasurer of the school board of district No. 12. I was present at a meeting of said school board held November 2, 1914, held to undertake to remove Mr. Deitmier, the clerk. Mr. Schroeder, president of the board, stated the object of the meeting was that the clerk had refused to issue an order for the high school teacher so she could draw her pay from the treasurer. The meeting was for the purpose of having the board insist on said clerk drawing such warrant to pay the high school teacher."

Defendant Salzman testified: "I was at the meeting when Mrs. Montgomery and the other ladies appeared before the board and asked for a high school. I objected to the district paying for the high school, and I would not at first take the chair. Mr. Bruns made me act as chairman in order to bring the motion before the house, where it would be carried, and so that the district should carry all the expense of the school. I was against them. I says we will try and find out first whether we have a legal right to establish a high school, etc.

"Some of the directors called Miss Nielson, the school superintendent, out there, and we discussed the high school question there until about midnight, and I said I would not take the responsibility, but if the majority of the people were in favor of it I would be. As long as the majority of the people had nothing to say to it, I would not take the

responsibility, and Miss Nielson was there and we talked the matter over and over again, and Miss Nielson said, 'Yes, we could have a high school and she said she would take the matter on her own shoulders.'

"The first time I heard them talking it was always about a high school. Never anything else but the high school, and up until that time Miss Nielson was there, and she and Mr. Deitmier had quite an argument at that meeting. Miss Nielson said they could proceed to establish this school under the guise of a school to teach other grades.

"They were going to teach German for one thing. I heard Miss Nielson ordered to get the German books for them."

From the foregoing, as well as other testimony of like effect in the record, we see no alternative but to hold that the facts are contrary to the findings of the trial court on this point. In arriving at this conclusion we have not overlooked the contention of defendants as made in their answer and the proof in support thereof. In such answer they negative an intention to establish a high school and they allege that "wherever the word 'high school' may be used or spoken of in the minutes of the said board, that the same was figuratively used, and without any intention of using the same as alleged in plaintiff's said complaint, and the only object that the said defendants sought to accomplish was the hiring of an additional teacher, who was able to teach eighth grade work and additional subjects of a higher grade, and which are ordinarily taught in the first year high school work," etc.

Such contention does not impress us with much force, nor do we deem the proof sufficient to sustain the allegations in the face of the showing to the contrary. In the light of the facts as found by us, it follows that the injunction prayed for should have been granted, for the statute (§ 1192, Comp. Laws, 1913) which is the exclusive source of the board's powers, is plain that a high school cannot be established in a district containing less than four schools, nor without the board first receiving authority therefor by a vote of the electors of the district.

But we should be obliged to reach the same conclusion even if such new school was not intended to be a high school, and this for the following reasons: Under our statute the school board is not given a free hand to arbitrarily locate, establish, and maintain new schools at its sole discretion, but it must act in the matter "as provided by law." The language contained in § 1174, Compiled Laws, which grants power to

the board to conveniently locate, organize, and maintain schools, is qualified by the words "as provided by law," and this section must be construed together with § 1184, which reads: "That whenever in the judgment of the board it is desirable or necessary to the welfare of the schools in the district, or to provide for the children therein, proper school privileges, etc., the board shall call an election of the voters in the district at some convenient time and place fixed by the board to vote upon the question" involved.

It follows that the school located and established in the Stillman, and later in the Porter, house, which concededly was thus located and established without a previous vote of the district, was in defiance of the plain mandate of the statute, and without authority on the part of the school board, and it should therefore have been enjoined as prayed for in the complaint. It is an elementary and well-established rule that school district officers have and may exercise only such powers as are expressly or impliedly granted by statute. Capital Bank v. School Dist. 6 Dak. 248, 42 N. W. 774; Farmers' & M. Nat. Bank v. School Dist. 6 Dak. 255, 42 N. W. 767; 35 Cyc. 849, 925.

"Where the question of the creation of a district high school is by the statute to be submitted to the voters in the territory which is to be affected, such statute is mandatory, and must be followed to effect a legal establishment of a district high school." Ping v. Keith, 150 Ky. 452, 150 S. W. 523.

A court of equity will, in a proper case and on the suit of an interested taxpayer, enjoin illegal or unauthorized acts on the part of the school board in the matter of the organization of new schools or the creation or increase of the district's indebtedness or unlawful payment or application of the school funds. 35 Cyc. 1050.

For the foregoing reasons the judgment must be reversed and a judgment entered in plaintiff's favor for the relief prayed for. It is so ordered.

CHRISTIANSON, J. dissenting. I am unable to agree with the conclusions reached by my associates in this case. I have no particular complaint to make of the propositions of law announced in the majority opinion, but I do not believe that they are applicable to the facts in this case. Plaintiffs brought this action on the theory that "defendants

have attempted to organize, establish, and conduct a district high school" without complying with the provisions of § 1192, Compiled Laws 1913, which reads: "In any district containing four or more schools, and having an enumeration of sixty or more persons of school age residing therein the board may call, and if petitioned so to do by ten or more voters in the district, shall call a meeting of the voters of such district, in the manner prescribed in § 1185 to determine the question of establishing a district high school. If a majority of the voters at such meeting vote in favor of establishing such high school, the meeting shall further proceed to select a site therefor, and to provide for the erection or purchase of a school building or for the necessary addition to some school building therefor. Thereupon the board shall erect or purchase a building or make such addition for such high school, as shall be determined at such meeting and shall establish therein a district high school containing one or more departments, and employ teachers therefor."

Defendants concede that the provisions of this section were not complied with, but they positively deny any intention to establish or conduct a high school. The issues were framed, and the trial had in the court below, proceeded upon the theory that the sole and controlling question to be determined in this action was whether the defendants sought to establish and conduct a high school, and plaintiffs' action must stand or fall upon the answer to this question. If defendants sought to establish and conduct such high school, plaintiffs should prevail, if they did not, defendants should prevail.

The trial judge, who saw the witnesses and heard their testimony as it fell from their lips, found (and in my opinion his findings are correct) that the defendants neither established nor attempted to establish such high school.

The testimony shows that certain pupils in the school district were so far advanced that it was desirable that they receive instruction in certain advanced subjects, and some of the residents of the district took this matter up with the school board, with the result that the county superintendent of public instruction was called in to confer with the school board in regard to the matter.

She testified in part as follows:

Q. At that time, what was your mission before the board?

A. They called me out to interpret the law, whether they had a right to hire another teacher and to teach a part of the eighth grade subjects and other higher branches.

Q. And now, did you then consent to their going ahead and hiring a teacher, and in teaching of such grades or additional subjects in that district?

A. I did.

Two members of the school board voted in favor of engaging an additional teacher to teach such advanced subjects. Mr. Salzman, the third member of the board, voted against the proposition. He testified upon the trial in part as follows:

Q. Now, Mr. Salzman, you say Miss Nielson also told you that, in the presence of the members of the board, or the board of this district, that she thought you had the right to go ahead and teach these additional subjects, or grades, as you put it?

A. Yes.

Q. You say she didn't call it a high school?

A. No, she didn't, herself.

The state Constitution provided for the establishment and maintenance of a system of public schools (Const. §§ 147-152), and created the offices of state superintendent of public instruction (Const. § 82) and county superintendent of schools (Const. § 150). The legislature, in compliance with the constitutional mandate, enacted laws for the establishment and maintenance of such public schools, and prescribed the duties of the state and county superintendents of public instruction. The legislature provided for the organization of common school districts as public corporations (Comp. Laws 1913, §§ 1140 et seq.) and for the government of such corporations. It provided that the governing body of a common-school district should consist of three directors, and conferred upon such school directors certain powers and duties, the execution of which requires the exercise of judgment and discretion. Among other things the legislature said: "The district school board shall have the general charge, direction and management of the

schools of the district, and the care, custody and control of all the property belonging to it, subject to the provisions of this chapter. . . ." Comp. Laws 1913, § 1173.

The school board "shall organize, maintain, and conveniently locate schools for the education of children, of school age within the district, and change or discontinue any of them as provided by law." Comp. Laws 1913, § 1174.

That such board "shall make all necessary repairs to schoolhouses, outbuildings and appurtenances, and shall furnish fuel and all necessary supplies for the schools and provide for janitor service." Comp. Laws 1913, § 1175.

That such board "shall, with the approval of the county superintendent of schools, furnish to each school all necessary and suitable furniture, maps, charts, globes, blackboards, and other school apparatus . . . [and] shall appropriate and expend each year not less than $10 nor more than $25 for each school of the district for the purpose of school library. . . ." Comp. Laws 1913, § 1176.

That such board "shall have the care and custody of the library and may appoint as librarian any suitable person, including one of their number . . . and shall make rules to govern the circulation and care of the books." Comp. Laws 1913, § 1177.

That such board "shall employ the teachers of the school district and may dismiss a teacher at any time for plain violation of contract, gross immorality or flagrant neglect of duty." Comp. Laws 1913, § 1178.

The board is also given the power to prescribe regulations for the admission of pupils; to "assist and co-operate with the teachers in the government and discipline of the schools, and may make proper rules and regulations therefor [and] . . . may suspend or expel . . . [for certain periods of time] any pupil who is insubordinate or habitually disobedient." Comp. Laws 1913, §§ 1179, 1180.

That such board *"subject to the approval of the county superintendent, . . . shall have [the] power to determine what branches, if any, in addition to those required by law shall be taught in any school in the district."* Comp. Laws 1913, § 1181.

So far as the record discloses, the school board had ample funds, available for the purpose of paying the salary of the additional teacher. It must be conceded that the school board had full authority to engage

teachers, and also, upon approval of the county superintendent, had power to require branches, in addition to those required by law, to be taught in any school of the district. Comp. Laws 1913, §§ 1173, 1181. The determination by these administrative officers of these questions (except possibly in unusual cases) is not subject to review or control by the courts in an equitable action. The board certainly had authority to engage whatever teachers were necessary to carry on the educational work of the district and also to require instruction to be given in the additional branches specified by this board. If the school board had engaged an additional teacher and placed her in one of the other schoolhouses in the district, and required her to teach the subjects under consideration, then the board would clearly have been within the letter of the law. But as a matter of convenience, and probably in order to avoid confusion and interference with the work carried on in such schoolhouses, and purely as a temporary arrangement, such school was conducted in a farmhouse, the use of which was given to the school without compensation. No complaint is made by any person whose children are required to attend school in such farmhouse; such persons are entirely satisfied with the arrangement. The plaintiffs base their right to be heard on the ground that they are taxpayers of the district, and contend that the moneys sought to be expended by the board in payment of the teacher's salary would constitute an illegal expenditure of public funds, and as such should be enjoined by a court of equity in a taxpayer's suit.

It is true, as suggested in the majority opinion, the law requires that the voters of the district be permitted "to vote upon the question of the selection, purchase, exchange or sale of a schoolhouse site, of the erection, removal or sale of a schoolhouse." Comp. Laws 1913, § 1184. That question, however, is not presented by the pleadings herein, but this action is based solely upon the theory that the defendants have sought to establish a high school without complying with the statutory provisions relating to the establishment of a high school. But even if this question was presented, it seems clear to me that there is nothing to justify the conclusion that defendants have sought to perform any of the acts or exercise any of the powers which this section requires to be performed or exercised by the voters of the district. The record negatives any intention on the part of the school board to select or pur-

chase a schoolhouse site, or erect or remove a schoolhouse. The farmhouse was vacant, and permission was granted to use it during the particular school year. Assuming that one of the schoolhouses of the district had been destroyed by fire and the school board had obtained permission to temporarily utilize this same building until a new schoolhouse was erected, would it be contended that such act on the part of the school board constituted a violation of law or an attempt on their part to select or purchase a schoolhouse site? The answer seems obvious. In principle I can see no difference between the case supposed and the case at bar. In this case the school board merely obtained temporary use of the building in question. Everything indicates that the arrangement was purely temporary. In fact there is no contention on the part of the plaintiffs that a permanent arrangement was intended.

It is true that the records of the school clerk (who was bitterly opposed to the engagement of the additional teacher) designate the school conducted in the farmhouse as a "high school," and some of the witnesses testify that this term was used in the proceedings had by the school board. This, however, has little or no tendency to prove that defendants intended to establish a high school within the contemplation of § 1192, Compiled Laws. I believe that the term "high school" was used purely in a colloquial sense, to indicate that certain "higher" subjects would be taught therein. In this connection it may be mentioned that one of the witnesses for the plaitiffs testified that certain pupils in the district who had been attending "college" at Valley City returned to the district and received instruction in the high school. The testimony does not show what particular educational institution in Valley City such pupil or pupils attended, but it is indicative of the sense in which the terms "high school" and "college" were used by the witnesses. I believe that the trial judge correctly found that the defendants did not establish, or attempt to establish, a high school, and if this finding is correct plaintiffs' cause of action falls. In my opinion the judgment should be affirmed. I am authorized to say that Mr. Justice Bruce concurs in the foregoing dissent.

JOHN M. GUNN v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY.

(158 N. W. 1004.)

Railroads — use and operation — running trains — keeping tracks in repair — hazardous nature — Constitution — equal protection — uniform laws — due process.

1. The business of running trains, keeping the tracks in repair, and other similar work connected with the use and operation of railroads, belongs to that class of work which may be called railroad work proper, and is of a peculiarly hazardous nature, and for that reason may be placed by statute in a class by constitutions which guarantee the equal protection and the uniform operations itself for the purposes of regulation, without violating the provisions of the of the laws, and freedom from the deprivation of liberty and property without due process of law.

Freight trains — unloading — railroad work and business.

2. The unloading of freight trains is work which is directly connected with the operation of the railroad, and belongs to the class which may be termed railroad work proper.

Statutory discrimination — true test — all similarly treated — like situated.

3. The true test of unlawful statutory discrimination is whether all who are similarly situated are similarly treated, and whether those who are similarly situated are hindered or prevented in their competition with one another.

Railroad business — regulation — statute — classes of business.

4. Where an evil exists which justifies regulation, a statute which seeks to prevent the same is not necessarily invalid because it does not bring all classes of business within its provisions.

Common carriers — employees — liability to — statutes — damages — negligence — fellow servant.

5. § 4804 of the Compiled Laws of 1913, which provides that "every common carrier shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers, agents, or employees, etc.," is constitutional when applied to a railroad employee who is injured through

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Note.—As to what is a railroad hazard within the statutes abolishing or restricting the fellow-servant rule as to railroad employees, see notes in 18 L.R.A.(N.S.) 478; 22 L.R.A.(N.S.) 969; and 47 L.R.A.(N.S.) 113 (in which cases pro and con on the question of loading and unloading cars are collected and discussed).

For authorities on the question of validity of statute abrogating fellow-servant rule, see notes in 12 L.R.A.(N.S.) 1040, and 47 L.R.A.(N.S.) 84.

the negligence of a fellow servant while unloading freight from a car which is on the main track of the railroad, and is being unloaded so that the car may be sent out again in the same or in another train a few hours later.

Opinion filed July 12, 1916.

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

Action to recover damages for personal injuries sustained while unloading a freight car.

Judgment for plaintiff. Defendant appeals.

Affirmed.

John E. Green and *Palda, Aaker & Greene* (*Alfred H. Bright* and *John L. Erdall,* of counsel), for appellant.

The so-called "Fellow-Servant Act" of this state does not apply in this case. Comp. Laws 1913, § 4804; Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453.

To come within the operation of the fellow-servant law, the injury must have occurred while the plaintiff or his fellow servant, responsible for the injury, was engaged in the business of operating a railroad. The services here were common to numerous other employees and did not consist of railroad work. Beleal v. Northern P. R. Co. 11 Ann. Cas. 924 et seq. note.

E. R. Sinkler and *D. C. Greenleaf,* for respondent.

A railroad company is liable in damages for injuries sustained by one of its employees where, as one of the grounds of negligence, it is shown that an insufficient number of men was employed to do a given piece of work on which the injured person was engaged. Rosin v. Danaher Lumber Co. 2 N. C. C. A. 265, note; Di Bari v. J. W. Bishop Co. 17 L.R.A.(N.S.) 773, note; Johnson v. Ashland Water Co. 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823, 20 Am. & Eng. Enc. Law, 91; Bonn v. Galveston, H. & S. A. R. Co. — Tex. Civ. App. —, 82 S. W. 808; Peterson v. American Grass Twine Co. 90 Minn. 343, 96 N. W. 913, 15 Am. Neg. Rep. 91; Jones v. Old Dominion Cotton Mills, 82 Va. 140, 3 Am. St. Rep. 92; Mad River & L. E. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312; Booth v. Boston & A. R. Co. 73 N. Y. 38, 29 Am. Rep. 97; Wood, Mast. & S. § 394; Beardsley v. Murray Iron Works Co. 129 Iowa, 675, 106 N. W. 181; Kirk v. Jajko, 224 Ill. 338,

79 N. E. 577; 3 Labatt, Mast. & S. 2912; Fitter v. Iowa Teleph. Co. 143 Iowa, 689, 121 N. W. 48.

It is the duty of the master to furnish enough force to do the work with reasonable safety to all those engaged in it. That if he knew, or by ordinary care could have known, that the force was inadequate, and if plaintiff did not know it, and in consequence of such lack of force plaintiff was injured, the master is liable, except for plaintiff's own negligence. Standard Sanitary Mfg. Co. v. Minor, 33 Ky. L. Rep. 982, 112 S. W. 572; Craig v. Chicago & A. R. Co. 54 Mo. App. 523; Alabama G. S. R. Co. v. Vail, 142 Ala. 134, 110 Am. St. Rep. 23, 38 So. 124; Cheeney v. Ocean S. S. Co. 92 Ga. 726, 44 Am. St. Rep. 113, 19 S. E. 33, 14 Am. Neg. Cas. 69.

Plaintiff was engaged in railroad work, and was within the protection of the statute. The unloading of cars, clearing the tracks, and all such work, is railroad work within the meaning of the statute. Without the doing of such work, trains could not be run, and the general traffic of the railroad would be suspended. It is a part of the operation of the railroad, like the keeping of the tracks in repair and clear, for the running of trains. Turner v. Terminal R. Asso. 132 Mo. App. 38, 111 S. W. 841; Orendorff v. Terminal R. Asso. 116 Mo. App. 348, 92 S. W. 148; Texas C. R. Co. v. Pelfrey, 35 Tex. Civ. App. 501, 80 S. W. 1036; Daley v. Boston & A. R. Co. 147 Mass. 101, 16 N. E. 690; Chicago K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; Union P. R. Co. v. Harris, 33 Kan. 416, 6 Pac. 572; Deppe v. Chicago, R. I. & P. R. Co. 36 Iowa, 52; Akeson v. Chicago, B. & Q. R. Co. 106 Iowa, 54, 75 N. W. 676, 4 Am. Neg. Rep. 384; Janssen v. Great Northern R. Co. 109 Minn. 285, 123 N. W. 664; Tay v. Willmar & S. F. R. Co. 100 Minn. 131, 110 N. W. 433; Kreuzer v. Great Northern R. Co. 83 Minn. 385, 86 N. W. 413, 10 Am. Neg. Rep. 293; Anderson v. Great Northern R. Co. 74 Minn. 432, 77 N. W. 240; Southern R. Co. v. Rutledge, 4 Ga. App. 80, 60 S. E. 1011; Baker v. Western & A. R. Co. 68 Ga. 699; St. Louis Merchants' Bridge Terminal R. Co. v. Callahan, 194 U. S. 628, 48 L. ed. 1157, 24 Sup. Ct. Rep. 857, 170 Mo. 473, 60 L.R.A. 252, 94 Am. St. Rep. 746, 71 S. W. 208; Stubbs v. Omaha, K. C. & E. R. Co. 85 Mo. App. 192; Briscoe v. Chicago, B. & Q. R. Co. 130 Mo. App. 513, 109 S. W. 93; Nicholson v. Transylvania R. Co. 138 N. C. 516, 51 S. E. 40; Britt v. Carolina &

N. R. Co. 144 N. C. 242, 56 S. E. 910; Thomas v. Raleigh & A. Airline R. Co. 129 N. C. 392, 40 S. E. 201; Meo v. Chicago & N. W. R. Co. 138 Wis. 340, 120 N. W. 344; Hardt v. Chicago, M. & St. P. R. Co. 130 Wis. 512, 110 N. W. 427; Luich v. Great Northern R. Co. 152 Wis. 414, 140 N. W. 33; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394; Pyne v. Chicago, B. & Q. R. Co. 54 Iowa, 223, 37 Am. Rep. 198, 6 N. W. 282; Reddington v. Chicago, M. & St. P. R. Co. — Iowa, —, 75 N. W. 679; Nichols v. Chicago, M. & St. P. R. Co. 60 Minn. 319, 62 N. W. 386; Hanson v. Northern P. R. Co. 108 Minn. 94, 22 L.R.A.(N.S.) 968, 121 N. W. 607; Njus v. Chicago, M. & St. P. R. Co. 47 Minn. 92, 49 N. W. 527; Metz v. Chicago, B. & Q. R. Co. 88 Neb. 459, 129 N. W. 994; Sigman v. Southern R. Co. 135 N. C. 181, 47 S. E. 420; Missouri, K. & T. R. Co. v. Smith, 45 Tex. Civ. App. 128, 99 S. W. 743; St. Louis Southwestern R. Co. v. Thornton, 46 Tex. Civ. App. 649, 103 S. W. 437; Atchison, T. & S. F. R. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567; Atchison, T. & S. F. R. Co. v. Brassfield, 51 Kan. 167, 32 Pac. 815.

The rule of liability must extend to all of a certain class, and equal protection of the law must be afforded. Robinson v. Baltimore & O. R. Co. 237 U. S. 84, 59 L. ed. 849, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1; Thomas v. Boston & M. R. Co. 134 C. C. A. 554, 219 Fed. 180, 8 N. C. C. A. 981; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 616, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Cousins v. Illinois C. R. Co. 126 Minn. 172, 148 N. W. 58, 6 N. C. C. A. 182.

Bruce, J. This is an action to recover damages occasioned to a railroad employee through the carelessness of a fellow servant in allowing a feed grinder to fall upon him and while unloading freight from a railroad car at about 8 o'clock at night, and in order that it might proceed on its journey the next morning, and which car was standing on the main track of the railroad, the engine having left and gone to a station some 10 miles distant in order to get water. A verdict was rendered for the plaintiff, and from the judgment entered thereon the defendant appeals.

The only point argued by counsel for appellant on this appeal is

that the evidence conclusively shows that the plaintiff was injured through the negligence of his fellow servant, Vandervoight, and that § 4804 of the Compiled Laws of 1913, which takes this defense away from railway companies, is not applicable to the case at bar. The statute in question provides that "every common carrier shall be liable to any of its employees, or in case of the death of an employee, to his personal representative, for the benefit of his widow, children or next of kin, for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works." This act was passed in 1907, and is § 1 of chapter 203 of the Laws of that year.

Counsel's chief reliance is placed upon the language which is used in case of Beleal v. Northern P. R. Co. 15 N. D. 318, 108 N. W. 33, 20 Am. Neg. Rep. 453, and the cases collected in the note thereto in 11 Ann. Cas. 924, and in which case this court held that the act did not apply to or protect a laborer who was engaged in cutting ice from the Cheyenne river and loading it into cars for the use of the company, the ice being conveyed by means of a chute to the cars and from a platform which was constructed on the bank of the river. Counsel for appellant argues that under the decision above quoted a railway company is only liable and the act only applies where the employee is engaged in operating the railway and is exposed to the peculiar dangers attending that business. He maintains that the employment of the plaintiff was not of that nature or class, and that under the decision above quoted, the extra-hazardous situation which is incident to such operation is necessary to save the statute from the taint of class legislation. His whole brief and argument indeed is centered around the following quotation from the Beleal Case, and wherein this court said that "there can be no doubt that the business of running trains, keeping the tracks in repair, and other similar work connected with the use and operation of railroads—that class of work which may be called railroad work proper —is of a peculiarly hazardous nature, and for that reason may be properly placed in a class by itself to that extent, for the purpose of imposing on the master a greater liability to the employees so engaged, and giving the latter greater rights against the master in case of injury, than in other occupations; . . . such a classification is proper be-

cause the peculiar nature of the work furnishes a proper basis therefor. The statute in question, however, taken literally, as respondent would have us do, purports to put railroad corporations in a class by themselves, simply because they are such corporations, and imposes upon them a liability from which other corporations under like circumstances are exempt, and extends to employees of a railroad, regardless of the nature of their work, certain rights which other laborers engaged in the same kind of work do not enjoy. Take this case as an illustration. There are many other companies besides railroad companies which lay up ice in large quantities for use in their business. If an ice company or a meat packing concern had had this force of men at work at the same time and place, and with the same apparatus, and the injury had been inflicted under the same circumstances, the master would not have been liable for the negligence of the plaintiff's fellow servant. The liability of the ice company or the packing house as a master would be less than that of the railroad company, and the employee of the latter would have more means of redress for his injury than the employee of some other kind of corporation. There is absolutely no difference in the nature of the work, or in the relative situation or condition of the master and the employee, between a railroad company and any other company gathering ice for its use."

The writer of this opinion, speaking for himself alone, entertains one doubt as to the correctness of the criterion of class legislation which is announced in the quotation above referred to.

But be this as it may, the Beleal Case and the case at bar are by no means parallel in their facts, but, on the other hand, involve totally different relations.

It is conceded in the Beleal Case "that the business of running trains, keeping the tracks in repair, and other similar work connected with the use and operation of railroads,—*that class of work which may be called railroad work proper,*—is of a peculiarly hazardous nature, and for that reason may be properly placed in a class by itself," and can we say that the unloading of freight trains which are standing upon the main tracks of a railroad, and even though an engine is not attached thereto, is not work of this class and is not "railroad work proper?" We certainly cannot so hold, and we have authority for refusing so to do.

"In the operation of a railroad," says the Missouri court of appeals, "it is as necessary to load and unload freight cars as it is to hitch an engine to them and haul them back and forth over the road, and the work is as directly connected with the operation of the road as is any other service a railroad company is required by law to perform." Orendorff v. Terminal R. Asso. 116 Mo. App. 348, 92 S. W. 148.

Being then "railroad work proper," there is absolutely no support in reason or in the authorities for the contention that the provisions of the state and Federal Constitutions which guarantee the equal protection and uniform operation of the law and freedom from the deprivation of property or liberty without due process of law are in any way impinged by the verdict and judgment in the case at bar, and it is these provisions only which can in any way be involved.

Though, indeed, we often find the term class legislation carelessly used, and to such an extent that one would almost come to believe that practically no protective legislation can be upheld, the term is nowhere to be found in our Constitutions, and as a matter of fact class legislation is not forbidden. All, indeed, that is required is that there shall be a reasonable public necessity for the law or statute, and that it shall apply generally to all who are equally affected. "It would practically defeat legislation if it was laid down as a rule that a statute must necessarily be adjudged invalid if it did not bring all within its scope or subject all to the same burdens." Cotting v. Kansas City Stock Yards Co. 183 U. S. 111, 46 L. ed. 109, 22 Sup. Ct. Rep. 43; State v. Olson, 26 N. D. 304, L.R.A.—, —, 144 N. W. 661.

The true test of unlawful statutory discrimination is merely whether all who are similarly situated are similarly treated or affected, or, to put it another way and in the language of the business world, whether one is really hindered in his competition with others. There is no competition between the railroad company and the manufacturer, or ordinary business man. Except in rare instances indeed a railroad's only competition is with other railroads, and if the expenses of all are equally increased by the liability, and all have the right to charge a reasonable rate which shall be based upon the expense of operation, why should any be heard to complain?

The statute in question "meets a particular necessity and all railroad corporations are, without distinction, made subject to the same lia-

bilities. . . . It is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage-coaches and to persons and corporations using steam in manufacturies." See Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Georgia R. Co. v. Ivey, 73 Ga. 499, 504.

The work then belonging to the extra-hazardous class, proof was not necessary that there was an extra hazard in this particular case. The theory of the coemployee exception is that the employee may protect himself against danger. Surely in the same line of employment and in the same line of work he is not required to constantly discriminate and to say to his master, "I refuse to work with this man in unloading binders, but I am willing to work with him in unloading apples. I refuse to work with him at night, but I am willing to work with him in the daytime. I refuse to work with him on a live train, but I am willing to work with him on one which is on a side track." The law can be carried to no such absurd conclusions.

Similar statutes indeed have been upheld when applied to one injured while trucking freight from a warehouse to a freight car, Orendorff v. Terminal R. Asso. 111 Mo. App. 348, 92 S. W. 148; while elevating baggage by means of an elevator from one floor to another in a railway station, Turner v. Terminal R. Asso. 132 Mo. App. 38, 111 S. W. 841; as to brakemen coupling cars, Minneapolis & St. L. R. Co. 127 U. S. 210, 32 L. ed. 109, 18 Sup. Ct. Rep. 1176; as to a mechanic injured by a steam hammer in the repair shops, Swoboda v. Union P. R. Co. 87 Neb. 200, 138 Am. St. Rep. 483, 127 N. W. 215; as to a person employed upon a construction train to carry water for the men and to gather up tools and put them in the caboose or tool car, Missouri P. R. Co. v. Haley, 25 Kan. 35; as to a section man employed by a railway company to repair its roadbed and take up old rails and put in new ones, Union P. R. Co. v. Harris, 33 Kan. 416, 6 Pac. 571; as to a person injured while loading rails on a car to be taken to other portions of the company's road, Atchison, T. & S. F. R. Co. v. Koehler, 37 Kan. 463, 15 Pac. 567.

Not only is this the holding of the majority of the state courts, but of the Supreme Court of the United States also. In the case of Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585, that great court is clear and outspoken upon the subject,

and sustains the validity of a similar statute when applied to a bridge carpenter who was injured while engaged in loading timbers onto a car for transportation upon the railroad, the court saying that "the mere fact that the plaintiff's regular employment was a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies."

It is not necessary for us to enter into a discussion of the general question as to whether the statute of North Dakota would be constitutional if construed according to its natural import and to cover all of the servants of a railway company no matter in what particular kind of employment or branch of the service they happened to be engaged.

It is enough to say that all of the authorities are agreed that such statutes are constitutional if construed to apply only to those employments which are strictly related to the operation of the trains of a railway company, and can fairly be said to be within the class of extra hazardous.

There can be no question that the unloading of the cars of the trains which are standing on the main track of a railway, and while such cars are in a live train or in a train from which the engine has been cut off to take water, and in order that that car may be sent out in the same or in another train a few hours later, is work which is both connected with the operation of the railroad and usually hazardous in its nature.

Provided that the work done is thus connected with the physical operation of the road and is dangerous in its nature, we know of no courts which split hairs over the precise degree of danger involved, and there is no necessity that they should.

Here we have a quasi public corporation whose rates may be regulated by statute, but which is entitled to charge reasonable rates, and rates which will not merely meet expenses, but assure a reasonable return. Here we have a corporation which is granted the extraordinary powers and privileges of eminent domain. State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1.

Here we have an employment where, as a general rule, the reason for the fellow-servant rule does not apply, the reason for the rule, as laid

down in the original butcher's employee case of Priestly v. Fowler, 3 Mees. & W. 1, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987, 19 Eng. Rul. Cas. 102, being that each servant has, through association, the opportunity to get acquainted with the characteristics of his co-employees, and that in such a case he can well enjoin care on the part of those servants, and that, such being the case, the instinct of self-preservation will not only afford the best safeguard against injury and loss of life, but the exercise of that instinct should, on the grounds of public policy, be insisted upon by the courts.

It is a matter of common knowledge indeed that the railroad employee cannot, as a rule, choose or grow acquainted with his associates, and that men gathered from all parts of an immense system are momentarily thrown together, and that, as the trains come and go, trainmen are exposed to the risk of the negligence of laborers and section men, engineers, conductors, and other employees whom they have never seen and over whose conduct they can exercise no control whatever.

So, too, as is pointed out by the supreme court of Wisconsin in the case of Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394; the policy that a railroad company shall be held liable to a higher degree of care, and which has resulted in the abrogation of the fellow-servant rule as far as it is concerned, is based not merely upon a regard for the safety of its employees, but of the public as well, the safety of that public being dependent upon a thoroughly competent and efficient operating class. On account of these risks and the public nature of their calling, railroads are placed within a particular class. Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

The judgment of the District Court is affirmed.

AGNES ROYER v. M. RASMUSSEN and Minnie Rasmussen.

(158 N. W. 988.)

Master and servant — negligence of servant — sued jointly — may be — liability.

1. A master and his servant may be jointly sued for the negligence of the latter, when the former is liable for such negligent act.

Causes of action — several — same transaction — arising out of — joined in one suit — responsibility — different degrees.

2. Where several causes of action arise out of the same transaction, they may be joined in one suit, although the defendants may be affected in different degrees of responsibility.

Opinion filed July 15, 1916.

Appeal from the District Court of Grand Forks County, *C. M. Cooley,* Judge.

Action to recover for personal injuries arising from alleged negligence in the operation of an automobile. From orders overruling demurrers to the complaint, defendants appeal.

Affirmed.

Bangs & Robbins, for appellants.

The complaint is void of any allegation showing negligence on the part of M. Rasmussen, or in anywise connecting him with the commission of the alleged negligent or wrongful act. His liability is predicated upon the relationship of the defendants. The master is liable for the acts of the servant only while such servant is acting within the scope of his employment. Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 643.

At common law the action against the servant was in trespass, and on the case against the master. They could not be joined. 1 Chitty, Pl. 12th ed. 1828; Pom. Code Rem. §§ 307, 308; Bliss, Code Pl. §§ 82,

Note.—That there is some conflict on the question of the right to join master and servant as defendants in an action for the servant's negligence will appear from an examination of notes in 28 L.R.A. 441; 12 L.R.A.(N.S.) 670; and 25 L.R.A. (N.S.) 356; but this case will be seen to be in accord with the general rule allowing it.

and 83; 26 Cyc. 1545; 5 Thomp. Neg. § 5776; Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Mulchey v. Methodist Religious Soc. 125 Mass. 487; Western U. Teleg. Co. v. Olsson, 40 Colo. 264, 90 Pac. 841; French v. Central Constr. Co. 76 Ohio St. 509, 12 L.R.A.(N.S.) 669, 81 N. E. 751; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Herman Berghoff Brewing Co. v. Przbylski, 82 Ill. App. 361; McNemar v. Cohn, 115 Ill. App. 31; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Page v. Parker, 40 N. H. 47.

"Although there are authorities to the contrary, the better rule, and the one supported by the weight of authority, is that where the master is liable for the negligent or wrongful act of his servant solely upon the ground of relationship between them under the doctrine of *respondeat superior*, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is not liable jointly with the servant, and a joint action cannot be maintained against them." Warax v. Cincinnati, N. O. & T. P. R. Co. 72 Fed. 637; Hukill v. Maysville & B. S. R. Co. 72 Fed. 745; Helms v. Northern P. R. Co. 120 Fed. 389; Davenport v. Southern R. Co. 124 Fed. 983; Shaffer v. Union Brick Co. 128 Fed. 97; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85; McIntyre v. Southern R. Co. 131 Fed. 985; Henry v. Illinois C. R. Co. 132 Fed. 715; Sessions v. Southern P. Co. 134 Fed. 313.

The measure of their liability varying, and being different in degree, they cannot be joined as defendants in the same action. Davenport v. Southern R. Co. 124 Fed. 983; Gustafson v. Chicago, R. I. & P. R. Co. 128 Fed. 85.

O'Connor & Johnson, for respondent.

The demurrer is made upon the ground that two causes of action have been improperly united in the same complaint,—separately stated. The weight of authority and the better reasons seem to support the view that the remedy in such a case is not by demurrer in the first instance, but by a motion to make more definite and certain. Lewis v. Hinson, 64 S. C. 571, 43 S. E. 15; Cargar v. Fee, 140 Ind. 572, 39 N. E. 93; Times Pub. Co. v. Everett, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

This court, in passing on the questions raised by the demurrer,

can consider nothing excepting that which appears from the face of the complaint. Hartland v. Windsor, 29 Vt. 354.

The complaint shows that the two defendants joined in the commission of the tort, and co-operated in the acts of negligence that caused the injury of which complaint is made. Pom. Code. Rem. 4th ed. § 307.

Trespass was the form of action originally for injuries caused by force, immediate and direct. But when it was desired to enforce the liability of the master for the negligent acts of his servant, it was found, there being no direct force emanating from the master, that the old writ of trespass did not meet the needs of the situation. Consequently, the statute of Westminster 2d was passed, giving authority to the clerks of chancery to issue writs where the case was similar to some of the existing actions. 13 Edw. I.; 2 Bl. Com. 51; 4 Reeves, History of English Law, 430; 1 C. J. 1064.

But under our statute all forms of pleading are expressly abolished. Comp. Laws, 1913, §§ 7355, 7439; Ed. of Blackstone 1916, p. 1643.

The fundamental provision of these Codes is the abolition of distinction between forms of actions. Under their provisions there is but one form of civil action. Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Oolitic Stone Co. v. Ridge, 169 Ind. 639, 83 N. E. 246; Conaughty v. Nichols, 42 N. Y. 83; Soule v. Weatherby, 39 Utah, 580, 118 Pac. 833, Ann. Cas. 1913E, 75; Pom. Code Rem. p. 5 note, § 347; Hahl v. Sugo, 169 N. Y. 109, 61 L.R.A. 226, 88 Am. St. Rep. 539, 62 N. E. 135; Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Hewett v. Swift, 3 Allen, 425; Schumpert v. Southern R. Co. 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813, 13 Am. Neg. Rep. 676; Comp. Laws 1913, §§ 7355, 7439.

"The rule seems to be well settled by the authorities that when the injury to the plaintiff results from the immediate force of the defendant, and is caused by his carelessness and negligence, and is not wilful, the plaintiff can maintain either trespass or case." Howard v. Tyler, 46 Vt. 688; Gates v. Miles, 3 Conn. 64; Blin v. Campbell, 14 Johns. 432; McAllister v. Hammond, 6 Cow. 342; Brennan v. Carpenter, 1 R. I. 474; Moreton v. Harden, 4 Barn. & C. 223, 107 Eng. Reprint, 1042, 4 Dowl. & R. 275; Williams v. Holland, 10 Bing. 112, 131 Eng. Reprint, 848, 6 Car. & P. 23, 3 Moore & S. 540, 2 L. J. C. P. N. S. 190; 9 Bacon, Abr. 441.

Among wilful tort feasors or intentional wrongdoers, no contribution will be allowed. Merryweather v. Nixan, 8 T. R. 186, 101 Eng. Reprint, 1337, 16 Revised Rep. 810 (1799); Peck v. Ellis, 2 Johns. Ch. 131; Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555; Miller v. Fenton, 11 Paige, 18; Hunt v. Lane, 9 Ind. 248; Rhea v. White, 3 Head, 121; Spaulding v. Oakes, 42 Vt. 343, 1 Am. Neg. Rep. 399; Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260 (1870); Boyd v. Gill, 21 Blatchf. 543, 19 Fed. 145 (1886); Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593 (1886); Boyer v. Bolender, 129 Pa. 324, 15 Am. St. Rep. 723, 18 Atl. 127 (1889).

The general rule is that even where the parties are equally wrong, *in pari delicto,* as far as legal liability to respond in damages for injuries to their persons is concerned, contribution will be allowed for joint *quasi delicto,* where the wrong or tort was not wilful, malicious, intentional, unlawful, or immoral. Thweatt v. Jones, 1 Rand. (Va.) 328, 10 Am. Dec. 538 (1823); Wooley v. Batte, 2 Car. & P. 417 (1826); Horbach v. Elder, 18 Pa. 33 (1851); Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663 (1849); Bailey v. Bussing, 28 Conn. 455 (1859); Selz v. Unna, 6 Wall. 327, 18 L. ed. 799 (1867); Nickerson v. Wheeler, 118 Mass. 295 (1875); Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Smith v. Ayrault, 71 Mich. 475, 1 L.R.A. 311, 39 N. W. 724 (1888); Vandiver v. Pollak, 97 Ala. 467, 19 L.R.A. 628, 12 So. 473 (1893); Farwell v. Becker, 129 Ill. 261, 6 L.R.A. 400, 16 Am. St. Rep. 267, 21 N. E. 792 (1889); Cooley, Torts, 3d ed. 254; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754.

This rule, however, does not apply to torts which are the result of mere negligence. Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663; Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253; Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Reprint, 693, 5 L. J. C. P. 68; 9 Cyc. 804; 7 Am. & Eng. Enc. Law, 365.

Argument that these defendants should not be joined because the master has not the right of contribution is specious and fallacious, and has no substantial support in the authorities. Bliss, Code Pl. § 89; Addison, Contr. 34, 35; Schumpert v. Southern R. Co. 65 S. C. 332, 95 Am. St. Rep. 806, 43 S. E. 813, 13 Am. Neg. Rep. 676; Lowell

v. Boston & L. R. Corp. 23 Pick. 24, 34 Am. Dec. 33; Old Colony R. Co. v. Slavens, 148 Mass. 363, 12 Am. St. Rep. 558, 19 N. E. 372.

Such joinder is sanctioned by the Federal courts. Davenport v. Southern R. Co. 68 C. C. A. 444, 135 Fed. 960; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 83; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; Connell v. Utica, U. & E. R. Co. 13 Fed. 241; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Comitez v. Parkerson, 50 Fed. 170; Chicago, R. I. & P. R. Co. v. Martin, 59 Kan. 437, 53 Pac. 461, 4 Am. Neg. Rep. 266, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 845; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754.

Respondent contends that it is proper to join the master and servant under the facts in this case, and that this view finds ample support in the authorities, and is more in harmony with the modern and reformed procedure under the Codes. Pom. Code Rem. § 312; Bailey, Personal Injuries, p. 2173; Wood, Mast. & S. 667; 2 Thomp. Neg. § 11; Cooley, Torts, 3d ed. 241, 242; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Wright v. Compton, 53 Ind. 337, 2 Mor. Min. Rep. 189; Howe v. Northern P. R. Co. 30 Wash. 569, 60 L.R.A. 94, 70 Pac. 1100; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 83; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Schumpert v. Southern R. Co. 65 S. C. 332, 43 S. E. 813, 13 Am. Neg. Rep. 676, 95 Am. St. Rep. 802, note p. 809; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Henshaw v. Noble, 7 Ohio St. 226; Whalen v. Pennsylvania R. Co. 73 N. J. L. 192, 63 Atl. 993; Southern R. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244; Winston v. Illinois C. R. Co. 111 Ky. 954, 55 L.R.A. 603, 65 S. W. 12; Central of Georgia R. Co. v. Brown, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989, 10 Am. Neg. Rep. 30; Gardner v. Southern R. Co. 65 S. C. 341, 43 S. E. 816; Phelps v. Wait, 30 N. Y. 78; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Suydam v. Moore, 8 Barb. 358; Hewett v. Swift, 3 Allen, 420; Roberts v. Johnson, 58 N. Y. 616, 5 Am. Neg. Cas. 200; Newman v. Fowler, 37 N. J. L. 89; Brokaw v. New Jersey R. & Transp. Co. 32 N. J. L. 328, 90 Am. Dec. 659; Shearer v. Evans, 89 Ind. 400.

No punitive damages could be allowed or collected under the pleadings in this case, as no malice or gross negligence is charged. Therefore counsel's argument on this point is not pertinent. Harmening v. Howland, 25 N. D. 38, 141 N. W. 131; Shoemaker v. Sonju, 15 N. D. 518, 108 N. W. 42, 11 Ann. Cas. 1173; Davis v. Seeley, 91 Iowa, 583, 51 Am. St. Rep. 356, 60 N. W. 183; Comp. Laws 1913, § 7466.

Fisk, Ch. J. The complaint in effect alleges, that plaintiff, while crossing one of the streets in the city of Grand Forks, was run over and injured by an automobile owned by defendant M. Rasmussen while being driven by his servant and codefendant, Minnie Rasmussen; that the accident was caused by the careless and negligent manner in which such automobile was being driven.

Each of the defendants separately demurred to the complaint, which demurrer was overruled, and each have appealed. It is stipulated that the decision of one appeal will control the other. It is conceded that the sole question for decision is whether the causes of action against the defendants are properly joined. Appellants contend that there is an improper joinder of causes of action for the reason that the liability of the servant, if any, is based upon her personal negligence, while that of the master is predicated upon the theory that the negligence of the servant is imputed to him. In other words it is asserted that he can be held only upon the doctrine of *respondeat superior,* for the alleged reason that he was not present in the car at the time of the accident. Such contention, however, has no proper basis in the record, for the complaint in paragraph 1 thereof distinctly alleges: "That . . . the auto . . . was operated by . . . Minnie Rasmussen at all the times mentioned . . . for and on the business of the defendant, M. Rasmussen, and with his knowledge, consent, *and under his direction.*" Such allegations for the purposes of this appeal must be accepted as true. It follows, therefore, that the defendants are jointly guilty of the acts of negligence complained of, and this being true they can be proceeded against jointly under all the authorities. This alone would necessitate an affirmance of the orders, but we wish to place our decision on the broader ground that, even if the complaint had disclosed that the master was not present at the time of the accident, and the automobile was not being driven under his direction, still both were proper-

ly joined in one action, notwithstanding the fact that some courts of high standing have held to the contrary. We are firmly convinced that their reasoning is both technical and unsound even at common law, and, moreover, they are clearly out of harmony with our reformed system of pleading and are opposed to the great weight of modern authority. We deem it unnecessary to enter into a minute discussion of the question at this time, for the reason that this court has recently had occasion to pass upon substantially the same principles of procedure which are here involved. See Stark County v. Mischel, 33 N. D. 432, 156 N. W. 931, and Allen v. Cruden, ante, 166, 157 N. W. 974. The supreme court of our sister state of Minnesota in Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754, recently decided the identical question before us under a statute very similar to our § 7466, Compiled Laws 1913, and we hereby adopt the reasoning and conclusion of that court as the sound and sensible rule for this jurisdiction. Among other things it is there said:

"We have no statute in this state fixing any rule upon the subject of the joinder of parties defendant in actions in tort. Section 4062, Rev. Laws 1905, refers only to actions upon contract. We must therefore refer to the rules of the common law controlling the question in determining whether the action at bar was properly brought against all the defendants. An examination of the books discloses an irreconcilable conflict in the decisions upon the question. It is held by some courts that separate persons, acting independently, but causing together a single injury, are joint tort feasors, and may be sued either jointly or severally at the election of the plaintiff, and that it is not essential that the defendants in such case shall have acted in concert. Matthews v. Delaware, L. & W. R. Co. 56 N. J. L. 34, 22 L.R.A. 261, 27 Atl. 919, 12 Am. Neg. Rep. 285, 15 Enc. Pl. & Pr. 559. Other courts uphold the converse of the proposition, maintaining the rule that joint or concerted action on the part of all the defendants is essential to the right of joinder in the same suit. Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745. The case of Trowbridge v. Forepaugh, 14 Minn. 133, Gil. 100, may be said to support this view.

"We do not feel called upon, however, to analyze the cases on this subject for the purpose of evolving a rule applicable to tort actions in

general; for the weight of authority sustains the right of an injured party to join in the same action parties bearing the relation to each other of the defendants in this case, namely, master and servant, the right of action springing from the wrongful act of the servant for which the master is responsible. The authorities, even upon this branch of the subject, are by no means harmonious, but the weight of reason sustains the right of joinder. The following authorities sustain this position: Newman v. Fowler, 37 N. J. L. 89; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Wright v. Compton, 53 Ind. 337, 2 Mor. Min. Rep. 189; Consolidated Ice Mach. Co. v. Kiefer, 26 Ill. App. 466; Southern R. Co. v. Sittasen, — Ind. App. —, 74 N. E. 898; Lynch v. Elektron Mfg. Co. 94 App. Div. 408, 88 N. Y. Supp. 70; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507; Colegrove v. New York & N. H. R. Co. 20 N. Y. 492, 75 Am. Dec. 418; Cuddy v. Horn, 46 Mich. 596, 41 Am. Rep. 178, 10 N. W. 32.

"No substantial reason can be given for requiring separate actions in such cases. On the contrary, the orderly administration of justice will be conserved by permitting the joinder. Both parties are liable for the consequences of the negligent acts of the servant, and one action and one recovery will terminate the litigation and avoid the necessity of separate trials of the same issue. So long as the liability of each defendant is identical, upon the same state of facts, it is of no material consequence that the liability of one arises at common law and that of the other under the statutes imposing liability upon the master for the negligence of his servants.

"One of the principal reasons assigned by those courts which hold such a joinder improper is that the right of contribution is lost and cannot be resorted to by one against the other codefendant. This reason, as applied to cases of this kind, is unsound. There is, it is true, a general rule that the right of contribution does not exist as between joint tort feasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of. Where there is no concert of action in the commission of the wrong, the rule does not apply. In such cases the parties are not *in pari delicto* as to each other, and as between themselves their rights may be adjusted in accordance with the principles of law applicable to the relation in fact existing

between them. The rule does not apply to torts which are the result of mere negligence. Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355; Acheson v. Miller, 2 Ohio St. 203, 59 Am. Dec. 663; Torpy v. Johnson, 43 Neb. 882, 62 N. W. 253; Adamson v. Jarvis, 4 Bing. 66, 130 Eng. Reprint, 693, 5 L. J. C. P. 68; 9 Cyc. 804; 7 Am. & Eng. Enc. Law, 2d ed. 365. Other reasons assigned in support of the theory that the master and servant may not be joined in the same action are purely technical, and entitled to no special consideration.

"It would seem, also, that § 4154, Rev. Laws 1905, disposes of the question adversely to appellant's contention, considered from the standpoint of separate causes of action, and not mere joinder of parties defendant. That statute provides that two or more causes of action may be united in one pleading when they arise out of the same transaction or transactions, affect all the parties to the action, and do not require separate places of trial. This authorizes the joinder of separate causes of action when the conditions named in the statute exist, and it is not important that the defendants named are not all affected alike. If the several causes of action pleaded arise out of the same transaction, they may be joined in one suit, although the defendants named may be affected in different degrees of responsibility. That causes of action in tort are included within the meaning of this statute is quite obvious. The word 'transaction,' as there used, embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrences be in the nature of tort or otherwise. Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024; Scarborough v. Smith, 18 Kan. 399; King v. Coe Commission Co. 93 Minn. 52, 100 N. W. 667. The plaintiff's right of action in the case at bar, as already observed, is for the death of her intestate, and is founded in the wrongful conduct of defendants in the operation of the company's business in its switch yards at Minneapolis. What occurred there, either in committing wrongful acts or negligently failing to take such action or steps as would prevent the injury complained of, amounts to a transaction or transactions within the meaning of the statute, and the several acts concurring and resulting in the death of plaintiff's intestate may properly be united in the same complaint."

The Wisconsin court has recently held to the same effect. Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93. In addition to the authorities cited by the Minnesota and Wisconsin courts we cite: Kirkpatrick v. San Angelo Nat. Bank, — Tex. Civ. App. —, 148 S. W. 362; Charman v. Lake Erie & W. R. Co. 105 Fed. 449; Wright v. Compton, 53 Ind. 337, 2 Mor. Min. Rep. 189; Howe v. Northern P. R. Co. 30 Wash. 569, 60 L.R.A. 949, 70 Pac. 1100; Thomas v. Great Northern R. Co. 77 C. C. A. 255, 147 Fed. 83; Schumpert v. Southern R. Co. 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813, 13 Am. Neg. Rep. 676; Kelly v. Chicago & A. R. Co. 122 Fed. 286; Whalen v. Pennsylvania R. Co. 73 N. J. L. 192, 63 Atl. 993; Southern R. Co. v. Grizzle, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244; Winston v. Illinois C. R. Co. 111 Ky. 954, 55 L.R.A. 603, 65 S. W. 13; 1 R. C. L. 363; Pom. Code Rem. § 312; Bailey, Personal Injuries, p. 2173; Wood, Mast. & S. 667; 3 Street, Foundations of Liability, pp. 264, 265; Mechem, Agency, § 2011; 7 Labatt, Mast. & S. § 2512; 2 Thomp. Neg. § 2; Cooley, Torts, 3d ed. 241, 242.

The author in 1 R. C. L. 363, states the rule as follows: "By virtue of statute in many, if not all, the so-called Code states, there may be a joinder in one complaint of two or more causes of action where they arise out of the same transaction, the word 'transaction' as used in such statutes meaning something which has taken place whereby a cause of action has arisen, and embracing not only contractual relations, but occurrences in the nature of tort as well. It is no objection to the joinder of causes of action that they concern separate primary rights, for, however numerous may be minor transactions, each constituting a primary right enforceable by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof, they all arise out of one 'transaction' and may be vindicated together, regardless of the form of remedy requisite as to each, provided they affect all the parties, and do not require different places of trial."

Mechem on Agency, after referring to the authorities holding to the contrary, says: "The weight of authority, however, is clearly the other way, and permits the principal and the agent to be joined in the same action at the option of the plaintiff." § 2011.

One of the most lucid and sound statements of the rule which has come to our notice is made by Mr. Labatt in his treatise on Master and

Servant. In § 2512 he reviews the authorities on principle, and among other things says:

"If the action is brought against the master and servant, all the courts agree that the joinder is proper where the liability is joint or concurrent, as where the master is guilty of actual negligence, as contradistinguished from imputed negligence under the doctrine of *respondeat superior*. So, in the case of trespass by the servant under the authority of the master, it is agreed that both may be joined, since both are in such a case deemed to be principals.

"The conflict in the decisions begins where the master does not participate in the negligent or wrongful act of the servant, his liability resting upon the doctrine of *respondeat superior* or upon statute. It has been held that the act complained of is for this reason not joint, and that the master and servant must therefore be pursued separately. The basis for this distinction is purely technical, and arose before the adoption of the reformed procedure. Under the old forms, the remedy against the master who did not command or participate in the wrong, but who, in the event of his servant's negligence, had the fault imputed to him, would be an action in case, while the action against the servant would be in trespass; and these actions could not be joined. One reason which has also been urged against the nonjoinder of master and servant in this class of cases is that the judgment would be against them jointly as joint wrongdoers, and consequently that the master, if he alone should satisfy the execution, could not call on the servant for reimbursement or contribution. This point was emphasized in the leading case in Massachusetts on the subject, and has had considerable influence on the decisions. There is, however, no real difficulty in this situation, for the master's right to contribution may be preserved, although the master and servant are sued together. Here, again, the objection to the joinder is technical.

The question whether the master and servant can be joined in an action to recover damages for the servant's wrongdoing in which the master does not participate long troubled the Federal courts, where the point was raised in applications for removal on the ground of a separable controversy. If the action is joint, the cause cannot, of course, be removed. The circuit court decisions were not in harmony on the question whether such actions are joint, or, in other words,

whether they present a separable controversy. Some of the lower courts adhered to the Massachusetts rule, while others upheld the right of joinder. This conflict in the decisions was finally settled by the Supreme Court in favor of the latter position [citing Alabama G. S. R. Co. v. Thompson (1905) 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 Ann. Cas. 1147], at least so far as to deny the master the right to remove on the ground of the existence of a separable controversy.

"The preponderance of authority in all jurisdictions is in favor of the right to join master and servant so as to proceed against them in a single action, although the master's liability is based on the doctrine of *respondeat superior,* and not upon any personal nonfeasance or misfeasance. . . .

"From a careful examination of the cases on the joinder of master and servant, it would seem that the better view is that in favor of allowing the single action where both are liable for the wrongful act of the servant, no matter on what theory or ground the master's responsibility may be placed, since this rule does away with a multiplicity of suits. The judgment in an action where the master does not participate in the wrong may be considered as joint and several, so as to preserve the master's right to an action against the servant in reimbursement; and this would appear to be especially true under the modern forms of procedure, abolishing the distinctions between the ancient technical forms of pleading."

Being in full accord with the views above quoted, and for the reasons above stated, we have no hesitancy in affirming the orders appealed from, and it is so ordered.

FLORENCE HEIN v. GREAT NORTHERN RAILROAD, a Corporation.

(159 N. W. 14.)

Damages — negligence — action — directed verdict — motion for — Federal Employers' Liability Act — benefits under — claimed by answer — — pleading.

1. Plaintiff, wife of Michael Hein, deceased, recovered a judgment for his death, occasioned through negligence of defendant based upon the state statutes, §§ 8321–8323, Comp. Laws. 1913.

Deceased was killed in a collision while driving an engine of defendant, hauling a loaded gravel train *en route* from Palermo, North Dakota, into Montana. The gravel was for use in Montana as railway ballast.

Motion for a directed verdict upon the ground that recovery was barred by the Federal Employers' Liability Act was denied. Verdict for $4,000 was returned; defendant appeals.

Held: It is not necessary that the benefits of the Federal act be claimed by answer. The motion for a directed verdict invoked said statute.

Federal act — state statutes — superseded — proof.

2. Under the proof the Federal act operated to supersede the state statutes upon the authority of which rests plaintiff's right to maintain this action.

Federal act — suit by plaintiff as individual — personal representative of deceased — dismissal.

3. Under the Federal act plaintiff could not sue as an individual. Under the statute suit must be brought by personal representative of the deceased, and this action, controlled by it, should have been dismissed upon the motion for a directed verdict.

Railroad company — engines — operated by deceased — time of accident — interstate traffic — proof — interstate commerce.

4. When it was proven that deceased was operating an engine of defendant, hauling a freight train for a part of a continuous haul from North Dakota into Montana, though another train crew would have taken the train at Wil-

Note.—For authorities passing upon the constitutionality, application, and effect of the Federal Employers' Liability Act, see comprehensive notes in 47 L.R.A.(N.S.) 38, and L.R.A.1915C, 47, in which former note cases will be found on page 47 supporting the conclusion that the Federal act supersedes the common law and all state legislation upon the subject, and on page 73, holding that the provisions of the statute giving a cause of action to the personal representative must be closely followed.

liston into Montana, defendant was shown to have been engaged at the time of the accident in interstate commerce, irrespective of the fact that the matter transported was material for its use upon its own lines in repair work; nor was it necessary, to invoke the provisions of the act, that the proof disclose that such materials were to be used upon its *main line*, as distinguished from sidetracks or branch lines. Transportation of gravel by said common carrier across state lines is interstate commerce within the meaning of the Federal Employers' Liability Act, under the Federal decisions controlling upon state courts.

Deceased — interstate commerce — engaged in — at time of death — Federal act — recovery — must be under.

5. As deceased came to his death when engaged in facilitating interstate commerce then being carried on by defendant, any recovery must be had under the Federal act, to the exclusion of state statutes.

Verdict — judgment — set aside — action dismissed.

6. The verdict and judgment entered thereon are ordered set aside, and this action dismissed.

Opinion filed July 20, 1916.

Appeal from District Court, Ward County, *Leighton,* Judge.

Reversed, and ordered dismissed.

Murphy & Toner, for appellant.

If plaintiff was living in adultery, and the decedent did not support her, she could not recover in this action. The court erroneously limited and restricted defendant in its proof in these respects. Defendant had the right to have evidence of these facts go to the jury. Ferren v. Moore, 59 N. H. 106; Boos v. Minneapolis, St. P. & S. Ste. M. R. Co. 127 Minn. 381, 149 N. W. 660; Stimpson v. Wood, 59 L. T. N. S. 218, 57 L. J. Q. B. N. S. 484, 36 Week. Rep. 734, 52 J. P. 822; Ft. Worth & D. C. R. Co. v. Floyd, — Tex. Civ. App. —, 21 S. W. 544; Atrops v. Costello, 8 Wash. 149, 35 Pac. 620; Cole v. Mayne, 122 Fed. 836; 2 Labatt, Mast. & S. § 727.

"It is a right given to the parties named in the statute to recover damages for the death of their relative, when, and only when, the death has caused such parties a pecuniary loss, and to the extent only of such pecuniary loss." It is clear that decedent was not contributing to the support of the plaintiff at the time of his death, and for a long time prior thereto, and therefore, if plaintiff was entitled to anything, it

would be only nominal damages. Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Charlebois v. Gogebic & M. R. Co. 91 Mich. 59, 51 N. W. 812; McGown v. International & G. N. R. Co. 85 Tex. 289, 20 S. W. 80; Kearney Electric Co. v. Laughlin, 45 Neb. 390, 63 N. W. 941; Orgall v. Chicago, B. & Q. R. Co. 46 Neb. 4, 64 N. W. 450; Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Safford v. Drew, 3 Duer, 627; Duckworth v. Johnson, 4 Hurlst. & N. 653, 157 Eng. Reprint, 997, 29 L. J. Exch. N. S. 25, 5 Jur. N. S. 630, 7 Week. Rep. 655; Central of Georgia R. Co. v. Alexander, 144 Ala. 257, 40 So. 424; Bromley v. Birmingham Mineral R. Co. 95 Ala. 397, 11 So. 341; Louisville & N. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 22 So. 20; Kelley v. Chicago, M. & St. P. R. Co. 50 Wis. 381, 7 N. W. 291, 2 Am. Neg. Rep. 294.

The case here proved is clearly one under the Federal Employers' Liability Act. Under the case proved, decedent's widow was not the proper party plaintiff. She cannot maintain this action. The cause of action pleaded and sought to be enforced was not recognized at the common law. It must have been brought under the state statute, and this statute is superseded by the Federal act. Michigan C. R. Co. v. Vreeland, 227 U. S. 59–67, 57 L. ed. 417–420, 33 Sup. Ct. Rep. 192; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779; Bacon v. Texas, 163 U. S. 207, 215, 41 L. ed. 132, 135, 16 Sup. Ct. Rep. 1023; Norfolk & S. Turnp. Co. v. Virginia, 225 U. S. 269, 56 L. ed. 1086, 32 Sup. Ct. Rep. 828; Employers' Liability Act of April 22, 1908, 35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657; Second Employers' Liability Cases, Mondou v. New York, N. H. & H. R. Co. 223 U. S. 153, 56 L. ed. 327, 347, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 75; Briggs v. Walker, 171 U. S. 466, 471, 43 L. ed. 243, 245, 19 Sup. Ct. Rep. 1; American R. Co. v. Birch, 224 U. S. 547, 557, 56 L. ed. 879, 882, 32 Sup. Ct. Rep. 603; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 576, 57 L. ed. 355, 363, 33 Sup.

Ct. Rep. 135, Ann. Cas. 1914B, 134; Troxell v. Delaware, L. & W. R. Co. 227 U. S. 434, 443, 57 L. ed. 586, 591, 33 Sup. Ct. Rep. 274.

The deceased was engaged in interstate commerce. The mere fact that the yard was a terminal point for that train does not change the situation. McNeill v. Southern R. Co. 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722; Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412.

The true test is: "Is the work in question a part of the interstate commerce in which the carrier is engaged?" McCall v. California, 136 U. S. 104, 109, 111, 34 L. ed. 391–393, 10 Sup. Ct. Rep. 881, 3 Inters. Com. Rep. 181; Zikos v. Oregon R. & Nav. Co. 179 Fed. 898; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1.

Deceased was engaged in the doing of minor tasks which were essentially a part of the larger one,—the interstate commerce in which the company and these immediate employees were then engaged. Lamphere v. Oregon R. & Nav. Co. 47 L.R.A.(N.S.) 1, 116 C. C. A. 156, 196 Fed. 336; Horton v. Oregon-Washington R. & Nav. Co. 72 Wash. 503, 47 L.R.A.(N.S.) 8, 130 Pac. 897; Johnson v. Southern P. Co. supra; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 161, 57 L. ed. 1129, 1134, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 503, 58 L. ed. 1062, 1069, L.R.A.1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834.

E. R. Sinkler, Francis J. Murphy and *Geo. A. McGee,* for respondent.

The real issue in this case, on the question of support, is not what deceased was doing two years prior to his death toward supporting plaintiff, but what support he was giving her immediately prior to and at the time of his death. Their relations two years prior were immaterial. It is purely a question of pecuniary compensation. Louisville & N. R. Co. v. Orr, 91 Ala. 546, 8 So. 360.

In an action brought under the statute by a widow to recover damages for the wrongful killing of her husband, where the complaint shows that deceased left surviving him a widow and minor children of tender

years, no specific allegations showing that such widow and children suffered pecuniary damages by the loss of such life are required. Haug v. Great Northern R. Co. 8 N. D. 23, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467.

The mere fact of hauling gravel from one state to another, for the use and repair of the defendant's own railroad, does not show that defendant was engaged in interstate commerce; the facts do not show that defendant was engaged in commerce. Norfolk & W. R. Co. v. Com. 93 Va. 749, 34 L.R.A. 105, 57 Am. St. Rep. 827, 24 S. E. 837; 7 Cyc. 412.

Defendant was not even engaged in the repair of its main line, assuming that it might be commerce had it been so engaged; but decedent and defendant were repairing other pieces of track. Zikos v. Oregon R. & Nav. Co. 179 Fed. 893; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

Goss, J. Plaintiff, widow of Michael Hein, deceased, sues under the state statutes governing recovery for death by wrongful act, §§ 8321–8323, Comp. Laws 1913. The complaint pleads acts of alleged negligence as having caused the death of Michael Hein.

The proof establishes that deceased came to his death through a collision between two gravel trains both hauling gravel *en route* to Montana, but at the time within this state. At the close of the testimony the court denied a motion for a directed verdict of dismissal, based "On the ground that the undisputed evidence discloses that this case is one in which the Great Northern Company's liability, if any, is controlled by the Federal statute known as the Employers' Liability Law; and if liable, said company is only liable to the personal representative of the deceased, Michael Hein, and not to the plaintiff; and that the party plaintiff here is not the real party in interest, or a person having a cause of action against said defendant railroad company." A verdict for $4,000 was returned.

Assignments based upon the denial of said motion test plaintiff's right to maintain this action and sustain her recovery. Two questions necessary of decision are raised. 1. Does the Federal Employers' Liability Act apply under the proof? 2. Can the benefit of Federal

statutes be invoked by a directed verdict where the answer makes no reference to such a defense, or at all. This latter question, first discussed, is answered in the syllabus of Grand Trunk Western R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168, that "the operation and effect of the Employers' Liability Act upon the rights of the parties are involved in an action for negligence where the complaint alleges and the proof establishes that the employee was engaged in, and the injury occurred in the course of, interstate commerce, even though the act was not referred to in the pleadings or pressed in the trial." Of the same contention here made, the opinion reads: "This simply amounts to saying that the Employers' Liability Act may not be applied to a situation which is within its provisions unless in express terms the provisions of the act be formally invoked. Aside from its manifest unsoundness considered as an original proposition, the contention is not open, as it was expressly foreclosed in Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477–482, 56 L. ed. 1171–1173, 32 Sup. Ct. Rep. 790." Or in the words of the note to Lamphere v. Oregon, R. & Nav. Co. 47 L.R.A.(N.S.) 75: "In order to have the benefit of the Federal act, it is not necessary that the act be mentioned, or that the plaintiff claim that he is suing under the act." And if true as to a plaintiff, it should likewise be true as to a defendant. "The authorities all agree with the reported case, that it is not necessary in order to entitle a plaintiff to a recovery under the Federal Employers' Liability Act, that the statute should be expressly referred to in the complaint, as the court is presumed to be cognizant of the enactment, and where the facts alleged bring the case within the act, full effect must be given to it. . . . On the same grounds, where the case made by the evidence is within the Federal act, the defendant is entitled to the benefit of its provisions, though neither party has pleaded the act." Quoting from note to Ann. Cas. 1914C, 171, citing St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156. The motion to dismiss invoked the Federal Employers' Liability Act as fully under the proof made as though it had also been raised by answer.

The other question is in order, *i. e.*, whether under the proof it is established that the deceased employee, at the time of his death, was operating an instrumentality engaged in interstate commerce, with re-

covery therefor governed by the Federal act, to the exclusion of said state statutes under which this action is brought. Concededly, the engine was in charge of Hein as engineer, at the time of his death, and was hauling a train load of gravel "going to the Montana division" to be used for "ballasting the track on the Montana division." The gravel train was to be turned over to another crew at Williston "to go into Montana." The engine Hein was operating was hauling gravel from the Palermo pit to the Montana division. All this respondent admits, but claims that this is insufficient to establish that either the defendant or the train was engaged in interstate commerce within the provisions of the Federal Employers' Liability Act, requiring suit to be brought by the personal representative, and superseding the state statute permitting the surviving wife to sue. Instead, counsel in respondent's brief asserts that "as far as the evidence discloses the gravel could be used on some feeder or branch of the Montana division, or upon some sidetrack of the Montana division. The proof does not show that it was to be used on the *main line.*" And "the mere fact of hauling gravel from one state to another for its own use does not show that the defendant was engaged in interstate commerce; in fact, it does not even show that it was commerce that defendant was engaged in." In short, plaintiff asserts that in hauling its own gravel trains across the state line, loaded with gravel procured in this state for use as ballast in Montana, defendant was not engaged in interstate commerce, and hence the deceased was not engaged in facilitating interstate commerce so as to make the provisions of the Federal act applicable, unless it be shown further that the gravel was to be used for the repair of its *main line,* carrying interstate traffic. Judicial notice is taken of geographical facts and location of defendant's railroad, its business as a common carrier engaged in both interstate and intrastate traffic. It is not necessary that the proof disclose that the gravel was to be used upon the *main line.* It is sufficient to invoke the Federal act if deceased was operating an engine hauling a gravel train for part of a continuous haul from North Dakota into Montana. That fact alone establishes that interstate traffic was being performed and carried forward. Assuming that the cars comprising the train were empty, the defendant, nevertheless, would be engaged in interstate commerce, within the meaning of this Federal statute. Such are the explicit holdings in

United States v. St. Louis, I. M. & S. R. Co. 154 Fed. 516, and United States v. Chicago & N. W. R. Co. 157 Fed. 616, and North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9 N. C. C. A. 109. Johnson v. Southern P. Co. 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412, and Schlemmer v. Buffalo, R. & P. R. Co. 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407.

The following is the syllabus in 157 Fed. 616: "The mere hauling of an empty car from one state to another, even though it may be for the purpose of repairing a defect, is engaging in interstate commerce." 154 Fed. 516, reads: "It is insisted, however, that these cars were not being used, but were chained together and on the way to the shop for repairs. It is true that they were not being used in the sense that they were loaded; so, also, it is true that they were on the way to the shops. But it is equally true that they were cars that were used in moving interstate traffic, albeit at this particular time they were empty."

It is true that these two decisions were rendered under the Safety Appliance Acts, but controlling principles are the same. If it was interstate commerce under one statute, it would be under the other, as each is *in pari materia* with the other. Such is the express holding in North Carolina R. Co. v. Zachary, supra. The opinion in that case reads: "There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon the defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer [N. C.]. But were it so the *hauling of empty cars from one state to another is, in our opinion, interstate commerce within the meaning of the act*" (Federal Employers' Liability Statute). Such is the view that has obtained with respect to empty cars in actions based upon the Safety Appliance Act of March 2d, 1893 (27 Stat. at L. 531, chap. 196, Comp. Stat. 1913, § 8605). Johnson v. Southern P. Co. 196 U. S. 1, 21, 49 L. ed. 363, 371, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867–873. And like reason applies as we think to actions founded upon the Employers' Liability Act, which, indeed, is *in pari materia with the other.*" This is the express holding of the

Federal court of last resort under the contention urged; if hauling empty cars across state lines is interstate commerce, hauling loaded ones certainly is. See also Atlantic Coast Line R. Co. v. Jones, 9 Ala. App. 499, 63 So. 693, 698; Peery v. Illinois C. R. Co. 123 Minn. 264, 143 N. W. 724; Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146, 57 L. ed. 1125, 33 Sup. Ct. Rep. 648, Ann. Cas. 1914C, 153, 3 N. C. C. A. 779.

These holdings pass upon and expressly overrule respondent's contention. They establish that when killed deceased was driving an engine hauling a train then engaged in interstate commerce and in law within the provisions of the Federal Employers' Liability Act, and that it was immaterial where or how the gravel was to be used on arrival in Montana. It was a subject of interstate shipment, *en route* on an interstate train. This effectually answers, to the contrary, respondent's contention that defendant, in hauling its own cars to repair its own railroad, was not engaged in interstate commerce, where interstate lines are traversed in so doing.

Under the admitted facts this case is controlled by the said Federal statutes. The state statutes sued upon are superseded, and have no application.

"The Federal act is said to be the supreme law of the land upon the subject of the liability of interstate carriers for injuries to their servants, and to supersede all state legislation of the same subject, although it does not abrogate in terms such legislation. Consequently, if the accident occurs under such circumstances as to make the Federal statute applicable, the plaintiff, as well as the defendant, is bound by its terms. In such a case there can be no recovery under any state statute, even if the state statutes are more favorable to the plaintiff than the Federal act. If the Federal act applies, it is exclusive of other remedies, although the complaint may also set out a cause of action at common law or under some state statute." From note to 47 L.R.A.(N.S.) 48, citing abundance of authority sustaining it. Also see L.R.A.1916A, 450, and note, and Zikos v. Oregon R. & Nav. Co. 179 Fed. 893.

As under the Federal act suit can be prosecuted only by the personal representative of the deceased, this action by the wife individually, based upon the authority of the state statute thus superseded, is brought by a person not a real party in interest, and without right to maintain

it. The motion to direct a verdict of dismissal should have been granted. The judgment appealed from is ordered set aside and reversed, and dismissal directed.

MARTIN T. LEE v. JAMES DOLAN, Sheriff of Mountrail County, North Dakota.

(158 N. W. 1007.)

Execution — writ of — sheriff — officer — failure or refusal to execute — return of — to proper court — amercement — amount of debt — damages — costs — statute — imperative — penal in terms — discretion — court has none — damages — failure to show — lack of damages — irrelevant — immaterial.

1. Section 7770, Compiled Laws of 1913, which provides, among other things, that "if any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, . . . or to return any writ of execution to the proper court on or before the return day, . . . such sheriff or other officer shall on motion in court and two days' notice thereof in writing be amerced in the amount of said debt, damages and costs with 10 per cent thereon to and for the use of said plaintiff or defendant as the case may be," is imperative and penal in its terms, and grants no discretion to the court, and in a proceeding thereunder a showing of damages or lack of damages on account of a failure to levy or to make a return of the execution within the time prescribed by the statute is irrelevant and immaterial.

On Petition for Rehearing.

Sheriff — amercement of — execution — return of — failure to make — proof necessary — admissions — no proof necessary — evidence — insufficiency of — question — cannot be raised for first time on appeal — excusable neglect.

2. Although in a proceeding to amerce a sheriff under the provisions of § 7770 of the Compiled Laws of 1913 for the failure to return an execution within the time limited, it is necessary to make proof both of the execution and of the judgment, the plaintiff is not compelled to prove that which the defendant admits, nor is the defendant allowed to raise in the supreme court questions as to the insufficiency of the evidence which were not raised before the trial judge; and where the answer admits that a judgment was duly entered and docketed wherein L. was plaintiff and B. was defendant, and that an execution was duly issued and delivered for service, and pleads and seeks to prove no other defense but that the failure to return the same was due to excusable neglect, no further proof of the judgment is necessary.

Action — parties to — naming of — judgment in — execution issued on such judgment — presumption.

3. Where in a court a judgment is entered in an action wherein a certain person is named as plaintiff and another certain person as defendant, and an execution issued out of said court bearing indentically similar names, the presumption will be that the execution was issued on the judgment referred to.

Sheriff — execution — liability for failure to return — statute — constitutional — punishments — laws of a general nature — uniform operation — due process.

4. Section 7770 of the Compiled Laws of 1913, which imposes upon a sheriff who fails to make a return of an execution within the time required by law a liability to the extent of the judgment with 10 per cent interest, is not in violation of §§ 6, 11, and 13 of art. 1 of the Constitution of North Dakota, which provide that no cruel or unusual punishments shall be inflicted; that all laws of a general nature shall have a uniform operation, and that no person shall be deprived of life, liberty, or property without due process of law.

Opinion filed April 22, 1916. Petition for rehearing July 21, 1916.

Appeal from the District Court of Mountrail County, *Frank E. Fisk*, Judge. Judgment for plaintiff. Defendant appeals.

Action in amercement under § 7770, Compiled Laws of 1913.

Affirmed.

Pierce, Tenneson, & Cupler and *Henry J. Linde*, for appellant.

The Amercement Statute of this state as to sheriffs and other officers failing, neglecting, or refusing to execute upon an execution placed in their hands, is not penal in its nature, and where it appears from the evidence that the plaintiff has sustained no damages by the acts or omissions of the officer, he is not entitled to recover damages. Comp. Laws 1913, § 7770; Swenson v. Christoferson, 10 S. D. 188, 66 Am. St. Rep. 712, 72 N. W. 459.

"The standard measure of damages being the value of property belonging to the judgment debtor, and available as a source of revenue to be applied in satisfaction of the judgment, the ownership of such property was certainly an essential subject of inquiry, and appellant has suffered no injury if defendants had no interest in the property at a time material to this action." Swenson v. Christoferson, supra; Crooker v. Melick, 18 Neb. 227, 24 N. W. 689; McFarland v. Schuler, 12 S. D. 83, 80 N. W. 161.

The question is, Could the judgment debt have been collected out of

property of the defendant at any time during the life of the execution? Crooker v. Melick, supra; Hellman v. Spielman, 19 Neb. 152, 27 N. W. 131; Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Code Civ. Proc. § 3039; Knapp v. Sweet, 24 N. Y. Supp. 817.

The language of the Texas statute is apparently penal, but that court has held that the officer may defeat a recovery by showing that the plaintiff has not been damaged by his neglect. Curry v. Farley, 8 Daly, 228; Smith v. Perry, 18 Tex. 510, 70 Am. Dec. 295; Maury v. Cooper, 3 J. J. Marsh. 224; Comp. Laws, §§ 5924, 5925, 7145, 7183, 7186, 7188; Ellis v. Blanks, — Tex. Civ. App. —, 25 S. W. 309; Ranken v. Jones, — Tex. Civ. App. —, 53 S. W. 583; Moore v. Floyd, 4 Or. 101; Beck & G. Hardware Co. v. Knight, 3 L.R.A.(N.S.) 420, and note, 121 Ga. 287, 48 S. E. 930, 2 Ann. Cas. 9.

While it may be true that our statute is penal in its nature, as are all statutes providing a summary method of enforcing rights, yet our court has impliedly held that any such officer may justify his acts or omissions by showing that plaintiff has suffered no damage thereby. Milburn-Stoddard Co. v. Stickney, 14 N. D. 282, 103 N. W. 752; 36 Cyc. 1189; First International Bank v. Lee, Ann. Cas. 1912D, 731, and note, 19 N. D. 10, 120 N. W. 1093; First International Bank v. Lee, 25 N. D. 197, 141 N. W. 716; First International Bank v. Lee, Ann. Cas. 1912D, 732, and cases cited; 25 Am. & Eng. Enc. Law, 694, 706, 707; 35 Cyc. 1888, 1890, 1892; Richardson v. Wicker, 80 N. C. 172.

Where a statute imposes a penalty of a fixed amount "in addition to the actual damages sustained, the penalty cannot be recovered by one who has sustained no actual damages." 35 Cyc. 1891, 1892.

Hall, Alexander, & Purdy and *George A. Gilmore,* for respondent.

No rule of statutory construction is better established than that legal terms having a well-defined meaning at common law must be understood in the same sense when used in a statute. 36 Cyc. 1118; Vann v. Edwards, 135 N. C. 661, 67 L.R.A. 461, 47 S. E. 784; Ex parte Vincent, 26 Ala. 145, 62 Am. Dec. 714; 2 C. J. 1319; Beecher's Case, 8 Coke, 58, 77 Eng. Reprint, 559; Godfrey's Case, 11 Coke, 42, 77 Eng. Reprint, 1199; Re Nottingham [1897] 2 Q. B. 502, 66 L. J. Q. B. N. S. 883, 77 L. T. N. S. 210, 61 J. P. 725.

Under the broader definition penal statutes include not only those in which the penalty is recovered by a public prosecution, but also those

permitting a recovery of the penalty by a private individual, as in an action of debt or qui tam. 36 Cyc. 1180; Waldner v. Bowden State Bank, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847; Kirby v. Western U. Teleg. Co. 4 S. D. 463, 57 N. W. 202; Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553; Rutzkowski v. George, 92 Hun, 412, 36 N. Y. Supp. 762; Ellis v. Blanks, — Tex. Civ. App. —, 25 S. W. 309; Hale v. Bickett, 34 Tex. Civ. App. 369, 78 S. W. 531.

"An amercement, strictly speaking, is a penalty, and is for a fixed sum without regard to the extent of the injury suffered by the complaining party, by reason of the default for which it is imposed." 35 Cyc. 1887, 1890; Bond v. Weber, 17 Kan. 410; Duncan v. Drakeley, 10 Ohio, 46; Moore v. McClief, 16 Ohio St. 50; Henderson-Sturges Piano Co. v. Smith, 33 Okla. 335, 125 Pac. 454.

"On a failure to return an execution the sheriff becomes liable for the amount of the judgment." Reid v. Dunklin, 5 Ala. 205; Cox v. Ross, 56 Miss. 481; Chaffin v. Crutcher, 2 Sneed, 360; Goodnow v. Willard, 5 Met. 517; Bachman v. Fenstermacher, 112 Pa. 331, 4 Atl. 546.

"Whether any damage was done to the plaintiff is immaterial. The amercement is for failure to discharge an official duty." Swain v. Phelps, 125 N. C. 43, 34 S. E. 110; Hawkins v. Taylor, 56 Ark. 45, 35 Am. St. Rep. 82, 19 S. W. 105; State ex rel. Thomas v. Youmans, 5 Ind. 280; Magee v. Robins, 2 La. Ann. 411; Wright v. Cannon, 3 Harr. (Del.) 487; Breuer v. Elder, 33 Minn. 147, 22 N. W. 622; Milburn-Stoddard Co. v. Stickney, 14 N. D. 282, 103 N. W. 752.

Bruce, J. This is a proceeding under the provisions of § 7770, Compiled Laws of 1913, relating to the amercement of sheriffs. In the district court, findings of fact were made to the effect that on the 28th day of May, 1914, a judgment for $975.01 in favor of the plaintiff, Martin T. Lee, and against John J. Brugman, was duly rendered and docketed in the district court of the county of Mountrail; that on January 22d, 1914, an execution was duly issued upon said judgment and delivered to the present defendant, James Dolan, as sheriff of said county, with instructions to levy and return the same within sixty days after its receipt, to the clerk of the district court of said county; that defendant failed to execute said execution, and did not return the same

within sixty days, or at all; that while the execution was in the hands of the defendant, the judgment debtor was the owner of some real and personal property in said county which might have been founded and levied upon by the exercise of reasonable diligence. As a conclusion of law the district court found that the defendant was liable in amercement in the amount of the judgment with 10 per cent added, and judgment was entered accordingly. From this judgment the present appeal is taken.

The findings of fact made by the trial court are, as we view them, substantially correct. We may add, however, that no specific directions were given to the sheriff to levy on any particular property,—the execution being given to him with directions merely to levy generally, and it being suggested to him that there was possibly some bank stock which could be levied upon. The question, indeed, to our minds, has simmered down to the one proposition, and that is whether, under the statute of North Dakota, a sheriff who fails to levy an execution within the sixty days, and does not return it within the sixty days, and who, during such sixty days, fails to answer the letters of the plaintiff in relation thereto, is liable absolutely for the face of the judgment with 10 per cent added, or can be held only for such damages as actually accrued to the plaintiff from the failure to levy the execution or to return it unsatisfied within the sixty days.

We are satisfied that the plaintiff had the right to have his execution levied. His letter to the sheriff was as follows: "Will you kindly call at the clerk of court's office in your city for an execution in the case of Lee against John J. Brugman, and we will ask you to make a levy on any property you can find of this party, at once, as we have recently been told that he is selling out and we want to tie up any property that you can. He may have some bank stock in some of those banks which you can get at, and you no doubt know this party as he has been a banker at Tagus in your county. Kindly send us a statement of your fees in the case when you make levy and we will remit."

It is clear to us, indeed, that even if the levy would have been of no avail, it was incumbent upon the sheriff to answer the letters of plaintiff, and to return the execution unsatisfied within the statutory time, so that plaintiff might take such steps as might appear to him to be necessary for his protection. Irrespective of the question whether any property

could have been reached or not, there was a clear violation of duty on the part of the sheriff, and the only question at issue is his liability therefor under the provisions of the statute. Section 7770 of the Compiled Laws of 1913 reads: "If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, . . . or to return any writ of execution to the proper court on or before the return day, . . . such sheriff or other officer *shall* on motion in court and two days' notice thereof in writing be amerced in the amount of said debt, damages and costs with 10 per cent thereon to and for the use of said plaintiff or defendant as the case may be." It is the plaintiff's theory that under this statute the liability of the sheriff is absolute, and that a showing of damages or lack of damages is irrelevant. Is this theory correct? We think it is.

In support of the position of the defendant and appellant, and which is that only such damages can be recovered as may be proven, we find the South Dakota case of Swenson v. Christoferson, 10 S. D. 188, 66 Am. St. Rep. 712, 72 N. W. 459, in which it was held that a statute identically similar to our own was not penal, and, it appearing from the evidence that the plaintiff had not been damaged by the acts of the officer, he was not entitled to recover.

This case was handed down in October, 1897, and is based entirely upon the authority of the Nebraska case of Crooker v. Melick, 18 Neb. 227, 24 N. W. 689.

The Nebraska decision was handed down in 1885 and also construes a statute which was also similar to our own. It, like the opinion of the supreme court of South Dakota, is based upon and cites no authority. Its reasoning is as follows:

"The only new liability sought to be created by the above statute is the penalty of 10 per cent. Without the statute the sheriff would be equally liable for all but the penalty; with it, he is only liable for actual damages, possibly with the penalty added. The statute gives a short, cheap, and expeditious remedy, but it only lies where an action in the nature of trespass on the case would lie. In the case at bar, if it be true, as stated by the sheriff in his answer, that Edward Haley, the execution defendant, had no property within the county at any time during the life of said writs of execution, out of which the same, or any part thereof, could have been collected, how can it be said that the plaintiff

was damaged by the failure of the sheriff to return the writs in time? If the writs had no value when they came into the sheriff's hands, they could lose none by reason of their retention by him until after the return day; and they could gain none except on the principle of forfeiture. Our laws do not favor forfeitures, and under the provisions of the Constitution, it is doubtful if the plaintiff can recover a technical forfeiture from the sheriff in such a case.

"It is the boast of our improved system of pleading and practice, that the actual facts of every case may be pleaded and proved without regard to fictions or technicalities. This would be of little avail if, in cases like the one at bar, the law had closed the door of investigation, and ascribed to excusable neglect or unavoidable accident the same consequences of punishment and loss as those which follow criminal malpractice. But such is not the law. It is the actual damage which the plaintiff has sustained in the value or availability of his security that he is entitled to recover in such cases in either form of proceeding, and all legal facts touching such value and availability may always be pleaded and proved. 'Notwithstanding the proof of the debt, and the sheriff's neglect, the inquiry is permitted whether the debt could have been collected. The original debt is, of course, the gist of the action, and it is perfectly well settled that the existence of such debt must be proved by the plaintiff. But, if that fact is established, the equally important inquiry remains whether the recovery of the debt has been prejudiced by the acts of the defendant. In other words, whether, under any circumstances, it could have been collected of the defendant's property.' 2 Sedgw. Damages, 7th ed. 447."

The South Dakota case above cited is followed by the South Dakota case of McFarland v. Schuler, 12 S. D. 83, 80 N. W. 161, and the Nebraska case is followed by the Nebraska cases of Hellman v. Spielman, 19 Neb. 152, 27 N. W. 131, and Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134. The later South Dakota case of McFarland v. Schuler, supra, however, is hardly in point, as it is an action for damages for failing to levy on an attachment, and is not an amercement proceeding at all. In addition to these cases defendant and appellant cites the New York case of Knapp v. Sweet, 24 N. Y. Supp. 817, in which the New York court under § 3039 of the Code of Civil Procedure, which provided that "an action may be maintained against a constable

for a neglect to return an execution within sixty-five days after the return day thereof," and "that the party in whose favor it was issued may recover in an action against the constable the amount of the execution if it was issued upon a judgment for a sum of money only, with interest from the time when the judgment was rendered," held that the constable might show that no damages were sustained by the plaintiff. The court in this case says: "Section 3039 is in the nature of a penalty imposed for a neglect of duty on the part of a constable to return the execution within sixty-five days after the return day thereof, and the nonreturn is prima facie evidence of his liability for the amount of the judgment and interest thereon. But is this rule to be applied when a defense is made that the plaintiff in the execution was not damaged or injured from the want of such return? We think not. It was held in the case of Curry v. Farley, 8 Daly, 228, 'that the constable does not incur the statutory penalty by his failure to return and file the execution within the time specified, if, in fact, he has not collected any money thereupon.' "

This New York case, however, was expressly overruled by a later case decided in another branch of the same court (New York supreme court), namely, Rutzkowski v. George, 92 Hun, 412, 36 N. Y. Supp. 762, where it was said: "In Knapp v. Sweet, supra, the view of the court as there expressed was that the same right is allowable to mitigate damages by a constable liable in an action for default in returning an execution, as is available to a sheriff as a defense. This would be so if the statute provided for the recovery of damages, but the provision that the party may recover against the constable 'the amount of the execution' has no qualification in the terms of the statute."

Appellant also cites the case of Smith v. Perry, 18 Tex. 510, 70 Am. Dec. 295, and which construes a statute somewhat similar to our own. That statute provides "that, should an officer neglect or refuse to return an execution as required by law, or should he make a false return thereof, he and his sureties shall be liable to the party entitled to receive the money collected on such execution for the full amount of the debt, interest, and costs to be recovered, as provided in the preceding section," and the preceding section provides for a procedure such as that which is before us. The opinion in the case was handed down in 1857, and held that the statute was not penal, and merely created a prima facie

liability against the sheriff for the full amount of the debt, interest, and costs, which could have been overcome by proof of a reasonable excuse or that the plaintiff had sustained no injury. The court, however, held that nominal damages could at any rate be recovered. The reasons given by the court for refusing to hold the statute penal were:

(1) That, if penal, it would make no difference though, after the issuance of the execution and the expiration of the time for making the return, the debt had been paid.

(2) That the primary object of the statute must have been to give compensation; otherwise the penalty would have been given to the state, and not to the plaintiff in the execution.

The opinion also discloses that the court was also actuated by the fear that "the temptation to seek to fix liability upon him [the sheriff] will, of course, be in proportion to the difficulty of collecting the debt from the judgment debtor. In Kentucky, where it seems the insolvency of the defendant in execution has not been admitted as a defense under their statute, the court on one occasion remarked that executions have sometimes issued against men hopelessly bankrupt with no other design than to take advantage of some possible slip or omission of the officer of the law; per Robertson, Ch. J., Maury v. Cooper, 3 J. J. Marsh. 224."

"Sheriffs," the court added, "should be held to a strict accountability, and wherever injury has or may have resulted to a party from neglect of duty by themselves or their deputies, they and their sureties should be made responsible. But the officer ought not be subjected to such perils and penalties for mere technical defaults, where no one has been injured, as that no discreet or judicious man would be willing to take upon himself the responsibility of the office. It cannot be supposed that the legislature intended, nor does the language of the statute require, a construction which would impose such penalties for the benefit of those who have not been injured by the dereliction of the officer."

In addition to this case, and practically holding to the same conclusions, are the cases of Weld v. Bartlett, 10 Mass. 470; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 Hill, 550; Moore v. Floyd, 4 Or. 101; Harris v. Murfree, 54 Ala. 161; Ellis v. Blanks, — Tex. Civ. App. —, 25 S. W. 309; Ranken v. Jones, — Tex. Civ. App. —, 53 S. W. 583; Beck & G. Hardware Co. v. Knight, 3 L.R.A.

(N.S.) 420, and note (121 Ga. 287, 48 S. E. 930); Kidder v. Barker, 18 Vt. 454.

Of these cases, however, the cases of Weld v. Bartlett; Moore v. Floyd; Beck & G. Hardware Co. v. Knight, and Kidder v. Barker, are not in point, as they were actions in tort for damages and brought in jurisdictions where there was no express statute upon the subject. The cases of Bank of Rome v. Curtiss and Pardee v. Robertson are also not in point, as they were brought under a statute which merely provided that "for any violation of this provision such sheriff or other officer shall be liable to an action at the suit of any party aggrieved for the damages sustained by him, in addition to any other fine, punishment, or proceeding which may be authorized by law."

The case of First International Bank v. Lee, 19 N. D. 10, 120 N. W. 1093, Ann. Cas. 1912D, 731, is also not in point, as the action was only for damages, and not one under any statute, and not one in amercement.

Opposed to these cases, and holding under similar statutes to that of North Dakota to the rule of absolute liability, which was adopted by the learned trial judge in the case at bar, are the cases of Hall v. Brooks, 8 Vt. 485, 30 Am. Dec. 485 (1836); Bond v. Weber, 17 Kan. 410; Duncan v. Drakeley, 10 Ohio, 45; Moore v. McClief, 16 Ohio St. 50; Henderson-Sturges Piano Co. v. Smith, 33 Okla. 335, 125 Pac. 454; Reid v. Dunklin, 5 Ala. 205; Cox v. Ross, 56 Miss. 481; Goodnow v. Willard, 5 Met. 517; Bachman v. Fenstermacher, 112 Pa. 331, 4 Atl. 546; Swain v. Phelps, 125 N. C. 43, 34 S. E. 110; Hawkins v. Taylor, 56 Ark. 45, 35 Am. St. Rep. 82, 19 S. W. 105; State ex rel. Thomas v. Youmans, 5 Ind. 280; Breuer v. Elder, 33 Minn. 147, 22 N. W. 622; Smith v. Martin, 20 Kan. 572.

In considering these statutes the language of Mr. Justice Brewer then on the supreme court of Kansas, which was rendered in the case of Bond v. Weber, 17 Kan. 410, is both conclusive and suggestive.

"If we give to this language its ordinary meaning, there can be but one conclusion. It is not that he *may* be amerced, but that he *shall* be. The duty of returning the execution within sixty days is expressly cast upon him; and a failure to perform that duty as expressly subjects him to amercement. *The terms of the statute imply no discretion.* The command is positive and peremptory. The amercement is not in com-

pensation, and to be measured by the extent of the injury but a penalty for neglect of duty, and of definite and fixed amount. Such were the views held in Ohio, from which state we took this statute. In Duncan v. Drakeley, 10 Ohio, 46, the court says: 'In proceedings under the statute authorizing the amercement of an officer, great strictness is required, and he who would avail himself of the remedy therein provided must bring himself both within the letter and spirit of the law. It is right that it should be so, *because the remedy is summary and in its consequences highly penal.* There is no trial by jury, and but little, if any, discretion left to the court. And again, after enumerating the cases in which an amercement may be had, it adds: 'While in an action at common law a plaintiff in any of these cases would recover only the damages actually sustained, by seeking his remedy under this statute he is sure to recover, if he recover at all, *the full amount of the debt,* with the additional penalty. *The object of the law is undoubtedly to induce fidelity on the part of a sheriff, but if carried into execution it sometimes operates very severely.*' So, also, in Moore v. McClief, 16 Ohio St. 50, the court uses this language: 'The plaintiff's right to demand a judgment of amercement in this case can rest on no equitable grounds, for the neglect of official duty of which she complains has done her no injury. The execution debtor was wholly insolvent when judgment was recovered against him, and has continued to be so ever since. Her rights then are purely statutory. *And if she makes a clear case for amercement under the statute, it is no defense against her claim that she had not been damnified.* The statute under which she proceeds is of a penal character; it affords a summary remedy, without trial by jury, for official delinquency; and without regard to the amount of damages resulting in fact from such delinquency, it leaves no discretion to the court as to the amount of the judgment to be rendered against the delinquent officer.' That the sheriff by his conduct in this case brought himself clearly within the terms of the statute is unquestioned. His counsel suggest nothing to the contrary, and we see nothing. True, no intentional wrong is shown; *but it is neglect, which the statute reaches and punishes,* and though it seems harsh and rigorous to impose the penalty, *yet there is the statute. Ita lex scripta est.* Its language is plain. Its meaning had been declared by the courts long before Kansas

was a state. *It grants no discretion. And it is as binding upon us as is any other command of the legislature.*"

The writer of this opinion will admit that he would like to set aside and to do violence to the plain language of the statute in question. The court, however, can only take such an action provided that it is sure that the language used, and as ordinarily construed, did not express the clear legislative intention and policy. What, then, are the two theories of such policy? In favor of leniency and a construction which shall do violence to the plain language of the statute is the argument of the supreme court of Nebraska in the case of Crooker v. Melick, 18 Neb. 227, 24 N. W. 689, that "it is the boast of our improved system of pleading and practice that the actual facts of every case may be pleaded and proved without regard to fictions or technicalities. This would be of little avail if, in cases like the one at bar, the law had closed the door of investigation, and ascribed to excusable neglect or unavoidable accident the same consequences of punishment and loss as those which follow criminal malpractice." And the argument in the case Smith v. Perry, 18 Tex. 510, 70 Am. Dec. 295, where the court says: "Temptation to seek to fix liability upon him will, of course, be in proportion to the difficulty of collecting the debt from the judgment debtor. In Kentucky, where it seems the insolvency of the defendant in execution has not been admitted as a defense under their statute, the court on one occasion remarked that executions have sometimes issued against men hopelessly bankrupt with no other design than to take advantage of some possible slip or omission of the officer of the law. . . . The officer ought not to be subjected to such perils and penalties for mere technical defaults, where no one has been injured, as that no discreet or judicious man would be willing to take upon himself the responsibility of the office. It cannot be supposed that the legislature intended, nor does the language of the statute require, a construction which would impose such penalties for the benefit of those who have not been injured by the dereliction of the officer. The primary object of the statute must have been to afford a redress for injuries. It could not have been intended to hold out a temptation and afford the opportunity to those who had sustained no injury, and consequently could have no real ground of complaint, to speculate upon the dereliction of the officer."

Another argument may be found in the suggestion of the court in the case of Smith v. Perry, supra, that the penalty could be collected even though the debt had been ultimately paid.

Opposed to these arguments, however, are the clear reading of the statute and the suggestion of Mr. Justice Brewer in the case of Bond v. Weber, 17 Kan. 410, that the statute does not say that he, the sheriff, *may* be amerced, but that he *shall be;* and on the ground of public policy the suggestions of the supreme court of Minnesota in the case of Breuer v. Elder, 33 Minn. 147, 22 N. W. 622, that "the procedure which the statute authorizes in cases of this kind is necessarily summary and rigorous. The courts must have control of their officers and power to compel the prompt and faithful execution of their processes. To permit an officer to whom judicial process is issued to set himself up as an independent authority, as such officers are sometimes inclined to do, and execute or not, at his pleasure and leisure or those of the judgment debtor, with impunity, would make the administration of justice a practical mockery."

Not only, indeed, does the plain reading of the statute seem to indicate this rule of absolute liability, but the nature of the summary proceeding which is provided for seems also to point to the same conclusion. It seems, indeed, inconceivable that if the legislature had intended an examination into the damages actually sustained and the value of the property which could or could not be reached by the execution, they would not have provided for a formal trial, and not for a mere summary proceeding.

It is true that some of the statutes which have been considered provide that the recovery shall be "the amount of the execution," and not, as does ours, that it shall be the amount of "the debt, damages, and costs." We can, however, see no distinction between these terms; nor is there any force in the argument of the supreme court of Texas in the case of Smith v. Perry, supra, that if the legislature had intended to enforce the duty as a public duty, it would have given the remedy to the state, and not to the individual, as such has not been the policy of our legislature. Section 6076, Compiled Laws of 1813, permits a debtor to recover twice the amount of the usurious interest charged, and the debtor is certainly not injured to this amount. Section 6749, Compiled Laws of 1913, provides for a forfeiture of $100 for the failure

to discharge a mortgage, and this in addition to the damages sustained. Jones v. Fidelity Loan & T. Co. 7 S. D. 122, 63 N. W. 553.

The rule of law may be harsh, but it is not of our making, and we are, as have been the courts of many other states, "reluctantly compelled, from a sense of duty, to tread in the path" which that legislature has made for us, and until such a time, if ever it shall be, when the body shall decree otherwise. Reid v. Dunklin, 5 Ala. 205.

The judgment of the District Court is affirmed.

On Petition for Rehearing.

BRUCE, J. A petition for a rehearing has been filed in which our attention is called to the fact that we omitted to pass upon appellant's objection that "there was no evidence offered, excepting the statements contained in the affidavits of Alexander and Gilmore, that any judgment supporting the execution (which was annexed to and made a part of the affidavit of the latter) was ever entered or docketed." Counsel for appellant argues that "the amercement of an officer is a proceeding penal in its nature, and the statute authorizing it must be strictly pursued both in regard to the proceedings and the facts authorizing it." See Milburn-Stoddard Co. v. Stickney, 14 N. D. 282, 103 N. W. 752; Duncan v. Drakeley, 10 Ohio, 46; 36 Cyc. 1188. He also argues that "where an execution plaintiff seeks to amerce a sheriff for a default in respect to the execution of his writ, he must show a valid judgment and the execution must conform strictly to that judgment." 35 Cyc. 1889.

All this we may concede, but it is quite clear to us that the purpose of the statute was to award to the execution creditor a speedy and a prompt remedy, and without any unnecessary formality. It is perfectly true that in such an action the complainant may be required to make strict proof of the execution and the judgment, but surely he is not compelled to prove that which the defendant admits, nor, after judgment and in the supreme court, to raise questions as to the insufficiency of the evidence which were not raised before the trial judge. No point was raised in the trial court whatever on the question of the identity of the judgment. The affidavit of J. P. Alexander stated that on the 28th day of May, 1914, a judgment was duly rendered, entered, and docketed

in a certain action wherein Martin T. Lee was plaintiff and John J. Brugman was defendant, in the district court for the county of Mountrail, for the sum of $975.01, and that thereafter an execution was issued on this judgment and delivered to the defendant, James Dolan, etc. The defendant in his answer admits that the execution described in the plaintiff's application was duly issued on June 22, 1914, and delivered to the defendant for service. He then goes on to state that the defendant had no property subject to execution. Attached to this answer is an affidavit by the defendant in which he states "that on or about the 22d day of June, 1914, there was delivered to him as sheriff an execution issued upon a judgment theretofore entered against John J. Brugman as defendant and in favor of Martin T. Lee as plaintiff in this court." The affidavit then goes on to offer excuses why a return was not made on said execution. Nowhere in the answer nor in the affidavits is there any pretense that the execution was not regularly issued and on a judgment regularly entered against the said Brugman. The presumption is that the parties in the execution and in the judgment were the same. State v. Kilmer, 31 N. D. 442, 153 N. W. 1089. There is also a presumption that the court was acquainted with its records. There was certainly a prima facie case made and there was no attempt to dispute it.

A rehearing has also been asked on the question whether the construction of the statute according to its natural language and import, and as announced in the principal opinion, renders such statute violative of the following clauses of the Constitution of the state of North Dakota.

"Excessive bail shall not be required, nor shall cruel or unusual punishment be inflicted." N. D. Const. § 6, art. 1.

"All laws of a general nature shall have a uniform operation." N. D. Const. § 11, art. 1.

"No person . . . shall be deprived of life, liberty or property without due process of law." N. D. Const. § 13, art. 1.

We are of the opinion that § 6 of article 1 is not violated. The recovery, though penal in its nature, is in no sense a fine, but merely the damages which the law adjudges to the individual as the consequence of the failure of an officer to discharge an official duty. See Porter v. Thomson, 22 Iowa, 391. The liability, though penal in its

nature, is not a punishment for crime. It is a condition upon the holding of the office, and a penalty not so much imposed, but agreed by the sheriff to be paid in the case of a failure of duty. The purpose of the statute is, it is true, to bring about a prompt and proper performance of duty. This, however, is accomplished not by the old means of technical amercement by which the officer was put *in misericordia* and in which case a fine was imposed upon him which was largely in the discretion of the court or of the jury (see Bouvier's Law Dict. 187, Notes to 2 C. J. 1319), but liquidated damages which the sheriff agrees to pay when he assumes office in case of a violation of his duty, and the liability for the payment of which results not only in the protection of the creditor, but in a proper discharge of the duties of the courts and of their officers and a consequent respect on the part of the public therefor.

The sheriff accepts office in short knowing of the statutes and of the results of a disobediance thereto, and his liability is accepted rather than imposed. Porter v. Thomson, supra. Such being the case, the constitutional provisions referred to do not apply, as they were intended to cover punishments rather than obligations, and to apply to what are commonly called criminal cases. Ex parte Watkins, 7 Pet. 573, 8 L. ed. 788.

It is to be noticed, indeed, that the Constitution of North Dakota makes no mention of penalties or obligations. It merely says that "cruel or unusual punishment" shall not be inflicted.

Even the provisions in the national Constitution upon the subject, and those which are to be found in the Magna Charta, cannot apply in cases of this kind. In the first place, the first ten Amendments to the Federal Constitution control Congress, and Congress alone, and not the legislatures of the several states. In the second place, the purpose of the framers of those instruments was to protect the individual against arbitrary and cruel legislative and judicial action, and against the tyranny of the courts, rather than to hamper those courts in the proper fulfilment of the duties which were imposed upon them. It was to restrain and control public officers, and for the protection of the people, rather than to excuse those public officers for remissness in duties. The constitutional provisions in short were for the protection of the people, and not for the protection of the legislatures or of the courts or their

officers. They were popular Bills of Rights; they were not official Bills of Rights. All that § 55 of the Magna Charta provided was that "illegal fines and amercements should not be insisted upon."

It is equally clear that the statute in question is not in violation of § 11, article 1, of the North Dakota Constitution, which provides that all laws of a general nature shall have a uniform operation. The statute applies uniformly to all sheriffs, and for reasons which are apparent makes a peculiar class of such officers. Classification is not necessarily class legislation. See Gunn v. Minneapolis, St. P. & S. Ste. M. R. Co. ante, 418, 158 N. W. 1004.

Nor is the statute in derogation of § 13, article 1, of the North Dakota Constitution, which provides that "no person shall . . . be deprived of life, liberty or property without due process of law."

No man has an inherent right to a public office nor can he be compelled to accept one. The legislature may therefore, except where restricted by the Constitutions, place upon the holding of a public office whatever obligations it pleases, and the applicant, by accepting the office, will be presumed to have accepted these conditions and obligations, and will be bound thereby.

Even if the statute were considered in the light of a criminal enactment, it would hardly be unconstitutional. It is true that for a small degree of moral turpitude a heavy penalty can be inflicted, and that the larger the judgment the greater that penalty is, and this though the neglect of duty is no greater in the case of the neglect to collect or return a large execution than a small one. This, however, does not invalidate the act. The word "cruel" as used in § 6 of article 1 of the Constitution of North Dakota, and as used in the Federal Constitution, has always been associated with physical pain and suffering. 2 Words & Phrases, 1765. There can be no claim that any physical suffering is involved in the penalty which is before us.

The only other word used is the word "unusual," and punishments or penalties such as that prescribed by the statute are not unusual. Punishments, indeed, which are based on the amount of the loss to the injured party, rather than on the degree of the moral turpitude of the offender, though unscientific, indefensible, and a survival of the age of personal vengeance and of "the eye for eye and a tooth for a tooth" theory of the law, are nevertheless everywhere to be found in our Codes,

and were to be found at the time of the adoption of the constitutional provision in question. They are not, and never have been, unusual.

We cannot invent constitutional provisions, nor can we set aside laws of our own initiative no matter how we may disapprove of them; and no matter how much we may disapprove of the personal vengeance and retributive theory of the criminal law, we must construe the constitutional provisions in the light of the thought which surrounded their enactment. Nor can we call that unusual which in fact was, and still is, customary. The moral turpitude in the stealing of $20 is often as great and greater than that involved in the stealing of $20.01, and yet the latter offense is made by statute grand, and the former petit, larceny. Comp. Laws 1913, § 9916. Statutes have everywhere been sustained which have punished embezzlement by a fine of twice and even several times the amount embezzled, regardless of that amount. The officers of municipal corporations have been held personally liable for judgments for which they have failed to levy taxes. Double damages for stock killed and property converted are, and for a long time have been, quite commonly allowed. Mims v. State, 26 Minn. 494, 5 N. W. 369; Porter v. Thomson, 22 Iowa, 391; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Ex parte Watkins, 7 Pet. 573, 8 L. ed. 788.

We see no reason for receding from our former order.

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

(159 N. W. 81.)

Common carrier — transportation with respect to — property — obligations — commerce with its delivery to carrier — acceptance — for transportation.

1. A common carrier's duties and obligations with respect to the transporta-

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Note.—Upon the question of liability of connecting carrier for loss beyond its own line, see note in 31 L.R.A.(N.S.) 1, referred to in dissenting opinion of case above.

The question of liability of receiving carrier for loss beyond its own line is also discussed in a note in 42 Am. Rep. 664.

tion of property commence with its delivery to and acceptance by him for that purpose.

Statutory rule — absence of — express stipulations — between parties — carrier — liability — bill of lading — owners of goods — complete delivery for transportation.

2. In absence of a statutory rule, or express stipulation between the parties, the carrier's primary liability does not depend upon whether a bill of lading has been issued, but upon whether there has been a complete delivery by the owner of the goods to the carrier for the purpose of transportation.

Bill of lading — receipt — delivery — not essential to — agent — evidence — proof of delivery.

3. A bill of lading or other receipt is not ordinarily essential to a complete delivery, but such instrument, when issued by an authorized agent of a carrier, is always competent evidence tending to prove that the property therein described was delivered to such carrier for shipment.

Bill of lading — receipt — contract — construction — different rules.

4. A bill of lading is at once a receipt and a contract. In its twofold character of receipt and contract, the bill of lading is subject to different rules of construction. In so far as it is merely a receipt, either party may explain or contradict it by parol evidence but as a contract it must be construed according to its terms.

Interstate commerce act — Carmack amendment — carriers — interstate transportation — receiving property for — loss — injury — beyond own lines — preceding carriers — liability.

5. The Carmack amendment to the Interstate Commerce Act makes a carrier who receives property for interstate transportation liable for loss or injury to such property beyond its own lines, but it does not make a carrier liable for the acts of preceding carriers, which may have resulted in loss of or injury to such property.

Local station agent — authority of — express or implied — contract of transportation — from places distant from such station — preceding carrier — acts of.

6. A local station agent, as such, has no power, without further authorization, express or implied, to bind his company by a contract to transport goods from places distant from such station and distant from defendant's line of railway; nor has such agent any authority to assume liability for acts of a preceding carrier.

Grain — value of — action to recover — common carrier — loss of grain — preceding carrier — while in possession of — defendant — not liable — special agreement — assumed responsibility — evidence.

7. Where plaintiff sues defendant for the value of certain grain alleged to

have been lost through defendant's negligence, while such grain was in the custody and under the control of, and upon certain boats owned and operated by, the defendant as a common carrier; and where the evidence shows that such grain was lost while in the possession of a preceding carrier and before the shipment had been delivered to or received by defendant, the plaintiff cannot be permitted to introduce evidence tending to show, or recover upon the theory, that the defendant, by special agreement, had assumed responsibility for the safety of such shipment while in custody of, and being transported by, such preceding connecting carrier.

Opinion filed July 22, 1916.

Appeal from the judgment of the District Court of Burke County, *Buttz,* Special Judge. Defendant appeals.

Reversed.

Palda, Aaker, & Greene (*Alfred H. Bright* and *John L. Erdall,* of counsel), for appellant.

"The duties and obligations of the common carrier with respect to the goods commence with their delivery to him; this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for loss. Hutchinson, Carr. 3d ed. § 105; Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990; Gass v. New York, P. & B. R. Co. 99 Mass. 220, 96 Am. Dec. 742.

"Where several connecting carriers establish and publish joint or through rates, that fact alone will not be sufficient to impose upon them a joint liability or render one of them responsible for the acts or omissions of the others." 1 Hutchinson, Carr. §§ 262, 263; Peterson v. Chicago, R. I. & P. R. Co. 80 Iowa, 92, 45 N. W. 573; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; Wehmann v. Minneapolis, St. P. & S. Ste. M. R. Co. 58 Minn. 22, 59 N. W. 546.

F. B. Lambert and *Geo. A. Gilmore,* for respondent.

"Whether an agent acted within the scope of his authority is a question of fact," and "agency and authority of agents are questions of fact." 1 Sutherland, Code Pl. Pr. & Forms, § 1127.

"Except as against the strict prohibitions of the Interstate Commerce Act, railroads may contract to do their business, or help such business, in the same manner and to the same extent as any other corporation." Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Such corporations, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827; Great Western R. Co. v. Blake, 7 Hurlst. & N. 987, 31 L. J. Exch. N. S. 346, 8 Jur. N. S. 1013, 10 Week. Rep. 388; Buxton v. Northeastern R. Co. L. R. 3 Q. B. 549, 9 Best. & S. 824, 37 L. J. Q. B. N. S. 258, 18 L. T. 795, 16 Week. Rep. 1124; Weed v. Saratoga & S. R. Co. 19 Wend. 534; Knight v. Portland, S. & P. R. Co. 56 Me. 234, 96 Am. Dec. 449; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 264, 24 L. ed. 693, 695; 1 Hutchinson, Carr. §§ 226, 228.

"An agent employed to solicit freight traffic has the implied authority to bind his principal for safe delivery at a point beyond his own line, and to contract over which road beyond such line the property shall be transported. Freemont, E. & M. Valley R. Co. v. New York, C. & St. L. R. Co. (Union State Bank v. Fremont, E. & M. Valley R. Co.) 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131.

"Where there was competent evidence before the jury that the railroad company undertook to carry property beyond its own line, and the jury have found such to be a fact, the other companies are deemed to be agents, for whose faults it is responsible. Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827.

"The giving and issuing of a receipt or bill of lading for the property to be transported to a place beyond the terminus of the road of the common carrier are evidence of a contract of such common carrier to transport such property to the place of destination. This prima facie case of the statute makes for the plaintiff on the facts stated." McCann v. Eddy, 133 Mo. 59, 35 L.R.A. 110, 33 S. W. 71; Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205.

"A railroad company has power and the right to contract as a common carrier to transport freight through another state, over another railroad beyond its own line." Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Ohio & M. R. Co. v. McCarthy, 96 U. S. 259, 24 L. ed. 693; Merchants' Dispatch Transp. Co. v. Bloch Bros. 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881.

Therefore, if a railroad or other transportation company can so contract, then, by analogy, it can contract and bind itself to be liable for damages on connecting railroads or lines, when such damages occur prior to its getting possession of the goods. Swift v. Pacific Mail S. S. Co. 106 N. Y. 206, 12 N. E. 583; Weed v. Saratoga & S. R. Co. 19 Wend. 534; Wylde v. Northern R. Co. 53 N. Y. 156, 5 Am. Neg. Cas. 189; Root v. Great Western R. Co. 45 N. Y. 524; Condict v. Grand Trunk R. Co. 54 N. Y. 500.

"A carrier which, by contract or by usage, solicits a compress company as its agent to receive cotton that is to be shipped over its road, and issues bills of lading therefor on presentation of the compress company's receipt, is in possession of the cotton when the bill of lading has been executed so as to be liable for the loss by fire." Deming v. Merchants' Cotton-Press & Storage Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

"A general western agent is held to have authority to bind the railroad company by special contract." Northern P. R. Co. v. American Trading Co. 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. Rep. 84; Thompson v. San Antonio & A. P. R. Co. 11 Tex. Civ. App. 145, 32 S. W. 427.

"A carrier may even contract to receive freight at a point not on its own line, so as to be liable for the negligence of the prior carrier." Noyes v. Rutland & B. R. Co. 27 Vt. 110.

CHRISTIANSON, J. This is an action to recover damages for certain wheat which plaintiff asserts he delivered, and defendant as a common carrier received, for the purpose of transportation; and which wheat, plaintiff asserts, was lost by reason of the negligence of the defendant and its employees, while in the possession and under the control of the defendant. The case was tried to a jury; a verdict was

returned in favor of the plaintiff, and defendant has appealed from the judgment entered upon the verdict.

The principal question presented on this appeal is whether plaintiff's cause of action was established. This question in turn involves a consideration of the issues raised by the pleadings and the admissibility of evidence thereunder.

Plaintiff's complaint alleges:

"1. That the defendant, at all of the times hereinafter mentioned, was, and since said dates has been and now is, a foreign corporation organized and existing under and by virtue of the laws of the state of Minnesota, and engaged in the owning, operating, and running of a line of railway from the city of Minneapolis, Minnesota, to Portal, North Dakota, as well as a line of boats on Des Lacs lake, a small inland waterway, extending from Kenmare, North Dakota, a small distance into the Province of Saskatchewan, Canada, and as such railway corporation engaged as a transportation company and inland common carrier of freight and passengers.

"2. That between the 25th day of September, 1910, and the first day of November of the same year, the defendant received from the plaintiff twelve (12) carloads of bulk wheat for transportation, eight (8) carloads of which were to be transported from points in North Dakota, to points in another state, and four (4) carloads of which were to be transported from Boscurvis, Saskatchewan, Canada, in through North Dakota, to points in other states; that for each of said shipments the defendant issued, signed, and delivered to the plaintiff a bill of lading; that plaintiff was and is the owner and consignor of all of such grain; that during its transportation the plaintiff did not accompany such grain or shipments, nor did he retain, or attempt to retain, or exercise any control over it whatsoever, but from the time of the shipments of such grain from the different shipping points the defendant, its agents, and servants had full and exclusive control thereof.

"3. That at Kenmare, North Dakota, between the dates hereinbefore mentioned, while such grain was being transported according to the contract between plaintiff and defendant, and while it was in the possession and under the exclusive control of the defendant, its servants, employees, and agents, it became necessary, in order to com-

plete such transportation according to contract, that such bulk wheat be transferred from boats on Des Lacs lake to cars on defendant's track at Kenmare, North Dakota; that in making such transfer the defendant, its agents, employees, and servants carelessly and negligently, through the employment and use of improperly constructed and out-of-repair machinery and devices for unloading grain, and through their negligence and lack of care in operating the same, the said defendant, its agents, servants, and employees, allowed and caused one thousand (1,000) bushels of wheat in bulk, of the value then and there of ninety-four (94) cents per bushel, or nine hundred and forty dollars ($940) in all, to be deposited and dumped in Des Lacs lake, where it became embedded in the mud and covered by the water of said lake, thereby losing and totally destroying the same and the whole thereof, to the plaintiff's damage in the sum of nine hundred and forty ($940) dollars.

"4. That no part of the said one thousand bushels (1,000) of bulk wheat delivered by plaintiff to defendant for transportation as hereinbefore alleged and dumped in said lake has ever been delivered by defendant to the consignees of said grain, nor has it or its value, or any part thereof, ever been delivered to or accounted for by defendant to the plaintiff although often demanded previous to the commencement of this action.

"Wherefore, plaintiff prays judgment against the defendant for the sum of nine hundred and forty dollars ($940) with interest thereon at the rate of 7 per cent per annum (7%) from and after the first day of November, 1910, together with his costs and disbursements of this action."

The answer admitted defendant's corporate existence, and also admitted that during the times mentioned it owned and operated a line of railway extending from the city of Minneapolis in the state of Minnesota to Portal in the state of North Dakota, but expressly denied all other allegations of the complaint.

The following facts were indisputably established by the evidence in this case: That the plaintiff, during the fall of 1910, operated certain grain elevators at Newport and Paisley, North Dakota, and Boscurvis, Saskatchewan, all being situated on the shores of Des Lacs lake. That such lake points were all situated a considerable distance away from any railway line owned or operated by the defendant. That

a corporation known as the Des Lacs Lake Navigation Company owned and operated a boat or barge line between the lake points named and Smith's (landing), the latter place being located about 3 miles from Kenmare. That the defendant railway company had constructed a sidetrack or spur from its main line at Kenmare, North Dakota, to Smith's (landing). That such spur or sidetrack was originally constructed through the solicitations of the officers of the navigation company, and under an agreement whereby the navigation company was to reimburse the defendant railway company for the expense of building said spur track by allowing the defendant to retain the navigation company's share of the freight receipts to the extent of $1,000, but that in event the business continued thereafter, the railway company would repay said $1,000 to the navigation company by paying to it 10 per cent of all moneys received by the railway company for shipments of freight received by it over said spur track.

The defendant railway company published a schedule of freight tariffs of 22 cents per hundredweight for shipments of wheat between the above-mentioned lake points and Minneapolis and Duluth respectively. By an agreement between the navigation company and the defendant railway company it was provided that the navigation company should receive 5 cents per bushel (for wheat and certain other kinds of grain) as its proportionate share of such through tariff, and the railway company the balance.

(The proper division of such joint or through rate between the defendant railway company and the navigation company was one of the questions discussed in Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 33 N. D. 291, 156 N. W. 1019. While this question is of no particular moment in the instant case, it may be stated that the evidence in this case is all to the effect that the navigation company was to receive 5 cents per *bushel,* for wheat and certain other kinds of grains, of such through rate.)

The apparatus for transferring the grain from the navigation company's boats to the defendant's cars at Smith's (landing) was also owned by the navigation company. The entire equipment of the navigation company was owned solely by such company, and the defendant railway company owned no part thereof. The men who operated the boats

and transacted the business of the navigation company were the employees of such company alone. No part of the operation expenses of the navigation company was borne by the defendant, although there is evidence to the effect that defendant's attorney at one time advanced $50 for the purpose of repairing one of the barges; but there is also evidence to the effect that plaintiff advanced about $250 to pay wages due to certain employees of the navigation company. In short, the navigation company and the railway company were independent carriers, and there were no relations between them except the agreement relative to the construction of the spur or sidetrack, and the agreement for the division of the through tariff or freight charges.

During September and October, 1910, the plaintiff shipped certain wheat from his elevators at the three lake points above-mentioned. Such wheat was transported upon the barges of the navigation company from the different lake points to Smith's (landing), where it was transferred from the barges and loaded upon the cars of the defendant railway company, and forwarded to its destination. Neither the navigation company nor the railway company had any agents at the lake points, nor were any bills of lading issued by the navigation company for any of the shipments. But after the grain had been loaded upon the defendant's cars at Smith's, the plaintiff or some one acting for him billed such shipments and received from the defendant's agent at Kenmare bills of lading therefor. It is conceded, however, that no bill of lading was ever issued by the defendant for any shipment until after the grain actually had been loaded into the cars of the defendant railway company at Smith's (landing), and the different bills of lading issued by the defendant described by number the particular car in which such grain had been loaded.

The original bills of lading were not produced upon the trial, but plaintiff offered in evidence certain receipts or memoranda, which, it is asserted, contain all the provisions embodied in the original bills of lading. Such receipts or memoranda show shipments as follows:

September 29, 1910, two carloads from Boscurvis, Saskatchewan, to Kingston, Ontario;

October 13, 1910, two carloads from Paisley to Minneapolis;

October 20, 1910, two carloads from Boscurvis, Saskatchewan, to Kingston, Ontario;

October 22, 1910, two carloads from Newport to Duluth;

October 27, 1910, two carloads from Newport to Duluth;

October 29, 1910, two carloads from Newport to Duluth.

The face of the receipt for the first shipment reads as follows:

For use in connection with the Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908.

Des Lacs Lake Navigation Co.
Minneapolis, St. Paul, & Sault Ste. Marie Ry.

Shippers No.....

This Memorandum is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

Agents No.....

Received subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

at Boscurvis, Sask., Sept. 29, 1910, from D. C. Knapp, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from .....
to.....is in cents per 100 lbs.

Consigned to Barnum Grain Co. .....
Destination Kingston, ...State of Ont. ....County of .....
Route c/o Great Northern Elev. Co. Superior, Wis. Car Initial Soo, Car No. 25,636.

No. Packages	Description of Articles and Special Marks	Weight
	Wheat	60000
	Bonded	Capacity

D. C. Knapp, Shipper. .....Agent.
Per ..... Per .....

Among the conditions appearing on the back, and made part of such receipt, were the following: "Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from such liability so imposed. Section 5. . . . Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to, and after they are detached from, trains." The receipt is a printed form used by the defendant railway company, but the words, "Des Lacs Lake Navigation Co.," appearing at the top are in writing, and were written at the same time the blanks in the body of

the instrument were filled in. The receipts for all the other shipments are in the same form, with the exception that in four of them the words, "Des Lacs Lake Navigation Co.," do not appear at the top of the receipts, but are inserted in the body of the instrument, in the blank space immediately following the word "route." Hence every receipt, and consequently, according to plaintiff's own contention, every bill of lading, on its face refers to the Des Lacs Lake Navigation Company.

Upon the trial plaintiff was permitted to testify (over objection) to an alleged conversation, or conversations, between himself and one Cole, whom plaintiff asserts was a soliciting or traveling freight agent of the defendant. Plaintiff claims that he first learned of the elevators at the three lake points through Mr. Cole; that Cole informed him that they were good points; and that Cole quoted him a rate of 22 cents per hundredweight from the lake points to Minneapolis or Duluth, grain to be shipped over the Soo line; that plaintiff agreed to go down and look the proposition over and afterwards went to Kenmare for the purpose of doing so and made a trial trip on the boat.

The record shows that the following colloquy took place between the court and plaintiff's counsel at the time this evidence was first offered:

The Court: What is the object of this examination?

Mr. Lambert: The object is to simply show that the Soo Railroad ran that line of boats over there, made the contract, got him to go over there, went up and showed him the—

The Court (interrupting counsel): The object is to show agency, isn't it?

Mr. Lambert: We figure we have the agency established, we want to show the Soo line operated that line of boats over there.

On the presentation of defendant's case, the defendant, among others, offered the testimony of one Von Neida, the secretary of the Des Lacs Lake Navigation Company, and it was clearly and indisputably shown that the defendant railway company in no manner owned or operated the boat line, and in fact had absolutely nothing to do with it, but that the boat line was owned and operated wholly by the Des Lacs Lake Navigation Company. Mr. Von Neida also

testified that he was on one of the boats with Mr. Knapp at or about the time the boat made its first trip that fall, and that at that time he had a conversation with Mr. Knapp relative to the transportation of the grain. Von Neida's testimony was in part as follows: "This was the initial trip of the boats for that year. We went up there for the purpose of looking over the depth of the water, particularly at the elevator landing, and the new unloading device that we had at the lower end of the lake. I told Mr. Knapp at that time that we had tried to operate both the elevator business and the navigation business the preceding year, and that it was too much for one concern to handle, and I told him what my relationship was with the boats, and what percentage of the through rate that the railway company got, and I told him that we got 5 cents of the through rate from these points through to Minneapolis and Duluth. I also told him that we had been short of funds the year before, that some accounts had not been paid, and that I had made arrangements to borrow $2,000 from Dr. Ringo at Minot, through Mr. Palda, and that that money had been promised and we would be in shape, some of it we had had, and expended, and that we hoped to be in shape to handle the grain, and I tried to induce him to take the proposition of handling the elevators."

Von Neida's testimony was afterwards stricken out by the court. But the plaintiff Knapp was afterwards called, and testified in rebuttal as a witness in his own behalf, in part as follows:

Q. Now this trip that Mr. Von Neida testified about your going up the lake with him, that was after you had had your first conversation with Mr. Cole, was it?

A. Yes, sir.

. . . . . .

Q. What happened between you and Mr. Cole after that?

A. Mr. Cole came to Portal and called me over by phone, and I told him then that the proposition did not look very good to me, and he assured me that the Soo Line would take care of me. They had expended a great deal of money, and there was no question but the thing would go well, and I told him if he would guarantee it I would go ahead.

Q. Was there anything said about the Soo giving a receipt all the way through?

A. Yes.

Objections were interposed by defendant's counsel to the testimony relative to such conversations. The defendants also moved for a directed verdict at the close of plaintiff's case, and at the close of all the testimony. Both motions were denied and the cause submitted to the jury. In its instructions to the jury the trial court said: "Gentlemen of the Jury, this case resolves itself first into a question of just what the contract was between the plaintiff and defendant with reference to the hauling of this grain, whether it was a contract that defendant should take and carry this grain from these different lake ports, Boscurvis, Newport, and Paisley, and transport it to destination, or whether they simply agreed or were to take it from the place where it was unloaded from the vessels onto the cars, as to what the contract was between Mr. Knapp and the railroad.

"Now Mr. Knapp claims that the contract was, they were to take the grain and become good for it or responsible for it from the time that it left the lake ports; while on the other hand the defendant claims they had nothing to do with the grain while it was on the lake at all, and that they had nothing to do with it until they received it on board their cars near Kenmare, North Dakota, and until they actually took possession of the cars themselves while putting the cars into their train.

"Mr. Knapp, you will remember claims that Mr. Cole was the agent of the Soo line, and he claims that Mr. Cole came up to Portal to see him about this very matter, and made representations to him, and as to what the evidence is on that point you will remember. . . .

"Of course if Mr. Cole was not the agent of the railroad company to make the contract with the plaintiff to carry this grain, he would have no power whatever to bind the defendant in any manner. If he did not have power or authority to make that sort of a contract, even though he might have been the company's agent for some other purpose, . . .

"In addition to that (general verdict) I am going to submit to you three special findings: First. What was the value of the grain

lost by plaintiff at the time and place of unloading the grain from its boats to the cars.

"Second. Was W. A. Cole the agent for the defendant company for the purpose of making a contract with the plaintiff to carry the grain from Newport, Paisley, and Boscurvis to destination.

"Third. Did W. A. Cole make a contract with the plaintiff to carry said grain from said towns to destination.

"In addition to your general verdict you will answer those three questions."

The jury returned affirmative answers to interrogatories numbered 2 and 3, and fixed the value of the wheat lost in answer to interrogatory No. 1, and also returned a general verdict for $853.50. Judgment was entered pursuant to the verdict, and the defendant has appealed from the judgment.

The principal errors assigned are based upon the rulings of the trial court in the admission of certain testimony relative to the alleged conversations between the plaintiff and Cole, and the denial of the motions for a directed verdict.

Plaintiff sought to establish defendant's liability by the following evidence: (1) The receipts for the shipments issued by defendant's agent at Kenmare. (2) Proof of certain conversations with defendant's agent Cole. And in their final analysis, the various assignments of error resolve themselves into, and require a determination of, these questions: (1) Did the receipts offered in evidence establish the fact that the defendant railway company received the wheat as a common carrier at the lake points, and hence was responsible for the proper transportation thereof from such lake points? (2) Was plaintiff entitled to introduce evidence tending to show, and recover upon the strength of, a prior parol contract with an agent of the defendant railway company, binding it to be responsible for the safety of such wheat while it was being transported by a preceding connecting carrier? We will discuss these propositions in the order stated.

There is no contention on the part of the plaintiff that any of the grain was lost after it had been loaded upon the cars of the defendant railway company. It is conceded that the grain, for the loss of which plaintiff seeks to recover herein, was lost on account of some defect in, or improper operation of, the appliances used by the navigation

company to hoist the grain from the barges to defendant's car. Plaintiff's position is stated as follows in his brief on this appeal: "Plaintiff does not claim that the wheat actually entering the cars belonging to the defendant was lost, but he does claim that the wheat actually and irrevocably turned over to the defendant at stations along the lake was lost after the plaintiff had relinquished all control over it, and after the defendant had commenced transportation under its contract made by the general agent of the defendant orally and afterwards confirmed by the written bills of lading, exhibits 1 to 12. We contend that the mere fact that the manual labor in handling the grain along the lake was done by persons not in the direct employ of the defendant is wholly immaterial so long as it was done under a contract with the defendant."

There is no controversy as to the facts with respect to the issuance of the shipping receipts. It is conceded that in every instance such shipping receipts were issued by the station agent at Kenmare, only after the wheat had actually been loaded upon the different cars of the defendant railway company described in the various shipping bills. There is no claim made, or evidence offered to show, that the station agent at Kenmare had any authority, either actual or ostensible, except such as his employment as station agent conferred upon him. Plaintiff's contention that the shipping receipts show a contract on the part of the defendant railway company to transport the wheat from the lake points rests primarily on the fact that the shipping receipts recite that the wheat was received at Newport, Paisley and Boscurvis, respectively.

While, ordinarily, a common carrier does, or even may be required to, issue bills of lading for goods delivered to it for transportation, yet, in the absence of a statutory rule on the subject or express stipulation between the parties affecting the conclusiveness thereof, the issuance of a bill of lading does not render a carrier liable unless, or until, the property described therein is delivered to it for transportation. Conversely it may be stated that the carrier is not relieved from liability because it has not issued a bill of lading for property actually delivered to and accepted by it for transportation. In short the existence or nonexistence of primary liability on the part of the carrier does not depend upon whether a bill of lading has been issued, but

such liability depends upon whether there has been a complete delivery to the carrier by the owner of the goods for the purpose of transportation. 5 Am. & Eng. Enc. Law, 187; 4 R. C. L. 695; Michie, Carr. § 407; Missouri, P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990.

The common carrier's duties and obligations with respect to the transportation of property commence with its delivery to and acceptance by him for that purpose. The point of time marking the carrier's liability is therefore that moment when the shipper surrenders the entire custody of his goods, and the carrier receives complete control of them, for the purpose of shipment. The duty and obligation respecting the care and safety of such goods rests wholly either upon the owner of the goods or upon the carrier. The law recognizes no division of such duty or obligation. Until it has become placed upon the carrier by a delivery to and acceptance by him, he cannot be held responsible, but the responsibility rests upon the owner; after the delivery to the carrier is complete he alone is responsible, and no duty or obligation rests upon the owner. 4 R. C. L. 688, 690; Hutchinson, Carr. 3d ed. § 105; 6 Cyc. 412, 414; Michie, Carr. § 400. An owner who delivers, and a carrier who accepts, property for transportation, delivers or accepts the same subject to the duties and obligations imposed by law. The only way in which such duties or obligations can be varied, limited, or extended is by special contract between the parties. 5 Am. & Eng. Enc. Law, 187; 4 R. C. L. 695; Michie, Carr. § 407. This rule is in harmony with and recognized by § 6212, Compiled Laws, 1913, which reads: "A bill of lading does not alter the rights or obligations of the carrier as defined in this chapter unless it is plainly inconsistent therewith." But, although not conclusive upon the parties, still a bill of lading issued by an authorized agent of a carrier is always competent (and generally prima facie) evidence, tending to prove that the property therein described was delivered to such carrier for shipment. Michie, Carr. § 411; 5 Am. & Eng. Enc. Law, 188.

Ruling Case Law (4 R. C. L. 695), states the rule to be as follows: "A bill of lading or other receipt is not ordinarily essential to a complete delivery, but as such an instrument is merely evidence that the carrier has received possession of the property, this fact may be shown by any other legitimate evidence. Conversely, it may be stated that

the mere signing of a receipt or bill of lading does not transfer possession of freight to a common carrier, and consequently such an instrument is not conclusive, but only prima facie, evidence of its receipt. So it is conceded, seemingly without controversy, that where a ship master or carrier's agent issues a bill of lading for goods no part of which is ever delivered to the carrier, the bill of lading is invalid in the hands of the pretended shipper to whom the carrier delivers it, and creates no liability on the part of the carrier in his favor. Also it appears that at least as between shipper and carrier, such a receipt may be contradicted as to the quantity of goods received or their condition when shipped."

The shipments involved in this action were all interstate shipments, and hence within, and controlled by, the provisions of the Acts of Congress relative to Interstate Commerce in so far as such acts are applicable. Southern P. Co. v. Crenshaw, 5 Ga. App. 75, 63 S. E. 865; State ex rel. Railroad Commission v. Adams Exp. Co. 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966. And the question as to the proper construction of the bills of lading for such interstate shipments is a Federal one, and subject to review as such by the Federal Supreme Court. Georgia, F. & A. R. Co. v. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541. There is no contention, however, that the Acts of Congress define a bill of lading, prescribe its form, or give to it any additional or unusual contractual or evidentiary effect.

As comprehending all methods of transportation, a bill of lading has been defined by the courts and text-writers as a written acknowledgment of the receipt of goods, and an agreement to transport and to deliver them at a specified place to a person named or on his order. 4 R. C. L. 3; Bouvier's Law Dict.; Whitnack v. Chicago, B. & Q. R. Co. 82 Neb. 464, 19 L.R.A.(N.S.) 1011, 30 Am. St. Rep. 692, 118 N. W. 67; Davis v. Central Vermont R. Co. 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. 313. And under the laws of this state "a bill of lading is an instrument in writing signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place." Comp. Laws 1913, § 6209.

The Interstate Commerce Act as amended (June 29, 1906) pro-

vides "that any common carrier, railroad or transportation company *receiving* property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass. . . ." (34 Stat. at L. 595, chap. 3591, Comp. Stat. 1913, § 8592, Fed. Stat. Anno. Supp. 1909, pp. 273, 274.)

And Section 10028, Compiled Laws of North Dakota, provides: "Every person being the master, owner or agent of any vessel, or officer or agent of any railroad, express or transportation company or otherwise being or representing any carrier, who delivers any bill of lading, receipt or other voucher, or by which it appears that any merchandise of any description has been shipped on board any vessel or delivered to any railroad, express or transportation company or other carrier, *unless the same has been so shipped or delivered, and is at the time actually under the control of such carrier, or the master, owner or agent of such vessel, or of some officer or agent of such company,* to be forwarded as expressed in such bill of lading, receipt or voucher, is punishable by imprisonment in the penitentiary not less than one and not exceeding five years, or by a fine not exceeding $1,000, or both."

The above quoted statutory provisions, both state and Federal, clearly contemplate that bills of lading shall be issued only for goods which have actually been received by, and are in the possession of, the carrier at the time the bill of lading is issued.

A bill of lading is said to be an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property delivered to a carrier for transportation. In the latter, it is a contract to carry safely and deliver. See Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Missouri P. R. Co. v. McFadden, 154 U. S. 155, 38 L. ed. 944, 14 Sup. Ct. Rep. 990; Elliott, Railroads, § 1415; Michie, Carr. §§ 473–476.

And "in its twofold character of receipt and contract the bill of lading is subject to different rules of construction. In so far as it is merely a receipt either party may explain or contradict it by parol,

but as a contract it must be construed according to its terms." See Elliott, Railroads, § 1415.

Cyc. (6 Cyc. 421) says: "A bill of lading is an instrument twofold in its character; it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. It states the terms of the shipment, anl also specifies the quantity of goods received, and sometimes their condition. While it may not, as already stated, be varied by parol evidence so far as it embodies the terms of the contract, yet, so far as it constitutes a receipt, it is like other receipts or written acknowledgments, subject to be contradicted or explained by proof as to the facts. Thus a bill of lading is evidence of the receipt of the goods by the carrier, but may be contradicted by evidence that no goods were received. Authorities agree without dissent to the proposition that recitals in the bill of lading as to the quantity of goods received by the carrier may be contradicted as between the parties by parol evidence showing a less quantity to have been delivered."

Ruling Case Law (4 R. C. L. 17, 18), states the rule to be as follows: "So far as a bill of lading is a receipt, it has the same character as other receipts, and is subject to the same principles of law. There is no more solemnity in its execution nor any more importance to be attached to it than to other instruments of a like nature. It may be stated generally that the receipt clauses in a bill of lading are subject to explanation, variation, or contradiction by parol evidence, as the general rule applicable to the admissibility of parol evidence to vary a written contract is not applicable to such clauses. The fact that both a contract and a receipt are embodied in the same instrument forms no reason why they should be regarded as differing in effect from similar instruments executed in an independent form. The clauses in a bill of lading which relate to the quantity and condition of the goods received do not enter into the contract between the parties and are explainable by parol." See also Michie, Carr. §§ 473–476.

As has been noted above, the authorities are agreed that, ordinarily, at least as between the original parties, the recitals in the shipping receipt relative to the kind, quantity, and condition of the goods received for shipment are construed as a receipt, and, hence, subject to the rules

of evidence applicable to receipts. Obviously the recitals relative to the time and place the goods were delivered to the carrier for transportation are equally a part of the receipt clause in the instrument, and subject to the rules of construction applicable to receipts.

While common carriers are required to carry all goods offered to them in the usual course of business, yet under the rule announced by the great weight of authority in this country a carrier is not "bound by law to accept and carry goods beyond the terminus of its own line. In the absence of any agreement, either express or clearly implied, for transportation beyond its own line, the common-law duty of an independent carrier is performed by safely transporting the goods over its own line and delivering them to the consignee or connecting carrier, as the case may be. If, in such a case, the goods are merely to be delivered by the initial carrier to a connecting carrier for further transportation, the former is considered as a forwarding agent rather than a carrier as to such further transportation, and is not liable for the default of subsequent carriers." Elliott, Railroads, 2d ed. § 1432. See also 6 Cyc. 374; 4 R. C. L. 875. The above-quoted rule is in harmony with, and practically covered by, § 6259, Comp. Laws 1913, which provides: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address, or connected with those who thus carry *and his liability ceases upon making such delivery.*"

Of course, all state laws are *pro tanto* superseded, and interstate shipments controlled, by the Carmack amendment to the Interstate Commerce Act, whereby a carrier receiving property for interstate transportation is made liable for loss or injury to such property anywhere en route, with a remedy over against the carrier at fault. The Carmack amendment, however, in no manner attempts to make a subsequent or terminal carrier liable for the acts of a preceding carrier. See Michie, Carr. § 3653. The Carmack amendment has no application to, and places no additional liability upon, the defendant in this case.

In determining whether a contract made for the carrier by an agent is binding, the principles of agency are applicable, and if the contract is within the general scope of authority of the agent, the

carrier will be bound thereby. 6 Cyc. 431. And conversely a carrier will not be bound by a contract outside of the general scope of authority of such agent, unless it is shown that the agent had express authority to make such contract. 6 Cyc. 432. An agent has such authority as the principal actually or ostensibly confers upon him. Comp. Laws 1913, § 6336. Actual authority is such as a principal intentionally confers upon the agent or intentionally or by want of ordinary care allows the agent to believe himself to possess. Comp. Laws 1913, § 6337. Ostensible authority is such as the principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. Comp. Laws 1913, § 6338.

There is no contention that the station agent at Kenmare had any authority, either actual or ostensible, greater than that conferred upon him by virtue of his general employment as station agent. The question, therefore, is presented, whether he, as such station agent, had authority to bind his principal, the defendant railway company, by contract either to carry goods from the lake points, or to be responsible for their safety, while they were carried upon the boats of the Des Lacs Lake Navigation Company.

In construing a statute identical with § 6259, supra, the South Dakota supreme court held that a station agent, as such, had no authority to contract for shipments over connecting lines, nor could his authority to do so be inferred from the fact that he collected freight for the entire distance. Sutton v. Chicago & N. W. R. Co. 14 S. D. 111, 84 N. W. 396; Coates v. Chicago, M. & St. P. R. Co. 8 S. D. 173, 65 N. W. 1067.

This is also recognized as the correct rule by the various textwriters. "We will see hereafter that the weight of authority in this country is that the carrier receiving goods for transportation to a destination beyond his own line impliedly contracts as carrier only for his own line, and in jurisdictions where this is the rule it is evident that an agent attempting to contract for transportation over a connecting line is exceeding his ordinary authority as agent of the receiving carrier, and his principal is not bound by such contract in the absence of express authority." 6 Cyc. 432.

"A local station agent's authority extends only to the control of the carrier's business at his own station. Such agent has no implied au-

thority to make any contract which will bind the company with reference to freight to be received at a different station than his own; when he attempts to do so, his act, until ratified, will not bind the company. This is in harmony with the well-settled rule that a principal is not bound by a contract made by an agent that is not within the actual or apparent scope of the agent's authority. The existence of express authority to make such contract is susceptible of proof." Michie, Carr. § 625.

"Prima facie the person in charge of a station at one place (station agent) has no power to act for the railway company in reference to the making of a contract of shipment to his station from another station on the railroad. Nor would it be the duty of the station agent receiving notice relating to a shipping contract made elsewhere, to transmit such notice to agent at the station at which the shipment was made. His failing to do so would involve the road in no liability." Michie, Carr. § 626. See also McManus v. Chicago G. W. R. Co. 138 Iowa, 150, 128 Am. St. Rep. 180, 115 N. W. 919; McLagan v. Chicago & N. W. R. Co. 116 Iowa, 183, 89 N. W. 233; Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998; Ætna Nat. Bank v. Water Power Co. 58 Mo. App. 532.

In order to hold defendant liable under the bills of lading, we must hold that the station agent at Kenmare, by virtue of his general authority as such, had authority to bind his principal, the defendant railway company, to carry goods from points distant from such station and distant from defendant's line of railway; and had authority to assume a liability then existing for goods which had been lost through the negligence of a preceding carrier before the bills of lading were issued. We are agreed that these acts were not within the general scope of his authority as such station agent.

The next question presented is whether the court erred in permitting plaintiff to introduce evidence tending to show a prior parol contract with the defendant's freight agent, Cole.

We have hereinabove set out plaintiff's complaint in full. It will be noted that it alleges that the defendant, railway company, owned and operated the boat line. If this had been the fact, then, of course, the questions presented for our determination on this appeal would not have arisen. But, as already stated, the evidence disclosed that the

boat line was owned and operated, not by the defendant, but by the Des Lacs Lake Navigation Company, an independent, connecting carrier. The complaint makes no reference to any special contract. In fact the only references in the complaint to any agreement to transport the wheat are the following clauses: "That for each of said shipments the defendant issued, signed, and delivered to the plaintiff a bill of lading;" and "that at Kenmare, North Dakota, between the dates hereinbefore mentioned, while such grain was being transported according to the contract between plaintiff and defendant, . . . it became necessary, in order to complete such transportation according to contract."

The bills of lading are not set out in the complaint, nor is there anything said to indicate that the statutory or common-law rights or obligations of the parties were in any manner altered by any conditions or stipulations in the bills of lading. Hence it must be presumed that they were not altered, as the rights or obligations of a carrier are not altered by a bill of lading unless the stipulations in the bill of lading are plainly inconsistent with the rights and obligations created by operation of law. Comp. Laws 1913, § 6212.

The complaint charged the defendant with a breach of duty. The injury for which plaintiff seeks to recover is alleged to have been occasioned by the fact that "in making such transfer (transferring the wheat from the boats to the cars) the defendant, its agents, employees, and servants carelessly and negligently through the employment and use of improperly constructed and out of repair machinery and devices for unloading grain and through their negligence and lack of care in operating the same, . . . caused 1,000 bushels of wheat to be deposited and dumped in Des Lacs lake." "Plaintiff's complaint stated a cause of action *ex delicto,* and charged a violation of the common law duties of a carrier." Cooke v. Northern P. R. Co. 22 N. D. 266, 270, 133 N. W. 303.

No legal duty, statutory or otherwise, rested upon the defendant to carry plaintiff's grain from the lake points or to assume responsibility for its safety while it was being transported upon the barges of the Des Lacs Lake Navigation Company. An obligation to do so under the undisputed facts in this case could not possibly exist by virtue of any legal duty which the defendant owed to the public in general, but if it existed

at all, it existed by virtue of a special contract between the plaintiff and the defendant. As already stated, the complaint does not allege any such contract to exist, but charges defendant with violation of its duties as a carrier while transporting goods upon its own lines.

It may be considered a settled point, on principle and authority, that the nature of the cause of action is determined by the allegations of the complaint, so that the inquiry need never extend beyond this first pleading in this suit. Pom. Code Rem. § 559.

The complaint is intended to form the foundation of the proof to be submitted by the plaintiff upon the trial, and should advise the defendant what the plaintiff relies upon as a cause of action. 31 Cyc. 43.

Pomeroy (Pom. Code Rem. § 554) says: "The very object and design of all pleading by the plaintiff, . . . is that the adverse party may be informed of the real cause of action . . . relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint . . . fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action . . . must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading. It frequently happens, however, and from the very nature of the case it must happen, that the facts as proved do not exactly agree with those alleged. To determine the effect of such a disagreement we must recur to the reason and object of the rule, and they furnish a certain and equitable test. If the difference is so slight that the adverse party has not been misled, but, in preparing to meet and contest the case as alleged, he is fully prepared to meet and oppose the one to be actually proved, then no effect whatever is produced by the variance; to impose any loss or penalty on the pleader would be arbitrary and technical. In the second place, the difference, while it does not extend to the entire cause of action . . . may be so great in respect to some of its particular material facts as to have misled the adverse party, so that his preparation in connection with that particular is not adapted to the proofs which are produced. In such circumstances an amendment is proper because the variance is partial, but it is obviously equitable that terms should be imposed.

Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action . . . as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint . . . is the only equitable result. It should be noticed that, in order to constitute this total failure of proof, it is not necessary for the discrepancy to include and affect each one of the averments. A cause of action as stated on the pleadings might consist, say, of five distinct issuable or material facts; on the trial four of these might be proved as laid, while one so entirely different might be substituted in place of the fifth that the cause of action would be wholly changed in its essential nature."

In Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 303, this court held that where a plaintiff elects to bring an action based upon the violation of the common-law duties of a carrier, he cannot be permitted to recover where it is shown that the relation between the parties are governed by a special contract. See also Normile v. Oregon R. & Nav. Co. 41 Or. 177, 69 Pac. 928; Bedell v. Richmond & D. R. Co. 94 Ga. 22, 20 S. E. 262; Gulf, C. & S. F. R. Co. v. Darby, 28 Tex. Civ. App. 229, 67 S. W. 129.

The principle enunciated in Cooke v. Northern P. R. Co. supra, is directly applicable here. In the case at bar defendant was advised by the complaint that plaintiff sought to recover damages for the loss of grain, lost while the same was in the custody and under the control of the defendant upon boats owned and operated by the defendant; but upon the trial he was permitted to introduce evidence tending to show, and recover upon the theory, that defendant, by reason of a special contract, was responsible for the safety of such shipments, not only over its own lines, but also over the lines of an independent connecting carrier over whose line the shipments were first transported. We are agreed that this evidence was variant from, and inadmissible under, the complaint.

Whether plaintiff has shown a right to recover damages for breach of a special contract is a question upon which we express no opinion as it is not involved, nor is it a proper issue, herein. It follows from what we have said above that the judgment below must be reversed, and the action dismissed.

Respondent also submitted a motion for dismissal of the appeal. The

notice of such motion, served upon appellant's counsel, recited that plaintiff, at a stated time and place, would move "for a dismissal of the above-entitled action . . . for lack of prosecution in that no brief has been served or filed by the appellant in said action. If the above-entitled appeal is being prosecuted in good faith, and the appellant's brief is filed with the court and served on the undersigned on or before the 20th day of May, 1915, this motion will not be pushed for argument or insisted upon, as the purpose of the undersigned is to get the case disposed of, etc."

There was no personal appearance either on behalf of, or in opposition to, said motion at the time the same was noticed to be heard, but the same was considered on the motion papers theretofore filed by respondent, and as appellant's brief had not been filed, the motion to dismiss was granted. On the following day appellant's counsel moved that the order of dismissal be vacated, and filed certain affidavits in support thereof. The order of dismissal was vacated, and the case set for argument on a day certain. Before argument on the merits, the respondent again moved for a dismissal of the appeal, and submitted certain affidavits in opposition to the affidavits filed by appellant. Respondent's counsel assailed the order reinstating the appeal on the ground that the same had been entered without notice. We have carefully considered the affidavits of the respective parties and the merits of the respective motions, and while appellant failed to file his brief within the time provided by the rules of this court, still we are wholly agreed that the showing made by appellant's counsel is sufficient to justify a vacation of the order of dismissal and a denial of the second motion to dismiss. We believe, however, that respondent is entitled to terms. We have therefore decided that in lieu of such terms no costs shall be taxed against plaintiff in this action.

Judgment reversed, and the cause remanded for further proceedings consistent with this opinion.

BRUCE, J. (dissenting). I am unable to concur with the above opinion. Counsel for appellant contends that "plaintiff has, by his own offer in evidence, established the contract under which the plaintiff and defendant dealt in respect to the transportation of the grain, and has thereby rendered incompetent and immaterial the negotiations by

him with the soliciting freight agent, Cole, because these negotiations were all prior to the making of these bills of lading." He also contends that the bills of lading exempt the defendant railway company from liability for the grain until actually loaded into its cars.

Counsel, however, is somewhat inconsistent in his positions. He insists that the terms of the bills of lading control, and that the testimony in regard to all prior negotiations to explain the same is incompetent and irrelevant, yet, at the same time, his whole defense is based upon an attempt to vary those very terms. The bills of lading specifically receipt for the grain, not at Kenmare, the point of the beginning of the rails of the railway company, but at the elevator points of Boscurvis, Paisley, and Newport. The contracts for shipment, indeed, which are contained in all of the bills of lading, and the only promises therein contained, are made by the defendant railway company, and by the defendant railway company alone. They are signed by the agent of the railway company, no attempt whatever being made to show that this person was agent for any one else but the railway company. The bills of lading upon their face show conclusively a contract between the railway company and the plaintiff, Knapp, and between these parties alone, and show conclusively an agreement on the part of that railway company to carry the goods from the elevator points to the points of destination. Defendant, however, seeks to show that these receipts which receipted for the grain, not at Kenmare, but at Boscurvis, Newport, and Paisley, and that its contracts to convey the grain, not from Kenmare, but from the said elevator points, were merely given as a matter of accommodation, and although his case is tried on this very theory, and this theory alone, he objects to the admission of the testimony of the witness Knapp, which tends to show the prior negotiations and to show that the receipts, in fact, evidenced the real contract, which was for the transportation of the goods from the elevator points, and not from Kenmare.

Either one proposition or the other must be true, and it is clear that the bills of lading alone control, or else that there is an ambiguity in them which can be explained by parol evidence, and in either event the record and the evidence are in my opinion such that the matter was properly submitted to the jury, and their verdict is controlling. Even if we take the position that the bills of lading are controlling and must

be considered alone, there can be no doubt of a contract for transportation by the railway company from the elevator points, and that, under such contract, the railway company is liable for the loss of the grain anywhere between such elevator points and the points of destination. There can be no question, indeed, that the railway company was the initial carrier. "The initial carrier," the court said, in the case of Savannah, F. & W. R. Co. v. Commercial Guano Co. 103 Ga. 590, 30 S. E. 555, "is not necessarily the one that first receives the goods from the shipper but it is the one that first receives the goods with an undertaking to transport and safely deliver them to the consignee at the place of destination." See also Noyes v. Rutland & B. R. Co. 27 Vt. 110; Swift v. Pacific Mail S. S. Co. 106 N. Y. 206, 12 N. E. 583; Evansville & C. R. Co. v. Androscoggin Mills, 22 Wall. 594, 22 L. ed. 724; note to 31 L.R.A.(N.S.) page 2.

That the second of two connecting carriers may become the initial carrier by contract, and agree to be liable for the transportation from the point of origin of the freight, though not upon its own line, cannot now be controverted. We have discussed this question in the prior case of Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 33 N. D. 291, 156 N. W. 1019, and all that is necessary here is to refer to that case and to the cases of Savannah, F. & W. R. Co. v. Commercial Guano Co. supra; Noyes v. Rutland & B. R. Co. 27 Vt. 110; Swift v. Pacific Mail S. S. Co. 106 N. Y. 206, 12 N. E. 583; Evansville & C. R. Co. v. Androscoggin Mills, 22 Wall. 594, 22 L. ed. 724, and to the so-called Carmack amendment. See also Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827.

The bills of lading, as I have before stated, expressly receipted for the goods at the elevator points. The promises in the bills of lading were made by the railway company, and by the railway company alone; they were made by its agent, and by its agent alone, and it is well established that when a bill of lading receipts for goods as having been received at a certain point and agrees to carry such goods to another point, such bill of lading contains not merely a receipt for the goods, but a promise to carry or convey the goods between the points mentioned. I am well aware of the numerous authorities which hold that the receipt part of a bill of lading may be overcome by parol evidence, and that it may be shown that the goods were never received at all or

were not of the quantity receipted for. I have yet to find a single authority, however, which looks upon this promise to convey as a part of the receipt, and provided that the goods were received at the points named in the receipt, the authorities are overwhelming that the contract is conclusive.

If, then, the bills of lading control, the only question is the construction of the clauses thereof which provide that: "Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line. No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed. Section 3. No carrier is bound to transport said property by any particular train or vessel or in time for any particular market or otherwise than with reasonable despatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail. Section 5 . . . Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

I do not see how these provisions are applicable in the case before us. The receipt was given for the wheat, not at Kenmare, but at the elevator points. Under that receipt the carrier became the *initial carrier*. It is not sought to be held liable for the loss of goods *beyond* the points of destination or upon the line of a subsequent carrier, but upon a line on which it had itself agreed to be liable. It had charged a rate of 22 cents, which was the rate not from Kenmare, but from the elevator points. It had receipted and taken the grain and the grain was loaded

at the elevator points. The loss mentioned occurred while the grain was being unloaded at the wharf at Kenmare, and it had been loaded "into the cars or vessels" of the defendants at the elevator points and from that point the railway company assumed responsibility for it. Section 5 of the provisions of the bills of lading merely applies where grain is taken in the first instance from a private wharf or landing or from the wharf or landing of a connecting carrier over whose line the said carrier has not assumed any responsibility. It cannot apply where the defendant is the initial carrier and where the loss occurs after the goods have been received by it as such initial carrier. See St. Louis Southwestern R. Co. v. Kilberry, 83 Ark. 87, 102 S. W. 894.

If on the other hand the bills of lading were ambiguous (and the defendant itself seeks to vary the terms thereof by showing that the receipts for the goods at the elevator points were merely made as a matter of accommodation), then parol evidence was admissible to explain the real contract between the parties. Not only this but § 6213 of the Compiled Laws of 1913 provides that "a carrier must subscribe and deliver to the consignor . . . any reasonable number of bills of lading of the same tenor, expressing truly the *original contract for carriage.*" If the parol evidence was admissible and competent, and I think it was, then there can be no question as to the liability of the defendant, or at any rate there was evidence to go to the jury showing such liability.

According to the testimony of the plaintiff (and this the jury was justified in taking at its full weight), the agent Cole held himself out as a general agent of the railway company, and there is certainly evidence outside of his own statements that his actions as such were ratified by the company. The plaintiff, Knapp, testified explicitly that he had been induced to lease the elevators by the promises of Cole that the defendant railway company would care for him and would get his grain out, and that Cole said that "the bills of lading will read from Boscurvis, Paisley, and Newport, and that I (Knapp) will get my receipts at Kenmare." There is evidence that there were no agents of either the navigation company or the railway company at the elevator points, and that this custom had been followed. The bills of lading therefore in the case at bar were issued in conformity to this agreement. In other words both by the bills of lading and by the prior parol agree-

ment, the railway company undertook to carry the wheat from the elevator points to the Minnesota terminals, and the receipts or bills of lading were given at Kenmare rather than at the elevator points merely because there were no agents at those elevator points.

The rate published (the 22-cent rate from the elevator points and the 17-cent rate from Kenmare) was published by the railway company and the railway company alone. The name of the navigation company did not appear therein or thereon except in one part where the tariff sheet states that the rate given will include "the cost of elevation at Smith's landing." The bills of lading were given by the railway company, and not by the navigation company, and although in some of them and at the top of the name of the railway company was written that of the navigation company, the promise to carry was the promise of the railway company alone, and read "Received subject to the classification and tariffs in effect on the date of the receipt by the carriers of the property described in the original bill of lading *at Boscurvis, Sask.* (Newport or Paisley, as the case might be) from D. C. Knapp the property described . . . which the Minneapolis, St. Paul and Sault Ste. Marie Railway Company agrees to carry to its usual place of delivery at said destination."

The defendant and appellant in short claims that the bills of lading control, and the plaintiff is absolutely bound thereby. He seeks, however, to vary their terms and to show that the promise to carry from the elevator points did not mean what it said, and yet objects to oral proof of what the promise was. That proof shows that the bills of lading were in conformity to the oral agreement, and which was to carry from the elevator points, and not from Kenmare.

It may be that a station agent has no implied authority to contract a liability beyond the line of the railway. The bills of lading, however, in the case at bar were issued under authority of the general agent and in the course of business which had been ratified by the company.

STATE OF NORTH DAKOTA v. MAURICE J. TRACY.

(158 N. W. 1069.)

United States — Constitution — Amendment — state courts — trials in — not applicable.

1. The 6th Amendment to the Constitution of the United States is not applicable to trials in state courts.

Supreme court — criminal cases — appeals in — judgment — technical errors — without — substantial rights.

2. Under the provisions of § 11013, Compiled Laws 1913, the supreme court, in determining appeals in criminal causes, must give judgment without regard to technical errors or defects or exceptions which do not affect the substantial rights of the parties.

Trial courts — discretion — conduct of trials.

3. Trial courts are vested with great discretion as regards the conduct of a trial and the regulation of matters incident thereto.

Witnesses — testimony — taking of — criminal action — at hospital — county seat — place of trial — jurisdiction — judgment — discretion of court.

4. Taking the testimony of a witness in a criminal action at a hospital in the county seat where the trial is being conducted, to which the presiding judge, jurors, court officials, state's attorney, and the defendant and his attorney, go for that purpose, against the defendant's objection, does not deprive the court of jurisdiction or nullify the judgment, and it cannot be said that any substantial right of defendant has been affected, unless it is shown that the trial court abused its discretion to the defendant's prejudice.

Opinion filed July 22, 1916.

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

From an order denying a motion for a new trial, defendant appeals.

Affirmed.

A. T. Faber, for appellant.

Note.—Upon the validity of proceedings in course of a trial outside of the court room, see note in 41 L.R.A. 563, in which the cases appear to be in conflict with the doctrine of STATE v. TRACY, although the annotated case Selleck v. Janesville, 41 L.R.A. 563, is in accord therewith, holding that taking the testimony of the plaintiff at her own home, to which the presiding judge and the jurors go for that purpose, against the defendant's objection, although it cannot be regarded as done in open court, does not deprive the court of jurisdiction or nullify the judgment, but is at most an irregularity.

The statutes of this state prescribe the place where courts shall be held and criminal trials had, and it is fixed by law to be in the courthouse at the county seat of the county in which the alleged offense was committed. Comp. Laws 1913, §§ 3293, 10398.

It is error for the court to adjourn to a hospital to take the testimony of a sick witness, who is unable to attend the session of court and give his testimony against the accused, where defendant enters objections thereto, and such action by the court was without authority and without jurisdiction. Funk v. Carroll, 96 Iowa, 158, 64 N. W. 768.

Wm. Langer, State's Attorney, *Henry J. Linde,* Attorney General, *Francis J. Murphy* and *H. R. Bitzing,* Assistant Attorneys General, for respondent.

The hospital to which court repaired to take the testimony of a witness for the state who was there sick and unable to attend court at the courthouse was in the county seat of the county in which the action was being tried. The court did not lose jurisdiction, nor did it abuse that broad discretion with which trial courts are invested, by such acts, over defendant's objections. Comp. Laws 1913, § 10398; Selleck v. Janesville, 41 L.R.A. 563, and note, 100 Wis. 157, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352; State v. Peyton, 32 Mo. App. 522; Reed v. State, 147 Ind. 41, 46 N. E. 135; Mohon v. Harkreader, 18 Kan. 383; LeGrange v. Ward, 11 Ohio, 257; Bates v. Sabin, 64 Vt. 511, 24 Atl. 1013.

The supreme court will disregard technicalities and irregularities, where substantial rights have not been affected or lost. Comp. Laws 1913, § 11013; State v. Tolley, 23 N. D. 284, 136 N. W. 784.

Christianson, J. Defendant was convicted of the crime of assault and battery with intent to commit rape, and has appealed from the order denying his motion for a new trial.

The action was tried in the city of Mandan, the county seat of Morton county. After the jury had been impaneled and sworn to try the action, the state's attorney requested that the jury be taken to the Mandan hospital for the purpose of taking the testimony of the complaining witness, Eva Bailett, who at that time was confined in said hospital on account of an operation for appendicitis, which had been performed upon her some four or five days prior thereto. Two doctors were sworn in sup-

port of the application, and their testimony concededly disclosed that the witness was in no condition to be brought into court to testify. The court thereupon granted the request of the state's attorney, and directed that the jury and all court officials, and the defendant and his attorney, be conveyed to the Mandan hospital for the purpose of taking the testimony of said Eva Bailett. Defendant's counsel objected to these proceedings upon the grounds that they were violative of article 6 of the Amendments to the Constitution of the United States, and § 10393, Compiled Laws of North Dakota. These objections were overruled, and the testimony of the witness Eva Bailett taken at the Mandan hospital in accordance with the court's directions.

The sole question presented on this appeal is whether the court erred in permitting the testimony of the witness Eva Bailett to be taken at the hospital. Defendant and his counsel were present at the time the witness was examined, and all proceedings then had were concededly had and conducted in accordance with the rules applicable to the examination of witnesses in criminal actions. The only irregularity charged is that the witness was examined at a place other than the court room.

Article 6 of the Amendments of the Constitution of the United States reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

"The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U. S. 237, 242, 39 L. ed. 409, 410, 15 Sup. Ct. Rep. 357.

The 6th Amendment to the Constitution of the United States, however, is not applicable to trials in state courts. "The ten Amendments first engrafted upon the Constitution had their origin in the apprehension that, in the investment of powers made by that instrument in the Federal government, the safety of the states and their citizens had not been sufficiently guarded. These Amendments were designed to be modifications of the powers vested in the Federal government; their language is susceptible of no other rational, literal, or verbal acceptation; and it has been uniformly held that they impose limitations only upon the Federal government, and not upon the states." 4 Enc. U. S. Sup. Ct. Rep. 139. See also Spies v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; Brown v. New Jersey, 175 U. S. 172, 174, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Maxwell v. Dow, 176 U. S. 581, 586, 44 L. ed. 597, 599, 20 Sup. Ct. Rep. 448, 494; West v. Louisiana, 194 U. S. 258, 261, 48 L. ed. 965, 968, 24 Sup. Ct. Rep. 650; Same as to 5th Amendment U. S. Const. State v. Barnes, 29 N. D. 164, 150 N. W. 557.

Section 10393, Compiled Laws 1913, reads: "In all criminal prosecutions the party accused shall have the right:

"1. To appear and defend in person and with counsel.

"2. To demand and be informed of the nature and cause of the accusation.

"3. To meet the witnesses against him face to face.

"4. To have the process of the court to compel the attendance of witnesses in his behalf.

"5. To a speedy and public trial, and by an impartial jury of the county in which the offense is alleged to have been committed or is triable, but subject to the right of the state to have a change of the place of trial for any of the causes for which the party accused may obtain the same."

Obviously defendant was deprived of no right guaranteed to him by this section. He was present and defended both in person and by counsel. He was informed of the nature and cause of the accusation. The witness Eva Bailett was required to give her testimony before the court and jury in the presence of defendant and his counsel, and he was afforded full opportunity of cross-examination, *i. e.*, the witness Eva Bailett, while testifying, was required to meet the defendant face to

face. He was not denied the process of court to compel the attendance of witnesses in his behalf. There is nothing to indicate that he was denied a speedy and public trial, by an impartial jury of the county in which the offense is alleged to have been committed.

Defendant also argues "that the place of trial of this action under the law was in the court room of the courthouse in the city of Mandan, North Dakota." And, that, "the court had no authority or jurisdiction, on any account, to adjourn to any other place without the consent of the parties."

Our law doubtless contemplates that the terms of district court shall be held at the county seats of the respective counties. See, §§ 747–766, 3293, Comp. Laws 1913. And it is made the duty of the county commissioners of each county to provide a court room in case no courthouse has been erected, or where the one erected has insufficient capacity, and if the board neglects to do so, the court may order the sheriff to do so at the expense of the county. Comp. Laws 1913, § 3293. While it is contemplated that the district court shall be holden in the court room provided for that purpose, still we are aware of no provision of statute requiring this to be done, and our law expressly recognizes the fact that conditions may arise where the court room provided may prove inadequate or insufficient, in which event the county commissioners are required to provide adequate quarters, or in event of their failure to do so the court may direct the sheriff to provide such quarters at the expense of the county. Our law also expressly permits the jury in a criminal action to be taken from the court room to the place where the offense is charged to have been committed, or in which any other material fact occurred in order that the jury may view such place. Comp. Laws 1913, § 10855.

The law recognizes the fact that no one can foresee the different incidents or conditions that may exist or arise upon the trial of a lawsuit. Hence trial courts necessarily must be, and are, vested with great discretion as regards the conduct of trials and the regulation of matters incident thereto. And in such matters the trial court's acts are subject to review in the appellate court only in case of manifest abuse thereof. 12 Cyc. 899, 918.

"Courts of error do not sit to decide moot questions but to redress real grievances." And, "after hearing the appeal the court must give

judgment without regard to technical errors or defects or exceptions which do not affect the substantial right of the parties." Comp. Laws 1913, § 11013.

A defendant in a criminal action is entitled to a fair trial in accordance with the provisions of our law. He is entitled to have the merits of the charge against him determined by a fair and impartial jury. He is not entitled, however, to have legitimate evidence tending to establish his guilt suppressed or excluded. There is no intimation that anything was said or done at the hospital or elsewhere which influenced or affected the verdict, but appellant rests his contention solely upon the proposition that the trial court was without power or jurisdiction to permit the testimony of a witness to be taken outside of the court room. The contention is without merit. See Reed v. State, 147 Ind. 41, 46 N. E. 135; State v. Peyton, 32 Mo. App. 522; Mohon v. Harkreader, 18 Kan. 383; Selleck v. Janesville, 100 Wis. 157, 41 L.R.A. 563, 69 Am. St. Rep. 906, 75 N. W. 975, 4 Am. Neg. Rep. 352. In our opinion the trial court's rulings were not only within its discretion, but constituted an eminently proper and wise exercise of such discretion. No prejudice to defendant has been shown. His substantial rights have not been affected.

The order appealed from must be affirmed. It is so ordered.

ANNA THOMPSON v. WALTER B. SCOTT.

(159 N. W. 21.)

Promise of marriage — breach of — action for damages — testimony of plaintiff — corroboration not necessary.

1. Corroboration of plaintiff's testimony is not required in an action for breach of promise of marriage.

Testimony — incredible — uniform course of nature — established physical facts — must be in conflict with — credence — lack of.

2. To declare testimony of a fact incredible, it must be so in conflict with the uniform course of nature or with fully established physical facts that no ordinarily intelligent, reasonable, and fair-minded man could give it credence.

Opinion filed July 22, 1916.

From a judgment of the District Court of Williams County, *Fisk*, J., defendant appeals.

Affirmed.

H. W. Braatelien, for appellant.

In an action for damages for breach of promise of marriage, the testimony of the plaintiff upon all of the material matters must be corroborated. Huston v. Johnson, 29 N. D. 546, 151 N. W. 774; 5 Cyc. 1017; Giese v. Schultz, 65 Wis. 487, 27 N. W. 353; Musselman v. Barker, 26 Neb. 737, 42 N. W. 759; Chamness v. Cox, 131 Ind. 118, 30 N. E. 901; Kennedy v. Rodgers, 2 Kan. App. 764, 44 Pac. 47; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132; Fisher v. Kenyon, 56 Wash. 8, 104 Pac. 1127, 20 Ann. Cas. 1264; Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410, Ann. Cas. 1916A, 388; Liebrandt v. Sorg, 133 Cal. 571, 65 Pac. 1098.

If the evidence in a given case is of such a character as to be grossly improbable, the verdict should be set aside. Oakland v. Nelson, 28 N. D. 456, 149 N. W. 337, 7 N. C. C. A. 661; McKnelly v. Brotherhood of American Yeomen, 160 Wis. 514, 152 N. W. 169.

A person relying upon an express promise must prove an offer and an acceptance. Krause v. Krause, 30 N. D. 54, 151 N. W. 991; Burnham v. Cornwell, 16 B. Mon. 284, 63 Am. Dec. 529; Yale v. Curtiss, 151 N. Y. 598, 45 N. E. 1125; Hinckley v. Jewett, 86 Neb. 464, 125 N. W. 1086.

Evidence of presents sent and exchanged is admissible on the question of the contract. Button v. Hibbard, 82 Hun, 289, 64 N. Y. S. R. 80, 31 N. Y. Supp. 483; Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

The conduct must be of such unequivocal character that a promise to marry can be fairly inferred. Bleiler v. Koons, 132 Pa. 401, 19 Atl. 140; Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 161; Dupont v. McAdow, 6 Mont. 226, 9 Pac. 925.

Palmer, Craven & Burns and *George H. Moellring*, for respondent.

If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is not material by what means they have arrived at that state. Homan v. Earle, 53 N. Y. 267; Perkins v. Hersey, 1 R. I. 493; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; McKee v. Mouser, 131 Iowa, 203, 108 N. W. 228.

The acceptance of an offer of marriage need not be in so many words. It may be implied from acts of the parties and from the relations assumed by them at the time of and subsequent to the offer. Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410, Ann. Cas. 1916A, 388.

Plaintiff's testimony need not be corroborated. Casey v. First Bank, 20 N. D. 211, 126 N. W. 1011.

CHRISTIANSON, J. This is an action for damages for breach of promise of marriage, and resulted in a verdict in favor of the plaintiff for $300. Judgment was entered pursuant to the verdict, and this appeal is from the judgment.

The sole question presented on this appeal is whether the evidence is sufficient to sustain the verdict. The plaintiff has never been married, and during the time involved in this action she operated a hotel at Wheelock in Williams county in this state. The defendant is a widower, and was a practising physician at Ray, about 6 miles distant from Wheelock. The defendant's wife died in February, 1914. Plaintiff claims that defendant commenced to make love to her in March, 1914, and continued his courtship until about June 12, 1914, and that during this time, she, at his request, promised to marry him. That she has always remained willing and ready to marry him, but that he has refused to do so. The defendant denied absolutely any promise of marriage, express or implied, and flatly contradicted all material parts of plaintiff's testimony.

Appellant's counsel does not seriously contend that plaintiff's testimony, if true, fails to establish a marriage contract between the parties; but he asserts that this testimony is not sufficient unless corroborated. In his brief appellant's counsel says: "These assignments raise the question of the sufficiency of the evidence to sustain the verdict. The testimony of the plaintiff as to the fact that the defendant courted her, and promised to marry her, is denied by the defendant, and plaintiff's testimony is without corroboration supporting her contentions, unless the evidence that he was at plaintiff's place of business several times, and was seen 'all over the place,' as one of her witnesses testified, can be taken as corroboration. . . . The rule should be laid down in this jurisdiction, that when such contracts are expressly denied, as

in this case, that the plaintiff should corroborate her statements by such circumstances as usually surround such relation."

Our statutes require corroboration in certain cases, but they contain no provisions requiring corroboration in an action for breach of promise of marriage, and we are aware of no authority vested in the courts to add such requirement. "The people in their Constitution have said that, in cases like the one at bar, 'the right of trial by jury shall be secured to all, and remain inviolate.' N. D. Const. § 7. They have also said that such causes shall be tried and determined in the district court (Const. § 103), and that the supreme court 'shall have appellate jurisdiction only.' Const. § 86. Therefore on appeal in a jury case this court reviews only the errors assigned upon the proceedings had in the trial court. . . . In this case the prime question was one of credibility of the witnesses, and the weight of the testimony of the respective parties. These were questions for the jury." Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592, 603.

This action is governed by the same rules which ordinarily apply in other civil actions, and, in absence of statutory requirement to the contrary, corroboration of plaintiff is not required. Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132; Kelley v. Brennan, 18 R. I. 41, 25 Atl. 346; Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 453.

We do not deem it necessary to set out the testimony, but it is sufficient to say that we are agreed that if plaintiff told the truth, the jury would be justified in finding that a marriage contract existed between the plaintiff and defendant. And while we are considerably impressed with the argument of appellant's counsel, wherein he assails the probability of certain portions of plaintiff's testimony, we are unable to agree with his deductions. The matters mentioned by appellant's counsel merely go to the question of whether plaintiff's story is probable or improbable; and the improbabilities of her story are not so great as to warrant us in saying that ordinarily intelligent men might not reasonably believe her story to be true.

In this case no motion for a new trial was made, but defendant stood on his motion for a directed verdict. Hence, before we would be justified in reversing the court's ruling on this motion we would be required to say that there is no credible evidence which, in the most favorable view, and granting all reasonable inferences and construction

in favor of the conclusion of the jury, tends substantially to support the verdict. "To declare sworn testimony of a fact incredible, we must be convinced that it is so in conflict with the uniform course of nature or with fully established physical facts that no reasonably intelligent [and fair-minded] man could give it credence." Salchert v. Reinig, supra. In this case the testimony of the plaintiff, if true, established sufficient facts to justify the jury in finding that a contract for marriage existed.

The judgment must be affirmed. It is so ordered.

MARIA KRAMER v. KATHARINA HEINS, Anna Zeien, Louis Karstens, Nickolaus Karstens, and All Other Persons Interested in the Estate of Said Dick Dammann, Deceased, and Nickolaus Karstens, as Administrator of the Estate of Louis Karstens, Deceased.

(158 N. W. 1061.)

Action — venue — change of — affects the merits — order on — appealable.

1. An order which changes the venue of an action affects the merits thereof, and is appealable under the provisions of § 7841 of the Compiled Laws of 1913.

County court — appeals from — probate proceedings — district court — calendar of causes — jurisdiction — continuance over term — causes for — illness of counsel.

2. Section 8615 of the Compiled Laws of 1913, which provides that appeals from the county court in probate proceedings must be docketed in the district court and placed on the calendar of causes for trial according to the date on which they are perfected, cannot, and is not so construed as to, imply that such district court will lose jurisdiction of the action when an appeal has been regularly taken to it, and the case has been regularly docketed, and merely because the case has been continued over the term on account of the illness of counsel.

Change of venue — civil cases — witnesses — convenience of — trial court — adjoining county — cause sent to — not required.

3. Section 7418 of the Compiled Laws of 1913, which provides for changes of venue in civil cases, presupposes that the convenience of witnesses and the saving of expense will be considered by the trial judge who grants the change, but does not require that in all cases the action shall be sent for trial to an adjoining county.

Opinion filed July 25, 1916.

Appeal from an order of the District Court of Ward County, *Leighton,* J., denying a motion to dismiss an appeal from the County Court, and also from an order changing the place of trial from Wells County to Ward County.

Action to set aside the probate of a will.

Affirmed.

Statement of facts by BRUCE, J.

This action originated in the county court of Wells county, North Dakota, where the last will and testament of one Dick Dammann was admitted to probate on or about the 2d of August, 1913. About a year later a petition was filed by the petitioner and respondent to revoke such probate, and a hearing was had in the county court on the 31st day of July, 1915, and findings were made in favor of the defendants and appellants herein. Thereupon the petitioner and respondent appealed to the district court of Wells county, and the action was placed upon the calendar for trial at the January, 1915, term, a trial *de novo* having been asked and a jury demanded. Thereafter the petitioner and respondent, Maria Kramer, appeared by counsel and made a motion for a continuance over the term or a postponement of trial for the period of ten days on account of the illness of counsel, and the case was continued over the term. The case was again on the calendar for trial at the July, 1915, term of the district court in and for the county of Wells, but, shortly prior to such term, the petitioner and respondent filed a motion for a change of venue on account of local bias and prejudice, and also a motion for a change of venue on account of the prejudice of the trial judge. At the opening of the term the appellants and defendants in the action below moved to dismiss upon the ground that the district court had devested itself of jurisdiction by reason of an unauthorized continuance over the first term. This motion as well as the motion for a change of venue were heard by stipulation at Minot before the Hon. K. E. Leighton, Judge of the 8th Judicial District, who had been called in by the judge of the 5th district. The motion to dismiss was denied. The motion for change of venue was granted, and the cause was sent to Ward county. Without going to trial the defendant and appellant Katharina Heins appealed to this court from both the order refusing to dismiss the action in the district court and the order granting the change of venue.

B. F. Whipple, J. J. Youngblood, and *Aloys Wartner,* for appellants.

A change of venue should not be granted after the case has been continued, unless it is shown that the grounds upon which the application is made were not known prior to the continuance. McCracken v. Webb, 36 Iowa, 551; Fitch v. Billings, 22 Iowa, 228; Waldron v. St. Paul, 33 Minn. 87, 22 N. W. 4; St. Louis, C. G. & Ft. S. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49; Schafer v. Shaw, 87 Wis. 185, 58 N. W. 240; Pearkes v. Freer, 9 Cal. 642; Jones v. Frost, 28 Cal. 245.

The right to a change of venue is not a vested one, but is a privilege which a party entitled thereto may waive, or which may be lost by laches. 4 Enc. Pl. & Pr. 383; 40 Cyc. 124–126.

"The second case in which application may be made to the court for a change of place of trial is when there is reason to believe that an impartial trial cannot be had in the county designated." But courts are adverse to granting a change upon this ground in the first instance, and it has been held that nothing less than an actual experiment, by way of a trial, will amount to a sufficient showing for change on such ground. 2 Wait, Pr. p. 642, § 3.

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

This appeal is an attempt to appeal from two separate and independent orders, both of which could have been reviewed on appeal from the final judgment.

Therefore, if both orders are appealable, this appeal is bad for duplicity, and would be dismissed under the rules of practice. Ballou v. Chicago & N. W. R. Co. 53 Wis. 150, 10 N. W. 87; Anderson v. Hultman, 12 S. D. 105, 80 N. W. 165.

The order appealed from did not "in effect determine the action and prevent a judgment." Comp. Laws 1913, § 7841; Strecker v. Railson, 19 N. D. 677, 125 N. W. 560; Reed v. Lueps, 30 Wis. 561.

In numerous cases of unauthorized continuances, mandamus has been invoked. State ex rel. Tooreau v. Posey, 17 La. Ann. 252, 87 Am. Dec. 525; Mason v. Superior Ct. 24 Cal. App. 386, 143 Pac. 554.

"But in a clear case of a continuance without right, or where no showing has been made authorizing the exercise of discretion, the court may be compelled (by mandamus) to proceed; and likewise a clear duty of the court to postpone will be enforced. 26 Cyc. 207; People ex rel. Brown v. Pearson, 2 Ill. 473; People ex rel. Teale v. Pearson, 2 Ill.

458; Dixon v. Feild, 10 Ark. 243; State ex rel. Tooreau v. Posey, supra; Wattles v. Wayne Circuit Judge, 119 Mich. 356, 18 N. W. 123.

Ordinarily, under a sufficient showing, the illness of counsel is good ground for continuance. 9 Cyc. 100.

The right of a defendant to have the place of trial changed to the proper county is an absolute right if asserted within the time prescribed by law and the trial court has no discretion, but must order the change. Ivanusch v. Great Northern R. Co. 26 S. D. 158, 128 N. W. 333; Smail v. Gilruth, 8 S. D. 287, 66 N. W. 452; Van Kleck v. Hanchett, 51 Wis. 398, 8 N. W. 236; Meiners v. Loeb, 64 Wis. 343, 25 N. W. 216.

Where the venue of the complaint is laid in a county not authorized by the Code, the defendant may move to change it to the right county before answering. 2 Wait, Pr. 409.

In other instances such application is addressed to the sound discretion of the trial court. 40 Cyc. 127, and cases cited; Walker v. Nettleton, 50 Minn. 305, 52 N. W. 864; Theresa Village Mut. F. Ins. Co. v. Wisconsin C. R. Co. 144 Wis. 321, 128 N. W. 103; Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110, 9 Sup. Ct. Rep. 696; Watson v. Whitney, 23 Cal. 375; Alverson v. Anchor Mut. F. Ins. Co. 105 Iowa, 60, 74 N. W. 746; Cobb v. Thompson, 10 Iowa, 367; Richardson v. Augustine, 5 Okla. 667, 49 Pac. 930; Schafer v. Shaw, 87 Wis. 185, 58 N. W. 240; Lego v. Shaw, 38 Wis. 401; Ross v. Hanchett, 52 Wis. 491, 9 N. W. 624; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419.

Bruce, J. (after stating the facts as above). Counsel for respondent suggests that the order refusing to dismiss the appeal from the county court may not be an appealable order. It is not necessary, however, for us to consider this question, as there is also an appeal from the order granting the change of venue, and that such an order "involves the merits of the action," and is therefore appealable under the provisions of § 7841 of the Compiled Laws of 1913, is well established. See Robertson Lumber Co. v. Jones, 13 N. D. 112, 99 N. W. 1082. The questions raised by both appeals are also substantially the same.

The next point urged is that the trial court erred in granting petitioner's motion to continue the case over the January, 1915, term of the district court.

Counsel for appellants calls attention to § 8615 of the Compiled Laws of 1913, which provides that: "Upon the delivery of such transcript and payment of the clerk's fee, the appeal must be docketed in the district court and placed on the calendar of causes for trial according to the date on which it was perfected and without a notice of trial or note of issue at the next term convening, not less than ten days after the taking of the appeal, and must be disposed of accordingly during the term, unless sooner disposed of in pursuance of the provisions of the next section."

The contention of counsel is that under this section the case should have been brought on for trial at the next term of the district court; namely, the January, 1915, term, and that the court erred in granting the motion of the petitioner for a continuance over the objection of the respondents and also erred in denying the respondents' (appellants herein) motion to dismiss the appeal from the county court.

We cannot believe, however, that this section can be anything more than directory. Surely it was not intended the parties should lose valuable legal rights merely because of the sickness of the counsel or of witnesses and the inability to prepare for trial at the next term of the court. In the case at bar there was a valid reason for a continuance. There is no doubt that counsel for the petitioner and respondent herein was seriously ill. If the construction contended for by counsel applies, an epidemic among the jurymen or the sickness of the witnesses or of the trial judge, which would render the trial at the term impossible, would have had the same effect. It will be noticed indeed that the statute does not require the case to be tried at the next term. It merely provides that it must "be docketed in the district court and placed on the calendar of causes for trial according to the date on which it is perfected, and must be disposed of accordingly during the term." In other words the case must be docketed at the first term and disposed of at that term the same as the other actions on that calendar. There is no question of the right to continue other cases upon the calendar for good causes shown, and there is no contention, and can be no contention, that such an appeal was to be given preference over any other cases, but merely to be docketed in its order, and there can be no contention that if the calendar had been crowded and it was impossible for the

judge to dispose of all of the cases at the term, that he would have had the right to continue the balance of the cases over.

The next point urged is that the trial court erred in granting the change of venue from the county of Wells to the county of Ward. It is argued that the case had been in the district court for over nine months at the time of the application, and it is urged that a change of venue should not be granted after a case has been continued, unless it is shown that the grounds upon which the application is made were not known prior to the continuance.

We think, however, there is no merit in this contention, in so far at least as the case at bar is concerned.

It is well established that whether a change of venue shall be granted or not is a matter which rests in the sound discretion of the trial judge. Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; Booren v. McWilliams, 33 N. D. 339, 157 N. W. 117. The question involved is not whether the respondent had an absolute right to such a change, but whether the trial judge abused his discretion in allowing it. Counsel cites the Iowa cases of McCracken v. Webb, 36 Iowa, 551; Fitch v. Billings, 22 Iowa, 228. These cases, however, were decided under § 2804 of the laws of Iowa, Revision of 1860, which expressly provided that an application for a change of venue should not "be allowed after a continuance except for a cause not known to the affiant before such continuance." He also cites the Minnesota case of Waldron v. St. Paul, 33 Minn. 87, 22 N. W. 4, but this case was one in which the discretion of the trial court was affirmed in denying a change, and where the rule of court provided that a change should not be granted where the benefit of a term would be lost except on certain conditions, and in which case it seemed apparent that such term would have been lost. He also cites the Wisconsin case of Schafer v. Shaw, 87 Wis. 185, 58 N. W. 240, which was also handed down under a statute similar to that of Iowa before mentioned, and in that case also the discretion of the judge was affirmed. The cases of Pearkes v. Freer, 9 Cal. 642, and Jones v. Frost, 28 Cal. 245, also were not cases of discretion or prejudice, but cases which involved the general right of a trial in the county, and which right it has been generally held may be waived by answering to the merits. Nor do we find in the record any proof that a term of court would be lost by a change to Ward county.

Counsel next complains that the case was not removed from Wells county to an adjoining county, but to Minot in Ward county. We have no doubt that in all of such cases the court should consult the convenience of witnesses and choose a place of trial which shall be reasonably accessible, and seek in every way to render the trial as inexpensive as possible. We have no proof, however, that this was not done in the case at bar. Minot is on the same line of railroad as Fessenden, and is a place which is readily accessible. It was evidently intended in North Dakota, no matter what may be the rule in other states, that the convenience of parties and the accessibility of the places of trial should be the subjects of consideration rather than the geographical location of the places. Nowhere in the Code is it provided that the place of trial shall be in an "adjoining" county, and we are not prepared to read the word into the Code. The statute indeed merely provides that "the court may change the place of trial," and nothing is said as to the geographical location of that place. See Comp. Laws 1913, § 7418.

The judgment of the District Court is affirmed.

WILLIAM O. HONSINGER v. ELSIE M. STEWART, Grace L. Knapp, Pauline G. Honsinger, McKenzie B. Stewart as the administrator of the Estate of Willis T. Honsinger, deceased, the Travelers Insurance Company, a Corporation, the Northern Trust Company, a Corporation, R. B. Carter, Fred W. Lohr, and the Merchants National Bank of Fargo, a Corporation, and All Other Persons Known and Unknown Having or Claiming to Have Any Right, Title, Lien, Claim or Demand in and to the Premises Set Forth in the Complaint Herein.

(159 N. W. 12.)

State Constitution — heir — suit for partition — other heirs and administration — against — cannot maintain — in district court — jurisdiction — county court taken — after — probate purposes — before final decree.

1. Under the provisions of § 111 of the Constitution of North Dakota, and §§ 8524, 8707, 8730, 8733, and 8797, of the Compiled Laws of 1913, an heir cannot

maintain a suit for partition against the other heirs and the administrator of an estate in the district court, after the county court has assumed jurisdiction to probate and administer the same, and has appointed an administrator for that purpose, and before a final decree of distribution has been made in the county court.

Partition — action in — brought in name of heirs alone — or jointly with administrator — statute — confers no right of hostile action — administrator — against.

2. Section 8797 of the Compiled Laws of 1913, which provides that actions in partition may be brought in the name of the heirs alone, or by the heirs and administrator jointly, confers no right to maintain an action which is hostile to the rights of such administrator.

Opinion filed July 25, 1916.

Appeal from the District Court of Cass County. *Pollock,* J. Action in partition.

Judgment for defendants. Plaintiff appeals.

Affirmed.

M. A. Hildreth, for appellant.

The law permits heirs or devisees of the decedent, whether in or out of possession, to maintain an action to quiet title to the real estate of the decedent against anyone except the administrator or executor. Comp. Laws 1913, §§ 8707, 8798.

The question of jurisidiction cannot be raised in connection with some other question, and then the party permitted to contend that the court did not have jurisdiction. Simensen v. Simensen, 13 N. D. 305, 100 N. W. 708; Yorke v. Yorke, 3 N. D. 343, 55 N. W. 1095.

A county court is not a court of final jurisdiction. It is subordinate to the district court. Comp. Laws 1913, § 7404; 3 Kerr's Cyc. Codes Cal. § 759; Ryer Co. v. Fletcher Ryer Co. 126 Cal. 482, 58 Pac. 908.

"For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the executor or administrator is the possession of the heirs." Cal. Code, § 1581; Probate Code, § 8159; Grant v. Murphy, 116 Cal. 432, 58 Am. St. Rep. 188, 48 Pac. 481; Poulter v. Poulter, 193 Ill. 641, 61 N. E. 1056; 7 Prob. Rep. Anno. 220; Smith v. Smith, 132 Iowa, 700, 119 Am. St. Rep. 581, 109 N. W. 194.

Pierce, Tenneson & Cupler, for respondents.

Before the final decree is entered in county court, none of their heirs

may maintain any action against the administrator, or other heirs, which may tend to infringe upon or disturb the jurisdiction of the county court. Const. § 111; Comp. Laws 1913, §§ 8524, 8707, 8708, 8714, 8730, 8734, 8764–8791, 8797, 8841, 8844, 8846, 8849, 8854–8860; Blakemore v. Roberts, 12 N. D. 399, 96 N. W. 1029; Beckett v. Selover, 7 Cal. 238, 68 Am. Dec. 237; Page v. Tucker, 54 Cal. 121; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Re Higgins, 15 Mont. 474, 28 L.R.A. 116, 39 Pac. 506; Black v. Story, 7 Mont. 238, 14 Pac. 703; Lowery v. Hawker, 22 N. D. 323, 37 L.R.A.(N.S.) 1143, 133 N. W. 918; Re Barker, 5 Wash. 390, 31 Pac. 976; Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008.

"The decree of distribution is an instrument by virtue of which heirs receive the property of the deceased. It is the final determination of the rights of the parties to a proceeding, and upon its entry their rights are thereafter to be exercised by the terms of the decree. The final decree of distribution is conclusive. Under our probate system, all deraignment of title to the property of the deceased persons is through the decree of distribution, entered as the final act in the administration of an estate. Sjoli v. Hogenson, 19 N. D. 92, 122 N. W. 1008; Johnson v. Rutherford, 28 N. D. 87, 147 N. W. 390; Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431; Shane v. Peoples, 25 N. D. 188, 141 N. W. 737; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Page v. Tucker, 54 Cal. 121; Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693; Subera v. Jones, 20 S. D. 628, 108 N. W. 26; Kelsey v. Welch, 8 S. D. 255, 66 N. W. 390; Adams v. Beideman, 33 N. J. Eq. 79; Ryer v. Fletcher Ryer Co. 126 Cal. 482, 58 Pac. 908.

The "partition of the estate" evidently refers to suits brought by the heirs or devisees. The possession of the administrator does not devest the heir or devisee of the fee. His possession is for the heirs or devisees who are the owners and seised in fee, subject to the temporary right of the administrator to the possession, and subject to the defined statutory powers and authority of sale given to the administrator. Code, § 8797; Ryer v. Fletcher Ryer Co. 126 Cal. 482, 58 Pac. 908; Grant v. Murphy, 116 Cal. 432, 58 Am. St. Rep. 188, 48 Pac. 481; Smith v. Smith, 132 Iowa, 700, 119 Am. St. Rep. 581, 109 N. W. 194; Adams v. Petrain, 11 Or. 304, 3 Pac. 163; Gatch v. Simpson, 40 Or. 90, 66 Pac.

688; Rutenic v. Hamaker, 40 Or. 444, 67 Pac. 196; 18 Cyc. 1277–1280; Dow v. Lillie, 26 N. D. 512, L.R.A.1915D, 754, 144 N. W. 1082.

Such objections as are here taken were properly taken by demurrer. Had defendants failed to demur, these objections would have been waived, excepting only the questions of jurisdiction, and that the complaint fails to state facts to constitute a cause of action. Comp. Laws 1913, § 7447; James River Nat. Bank v. Purchase, 9 N. D. 280, 83 N. W. 7.

BRUCE, J. This is an appeal from an order sustaining a demurrer to a complaint, and from the judgment entered in favor of the defendants, the plaintiff declining to plead over.

The action is one for a partition of the lands of a deceased person among his heirs, for an adjudication of the various interests therein, and for a sale of the land in the event that partition cannot be made, and for general equitable relief. It is brought by one of the heirs, William O. Honsinger, and against the remaining heirs, the administrator, certain mortgagees; namely, the Travelers Insurance Company, R. B. Carter, the Merchants Bank of Fargo, the Northern Trust Company, and an attaching creditor, Fred W. Lohr. It is brought, however, in the district court and before any final decree of distribution has been entered in the probate or county court.

The demurrer is joined in by all of the defendants except the attaching creditor, Lohr, and raises the objections:

(1) That the court has no jurisdiction of the persons of the said defendants.

(2) That the court has no jurisdiction of the subject matter of the action.

(3) That the complaint does not state facts sufficient to constitute a cause of action.

The main question for decision is whether an heir can maintain a suit for partition against the other heirs and the administrator in the district court, after the county court has assumed jurisdiction to probate and administer the estate, and has appointed an administrator for that purpose, and before a final decree of distribution has been made by the county court. We are satisfied that he cannot.

Under the Constitution and Code of North Dakota, "the entire assets of the estate, except those mentioned in § 6372, Revised Codes, 1905, §

8707, Comp. Laws 1913 pass into the possession of the executor or administrator, to be held for the use of the estate, and finally to be distributed to the heirs or devisees under the order of the county court. These sections of the Code changed entirely the common-law rule governing the possession and control of real property pending administration." Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Section 111 of the Constitution of North Dakota gives to the county court "exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators and guardians, and such other probate jurisdiction as may be conferred by law."

Following this constitutional provision is § 8524 of the Compiled Laws of 1913, which provides that "the county court has original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators and guardians, and such other probate jurisdiction as may be conferred by law."

Following this is § 8707, Compiled Laws of 1913 which provides that "the executor or administrator is entitled to possession of all the real and personal property of the decedent except the homestead and other exempt property reserved by law to the surviving husband or wife; . . . and must protect the real property from waste or other injury and collect the rents and profits thereof until ordered to surrender the same, and collect the goods, chattels and other effects of the decedent and the debts and demands of every description due to the decedent or accruing to the estate in his right, and safely keep and dispose of the same according to law."

Section 8730 of the Compiled Laws of 1913 provide that "all the property of the decedent except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children shall be chargeable with the payment of the debts of the deceased, the expenses of administration and the allowance to the family, and the property, personal and real, may be sold as the court may direct in the manner hereinafter prescribed. There shall

be no priority as between personal and real property for the above purposes."

Section 8733 provides that "the estate real and personal given by will to legatees or devisees is liable for the debts, expenses of administration and allowance to the family in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator and there is other sufficient estate."

It is apparent from the above provisions that to allow the district court to entertain an action for the partition of the real estate among the heirs before the decree of final distribution would materially interfere with the exclusive jurisdiction and control which has been given both by the Constitution and the statute to the county court. "The entire assets of the estate, except those mentioned in § 6372 Rev. Codes 1895, § 8707, Comp. Laws 1913, pass into the possession of the executor or administrator to be held for the use of the estate and finally to be distributed to the heirs or devisees under the order of the county court," and this is both for the protection of the heirs and devisees and of the creditors as well as for the purpose of securing the payment of the costs of administration. See Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

There may be decisions to the contrary, but they are decisions under Codes and constitutional provisions which are dissimilar to our own, and which adhere to the common-law theory that the heir or devisee has sole control of the real estate, and that such real estate is not subject to the payment of debts or the expenses of administration. Ibid.; Meeks v. Hahn, 20 Cal. 621; Re Barker, 5 Wash. 390, 31 Pac. 976; Lowery v. Hawker, 22 N. D. 318, 37 L.R.A.(N.S.) 1143, 133 N. W. 918.

Before the final decree of distribution, the title of an heir is not such as will support an action of partition as against the administrator and the other heirs. Sjoli v. Hogenson, 19 N. D. 82, 122 N. W. 1008; Fischer v. Dolwig, 29 N. D. 561, 151 N. W. 431; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 605; Page v. Tucker, 54 Cal. 122; Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693; Adams v. Beideman, 33 N. J. Eq. 79.

The cases cited by counsel for appellant are not in point. Ryer v. Fletcher Ryer Co. 126 Cal. 482, 58 Pac. 908, was a suit commenced by an administrator against a person who, at the death of the decedent, owned the land in common with the decedent. It was not an action to partition the land among the heirs, but rather a suit by an administrator to recover property of the decedent from one not an heir and for the benefit of the heirs and of the estate. The case of Grant v. Murphy, 116 Cal. 432, 58 Am. St. Rep. 188, 48 Pac. 481, was a controversy between rival estates and, like the preceding case, it was one ultimately to decide what property belonged to the estate and what did not. The cases of Smith v. Smith, 132 Iowa, 700, 119 Am. St. Rep. 581, 109 N. W. 194, and Poulter v. Poulter, 193 Ill. 641, 61 N. E. 1056, were handed down in states having different constitutional provisions from our own.

The only section of our Code indeed which seems to furnish any support for the position of the appellants is § 8797 of the Compiled Laws of 1913, which is § 6460 of the Revised Codes of 1899, and which provides that "the heirs or devisees may themselves or jointly with the executor or administrator maintain an action for the possession of the real estate or for the purpose of quieting title to the same against anyone except the executor or administrator. For the purpose of bringing suits to quiet title or for partition of such estate the possession of the executor or administrator is the possession of the heirs or devisees. Such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator for the purposes of administration as provided in this Code."

It is clear, however, that the right of action in the heirs, which is conferred by this section, is subject to the right of possession of the administrator, and confers no right to maintain an action which is hostile to him. Blakemore v. Roberts, 12 N. D. 394, 96 N. W. 1029.

Nor is there any merit in appellant's contention that the demurrer amounted to a general appearance, and therefore conferred jurisdiction upon the district court in this suit. The demurrer asked for no relief except the dismissal of the action and costs. Section 7442 expressly provides that the points may be raised by demurrer; "that the court has no jurisdiction of the person of the defendant or the subject of the action." It is true that the demurrer also alleges that the complaint

does not state facts sufficient to constitute a cause of action, and it is possible that this allegation may have given the district court jurisdiction of the persons of the defendants. It did not, and could not, however, give the district court jurisdiction of the subject matter, and it is the jurisdiction of the subject matter which is, after all, the matter which is involved in this case.

The judgment of the District Court is affirmed.

STATE OF NORTH DAKOTA v. GUSTAVE A. FALK.

(159 N. W. 10.)

Perjury — false testimony — civil action — during trial of — issues — no proof of — testimony — materiality of — conviction for — immaterial testimony — will not stand — advised verdict — motion for — error raised by — instructions — exceptions.

A prosecution for perjury for alleged false testimony given by defendant during trial of a civil action. There was no proof made of what the issues were in such civil action. Hence, there was no evidence from which to determine the materiality of such false testimony. A conviction of perjury cannot be sustained upon immaterial testimony, or sustained without proof of materiality of the false testimony upon which the prosecution is predicated. Such error was raised by motion for an advised verdict of acquittal, again on exceptions to instructions.

Opinion filed July 26, 1916.

Appeal from a judgment of conviction of perjury entered in the District Court of Morton County, *Hanley,* Judge.

Reversed and a new trial granted.

A. T. Faber, for appellant.

The essentials of the crime charged are: the taking of the oath, in a proceeding before a competent tribunal, in cases in which an oath may be administered; giving testimony, and, wilfully and contrary to said

Note.—Authorities on the question of whether a charge of subornation of perjury may be based on false testimony which is immaterial are collected in a note in 25 L.R.A.(N.S.) 120, which may be of interest in connection with this case.

oath, stating any material matter which he knows to be false. Comp. Laws 1913, § 9366; Hitesman v. State, 48 Ind. 473; People v. Simpton, 133 Cal. 367, 65 Pac. 834; State v. Divoll, 44 N. H. 140; United States v. McConaughy, 33 Fed. 168; Brown v. State, 91 Wis. 245, 64 N. W. 749; 16 Enc. Pl. & Pr. 329; State v. Scott, 78 Minn. 311, 81 N. W. 3.

The information must contain a positive declaration or averment that defendant was duly sworn to testify truthfully. People v. Simpton, 133 Cal. 367, 65 Pac. 834; People v. Dunlap, 113 Cal. 74, 45 Pac. 183.

All of the elements specified in the statute must be alleged. State v. Webb, 41 Tex. 67; Juaraqui v. State, 28 Tex. 625.

The information must allege in general terms that certain issues were joined and on trial in the proceeding in which the alleged perjury was committed. It is not sufficient to allege that the issue to be tried was material. Guston v. People, 61 Barb. 35; People v. Howard, 111 Cal. 655, 44 Pac. 342; Rosebud v. State, 50 Tex. Crim. Rep. 475, 98 S. W. 858; McMurtry v. State, 38 Tex. Crim. Rep. 521, 43 S. W. 1010; Buller v. State, 33 Tex. Crim. Rep. 551, 28 S. W. 465.

The name of the court must also be alleged. 3 Whart. Crim. Law, 2221; State v. Ayer, 40 Kan. 43, 19 Pac. 403; State v. Oppenheimer, 41 Tex. 82.

The period of time in which the alleged false testimony was material to the issue on the trial upon which the alleged perjury was committed. This is essential so as to apprise defendant of the charge against him. People v. Vogt, 156 Mich. 594, 121 N. W. 293; People v. Maxwell, 118 Cal. 50, 50 Pac. 18; State v. Webb, 41 Tex. 67; Gibson v. State, 44 Ala. 17; State v. Lea, 3 Ala. 602; State v. Raymond, 20 Iowa, 582; Fitch v. Com. 92 Va. 824, 24 S. E. 272; Burns v. People, 59 Barb. 531.

The state must establish what the material issues were in the case in which the false testimony is alleged to have been given, in order to show the fact that the false testimony was material to such issue. 2 Bishop, Crim. Proc. 3d ed. § 933; People v. Ah Sing, 95 Cal. 657, 30 Pac. 797; Bledsoe v. State, 64 Ark. 474, 42 S. W. 899; 3 Greenl. Ev. § 197; State v. Aikens, 32 Iowa, 403; Wood v. People, 59 N. Y. 117; McMurry v. State, 6 Ala. 324; Heflin v. State, 88 Ga. 151, 30 Am. St.

Rep. 147, 14 S. E. 112; People v. Lem You, 97 Cal. 224, 32 Pac. 11; People v. Macard, 109 Mich. 623, 67 N. W. 968.

An instruction is erroneous where it assumes material facts to be proved of which there is no evidence or upon which the evidence is contradicted or controverted. 12 Cyc. 601 (XIV); People v. Matthai, 135 Cal. 442, 67 Pac. 694; Densmore v. State, 67 Ind. 306, 33 Am. Rep. 96; State v. Bige, 112 Iowa, 433, 84 N. W. 518; Com. v. Smith, 153 Mass. 97, 26 N. E. 436; State v. Peltier, 21 N. D. 188, 129 N. W. 451; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; State v. Barry, 11 N. D. 428, 92 N. W. 809.

Wm. Langer, State's Attorney, *Henry J. Linde,* Attorney General, *Francis J. Murphy* and *H. R. Bitzing,* Assistant Attorneys General, for respondent.

No information or indictment is insufficient, nor can the trial judgment or other proceedings thereon be affected by reason of a defect or impression in matters of form which does not tend to affect the proceedings or the substantial rights of the defendant upon the merits. Comp. Laws 1913, § 10694; State v. Tolley, 23 N. D. 284, 136 N. W. 784.

It is not necessary in an information to state presumptions of law, nor matters of which judicial notice is taken. Comp. Laws 1913, § 10695.

Goss, J. Defendant was informed against and convicted of perjury committed during the trial of a civil action. He appeals, assigning many errors, only one of which is necessary to be considered. To charge perjury, it was necessary to allege the materiality of the false testimony given. To establish materiality, proof of the issues under which the testimony was offered was essential. But there is no proof of what the issues were in the trial during which the alleged false testimony was given, from which to determine materiality of the evidence given. This failure of proof was raised by motion to advise a verdict of acquittal, and again on exceptions to instructions. The trial court instructed: "And in determining whether or not the testimony was material, as stated before, the question you should bear in mind is what the issues were in the former trial, what the complaint was in the former trial and what the issue was that was being tried." And "the

question that you are trying is, . . . whether or not, as such witness, Falk testified falsely *to any material fact in that case,* and if you find beyond a reasonable doubt from the evidence that he did so testify falsely to a material fact, and that he knew he was testifying falsely at that time to such material fact, and knew it was material, then, under the information and under these instructions, you should find the defendant guilty." The court also instructed upon materiality, when testimony would be material and when it would not be. The exception taken to these instructions is that "the court erred in assuming without any evidence that the state had established what the material issues in the former trial were upon which the alleged perjury was assigned."

The alleged perjury was committed in a civil action, and one in which the information charges that it was a material issue to establish that a common nuisance was kept and maintained at a certain place by the keeping of intoxicating liquors for sale there as a beverage, or by permitting people to there resort for the purpose of drinking intoxicating liquors; and the testimony of Falk wherein he denied seeing beer or seeing others drink beer there, the alleged false testimony, is set forth. The materiality of these statements is apparent from the face of the information, and therefore materiality is probably sufficiently alleged (Comp. Laws 1913, § 10700; Fitch v. Com. 92 Va. 824, 24 S. E. 272; 30 Cyc. 1435; Whart. Crim. Law, 11th ed. § 1549), although it is in bad form and open to question. See People v. Vogt, 156 Mich. 594, 121 N. W. 293; State v. Mumford, 12 N. C. (1 Dev. L.) 519, 17 Am. Dec. 573; and United States v. Robinson, 4 Dak. 72, 23 N. W. 90. But in proving its case the state wholly overlooked offering proof of what the issue was in said nuisance action. It offered in evidence only the summons, complaint, and injunctional order therein issued, without putting in evidence the answer or establishing whether any allegation of said complaint was controverted or was in issue on trial in said action. The proof as to issues on trial in the civil action is as indefinite as though the complaint therein was not in evidence. For all that appears upon this record every syllable of testimony given by Falk may have been upon matters concerning which there was no issue and no necessity of proof whatever. And it seems that this was not entirely an oversight, as the clerk of the court

was called by the state and asked to produce certain records in said civil action, and gave this testimony:

Q. Where are the records now?

A. The records were sent down to justice court in another case and I have not gotten them back from him.

Subsequently he found a portion of them, the summons and complaint, and upon his testimony as a basis, they were offered and received in evidence. But the way in which the issue arose upon which the alleged false testimony was given is wholly unproven. In fact, there was no proof whatever of that issue on trial or that there was any issue for trial or tried. So far as the record is concerned it simply proves that certain false testimony was given, without any proof of how it was material or to what extent it was material or necessary, or proof of its materiality upon any question determined in the civil action. Its materiality then is wholly left to speculation, and, as stated in the exception to the court's instruction, the court "assumed without any evidence that the state had established what the material issues in the former trial were upon the alleged perjury so assigned." It is almost elementary that any allegation that is necessary to be made in a criminal information is also necessary to be proven to support a conviction thereon. The text books and cases are in accord upon the necessity of proof of the materiality of the alleged false testimony; and to prove materiality it is necessary therefore to prove as a fact on the trial for perjury so much of the issue as is necessary to establish such materiality. "On a prosecution for perjury the materiality of the testimony may be shown by introducing all or so much of the pleadings in the action as show the issues, together with proof of such facts as tend to show the testimony to be on a material issue." 30 Cyc. 1446-F. See also Comp. Laws 1913, § 10700. And again, "To sustain an indictment for perjury there must be proof that the false testimony was material to the issue, unless by statute materiality is rendered unnecessary. The record of the case or a duly authenticated transcript thereof is necessary for this purpose, and the fact that the testimony was received is not, standing alone, sufficient. . . . In no event can the materiality of the testimony or assertion assigned as perjury be established by the opinions of witnesses." 30 Cyc. 1450. "In a trial at nisi prius on

an indictment for perjury the postea must be produced by the plaintiff. At common law generally the entire record should be put in evidence." Whart. Crim. Law, 11th ed. § 1590. "To sustain a conviction for perjury it must appear, either upon the face of the facts set forth in the indictment that the matter sworn to upon which the perjury is assigned was material, or it must be expressly so averred *and the materiality must be proved upon the trial.*" Syllabus in Wood v. People, 59 N. Y. 117. The opinion in that case in part reads: "The materiality must be proved on the trial or there can be no conviction. A false oath upon an immaterial matter will not support a conviction for perjury." The same is the holding in People v. Peck, 146 App. Div. 266, 130 N. Y. Supp. 967, affirmed by court of appeals in 206 N. Y. 669, 99 N. E. 1114. The opinion in part reads: "The indictment does not in words charge that any or all of the statements therein alleged to have been made by defendant were material, or were of and concerning a matter material in the proceeding then being conducted by the examiner. It is not necessary that the indictment so charge, provided the facts which are set forth therein are sufficient in themselves to show that the sworn statements alleged to be false were material. But the materiality must be shown in the indictment itself, either by direct statement or by the facts stated therein." And from the syllabus: "Wilfully testifying falsely to an immaterial fact is not perjury." Another leading case illustrative of the failure of proof in the case at bar, and from the New York court of appeals, is People v. Teal, 196 N. Y. 372, 25 L.R.A.(N.S.) 120, 89 N. E. 1086, 17 Ann. Cas. 1175. The opinion is in a case for subornation of perjury, but the rule is the same, as to suborn perjury, perjury must have been committed. In People v. Teal, the false testimony was procured to have been given in a divorce action by Helen K. Gould v. Frank J. Gould. The complaint charged defendant with an act of adultery with a party named, and as occurring in Canada. The alleged false testimony offered in proof of said complaint described an alleged act of adultery with a different person, and in New York city. The party procuring this testimony to be given was convicted of subornation of perjury. The opinion by Justice Werner states: "The bare statement of these facts, unrelated both in pleading and in circumstance, is sufficient to draw attention sharply to the utter irrelevancy, incompetency, and immateriality of the false

testimony solicited to the issue tendered by the complaint in Gould v. Gould. . . . From time immemorial the common law has made the materiality of false testimony an essential ingredient of the crime of perjury. From their earliest beginnings our statutes have always embodied that rule. Our penal laws, but recently recodified, have continued it. That, in short, is the unquestioned law of this state. . . . Subornation of perjury can only be predicated upon perjury committed. . . . That crime in the case at bar is subornation of perjury, and could only have been committed if the false testimony, if given, had constituted perjury. It seems to follow therefore that if there could have been no subornation of perjury, there was in fact no attempted subornation of perjury within the meaning of the statute. If the person actually giving false testimony is not guilty of perjury, the person through whose procuration the testimony is given cannot be guilty of subornation of perjury. . . . If this reasoning is sound, it is clear that the question before us resolves itself into the inquiry whether the actual giving of the false testimony set forth in the indictment would have constituted the crime of perjury. We have already said that the false testimony which the defendant attempted to procure was irrelevant, incompetent, and immaterial to the only issue presented by the complaint in Gould v. Gould. We may pass without discussion the elements of irrelevancy and incompetency. These could have been waived. They are, moreover, not essential to the commission of perjury as defined in the statute. It is different, however, as to materiality. *If false testimony is not material, it cannot support an indictment for perjury.* The testimony upon which a charge is predicated must be false 'in any material matter.' The testimony solicited of MacCauslan was not false in any matter material to the issue in Gould v. Gould, and we do not see how the conviction in the case at bar can be sustained." See also the several recent perjury cases from Texas of Reed v. State, — Tex. Crim. Rep. —, 174 S. W. 1065; Cox v. State, — Tex. Crim. Rep. —, 174 S. W. 1067; and Jones v. State, — Tex. Crim. Rep. —, 174 S. W. 1071. If a conviction cannot be sustained where the record discloses the false testimony to be immaterial, certainly conviction for perjury cannot be sustained here where the record wholly fails to disclose its materiality to the inquiry upon which it was given. All proof of how and in what respects any of these false statements were material

to the issues involved in the civil action is wholly lacking. Under the record made it can be assumed that defendant wilfully testified falsely, but that does not establish his guilt of the crime of perjury. He could have admitted the giving of such false testimony, but still have been entitled to have the issue of its materiality passed upon by the jury, and if found immaterial in fact, be acquitted of perjury. No crime is therefore proven. The conviction therefore upon insufficient testimony is set aside and the case is remanded.

STATE OF NORTH DAKOTA EX REL. GEO. E. WALLACE, F. E. Packard, H. H. Steele, Members of the North Dakota Tax Commission, v. CARL O. JORGENSON, as State Auditor.

(159 N. W. 35.)

Mandamus — original proceedings — state auditor — appropriations — tax commission — unexpended balance — contemplated allowance — law — one-man tax commission — legislature.

1. Original mandamus proceedings to compel state auditor to credit certain alleged appropriations claimed by the tax commission to be standing appropriations for its use under chap. 303, Session Laws 1911, and for an alleged unexpended balance of appropriations. The auditor's return discloses that he has credited the commission with all the appropriations provided for it by the 1915 legislature. The commission claims that the 1915 appropriation is invalid because alleged to have been enacted as contemplated allowances for a one-man tax commission, which the legislature assumed would be enacted by senate bill 261, failing of passage in the closing days of the last legislature.

General appropriation — bill — salaries — tax commissioners — validity of law.

2. The first item of subdivision 18 of said chap. 43, Sess. Laws 1915, the general appropriation bill, has been so held void in State ex rel. Packard v. Jorgenson, 31 N. D. 563, for failing to appropriate for salaries for the tax commissioners. The validity of the balance of the subdivision, being appropriations for eleven specific classifications of expense, is the issue involved here.

Held, The last eleven items of said subdivision 18 are valid appropriations, and were not passed under misapprehension or by legislative inadvertence.

Sections 6 and 7 of chapter 303 of the Session Laws 1911, did not constitute an appropriation for the tax commission of more than $6,000 per annum, for all the items therein included.

Appropriations — form of — balance — continuing appropriation — commission — biennial period.

3. The form of the appropriations made under chap. 303, Sess. Laws 1911, was such as to leave no unexpended balance of appropriations remaining over as a continuing appropriation for the use of the commission, in the event that such sums were not all expended during such biennial period.

State auditor — validity of law — appropriation — unexpended balance — commission not entitled to.

4. The state auditor's contention as to both the validity of subdivision 18, and that there is no unexpended balance from the preceding biennial period to which commission is entitled to credit, is sustained. This proceeding is dismissed without costs.

Opinion filed July 26, 1916.

An original proceeding.

Geo. E. Wallace and *F. E. Packard,* for petitioners.

Where the prerogatives, rights, and franchises of the state government are here directly involved, the supreme court has original jurisdiction. State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A. (N.S.) 67, 142 N. W. 450.

"If a statute is valid, it is to have effect according to the purpose and intent of the lawmaker. The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent." 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 63.

"By the construction of a statute is meant the process of ascertaining its true meaning and application. For this purpose resort may be had not only to the language and arrangement of the statute, but also to the intention of the legislature, the object to be secured, and to such extrinsic matters as the circumstances attending its passage, the sense in which it was understood by contemporaries, and its relation to other laws." 36 Cyc. 1102; Power v. Hamilton, 22 N. D. 177, 132 N. W. 664; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 523.

Section 303 of the 1911 Laws has not been repealed. Repeals by implication are not favored, and will not be indulged in unless it is manifest that the legislature so intended. Reeves v. Bruening, 16 N. D. 398, 114 N. W. 313; 26 Am. & Eng. Enc. Law, 721, and cases cited; 2 Current Law, 1734, 1736, and recent authorities cited; 36

Cyc. 1087; Birmingham v. Southern Exp. Co. 164 Ala. 529, 51 So. 159; State ex rel. Metcalf v. Baker, 114 Minn. 209, 130 N. W. 999; Wilson v. Edwards County, 85 Kan. 422, 116 Pac. 614; Greenbush Cemetery Asso. v. Van Natta, 49 Ind. App. 192, 94 N. E. 899; Lewis's Sutherland, Stat. Constr. 2d ed. 247, and note.

Such repeals are avoided if possible. State v. Young, 17 Kan. 414; Minot v. Amundson, 22 N. D. 239, 133 N. W. 551; Hoyne v. Danisch, 264 Ill. 483, 106 N. E. 341; People ex rel. Hinch v. Harrison, 185 Ill. 307, 56 N. E. 1120; People ex rel. Kelly v. Raymond, 186 Ill. 407, 57 N. E. 1066; Galpin v. Chicago, 249 Ill. 554, 94 N. E. 961; Cruse v. Aden, 127 Ill. 231, 3 L.R.A. 327, 20 N. E. 73; People ex rel. Akin v. Kipley, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; Hogan v. Akin, 181 Ill. 448, 55 N. E. 137; Krome v. Halbert, 263 Ill. 172, 104 N. E. 1066; People ex rel. Redman v. Wren, 5 Ill. 269; Bryan v. Buckmaster, Breese, (Ill.) 22, Appx.; People ex rel. Krause v. Harrison, 191 Ill. 257, 61 N. E. 99; Cleveland, C. C. & St. L. R. Co. v. Blind, 182 Ind. 398, 105 N. E. 483; Indiana State Dig. V. b; Carver v. Smith, 90 Ind. 222, 46 Am. Rep. 210; Jeffersonville, M. & I. R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403; Hay v. Baraboo, 127 Wis. 1, 3 L.R.A.(N.S.) 84, 115 Am. St. Rep. 977, 105 N. W. 654; Black, Constr. & Interpretation of Laws, pp. 117, 118; Sedgw. Stat. & Const. Law, 98; Deneen v. Unverzagt, 225 Ill. 378, 80 N. E. 321, 8 Ann. Cas. 396, and cases cited; Jersey City v. Hall, 79 N. J. L. 559, 76 Atl. 1058, Ann. Cas. 1912A, 696; 36 Cyc. 1088, and authorities; Lewis v. Cook County, 72 Ill. App. 151; State ex rel. St. Paul Gaslight Co. v. McCardy, 62 Minn. 509, 64 N. W. 1133; Lewis's Sutherland, Stat. Constr. 2d ed. §§ 267, 275, citing Dwarris, Stat. 765; Crane v. Reeder, 22 Mich. 322; Woodworth v. Kalamazoo, 135 Mich. 233, 97 N. W. 714; Nelden v. Clark, 20 Utah, 382, 77 Am. St. Rep. 917, 59 Pac. 524; Fargo v. Ross, 11 N. D. 369, 92 N. W. 449; Schafer v. Schafer, 71 Neb. 708, 99 N. W. 482; Augusta Nat. Bank v. Beard, 100 Va. 687, 42 S. E. 694; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 127.

A general appropriation bill merely suspends a continuing appropriation, in case of conflict. Jeffreys v. Huston, 23 Idaho, 372, 129 Pac. 1065; United States v. Langston, 118 U. S. 389, 30 L. ed. 164,

6 Sup. Ct. Rep. 1185; Mernaugh v. Orlando, 41 Fla. 433, 27 So. 34; Brown v. Barry, 3 Dall. 365, 1 L. ed. 638; 36 Cyc. 1101.

In the absence of constitutional prohibition, the legislature may make continuing appropriations, that is, the payment of which is to be continued beyond the term or session of the legislature by which they were made. 37 Cyc. 894; Re Continuing Appropriations, 18 Colo. 192, 32 Pac. 272; Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; People ex rel. McCullough v. Pacheco, 27 Cal. 176; Stratton v. Green, 45 Cal. 149; State ex rel. McDonald v. Holmes, 19 N. D. 286, 123 N. W. 884.

The term "specific" as used by the courts means nothing more nor less than the setting apart of a definite amount for a definite purpose. State ex rel. Packard v. Jorgenson, 31 N. D. 563, 154 N. W. 525.

Henry J. Linde, Attorney General, *Francis J. Murphy* and *H. R. Bitzing,* Assistant Attorneys General, for respondent.

The mere fixing of the amount of compensation to be paid and directing the time and manner of payment is not in itself a valid appropriation. Const. § 186; Redding v. Bell, 4 Cal. 333; Myers v. English, 9 Cal. 341; Stratton v. Green, 45 Cal. 149; Baggett v. Dunn, 69 Cal. 75, 10 Pac. 125; State ex rel. Blackford v. Kenney, 10 Mont. 496, 26 Pac. 388; Goodykoontz v. Acker, 19 Colo. 360, 35 Pac. 911; Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; State ex rel. Buchanan v. State Treasurer, 68 S. C. 411, 47 S. E. 683; Menefee v. Askew, 25 Okla. 623, 27 L.R.A.(N.S.) 537, 107 Pac. 159; Leddy v. Cornell, 52 Colo. 189, 38 L.R.A.(N.S.) 918, 120 Pac. 153, Ann. Cas. 1913C, 1304; McPherson v. Houston, 24 Idaho, 21, 132 Pac. 107; Mansfield v. Chambers, 26 Cal. App. 499, 147 Pac. 595.

Under this constitutional provision the salary or compensation of the officers named therein only is beyond the power of the legislature to increase or reduce during the term for which they may be elected. Thomas v. Owens, 4 Md. 189; State ex rel. Roberts v. Weston, 4 Neb. 216; State ex rel. Rotwitt v. Hickman, 9 Mont. 370, 8 L.R.A. 403, 23 Pac. 740; State ex rel. Buck v. Hickman, 10 Mont. 497, 26 Pac. 386; State ex rel. Henderson v. Burdick, 4 Wyo. 272, 24 L.R.A. 266, 33 Pac. 125; People ex rel. Hegwer v. Goodykoontz, 22 Colo. 507, 45 Pac. 414; White v. Huston, 25 Idaho, 170, 136 Pac. 214; State ex rel. Fornoff v. Sargent, 18 N. M. 272, 136 Pac. 602; State ex rel. Chavez

v. Sargent, 18 N. M. 627, 139 Pac. 144; Dorman v. Sargent, 20 N. M. 413, 150 Pac. 1021.

Under § 186 of the Constitution no particular appropriation or set form of words is requisite or necessary to accomplish this purpose, but the clear intent to set aside a specified sum of money must appear in the language used in the statute. State ex rel. Wade v. Kenney, 10 Mont. 485, 26 Pac. 197; Terrell v. Sparks, 104 Tex. 191, 135 S. W. 519; Gilbert v. Moody, 3 Idaho, 3, 25 Pac. 1092; State ex rel. Brainerd v. Grimes, 7 Wash. 191, 34 Pac. 833; Humbert v. Dunn, 84 Cal. 57, 24 Pac. 111; Proll v. Dunn, 80 Cal. 220, 22 Pac. 143; People ex rel. McCauley v. Brooks, 16 Cal. 24; State v. Bordelon, 6 La. Ann. 68.

The original Tax Commission Act does not constitute an appropriation. State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A. (N.S.) 67, 142 N. W. 450; McPherson v. Huston, 24 Idaho, 21, 132 Pac. 107.

Section 654 of the Compiled Laws of 1913 was expressly repealed by chapter 43 of the Laws of 1915 and removes all of the reasons or grounds upon which the Birdzell Case stood. Nichols v. The Comptroller, 4 Stew. & P. (Ala.) 154; Reynolds v. Taylor, 43 Ala. 420 (1864); Carr v. State, 127 Ind. 204, 11 L.R.A. 370, 22 Am. St. Rep. 624, 26 N. E. 778; Myers v. English, 9 Cal. 341; Pickle v. Finley, 91 Tex. 484, 44 S. W. 480; Shattuck v. Kincaid, 31 Or. 379, 49 Pac. 758; Kingsbury v. Anderson, 5 Idaho, 771, 51 Pac. 744; State ex rel. Keith v. Westerfield, 23 Nev. 468, 49 Pac. 119; State ex rel. Davis v. Eggers, 29 Nev. 469, 16 L.R.A.(N.S.) 630, 91 Pac. 819; State ex rel. Norcross v. Eggers, 35 Nev. 250, 128 Pac. 987.

Where the salary or compensation is fixed by statute, and the language fixing such salary or compensation is coupled with the words "he shall receive," or other similar language, or is coupled with the expression that the "salary shall be payable in the same manner that the salary of other state officers is paid," and other state officers being paid monthly upon warrant of the state auditor, then such statutory provision might be construed as an appropriation. State ex rel. Brown v. Weston, 6 Neb. 16; Martin v. Francis, 13 Kan. 220; People ex rel. Richardson v. Spruance, 8 Colo. 530, 9 Pac. 628; State ex rel. Journal Pub. Co. v. Kenney, 9 Mont. 389, 24 Pac. 96; Kingsbury v. Anderson,

5 Idaho, 771, 51 Pac. 744; Pickle v. Finley, 91 Tex. 484, 44 S. W. 480; Prime v. McCarthy, 92 Iowa, 569, 61 N. W. 220.

"No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereto as shall not be so expressed." Const. § 61; State ex rel. McDonald v. Holmes, 19 N. D. 286, 123 N. W. 884; Mathews v. People, 202 Ill. 389, 63 L.R.A. 73, 95 Am. St. Rep. 241, 67 N. E. 28; People v. Joyce, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472; Re Appropriation Bill, 14 Fla. 283; State ex rel. Hibbard v. Cornell, 60 Neb. 276, 83 N. W. 72; Merrill v. State, 65 Neb. 509, 91 N. W. 418; Prewitt v. Prewitt, 56 Colo. 174, 139 Pac. 1; People ex rel. Richardson v. Spruance, 8 Colo. 530, 9 Pac. 628; State ex rel. Delgado v. Sargent, 18 N. M. 131, 134 Pac. 218; Fergus v. Russel, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120.

The unity of the subject of an appropriation bill is not broken by appropriating several sums for several specific objects which were necessary or convenient to the accomplishment of one general design. State v. Sloan, 66 Ark. 575, 74 Am. St. Rep. 106, 53 S. W. 47; State ex rel. Lucero v. Marron, 17 N. M. 304, 128 Pac. 485.

Goss, J. This is the third chapter in litigation involving appropriations for the state tax commission. For the first see State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450; for the second, see State ex rel. Packard v. Jorgenson, 31 N. D. 563, 154 N. W. 525. And this original proceeding, the third of the kind, involves the question of whether subdivision 18 of chap. 43 of the Session Laws of 1915, exclusive of the first item of said subdivision 18, is an appropriation for such purposes or instead invalid because passed under a misapprehension or by inadvertence.

In 31 N. D. 563, passing upon the first item of said subdivision 18, consisting of the words, "salary tax commissioner, $3,000 per annum, $6,000," it was held that this item of said subdivision 18 of the general appropriation bill was void because passed as a provision for the salary of a tax commission composed of only one tax commissioner, instead of three, and which inadvertence arose from the fact that, as set forth in 31 N. D. 563, a bill for the substitution of a one-man tax commission for the three-member commission was on its way through the legislature and had passed the Senate when the general appropriation bill

during the closing days of the legislature was passed under the expectation that the one-man commissioner bill would become a law, and that therefore subdivision 18, so far as the appropriation for the salary of a tax commissioner, contemplated and was an appropriation by inadvertence, and not for a salary or the salaries of the three-member tax commission. The payment of the salaries of the tax commission was not therefore prevented by this item of the last general appropriation one.

The question now arises, on the writ and return thereto, as to whether the other items of subdivision 18 and specific appropriation therein are valid, or on the contrary they, like the first item of said subdivision, are merely the result of inadvertence, and, as such are but purported and contemplated appropriations for a one-man commission, void. If so, as claimed by the relator, the only appropriation standing to support this commission would be those provided in the act creating the tax commission, chap. 303, Sess. Laws 1911, as interpreted and declared in the first case, State ex rel. Birdzell v. Jorgenson, supra, and which in the second case, 31 N. D. 563, was held to be continuing appropriations for salaries of the tax commissioners. The questions here presented were not, however, there determined. Subdivision 18 reads:

Tax Commission.

Salary, Tax commissioner	$3,000 per annum	$6,000.00
Secretary	2,400 per annum	4,800.00
Clerkhire and assistants		8,000.00
Postage		805.00
Office supplies		500.00
Furniture and fixtures		500.00
Traveling expenses		2,220.00
Printing		500.00
Miscellaneous		
Telephone		200.00
Telegrams		25.00
Freight and express		50.00
Dues and fees		200.00
Total		$23,800.00

The first item or line is a nullity, 31 N. D. 563. Was the balance enacted under the same misapprehension and necessarily legislative inadvertence, or is it, as it purports to be, a valid appropriation by items? If the latter, the writ must be denied. If invalid, the writ must issue.

The matter must be determined from the measure itself in the light of known surrounding facts and circumstances confronting the legislature, and of which judicial notice may be taken. It is noticeable that the legislation under attack specifies with particularity the items and purposes, pursuant to a similar intent declared in the general budget or appropriation bill. The act itself, Sec. 1, provides that "the sums hereinafter named only, or so much thereof as may be necessary, are hereby appropriated from any moneys in the state treasury not otherwise appropriated, *for the purposes specified in the following sections of this act.*" Again, § 2 provides: "Unless otherwise specifically stated, the appropriations hereby made shall be available for the expenses to be incurred in and about *the several purposes herein set out,* during the fiscal period of two years, beginning July 1st, 1915, and ending July 1st, 1917." But are the purposes specified in subdivision 18 those for a contemplated one-man tax commission or those for our tax commission of three members? It must appear beyond cavil that subdivision 18 as a whole was a provision for a one-man tax commission, before these appropriations by items thereof can be declared void. If it can be said that the legislature was providing for either form of commission, contemplating that the items of expense enumerated in the subdivision would be the same under either a one or three-man commission, then it cannot be said with sufficient certainty that the legislature did not contemplate that the items should stand as its appropriation for the present or three-man commission; in which event the appropriation must be considered valid as a provision for the present commission.

Scrutinizing the items, it is noticeable that the same salary for the secretary is allowed in subdivision 18 as was provided by the prior statute, and so far as that item is concerned, there is a fair inference that it was placed therein in recognition of and provision for the office created by prior law. In other words, it can be considered a specific appropriation to take care of what was held to be a salary in State

ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450.

It is a well-known fact that the present efficient state auditor had prepared pursuant to § 710, Comp. Laws 1913, for the benefit of the appropriation committees of and the legislature itself a budget of appropriations requested for and by state offices and state departments, and which tabulated statement as a basis for a general appropriation bill was substantially embodied in, and became the substance of the state budget bill, § 18 of which is under consideration.

The relator on argument has made use of this tabulated statement. It is an official record prepared and furnished pursuant to the requirements of §§ 708–10, Comp. Laws 1913, the data therein having been furnished by the various state departments to the state auditor, under said statutes: Judicial notice of it can therefore be taken. Therefrom it is ascertained that in the estimate of the present tax commission as to its probable expense for the future biennial period specifying items of contemplated expense with particularity, that this commission made its estimate of its necessities for clerk hire and assistants for said period from July 1, 1915, to July 1, 1917, as a basis for the second item of subdivision 18 as follows:

For "One chief clerk $1200
Stenographer 1080
Stenographers 900
Bill clerk and librarian ..... 780," annually,

or an estimate of annual expense for such specific purposes covered in subdivision 18 as "clerk hire and assistants," of $3,960, or $7,920 for the biennial period, and for which, evidently closely following the advice of the tax commission (not a one-man commission, but a three-man commission), the legislature appropriated for said items more than was asked, or $8,000. This, like the appropriation for the secretary, is strongly significant of care and attention by the legislature to the needs of a three-man commission, and negatives any argument of inadvertence in making such items of appropriation. But stronger proof still appears from the same tabulated request of this commission.

The next item of subdivision 18 is "postage, $805." Turning to

the estimate in the tabulated statement, or request of the commission of the legislature for such purpose is found a request for an appropriation for postage of exactly $805 in one item. This certain amount was not fixed under any misapprehension. For the next item of subdivision 18, that of "office supplies, $500" there is found a request in the statement of requested appropriations for $500 for such purposes.

Again strongly significant of a careful consideration of the necessities of a three-man commission as to both items of postage and office supplies, the commission was given to the dollar exactly what it requested for such purposes. And the same is true of the item of subdivision 18 of "printing, $500." Exactly that amount was asked by it. Nor is that all. Subdivision 18 contains an appropriation under heading of "miscellaneous" for "telephone, $200," "telegrams, $25," "freight and express, $50," "dues and fees, $200," and each particular item as so stated and itemized is likewise set forth in the budget under the same heading "miscellaneous." This leaves but two items of the entire subdivision 18 (exclusive of that of "salary of tax commissioner"), not granted in the exact amounts requested by this commission, as official records conclusively establish. In other words, the legislature in nine instances, including the provision for salary of the secretary of the board, in making the appropriation in subdivision 18, granted to the dollar the request of the present three-man tax commission, and in only two items out of eleven was any change made from what was requested, and those in the items of furniture and fixtures and traveling expense. For the former an appropriation of $500 was made in lieu of $1,200 requested.

When the fact is considered that the commission was organized, established, and had been doing business for years, it would seem that the legislature might very properly deem it the part of wisdom to grant $500 for such purpose instead of $1,200 as asked. And the same is true as to the $4,000 item requested for traveling expense, for which instead $2,220 was appropriated in subdivision 18. From the fact that this item appropriated is not in a round sum, as $2,000 or $2,500, it would not be speculation to assume that some calculation was made and care used in arriving at the certain sum of $2,220 appropriated. The total request was for but $2,320 more than was granted for the biennial period. There was allowed this commission within

$1,160 per year of all it requested. Few departments of state were treated as well by that legislature. Over $5,000 was cut from appropriations desired for the use of this court and the State Law Library. Under these circumstances and actuating facts, should any court hold that these eleven items of subdivision 18 were inadvertently passed as an appropriation for such expenses of a commission other than this tax commission? And this too when the amounts fixed in nine out of eleven of said items are exactly what was requested by the present commission? Manifestly not. The contrary is conclusively demonstrated to be the fact, almost beyond a reasonable doubt.

And reference to senate bill No. 261 confirms still further this conclusion. It made no provision for such an official as a "secretary," so designated, in and for whose salary subdivision 18 makes a specific provision. Instead, senate bill 261 provided for a *deputy commissioner*. The legislature had no reference to a deputy commissioner by the word secretary in the appropriation bill. Instead, it must have had reference to the existing order of things. Had it been legislating with reference to senate bill 261, it would not have provided for the salary of a secretary, but a deputy commissioner, as it did in kindred subdivisions, such as 16 and 17 of said act. And reference to the many subdivisions in chapter 43 shows the words "secretary" and "deputy" are used accurately and advisedly throughout the whole appropriation bill. It was so in this instance. It is an appropriation for the present tax commission.

If it be assumed, as was held in State ex rel. Packard v. Jorgenson, 31 N. D. 563, 154 N. W. 525, that the provision for salary of a tax commission at $3,000 per annum was placed in subdivision 18 under the supposition that the bill creating a one-man tax commission was or would become the law, still the only assumption so far as the rest of the items of subdivision 18 are concerned must be that the legislature nevertheless assumed that the same expense otherwise would be needed and incurred by a one-man as by a three-man tax commission, and appropriated accordingly. The effect, whatever the reason, would be the same as held in 31 N. D. 563, and resort must be had to the continuing appropriation for the salary of the tax commissioners, inasmuch as they were unprovided for. With said exception subdivision 18 is a valid appropriation, according to its terms, for the items therein

enumerated. And this being the case, § 4 of this general budget bill operates as an implied repeal of all the appropriations contained in chap. 303 of the Session Laws of 1911, excepting only that providing for and constituting an appropriation for the salaries of the three members of the tax commission. All other appropriations contained in said act were impliedly repealed when chap. 43, Sess. Law 1915, became effective. No stronger language to work an implied repeal could scarcely be framed. It expressly repeals certain sections enumerated and provides that "And all other acts and parts of acts in so far as the same relate to appropriations . . . for the same *matters or purposes provided for* herein are hereby repealed. It is the intent hereby to enact an *exclusive* general appropriation bill and to repeal each and every act and all parts of acts now existing which appropriate, or purport to appropriate money for any of the *offices, officers, purposes and things* set out in § 3 thereof in so far as the same conflicts therewith *or relate to appropriations for the same matters or purposes provided for therein.*" Certainly the legislature left nothing unsaid in this repealing portion of the statute. It is difficult to see how it could be strengthened. While implied repeals are not favored, this is clearly one if there can be any implied repeal, as to all such items of appropriations existing prior to the passage of this act, except solely as to the salaries of the tax commissioners.

One other argument of the relators needs mention. It is contended that inasmuch as on July 1st, 1915, the tax commission had not spent within $8,104.93 of the full amount it could have disbursed, had it necessarily been obliged to do so in performing its duties as a commission, that in contemplation of law there remained on July 1st, 1915, an *"unexpected balance"* of that amount, $8,104.93 of an appropriation; and that the action of the auditor in canceling on his books the entry showing that amount of unexpended state moneys liable to disbursement by the tax commission during the biennial period expiring on July 1st, 1915, was unauthorized, and in effect was a revocation of a standing, specific appropriation for a specific amount. In brief it contends that in any event it should have this amount now set aside for its use, inasmuch as it was not spent during the last biennial period, expiring July 1st, 1915. This contention cannot be sustained. Under the files in this case it appears that the state auditor, in making the credits on his

books under the system of bookkeeping in vogue in his office, attempted to and supposed he was acting under and following the opinion of this court in the first case, that of State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450. Certain portions of said opinion might lead to the conclusion that the appropriation of "not to exceed $6,000 per annum," mentioned in § 7 of the act as "compensation of such secretary, clerk, stenographers, and experts employed by them," was not inclusive of the provision in § 6 of the act, wherein it is stated that the board "shall thereupon organize by electing a secretary who shall receive a salary of not more than $2,400 per annum." It appears that the state auditor construed the opinion in 25 N. D. 539, as though it directed an allowance of $8,400 per annum, instead of $6,000, for the items enumerated in §§ 6 and 7 of the act, now §§ 2085, 2086, Comp. Laws 1913. And there is language in that opinion which might warrant that construction. But on reconsideration we hold that both sections taken together did not constitute an annual appropriation in excess of $6,000. To that extent that decision is modified by this.

Correction of this error would reduce the so-called unexpended balance $4,800 for the biennial period, leaving at most what is termed as an unexpended balance of only $3,304.93. But further reference to the appropriations credited under said decision discloses that $6,000 so allowed and created under § 14 of the original act, now § 2092, Comp. Laws 1913, cannot be considered as a definite and explicit legislative appropriation of that specific amount, because under the terms of the statute the appropriation is an annual one in "the sum of $3,000 or as much thereof as may be needed." As it was not needed and not used at the expiration of the biennial period, and when the appropriations provided by the general budget bill, chap. 43, Sess. Laws, 1915, became effective, supplanting these prior appropriations, the authority to disburse state moneys under the prior legislative sanction ceased. In fact and in law, where appropriations are made for an amount stated, "or so much thereof as may be needed," there can be, strictly speaking, no unexpended balance of an appropriation, as only the amount needed and used can be considered appropriated.

Counsel for petitioners in their brief contend that this court, in 31 N. D. 563, held subdivision 18 to be void in its entirety. That ques-

tion was not in issue there. There is language, inadvertently used, to that effect in that opinion, but only the first item of subdivision 18 was there under consideration, and was the only part of said subdivision passed upon.

In conclusion the provisions of subdivision 18 of chap. 43, Sess. Laws 1915, contain the appropriation for the tax commission for the biennial period specified, excepting solely for salaries of the three members of the tax commission, the salaries for whom are provided for by § 5 of chap. 303, Sess. Laws 1911, now § 2084, Comp. Laws 1913. Hence, the state auditor is authorized to disburse, as the expenses of the tax commission for said biennial period, $18,000 for salaries of said commissioners for said period, and not more than $17,800 under appropriations made under subdivision 18 of chap. 43, Sess. Laws 1915, by the last eleven items thereof, one of which items is for the salary of the secretary for said commission. This makes in effect a total biennial appropriation of $35,800 for such purposes. To this the tax commission is limited, and the auditor also, in disbursements.

The writ must be denied, the contention of the auditor being in all things upheld. No costs will be taxed, inasmuch as no private interests are involved. The proceeding is dismissed.

R. B. GRIFFITH v. FRANKFORT GENERAL INSURANCE COMPANY, a Corporation.

(159 N. W. 19.)

Building contractors — employers — employees — neligence — injuries — liability insurance — claims under — for injuries sustained — workman — advancement to for injuries — settlement by company — with workman — claim agent — ratification of — by failure to repudiate — insurance policy — recognizing liability thereunder — waiver of rights.

Plaintiff through contractors erected a building, safeguarding against liability for negligent injuries to workmen by employers liability insurance taken of defendant company. One Westby was injured while working on said building, and made a claim of plaintiff for injuries and for wages during lost time. Defendant's claim agent settled with Westby. Plaintiff alleges it retained $150 for him deducted from Westby's claim and which amount plaintiff had ad-

vanced the laborer pending settlement. Defendant claims it settled for $150 less than the claim presented, and made no agreement with Westby to reimburse plaintiff for his advances to Westby. Verdict in plaintiff's favor. Defendant appeals.

Held: (1) The evidence was sufficient to justify submission to the jury and sufficient to support the verdict.

(2) Though the claim agent was without actual authority to make settlement found by the jury to have been made, defendant could waive any want of authority and ratify the settlement, and has done so by failing to repudiate it.

(3) It cannot avail of a favorable settlement with Westby, relieving it from liability on its insurance contract, and at the same time keep money it agreed on said settlement with Westby to pay to Griffith, under claim that under the contract it could have defended and refused to have paid anything, because Griffith advanced said $150 in violation of its insurance contract.

(4) By recognizing its responsibility under the insurance policy by settling with Westby thereunder, it waived any right to avoid the same to defeat payment to plaintiff, of the money it received in such settlement for him.

Opinion filed July 28, 1916.

From a judgment of the District Court of Grand Forks County, *Cooley,* J., defendant appeals.

Affirmed.

Murphy & Toner, for appellant.

An agent cannot do indirectly what he is forbidden to do directly. The agent in this case had no authority to bind the company to the promise to pay Griffith any sum of money to reimburse him for advancement made to the injured workman. He had no ostensible or apparent authority to make the alleged promise. Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Hurley v. Watson, 68 Mich. 531, 36 N. W. 726; Kraniger v. People's Bldg. Soc. 60 Minn. 94, 61 N. W. 904; United States Bedding Co. v. Andre, 105 Ark. 111, 41 L.R.A.(N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D, 800; Baker v. Seaward, 63 Or. 350, 127 Pac. 961; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Cornish v. Woolverton, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4; Trull v. Hammond, 71 Minn. 172, 73 N. W. 642; Burchard v. Hull, 71 Minn. 430, 74 N. W. 163; Oberne v. Burke, 30 Neb. 581, 46 N. W. 842; Edwards v. Dooley, 120 N. Y. 540, 24 N. E. 827.

The fact of agency, or the extent of the agent's authority, cannot be

proved by the admissions or declarations of the agent. Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Taylor v. Commercial Bank, 174 N. Y. 181, 62 L.R.A. 783, 95 Am. St. Rep. 564, 66 N. E. 726; Somers v. Germania Nat. Bank, 152 Wis. 210, 138 N. W. 713; Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556; Walsh v. St. Paul Trust Co. 39 Minn. 23, 38 N. W. 631.

The doctrine of apparent or ostensible authority in an agent cannot be invoked by one who relied only on the alleged agent's declaration of authority and made no inquiry as to the true situation. Christ v. Garretson State Bank, 13 S. D. 23, 82 N. W. 89; Q. W. Loverin-Browne Co. v. Bank of Buffalo, 7 N. D. 569, 79 N. W. 923.

Implied authority of an agent can only be *implied* from *facts*. Such authority, if it exists at all, must find its source in the *intention* of the principal, either express or implied. If that intention cannot be shown the authority cannot exist. Mechem Agency, §§ 274, 289, 290, pp. 176, 177, 190, 191; Pehl v. Fanton, 17 Cal. App. 247, 119 Pac. 400; Sullivant v. Jahren, 71 Kan. 127, 79 Pac. 1071; Brown v. Grady, 16 Wyo. 151, 92 Pac. 622; Downing Invest. Co. v. Coolidge, 46 Colo. 345, 104 Pac. 392; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Bank v. Pacific Coast S. S. Co. 95 Cal. 1, 29 Am. St. Rep. 85, 30 Pac. 96; Schaeffer v. Consolidated Nat. Mut. Ben. L. Ins. Co. 38 Mont. 459, 100 Pac. 225; Stock Exch. Bank v. Williamson, 6 Okla. 348, 50 Pac. 93; Mitrovich v. Fresno Fruit Packing Co. 123 Cal. 379, 55 Pac. 1064; Ming v. Pratt, 22 Mont. 262, 56 Pac. 279; Saving & L. Soc. v. Gerichten, 64 Cal. 520, 2 Pac. 405; Rust v. Eaton, 24 Fed. 830; Merritt v. Wassenich, 49 Fed. 785; United States Bedding Co. v. Andre, 105 Ark. 111, 41 L.R.A.(N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D, 800; Wilson v. Shocklee, 94 Ark. 301, 126 S. W. 832; McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132; Galveston, H. & S. A. R. Co. v. Allen, 42 Tex. Civ. App. 576, 94 S. W. 417; Heath v. Paul, 81 Wis. 532, 51 N. W. 876; Siebold v. Davis, 67 Iowa, 560, 25 N. W. 778; Miller v. Sawbridge, 29 Minn. 442, 13 N. W. 671; Kinman v. Botts, 147 Iowa, 474, 124 N. W. 773; Spies v. Stein, 70 Neb. 641, 97 N. W. 752; Wilken v. Voss, 120 Iowa, 500, 94 N. W. 1123; Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964; De Sollar v. Hanscome, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816.

The plaintiff here could not recover under the policy of insurance.

If he could not so recover, it was because of the prohibitive terms of the policy, and if the policy was voided by the violation of these prohibitive terms, then these terms could not have been waived and must have been in full force at the time of the trial. Hammer v. Downing, 39 Or. 504, 64 Pac. 651, 65 Pac. 17, 990, 67 Pac. 30.

It is a general rule that an action for money had and received cannot be resorted to where there is a contract open and unexecuted and the breach of the contract is the basis of the suit. Vincent v. Rogers, 30 Ala. 471; Barrera v. Somps, 113 Cal. 97, 45 Pac. 177, 572; Rollins v. Duffy, 14 Ill. App. 69; Atkinson v. Scott, 36 Mich. 18; Peltier v. Sewall, 3 Wend. 269; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. 541, 9 L. ed. 222; Charles v. Dana, 14 Me. 383; Field v. Banks, 177 Mass. 36, 58 N. E. 155; Richards v. Killam, 10 Mass. 239, 6 Am. Dec. 119; Clark v. Sherman, 5 Wash. 681, 32 Pac. 771; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335; Middleport Woolen Mills Co. v. Titus, 35 Ohio St. 253.

There are *no promises* in the contract to pay *plaintiff* anything. Plaintiff being a stranger to the contract and its consideration, and there being nothing in it to indicate that it was made for his benefit, a suit thereon by plaintiff is not maintainable. Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Savings Bank v. Thornton, 112 Cal. 255, 44 Pac. 466; Baxter v. Camp, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803; Wright v. Terry, 23 Fla. 160, 2 So. 6; Lowe v. Turpie, 147 Ind. 652, 37 L.R.A. 233, 44 N. E. 25, 47 N. E. 150; German State Bank v. Northwestern Water & Light Co. 104 Iowa, 717, 74 N. W. 685; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; Frerking v. Thomas, 64 Neb. 193, 89 N. W. 1005; Washburn v. Interstate Invest. Co. 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Montgomery v. Rief, 15 Utah, 495, 50 Pac. 623; Davis v. Patrick, 122 U. S. 138, 30 L. ed. 1090, 7 Sup. Ct. Rep. 1102; Fish & H. Co. v. New England Homestake Co. 27 S. D. 221, 130 N. W. 841.

Plaintiff is here trying to enforce, for his own benefit, a contract between defendant and Westby, and hence is bound by the rule that prior oral negotiations, promises, and statements are merged in the written contract, and will not be permitted to contradict same. 21 Am. & Eng. Enc. Law, 1079, and cases cited; Schultz v. Plankinton Bank,

141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; Schneider v. Kirkpatrick, 80 Mo. App. 145; Selchow v. Stymus, 26 Hun, 145; Hankinson v. Riker, 10 Misc. 185, 30 N. Y. Supp. 1040; Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co. 55 Minn. 242, 22 L.R.A. 390, 56 N. W. 815; Wodock v. Robinson, 148 Pa. 503, 24 Atl. 73.

The release here is not a mere receipt; it is a complete contract, and, standing unimpeached for fraud or mistake, precludes all parties. Hess v. Great Northern R. Co. 98 Minn. 198, 108 N. W. 7, 803; Hubbard v. Hartford F. Ins. Co. 33 Iowa, 325, 11 Am. Rep. 125; Atchison, T. & S. F. R. Co. v. VanOrdstrand, 67 Kan. 386, 73 Pac. 113; Barker v. Northern P. R. Co. 65 Fed. 461; Louisville Veneer Mills Co. v. Clemonts, 33 Ky. L. Rep. 106, 109 S. W. 308; McCormick v. St. Louis, 166 Mo. 315, 65 S. W. 1038; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 501; Jossey v. Georgia Southern & F. R. Co. 109 Ga. 439, 34 S. E. 664; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640, 16 Am. Neg. Cas. 314.

A receipt is the mere written acknowledgment of the fact of payment. Thompson v. Layman, 41 Minn. 295, 42 N. W. 1061; Ryan v. Ward, 48 N. Y. 204, 8 Am. Rep. 539; Sargeant v. National L. Ins. Co. 189 Pa. 341, 41 Atl. 351.

A receipt is a mere evidence of a fact, and differs from a *release,* which extinguishes a pre-existing right. Equitable Securities Co. v. Talbert, 49 La. Ann. 1393, 22 So. 762.

A receipt in full may be explained or disputed, but a release estops and concludes forever. Crane v. Alling, 15 N. J. L. 423; Sherburne v. Goodwin, 44 N. H. 276; Illinois C. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Cory v. Chicago, B. & K. C. R. Co. 100 Mo. 282, 13 S. W. 346; Northwestern Union Packet Co. v. Clough, 20 Wall. 528, 22 L. ed. 406, 7 Am. Neg. Cas. 317; Webster v. Ela, 5 N. H. 540; Missouri P. R. Co. v. Goodholm, 61 Kan. 758, 60 Pac. 1066; Walther v. Briggs, 69 Minn. 98, 71 N. W. 909; Thorn Wire Hedge Co. v. Washburn & M. Mfg. Co. 159 U. S. 423, 40 L. ed. 205, 16 Sup. Ct. Rep. 94.

In contemplation of law, the sum total of the powers which the principal has *caused* or *permitted* his agent to seem to possess is the agent's authority. Aldrich v. Wilmarth, 3 S. D. 523, 54 N. W. 811; 40 Century Dig. title, Principal & Agent, § 254.

Instructions to an agent cover not only the *powers conferred* and which are to be made known to third parties, but also private directions as to the manner in which he shall execute his authority, and not intended to be communicated to third persons dealing with the agent, because of their nature. Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 96; Van Santvoord v. Smith, 79 Minn. 316, 82 N. W. 642; Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195.

These can have no effect to qualify the liability of the principal to third persons, to whom they are not, and are not intended to be made known. Barnes v. Downes, 2 Tex. App. Civ. Cas. (Willson) 472; Young v. Wright, 4 Wis. 144, 65 Am. Dec. 303; Farmers' & M. Bank v. Butchers' & D. Bank, 16 N. Y. 125, 69 Am. Dec. 678; Moore v. Tickle, 14 N. C. (3 Dev. L.) 244; Lauer Brewing Co. v. Schmidt, 24 Pa. Super. Ct. 396.

Limitations of authority which are known to a person dealing with an agent are as binding upon such persons as they are upon the agent, and he can acquire no rights against the principal by dealing with the agent contrary thereto. Hutson v. Prudential Ins. Co. 122 Ga. 847, 50 S. E. 1000; Lucas v. Rader, 29 Ind. App. 287, 64 N. E. 488; Fritz v. Chicago Grain & Elevator Co. 136 Iowa, 699, 114 N. W. 193; Seven Hills Chautauqua Co. v. Chase Bros. Co. 26 Ky. L. Rep. 334, 81 S. W. 238; Carson v. Culver, 78 Mo. App. 597; Bradley v. Basta, 71 Neb. 169, 98 N. W. 697; Dietz v. City Nat. Bank, 42 Neb. 584, 60 N. W. 896; Catoir v. American L. Ins. & T. Co. 33 N. J. L. 487; Gilbert v. Deshon, 107 N. Y. 324, 14 N. E. 318; Universal Metal Co. v. Durham & C. R. Co. 145 N. C. 293, 59 S. E. 50; Suffolk Peanut Co. v. Luden, 32 Pa. Super. Ct. 603; Topham v. Roche, 2 Hill, 307, 27 Am. Dec. 387; National Guarantee & Loan Co. v. Thomas, 28 Tex. Civ. App. 379, 67 S. W. 454; Bank of Ravenswood v. Wetzel, 58 W. Va. 1, 70 L.R.A. 305, 50 S. E. 888, 6 Ann. Cas. 48; Authors & Newspapers Asso. v. O'Gorman Co. 147 Fed. 616; Russ v. Telfener, 57 Fed. 973.

It is proper to receive evidence to establish the agent's authority, or to show the knowledge of third persons dealing with the agent as to his authority and any limitations thereon. Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415, 31 N. E. 838; Sage v. Haines, 76 Iowa, 581, 41 N. W. 366; Shaw v. Williams, 100 N. C. 272, 6 S. E. 196; Wheeler v. McGuire, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190;

Mitrovich v. Fresno Fruit Packing Co. 123 Cal. 379, 55 Pac. 1064; Lucas v. Rader, 29 Ind. App. 287, 64 N. E. 488; Humphrey v. Havens, 12 Minn. 298, Gil. 196; McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132; Rathbun v. Snow, 123 N. Y. 343, 10 L.R.A. 355, 25 N. E. 379; Tompkins Machinery & Implement Co. v. Sherrill, 84 Tex. 627, 19 S. W. 860; Galveston H. & S. A. R. Co. v. Allen, 42 Tex. Civ. App. 576, 94 S. W. 417; Crawford v. Whittaker, 42 W. Va. 430, 26 S. E. 516; Bartlet v. L. Bartlett & Son Co. 116 Wis. 450, 93 N. W. 473.

The by-laws of a corporation are properly receivable as evidence of the defendant's claim of limited authority in the agent, as a part of its defense. Grant County State Bank v. Northwestern Land Co. 28 N. D. 500, 150 N. W. 736; Thatcher v. Kaucher, 2 Colo. 698; J. I. Case Threshing Mach. Co. v. Eichinger, 15 S. D. 530, 91 N. W. 82; Nininger v. Knox, 8 Minn. 140, Gil. 110; Mt. Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341; Clark v. Dillman, 108 Mich. 625, 66 N. W. 570; Wimp v. Early, 104 Mo. App. 85, 78 S. W. 343.

Ratification is alleged by the plaintiff and denied by the defendant. The burden of proving ratification was on plaintiff. Valley Bank v. Brown, 9 Ariz. 311, 83 Pac. 362; Chicago Cottage Organ Co. v. Stone, 71 Ark. 643, 73 S. W. 392; Dean v. Hipp, 16 Colo. App. 537, 66 Pac. 804; Sears v. Daly, 43 Or. 346, 73 Pac. 5; Moore v. Ensley, 112 Ala. 228, 20 So. 744; Smyth v. Lynch, 7 Colo. App. 383, 43 Pac. 670; Skirvin v. O'Brien, 43 Tex. Civ. App. 1, 95 S. W. 696; Combs v. Scott, 12 Allen, 493; Henderhen v. Cook, 66 Barb. 21; Nichols v. Bruns, 5 Dak. 28, 37 N. W. 752; Martin v. Hickman, 64 Ark. 217, 41 S. W. 852; Lambert v. Gerner, 142 Cal. 399, 76 Pac. 53; Schollay v. Moffitt-West Drug Co. 17 Colo. App. 126, 67 Pac. 182; Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319, 11 Ann. Cas. 407; St. John & M. Co. v. Cornwell, 52 Kan. 712, 35 Pac. 785; Pittsburgh & O. Min. Co. v. Scully, 145 Mich. 229, 108 N. W. 503; Johnson v. Ogren, 102 Minn. 8, 112 N. W. 894; Nord v. Boston & M. Consol. Copper & S. Min. Co. 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; Fitzgerald v. Kimball Bros. Co. 76 Neb. 236, 107 N. W. 227; Stock Exch. Bank v. Williamson, 6 Okla. 348, 50 Pac. 93; Quale v. Hazel, 19 S. D. 483, 104 N. W. 215; Knapp v. Smith, 97 Wis. 111, 72 N. W. 349; Schutz v. Jordan, 141 U. S. 213, 35 L. ed. 705, 11 Sup. Ct. Rep. 906.

In order to establish ratification, it must clearly appear that the principal was informed of all the facts and circumstances, and that no material fact was suppressed or withheld. Bank of Owensboro v. Western Bank, 13 Bush, 526, 26 Am. Rep. 211; Mummy v. Haggerty, 15 La. Ann. 268; Brown v. Bamberger, 110 Ala. 342, 20 So. 114; McGlassen v. Tyrrell, 5 Ariz. 51, 44 Pac. 1088; Nicklase v. Griffith, 59 Ark. 641, 26 S. W. 381; Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433; Dean v. Hipp, 16 Colo. App. 537, 66 Pac. 804; Eggleston v. Mason, 84 Iowa, 630, 51 N. W. 1; Woods v. Palmer, 151 Mich. 30, 115 N. W. 242; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; Shull v. New Birdsall Co. 15 S. D. 8, 86 N. W. 654.

If the issue of fact submitted by the court had really been the issue raised by the evidence, a verdict for defendant should have been *directed, because there was no promise for the benefit of a third party.* The remedy, if any, was under the contract to Westby. Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Emmitt v. Brophy, 42 Ohio St. 82; Johannes v. Phenix Ins. Co. 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414; Parlin v. Hall, 2 N. D. 473, 52 N. W. 405.

If a third party seeks to enforce a contract between others, he must show some *promise for his benefit,* or he cannot maintain such action. Baxter v. Camp, 71 Conn. 245, 42 L.R.A. 514, 71 Am. St. Rep. 169, 41 Atl. 803; State v. St. Louis & S. F. R. Co. 125 Mo. 596, 28 S. W. 1074; Winn v. Lippincott Invest. Co. 125 Mo. 528, 28 S. W. 998; Gifford v. Corrigan, 117 N. Y. 257, 6 L.R.A. 610, 15 Am. St. Rep. 508, 22 N. E. 756; Bartley v. Rhodes, — Tex. Civ. App. —, 33 S. W. 604; Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57; Etscheid v. Baker, 112 Wis. 129, 88 N. W. 52; Thomas Mfg. Co. v. Prather, 65 Ark. 27, 44 S. W. 218; Starbird v. Cranston, 24 Colo. 20, 48 Pac. 652; Beeson v. Green, 103 Iowa, 406, 72 N. W. 555; Stephenson v. Elliott, 53 Kan. 550, 36 Pac. 980; Morgan v. Overman Silver Min. Co. 37 Cal. 534; Pugh v. Barnes, 108 Ala. 167, 19 So. 370; Sanders v. Clason, 13 Minn. 379, Gil. 352; Washburn v. Interstate Invest. Co. 26 Or. 436, 36 Pac. 533, 38 Pac. 620; Parker v. Jeffery, 26 Or. 186, 37 Pac. 712; Buckley v. Gray, 110 Cal. 339, 31 L.R.A. 862, 52 Am. St. Rep. 88, 42 Pac. 100; Savings Bank v. Thornton, 112 Cal. 255, 44 Pac. 466; Mont-

gomery v. Rief, 15 Utah, 495, 50 Pac. 623; American Exch. Nat. Bank v. Northern P. R. Co. 76 Fed. 130.

H. A. Bronson, for respondent.

There is no privity of contract between the employee and the insurer on a policy of indemnity insurance; the contract is for the benefit of the employer. 15 Cyc. 1038; Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 Anno. Cas. 962; Allen v. Ætna L. Ins. Co. 7 L.R.A.(N.S.) 958, 76 C.C.A. 265, 145 Fed. 881.

It is fundamental that the true consideration of a release, receipt, or even of a deed, may be established by parol evidence outside of the instrument itself. 6 Am. & Eng. Enc. Law, p. 769.

If one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms as fully as though he had made it himself. He ratifies, by accepting of benefits in part even, the whole transaction. 2 C. J. 504; 1 Am. & Eng. Enc. Law, 1196; McCaull v. Nichols, 29 N. D. 405, 150 N. W. 932; Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11.

Where a corporation obtains and keeps the proceeds of an unauthorized contract made by one of its officers, it is estopped to repudiate the contract. Clement, B. & Co. v. Michigan Clothing Co. 110 Mich. 458, 68 N. W. 224; Rogers v. Empkie Hardware Co. 24 Neb. 653, 39 N. W. 844; Keim v. Lindley, — N. J. Eq. —, 30 Atl. 1063; Wheeler & W. Mfg. Co. v. Aughey, 144 Pa. 398, 27 Am. St. Rep. 638, 28 W. N. C. 381, 22 Atl. 667.

The principal, by keeping the fruits of an unauthorized act of his agent, ratifies the act and makes it his own. Davis v. Krum, 12 Mo. App. 279; Wyman v. Moore, 103 Cal. 213, 37 Pac. 230; Coykendall v. Constable, 99 N. Y. 309, 1 N. E. 884; Guadelupo y Calvo Min. Co. v. Beatty, — Tenn. —, 1 S. W. 348; Westby v. J. I. Case Threshing Mach. Co. 21 N. D. 575, 132 N. W. 137; Perry v. Simpson Waterproof Mfg. Co. 37 Conn. 520; Humphrey v. Patrons' Mercantile Asso. 50 Iowa, 607; Episcopal Charitable Soc. v. Episcopal Church, 1 Pick. 372; Fleming v. Sherwood, 24 N. D. 144, 43 L.R.A.(N.S.) 945, 139 N. W. 101.

Defendant's exhibit "6" is a letter written by the agent Hagsett to the manager of the company, *after* the settlement with the injured em-

ployee. It relates to a past transaction, was a private communication from one agent to another agent, with no pretense that its contents were ever made known to any of the parties here interested. It was properly excluded. Mulroy v. Jacobson, 24 N. D. 354, 139 N. W. 697; Holt v. Johnson, 129 N. C. 138, 39 S. E. 796; Huston v. Johnson, 29 N. D. 555, 151 N. W. 774; Conner v. Seattle, R. & S. R. Co. 56 Wash. 310, 25 L.R.A.(N.S.) 930, 134 Am. St. Rep. 1110, 105 Pac. 634, and cases cited; United States v. Barker, 4 Wash. C. C. 464, Fed. Cas. No. 14,520; 16 Cyc. 1205; Sargent v. Wording, 46 Me. 464; Capen v. Crowell, 63 Me. 455; Northwestern Fuel Co. v. Central Lumber & Coal Co. 110 Minn. 128, 124 N. W. 981; Duysters v. Crawford, 69 N. J. L. 614, 55 Atl. 823.

Secret and private instructions from officers to agents, or from one agent to another, are not admissible as binding on outside third parties. 31 Cyc. 1327, 1657; Nininger v. Knox, 8 Minn. 140, Gil. 110; Canham v. Plano Mfg. Co. 3 N. D. 229, 55 N. W. 583; Rosenstock v. Tormey, 32 Md. 169, 3 Am. Rep. 125; Meinhold v. Bradley Salt Co. 20 Misc. 608, 46 N. Y. Supp. 346; Farrar v. Duncan, 29 La. Ann. 126; Robbins v. Magee, 76 Ind. 381; McAlpin v. Ziller, 17 Tex. 508; Howell v. Graff, 25 Neb. 130, 41 N. W. 142; Cruzan v. Smith, 41 Ind. 288; Kelly v. Fall Brook Coal Co. 67 Barb. 183; Cornell v. Masten, 35 Barb. 157; 40 Century Dig. p. 1155.

But regardless of these considerations, every principle of estoppel and ratification prohibits the appellant from denying the contract that the agent Hagsett actually made. Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Chase v. Redfield Creamery Co. 12 S. D. 529, 81 N. W. 951.

Defendant admits and ratifies the settlement covering the $376.50; it cannot ratify a part of an indivisible transaction without ratifying the whole. Comp. Laws 1913, § 6332; Wyckoff v. Johnson, supra.

The defendant knew plaintiff had advanced to Westby a sum of money; it knew this was on account of the injury caused to Westby; it knew that Westby desired that plaintiff should have this money back. Defendant knew all these things and made settlement in the light of them. Comp. Laws 1913, § 6350; Grant County State Bank v. Northwestern Land Co. 28 N. D. 502, 150 N. W. 736.

The issues as framed by the pleadings admit the agency. 31 Cyc.

1632; Hamill v. Baumhover, 110 Iowa, 369, 81 N. W. 620; Cross v. Atchison, T. & S. F. R. Co. 71 Mo. App. 585.

All of the facts in this case show that the doctrine of actual or ostensible authority applies. Grant County State Bank v. Northwestern Land Co. supra.

Where a person has money to which, in equity and good conscience, another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by assumpsit. Devries v. Hawkins, 70 Neb. 656, 97 N. W. 792; McCormick Harvesting Mach. Co. v. Stires, 68 Neb. 432, 94 N. W. 629; Stephenson County v. Manny, 56 Ill. 160; Allsman v. Oklahoma City, 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184; Pardee v. Salt Lake County, 39 Utah, 482, 36 L.R.A.(N.S.) 377, 118 Pac. 122, Ann. Cas. 1913E, 202; Holloway v. Talbot, 70 Ala. 389; Maas v. Montgomery Iron Works, 88 Ala. 328, 6 So. 701; Jos. Joseph & Bros. Co. v. Hoffman, 173 Ala. 568, 38 L.R.A.(N.S.) 924, 56 So. 216, Ann. Cas. 1914A, 718; 27 Cyc. 852.

A creditor may maintain an action against a third person upon the promise made to the debtor to pay his debt to the creditor, when the promise is part of the consideration for property, or the right of the property, transferred by the debtor to such third person. Sanders v. Clason, 13 Minn. 379, Gil. 352; Johannes v. Phenix Ins. Co. 66 Wis. 50, 57 Am. Rep. 249, 27 N. W. 414.

A party cannot be deprived of the right to such relief as he should have under the issues and facts, merely because he entertained an erroneous idea of the nature of the action. Logan v. Freerks, 14 N. D. 127, 103 N. W. 426.

Under the contract of insurance made between Griffith and the company, Westby, the injured employee, had no right or claim or cause of action against the company. Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; Cyc, Anno. 1901–1913, p. 2757; Tozer v. Ocean Acci. Guarantee Corp. 94 Minn. 478, 103 N. W. 509.

The insured, under an indemnity insurance policy, may take settlement, and the insurance company be estopped to deny the right of the insured to recover under the policy or be effected by waiver thereof. Interstate Casualty Co. v. Wallins Creek Coal Co. 163 Ky. 778, L.R.A.

1915F, 958, 176 N. W. 217; St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co. 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. Rep. 400; New Orleans & C. R. Co. v. Maryland Casualty Co. 114 La. 154, 6 L.R.A.(N.S.) 562, 38 So. 89; Butler Bros. v. American Fidelity Co. 120 Minn. 157, 44 L.R.A.(N.S.) 609, 139 N. W. 355.

Goss, J. The questions for decision in the main are merely of fact and within the pleadings. They arise from an examination of the testimony to ascertain whether there was sufficient conflict to take any issue of fact to the jury. In other words, the principal question, arising under the pleadings, proof, and motion for judgment for the defendant notwithstanding the verdict of the jury, is whether there is sufficient evidence to sustain the verdict upon the issues as framed by the pleadings.

Plaintiff in 1913, through contractors, erected a block in Grand Forks. Plaintiff procured of defendant an employer's liability insurance policy indemnifying plaintiff against liability for damages from any injuries from negligence that might occur to the workmen in the erection of said building. On August 4, 1913, one John Westby was injured while working on said building. Griffith saw that doctors were secured and that Westby was taken to the hospital, and then notified Holmes, the agent of defendant company and who issued the policy to the plaintiff, and received from him instructions to see Westby and find out the best settlement that could be made with him. Westby subsequently demanded a settlement of plaintiff, who told him that he had nothing to do with the settlement, but that Holmes wanted him to see what Westby would take to settle, and talked with Westby about a settlement. Westby demanded $250 damages and the doctor's bills and pay for lost time. He was told to see the insurance company; that he would have to settle with them. Griffith, however, took the matter up with Murphy & Toner, defendant's attorneys, and reported to them what Westby wanted in settlement, and sent Westby to their office. No settlement was made. As the time passed Griffith paid Westby $30 that he was owing him for wages at the time of the accident, and at different dates further amounts aggregating an advance of $150. Griffith informed the office of Murphy & Toner of this advance, leaving a state-

ment of the amount with their clerk. He was directed by Holmes not to make any further advances to Westby, and did not do so.

On November 23, 1913, nearly four months after the injury, Westby met at Murphy & Toner's office one Hogsett, an adjusting agent or claim agent of the defendant company, and talked with him about settling his claim against Griffith and the contractors. Westby made the same demand that he had made of Griffith. "I asked him for the same thing as I asked Griffith, for $250 and full time, and he was going to see the insurance company about it,—he was going to find out." "He asked me what I wanted, and I told him I wanted $250 and full time." Westby had a statement of his time along with him, and gave it to Hogsett. The copy in evidence shows an itemized claim from October 5th to November 5th, amounting to $276.50, for wages claimed due during the time lost. On the back thereof are figures which Westby swears were written upon the back of the original statement at that time by the agent, *viz.*,

250.
276.50

526.50
150.

376.50

This computation is quite material under testimony as to the subsequent transaction when the claim was settled. The whole issue of fact is whether this adjuster, in the subsequent settlement in which $376.50 was paid, told Westby, or knowingly lead him to settle under the belief, that the defendant company would pay Griffith this $150 deducted as above in addition to the $376.50 it paid on such settlement to W. Westby saw the agent do this figuring, and the agent then and there made him an offer of $100 damages and full time in full settlement, and which Westby refused to accept. The parties separated without effecting a settlement. Three days later, November 26, 1913, Griffith received a phone call from Murphy & Toner's office to send Westby over, and found him and sent him over.

Hogsett was there, and Westby's testimony is that "he asked me if I

felt any different or if I could do a little cheaper, I don't know for sure how he said it. I said, 'No,' I wanted the same as I asked for the first time."

Q. "What did he say to you then?"

A. " 'Well, come in here and we will settle.' And he took me into the other room," where Murphy was.

They produced a paper, the release that had been prepared for Westby's signature, and as he could not read it, read it to him and gave him a check for $376.50.

Q. "Then, what did you do next?"

A. "Well, Murphy cashed the check and gave me the cash money."

Q. "Yes, what was said at the time?"

A. "I asked him before I signed my name if he was going to settle everything there was against me. He says 'Yes, and this money is all yours, he says.' "

The agent testifies to a different statement. He agrees that when Westby was just about to put the pen to the settlement, Westby interrogated him concerning what was settled. And that Westby had claimed for lost time amounting to $276.50, but says that Westby stated: "I have lost time amounting to $276.50, and I want to get $126.50 and $250. damages." He also admits that Westby told him, he, Westby, had received $150 from Griffith; that "there wasn't any question but what he was asking $250 additional" for damages, nor that the statement was presented for $276.50 for lost time. Hogsett was asked on cross-examination, "Did you tell him he would have to pay out of the $376.50 any expenses incurred?

A. "I did not."

Q. "You testified that you specifically called the attention of Westby at the time this settlement was made that the $150 that Griffith had advanced didn't concern him?

A. *"No, I wouldn't put it that way.* He specifically called that subject to my attention and that is what I said. I didn't go out of my way to say that. It came up naturally in answer to his question, and I didn't put it quite as you state. He simply says: 'What about this $150 that Griffith has paid me,' and I told him that *that was a matter that had nothing to do with this settlement,* possibly I might have used the expression you used, it didn't concern him, I don't know how I put

it, but that was the gist of it, and that I was not authorized to make any payment of that amount as is the fact."

Q. "Did you tell Westby that he would have to pay that back to Griffith?"

A. "No, that question wasn't discussed about his paying it back."

This reflects the contention on the facts of the parties. It might also be stated that there were other bills subsequently paid by the company, growing out of Westby's injury, such as $6 to the Deaconess Hospital; $16 for doctor bills to Wheeler, Williamson, & Campbell, for treatment of Westby and two others; $3 for ambulance charge for conveying Westby and another to the hospital. Which bills were recommended for payment by the adjuster on November 26, 1913, in his report to the company, and in which letter is found the following significant paragraph: "I believe there is no good reason for reimbursing the assured (Griffith) for the $150 lost time he paid to Westby and $50 lost time to Olson, and understand from your telegram of the 26th that you think likewise. The payment of this lost time did not help matters at all, but on the contrary tended to make the claimant more arrogant and independent in our negotiations for settlement. I found it absolutely impossible to get either of them to reduce his offer a cent." Several telegrams are in evidence between the agent and the company. The agent's authority was undoubtedly limited, in fact, to following the instructions of the company; and the company evidently had determined not to reimburse Griffith for this $150 advanced. It evidently based its refusal upon a clause in the policy that, "except as requested by the company, the insured shall not interfere in any way respecting any negotiations for the settlement of any claim or suit, or in the conduct of any legal proceedings," and asserts in the answer that such advances were in violation of and contrary to the contract of insurance. This feature of the case will be later discussed.

Westby's testimony standing alone is sufficient to take the case to the jury on the facts. The testimony of the agent does not change the situation. If we were to weigh the testimony we would say that it strengthened it, all things considered. The jury could conclude from the evidence that Hogsett knew that Westby believed the $150 would be paid in addition to the amount that was paid him, and was deceived and mislead into accepting the money from the agent under the belief

that the $150 advance with other bills pending, would also be paid by the company. Westby had refused the same settlement, $100 and for full time, at the first interview. The agent knew this when, at the opening of the next one three days later, he asked if he could not settle cheaper than his original demand; and, on Westby's statement that he would not take any less, says, "Well, come in here and we will settle," —almost the equivalent of a statement that he would settle at the amount demanded which included the $150 item to Griffith, as Hogsett well knew. And when about to sign the release the agent admits Westby asks him a question, "What about this $150 that Griffith has paid me?" While Westby says he asked "if he was going to settle everything there was against me," and to which the agent replied, "Yes, and this money is all yours," which could be well taken as an assurance that this amount paid was for Westby while the others, Griffith among them, would be paid. And the subsequent report of the agent that day to his company, that "I found it absolutely impossible to get either man to reduce his offer a cent," impeaches his testimony wherein he would have the court believe (as it must conclude if defendant prevails) that Westby did actually cut his claim $150, and accept the amount offered him in the first interview, at that time promptly rejected. Only one offer was made, so there can be no confusion on what offer was meant in that report. There was sufficient testimony to go to the jury on this question.

But appellant claims that Westby knew the limitations, on the authority of Hogsett, to pay only the amount he was authorized by his company to pay, and that he knew the settlement as made was unauthorized. Two answers may be made to this, either of which is sufficient: 1st. This depends for proof entirely upon the agent's testimony, which under the rule of false in part false *in toto,* it might well be found that Westby knew nothing of any want of authority in the agent to settle according to the agreement entered into; and 2d. In order to avail of any such want of authority the company must repudiate the entire settlement. It could ratify any unauthorized settlement its agent made, and has ratified by not repudiating it *in toto.* It could not stand on and rely on rights obtained by an unauthorized settlement, and assert at the same time that the settlement was void because unauthorized. If, by that settlement, it retained $150 to be

paid Griffith in release of Griffith's claim against Westby for that amount advanced Westby by Griffith, it must pay Griffith or repudiate *in toto* the settlement with Westby. It cannot avail itself of a favorable settlement with Westby, relieving itself of liability on its insurance contract, and at the same time assert that the money it retained by its agreement with Westby shall not be paid to Griffith, to whom it agreed with Westby to pay it, simply because it had a defense and possibly could have avoided its obligation to pay anything because of Griffith's advances. Any right to interpose such a defense was waived when it settled Griffith's liability to Westby, and thereby recognized its liability under the insurance contract by performing its contractual responsibility thereunder. It had the option to waive the effect of the advance, and did so by settling under the policy the liability of Griffith to Westby. After so doing, it cannot set up this provision of the policy to defeat Griffith's recovery of money Westby left with it for Griffith under the settlement it made with knowledge of that advance. None of appellant's authorities are applicable to these facts. The instructions were correct and within the issues. Appellant has sought to surround its case with questions of agency that are not properly in it. This lawsuit was born in the agent's deception of Westby, and in his report to his company encouraging refusal to pay Griffith.

Judgment is affirmed.

PETER KINNONEN v. GREAT NORTHERN RAILWAY COMPANY.

(158 N. W. 1058.)

Railway company — malicious assault — brakeman — peace officer — committed by — railway company — property of — protection of — furtherance of its business.

1. A railway company is not liable, under the provisions of § 10591, Compiled

Note.—That the case of KINNONEN v. GREAT NORTHERN R. Co. expresses and is in accord with the great weight of authority on the question of the liability of an employer for the acts of a special policeman will be found by an examination of the notes in 23 L.R.A.(N.S.) 289; 30 L.R.A.(N.S.) 481; 39 L.R.A.(N.S.) 122; and 43 L.R.A.(N.S.) 1164, on the liability of private person or corporation for acts of special police officer appointed by public authority.

Laws of 1913, for a malicious assault committed by a peace officer and a brakeman who are in its employ, when such assault is not committed for the purpose of protecting the property of the said company or in the furtherance of its business, or while said persons are acting for it.

Malicious assault — by brakeman — special police officer — train — person assaulted — ejected from — public street — trespasser — stealing ride on train.

2. A railway company is not liable for a malicious assault upon a person, committed by one of its brakeman and by a special peace officer employed by it, after such person has been ejected from and left its train for stealing a ride therefrom, and who after such ejection, and a mile or so from the place thereof, and while the train is stopping at a station, gets into an altercation with another brakeman, and then runs and is chased away, and later returns towards the train, and then is arrested upon a public street by the peace officer, either on the charge of an assault with a deadly weapon alleged to have been committed during the aforesaid altercation, or for having unlawfully stolen a ride on said train, and who, after such arrest, is assaulted by the brakeman, who is aided by the police officer either by standing by without interfering, or by holding the plaintiff; there being no proof whatever in the record that at the time of such assault either the police officer or the brakeman were acting for the protection of the property of the company, or that the said plaintiff was about to, or intended again to, board the train, or that the said peace officer and brakeman had any idea that he intended so to do.

Railway property — protecting — guarding — malicious assault — time intervening — between the acts — appreciable — deemed personal assault — employer — not act of.

3. Where an appreciable interval intervenes between the acts of protection which are exercised by persons in the guarding of the property of their employers and a malicious assault which they afterwards commit, the assault will be deemed to be a personal act of the servant, and not an act of the employer.

Opinion filed June 1, 1916.

Action against employer for assault and battery committed by employee.

Appeal from the District Court of Nelson County, *Chas. M. Cooley*, J. Judgment for plaintiff. Defendant appeals.

Reversed.

Murphy & Toner, for appellant.

While the theory of liability entertained by counsel for plaintiff was not disclosed upon the trial, it is inferred that they contend that

§ 10591, Comp. Laws, settles the company's responsibility for the acts of its employees while performing the duties of peace officers. This law really means nothing of the kind. Comp. Laws 1913, § 10573; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540, 4 Am. Neg. Rep. 283; Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Cas. 448; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601.

If a special deputy sheriff paid by a street railway company were acting *solely in his capacity* as an officer in assaulting a passenger, and not by direction of the conductor in charge of a car, the street railway company is not liable for the act. Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380, 18 Am. Neg. Rep. 479; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; Waaler v. Great Northern R. Co. 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097, 17 Am. Neg. Rep. 131.

A general manager of a mercantile establishment authorized to collect for his store, assaulted a customer to whom he had gone to make a collection,—held, that the merchant was not liable, the assault being outside the authority conferred on the manager. Matsuda v. Hammond, 77 Wash. 120, 51 L.R.A.(N.S.) 920, 137 Pac. 328; Cooley, Torts, 2d. ed. p. 628; Franklin F. Ins. Co. v. Bradford, 201 Pa. 32, 55 L.R.A. 408, 88 Am. St. Rep. 770, 50 Atl. 286; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 311, 18 Am. Neg. Rep. 289.

But if the master's business is done, or is taking care of itself, and the servant commits an assault out of personal spite, the master is not liable. Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 313, 18 Am. Neg. Rep. 289.

Where an officer makes an arrest and fails to protect the prisoner from assault and injury, it cannot be said that any outside third party may be held responsible in damages. The special officer here who made the arrest, and had the prisoner in charge, was not at that time engaged upon any other business,—especially was he not engaged in protecting the railway company's property, or, upon any other enterprise involving his *duties* as an employee of the company. Dickson

v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 507, 35 N. E. 1; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Hershey v. O'Neill, 36 Fed. 168; Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 615, 47 L.R.A.(N.S.) 965, 135 N. W. 189; Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 189.

If we assume that the special agent was acting for defendant at the time, the only theory upon which the evidence offered was admissible was that it was a statement against interest, and even then, it came too late to be admissible. Our specific objection to this evidence is that it *did not constitute an admission against interest.* 2 Jones, Ev. pp. 490, 491.

"Where there is a question as to whether any act was done by any person, the following facts are deemed to be relevant: Any fact which supplies a motive or which constitutes preparation for it. Equally familiar is the practice of proving as parts of the chain of evidence, the opportunity, preparation, motive, desire, or intention of the party to do the act in question." Jewett v. Banning, 21 N. Y. 27; Bruner v. Wade, 84 Iowa, 698, 51 N. W. 251.

Frich & Kelly, for respondent.

The rule is that if, while engaged in executing the employment of his principal, the servant so conducts himself, whether negligently or maliciously so as to injure another, the principal will be liable. Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 624, 47 L.R.A.(N.S.) 965, 135 N. W. 189; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472.

In a case where a depot agent, though present, failed to interfere and protect a patron from an assault by his subordinate, the company was held liable. Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 624, 47 L.R.A.(N.S.) 965, 135 N. W. 189; Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 652; Gillon v. Wilson, 3 T. B. Mon. 217.

"Each of such railway or railroad companies or receiver thereof is and shall be held responsible for the acts of all conductors or other

persons employed by it while acting as peace officers under the provisions of this article, to the same extent as for the acts of its general agents or employees." Taylor v. New York & L. B. R. Co. 80 N. J. L. 282, 39 L.R.A.(N.S.) 122, 78 Atl. 169.

It is held that such special officers are primarily agents of the railway company, and that the latter is liable for acts committed by them in excess of the authority conferred by the statute. Sharp v. Erie R. Co. 184 N. Y. 100, 76 N. E. 923, 6 Ann. Cas. 250, 19 Am. Neg. Cas. 448; King v. Illinois C. R. Co. 69 Misc. 245, 10 So. 42; Rand v. Butte Electric R. Co. 40 Mont. 398, 107 Pac. 87; 6 Labatt, Mast. & S. § 2478; Illinois Steel Co. v. Novak, 184 Ill. 501, 56 N. E. 966; Eichengreen v. Louisville & N. R. Co. 96 Tenn. 229, 31 L.R.A. 702, 54 Am. St. Rep. 833, 34 S. W. 219; Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186; Union Depot & R. Co. v. Smith, 16 Colo. 361, 27 Pac. 329; Higby v. Pennsylvania R. Co. 209 Pa. 452, 58 Atl. 858; Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 652; Southwestern Portland Cement Co. v. Reitzer, — Tex. Civ. App. —, 135 S. W. 237; Brewster v. Interborough Rapid Transit Co. 68 Misc. 348, 123 N. Y. Supp. 992; Parke v. Fellman, 145 App. Div. 836, 130 N. Y. Supp. 361; Hedge v. St. Louis & S. F. R. Co. 164 Mo. App. 291, 145 S. W. 115.

The difference between the statute of this state, and the statutes of the states from which counsel cite authorities as sustaining their contention, has apparently been lost sight of, and accounts for their misinterpretation of the law applicable. Healey v. Lothrop, 178 Mass. 151, 86 Am. St. Rep. 471, 59 N. E. 653; Horgan v. Boston Elev. R. Co. 208 Mass. 287, 94 N. E. 386; Hirst v. Fitchburg & L. Street R. Co. 196 Mass. 353, 82 N. E. 10; Krulevitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590, and cases cited.

That such an employee may be properly regarded as one whose ordinary duties include the protection of the cars against the intrusion of trespassers would seem to constitute a satisfactory basis for such presumption. Dixon v. Northern P. R. Co. 2 Ann. Cas. 620, and note, 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943; Texas & P. R. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79; Smith v. Louisville & N. R. Co. 95 Ky. 11, 22 L.R.A. 72, 23 S. W.

652; Southern P. R. Co. v. James, 118 Ga. 340, 63 L.R.A. 257, 45 S. E. 303, 15 Am. Neg. Rep. 269; Hayes v. Southern R. Co. 141 N. C. 195, 53 S. E. 847; O'Banion v. Missouri P. R. Co. 65 Kan. 352, 69 Pac. 353; Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 Atl. 986; Tyson v. Joseph H. Bauland Co. 186 N. Y. 397, 9 L.R.A. (N.S.) 267, 79 N. E. 3; 26 Cyc. 1576, note 18, and cases cited.

The "errors of law on the trial," discussed by counsel, were not referred to during the argument upon the motion for a new trial, and are not properly before this court for decision. Northern Shoe Co. v. Cecka, 22 N. D. 631, 135 N. W. 177; Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 624, 47 L.R.A.(N.S.) 965, 135 N. W. 189; Dixon v. Northern P. R. Co. 37 Wash. 310, 68 L.R.A. 895, 107 Am. St. Rep. 810, 79 Pac. 943, 2 Ann. Cas. 620; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165, and cases cited; 5 Thomp. Corp. § 6299, and cases cited.

It is established that plaintiff's injuries are severe and permanent, and, considering his youth, the verdict is not excessive. Rand v. Butte Electric R. Co. 40 Mont. 398, 107 Pac. 87; Dowd v. McGinnity, 30 N. D. 308, 152 N. W. 524; Carpenter v. Dickey, 26 N. D. 184, 143 N. W. 964.

Statement of facts by BRUCE, J.:

This is an action to recover damages for an assault committed by a brakeman and special peace officer who were employed by the defendant railway company, and the duty of both of whom, as far as the defendant was concerned, involved the protection of the property of the company and the keeping of trespassers therefrom.

The complaint alleges:

That under the authority conferred by article 8 of chapter 6, § 9750 of the Code of Criminal Procedure of this state, the defendant Great Northern Railway Company, on or about January 1, 1914, appointed the defendant N. P. Nissen as a peace officer, and authorized him to act as such in the protection of its property and in the preservation of order upon its premises and in or about its depots, grounds, yards, buildings, and other structures within this state, and that by virtue of such employment the defendant N. P. Nissen became, and at the date

hereinafter mentioned was, the general agent of the defendant Great Northern Railway Company, for whose acts the said last-named defendant thereby became chargeable.

That upon the date hereinafter mentioned the defendant B. Blanchard, was an agent, to wit, a brakeman in the employ of the defendant Great Northern Railway Company.

That heretofore, to wit, on the 25th day of July, A. D. 1914, the defendant N. P. Nissen, acting in his capacity as a peace officer as aforesaid, and exercising the powers conferred upon him by the defendant Great Northern Railway Company, and professing thereby to be endeavoring to protect the property and employees of the defendant Great Northern Railway Company from improper use and annoyance by the plaintiff, arrested the plaintiff without a warrant at the village of Petersburg, in the county of Nelson, state of North Dakota, and took said plaintiff into his custody and into the custody of the defendant Great Northern Railroad Company as a prisoner.

That on the date last aforesaid, and while the plaintiff was so as aforesaid a prisoner in the custody of the defendants Great Northern Railway Company and N. P. Nissen, the said Nissen and the defendant B. Blanchard committed an extremely brutal assault upon the person of the plaintiff, and cruelly beat and wounded the plaintiff; that in the course of such assault and while the plaintiff was restrained by the defendant Nissen, the defendant Blanchard repeatedly struck the plaintiff upon the body, head, and face, and while the plaintiff lay prostrate upon the ground and unable to defend himself or offer any resistance thereto, the defendants Nissen and Blanchard repeatedly kicked the plaintiff upon the side of his body and upon his face and head; that as a result of said assault, and of the battery inflicted upon him by the defendants, the plaintiff suffered great and grievous personal injuries and a partial loss of the senses of sight and hearing, besides mental suffering and humiliation, all to his damage in the sum of ten thousand ($10,000) dollars, no part of which has been paid, though payment thereof has been demanded.

The answer, omitting formal parts, is as follows:

(1) Defendant admits the allegations of paragraph 1 of the complaint. Admits that at the time of the alleged assault upon the plaintiff referred to in the complaint the defendant Nissen was an employee

of this defendant, to wit, a watchman or special agent to look after the property of the defendant railway company. This defendant denies that at the time referred to in the complaint, or at any time, it had in its employ B. Blanchard. This defendant also admits that about the time stated in paragraph 4 of the complaint the defendant Nissen took the plaintiff into his custody at or near the village of Petersburg, upon the charge of stealing a ride upon one of the trains of the defendant railway company. This defendant further admits that, after the arrest of the plaintiff as aforesaid, an assault was committed upon the person of said plaintiff by a brakeman in the employ of the railway company, and that said plaintiff sustained slight injuries therefrom, but in this behalf defendant avers that the plaintiff has fully recovered from such injuries. Defendant further alleges that the person committing said assault was acting entirely without the scope of his authority as an employee of the defendant railway company.

(2) Except as hereinbefore admitted or denied this defendant denies each and every allegation, matter, and thing in said complaint contained.

(3) This defendant further alleges that at the time of the assault upon, and injuries to, the plaintiff, said plaintiff was engaged in the performance of an unlawful act, to wit, plaintiff was engaged in stealing a ride upon a train of this defendant contrary to the laws of the state of North Dakota. That immediately prior to the time of said assault the plaintiff had clandestinely, and without paying to the defendant railway company the proper charges therefor, ridden upon a train of the defendant railway company from Grand Forks to the village of Petersburg, and refused to desist from such unlawful conduct when requested so to do by the trainmen in charge of said train. That at the time of the assault referred to in the complaint, the plaintiff proposed and intended to again board said train at the village of Petersburg, and unlawfully ride thereon to the city of Lakota, North Dakota, and so ride without paying the fare required by the laws of said state. That because of the unlawful acts and conduct of the plaintiff aforesaid, and by reason of his own wilful wrong, and contributory negligence aforesaid, said plaintiff sustained the injuries received by him.

Wherefore, this defendant demands judgment that plaintiff's action be dismissed with costs.

BRUCE, J. (after stating the facts as above). The first point to be considered is whether the trial court erred in refusing to direct a verdict for the defendant, and in considering this proposition, we must give full weight to the testimony of the plaintiff. This testimony supports in the main the allegations of the complaint; the only question, indeed, which is in dispute being whether the plaintiff was arrested and the assault was made by the brakeman and participated in by the peace officer Nissen, for the protection of the property of the defendant railway company, and whether such persons were acting within the scope of their authority though maliciously, or whether it was committed outside of the scope of their authority. The law in the case seems to be settled. Section 10591, Compiled Laws of 1913, provides that "each of such railway or railroad companies or receivers thereof is, and shall be held responsible for the acts of all conductors or other persons employed by it while acting as peace officers under the provisions of this article to the same extent as for the acts of its general agents or employees."

It must be clear from the above section that if neither the police officer Nissen nor the brakeman Blanchard were acting for the company or for the protection of the property of the company, the defendant was not liable. The authorities are almost unanimous in holding that when an officer of the kind mentioned is merely performing his duty as a police officer, and is not at the same time furthering the interests of his company, that such company will not be liable for his acts. See notes to 23 L.R.A.(N.S.) 289, and 30 L.R.A.(N.S.) 481; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540, 4 Am. Neg. Rep. 283; Dickson v. Waldron, 135 Ind. 507, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Hershey v. O'Neill, 36 Fed. 168.

What is true of the special peace officer is of course true of a brakeman whose duty it is to protect the property of his employer. His employer, in short, is liable for his acts, though malicious, when done in protecting its property, but he is not liable for such acts when they are not done for that purpose. Galehouse v. Minneapolis, St. P. & S. Ste. M. R. Co. 22 N. D. 615, 47 L.R.A.(N.S.) 965, 135 N. W. 189; Cooley, Torts, 2d ed. p. 628; notes to Franklin F. Ins. Co. v. Bradford, 88 Am. St. Rep. 770, 772; 1 Jaggard, Torts, 278.

As far as the police officer is concerned, all that the statute provides is that the railway company shall be liable for his acts to the same extent as if he had been any other agent or employee. That is to say, only for his acts when done within the scope of his authority and while acting for it and in its protection. As far as the evidence is concerned there seems to be no dispute that the assault was committed when the parties concerned were in no way acting for the benefit or protection of the defendant. The plaintiff, it is true, had stolen a ride upon defendant's train. He had, however, been ejected therefrom, when it was a mile or so east of Petersburg. While the train was standing at Petersburg he caught up with it, and got into an altercation with one of the brakemen. Defendant's witness testified that he threatened the brakeman with a knife, but that is immaterial. According to plaintiff himself, the altercation took place, and the brakeman threw stones at him, and the police officer chased him, shooting a revolver over his head. After circling the town, he returned towards the depot, and was then arrested by the peace officer, according to the evidence, on the charge of assault with a deadly weapon, and, according to the answer, on the charge of having stolen a ride. It was then and while being searched by the officer, or immediately after, that he was assaulted by the brakeman, and that the officer either assisted in holding him, or stood idly by and allowed the assault to take place. Though the brakeman may at one time have been engaged in protecting the property of his employer, there can be no pretense that he was so engaged at the time of the assault, and the law is well established that when there is an appreciable interval between the acts of protection and a malicious assault in connection with that protection, that the assault is deemed to be a personal act of the servant. See Spencer v. Kelley, 32 Fed. 838; Roberts v. Southern R. Co. 143 N. C. 176, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375.

There is absolutely no evidence that the plaintiff at the time of the assault or at any time prior thereto was attempting to, or had intended to, again board the train, and though the answer states "that at the time the assault referred to in the complaint, the plaintiff intended to again board said train at the village of Petersburg and unlawfully ride thereon to the city of Lakota," such allegation was merely made for the purpose of laying the foundation for proof of contributory negligence, and there

is no evidence that either the peace officer or the brakeman had any knowledge of such intention, nor does the answer allege or admit that they did, nor as a matter of fact does the plaintiff himself contend that any such intention was entertained by him.

Though, therefore, the assault was a brutal one and absolutely unjustified, and may be the ground for liability on the part of the special agent and the brakeman, it can impose no liability on the defendant company. See, in addition to the cases already cited, Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537.

We are not unmindful of the authorities cited by counsel for respondent to the effect that "if the servant while doing the master's business exceeds his instructions whereby an injury to another results, the master is liable because the law casts upon him the duty of employing fit agents for the transaction of his business." There is, however, no proof that the brakeman and the peace officer were in any manner transacting their master's business at the time of the assault which is before us.

The judgment of the District Court is reversed and a new trial is ordered.

CHRISTIANSON, J. (dissenting). I am unable to concur in the foregoing opinion. It seems to me that, under the evidence and the allegations of defendant's answer, the question whether the special agent, Nissen, was acting for the company or for the protection of its property at the time he arrested plaintiff, was one of fact for the jury.

MINNESOTA MUTUAL LIFE INSURANCE COMPANY, a Foreign Corporation, v. TAGUS STATE BANK, a Corporation.

(L.R.A.1917A, 519, 158 N. W. 1063.)

Banks — notes — collections — cashier's checks — deposited proceeds in bank — plaintiff — owner of notes — owner of checks.

1. Defendant bank collected two notes for plaintiff and placed the proceeds on deposit with itself, issuing therefor its cashier's checks for $1,802.00 to plaintiff, but held them in its bank undelivered. Its cashier, John J. Brugman, ap-

propriated to the use of himself and the president of the bank a like amount of money from said bank. The president of said bank, W. J. Brugman, knew all these facts, and participated in appropriating part of the money, part of it going to take up his own overdraft with his bank. It is stipulated that previous to this transaction the stockholders and directors of defendant bank believed the cashier "to be an honest and upright officer." The bank refuses to pay plaintiff the money it so appropriated, and denies liability under the claim that it received said moneys as a special deposit, and was obliged to use only ordinary care in the keeping and transmission thereof, and that while so doing, and without its negligence, its officers, whom it believed to be honest, misappropriated the special deposit to their use, and for which it should not be held responsible.

Held: The act of these officials was the act of the bank.

Special deposit.

2. The funds were not on special deposit.

Officers of bank — funds — misappropriation of — to own use — act of bank — general deposit.

3. The funds were on general deposit with it, and therefrom arose the relation of debtor and creditor between plaintiff and defendant.

Special deposit — loss of — negligence — of bank — liability — judgment.

4. Though it be assumed that this was a special deposit, yet the loss thereof presumes negligence by defendant, and places it under the burden of affirmatively proving that it was not negligent if it would escape liability; and not making such proof, it must respond in judgment.

Opinion filed August 2, 1916.

From a judgment against defendant in District Court, Ward County, *Leighton,* Judge, defendant appeals.

Affirmed with costs.

Palda & Aaker and *I. M. Oseth,* for appellant.

"Money received by a bank solely for the purpose of transmission to a correspondent bank becomes a special deposit." Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710.

"The fact that money so collected has been mingled in the vault with other funds of the bank does not alter or destroy the relation of bailor and bailee." Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; 3 R. C. L. 633; Re Johnson, 103 Mich. 109, 61 N. W. 352; Wallace v. Stone, 107 Mich. 190, 65 N. W. 113; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; Continental Nat. Bank

v. Weems, 69 Tex. 489, 5 Am. St. Rep. 85, 6 S. W. 802; Commercial Nat. Bank v. Armstrong, 39 Fed. 684; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214.

Money so held is not in any sense the property of the bank. Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 769, 86 N. W. 21; Minneapolis Sash & Door Co. v. Metropolitan Bank, 77 Am. St. Rep. 609, note; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; Prescott v. Leonard, 32 Kan. 142, 4 Pac. 172; Re State Bank, 56 Minn. 119, 45 Am. St. Rep. 454, 57 N. W. 336; Griffin v. Chase, 36 Neb. 328, 54 N. W. 572; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; Akin v. Jones, 93 Tenn. 353, 25 L.R.A. 523, 42 Am. St. Rep. 921, 27 S. W. 669; Beal v. Somerville, 17 L.R.A. 291, 1 C. C. A. 598, 5 U. S. App. 14, 50 Fed. 647; Commercial Nat. Bank v. Armstrong, 39 Fed. 684; Re Johnson, 103 Mich. 109, 61 N. W. 352; McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214; 3 R. C. L. 522.

For the loss of the subject of bailment, the bailee is liable only for negligence in its care, or for acts constituting conversion. The degree of negligence depends upon the character of the bailment. Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Reprint, 107; Cheshire v. Bailey, 1 Ann. Cas. 94, and note, [1905] 1 K. B. 237, 4 B. R. C. 553, 74 L. J. K. B. N. S. 176, 53 Week. Rep. 322, 92 L. T. N. S. 142, 21 Times L. R. 130; 2 C. J. 723, 732, § 396; Louisville & N. R. Co. v. Buffington, 131 Ala. 620, 31 So. 592; Richardson v. Futrell, 42 Miss. 525; Robinson v. Illinois C. R. Co. 30 Iowa, 401; Rechtscherd v. St. Louis Accommodation Bank, 47 Mo. 181.

A crime or tort committed against the bank itself has never been held to be the act of the bank. A bank is not responsible for the acts of its officers, unless those acts are within the real or ostensible authority of the officers. Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477, 7 So. 601; McKeon v. Citizens' R. Co. 42 Mo. 79, 4 Am. Neg. Cas. 471; Jackson v. St. Louis, I. M. & S. R. Co. 87 Mo. 422, 56 Am. Rep. 460, and other cases cited in note to Chase v. Waterbury Sav. Bank, 1 Ann. Cas. 96.

If the acts of these officers were not within their authority and powers, then they were not the acts of the bank, and the bank cannot

here be held. National Bank v. Johnson, 6 N. D. 185, 69 N. W. 49.

In an action of this nature, where plaintiff has made out a prima facie case, the burden then shifts to defendant to account for the non-delivery of the property, and one of these methods is to show that the property was lost or stolen from him without his fault or culpable neglect, he having exercised all care and diligence commensurate with the circumstances, the nature of the property, and character of the trust. This being shown, the prima facie liability has been avoided, and it then becomes the duty of plaintiff to rebut such showing by affirmative proof of lack of care and diligence. Until plaintiff does this he cannot recover. Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Lamb v. Western R. Corp. 7 Allen, 98; Kafka v. Levensohn, 18 Misc. 202, 41 N. Y. Supp. 368; Rothoser v. Cosel, 39 Misc. 337, 79 N. Y. Supp. 855.

Where the bank did not know of the dishonest practices of its cashier, and could not by the exercise of ordinary care have discovered same, it cannot be held liable for his unauthorized and dishonest acts and conduct. Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Cutting v. Marlor, 78 N. Y. 454; Ouderkirk v. Central Nat. Bank, 119 N. Y. 271, 23 N. E. 875; Gray v. Merriam, 148 Ill. 190, 32 L.R.A. 769, 39 Am. St. Rep. 172, 35 N. E. 810, 1 Am. Neg. Cas. 478; Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502.

The negligence of the bank in such cases must be gross, culpable. Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523; Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831; First Nat. Bank v. Graham, 79 Pa. 106, 21 Am. Rep. 49; Ray v. Bank of Kentucky, 10 Bush, 344.

"The undertaking of banking corporations with respect to their officers is that they shall be skilful and faithful in their employment; they do not warrant their general honesty and uprightness." Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168, 1 Am. Neg. Cas. 502; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82, 36 Am. Rep. 582; Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, 11 Sup. Ct. Rep. 162, 1 Am. Neg. Cas. 599; Giblin v. McMullen, L. R. 2 P. C. 317, 5 Moore, P. C. C. N. S. 434, 38 L. J. P. C. N. S. 25, 21 L. T. N. S.

214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613; Smith v. First Nat. Bank, 99 Mass. 605, 97 Am. Dec. 59, 1 Am. Neg. Cas. 523.

Bradford & Nash and *E. R. Sinkler* and *Butler & Mitchell,* for respondent.

"After the collection has been made the bank becomes a simple contract debtor for the amount, less commissions if any have been charged. If the party has no deposit account, the bank simply owes him the money on demand." 1 Morse, Banks & Bkg. § 248; Marine Bank v. Fulton County Bank, 2 Wall. 252, 17 L. ed. 785.

"Proceeds received after the bank becomes insolvent are held in trust, and may be recovered in full." 1 Morse, Banks & Bkg. § 248 A. with cases cited; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 778, 86 N. W. 21.

"Where money is deposited, and the bank has but a simple duty to perform with respect to it, and it is the intent of the parties that this duty is to be performed upon the identical money deposited,—like paying it over to a third person,—the deposit is special, and the bank is the mere agent for the performance of that duty." Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710; Plano Mfg. Co. v. Auld, supra.

If the agent after receiving the deposit and contrary to his instructions and to his duty, mingles their funds with his own, he is certainly in no position to deny that the relationship of debtor and creditor arises. Plano Mfg. Co. v. Auld, supra.

"The bank may be guilty of negligence and liable accordingly in employing or retaining an unfit person in the position of cashier." . . . As far as the question of mere negligence is concerned, the bank can plead its not knowing or having cause to suspect the integrity of its officers. Merchants' Nat. Bank v. Guilmartin, 88 Ga. 797, 17 L.R.A. 322, 15 S. E. 831.

"The burden of showing the circumstances of the loss rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property." Ouderkirk v. Central Nat. Bank, 119 N. Y. 263, 23 N. E. 875; Merchants' Nat. Bank v. Carhart, 95 Ga. 394, 32 L.R.A. 775, 51 Am. St. Rep. 95, 22 S. E. 628.

"The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest." Comp. Laws 1913, § 7147.

"If a debt ought to be paid at a particular time and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment." Young v. Godbe, 15 Wall. 565, 21 L. ed. 251; Sullivan v. McMillan, 37 Fla. 134, 53 Am. St. Rep. 239, 19 So. 340; Wood v. Cascade F. & M. Ins. Co. 8 Wash. 427, 40 Am. St. Rep. 917, 36 Pac. 267.

Goss, J. This case was tried upon these stipulated facts: "It is stipulated by and between the parties to this action that on October 13, 1913, and all times mentioned in the complaint and answer in this litigation, the plaintiff was a foreign corporation, authorized to do business in the state of North Dakota, and the defendant was and is a domestic banking corporation organized under the laws of the state of North Dakota; that on or about October 13th, 1913, the Minnesota Mutual Life Insurance Company did send to the Tagus State Bank for collection two notes as follows: One note against O. J. Ness for $800 and interest. One note against Jno. J. Leon, for $900 and interest, the two notes amounting to $1,802; that the said notes were secured by real estate mortgages on lands in the vicinity of Blaisdell, then owned by O. J. Ness.

"It is further stipulated that on or about December 31, 1913, the said O. J. Ness paid to the Blaisdell State Bank of Blaisdell, North Dakota, the sum of $1,802 for the purpose of taking up said notes and mortgages above referred to, with instructions to send said moneys to the Tagus State Bank for such purpose; that thereafter and on December 31st, the Blaisdell State Bank did issue its cashier's checks for the sum of $1,802 which are marked exhibit A No. 1065, and B No. 1604, and which were sent to the Tagus State Bank with instructions that the same were for payment of the above-mentioned two loans; that the Tagus State Bank thereafter and between the 14th day of January and the 17th day of January, 1914, cashed such check for $1,802, and did make out and hold in its possession cashier's certificates in the sum of $1,802, being the certificates numbered 3479 marked exhibit C, and No. 3482 marked exhibit D; that on the cashier's

check register on which said exhibits C and D are recorded, there is a notation marked Ole J. Ness under exhibit C No. 3479, and the words Jno. J. Leon, loan under exhibit D, which said checks were made payable to the Minnesota Mutual Life Insurance Company; that thereafter and on or about January 24th, 1913, Jno. J. Brugman, who was then the cashier of said bank, did cash such certificate without indorsement by the Minnesota Mutual Life Insurance Company or any other indorsement, and did appropriate said moneys to his own use; that none of said sums have been paid by the Tagus State Bank to the Minnesota Mutual Life Insurance Company, to the Blaisdell State Bank, or to Ole J. Ness or to Jno. J. Leon; that Jno. J. Brugman was the cashier of the Tagus State Bank during all the times mentioned in this stipulation; that prior to the payment of the Leon and Ness notes the same were sent by the defendant to the Blaisdell State Bank for collection without knowledge or authority on the part of the Minnesota Mutual Life Insurance Company that the same had been done; that on or about July or August, 1914, the Tagus State Bank did get said note from the Blaisdell State Bank and returned the same to the Minnesota Mutual Life Insurance Company, being the same notes which were sent to the Tagus State Bank for collection; that no satisfaction of the mortgages securing the notes herein mentioned was ever made by the plaintiff or sent to the defendant or requested by the defendant, but that the Blaisdell State Bank did demand such satisfaction from the Tagus State Bank; that subsequent to February 1st, 1914, the plaintiff has repeatedly demanded payment of the said $1,802 and interest from the Tagus State Bank; that Jno. J. Brugman, cashier of the Tagus State Bank, took the cashier's checks exhibits C and D and used the amounts which they represented to take up his own and his brother's checks, which came in from outside banks, and that no entry was made on the books of the transaction taking up said check with these cashier's checks marked exhibits B and E; that prior to this transaction Jno. J. Brugman, of the said Tagus State Bank, was believed by the public and the stockholders and the directors of the defendant to be an honest and upright officer, and so conducted himself so far as anyone knew, but that all such transactions were made and done with the knowledge and consent of W. J. Brugman, the presi-

dent of said bank, who also participated in a portion of the money converted on the cashing of said exhibits C and D."

Upon these facts judgment was ordered for plaintiff for $2,000.81 and costs. Defendant bank appeals.

Appellant's basis for denial of liability is in its claim that the collection made became in law but a special deposit in said bank giving rise to the relation of bailor and bailee, and that the bank is not liable for the embezzlement of such special deposit by its supposed honest officials, its cashier, done with the connivance of its president.

Decision of any question that would arise under a bailment is without the case because the facts stipulated show that no deposit was made with defendant's bank. It had authority to collect and procured collection of these notes. It reduced to cash the checks sent it by its collecting agent, the Blaisdell Bank. In possession of the funds, it became charged with a duty to remit said amount less commissions for its services. It placed these funds on deposit with itself. This is shown by the issuance of its two cashier's checks, which are equivalent to its draft on its general funds, and negatives to the mind of anyone familiar with banking usage any possible contention that these funds were placed on special deposit. The issuance of cashier's checks, necessarily drawn generally against its cash, evidenced that the other side of its bookkeeping transactions had taken place, *viz.*, that the sums had been deposited in its cash as general deposits subject to check. The purpose of the transaction was to swell its deposits temporarily, and that it might retain the funds until its cashier's checks returned for collection. Otherwise it would have drawn its draft on its correspondent bank and credited its cash with the sums deposited. In either event the effect is the same, except that by its system of cashier's checks it retained the money temporarily pending return of its checks for collection. In either case no relation other than that of debtor and creditor would be created. Citizens' State Bank v. Iverson, 30 N. D. 497, 153 N. W. 449. The bank did not agree to transmit the identical money received. In fact it received in all probability no coin or specific cash, but only its equivalent in credit on its books, or those also of its correspondent bank elsewhere. Its obligation to plaintiff was to transmit to it the same amount of money that it received less its commissions for services in collecting and remitting. No particular coin or currency was in

contemplation of this business transaction to be transmitted nor even dealt with or considered. Hence no special deposit was made, nor can such theory change the ordinary debtor and creditor relation that arose under the stipulated facts. Note to 1 Morse, Banks & Bkg. § 248; Plano Mfg. Co. v. Auld, 14 S. D. 512, 86 Am. St. Rep. 778, 86 N. W. 21; Cutler v. American Exch. Nat. Bank, 113 N. Y. 593, 4 L.R.A. 328, 21 N. E. 710.

There is no substantial conflict in the theory of the law as to when deposits are general or special. But in the application of the theory under the peculiar facts of each case there is far from harmony in the decisions. Much of the discord arises from the change in relations of the parties pending the transactions and where rights of others intervene or are to be considered. Much of the law cited by appellants was declared in suits brought by claimants against receivers of defunct banks. It is here of no concern whether this plaintiff could follow this deposit in the hands of a receiver had this bank failed before remitting. Plaintiff asserts no such right, being content to treat this transaction exactly as the bank treated it, *viz.*, as a general deposit against which it drew its checks in plaintiff's favor. Whether the bank alone could in that way make plaintiff a general depositor against its wishes, so as to bar it from following its deposit as a trust fund or special deposit with plaintiff, denying the passing of any title thereto to its collecting agent, the bank, is not the question before us. The situation here is simple, and is merely whether the defendant, after creating by its act a general deposit and the relation of debtor and creditor with plaintiff, may then claim, after its cashier and president have by their trickery and dishonesty embezzled its funds to an amount equal to what plaintiff has so deposited, that a special deposit was made in order to found a claim thereon that its officers have embezzled a special deposit and not its own general funds. This sums up the contention made by defendant. No authorities can be found to support such a claim. It can not be allowed to thus defeat its liability.

But defendant asks: "If the misappropriation was not the act of the bank, how can it be held liable?" The act of the bank upon which its liability rests was *receiving* these funds in due course of ordinary banking for transmission and then making a general deposit of them as it did. What happened subsequent to this could not release it from

liability. Hence it is no concern of plaintiff that defendant's officials embezzled its general funds afterward. Nor does it release the bank from liability.

The note to 86 Am. St. Rep. at page 786, covers this situation by the following: "In the absence of such general agreement, however, [an agreement to transmit funds received as a special deposit] 'the custom of bankers to credit customers with the proceeds of paper left for collection when the paper has been collected is universally recognized; and customers and bankers are presumed to contract and deal together in view of this usage. The law therefore authorizes the banker to credit the customer with the proceeds in lieu of making a specific delivery; and the necessary effect of an authorized credit is to create the relation of debtor and creditor between them from the time when the credit is given.' First Nat. Bank v. Bank of Monroe, 33 Fed. 408. From this it follows that the bank takes title to the proceeds of a check or draft deposited with it for collection immediately upon crediting the depositor with the amount of such proceeds. In this connection the rights of a bank are different from and greater than those of other attorneys or agents, as is pointed out in Tinkham v. Heyworth, 31 Ill. 519. The bank occupies the position of an agent for collection until the proceeds are actually received and credited, thereupon it takes title thereto, and the relation of debtor and creditor takes the place of that of principal and agent,"—citing many cases. See also notes to 39 L.R.A.(N.S.) 847; 16 L.R.A. 516; and 32 L.R.A. 769, citing much authority, and 3 R. C. L. pages 632 et seq. where authorities are cited and explained. This was a general deposit made with it. This difference between the implied powers of a bank through custom and business convenience was the basic principle recognized and held controlling by this court in Schafer v. Olson, 24 N. D. 546, 43 L.R.A.(N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653. And to that extent that case is authority here. See also the decision in State v. Bickford, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916D, 140.

But assume this was a special deposit. It is stipulated that the president had knowledge of the misuse. There is no showing or fact stipulated to show that the president was considered and known as honest or otherwise. The contrary is the presumption. "From the loss of the property (the special deposit), actionable negligence is pre-

sumed." 3 R. C. L. 559. From the facts stipulated, it affirmatively appears that the bank or its directors were negligent in the selection of its managing head, and should be held liable on that ground, even accepting its claim that these funds were in fact and law a special deposit. Gray v. Merriam, 148 Ill. 190, 32 L.R.A. 769, 39 Am. St. Rep. 172, 35 N. E. 810, 1 Am. Neg. Cas. 478. "And the banker must prove the exercise of the degree of care required of him by the decisions in the jurisdiction in which the loss occurred and in which his liability is sought to be enforced," or respond in liability for even a special deposit. 3 R. C. L. 559, 560. The bank cashier embezzled this money with the knowledge of the bank, with imputed notice to the directors, the bank itself, of what was done and which makes it the act of the bank and estops it from questioning its liability. "Knowledge of a bank teller relative to the collection of money and the ownership of notes left with him for collection must be imputed to the bank, and notice to him is notice to the bank." 3 R. C. L. 475; McCarty v. Kepreta, 24 N. D. 395, 48 L.R.A.(N.S.) 65, 139 N. W. 992. The stipulation shows these funds went to cover the personal overdraft on the bank of its managing officers. Knowledge of this fact is imputed to the bank. The acts of its cashier and president in turning these funds over to the bank to repay their shortage with the bank estops the bank to claim otherwise than that it has plaintiff's funds, Citizens' State Bank v. Iverson, 30 N. D. 497, 153 N. W. 449. It has no defense against this suit. Judgment is affirmed.

CHRISTIANSON, J. I concur in the result.

AMY A. BARNES v. WILLIAM H. HULET.

(159 N. W. 25.)

Supreme court — trial de novo in — demand for — written contract — reformation — fraud — cancelation for — title to land — possession — contract — abandonment — forfeiture — annual rental — interest in lieu of — costs.

Both parties appeal. Trial *de novo* demanded by defendant and partial

retrial by plaintiff. Reformation of a written contract and its cancelation for alleged fraud of defendant, and forfeiture for his defaults under the contract, are sought by plaintiff; defendant asks that title of the land in suit be quieted in him, on condition.

Held: There was no fraud practised upon plaintiff, inducing her to make the contract for sale of the land to defendant.

(2) Possession in defendant was contemplated by the contract.

(3) There was no abandonment by defendant of the contract or premises.

(4) Plaintiff is not entitled to forfeiture.

(5) Plaintiff should not recover an annual rental of $300 and interest thereon for defendant's possession of the premises.

(6) In lieu of rental allowed by the judgment, plaintiff should recover only interest at 7 per cent per annum on the $2,100 balance due on contract from its date of deposit made with the clerk.

(7) Balance of deposit over $2,100 and interest and costs of trial less defendant's costs on this appeal, ordered returned to defendant, in whom also title is quieted to the half section in dispute.

Opinion filed August 7, 1916.

From a decree of the District Court of Ransom County, *Allen,* Judge, both parties appeal.

Modified and judgment directed.

Curtis & Curtis, for appellant.

When a judge trying a case without a jury has determined upon his decision in such case, he may announce his decision orally, and may call upon the attorney for the prevailing party to prepare findings in accord with such decision, or he may draft the findings himself. Howard v. Howard, 52 Kan. 469, 34 Pac. 1114; Bateman v. Blaisdell, 83 Mich. 357, 47 N. W. 223.

Findings are, as a rule, drawn by the attorney for the successful party, and if in accord with the judge's decision, are signed as of course. Boyd v. Campbell, 12 Misc. 351, 33 N. Y. Supp. 557.

The court having failed to find fraud, or to make special findings upon the question of fraud, the presumption is that if findings on such question had been asked by the losing party, they would have been denied. Hence the plaintiff-appellant is not entitled to judgment upon the ground of fraud. Farmers' Loan & T. Co. v. Canada & St. L. R. Co. 127 Ind. 250, 11 L.R.A. 740, 26 N. E. 789.

There is no proof of fraud, nor is there in fact any fraud in the

case, as the past history of this litigation will show. Barnes v. Hulet, 29 N. D. 136, 150 N. W. 562; Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468; Clopton v. Clopton, 10 N. D. 569, 88 Am. St. 749, 88 N. W. 562; Dedrick v. Charrier, 15 N. D. 515, 125 Am. St. Rep. 608, 108 N. W. 38; Martinson v. Marzolf, 14 N. D. 301, 103 N. W. 937; Plano Mfg. Co. v. Doyle, 17 N. D. 386, 17 L.R.A.(N.S.) 606, 116 N. W. 529.

Damages in this class of cases are measured as follows: "The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon." Comp. Laws 1913, § 7147.

Rourke, Kvello, & Adams, for plaintiff-respondent.

"The rescission of a written contract may be adjudged on the application of a party aggrieved." Comp. Laws 1913, §§ 5934, 7206.

"Actual fraud within the meaning of this chapter consists of the acts committed by the party to the contract or with his connivance with intent to deceive another party thereto, or to induce him to enter into the contract." Comp. Laws 1913, § 5849; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 517, 101 N. W. 903.

A false impression may be done by word, act, concealment, or suggestion or suppression. Liland v. Tweto, 19 N. D. 552, 125 N. W. 1032, and authorities cited.

"A contract may be rescinded where the vendor lives at a distance, and there is concealment of material facts, coupled with misrepresentations that prevent investigation." 39 Cyc. 1287, 1289; Garr v. Alden, 139 Mich. 440, 102 N. W. 950; Lofgren v. Peterson, 54 Minn. 343, 56 N. W. 44; Grindrod v. Wolf, 38 Kan. 292, 16 Pac. 691.

The appellant abandoned the contract. "A release in writing is not necessary to establish abandonment." Mahon v. Leach, 11 N. D. 181, 90 N. W. 807.

"By abandoning the contract the provisions of the same are deemed waived and the contract annulled and extinguished." Mahon v. Leach, supra; Ottow v. Friese, 20 N. D. 86, 126 N. W. 503.

Where both parties to a contract for the sale of land for a period of two years fail to take any affirmative steps to put the other in default, the contract will be considered as abandoned. Weitzel v. Leyson 23 S.

D. 367, 121 N. W. 868; 2 Warvelle, Vend. & P. § 8, and authorities cited.

Or where one party absolutely and positively refuses to perform the conditions of the contract. Stratton v. California Land & Timber Co. 86 Cal. 353, 24 Pac. 1065; Giltner v. Rayl, 93 Iowa, 16, 61 N. W. 225; 39 Cyc. 1354, § 3.

This is an action for the rescission of a contract and the placing of the parties *in statuo quo*. Respondent is not standing on the contract, and therefore the measure of damages is not as for a mere money obligation and interest. A contract to convey does not confer the right of possession. The contract here was an executory one, and at no time was appellant entitled to the possession of the land. The purchaser was not entitled to enter and occupy, without license from the vendor. Holmes v. Schofield, 4 Blackf. 171, 29 Am. Dec. 364; Kratemayer v. Brink, 17 Ind. 509; Spencer v. Tobey, 22 Barb. 260; 2 Warvelle, Vend. & P. § 874; Gamble v. Ross, 88 Mich. 315, 50 N. W. 379; Gault v. Stormont, 51 Mich. 636, 17 N. W. 214; Druse v. Wheeler, 22 Mich. 439.

The amount which the vendor is to restore to the purchaser, is the amount of his purchase money with interest, less a reasonable rental value of the premises. Frink v. Thomas, 20 Or. 265, 12 L.R.A. 239, 25 Pac. 717.

"Upon rescission by the vendor the purchaser is to be charged with a fair rental value of the land from the time he took possession." 39 Cyc. 1304.

And where the purchaser in possession wishes to rescind, he must, as a condition, tender the rents received by him for the use of the land. 39 Cyc. 1420; Moline Plow Co. v. Bostwick, 15 N. D. 658, 109 N. W. 923; Haman v. McNickle, 82 Cal. 122, 23 Pac 272; Carter v. Walters, 91 Iowa, 727, 59 N. W. 201.

A rescission of an express contract renders the same of no force or validity so far as its enforcement, or damages for its breach, is concerned; but the implied obligation of the parties to restore everything of value remains in force, and may be enforced after rescission. Chesley v. Soo Lignite Coal Co. 19 N. D. 18, 121 N. W. 73; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 690.

Fraud was a material issue in this case, and it is reversible error

for the trial court to fail to find on a material issue arising on the trial. Hyde v. Minnesota, D. & P. R. Co. 24 S. D. 386, 123 N. W. 849; Jandt v. South, 2 Dak. 46, 47 N. W. 779; Gull River Lumber Co. v. School Dist. 1 N. D. 500, 48 N. W. 427; Security Improv. Co. v. Cass County, 9 N. D. 555, 84 N. W. 477.

The trial court's findings should be responsive to all the material issues made by the pleadings and should cover all issues. 8 Enc. Pl. & Pr. 944.

Goss, J. This is an action in equity to reform a written contract, and as reformed to have the same canceled as having been procured through fraud; and for annulment for breach thereof by the defendant; and for an accounting for rents and profits. Portions of the pleadings are set forth; 320 acres are involved. Plaintiff, a sister-in-law of defendant, is a resident of Minnesota, and not familiar with land values. On June 21, 1905, plaintiff and defendant entered into the following contract:

This agreement made and entered into the 21st day of June, 1905, by and between Amy A. Barnes of Proctor, Minnesota, party of the first part, and William H. Hulet, of Miller, North Dakota, party of the second part.

Witnesseth: That the parties of the first part, for and in consideration of the sum of ($3,000) three thousand dollars, to be paid as hereinafter specified, agrees to sell and convey to said party of the second part, by deed of quitclaim, the following described real estate, situated in the county of Ransom, and state of North Dakota; to wit, The west half of section 21 (twenty-one) township 136, N. of Range 57, West, of the fifth principal meridian, containing 320 acres, more or less according to the government survey thereof; and the said party of the second part agrees to pay therefor the said following sum of ($3,000) three thousand dollars at the time of the execution of this instrument, the sum of $900 upon the execution of this agreement, ($1000) one thousand dollars as soon as title is quieted, and balance in one year. In case the party of the second part fails to make the payments above specified, at the time herein named, the parties of the first part at their option may declare this contract void and terminated,

and any and all rights acquired by the party of the second part shall immediately cease.

It is stipulated that the conditions hereof shall extend to and be obligations upon both parties, their heirs, executors, and administrators.

Witness our hands this 21st day of June, 1905.

Amy A. Barnes.
William H. Hulet.

Signed in the presence of
C. O. Heckle.
A. F. Anderson.

The complaint further alleges that "by the mutual mistake of plaintiff and defendant the following portions of the agreement so made prior to the execution of said written memorandum thereof were omitted therefrom; to wit, 'that the action to quiet title should be commenced in the name of the defendant and be completed within one year at the defendant's expense;' (2) 'the mutual agreement for the payment of taxes accruing subsequent to June 21st, 1905, by the defendant;' (3) 'the mutual agreement for the payment of interest at the rate of 7 per cent on the unpaid purchase price remaining from time to time unpaid;' (4) 'payment of the balance of $1,100 within one year from the date of the signing of said agreement;' (5) that the action to quiet title was brought within one year, 'but was dismissed a short time afterwards, and then for the first time plaintiff discovered the mutual mistake in the omissions from said written agreement;' that immediately thereafter, plaintiff placed the contract in the hands of her attorneys for its reformation; that defendant has not paid the taxes subsequent to said contract, nor any interest on the unpaid portion of the purchase price, and has allowed the land to be sold for nonpayment of taxes, and has not paid any further sums than $900 paid at the time of the signing of the contract, though demand has often been made therefor."

"For a second cause of action plaintiff alleges that the contract was procured from her by fraud" in the deception practised upon her before signing the contract. "That the land was worth not to exceed $10 per acre, while in fact it was worth not less than $30 per acre, as defendant well knew." That plaintiff relied upon defendant to deal fairly

with her; that when she signed the contract "she was ill and in great physical distress, all of which was well known to defendant." Plaintiff reaverred the portions of the agreement omitted from the contract, "The plaintiff further alleges that she did not discover the said fraudulent representation as to the value of said land until about the first day of March, 1911, at which time she was first informed of the dismissal of the action to quiet title."

For a third cause of action all the foregoing matters are realleged, and recovery is asked for the rents and profits for the period during which defendant has been in possession. The answer denies all these matters except the relationship, the execution and delivery of the contract, and that defendant has been in possession. This action was begun in August, 1911, and tried in December, 1912. The court found the execution and delivery of the agreement; that defendant, as part of the consideration for said contract, had agreed to pay all taxes then unpaid against and future taxes upon said land; that he would quiet title thereof, particularly against the claims of one Amos A. Gates; and that such portions of the agreement were omitted from the written contract which should be reformed to include the same. It further found that the taxes from 1900 to 1912 inclusive had not been paid by defendant, that the same amounted to $487.79 and interest; that there was due plaintiff from defendant on the original contract price, $2,100, allowing no interest, but, in lieu thereof, adjudging that defendant pay plaintiff $300 per year and interest thereon from 1906 to 1913 inclusive, judgment not having been entered until June, 1913. These rentals allowed amount to $2,400 and interest for an average period of four years at 7 per cent. A short-time foreclosure was decreed by directing payment of the aggregate sum, including costs, of $5,209.05 and interest at 7 per cent from June 2, 1913, to be paid within ninety days, or defendant's interest in said premises be canceled.

From this judgment both parties appealed. From the fact that the court failed to pass upon the question of fraud and forfeit the contract because thereof, plaintiff appeals. Plaintiff also contends that by dismissing the action to quiet title brought under the contract, the defendant abandoned the contract and its performance, and waived and forfeited all his rights under the contract. Defendant-appellant claims (1) that there is not only an absence of proof of fraud, but affirmative

proof disproving fraud or abandonment; and (2) that the court adopted the wrong measure of damages in mulcting him for $300 a year and interest thereon from the end of each respective year as for the value of the use and occupation of said premises, where, instead, it should have allowed but simple interest at 7% on the amount unpaid from June 21, 1905, which would have been a decree in plaintiff's favor for $3,423.87, instead of the amount adjudged and deposited, $5,209.05; or a surplus of $1,785.18 that defendant claims should be returned to him from said deposit with the clerk.

To summarize the claims of the two appellants: The plaintiff-appellant claims any rights of defendant to the land should be adjudged canceled and title quieted in her, and in any event the judgment entered in her favor for $5,209.05 should be affirmed.

Defendant-appellant asks that title in him be quieted against plaintiff, and that only $3,423.87 of the $5,209.05 on deposit with the clerk, less the costs of this appeal, be turned over to the plaintiff. As fraud is first considered in the briefs it will be first determined. The facts in brief are as follows: Gates, father of plaintiff and father-in-law of defendant, claims some interest in said land. He had previously had litigation with defendant's wife, see Hulet v. Northern P. R. Co. 14 N. D. 209, 103 N. W. 628, over this same land, in which an unrecorded deed was adjudged to be a transfer of title from the father to Mrs. Hulet. That for two and one half years before the contract between plaintiff and defendant was entered into, defendant had been negotiating with plaintiff looking towards purchase of this land. In the correspondence are many references to Gates, both parties assuming that an action to quiet title as against him was necessary before title of record could be had or passed on sale. Taxes for several years were unpaid, and mention is made in the letters that a tax deed would be taken; that certain testimony of defendant's wife was necessary to be taken in any action to quiet title. Defendant importuned plaintiff to sell him the land, he living near it. He had written her that real estate men had offered $3,500 for the half section. Plaintiff lived in Duluth. They visited back and forth, and shortly before this transaction defendant was in Duluth. About June 1st, 1905, plaintiff came to visit at defendant's home. That notwithstanding she alleges in her complaint that she was "ill and in great distress, all of which

was well known to the defendant," as one of the reasons for the consummation of the alleged fraud upon her, her own testimony disproves that entirely. She testifies to facts showing that she went with defendant to the county seat, ascertained the amount of taxes due, and knowingly and after deliberate consideration of matters, entered into the contract. That defendant had sent her the contract for execution before ever she came to North Dakota on this trip; that her husband had advised her against selling; that she knew the title was not in condition for an advantageous sale in that whoever bought the land would in all probability purchase a lawsuit with her father; that she herself was reluctant to engage in litigation with him, while defendant was willing to, having had litigation with him. She knew that back taxes amounting to approximately $400 would have to be paid; that the expense of litigation would be considerable; that the land was nonproductive, and that defendant desires it. She testifies that she went to Attorney Heckle at Lisbon, who filled in the contract for herself and defendant. Concerning this Heckle testifies: "I remember distinctly of reading the contract over to her; I said to her that it did not draw any interest, and asked what interest I should insert, and she said that she was selling to Hulet; that they were good friends, and that she was going to let him have it for $3,000 without interest. I remember this so distinctly because she was sitting back of me, and when I asked the question regarding interest I was obliged to turn clear around to see her. The price of the land was talked over. She said she would sell the land to Hulet for a less price than she would sell to anybody else. She did not ask me, as a business man, what the land was worth. She was in the office about one half hour, and the talk was confined entirely to the contract and the matters relating to it." In all probability this testimony is the truth. She remained at defendant's for a couple of months. One of his neighbors testifies to having talked with her while there. He says: "It was mentioned that she had sold her land to Hulet; the price was mentioned, which was, as near as I can remember, $3,000, and it seemed cheap to me, and I told her so; told her that she had sold that land quite cheap. As near as I can remember she answered, 'she couldn't use the land,—wouldn't do anything with it herself.' Witness thought the land was worth 'perhaps four or five thousand dollars.'" Plaintiff denies talking with this witness about the price of the land, but admits having seen him at defendant's place. In reply to a ques-

tion as to what was said in Heckle's office about interest, answers, "I cannot answer that question because I don't remember anything said about interest." A letter from Heckle to her, and her answer, are in evidence, but do not change the fact. She testifies going to the courthouse at Lisbon, that they talked over the probable outcome of an action with Gates. She says, "Well, if I signed the contract, he agreed to pay $1,000 down, and I signed. He said that he would start an action to quiet title in a very short time, and I thought it would take place when the next court met. He said 'I don't think I will have much trouble.' He says, 'Gates may sign it, he may deliver the deed without any trouble' and—I can't recall much more."

Q. After you got to Lisbon what was said between you and Hulet relative to the contract, or the terms or conditions that should be in the contract?

A. There was nothing new came up; the conversation was almost the same; that he would start proceedings to quiet title and that he would pay up the taxes, and that he thought he would have everything straightened out in a year, and that he would pay me the balance in a year, as the contract called for.

Q. And at the courthouse, what was said between you and Hulet in regard to it?

A. We simply looked up the records in regard to the taxes; I don't think we mentioned the matter of the contract at the courthouse—we went there to look up about the taxes.

Q. Your main object in going to the courthouse was to be satisfied of the fact that your father had a tax title deed of this land, wasn't it?

A. That was one of the things; and I wanted to be satisfied about the amount of taxes against the land.

Q. In looking up the taxes you discovered that your father had a tax title to this land dated March 12, 1897, didn't you?

A. March 12, 1897, Yes, sir.

Q. Prior to that time you say you had never paid any taxes on that land?

A. No, I never paid a dollar taxes.

Q. From that day to this?

A. No sir.

Fraud in the dismissal of the action, one of the causes of fraud alleged therein, concerning which she alleges in her complaint that she did not learn that the action was dismissed until a short time after its dismissal in February, "and then for the first time discovered the mutual mistakes in said written memorandum of agreement," and statements therein that she did not discover the fraudulent representation as to the value of said land "until about the first of March, 1911, at which time she was first informed of the dismissal of the action to quiet title," are disproven by her own testimony. Under this allegation it became material to know when she learned of the dismissal of the action, as she dates therefrom a contention of abandonment of the contract on that date, and also her discovery of fraud as to representation of value of the land, made to her nearly six years before this, before entering into the contract.

As to this she testifies:

Q. When did you first get notice that that action had been dismissed?

A. Well—

Q. Did you ever get notice or information?

A. No sir, I didn't.

These portions of the complaint were then read to her and she tried to evade direct answer and finally stated that, "well my father told me several years ago."

Q. How long ago?

A. Well, it must have been a year or a year and a half ago.

It seems that another brother-in-law and her father, "two or three years after the contract was signed," had laughed at her and said "she had almost given that land away; that it was worth $30 an acre." Concerning the statement in her complaint as to her being "ill and in great physical distress," she was asked, "That sickness related to the time prior to the signing of the contract?" to which she answered "No, afterward," and when asked "why that clause was inserted in that complaint," she says, "Well it is simply a mistake as to the time." She was also asked, "About what time was it when you discovered that

Hulet's representations as to the value of your land were false?" to which she replied, "Why, when my brother-in-law at Duluth told me a year or so afterwards;" and then when confronted with the statement of her complaint alleging that she first discovered it "about the first of March, 1911," she attempts another explanation and brings in her father again, about three years after the contract was signed; and when asked why she did not then commence an action to cancel the contract, gives as her excuse, "I didn't wish to excite Mrs. Hulet who was out of her mind." Again she places the time when she first discovers the fraud as "about four or five years after the contract was signed."

These excerpts fairly illustrate the unreliability of plaintiff's testimony, as well as disprove many important and basic allegations of her own complaint. And from the fact that her father is claimed as a justification for nonpayment of taxes and for her failure to earlier discover the alleged fraud upon her, and mentioned in other matters in correspondence, it is but a fair inference that defendant is correct in his claim in the brief that the father is largely instrumental, if not the moving power, in having this suit brought.

In correspondence in 1909 and later, defendant tells plaintiff of arrangements he has made to get her the money if she will but get an assignment of her father's interests in order that he may close loans and pay her off. It appears also that the testimony of Mrs. Hulet was thought very necessary in the action to quiet title against her father, and that she became insane and was so adjudged November 30, 1912, and taken to the State Asylum for insane. That she had had spells of despondency from 1904 on, evidently gradually getting worse and finally losing her mind altogether. Three or four years before 1912 she had been at a sanatarium. Many insane acts on her part are related, sufficient to show that not long after this contract was made she became mentally unbalanced. This and the supposed necessity for her testimony are assigned as the reason why the action to quiet title against Gates, and begun within a year after the contract was entered into, was not prosecuted to judgment, but instead was finally dismissed in 1911. This is corroborated by correspondence in evidence tending to establish good faith on defendant's part. The correspondence discloses that the wife's trouble took much of the husband's means, to the knowledge of the plaintiff, and is probably a reason why payment was

not enforced or earlier attempted of the contract. So far as the value of the land is concerned, the testimony is somewhat in conflict as to prices at that time, ranging from twelve to twenty dollars per acre. But the land was probably worth around $4,800, or $15 per acre. Defendant agreed to pay therefor $3,000, take up $400 in back taxes, and prosecute an action to quiet title against the father-in-law, all of which might make the value agreed to be paid more adequate than would seem at first impression. And plaintiff, understanding all this, entered into the contract with reference to it, under her declared willingness to sell it to Hulet "for a less price than she would sell it to anybody else." There is nothing substantial upon which to found a finding of fraud in procuring the contract, nor is there any evidence of abandonment of the contract by defendant. He was in possession. He had paid $900 down. He assumed that plaintiff would not enforce cancelation, and she did not, and matters drifted. "Abandonment of property necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act, indicating a purpose to repudiate the ownership. . . . The act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right to the thing, otherwise there is no abandonment." 1 R. C. L. 4. True he did not pay taxes; that was probably intended to be left to settlement at the conclusion of the pending action against his father-in-law. Nor would the fact that he had procured a tax deed to be taken out in the name of Mrs. Hulet, after the execution of this contract and before commencement of this suit, change the situation as between these parties, as Hulet was paying taxes he had agreed to pay, and the deed as against plaintiff was void. "The purchaser under such circumstances acquires no title by his purchase, and it is deemed to be only one method of paying taxes." Stiles v. Granger, 17 N. D. 502, 117 N. W. 777.

Appellant's brief does not challenge the court's findings that the written agreement was entered into with the additional understanding that defendant should pay taxes prior as well as subsequent to the date of the contract, though the complaint only claims reformation for taxes subsequently paid; nor that there was due on the contract the sum of $2,100 in addition to claims for taxes. But defendant does assert that

plaintiff should not recover as for the use and possession, but instead should have legal interest upon the debt due under the contract.

This court agrees with this contention. Plaintiff's theory is based upon her assertion in the brief that the contract as drawn and performed did not entitle defendant to possession of said premises. But the parties under the proof dealt with reference to possession. Defendant took possession. Plaintiff has never during these six years asserted any right to possession, but has permitted defendant to enjoy it and use the premises under the belief that although the contract was silent thereon, the land was to all intents and purposes his. One can scarcely believe that he paid $900 down, unless he was to receive immediate possession. The contract in this particular should be reformed to stipulate possession to defendant from and after its date. While perhaps a court of equity might be justified in a proper case to award such a judgment as here decreed, this is not such an instance. It is inequitable, and a total disregard of contract provisions in the absence of fraud, to practically double in this way the contract price for this land. The contract should be respected, reformed, and enforced as made. It is true the plaintiff may have intended to charge no interest, as she stated to Heckle, but defendant defaulted in payments, and under the circumstances interest should be charged at least from default. And defendant offers to pay interest from date of contract, an equitable offer.

The judgment appealed from and the findings upon which it is based should be modified so as to award the plaintiff, in lieu of any provision for $300 rental per annum and interest thereon, only the balance remaining due on the contract, $2,100, with interest at 7 per cent per annum, from June 21st, 1905, to August 9th, 1913, with costs of trial, all amounting to $3,423.87 (since which last date any amount due has been on deposit with the clerk and subject to order of the court and the plaintiff); and the decree should adjudge that the clerk deliver to plaintiff said $3,423.87, less the taxable costs of the defendant-appellant on this appeal; and then return to defendant the balance of the $5,209.05 deposit remaining, and that defendant then be entitled to judgment quieting title in him to the land, as against the plaintiff.

Judgment is directed to be entered accordingly.

CARL E. TALLMADGE, J. J. Murphy, and J. W. Stribbling v. SAM WALKER, P. F. Schmidt, Jesse Edens, Guy Griswold, and Margaret Kennedy, as Superintendent of Schools of Hettinger County, North Dakota, and J. R. Batty, as Treasurer of the County of Hettinger, State of North Dakota.

(159 N. W. 71.)

Quo warranto — action in — school district — organization — legality of — directors — special interest — prosecution of action.

1. In an action in the nature of quo warranto to test the legality of the organization of a school district out of a portion of the territory of an old district, the directors of the latter district have such a special interest as to enable them to prosecute the action in their own name.

School district — quo warranto — to test legality — organization — new district — party — not necessary.

2. In an action in the nature of quo warranto to test the legality of the organization of a new school district out of a portion of the territory of an old district, it is unnecessary to join the new district as a party defendant.

School districts — old territory — organization out of — complaint — facts — statement of — insufficient.

3. In an action in the nature of quo warranto to test the legality of the organization of a new school district out of a portion of the territory of an old district, it is held that the complaint fails to state facts sufficient to constitute a cause of action.

County commissioners — boards of — county superintendent — school district — voters — majority — special board — new districts.

4. Section 1147, Compiled Laws 1913, which provides that "the board of county commissioners and county superintendent may organize a new school district from portions of school districts already organized, . . . upon being petitioned so to do by at least a majority of the school voters residing in the districts whose boundaries will be affected by the organization of a new district and by at least three fourths of the residents of the territory to be included on the new district," construed and *held*, for reasons stated in opinion, that the legislative intent was to empower such special board to organize new school districts from portion of one or more old districts.

Petition — school districts — new — organization of — county commissioners — county superintendent — proceedings — irregularity — does not nullify.

5. A petition in all respects complying with provisions of § 1147, Compiled

Laws, except that it prayed for the organization of *two* new school districts instead of one, was filed with the board of county commissioners and county superintendent. Pursuant thereto, notice was given, and, upon a hearing, the board organized two new school districts from portions of an old district. *Held*, that while such petition and the proceedings thereunder were irregular, they were not a nullity, and afford plaintiffs no ground for the relief prayed for in the complaint.

Opinion filed August 7, 1916.

Appeal from the District Court, Hettinger County, *W. C. Crawford*, J.

From a judgment in defendants' favor, plaintiffs appeal.

Affirmed.

W. F. Burnett and *Thos. H. Pugh*, for appellants.

Unless these proceedings can be inquired into in an action or proceeding in the nature of quo warranto, the plaintiffs are without remedy; and where this remedy is available, it has been held there is no concurrent remedy in equity, unless by statutory provision. Comp. Laws 1913, §§ 1147, 3298; 32 Cyc. 1415, 1424, 23 Am. & Eng. Enc. Law, 2d ed. 637; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; Atlee v. Wexford County, 94 Mich. 562, 54 N. W. 380; People ex rel. Saunier v. Stratton, 33 Colo. 464, 81 Pac. 245; Gardner v. State, 77 Kan. 742, 95 Pac. 588; State ex rel. Anderson v. Tillamook, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C, 483; State ex rel. Brown v. Sengstacken, 61 Or. 455, 122 Pac. 292, Ann. Cas. 1914B, 230; People ex rel. Kingsland v. Clark, 70 N. Y. 518; People v. Cook, 8 N. Y. 67, 59 Am. Dec. 451; People ex rel. Roeser v. Gartland, 75 Mich. 143, 42 N. W. 687; Topeka v. Dwyer, 70 Kan. 244, 78 Pac. 418, 3 Ann. Cas. 239; Kuhn v. Port Townsend, 12 Wash. 605, 29 L.R.A. 445, 50 Am. St. Rep. 911, 41 Pac. 923; State ex rel. Harmis v. Alexander, 129 Iowa, 538, 105 N. W. 1021.

It is the rule that where the language in a statute is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences or of public policy. 36 Cyc. 1103, 1115.

The remedy of quo warranto is fully attainable through the medium of a civil action. Comp. Laws 1913, § 7969; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590.

Boards, like county commissioners, are but the creatures of the statute, and have only such powers as are conferred by statute, and such grants of authority must be followed strictly, and such statutes strictly construed. Gleason v. Spray, 81 Cal. 217, 15 Am. St. Rep. 47, 22 Pac. 551; Bowen v. Minneapolis, 47 Minn. 115, 28 Am. St. Rep. 333, 49 N. W. 683; People ex rel. Reynolds v. Buffalo, 140 N. Y. 300, 37 Am. St. Rep. 563, 35 N. E. 485; Notes to Riggs v. Palmer, 12 Am. St. Rep. 826, and Rafferty v. Central Traction Co. 30 Am. St. Rep. 775; State ex rel. Grady v. Lincoln County, 18 Neb. 283, 25 N. W. 91.

The plaintiffs have legal capacity to sue. Comp. Laws 1913, § 7970; Wishek v. Becker, supra; Jenness v. Clark, 21 N. D. 155, 129 N. W. 357, Ann. Cas. 1913B, 675; Taylor v. Sullivan, 45 Minn. 309, 11 L.R.A. 272, 22 Am. St. Rep. 729, 47 N. W. 802; 15 Cyc. 403, 404; 23 Am. & Eng. Enc. Law, 2d ed. 617; Fordyce v. State, 115 Wis. 608, 92 N. W. 430.

When the right to exercise jurisdiction over territory depends upon the legality of an organization, as a municipal corporation, the individuals assuming jurisdiction are the proper defendants. 23 Am. & Eng. Enc. Law 2d ed, 623.

Jacobsen & Murray, for respondents.

An action in quo warranto must be brought by or in the name of the state. It cannot be maintained by or in the name of a person except such person has some special interest in it,—some private interest. Comp. Laws 1913, §§ 7970, 7971; Wishek v. Becker, supra; Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675; Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8, 145 N. W. 725; State ex rel. Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025; 4 Sutherland Code Pl. Pr. & Forms, §§ 7022–7024, 7039; 5 Wait, Pr. 614; State ex rel. Wah-We-Yea-Cumin v. Olson, 107 Minn. 136, 21 L.R.A. (N.S.) 685, 119 N. W. 799; Territory ex rel. Peterson v. Hauxhurst, 3 Dak. 205, 14 N. W. 432; 32 Cyc. 1443, 1444; State ex rel. Hess v. Boehringer, 16 Ariz. 48, 141 Pac. 126; Campbell v. Sargent, 85 Kan. 590, 118 Pac. 71; State ex rel. Murdock v. Ryan, 41 Utah, 327, 125 Pac. 666; Hudson v. Conklin, 77 Kan. 764, 93 Pac. 585; 28 Cyc. 174; State ex rel. Doud v. Council, 106 Iowa, 731, 77 N. W. 474; State ex rel. Walker v. McLean County, 11 N. D. 356, 92 N. W. 385;

Atchison, T. & S. F. R. Co. v. Wilson, 33 Kan. 223, 6 Pac. 281; School Dist. v. Gibbs, 52 Kan. 564, 35 Pac. 222; State ex rel. Madderson v. Nohle, 16 N. D. 168, 125 Am. St. Rep. 628, 112 N. W. 141.

The new corporation should be made a party to the action, and in making it a party no admission as to its validity is made. State ex rel. Weinsheim v. Leischer, 117 Wis. 475, 94 N. W. 299; State ex rel. Ross v. Somerby, 42 Minn. 55, 43 N. W. 689; People ex rel. Schindler v. Flint, 64 Cal. 49, 28 Pac. 495; Territory ex rel. District Attorney v. Armstrong, 6 Dak. 226, 50 N. W. 832; People ex rel. Saunier v. Stratton, 33 Colo. 464, 81 Pac. 245.

The complaint does not contain a statement of facts sufficient to constitute a cause of action. The decision of the board of county commissioners on a petition for a change of a county seat is final, and not open to judicial investigation. State ex rel. Little v. Langlie, 5 N. D. 594, 32 L. R. A. 723, 67 N. W. 958; State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5.

"A school district, when organized as provided by law, is a public corporation of a municipal character. The power to change its boundaries, as well as to define them in the first instance, is of legislative origin, and whether exercised immediately by the legislature, or by a board designated, is a legislative act." Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N. W. 499; State ex rel. Connaughton v. Holcomb, 95 Kan. 660, 149 Pac. 684.

Under a proper petition, the findings of fact of the board are conclusive. Mooney v. Tulare County, 2 Cal. App. 65, 83 Pac. 165; People v. Linda Vista Irrig. Dist. 128 Cal. 477, 61 Pac. 86; People ex rel Russell v. Loyalton, 147 Cal. 774, 82 Pac. 622; People ex rel. Skelton v. Los Angeles, 133 Cal. 338, 65 Pac. 750; Greenfield School Dist. v. Hannaford Special School Dist. 20 N. D. 393, 127 N.W. 499.

"Where adjacent territory has been annexed to a city for school purposes, by its board of education, under laws authorizing the same when a majority of the electors of the territory make application therefor, it will be presumed, in the absence of proof to the contrary, that the board's finding to the effect that the application was made by a majority of the electors within the territory was based on a competent proof." Redfield School Dist. v. Redfield Independent School Dist.

14 S. D. 229, 85 N. W. 180; School Dist. v. Wolf, 78 Kan. 805, 20 L.R.A.(N.S.) 358, 98 Pac. 237; Comp. Laws 1913 § 1147; People ex rel. Skelton v. Los Angeles, 133 Cal. 338, 65 Pac. 749.

There is no charge of fraud in this case. 23 Cyc. 1221.

Fisk, Ch. J. This is an action in the nature of quo warranto to inquire into the validity of certain proceedings whereby an alleged new school district was organized out of a portion of New England School District Number Nine of Hettinger County, and to inquire into the right of certain of the defendants to exercise the rights, duties, or franchises appertaining to the office of directors and treasurer of such pretended new district.

Defendants demurred to the complaint upon the following grounds:

"First. That the court has no jurisdiction of the person of the defendants, or the subject matter of the action.

"Second. That the plaintiffs have not legal capacity to sue.

"Third. That there is a defect of parties plaintiff and defendant.

"Fourth. That the complaint does not state facts sufficient to constitute a cause of action."

Such demurrer was sustained and judgment ordered dismissing the action, and plaintiffs appeal.

The facts alleged in the complaint, and which are necessary to an understanding of the points involved, are briefly as follows: "New England School District No. 9 was formed some years ago and has been operated as a common school district since the formation thereof continuously until July 10, 1914, when notice of an election was given within the district upon the question of consolidation of the schools of the district, which election was held July 27, 1914, at which election the majority of the electors declared in favor of consolidation, and the schools were accordingly consolidated.

School district No. 9 was composed of the village of New England and the townships of New England and Kunze, the corporate limits of the village extending into each township about equally. Plaintiffs are the duly elected, qualified, and acting directors of said school district.

On the 17th day of July, 1914, certain residents of the townships of Kunze and New England filed a petition with the county superintend-

ent of schools, for a division of the old district No. 9 into three school districts, namely: (a) The village of New England, (b) the township of Kunze, excepting as to that part of the village lying within the boundaries of said township, and, (c) the township of New England, excepting as to that part of the village lying within its boundaries. This petition was signed by residents of the two townships, and is as follows:

Exhibit A.

Petition for organizing new school districts and changing boundaries of old one. To the Board of County Commissioners and to the Superintendent of Schools, Hettinger County, North Dakota:

We, the undersigned, respectfully show that we are residents, citizens, and voters of that certain school district known as the New England School District No. 9, situated in Hettinger county, North Dakota, and comprise the incorporated village of New England and the civil township of New England and the civil township of Kunze; and that said school district is bounded by the congressional township line of townships 135 and 136 in range 97; that said school district is too large; and that it is for the best interest of the patrons, taxpayers, voters, and citizens of said school district, that the boundaries of said school district be changed, and that said school district of New England be cut and divided into three school districts, which three school districts should be bounded as follows:

1st. The old school district of New England be bounded by the boundary lines of the incorporated village of New England, and that the limits of the old school district be the same as the limits of the incorporated village of New England.

2nd. That a new school district be formed out of the territory of the old district comprising the civil township of Kunze, and that such new school district be bounded by the same lines as the boundaries of the congressional township No. 136 in range 97, except that part of such congressional township that is within the corporate limits of the said village of New England.

3rd. That another new district be formed out of the territory of the school district comprising the civil township of New England, and that such new school district be bounded by the said lines as the bound-

aries of the congressional township No. 135 in range 97, except that part of the congressional township that is within the corporate limits of the village of New England.

Wherefore, the undersigned respectfully petition the Honorable Board of County Commissioners of Hettinger County, and the Superintendent of Schools of Hettinger County, that the School District of New England No. 9 be divided and the boundaries arranged as above set forth.

Notice of hearing on such petition was given, the time for the hearing being set for August 25, 1914; on October 5, 1914, the board of county commissioners made an order attempting thereby to divide the district, as aforesaid, into three school districts.

Thereafter an election was held in each of such townships for the purpose of electing school officers, and the defendants Walker, Schmidt, and Edens were elected as directors, and defendant Griswold, as treasurer.

Plaintiffs contend that the board (a) had no authority in law to determine the matters set forth in the petition exhibit "A;" (b) acquired no jurisdiction so to act by and through the petition exhibit "A;" (c) the petition does not set forth the facts required by statute; (d) the petition was signed by persons not then residents of school district No. 9; (e) the petition was not signed by a majority of the school voters of the district; (f) the school voters of the district by voting to consolidate the district and schools thereof, subsequent to the filing of the petition, ousted the board of jurisdiction; (g) an existing common school district cannot be divided into three or more districts under one omnibus petition; (h) no opportunity was given the school voters and taxpayers to appear before the board when this matter was taken up for consideration and determination.

The complaint alleges that the defendants, who claim to have been elected to the school district offices, have usurped and intruded into and are unlawfully holding and unlawfully attempting to exercise the franchises and rights of such offices, and the prayer for relief is that they be ousted therefrom, and that the said school districts be declared to have no existence, and for injunctive relief.

In support of the grounds of the demurrer, respondents assert that

the action cannot be maintained by and in the name of the plaintiffs for the reasons as stated,—that they have no private or special interest in the questions involved. In this they are, we think, clearly in error. Their promise being unsound, an erroneous conclusion naturally follows. While both by statute and decisions in this jurisdiction the action cannot be prosecuted by private persons in their own name unless they have a special interest, but must be brought in the name of the state, such action may by the express provisions of our Code be brought by persons having a special interest in the subject matter. See Comp. Laws, § 7971; Wishek v. Becker, 10 N. D. 63, 84 N. W. 590; Jenness v. Clark, 21 N. D. 150, 129 N. W. 357, Ann. Cas. 1913B, 675.

That plaintiffs, as directors of New England School District No. 9, have a special interest sufficient to enable them to prosecute the action seems beyond question. The fact that the complaint does not expressly allege such special interest is not controlling. Facts are therein alleged from which it appears that they, as such directors, are under a legal duty (if the attempted organization of such new district was illegal) to take charge, direction, and management of the schools of the district, and the care, custody, and control of all the school property therein (Comp. Laws, § 1173); and the fact that defendants, if acting illegally, are attempting to usurp a portion of such duties and prerogatives, is sufficient to confer upon plaintiffs such a special interest as to enable them under the Code to prosecute this action. The numerous authorities cited in respondents' brief on this point, when carefully analyzed, will be found to be not opposed to, but in harmony with, the above conclusion. We deem it unnecessary to refer in detail thereto.

Respondents next contend that the alleged new school district should have been joined as a party defendant. Their contention seems to have support in the following cases: State ex rel. Weinsheim v. Leischer, 117 Wis. 475, 94 N. W. 299; State ex rel. Ross v. Somerby, 42 Minn. 55, 43 N. W. 689; People ex rel. Schindler v. Flint, 64 Cal. 49, 28 Pac. 495.

The great weight of authority, however, and we think the better reason, is opposed to the holdings in the above cases. We content ourselves by citing some of the cases and quoting briefly therefrom. People ex rel. Saunier v. Stratton, 33 Colo. 464, 81 Pac. 245 and the numerous cases cited. Armstrong v. State, 29 Okla. 161, 116 Pac. 770, Ann.

Cas. 1913A, 565; State v. South Park, 34 Wash. 162, 101 Am. St. Rep. 998, 75 Pac. 636; Territory ex rel. District Attorney v. Armstrong, 6 Dak. 226, 50 N. W. 832; 32 Cyc. 1443; 23 Am. & Eng. Enc. Law, 622, 623.

In disposing of such point in People ex rel. Saunier v. Stratton, supra, the Colorado court said: "It is contended that, as the town is not a party to the proceedings, no judgment binding upon it can be rendered; that, the information being against the officers of the town, the regularity of the incorporation cannot be attacked in a suit in which the town is not a party. The great weight of authority supports the position taken by the plaintiff in error in his contention that the town is not a necessary party. It is held that the only way in which the regularity of the incorporation can be tested is by a proceeding against the individuals who claim to hold offices in the town government, because it is held that when suit is brought against the town, the town is recognized as a municipality, and that one cannot, in a suit in which he recognizes the existence of a town, ask to have the proceedings by which the town was incorporated declared void. The rule is that 'if the information be for usurping a franchise by a corporation, it should be against the incorporation, but if for usurping the franchise to be a corporation, it should be against the particular persons guilty of usurpation.' The action in this case being for the usurpation of a franchise to be a corporation, the *de facto* town was not a necessary party defendant, and the court can and should proceed to render judgment of ouster against the individuals who are assuming to exercise corporate powers of the town of Atwood. We find authority for this in 2 Dill. Mun. Corp. 4th ed. § 894; 17 Enc. Pl. & Pr. 437; State ex rel. Crow v. Fleming, 158 Mo. 558, 59 S. W. 118; State ex rel. Atty. Gen. v. Cincinnati Gaslight & Coke Co. 18 Ohio St. 262; People ex rel. Weber v. Spring Valley, 129 Ill. 169, 21 N. E. 843; People ex rel. Lord v. Bruennemer, 168 Ill. 482, 48 N. E. 43; State ex rel. Summers v. Uridil, 37 Neb. 371, 55 N. W. 1072; State ex rel. Lindholm v. Parker, 25 Minn. 215; People v. Carpenter, 24 N. Y. 86."

The Oklahoma court in Armstrong v. State, 29 Okla. 161, 116 Pac. 770, Ann. Cas. 1913A, 565, also said: "The rule which seems to be supported by the great weight of authority is that if the action is for usurping a franchise by a corporation, it should be against the corp-

oration; but if usurping the franchise to be a corporation, it should be against the particular persons guilty of the usurpation by assuming to act in a corporate capacity, and not against the corporation as such."

With the reasoning and conclusions of these courts on this point, we are in full accord.

This brings us to the only remaining question, *viz*: Does the complaint state facts sufficient to constitute a cause of action? The complaint is quite voluminous, and we deem it unnecessary to set it out at length in this opinion. Its substance has already been stated. Plaintiffs' main contention is that under § 1147, Compiled Laws, there is no power in the special board consisting of the county commissioners and county superintendent to organize a new school district except out of territory comprising portions *of two or more districts already organized,* and that such board, therefore, exceeded its powers in attempting to organize a new district or districts out of New England School District, No. 9. The statute, § 1147, supra, reads: "The board of county commissioners and county superintendent may organize a new school district from portions of school districts already organized, . . . upon being petitioned so to do by at least a majority of the school voters residing in the districts whose boundaries will be affected by the organization of a new district and by at least three fourths of the residents of the territory to be included in the new district."

Counsel argue that the powers of such special board are to be measured and limited by the provisions of this statute, and that such law must be construed so as to fairly reflect the legislative intent. No doubt they are correct in this. They are also correct in stating the well-settled rule "that where the language used in a statute is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences or of public policy." 36 Cyc. 1115. Our attention is called to the fact that § 1147, Compiled Laws, is a part of the school law revision effected by chap. 266, Laws of 1911, and that such section is new and was modeled upon § 793, Rev. Codes 1905, Comp. Laws 1913, § 1146, which latter Section was repealed by chap. 266 of aforesaid; also to the fact that § 43½ of chap. 266, which was repealed by chap. 259 of the Laws of 1913, vested in the board of county commissioners and the county superintendent full authority to rearrange and establish the boundaries of the several districts of the

county at its meeting on the second Monday in July, and directed the manner of so doing. It is argued from this that the legislative intention enacting § 1147 and repealing the prior sections as aforesaid must have been to restrict the powers of such special board to the organization of new districts only out of territory to be taken from two or more districts already organized.

While such contention is plausible we are agreed that it is unsound, and such construction would lead to unreasonable and absurd results. Appellants' whole contention is based upon a narrow and literal construction of certain language in § 1147, wherein the board is clothed with power "to organize a *new school district from portions of school districts already organized,*" etc. We think the legislative intent clearly was to empower such board to organize new districts from portions of an old district or districts. Manifestly the words "a new school district" were not intended to mean that but one district could be organized. This would be absurd, and it is equally absurd to say that such new district or districts should be restricted so as to embrace territory taken only from two or more old districts. The plural number was evidently intended to include the singular and the singular the plural. See Comp. Laws, § 7308.

Appellants seek by their complaint to attack the sufficiency of the petition filed as a basis for the organization of the new district, as well as the regularity of the proceedings relating to the acts of the board. However, these matters are not argued in the brief, but at the most merely mentioned, and we therefore deem it unnecessary to notice them at length. Suffice it to say that we have considered the same and find no substantial merit therein. While it was no doubt irregular to join in one petition a prayer for the organization of two distinct school districts, still such irregularity does not nullify the orders of the board, nor did it deprive such board of jurisdiction. The petition contains all the essentials of two complete petitions, and the procedure of the special board contains all the essentials of two separate proceedings. This may also be said with reference to the notice as well as to all other steps taken in the proceedings. To hold that the organization of the newly created districts is, for such mere irregularities, a nullity, would be sacrificing substance to mere form. We are convinced that the learned trial court properly sustained the demurrer, and the judgment is accordingly affirmed.

CARL E. TALLMADGE, J. J. Murphy, and J. W. Stribling v. W. P. WEBER, Joe Dubesar, James Stepan, Chas. Schumacher, Margret Kennedy, as Superintendent of Schools of Hettinger County, and J. R. Batty, as Treasurer of the County of Hettinger.

(159 N. W. 74.)

Opinion filed August 7, 1916.

Appeal from the District Court, Hettinger County, *W. C. Crawford,* J.

From a judgment in defendants' favor, plaintiffs appeal.

Affirmed.

W. F. Burnett and *Thos. H. Pugh,* for plaintiffs and appellants.

Jacobsen & Murray, for defendants and respondents.

PER CURIAM.

This is a companion case to that of TALLMADGE v. WALKER, ante, 590, 159 N. W. 71, just decided by this court. The facts in both cases are in all essential matters identical. The pleadings including the complaint and demurrer are the same in each case. This case is therefore controlled by our decision in the other appeal, and the judgment appealed from is accordingly affirmed.

MERCER COUNTY STATE BANK OF MANHAVEN, a Corporation, v. BERT A. HAYES, Effa I. Hayes, and E. M. Serr.

(159 N. W. 74.)

Taxes — lands sold for — to county — deed — quitclaim — tax deed — purchaser — note — mortgage — lack of title — to defeat mortgage — cannot claim — claims by third parties — none ever asserted — purchaser in possession — undisputed — rents — receiving.

1. Where the record shows that land was sold to the county of M. for taxes (though there is no proof of the issuance of a tax deed), and was afterwards quitclaimed by the county to A by an instrument which recited that a tax deed

had been issued to the county therefore, and was occupied by A for five years and improved by him, and later sold by him by warranty deed to C, and then by C conveyed by warranty deed to D, the last purchaser, D, cannot, when sued on a note and mortgage which were given by him as part payment on such purchase, avoid the payment thereof by alleging a lack of title in the original grantor and by proof merely that there is no evidence of the issuance of a tax deed to the county, and if the property was not obtained by the county under tax sale, the title remains in the original owners, who have never asserted any title thereto or made any claim therefor, the said D never at any time having offered to return the property, nor brought any suit to quiet the title thereto, nor attempted to rescind his contract of purchase, but, on the other hand, having remained in the possession of the premises, and being in such possession and collecting the rent thereof at the time of the trial.

Warranty — breach of — rescission — damages — suit for.

2. Parties who claim a breach of warranty may do one of two things. They may rescind or they may stand on their contract and sue for damages for the breach. They cannot do both.

Seisin — implies possession — legal right — estate in lands.

3. Seisin implies possession. It is possession with a legal right to the estate in the land.

Opinion filed August 8, 1916.

Appeal from the District Court of Mercer County, *S. L. Nuchols*, J.

Action to foreclose a mortgage. Judgment for defendants. Plaintiff appeals.

Reversed.

H. L. Berry and *Thorstein Hyland* (*Hyland & Madden* of counsel), for appellant.

Parties claiming a breach of warranty may rescind the contract, or they may stand on it and sue for damages. They cannot do both. Defendants here have elected to stand on their contract, but their defenses are inconsistent with their election. Nichols & S. Co. v. Dallier, 23 N. D. 532, 137 N. W. 570.

A failure of consideration must be a total failure to be a defense. A partial failure can avail only as a set-off, recoupment, or counterclaim. Neither the pleadings nor the evidence in this case warrant a finding of damages. Noble v. Olympia Brewing Co. 64 Wash. 461, 36 L.R.A.(N.S.) 467, 117 Pac. 241; Bowne v. Wolcott, 1 N. D. 420, 48 N. W. 336; Frazer v. Peoria County, 74 Ill. 282; Kincaid v. Brit-

tain, 5 Sneed, 119; Recohs v. Younglove, 8 Baxt. 385; Hartford & S. Ore Co. v. Miller, 41 Conn. 112, 3 Mor. Min. Rep. 353; Kimball v. Bryant, 25 Minn. 496; Cockrell v. Proctor, 65 Mo. 41; 2 Sutherland, Damages, 265; Mayne, Damages, 143; Smith v. Hughes, 50 Wis. 620, 7 N. W. 653; Hencke v. Johnson, 62 Iowa, 555, 17 N. W. 766.

"A purchaser of land who is in undisturbed possession, and has received a conveyance of the same with warranty, cannot have relief in equity against payment of the purchase price, on the ground of a defect in the title." Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Bumpus v. Platner, 1 Johns. Ch. 218; Yeates v. Pryor, 11 Ark. 74; Peay v. Wright, 22 Ark. 205; Hunter v. Bradford, 3 Fla. 286; Roberts v. Woolbright, Ga. Dec. pt. 1, p. 100; McGehee v. Jones, 10 Ga. 133; Bowlin v. Pollock, 7 T. B. Mon. 49; Timms v. Shannon, 19 Md. 315, 81 Am. Dec. 632; Vick v. Percy, 7 Smedes & M. 256, 45 Am. Dec. 303; Guice v. Sellers, 43 Miss. 56, 5 Am. Rep. 476; Mitchell v. McMullen, 59 Mo. 252; Edwards v. Bodine, 26 Wend. 114; Re Livingston, 9 Paige, 445; Hill v. Butler, 6 Ohio St. 217; Van Lew v. Parr, 2 Rich. Eq. 337; Holt v. Payne, 3 Tex. 478; Patton v. Taylor, 7 How. 159, 12 L. ed. 649; Walker v. Wilson, 13 Wis. 525.

It has been held that there is a distinction between the covenant of seisin and other covenants; and that by reason of this distinction, damages for a breach of the covenant of seisin might be set up as a counterclaim by the purchaser in an action to foreclose a mortgage given to secure the purchase money.

But, this distinction is repudiated in many jurisdictions. Farbham v. Hotchkiss, 2 Keyes, 15; Jones v. Stanton, 11 Mo. 436; Woodruff v. Bunce, 9 Paige, 443, 38 Am. Dec. 559; Randall v. Bourguardez, 23 Fla. 264, 11 Am. St. Rep. 379, 2 So. 310; Dunn v. Mills, 70 Kan. 656, 79 Pac. 146, 3 Ann. Cas. 363; Harvey v. Morris, 63 Mo. 475; Reeve v. Downs, 22 Kan. 330; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; McLeod v. Barnum, 131 Cal. 605, 63 Pac. 924; Sanderlin v. Willis, 94 Ga. 171, 21 S. E. 291.

Where the purchaser does not elect to rescind, it is considered that he is willing to receive such title as the vendor is able to give, and content with the personal responsibility of the vendor upon his covenants, in case title actually fails and he is afterwards dispossessed. Worthington v. Curd, 22 Ark. 277; Garvin v. Cohen, 13 Rich. L. 153; Hel-

venstein v. Higgason, 35 Ala. 259; Wiley v. Howard, 15 Ind. 169; McGehee v. Jones, 10 Ga. 127; Watson v. Kemp, 41 Ga. 586; Smith v. Hudson, 45 Ga. 208; Booth v. Saffold, 46 Ga. 278; Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353; Harvey v. Morris, 63 Mo. 477; Rhorer v. Bila, 83 Cal. 51, 23 Pac. 274; Florence Oil & Ref. Co. v. McCandless, 26 Colo. 534, 58 Pac. 1084; Pershing v. Canfield, 70 Mo. 140.

In the absence of fraud, a purchaser under a warranty deed is not entitled to restoration of the purchase money until after eviction. Brown v. Smith, 5 How. (Miss.) 387; Hunter v. Bradford, 3 Fla. 269; Roberts v. Woolbright, Ga. Dec. pt. 1, p. 98; Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Vick v. Percy, 7 Smedes & M. 256, 45 Am. Dec. 303; Anderson v. Lincoln, 5 How. (Miss.) 279; Waddell v. Beach, 9 N. J. Eq. 793; Seidman v. Geib, 16 Daly, 434, 19 N. Y. Civ. Proc. Rep. 359, 11 N. Y. Supp. 705; Champlin v. Laytin, 6 Paige, 189; Chesterman v. Gardner, 5 Johns. Ch. 29, 9 Am. Dec. 265; Failing v. Osborne, 3 Or. 498; Briggs v. Gillam, Rich. Eq. Cas. 432.

In all cases where a party has entered into possession of land under color of title, and in good faith has made permanent improvements, he may recover the reasonable value thereof as against another party recovering the property under a paramount title. McKenzie v. Gussner, 22 N. D. 445, 37 L.R.A.(N.S.) 918, 134 N. W. 33; Jackson v. Loomis, 15 Am. Dec. 347, and note, 4 Cow. 168; Waterman Hall v. Waterman, 220 Ill. 569, 4 L.R.A.(N.S.) 776, 77 N. E. 142; Webb v. Wheeler, 80 Neb. 438, 17 L.R.A.(N.S.) 1178, 114 N. W. 636.

John F. Sullivan, for respondents.

Specifications of error not presented and argued in the brief are waived. Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663.

The property here involved is not so valuable to defendants as it would have been had the title been perfect, and by reason of the defects they are entitled to damages. To this end they are entitled to resist payment of that part of the purchase price represented by the note in question. Williams v. Neely, 69 L.R.A. 232, 67 C. C. A. 171, 134 Fed. 1; Zent v. Picken, 54 Iowa, 535, 6 N. W. 750.

"In the United States a large majority of the courts hold that the covenant of seisin, if broken at all, is broken as soon as made, and consequently cannot run with the land nor pass to an assignee." 11 Cyc.

1085, and note 93, 1086, 1088, 1106, 1110, 1144; Pringle v. Witten, 1 Bay, 256, 1 Am. Dec. 612; Bell v. Huggins, 1 Bay, 326; Sumter v. Welsh, 2 Bay, 558; Moore v. Lanhan, 3 Hill, L. 304; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Richardson v. Dorr, 5 Vt. 9; Egan v. Martin, 71 Mo. App. 60; Coleman v. Clark, 80 Mo. App. 339; Kinzie v. Riley, 100 Va. 709, 42 S. E. 872.

The measure of damages on a breach of the covenant of seisin is as a general rule the purchase money with interest. Overhiser v. McCollister, 10 Ind. 41; Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126; Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

"The real consideration for the notes in this case was the title to the land free from encumbrances." 8 Am. & Eng. Enc. Law, 208.

A covenant against encumbrances is broken at once when made, if encumbrances exist. Williams v. Neely, supra; Conwell v. Clifford, 45 Ind. 392.

Failure of consideration, or want of consideration, is always a good defense. Scudder v. Andrews, 2 McLean, 464, Fed. Cas. No. 12,564; Frisbie v. Hoffnagle, 11 Johns. 50; Redding v. Lamb, 81 Mich. 318, 45 N. W. 997.

Where a part of the land so with warranty is held adversely, and this was known to plaintiff, he cannot recover the purchase price. Ballard v. Burrows, 51 Iowa, 81, 50 N. W. 74; Sparrow v. Smith, 63 Mich. 209, 29 N. W. 691.

Where grantors make express covenant of warranty, they cannot set up knowledge of vice in their title to exonerate themselves from the obligation of their contract. New Orleans v. Gaines (New Orleans v. Whitney), 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; Real v. Hollister, 20 Neb. 112, 29 N. W. 189; Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336; Carroll v. Safford, 3 How. 441, 11 L. ed. 671; Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151; Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666; Zent v. Picken, 54 Iowa, 535, 6 N. W. 750.

A covenant against encumbrances is a personal obligation, and does not run with the land, and is broken at the time the conveyance is made. Campbell v. McClure, 45 Neb. 608, 63 N. W. 920; Kane v. Mink, 64 Iowa, 84, 19 N. W. 852; Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778; Allen v. Allen, 48 Minn. 462, 51 N. W. 473; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Davidson v. Cox, 10 Neb. 150, 4

N. W. 1035; Duvall v. Craig, 2 Wheat. 45, 4 L. ed. 180; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437; Batterton v. Smith, 3 Kan. App. 419, 43 Pac. 275; West Coast Mfg. & Invest. Co. v. West Coast Improv. Co. 25 Wash. 627, 62 L.R.A. 763, 66 Pac. 97; Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950.

Where a grantor in a deed with covenant of seisin has neither title to nor possession of the land described, the grantee may immediately on discovering such fact sue for the price paid. Rombough v. Koons, 6 Wash. 558, 34 Pac. 135; Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710; Bryant v. Mosher, 96 Neb. 555, 148 N. W. 329; Gale v. Frazier, 4 Dak. 196, 30 N. W. 138.

Covenants which do not run with the land are covenants of seisin, of the right to convey, and covenants against encumbrances. McCulloch v. Bauer, 24 N. D. 109, 39 N. W. 318; McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028.

"The action being one for breach of the covenant of seisin, to sustain it, there was no necessity for proving an eviction." Seyfried v. Knoblauch, 44 Colo. 86, 96 Pac. 993; Webb v. Wheeler, 80 Neb. 438, 17 L.R.A.(N.S.) 1178, 114 N. W. 636; Beck v. Staats, 80 Neb. 482, 16 L.R.A.(N.S.) 768, 114 N. W. 633; Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778; Matteson v. Vaughn, 38 Mich. 373; Pierce v. Johnson, 4 Vt. 247; Westrope v. Chambers, 51 Tex. 178; Mitchell v. Kepler, 75 Iowa, 207, 39 N. W. 241; Hayden v. Patterson, 39 Colo. 15, 88 Pac. 437.

Defendant in such a case does not have to wait until eviction before asserting his rights. When sued for the purchase price, or when foreclosure proceedings are begun, he may set up any of these breaches by way of defense, and may claim and prove damages by reason of their existence, and may resist payment of the purchase money until that which he purchased—a perfect title—is made and delivered to him. The cases holding that only nominal damages can be recouped are in jurisdictions where it is held that such covenants run with the land, and are not applicable in this jurisdiction, where it is declared that they do not run with the land,—that they are personal covenants or obligations. Boon v. McHenry, 55 Iowa, 202, 7 N. W. 503; 11 Cyc. 1086, note 94; Hacker v. Blake, 17 Ind. 97.

The burden was upon Serr to show his title, and not upon the defendants to show the want of it. Beckman v. Henn, 17 Wis. 412; Mecklem v. Blake, 16 Wis. 103, 82 Am. Dec. 707; Koepke v. Winterfield, 116 Wis. 44, 92 N. W. 437.

"The purchasers in a suit upon the notes had the right, as a defense thereto, to plead a failure of consideration, without an eviction from the premises. Upon the plaintiff's title must ultimately rest the right to recover on these notes." Brady v. Bank of Commerce, 41 Okla. 473, 138 Pac. 1020, Ann. Cas. 1915B, 1019; Faller v. Davis, 30 Okla. 56, 118 Pac. 382, Ann. Cas. 1913B, 1181; Joiner v. Ardmore Loan & T. Co. 33 Okla. 266, 124 Pac. 1073.

The defendants contracted to buy a marketable title. For such title only they agreed to pay. They have not received it. The grantors undertook to sell and convey such title. They have not done so. McCulloch v. Bauer, supra; Crow v. Taylor, 23 N. D. 469, 137 N. W. 451.

BRUCE, J. This is an action to foreclose a mortgage which was given to secure part of the purchase price of several city lots. The defense is that the grantor, who was the vice president of the plaintiff bank, was not the owner of said lots or any part thereof, and that the plaintiff bank had full knowledge of this fact at the time that the mortgage was taken. The answer, however, does not ask for a rescission of the contract of purchase, nor does it offer to restore the property, nor does it contain any allegation of any ejection, actual or threatened, nor of an assertion of any paramount title, nor was there any proof upon the trial of any of these facts.

All that the proof showed or tended to show was that some time in the eighties, the lots were sold to the county of Mercer for taxes; that in 1906 all of the books and records of the register of deeds of Mercer county were destroyed by fire, and if any tax deed was issued to the county, there is no record thereof; that later, and on the 28th day of April, 1909, the county of Mercer quitclaimed the premises to B. G. Letzring and Adelia Letzring, his wife, and that said deeds contained the following statements of a resolution passed by the board of county commissioners: "Whereas the records in the auditor's office show that certain lots in the village of Stanton were deeded to Mercer county by

tax deed in the years 1888 and 1889, therefore be it resolved that Mercer county by its officers issue a quitclaim deed to anyone who so desires to purchase said lots, etc." That the said Letzrings lived on the said lots for about five years and built thereon a livery barn and garage and a small residence; that later, and on the 24th day of June, 1913, the said Letzrings conveyed lots 16 and 17 by warranty deed, and the south half of lot 18 by special warranty deed to the Mercer County Abstract Company; that later, and on the 9th day of August, 1913, the Mercer County Abstract Company conveyed the premises by warranty deed to E. M. Serr; that later, and on the 9th day of August, 1913, the said E. M. Serr and wife conveyed the premises by warranty deed to Bert A. Hayes and Effa I. Hayes, his wife, and that, as a part payment of the purchase price, the said Bert A. Hayes and Effa I. Hayes, his wife, executed and delivered to the Mercer County State Bank of Manhaven, of which the said E. M. Serr was vice president, a note and mortgage for $1,400, and which said note and mortgage are now sought to be foreclosed.

Not only is there no offer in the answer to return the premises, nor any allegation or proof of the assertion by anyone of any adverse title, and not only is there no proof of any attempt to rescind the contract, but there is proof that the defendants Bert A. and Effa I. Hayes remained in the possession of the premises either by themselves or by their tenants up to the time of the trial, and at the time of the trial were collecting the rents therefrom, and stated that they intended so to do, and the only complaint is that if no tax deed was issued and the county of Mercer obtained no title through the tax sale, the record title would be in the names of some third parties, the original owners and defaulting taxpayers, the McGraths.

There was also on the trial some attempt to prove that the sale to the Hayeses was fraudulently made, and that they expected to receive the whole of lot 18, rather than a half thereof. The proof, however, does not sustain this claim or allegation.

The question then before us is this: Can a purchaser of land which the record shows was sold to the county for taxes, though there is no proof of the issuance of a tax deed, and which has afterwards been conveyed by the county to another by a quitclaim deed which recites that a tax deed had been issued to the county therefor, and which is occupied by such other for five years and improved by him by the

erection of buildings, and later conveyed by him by warranty deed to still another person, and then by such other person conveyed by warranty deed to him (the purchaser), when sued on a note and mortgage which were given by him as part of such purchase price, avoid the payment thereof by alleging a lack of title in the original grantor and by proof merely that there is no evidence of the issuance of a tax deed to the county, and if the property was not obtained by the county under such tax sales, the title remains in the original owners, who have never asserted any title thereto or made any claim therefore, the said purchaser never at any time having offered to return the property, brought any suit to quiet the title thereto or attempted to rescind his contract of purchase, but on the other hand having remained in the possession of the premises and being in the possession and collecting the rents thereof at the time of the trial?

We are satisfied that the defendants can avail themselves of no such defense: "It is true," said this court in the case of Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353, "that a total failure of title in many cases is not ground for resisting payment of the purchase price if the purchaser remains in possession of the premises, and is not threatened with dispossession, and does nothing towards protecting himself against such adverse title, and is not in any way disturbed or damaged by such outstanding title, it not being hostilely asserted against him. The grounds upon which such cases turn are that such possession may ripen into a good title by the lapse of time, and that the law will not countenance a purchaser in accepting and holding possession and title which are not attacked and to perfect which the purchaser has done nothing, and at the same time refuse to pay for the land."

"We recognize," says the supreme court of Georgia in the case of Sanderlin v. Willis, 94 Ga. 171, 21 S. E. 291, "that the purchaser of land who enters into possession under a warranty deed or a bond for titles cannot, before eviction, defeat an action for the purchase money, unless there has been fraud on the part of the vendor, or the latter is insolvent, or there is some other ground which would in equity entitle the purchaser to relief."

These quotations express the law as announced by the overwhelming weight of authority. See also Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554; Dunn

v. Mills, 70 Kan. 656, 79 Pac. 146, 502, 3 Ann. Cas. 363; Harvey v. Morris, 63 Mo. 475; Reeve v. Downs, 22 Kan. 330; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 96; McLeod v. Barnum, 131 Cal. 605, 63 Pac. 924; Sonderlin v. Willis, supra; Rhorer v. Bila, 83 Cal. 51, 23 Pac. 274.

Parties who claim breach of warranty may do one of two things. They may rescind or they may stand on their contract and sue for damages for the breach. They cannot do both.

Not only is this the case, but the defendants are entirely lacking in their proof. The note and mortgage import a consideration, and the burden of proof is upon them to show that none was forthcoming. There is no proof that the original owners of the property have been heard from since the time of the tax sale. The quitclaim deed from the county recited that a deed had been given. Purchasers under this quitclaim deed are allowed to remain in possession for five years and erect valuable buildings, and these purchasers are allowed to deed to still other purchasers, and these other purchasers to still others, who are allowed to remain in possession for nearly two years, and who as far as we know are still in possession, and collecting the rents and profits from the premises, and this without the original owners asserting any interest or title whatever. We are not, in short, satisfied that the defendants have proved that there is any outstanding title in the premises which can be asserted in a court of equity, and which any court of equity would deem paramount to their own.

We are not unmindful of the cases which are cited by counsel for the respondents. In the case of Redding v. Lamb, 81 Mich. 318, 45 N. W. 997, the defendants had purchased in an outstanding title, and when sued for the purchase price sought to offset what they had paid. This of course may be done. In the case at bar, however, though there may be a paper blemish to the title, no third party has asserted any claim; no third party has been paid anything for any claim; the third parties are not parties to the action before us, and we have no proof of any breach of the covenants of either seisin, possession, or warranty. The judgment in the case of Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353, was rendered merely on account of the fact that the blemishes were encumbrances, and that the purchasers had the right to offset the value of these encumbrances against the purchase price. A clear distinction,

however, was made between a breach of a covenant against encumbrances and a total failure of title, or a failure of title which was imagined rather than proved. In the case of Bowne v. Wolcott, 1 N. D. 415, 48 N. W. 336, the defective title was not asserted as a defense in an action for the purchase price, but was itself made the ground of an action against the grantor for a breach of his covenants. Even in that case it was held that though the covenants of seisin had practically been broken, as the defendant has conveyed a government homestead upon which at the time of the issuance of the deed no patent had been issued, yet the plaintiff could only recover nominal damage as he had not been disturbed in his possession. This case indeed is an authority for rather than against the plaintiff and appellant in the action which is before us. All that the case of Real v. Hollister, 20 Neb. 112, 29 N. W. 189, held was that a covenant of seisin is broken, if at all, when made, and is not one of the covenants which run with the land. We have in the case at bar, however, as before stated, no proof that that covenant was ever broken. The case of Ballard v. Burrows, 51 Iowa, 81, 50 N. W. 74, was one which was based on the breach of the covenants in the deed. It was not one to resist the payment of the purchase price, neither was it one for the breach of the covenants of seisin. In it also the proofs conclusively showed that 20 acres of the land were *in the adverse possession of a third person,* and had been so for more than ten years. The case of Campbell v. Spears, 120 Iowa, 670, 94 N. W. 1126, was merely an action to set aside an exchange of land. The case of Le Roy v. Beard, 8 How. 451, 12 L. ed. 1151, was merely an action to recover for money paid by the purchaser in order to protect his title. There is nothing in the case which is before us to show that the defendants ever paid, or ever will have to pay, anything to protect theirs. The case of Pollard v. Dwight, 4 Cranch, 421, 2 L. ed. 666, it is true, stated that a covenant of seisin could be broken without an actual eviction, but this statement or holding was based upon the supposition that there was actual proof of a failure of seisin. The action too was one for damages for breach of covenant.

The case of Zent v. Picken, 54 Iowa, 535, 6 N. W. 750, is similar to that at bar, in that a breach of the covenants of seisin and possession was interposed as a defense in an action to foreclose a mortgage. In that case, however, not merely the title, but the possession, was at the

time of the grant clearly in another than the grantor. Seisin implies possession. It is possession with a legal right to the estate in the land. 5 Mod. Am. Law, 38. The case of Campbell v. McClure, 45 Neb. 608, 63 N. W. 920, merely involves an action to recover under the covenants of a warranty for taxes paid by the grantee, and which were a lien upon the land at the time of his purchase. The case of Kane v. Mink, 64 Iowa, 84, 19 N. W. 852, was an action for damages occasioned by the breach of a covenant, and where the evidence showed that the land had been sold under a prior judgment, and that though there was no actual eviction, the plaintiff at such execution sale had demanded that the plaintiff should account to him for the rent and use of the property. The case of Sherwood v. Landon, 57 Mich. 219, 23 N. W. 778, merely held that when land the paramount title to which it in another, is conveyed with covenants of seisin, the covenant is at once broken, and an action for damages for the breach thereof will be barred after six years from the date of the conveyance. The theory of the case was merely that the covenants of seisin do not run with the land, and that "if a party does not choose to investigate his title or enforce his possession within the period of limitation, he must take the consequences of his neglect." In the case at bar the defendants at no time sought to rescind the contract of purchase or to fortify their title.

The case of Allen v. Allen, 48 Minn. 462, 51 N. W. 473, holds, among other things, that a covenant of seisin is broken if the covenantor has not the possession, the right of possession, and the complete legal title, and that when the covenant is broken, an immediate cause of action arises. It does not hold, however, that a party in the possession, and who elects to retain the possession, may refuse to pay the purchase price. The case of Batterton v. Smith, 3 Kan. App. 419, 43 Pac. 275, was merely one in which, in an action for the purchase price, the defendant was allowed to recoup his expenses in perfecting his title. In the case of Bolinger v. Brake, 4 Kan. App. 180, 45 Pac. 950, there was no possession in the grantors at the time of the conveyance.

We have analyzed enough of the cases to show their general holding. The criticisms offered on those analyzed is applicable to practically all, if not all, those cited by the respondents. We have in short no criticism of the doctrine, that covenants of seisin do not run with the land, and if the grantor has no seisin at the time of the conveyance,

a cause of action for a breach thereof immediately arises. Comp. Laws 1913, §§ 5785–5792. Nor have we any fault to find with the doctrine that one may offset against the purchase price anything which he may have paid or any losses which may have occurred to him through endeavoring to protect his possession and title. We have yet to find a case, however, where a person has been allowed to both retain possession of the property and to avoid the payment of the purchase price without some proof of the monetary loss, or of an interference with his possession and title.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment according to the prayer of the complaint.

The respondents will pay the costs and disbursements of the appeal.

F. E. McCURDY v. A. W. LUCAS, R. C. Battey, C. Bortsch, Jr., R. L. Best, and C. N. Kirk, as the Board of City Commissioners of the City of Bismarck, North Dakota.

(159 N. W. 22.)

Elections — inspectors — appointment of — state-wide primary — government — commission system — city commissioners — selection by lot — not required to do so.

1. In appointing inspectors of election for a state-wide primary election, in a city operating under the commission system of government, the city commissioners are not required to select one of their number by lot, the person so chosen to act as inspector in the precinct in which he resides, and appoint the inspectors in the remaining precincts in the city.

Board of county commissioners — election precinct officers — cities having commission system — no power to appoint.

2. The board of county commissioners have no authority to appoint inspectors of election in precincts situated within a city operating under the commission system of city government.

Opinion filed August 8, 1916.

Appeal from the District Court of Burleigh County, Hon. *W. L. Nuessle,* J.

Reversed.

Miller, Zuger, & Tillotson and *H. R. Berndt,* for appellants.

F. E. McCurdy, for respondent.

CHRISTIANSON, J. The respondent, who is a duly qualified elector and taxpayer of the city of Bismarck, in Burleigh county, North Dakota, and a candidate for nomination to the office of state's attorney of Burleigh county on the Republican ticket at the primary election to be held on June 28th, 1916, applied to the district court of Burleigh county for a writ of mandamus compelling the defendants, as members of the board of city commissioners of the city of Bismarck, "to cast lots among themselves and determine by lot which of their number shall act as inspector of election of the precinct in which he resides, and to require the city commissioner on whom the lot falls to appoint inspectors for the remaining precincts of the city of Bismarck."

The trial court directed that the writ issue as prayed for, and the defendants appeal.

The city of Bismarck is incorporated under the provisions of chapter 45 (§§ 3771–3834) of the Political Code, Compiled Laws of North Dakota, 1913, and is being operated under the commission system of city government. The city is divided into six election precincts, and the defendants constitute its board of city commissioners.

And it appears that on May 18, 1916, the board of county commissioners of Burleigh county appointed election inspectors in the precincts situated within the city of Bismarck, and on June 12, 1916, at a regular session duly and regularly called and held for that purpose, the defendants, as the board of city commissioners of said city of Bismarck by resolution duly adopted by a majority of its members, concurred in the appointments made the board of county commissioners. The petitioner complains of this method of selection, and asserts:

(1) That the county commissioners had no authority to appoint such inspectors in any event.

(2) That the board of city commissioners as such had no authority to make such appointment, but that under the provisions of § 951, Comp. Laws 1913, it was incumbent upon them to cast lots among them-

selves and in this manner select one of their number, and that the one so chosen should act as inspector in the precinct in which he resides, and should appoint inspectors in the other five precincts in the city.

The statutory provision (Comp. Laws 1913, § 951) relied upon by petitioner reads: "The chairman of the board of supervisors in organized townships shall by virtue of his office be inspector of elections. In case the township contains more than three hundred voters, such chairman shall be inspector of elections in the precinct in which he resides, and shall appoint the inspector in all other precincts which are component parts of the township of which he is chairman. In case the township and any incorporated town or village within its limits contain less than three hundred voters and such township or incorporated town or village have but one voting place, the chairman of the township board of supervisors shall be inspector of elections. In all cities in which the aldermen are elected in different years, the senior alderman shall be inspector of elections for the precinct in which he resides; and in cities in which the aldermen are not so elected, the alderman who shall act as inspector of elections shall be determined by lot in such manner as the city council shall prescribe. In case a ward in any city contains more than three hundred votes, the senior alderman or the alderman chosen by lot shall be inspector of elections for the precinct in which he resides, and shall appoint the inspectors in all other precincts which are component parts of the ward of which he is alderman. In incorporated towns and villages the president of the town or village board of trustees shall act as inspector, and, if the town or village contains more than three hundred voters, he shall act as inspector of the precinct in which he resides, and appoint the inspectors in the other precincts. In case the alderman designated or selected to act as inspector in any ward is disqualified from acting, the other alderman of the ward shall act as inspector, and appoint other inspectors when necessary; and in case the president of the board of trustees of any town or village is disqualified, the remaining members of the board shall select one of their number to act as such inspector, and appoint other inspectors when necessary. The inspector shall, prior to the opening of the polls in his precinct, appoint as judges of election two qualified electors of such precinct who shall have been resident freeholders therein for at least ninety days next preceding such election, and who are

members of different political parties and of the parties which cast the highest number of votes at the preceding general election; provided, that if at least one week prior to such election the chairman of the county central committee of either of the two parties that cast the largest number of votes in the state at the last general election, shall nominate a member of such party as judge, having the qualifications above prescribed, presenting a certificate of such nomination signed by such chairman, he shall be appointed by the inspector, and such judges together with the inspector shall constitute the board of elections. No persons shall be a member of the board of elections who has anything of value bet or wagered on the result of such election, or who is a candidate or is the father, father-in-law, son, son-in-law, brother or brother-in-law of any candidate at such election. If at any time before or during an election it shall be made to appear to any inspector, by the affidavit of two or more qualified electors of the precinct, that either of the judges is disqualified under the provisions of this section, he shall at once remove such judge and fill the place with a qualified person of the same political party as the judge removed, and in case such person so disqualified shall have taken the oath of office as prescribed by law, the inspector shall place such oath and affidavit before the state's attorney of the county; provided, that in case such inspector is disqualified from acting, the other two members of the board of township supervisors and the clerk shall, at least ten days before the date of holding the election, hold a meeting for the purpose of filling such vacancy. Such vacancy shall be filled by appointing an inspector who shall belong to the same political party as the disqualified inspector, and the name of the inspector so appointed shall at once be reported to the county auditor by such clerk."

The petitioner contends that, in view of the fact that under the commission form of government all the commissioners are elected from the city at large, and not from wards, and as there can be and is no senior city commissioner, that the city commissioners should be treated as five aldermen elected from one ward, and as such required to cast lots as provided by § 951, Comp. Laws.

The defendants by their answer assert that § 951, Comp. Laws 1913, is applicable only in cities incorporated under the general incorporation act, i. e., in cities having aldermen; and that its provisions are not ap-

plicable to cities incorporated and operating under the commission form of government. They further assert that conflicting opinions have been rendered by the city attorney, state's attorney, and Attorney General as to the method of the appointment of such election inspectors, and that they are in doubt as to whether they are authorized to make such appointment, but they assert that power to appoint is vested either (1) in the board of county commissioners, or (2) in the board of city commissioners acting as a board, and they further assert that the same persons have been selected as inspectors both by the county commissioners and by the board of city commissioners, and that consequently, in this case, the inspectors have in any event been properly appointed.

It is the function of the courts to interpret, not to make, laws. And "where a statute is incomplete or defective, whether as a result of inadvertance, or because the case in question was not foreseen or contemplated, it is beyond the province of the courts to supply the omissions, even though as a result the statute is a nullity." But it has been held that "where the ordinary interpretation of a statute leads to consequences so dangerous and absurd that they could never have been intended, the court may adopt a construction from analogous provisions, and thus supply an omission." 36 Cyc. 1113. The fundamental purpose of statutory construction is to ascertain and give effect to the intention of the legislature. 36 Cyc. 1106; 26 Am. & Eng. Enc. Law, 602. The intent is the vital part. It is the spirit which gives life to a legislative enactment. Lewis's Sutherland, Stat. Constr. 2d. ed. § 363. If the language is clear and admits of but one meaning, there is no room for construction and it must be assumed that the legislature meant and intended to say what it has thus plainly expressed. 26 Am. & Eng. Enc. Law, 598; 36 Cyc. 1107. But where the language of the statute is of doubtful meaning, or the literal interpretation manifestly fails to express the real legislative intent, the duty devolves upon the court to ascertain the true meaning of the statute. 36 Cyc. 1108; 26 Am. & Eng. Enc. Law, 601. In ascertaining such meaning, "every statute should be construed with reference to the general system of which it forms a part." And "all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law. The endeavor should be made by tracing the history of legislation on the subject, to ascertain the uniform

and consistent purpose of the legislature, or to discover how the policy of the legislature . . . has been changed or modified from time to time." 36 Cyc. 1144, 1147. Bearing these well-known principles in mind, we approach the questions presented for our determination in this case.

Plaintiff's contention that a city operating under the commission form of government must be treated as one ward having five aldermen, and that one of such five should be selected by lot to act as inspector in the precinct in which he resides and appoint inspectors in the remaining precincts in such city, is, in our opinion, unsound. We are unable to find anything to indicate that the legislature intended that such election inspectors should be so chosen. Section 951, Comp. Laws 1913, by its terms, is applicable to cities operating under the aldermanic system. It was enacted many years before the commission plan of city government came into existence. Consequently, the legislature could not have had the conditions existing under the commission plan in mind at the time this statute was enacted.

The conditions which make § 951 applicable to, and workable in, cities operating under the aldermanic system do not exist in cities operating under the commission form of government, and the legislature has manifested no intent that it should be so applied to such cities. On the contrary, the legislature has recognized that its provisions are inapplicable to, or at least impractical in, cities operating under the commission plan. Thus in cities operating under the aldermanic system, the provisions of the general election laws (including § 951, Comp. Laws) are made applicable to city elections. Comp. Laws 1913, § 3670. But in municipal elections, in cities operating under the commission system, the legislature has provided that "for all general and special elections held under the provisions of this act in the city, for city officers and for other purposes, the board of city commissioners shall, at least ten days before any election is held, appoint in each precinct established in the city, one inspector and two judges of election." Comp. Laws 1913, § 3784.

Defendants' contention that there is no provision of law authorizing the city commissioners or any one of them to appoint election inspectors, and that therefore the county commissioners are empowered to do so, is based upon § 696, Compiled Laws 1913, which reads:

"All vacancies, except in the office of a member of the legislative assembly shall be filled by appointment as follows. . . .

"2. In county and precinct offices, by the board of county commissioners, except vacancies in such board. . . ."

This section, however, must be read in connection with § 683, Comp. Laws (defining vacancies), which reads:

"Every office shall become vacant on the happening of either of the following events:

"1. Death of the incumbent.

"2. His insanity judicially determined.

"3. His resignation.

"4. His removal from office.

"5. His failure to discharge the duties of his office, when such failure has continued for sixty consecutive days, except when prevented from discharging such duties by sickness or other unavoidable cause.

"6. His failure to qualify as provided by law.

"7. His ceasing to be a resident of the state, district, county or township in which the duties of his office are to be discharged, or for which he may have been elected.

"8. His conviction of a felony or of any offense involving moral turpitude or a violation of his official oath.

"9. His ceasing to possess any of the qualifications of office prescribed by law.

"10. The decision of a competent tribunal declaring void his election or appointment."

It will be observed that a vacancy, as defined by the foregoing section, did not exist in the office of election inspector in the different election precincts in the city of Bismarck.

The only express legislative authority to a board of county commissioners to appoint election inspectors is granted by § 952, Comp. Laws 1913, which provides that the county commissioners shall appoint such inspectors in precincts "consisting of unorganized townships."

The policy and intent of the legislature as manifested and declared by these statutory provisions is that the inspector of election in any election precinct situated within organized townships, villages, or cities, should be either the local official designated by the legislature, or in case such official was disqualified, or the legislative designation

inapplicable, that then the inspector should be appointed by some local officer or officers. We are unable to find anything to indicate that the legislature ever intended that the county commissioners should select election inspectors in election precincts situated within organized townships, villages, or cities.

We are next confronted with defendants' second contention, that the power to appoint such election inspectors is vested in the city commission, and not in any one member thereof selected by lot. It is pointed out that this is in harmony with the general policy and intent of the legislature as manifested by the election laws, as well as by the laws applicable to, and the conditions created in, cities operating under the commission system. There is much in this argument that appeals to us. And while we are by no means satisfied that the legislature has spoken on the subject at all, we are of the opinion that if any intent has been expressed by it, that it is in accord with this latter contention.

The trial court's decision is reversed and the proceeding ordered dismissed.

GAS TRACTION COMPANY, a Corporation, v. J. H. STENGER.

(159 N. W. 32.)

Warranties — express — implied — breaches of — evidence — defenses — counterclaims.

Evidence examined and *held* that, for reasons stated in the opinion, defenses and counterclaims based upon alleged breaches of express and implied warranties have not been established.

Opinion filed August 10, 1916.

From a judgment of the District Court of Richland County, *Allen*, J., defendant appeals.

Affirmed.

J. A. Dwyer and *Wolfe & Schneller*, for appellant.

The whole contract is an example of rare ingenuity, and comes very

near being inherently fraudulent on its face, and void as against public policy. The defendant was an unsuspecting purchaser. He relied upon what the agent said and read to him, and supposed that the instrument he signed contained just what the agent had read to him. This agent was a soliciting agent of the plaintiff, to get this application signed, and to make this sale, and he had undoubted authority and power to represent to defendant that what he read was just what the paper contained. Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799.

It is the established law of this state that unless the paper expressly cuts off all warranties, it must be construed as applying solely and only to warranties by contract between the parties, and as not applying to warranties implied by law. Northwestern Cordage Co. v. Rice, 5 N. D. 432, 57 Am. St. Rep. 563, 67 N. W. 298; Hooven & A. Co. v. Wirtz, 15 N. D. 477, 107 N. W. 1078.

Lawrence & Murphy, for respondents.

Justice is nothing more or less than conformity to some obligation law, and all human actions are either just or unjust as they are in conformity to or in opposition to law. Borden v. State, 11 Ark. 519, 54 Am. Dec. 217; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145.

Courts cannot annul or construe away an agreement otherwise legal, on the sole ground that in its enforcement it operates harshly in a given case which is presented for determination. Minnesota Thresher Mfg. Co. v. Lincoln, supra; Aultman & T. Machinery Co. v. Runck, 23 N. D. 579, 137 N. W. 831.

Defendant having elected to affirm the contract, he must now, after four years, abide by it. Sturtevant Mill Co. v. Kingsland Brick Co. 74 N. J. L. 492, 70 Atl. 732; Charter Gas & Engine Co. v. Barton, — Ala. —, 39 So. 985; Southwestern Portland Cement Co. v. O. D. Harvard Co. — Tex. Civ. App. —, 155 S. W. 656.

"Where the contract provides for a return of the goods if unsatisfactory, the buyer cannot relieve himself or liability for the price unless he returns or offers to return them, and the offer to return must be unconditional." Walsh Mfg. Co. v. Plymouth Lumber Co. 159 N. C. 507, 75 S. E. 718; Berlin Mach. Works v. Ewart Lumber Co. 184 Ala. 272, 63 So. 567; Slawson v. Albany R. Co. 3 Thomp. & C.

768, 1 Hun, 438; Dewey v. Erie, 14 Pa. 211, 53 Am. Dec. 533; International Filter Co. v. Cox Bottling Co. 89 Kan. 645, 132 Pac. 180; Darling v. Manistee, 166 Mich. 35, 131 N. W. 450; Gray v. Consolidated Ice Mach. Co. 103 Ga. 115, 29 S. E. 604; Fred W. Wolf Co. v. Northwestern Dairy Co. 55 Wash. 665, 104 Pac. 1123; Fred W. Wolf Co. v. Monarch Refrigerating Co. 252 Ill. 491, 50 L.R.A.(N.S.) 808, 96 N. E. 1063.

Defendant must comply with the terms of the contract, and he must establish the fact that he has done so, as a condition precedent to his right of recovery. He has failed to do so in this case, and he has no remedy in court for damages or otherwise. Allen v. Tompkins, 136 N. C. 208, 48 S. E. 655.

Defendant's conditions of the contract must have been performed by him, or any remedy he might have had for a breach is lost. Fetzer v. Haralson, — Tex. Civ. App. —, 147 S. W. 290.

"When a vendee of personal property has agreed that if there is a breach of warranty he will return the property, its return is the only condition on which he can rely on a broken warranty." Osborne v. Traylor, 8 Ky. L. Rep. 359; Chase Hackley Piano Co. v. Kennedy, 152 N. C. 197, 67 S. E. 488; Walsh Mfg. Co. v. Plymouth Lumber Co. 159 N. C. 507, 75 S. E. 718; W. F. Main Co. v. Griffin-Bynum Co. 141 N. C. 43, 53 S. E. 727; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 424, 61 N. W. 145; Fahey v. Esterly Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580.

So, when the contract for the purchase of a threshing machine, under warranty, requires notice of defects to be given the company or vendor, and there has been failure on the part of the purchaser to claim any defects and failure to give notice within the time specified in the contract, or to return or offer to return the property, he has no standing in court to resist on any ground or breach of warranty, in an action for the purchase price. Gaar, S. & Co. v. Green, 6 N. D. 48, 68 N. W. 318; Aultman & T. Machinery Co. v. Wier, 67 Kan. 674, 74 Pac. 227; Seiberling v. Rodman, 14 Ind. App. 460, 43 N. E. 38; Minnesota Thresher Mfg. Co. v. Lincoln, 4 N. D. 410, 61 N. W. 145; McCormick Harvesting Mach. Co. v. Allison, 116 Ga. 445, 42 S. E. 778; Eichelroth v. Long, 156 Ill. App. 108; Hasenwinkle Grain Co. v. Dooley, 130 Ill. App. 75; Westbrook v. Reeves, 133 Iowa, 655, 111 N. W. 11; Gaar,

S. & Co. v. Hodges, 28 Ky. L. Rep. 889, 90 S. W. 580; Nichols-Shepard Co. v. Rhoadman, 112 Mo. App. 299, 87 S. W. 62; Heagney v. J. I. Case Threshing Mach. Co. 4 Neb. (Unof.) 745, 96 N. W. 175, rehearing in 4 Neb. (Unof.) 753, 99 N. W. 260; Rowell v. Oleson, 32 Minn. 288, 20 N. W. 227; Hinchcliffe v. Barwick, 49 L. J. Exch. N. S. 495, L. R. 5 Exch. Div. 177, 42 L. T. N. S. 492, 28 Week. Rep. 940, 44 J. P. 615; Mesnard v. Aldridge, 3 Esp. 271; Hamilton v. Northey Mfg. Co. 31 Ont. Rep. 468; King v. Towsley, 64 Iowa, 75, 19 N. W. 859; Dunham v. Salmon, 130 Wis. 164, 109 N. W. 959; Sessions v. Hartsook, 23 Ark. 519; Kirk v. Seeley, 63 Mo. App. 262; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; Walters v. Akers, 31 Ky. L. Rep. 259, 101 S. W. 1179; Wilson v. Nichols & S. Co. 139 Ky. 506, 97 S. W. 18; Haynes v. Plano Mfg. Co. 36 Tex. Civ. App. 567, 82 S. W. 532; Bomberger v. Griener, 18 Iowa, 477; Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632; F. C. Austin Mfg. Co. v. Clendenning, 21 Ind. App. 459, 52 N. E. 708; Davis v. Gosser, 41 Kan. 414, 21 Pac. 240; Hoover v. Doetsch, 45 Ill. App. 631; Birch v. Kavanaugh Knitting Co. 34 App. Div. 614, 54 N. Y. Supp. 449, affirmed in 165 N. Y. 617, 59 N. E. 1119; Miller v. Nichols, 5 Neb. 478; James v. Bekkedahl, 10 N. D. 120, 86 N. W. 226; McCormick Harvesting Mach. Co. v. Arnold, 116 Ky. 508, 76 S. W. 323; Nichols & S. Co. v. Miller, 76 Neb. 809, 107 N. W. 1010; Williams v. Donaldson, 8 Iowa, 108; Hills v. Bannister, 8 Cow. 31.

An express warranty excludes any implied warranty. The contract here provides: "It is mutually agreed that said engine, fixtures, and equipment are purchased upon the following warranty only."

This brings this case squarely within the rule laid down by our court. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 522, 101 N. W. 903; Blackmore v. Fairbanks, M. & Co. 79 Iowa, 282, 44 N. W. 548; Lynch v. Curfman, 65 Minn. 170, 68 N. W. 5; Wasatch Orchard Co. v. Morgan Canning Co. 32 Utah, 229, 12 L.R.A.(N.S.) 540, 89 Pac. 1009; Bucy v. Pitts Agri. Works, 89 Iowa, 464, 56 N. W. 541.

Defendant is limited to the express written agreement, and cannot rely upon any oral statements or assertions made to him, if any, by the experts or salesmen as to what plaintiff would do. Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; Cughan v. Larson, 13 N. D. 373, 100 N. W. 1088; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986;

Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516; Western Electric Co. v. Baerthel, 127 Iowa, 467, 103 N. W. 475; Apking v. Hoefer, 74 Neb. 325, 104 N. W. 177.

Misrepresentations render the contract of sale voidable only, but the party relying upon the fraud must act promptly in making his election, whether he would acquiesce in or repudiate the contract. If he fails to rescind the contract promptly, he will be bound by it to the same extent as though it was binding in the first instance. Annis v. Burnham, 15 N. D. 582, 108 N. W. 549; Sonnesyn v. Akin, 14 N. D. 248, 104 N. W. 1026; Chilson v. Houston, 9 N. D. 498, 84 N. W. 354.

Further, he affirms the contract by his acceptance of the fruits of the transaction, in the long and continued beneficial use of the machine, in plowing, harvesting, and threshing. 20 Cyc. 92; Kingman & Co. v. Stoddard, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740; Grymes v. Sanders, 93 U. S. 55, 62, 23 L. ed. 798, 801, 10 Mor. Min. Rep. 445; McLean v. Clapp, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369.

Further, defendant voluntarily made payments. People v. Stephens, 71 N. Y. 527; Selway v. Fogg, 5 Mees. & W. 83, 151 Eng. Reprint, 36, 8 L. J. Exch. N. S. 199; Saratoga & S. R. Co. v. Row, 24 Wend. 74, 35 Am. Dec. 598; Parsons v. Hughes, 9 Paige, 592; Gilmer v. Ware, 19 Ala. 252; Thweatt v. McLeod, 56 Ala. 375; Doherty v. Bell, 55 Ind. 205; St. John v. Hendrickson, 81 Ind. 353; Whiting v. Hill, 23 Mich. 399, 6 Mor. Min. Rep. 692; Craig v. Bradley, 26 Mich. 369; Dailey v. King, 79 Mich. 568, 44 N. W. 959; McEacheran v. Western Transp. & Coal Co. 97 Mich. 479, 56 N. W. 860; Western Electric Co. v. Hart, 103 Mich. 477, 61 N. W. 867; Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54; Thompson v. Libby, 36 Minn. 287, 31 N. W. 52; Morris v. Ewing, 8 N. D. 99, 76 N. W. 1047.

CHRISTIANSON, J. This is an action to foreclose a chattel mortgage given to secure three promissory notes. The complaint is in the usual form. The answer admits the execution and delivery of the notes and chattel mortgage, but alleges (both by way of answer and counterclaim) that the notes were executed and delivered by defendant to plaintiff

in consideration of a certain "Big Four" traction engine; that defendant was induced to purchase said engine by reason of certain representations and warranties made to the defendant by the representatives of the plaintiff, and that said engine failed to comply with said representations and warranties.

The controlling facts may be summarized as follows: On October 27, 1911, the defendant, Stenger, at Hankinson, North Dakota, signed an order for the purchase from the plaintiff of a "Big Four" tractor. The defendant testified that the business was transacted with one Aller, a traveling salesman of plaintiff, and that A. G. Peterson, plaintiff's local agent at Hankinson, was also present at the time and participated therein. The usual printed form of contract was used. The portions of said contract involved in this action are as follows: "The undersigned agrees after . . . . days' trial of said engine, in such field work as the undersigned may elect, under the supervision of such operator, if said engine develops thirty horse power at the drawbar; if the steering device will guide the engine while plowing, as well as any man; if it will plow an acre of ground in favorable soil with from 1 to 1½ gallons of gasolene (breaking sod requiring more fuel); if it will furnish ample power to drive any 40-inch cylinder threshing machine, complete with self-feeder, weigher, and blower manufactured in the United States; if said engine will upon level ground and in suitable soil pull from six to eight 14-inch breaking plows or eight to ten 14-inch stubble plows, and if the undersigned is satisfied from such trial that said engine will perform all the conditions hereinbefore stated,—that the undersigned will, at the expiration of such .... days' trial, purchase said engine, fixtures, and equipment, and pay therefor the sum of $2500 as follows: One note for $500, due on or before June 1st, 1912; one note for $1,000, due on or before October 1st, 1912; one note for $1,000, due on or before October 1st, 1913,—each and all of said promissory notes to be secured by a first mortgage on said gas traction engine fixtures and equipment, and also by chattel mortgage on four (4) mules, weight about 1,400 lbs.

"If said engine, fixtures, and equipment are not so purchased, the undersigned agrees within two days after the expiration of such . . . . days' trial to return the same to said railway station; and said undersigned further agrees that his failure to so return said engine,

fixtures, and equipment within two days after said . . . . days' trial shall be an acceptance and purchase of said engine, fixtures, and equipment by the undersigned at the price and upon the terms and conditions hereinbefore stated.

"It is mutually agreed that said engine, fixtures, and equipment are purchased upon the following warranty only *viz:* A. Should any of the hardened cut steel gears on said engine break, wear out, or become defective within five years from the date of said purchase, said Gas Traction Company will, upon demand therefor, replace them by delivering such parts on board cars at Minneapolis, Minnesota. B. Should any parts (except electrical parts) prove defective within one year from the purchase of said engine on account of inferior material or workmanship, and such parts be returned to the Gas Traction Company at its factory at Minneapolis, Minnesota, transportation prepaid thereon, and be found by the Gas Traction Company to be defective on account of such inferior material or workmanship, said company will furnish new parts in lieu of such defective parts on board cars at Minneapolis, Minnesota.

"It being expressly agreed that the retention of said engine beyond the time above specified shall be a waiver of all other representations, warranties, terms, or conditions upon which said engine is ordered or purchased.

"It is further agreed that this order and agreement is given and accepted, and the sale and purchase of said engine, fixtures, and equipment are made, upon the express condition that this order and agreement contains all the terms and conditions of the sale and purchase of said engine, fixtures, and equipment, and cannot in any manner be changed, altered, varied, or modified without the written consent of an officer of said Gas Traction Company; that the sending of any person by the Gas Traction Company to repair or operate said engine, or the remaining of the person sent to start said engine, after the expiration of said . . . . days' trial, shall in no manner waive, modify or annul any of the terms or conditions hereof."

The engine covered by the contract was at Hankinson and had been examined by Stenger prior to the execution of the order or contract. The defendant also testified that Aller, the traveling salesman, read the order to defendant before it was signed. On direct examination de-

fendant stated that he recalled all portions of the order being read except the following: "The Gas Traction Company shall not be responsible for any delay in shipping said engine caused by accidents, strikes, or other unavoidable circumstances, and this order and agreement is not binding upon the Gas Traction Company until approved by said company by an officer signing the same." And defendent does not testify that this clause was not read, but he merely says he doesn't remember whether it was read or not. No claim made by either party is based upon this clause, however, and it is of no material consequence under the contentions of the parties in this case.

The printed contract form provided for a three-day trial period, and Stenger testified that when it was read to him by Aller, he (Stenger) objected to this period as being too short and insisted on being allowed at least six days' trial, and that thereupon Aller changed the printed form by inserting "6" instead of "3" in the various places so as to allow a six, instead of a three, day trial period. After the execution and delivery of the order or contract, the engine was taken out to defendant's farm as provided by the contract.

The defendant tried out the new engine a day of two in plowing, but did not test it for gasolene consumption, and defendant states that the engine "plowed good." An expert, Martin, was called and spent two or three days on Stenger's farm, and while the expert was there the defendant tried the engine in threshing flax with a 42x70 Avery Separator, and during such test the thresher clutch broke. No further tests were made so far as threshing was concerned, but the defendant continued to use the engine, and plowed with it the rest of the fall until it froze up. A day before the expiration of the six-day period, the defendant voluntarily went to town and made settlement therefor by executing the notes and chattel mortgage involved in this action. The defendant used the engine for plowing after settlement in the fall of 1911, for more than six days, and on May 23, 1912, he paid the first note for $500, which would have become due on June 1, 1912.

In the harvest season of 1912, the engine pulled three binders, and practically all of defendant's crop on a $600-acre farm was harvested therewith. In September, 1912, the defendant purchased a new 36x60 Avery Separator, and used the "Big Four" engine and threshed therewith in all about 1,000 acres. At this time the various difficulties with

the threshing attachment, of which defendant complains, developed, and plaintiff's expert, Martin, made two trips to defendant's farm to replace broken friction blocks on this attachment. On November 29, 1912, the defendant paid $1,000 on the second note, and on December 2, 1912, he paid the balance of such note, amounting to $92.

Defendant also testified that this note had been protested for nonpayment by the First National Bank of Hankinson, and that he there upon requested the plaintiff to send the note to the Citizens National Bank instead, and that after selling some grain to procure the necessary moneys, he went to this bank and paid the full amount due upon said note in the manner above stated. Hence, only the last note described in the order remains unpaid, and is the one upon which this action is based.

The trial court made findings of fact and conclusions of law in favor of the plaintiff upon all issues, and the defendant, Stenger, has appealed from the judgment entered thereon, and demanded a trial *de novo* in this court.

In his brief appellant asserts that the judgment ought to be reversed because: "1. By the fraud of Aller, the minds of the contracting parties were precluded from meeting, and the instrument was thereby vitiated *in toto* as a contract. 2. If that be not so still it is vitiated in all matters relating to the time of trial the right to rescind, and the defendant's right to affirm the sale and recover damages."

Appellant's entire argument in support of these propositions is based upon the assumption that the traveling salesman did not, as a matter of fact, alter the printed form so as to allow a six, instead of a three, day trial period, and that his representations to the defendant, Stenger, that the contract had been so changed were, as a matter of fact, false.

The record shows that upon the trial plaintiff's attorney did not have the original contract signed by defendant, but introduced in evidence in lieu thereof (without objection) one of the regular printed forms of the plaintiff with the understanding that the original contract was to be presented as evidence without any formality as soon as plaintiff's attorney procured it from his client. The printed blank was used upon the trial during the examination of defendant, and it is conceded that this is the form which defendant signed. The record, however, shows that the original order was never produced. The reason why

is not disclosed by the record, but on argument in this court, plaintiff's counsel asserted that the reason for the failure to file the same was that it had become lost.

In its findings of fact the trial court set out *in haec verba* the order signed by defendant, and in so doing apparently overlooked the testimony of the defendant relative to the alteration of the order as regards the length of the trial period, and the order set forth in the court's findings therefore is in accordance with the printed form, and provides merely for a three-day period of trial. Hence defendant's counsel argues that the order which the trial court found that defendant signed is materially different from the one which defendant was led to believe that he signed. In his brief defendant's counsel says: "The whole case hinges upon the question whether or not exhibit C-1 (the order) is or is not a valid, binding contract cutting off such rights (the rights to assert warranties). *If it is, plaintiff must recover.* If it is not the defendant must on this record recover." And, again: "Was there a fixed time specified in the real contract made between the plaintiff and defendant, beyond which time a retention of the engine would work a forfeiture of these rights on the part of the defendant? The paper says, 'Yes; three days.' The defendant signed that paper. *Unless that paper limitation is vitiated by fraud, it must control.* That brings us back to the first and second propositions specified in our argument. '1. By the fraud of Aller, exhibit C-1 was vitiated *in toto.*' '2. If that be not so, still it was vitiated in all matters relating to the time of trial, the right to rescind, the limitation of defendant's rights to rescission, and the attempt to force defendant to waive his common-law rights and remedies.' Defendant, when Aller was reading exhibit C-1 to him, refused to deal or to sign the paper with the three-day trial limitation in it. Aller said he would change that and make it six days. He took a pen or pencil and pretended to make the change. Then he read the paper to defendant as having been changed in every place from three to six days. The paper was then signed by defendant. It was not changed at all, but contained the original, printed, three days' limitation. It was submitted to the plaintiff company, and approved as printed."

The only testimony on the question of alteration of the order was that of the defendant, who testified as follows on his direct examination:

Q. In that talk (at the time the order was given) was there any-

thing said about whether the printed order had been changed or would be change to make it six days?

A. It had.

Q. What was said and who said it, about that?

A. The order read three days.

Q. Who said that?

A. Aller did, he said the order—I had three days, he wanted to know if I thought I was satisfied with that, and I wanted at least six days' trial; that is what I had on all other machines and he said it was already put in, and he wrote in the figure "6" and marked the three days,—that is in the printing, crossed that out, and wrote in six days.

And on his cross-examination defendant testified:

Q. You said you read the order when you signed it?

A. Which order?

Q. The order for the new rig?

A. Yes, they read it to me.

Q. Aller read it to you?

A. He read the whole thing through to me.

Q. Then you signed it?

A. Yes.

Q. And you gave it to Aller?

A. I don't know who took it, I judge Aller or Peterson took it, it laid on the table and they were both sitting around there.

Q. And you say Aller took the order and with a pencil changed it from three days' trial to a six-day trial, is that right, before you signed it?

A. *Yes, he changed it from three days to a trial of six days,* but I won't say with a pencil.

Q. But you signed it?

A. Yes.

This testimony was not controverted by anyone, and in his motion for judgment made at the close of all the testimony, plaintiff's counsel recognized the correctness of this testimony, and apparently conceded that the order was, as a matter of fact, changed as testified to by the defendant. In his motion defendant's counsel said "that it appears in

evidence that the machinery in controversy was purchased by defendant from the plaintiff pursuant to the terms of a written contract, providing, among other things, *that if after six days' trial of the engine* in such work as defendant might elect, such engine should develop 30 H. P. etc."

There is nothing to indicate that any fraud was practised upon the defendant. In fact his own testimony negatives, rather than affirms, the assertions of fraud and misrepresentations. A careful consideration of the evidence convinces us that Allen changed the contract so as to provide for a six, instead of a three, day trial period before it was signed by the defendant. Consequently the charge of fraud is unfounded.

It is also asserted that the order did not exclude implied warranties, and that, therefore, defendant might recover for breach of such implied warranties. The warranties set forth in the answer largely follow the express warranties in the contract, and defendant in his answer relied upon express, rather than implied, warranties. The evidence shows, and the trial court found, "that said plaintiff duly replaced all parts found defective within one year of the purchase of said engine on account of inferior material or workmanship, . . . transportation charges prepaid thereon according to the terms and conditions of said contract, and that the said plaintiff has complied in all respects with the conditions of said contract. . . . That no warranties . . . were given upon said engine or upon the sale or delivery thereof on the part of plaintiff or any of its agents or representatives except the regular written express warranty contained in the contract of purchase. That the said defendant, Stenger, is an intelligent man, is well versed in the English language, and is capable of writing and understanding the same, and that said defendant, Stenger, well knew the terms and conditions of the written contract for the purchase of said engine at the time of the execution and delivery thereof on his part." It will be noted that the contract of purchase expressly provides: "It is mutually agreed that said engine, fixtures, and equipment are purchased upon the following warranty *only*." Courts have no right to make contracts for the parties, but can only enforce the contracts which the parties themselves have made. There can be no serious doubt as to the intention of the parties with respect to warranties. The alleged implied

warranties now sought to be asserted are excluded by the express warranties on the same subject. Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; 35 Cyc. 390, 392; see also Hooven & A. Co. v. Wirtz, 15 N. D. 477, 107 N. W. 1078; Sorg v. Brost, 29 N. D. 124, 127, 150 N. W. 455; Comptograph Co. v. Citizens' Bank, 32 N. D. 59, 155 N. W. 680.

The judgment appealed from must be affirmed. It is so ordered.

ELLIOTT SUPPLY COMPANY, a Domestic Corporation, v. J. D. JOHNSON.

(159 N. W. 2.)

Personal property — warranty of quality — breach of — executed contract — rescission — fraud — absence of.

1. A person cannot for breach of warranty of the quality of personal property rescind an executed sale in the absence of fraud or an agreement authorizing a rescission.

Counterclaim — evidence — damages — proof of — jury — questions for — verdict — motion for directed — error.

2. Evidence examined and held insufficient to warrant a submission to the jury of the defendant's counterclaim, there being insufficient proof of damages occasioned by the breach of warranty therein alleged. It was therefore error to deny plaintiff's motion for a directed verdict.

Damages — measure of — breach of warranty — quality of personal property.

3. The true measure of damages for breach of warranty of the quality of personal property is the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value *at that time.*

Opinion filed July 19, 1916.

Appeal from District Court, Hettinger County, *Crawford, J.*

From a judgment in defendant's favor, plaintiff appeals.

Reversed and a new trial ordered.

Harvey J. Miller, for appellant.

A warranty is an agreement by which a seller assures to a buyer

the existence of some fact affecting the transaction, whether past, present, or future. A statement that "the machine is guaranteed and it will beat anything in this part of the country" is a mere boast. Esterly Harvesting Mach. Co. v. Berg, 52 Neb. 147, 71 N. W. 952.

The breach of a warranty of the quality or personal property on a sale, entitles the buyer to rescind unless it has become an executed contract. Comp. Laws 1913, § 5994.

A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or might be known to the person accepting. Comp. Laws 1913, § 5866; Schager v. Dinneen, 33 S. D. 116, 144 N. W. 719; Schmidt v. Jutting, 31 S. D. 69, 139 N. W. 769; 35 Cyc. 429.

The use of a warranted machine after knowledge of defects, without offer to return as provided by the contract of sale, was an acceptance. Kingman v. Watson, 97 Wis. 596, 73 N. W. 438.

There being no evidence to the contrary, it is presumed that the property is worth the contract price. Comp. Laws 1913, § 7158; C. Aultman & Co. v. Ginn, 1 N. D. 402, 48 N. W. 336; Houghton Implement Co. v. Doughty, 14 N. D. 331, 104 N. W. 516.

The true measure of damages in case of a breach of warranty is the difference in value of the property as represented, and its actual value at the time. Comp. Laws 1913, § 7158; Houghton Implement Co. v. Doughty, supra.

Where a return of the property is offered, and a demand for the notes given therefor is made, these are elements of a rescission. 35 Cyc. 434; Comp. Laws 1913, §§ 5994, 7158.

But where the evidence clearly shows that the contract has been executed, no rescission can be had. Comp. Laws 1913, § 5994; Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513.

Where the vendee continues to use the property after defects are discovered, without complaint to vendor, a rescission cannot be had. Bates v. Fish Bros. Wagon Co. 169 N. Y. 587, 62 N. E. 1094; Huyett & S. Mfg. Co. v. Gray, 124 N. C. 322, 32 S. E. 718; Osborne v. Dwyer, 13 Ill. App. 377; 35 Cyc. 429.

Charles Simon, for respondent.

For the purpose of determining its effect, the allegations of a plead-

ing will be liberally construed with a view of doing substantial justice. Comp. Laws 1913, § 7458.

A motion for judgment notwithstanding the verdict will not be sustained where there is any issue for the jury under the evidence. Nelson v. Grondahl, 12 N. D. 130, 96 N. W. 299.

A variance between the cause pleaded and the proof is not sufficient ground for such a judgment. Welch v. Northern P. R. Co. 14 N. D. 19, 103 N. W. 396.

And where it appears that a party can supply any defects in his proof, such a judgment will not be upheld, and a new trial will be ordered. Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346.

Questions of fact shall not be reviewed in the supreme court in cases tried before a jury, unless a motion for a new trial is made in the court below. Comp. Laws 1913, § 7842; Landis Mach. Co. v. Konantz Saddlery Co. 17 N. D. 310, 116 N. W. 333; Patrick v. Nurnberg, 21 N. D. 377, 131 N. W. 254.

A warranty is express when the seller makes an affirmation with respect to the article sold, pending the treaty of sale, upon which it is intended that the buyer shall rely. 35 Cyc. 365.

No particular form of words is necessary to constitute a warranty. Where representations as to the property are made by the seller and it clearly appears that they are relied upon by the buyer, and furnish an inducement for him to buy, a warranty is created. 35 Cyc. 374.

There was ample evidence to support the verdict in this case, and its weight and sufficiency having been passed upon by the jury, this court will not interfere. Russell v. Olson, 22 N. D. 410, 37 L.R.A.(N.S.) 1217, 133 N. W. 1030, Ann. Cas. 1914B, 1069; Delvaux v. Kewaunee, G. B. & W. R. Co. 161 Wis. 554, 154 N. W. 380.

Fisk, Ch. J. This appeal is from a judgment of the District court of Hettinger county. Plaintiff seeks to recover on a promissory note of $58.50. Defendant admits the execution and delivery of the note, and alleges by way of counterclaim that such note and a like amount of cash were given by the defendant to the plaintiff as the purchase price of three belt guides and shifts sold to defendant on August 3, 1912, under an alleged warranty as to the quality and fitness of the same for the uses and purposes for which they were sold. Facts showing a

breach of such warranty are alleged, and also facts showing that defendant relies upon a rescission of the sale for such alleged breach of warranty, and he demands the cancelation of the note and a recovery of the cash payment of $58.50, together with interest thereon from the date the same was paid.

The case was tried to a jury in the court below, and at the close of the testimony plaintiff moved for a directed verdict for the amount of the note with interest, on the ground and for the reason "that the amount due upon the note is not disputed; that as has been shown by the testimony of the defendant, the sale of the belt guides and shifts is an executed contract, and there was no rescission of that contract and no offer to return the property sold; that the property has never been returned, the company has never been notified of the defect or of the breach of warranty, and that there was no measure of damages proved on the part of the defendant and no testimony offered as to the amount of the damages." Such motion was denied, and the jury returned a verdict in defendant's favor as prayed for in the counterclaim. Thereafter a motion for judgment notwithstanding the verdict was made and subsequently denied, and the appeal is from the order denying such motion, and also from the judgment entered pursuant to the verdict.

Appellant has specified numerous alleged errors of law occurring at the trial, and in the charge to the jury it has also specified numerous instances wherein the evidence is alleged to be insufficient to support the verdict. We find it unnecessary to notice these specifications seriatim, but will, in a general way, merely state our views relative thereto.

Owing to the small sum involved, we are loath to disturb the judgment, but we feel impelled to do so for the following reasons, briefly stated:

Under the undisputed facts, an executed sale of the three belt guides and belt shifts was made by the plaintiff to the defendant (a dealer in farm machinery) on August 3, 1912. Defendant testified that he received such goods some time late in the season, and that one of the attachments was used by a Mr. Polchow, and one by a Mr. Schmidt. He states that Polchow used his about five days, but does not know how long Schmidt used his. He says that the plaintiff's agent, who nego-

tiated the sale, said "they are guaranteed and will beat any in this part of the country," and that he purchased them upon the strength of such representations. The whole tenor of defendant's testimony is to the effect that the attachments were warranted and that they did not fulfil the warranty, and he seems to rely for relief upon an alleged right to rescind the sale for breach of such warranty, although as to one of the attachments the proof wholly fails to show that it did not, in all things, fulfil the alleged warranty. He also testified that he used one of the guides and shifts for a period of three weeks, when it finally broke, doing damage to a cylinder pulley and belt. Notwithstanding the alleged inferior quality of such guides and shifts, no notice thereof seems to have been given to the plaintiff, and on February 27, 1913, defendant made settlement in full with the plaintiff by giving the note in suit and paying a like amount in cash. But he says this was done on the express understanding that if the belts and guides were not as warranted, he would not have to pay the note. There seems to be no proof that the belt guide and shift sold to Schmidt did not work satisfactorily, and, as far as the proof shows, he still retains the same.

There is testimony on the part of the plaintiff tending to show that in September, 1912, defendant expressed himself as entirely satisfied with these belt guides and shifts, and regretted that he had not ordered more of them, stating they were the best he had ever seen and were giving excellent satisfaction. This testimony seems to be corroborated to some extent at least by the fact that, in the following February, defendant made full settlement by paying one half cash and executing and delivering the note in suit. However, it is not our province to weigh the testimony further than to ascertain whether there is any sufficient evidence to support the verdict. We are inclined to the view that there is sufficient evidence to support a finding that the attachments were warranted to be reasonably suitable for the purposes for which they were sold, and that as to two of them, such warranty was breached, and that notwithstanding the fact that the plaintiff settled for the attachments in February, 1913, he may nevertheless recover for any damages suffered through such breach of warranty, provided the settlement was a conditional one as testified to by defendant.

But the trouble with defendant's case is that he apparently relied wholly upon an alleged right to rescind the sale. It is obvious, however,

that he has no such right, it being an executed sale, and there being no reservation of a right of rescission in case of a breach of the warranty, nor any fraud shown.

Section 7158, Compiled Laws 1913, provides that the breach of a warranty entitles the buyer to rescind an agreement for sale, but not an executed sale, unless the warranty was intended by the parties to operate as a condition. See also Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513.

Both in his answer and in his proof, defendant has evidently relied upon a right of rescission, and, in so doing, has failed to furnish any basis in the proof for the recovery of damages as for a breach of warranty. He has failed to make proof of his damage. It was error, therefore, to deny plaintiff motion for a directed verdict and as a result a new trial must be ordered.

We have examined the instructions complained of and find no substantial merit in appellant's criticism thereof, although the learned trial court evidently, through inadvertence, committed a technical error in instructing as to the measure of damages. The true measure of damages for a breach of warranty as defined by § 7158, Compiled Laws, is the excess, if any, of the value which the property would have had at the time to which the warranty referred if it had been complied with over its actual value at that time; but the trial court instructed that "the measure of damages is the difference in value of the articles if they had been as warranted and the value of the articles *as they are.*"

The trial court should also have restricted the recovery of damages to the two guides and shifts which, the proof shows, failed to comply with the warranty. For the above reasons, the judgment must be reversed and the cause remanded for further proceedings according to law. It is so ordered.

JENS JENSEN v. L. F. CLAUSEN.

(159 N. W. 30.)

Witnesses — credibility — testimony of — weight of — questions for jury.

1. The credibility of witnesses and weight of their testimony are questions for the jury.

New trial — motion for — trial court — rulings of — grounds for — must be presented — waiver.

2. Where there is a motion for a new trial, rulings of the trial court constituting proper grounds for a new trial under the statute must be so presented; otherwise they will be deemed waived.

Evidence — admission — rulings on.

3. Certain rulings on the admission of evidence examined and held nonprejudicial.

Trial court — discretion — abuse of — new trial — motion for — newly discovered evidence.

4. 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.

Complaint — cause of action — failure to set forth — objection — may be taken anytime — first in supreme court — not viewed with favor — liberal construction.

5. Where a complaint wholly fails to set out a substantial cause of action, and cannot be made good by amendment, the objection to its sufficiency may be urged at any time; but such objection is not viewed with favor where raised for the first time on appeal, and the complaint will be construed liberally and supported by every legal intendment.

Opinion filed August 10, 1916.

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

Affirmed.

Francis J. Murphy and *L. F. Clausen,* for appellant.

"Undue influence" under our statute exists where one person takes advantage of another's weakness of mind, or takes a grossly oppressive and unfair advantage of another's distress or necessity. Comp. Laws 1913, § 5852.

To obtain a verdict or finding that a certain act was procured by undue influence, it is necessary to show that its execution was the result of an influence which destroyed the free agency of the actor, and constrained him to act against his will. 13 Enc. Ev. p. 191, and cases cited.

The obtaining of property from another with his consent, induced by a wrongful use of force or fear or under color of official title is to make use of "undue influence." Comp. Laws 1913, §§ 9943, 9994.

Before a conveyance of real property will be set aside as having been given under duress or menace, the proof must be clear, specific, and satisfactory. Anderson v. Anderson, 17 N. D. 275, 115 N. W. 836; Englert v. Dale, 25 N. D. 587, 142 N. W. 169.

Where, in the trial of a civil action, a person is charged wth fraud, dishonesty, or crime, there is a legal presumption that he is innocent, and he is entitled to have such presumption considered by the jury in connection with the evidence in the case. Childs v. Merrill, 66 Vt. 302, 29 Atl. 532; Bradish v. Bliss, 35 Vt. 326; Grant v. Riley, 15 App. Div. 190, 44 N. Y. Supp. 338.

To avoid an act on the ground of menace and arrest and imprisonment, it must appear that the threat was unlawful imprisonment, and the party put in fear of imprisonment, and induced by such fear to do the act. Thorn v. Pinkman, 84 Me. 101, 30 Am. St. Rep. 335, 24 Atl. 718; 9 Cyc. 448, and note 34; Alexander v. Pierce, 10 N. H. 498.

"Not only must the threat be unlawful imprisonment, but it must be a threat of immediate imprisonment, or to be shortly inflicted. 6 Am. & Eng. Enc. Law, 64, and cases cited; Beath v. Chapoton, 115 Mich. 506, 69 Am. St. Rep. 589, 73 N. W. 806; Buchanan v. Sahlein, 9 Mo. App. 552; Bodine v. Morgan, 37 N. J. Eq. 426; Wolff v. Bluhm, 95 Wis. 257, 60 Am. St. Rep. 115, 70 N. W. 73.

The threat must be such as to excite the honest fear of some grievous wrong. 6 Am. & Eng. Enc. Law, 64.

Since the right to recover in this case rests upon the fact that a crime has been committed, that fact must be shown by a higher degree of proof than a mere preponderance of the evidence. 17 Cyc. 771, and cases cited; Fowler v. Wallace, 131 Ind. 347, 31 N. E. 53; Merk v. Gelzhaeuser, 50 Cal. 631; Williams v. Dickenson, 28 Fla. 90, 9 So. 847; Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523; Sinclair v. Jackson, 47 Me. 102, 74 Am. Dec. 476; Clark v. Dibble, 16 Wend. 601; Thayer v. Boyle, 30 Me. 475; Forshee v. Abrams, 2 Iowa, 571; Sperry v. Wilcox, 1 Met. 267; People ex rel. Deneen v. Sullivan, 218 Ill. 419, 75 N. E. 1005.

"No prosecution shall be commenced except on the complaint of the husband or wife, save when such husband or wife is insane. It must be entirely apparent that the policy of the statute as to this offense

is, that if the parties injured chose to acquiesce in the wrong done, no one else ought to be allowed to move in the matter." State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Bennett, 31 Iowa, 24; State v. Corliss, 85 Iowa, 18, 51 N. W. 1154; State v. Oden, 100 Iowa, 22, 69 N. W. 272.

"A contract to settle an action of criminal conversation is not founded on an immoral consideration." Phillips v. Pullen, 50 N. J. L. 439, 14 Atl. 222.

And in such cases there is no principle of public policy involved. Sloan v. Davis, 105 Iowa, 97, 74 N. W. 922.

"The presumption of innocence of a defendant prevails in a civil action where a judgment against him will establish his guilt of a crime, and he is entitled to an instruction that he is presumed to be innocent." Grant v. Riley, supra; Corner v. Pendleton, 8 Md. 337.

"A new trial may be granted for newly discovered evidence of material admissions of the successful party, which are not cumulative to other evidence at the trial." 29 Cyc. 945, and cases cited.

"Admissions and conversations of the defendant, the purport of which is in direct conflict with his testimony in the case, and with the theory of his defense, are not impeaching, but original, evidence." Alger v. Merritt, 16 Iowa, 121.

Palda & Aaker and *I. M. Oseth,* for respondent.

Partial illegality of consideration usually avoids and destroys the whole contract. This is always so where the consideration is entire,—not susceptible of separation or division. 6 R. C. L. 682, and cases cited.

In such cases the right of condonation which the policy of the law contemplates is that of condonation as against the husband or wife, and not against the invading adulterer. But when the failure to consent to the prosecution is based upon other considerations than the preservation of family relations, in which the state is directly interested, and is attempted to be exchanged for money or property, the whole matter degenerates to the level of traffic in immorality and adultery, which the state will not recognize. 2 C. J. 17, and note; State v. Wesie, 17 N. D. 567, 19 L.R.A.(N.S.) 786, 118 N. W. 20.

The degree of proof required in such cases is not that it shall be sufficient to warrant a judgment establishing the defendant's guilt of

a crime. The issues are civil in their nature, such an action is a civil action for money or property, and the criminal side or aspect is only an incident to the main action. Grant v. Riley, 15 App. Div. 190, 44 N. Y. Supp. 238; Thayer v. Boyle, 30 Me. 475; Merk v. Gelzhaeuser, 50 Cal. 631; Barton v. Thompson, 46 Iowa, 30, 26 Am. Rep. 131; Clark v. Dibble, 16 Wend. 601; Forshee v. Abrams, 2 Iowa, 571; Sperry v. Wilcox, 1 Met. 267.

The true rule is that an instrument executed under threats made by the payee to prosecute the promisor for any crime, under such circumstances that the promisor actually feared such prosecution and imprisonment if he did not execute the instrument, is made under duress and is void in the hands of the original payee. Such a rule is reasonable and in accord with the trend of modern decisions. First Nat. Bank v. Bryan, 62 Iowa, 42, 17 N. W. 165; Henry v. State Bank, 131 Iowa, 97, 107 N. W. 1034; Hullhordt v. Scharner, 15 Neb. 57, 17 N. W. 259; Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; Peckham v. Van Bergen, 10 N. D. 43, 84 N. W. 566.

CHRISTIANSON, J. Plaintiff, who is a farmer residing in Ward county in this state, brings this action against defendant, who is an attorney, to recover damages for certain alleged wrongful and fraudulent acts on the part of the defendant.

The evidence offered by plaintiff tended to show the following facts:

In March, 1913, and for some time prior thereto, the plaintiff, who is a bachelor, had a housekeeper, one Mrs. Domsten. They resided on plaintiff's farm near Kenmare. Mrs. Domsten was a married woman who had separated from her husband, and the defendant, who is an attorney, was engaged by her to institute an action for divorce against her husband, Martin Domsten. While the divorce action was pending, the defendant, on or about March 31, 1913, called the plaintiff into his office and informed him that a neighbor had told him (defendant) that Mrs. Domsten was pregnant; and that plaintiff either had to pay to the defendant $1,000 or be sent to the penitentiary. Plaintiff at first refused to consider the proposition, stating that he and Mrs. Domsten were thinking of getting married, whereupon defendant informed him that she was still a married woman. After some further talk between them, plaintiff signed and delivered to defendant a note for

$1,000, payable to the order of Martin Domsten, together with chattel and real estate mortgages securing payment thereof.

The defendant Clausen testifies that Domsten came to see him and retained him to maintain an action for criminal conversation against the plaintiff, and that the note and mortgages, executed by the plaintiff, were executed and delivered in settlement of the civil liability involved in such proposed action.

Domsten testified that he came to see the defendant about the pending divorce action wherein Domsten was defendant; that his own attorney, one Clark, was out of the city, and that he therefore went to see Mr. Clausen, who, as already stated, represented the plaintiff in such divorce case. That during the conversation then had, Domsten stated that he wanted to make some adjustment with respect to the custody of the children involved in the divorce proceeding, and that if this matter were adjusted and Domsten's expenses paid, he (Domsten) would not resist the divorce action. That some days later Domsten again saw the defendant and was informed by him that he had everything settled.

In regard to the settlement then made between Domsten and the defendant, Domsten testified:

Q. What did he give you as a settlement; what did he tell you your share was? A. He says you can take $100. Now would you take a note, he says. I says I suppose I have to if you don't got the money, so I took it.

The note referred to was defendant's personal note, payable to Domsten. This note has not been paid. Some time after the commencement of this action defendant assigned to Domsten a note for $50, which the defendant had received from the plaintiff as part payment of his attorneys' fees in the divorce case.

At the time he received the $100 note, Domsten, at defendant's request, assigned to him the note and mortgages executed by the plaintiff, and defendant, thereafter sold the same to a bank at Kenmare, in due course, before maturity, and for value, and plaintiff was compelled to pay the same to such bank.

The cause was tried to a jury and resulted in a verdict in plaintiff's favor, and defendant appeals from the judgment and the order denying

his alternative motion for judgment notwithstanding the verdict, or for a new trial.

(1) Defendant asserts, and the greater portion of his brief is devoted to an argument of the proposition, that the evidence is insufficient to sustain the verdict. Much of defendant's argument is directed at the credibility of the respective witnesses, and the weight of their testimony. These were matters for the jury. Defendant did not move for a directed verdict. This is to some extent indicative of the fact that at the time of the trial he must have believed that there was an issue of fact to be determined by the jury. And an examination of the evidence leads us to the conclusion that we would not be justified in saying as a matter of law that the verdict is contrary to, or unsupported by, the evidence.

Defendant also asserts that the trial court gave two erroneous instructions to the jury.

(2) Under the laws of this state misdirection is an error in law, and constitutes one of the statutory grounds for a new trial. Comp. Laws 1913, § 7660.

The statute requires that a party who makes a motion for a new trial shall serve with his notice of motion a concise statement of the errors of law of which he complains. Comp. Laws 1913, § 7656. In the case at bar defendant made a motion for a new trial upon several grounds, but no error was specified in the court's instructions to the jury. Hence the trial court in ruling on the motion for a new trial ruled upon the theory that no complaint was made of its instructions to the jury.

It is true that in absence of a motion for new trial, errors in instructions are reviewable on an appeal from the judgment. But when a party moves for a new trial, he is required to embrace in such motion all errors complained of, which under the statute constitute proper grounds for a new trial; otherwise they will be deemed waived. 29 Cyc. 945. See also State v. Glass, 29 N. D. 620, 151 N. W. 229.

We deem it proper to say, however, that we have examined the instructions given in this case, and the instructions complained of are not fundamentally wrong, nor has appellant shown them to be prejudicial.

(3) Defendant also assigns error upon the court's action in overruling certain objections to questions propounded to the defendant while under cross-examination. The questions related to the Domsten divorce

case. We are by no means justified in saying that the examination complained of constituted improper cross-examination, and appellant has indicated no manner in which he could have been prejudiced thereby, and we are unable to see how he could possibly have been prejudiced by such rulings.

(4) Defendant also asserts that the trial court should have granted a new trial on the ground of newly discovered evidence.

This ground of the motion for a new trial is based solely upon the affidavit of the defendant, to the effect "that he is the defendant in the above-entitled action. That subsequent to the trial of said cause he has discovered evidence which will establish the fact that the plaintiff shortly after the settlement of the claim of Martin R. Domsten against the plaintiff, in which the defendant obtained the note and mortgages in question, the plaintiff made certain admissions to A. Meland, Fred Eshenbaker, and G. N. Combs, that he, the plaintiff, voluntarily, freely, and gladly made said settlement, and was not intimidated or threatened in the making of the same, either by the defendant or anyone else; that said evidence is new, material to the issue, and not cumulative, nor will it be brought to impeach any evidence or the testimony of any witness who has heretofore been examined in this action. That he did not know of the existence of said evidence at the time of the trial, and could not by using reasonable diligence have discovered and produced the same upon the former trial."

And the joint affidavit of A. Meland, Fred Eshenbaker and G. M. Combs, wherein they say "that they are well acquainted with Jens Jensen and L. F. Clausen, the plaintiff and defendant in the above-entitled action. That during the spring of A. D. 1915 (sometime in the month of April or May), the said plaintiff stated to these affiants that he, the plaintiff, had had a settlement with the said L. F. Clausen of the claim of one Martin H. Domsten against him, the plaintiff, in damages for having sexual intercourse with the said Domsten's wife, and that said settlement was for the amount of $1,000. The said Jensen further states that he was glad to get it settled and was well satisfied therewith, and that the reason why he made said settlement was that he did not want the matter to go into court and made public for everybody to talk about. That no statement was made or anything said at that time by said Jensen to the effect that said Clausen had, in making

said settlement, threatened to have the said Jensen arrested or sent to the penitentiary, or that said Clausen had in any other way taken any undue advantage of him in making said settlement. That affiants are residents of said county of Ward and neighbors of said Jensen, and that they frequently saw and talked to the said Jensen during the spring and early summer of A. D. 1913 about the said Domsten affair, and at no time during said conversations did said Jensen intimate that said Clausen had made any threats to him or taken any undue advantage of him in making such settlement, but he always stated that he made the same to avoid publicity. Affiants further state that it was not until in the fall of A. D. 1913, and some considerable time after the commencement of this action, that the plaintiff stated to them that the defendant had threatened him, the plaintiff, with arrest in making said settlement, although these affiants had frequently seen and talked with him about this Domsten affair during the summer of 1913."

The law applicable to motions for new trial on the ground of newly discovered evidence was fully discussed in Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; State v. Cray, 31 N. D. 67, 153 N. W. 425; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261. And by applying the rules there laid down, we reach the conclusion that the trial court did not abuse its discretion in denying a new trial.

(5) In a supplemental brief, defendant also presents the objection that plaintiff's complaint does not state facts sufficient to constitute a cause of action. This objection was in no manner raised in the court below, nor was it raised by any specification of error on this appeal, nor is it argued in appellant's original brief, but, is first presented by a supplemental brief served and filed after service of respondent's brief.

It is true that where a complaint wholly fails to set out a substantial cause of action, and cannot be made good by amendment, the objection to its sufficiency may be urged at any stage of the proceeding. Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Comp. Laws 1913, § 7447.

But it is equally true that the reviewing court does not look upon such an objection with favor when raised for the first time on appeal. "And the complaint will be construed liberally and supported by every legal intendment, and if the defect was amendable, or the pleading is good after verdict, or sufficient to bar another action for the same cause,

it will be sufficient on appeal in the absence of objection in the court below. It must be shown that there is a total absence of an averment of some fact essential to the existence of the cause of action, or the presence of some averment that destroys plaintiff's right to recover. 3 C. J. 787.

The objections to the complaint in the case at bar go to the manner in which the cause of action is alleged. The complaint substantially stated a cause of action, and is clearly sufficient to bar another action for the same cause. The alleged defects of which defendant complains could have been readily cured by amendment.

The judgment and order denying a new trial are affirmed.

MAREN G. TORGERSON and John J. Stendal, the Guardian ad Litem of Lief Torgerson, Martin R. Torgerson, Regina C. Torgerson, and Andrea Breta Florence Torgerson, Minors, v. BRITHA HAUGE, Lief Torgerson, John T. Hauge, Martha O. Fundingsland, Torger T. Hauge, Britha Olson, and Karina Alveshere.

(159 N. W. 6.)

The parents of Andrew Torgerson entered into an oral understanding with him in 1839, whereby he should reside with and care for them during their lives, and should receive their property. They executed and delivered to him their joint written will constituting him sole devisee of all their property. Andrew purchased an adjoining quarter, sold his own homestead in another county, and for fifteen years lived with his parents.

Andrew died in June, 1914; the father in October following, at the age of seventy-four years. The mother was seventy-four years old at the time of the trial. Andrew leaves a widow and four minor children. Surviving him are these defendants, his four brothers and sisters and his mother. Six weeks after the death of Andrew, his brothers and sisters procured the aged and

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Note.—Cases discussing the right to change a will as affected by contract are collected in a note in 14 L.R.A. 861, in which it appears, as in the case above, that a will based on a valuable consideration, giving the whole of the property of the testator to certain beneficiaries, to whom it is delivered, is irrevocable.

On agreements to make particular dispositions of property by will and the mode of their enforcement, see note in 66 Am. Dec. 784.

enfeebled father and mother to make another will, revoking the former one and dividing all their property between themselves and the heirs of Andrew, one fifth to each. The parents then leave and reside with the defendants. Andrew's widow protests and offers to continue to support and care for them.

The children of Andrew herein seek to enjoin the probate of the second will and maintain the *status quo* during the lifetime of the mother; and to define the estate of the minors in the real property and declare their interest therein a trust upon the fee thereof to be subsequently perfected by the probate of the first will or proceedings in equity; and to annul any pretended interest of the defendants under the purported second will and to make suitable provisions meanwhile for the maintenance and care of the mother out of said homestead premises, title to which was acquired by final proof years ago, but subsequent to the delivery of the first will.

Wills — contractual — testamentary — contractual features — revocation — not permitted — consent of beneficiaries — without — executed — equity.

1. *Held:* A will executed under such an agreement is both contractual and testamentary. Its contractual features cannot be later revoked by the testators without the consent of the beneficiaries where executed, and where equity should enforce its provisions.

Contract — substantially performed — equity — relief — specific — performance — trust — heirs — transferee — devisee.

2. Under the facts this contract under which said will was executed and delivered was substantially performed, and to such an extent that equity will grant relief equivalent to specific performance and fasten a trust upon the property for the benefit of the heirs of the beneficiary under the contract, as against any transferee or devisee.

Will — recognized in equity — contract — as part performance — enforceable contract.

3. A will so executed will be recognized in equity as a part performance of the contract and becomes itself in its contractual features an enforceable contract.

Government homestead — title to — testator — final proof — not made — will — at time of — immaterial.

4. That the title to the government homestead had not been vested by final proof in the testator when said will and contract was made was immaterial where subsequently made.

Contract — transfer — will — Federal statutes.

5. Such a contract for transfer and will executed thereunder is not a violation of, but instead is provided for and recognized by, U. S. Rev. Stat. § 2291.

Mother of beneficiary — will — joining in — acquiesced in for years — contract — benefits under — homestead rights — equitable provision — maintenance — possession — to heirs of beneficiary.

6. The mother of Andrew having joined in the will and acquiesced for years in the benefits under the contract, no homestead rights of hers are violated by equitable provision for her maintenance from said property or its proceeds. Equity has power under such circumstances to award possession as against her to the heirs of Andrew, where ample provision for her maintenance is made, and she refuses to remain with them upon said premises.

Widow of beneficiary — rights of — waived — children.

7. No rights of the widow of Andrew are involved, she having formally waived any right in said premises to and in favor of her children, these plaintiffs.

Opinion filed July 21, 1916. Rehearing denied August 16, 1916.

Defendants appeal from District Court, Wells County, *Coffey*, Judge, demanding trial *de novo*.

Affirmed.

B. F. Whipple and *J. J. Youngblood*, for appellants.

An unproved homestead is not devisable by will or contract. The Federal statutes have limited the power of the entryman to alienate his homestead to a few specific cases, the chief of which are for roads, schools, and irrigation purposes. Such statutes are strictly construed. Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. 100; Wood v. Noel, 116 La. 516, 40 So. 857; Ford v. Ford, 24 S. D. 644, 124 N. W. 1108; Cascade Public Service Corp. v. Railsback, 59 Wash. 376, 109 Pac. 1062; Tait v. New York L. Ins. Co. 1 Flipp. 288, Fed. Cas. No. 13,726; Siegel, C. & Co. v. Eaton & P. Co. 165 Ill. 550, 46 N. E. 449.

Assuming the contract to have been fully established, the plaintiffs cannot maintain their action for specific performance because the contract has not been completed. If there was ever a valid agreement, it was extinguished by the death of Andrew Torgerson, the beneficiary, before the death of his father. Cox v. Cox, 26 Gratt. 305; Snyder v. Snyder, 77 Wis. 95, 45 N. W. 818; Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514; Adams, Eq. p. 252, *82; Benedict v. Lynch, 1 Johns. Ch. 370, 7 Am. Dec. 484.

A court of equity cannot enforce a contract specifically unless it can be done mutually and completely, and so as to secure substantially, be-

yond question, all that the parties contemplate. If this is impracticable, the remedy, if any exists, is to be found elsewhere. Buck v. Smith, 29 Mich. 166, 18 Am. Rep. 84; Blanchard v. Detroit, L. & L. M. R. Co. 31 Mich. 52, 18 Am. Rep. 142; Rust v. Conrad, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265; Bumpus v. Bumpus, 53 Mich. 346, 19 N. W. 29; Wright v. Wright, 31 Mich. 380; Roberts v. Kelsey, 38 Mich. 602.

Equity will never compel performance by one party when there can be no certainty that the other party ever intends to carry out the promises made by him. O'Brien v. Perry, 130 Cal. 528, 62 Pac. 927; Civ. Code § 3390; Hayden v. Collins, 1 Cal. App. 259, 81 Pac. 1120; Prusiecke v. Ramzinski, — Tex. Civ. App. —, 81 S. W. 771; Ikerd v. Beavers, 106 Ind. 483, 7 N. E. 328; 40 Cyc. 1067.

H. J. Bessesen, John O. Hanchett, and *J. L. Johnson,* for respondents.

The law and the decisions uphold the validity of a mortgage executed by a homestead entryman prior to proof and patent, where the entryman thereafter perfects his title and obtains patent to the land. Adam v. McClintock, 21 N. D. 483, 131 N. W. 394; Martin v. Yager, 30 N. D. 577, 153 N. W. 286; Holtan v. Beck, 20 N. D. 5, 125 N. W. 1048; Sutphen v. Sutphen, 30 Kan. 510, 2 Pac. 100; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; Svanburg v. Fosseen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4.

Where a man has given up his inherent right to establish and build a home for himself and family elsewhere, and has, pursuant to a contract, occupied, and for many years improved, a tract of land belonging to another, under an agreement to convey it to him by deed or devise it to him by will, it is held that the law cannot place the parties *in statu quo;* that money damages will not suffice, and that it is such a case that the only adequate remedy is by action for specific performance in a court of equity, and that such court, under such circumstances, will always decree specific performance. Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; Svanburg v. Fosseen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57.

The homestead estate can be lost by both husband and wife by aban-

donment or by estoppel *in pais,* the same as any other interest in or title to real property. Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Ferris v. Jensen, 16 N. D. 466, 114 N. W. 372.

The doctrine of equitable estoppel by conduct applies as against married women the same as against all persons *sui juris.* Bird v. Pope, 73 Mich. 483, 41 N. W. 514; Baker v. Syfritt, 147 Iowa, 49, 125 N. W. 998; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; Best v. Gralapp, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 464; Kofka v. Rosicky, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788.

"Such an agreement may be indirectly enforced during the promisor's lifetime by a decree canceling a conveyance made by him to another in violation of the agreement, or a decree that the grantor in such conveyance hold the title in trust subject to the purposes of the agreement; by an injunction against conveying the property or making a will in violation of the agreement; or that grantee hold the property in trust during his lifetime with remainder in fee to the complainant or his heirs; or that on performance or readiness to perform by plaintiff he will be entitled to the land on the death of the promisor." 36 Cyc. 738, ¶ 4; Svanburg v. Fosseen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; Owens v. McNally, 113 Cal. 444, 33 L.R.A. 369, 45 Pac. 711; Cox v. Cox, 26 Gratt. 305; Snyder v. Snyder, 77 Wis. 95, 45 N. W. 818; Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514.

The heirs of Andrew Torgerson succeeded to the equitable estate which he had in the property during his lifetime, burdened with the fulfilment of the contract he had made, and which he had executed as far as possible. Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921; France v. France, 8 N. J. Eq. 650; Van Duyne v. Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq. 142; Davison v. Davison, 13 N. J. Eq. 246; Pom. Spec. Perf. of Contr. p. 104; 2 Story, Eq. Jur. §§ 759, 761; Fry, Spec. Perf. 174; Wallace v. Brown, 10 N. J. Eq. 308; Cooper v. Carlisle, 17 N. J. Eq. 529; Eyre v. Eyre, 19 N. J. Eq. 102; Green v. Richards, 23 N. J. Eq. 33; Dean v. Anderson, 34 N. J. Eq. 500; Haughwout v. Murphy, 22 N. J. Eq. 531.

Goss, J. The quarter section, the subject matter of this suit, was the government homestead of Torger J. Hauge. It is the southwest quarter of 6, township 149 north of range 71 west, and within Wells county. Torger Hauge made proof thereon in 1902. Britha Hauge, now his widow, is still living. Their children were the defendants other than the widow appellant, and also their youngest son, Andrew Torgerson. The plaintiffs are his children suing by guardian the mother and the brothers and sisters of their father, Andrew Torgerson. Both Andrew Torgerson and his father, Torger J. Hauge, are dead. The son died from tuberculosis June 5, 1914, after a lingering illness. His father, Torger J. Hauge, died in October following.

In 1899 Torger J. Hauge and his wife were living upon this tract as their unproven government homestead. Andrew Torgerson, their youngest son, unmarried, was residing upon a government homestead near Balfour. The other four children of Torger and wife had married and had left the parental roof. In 1889 the father and mother entered into an arrangement with Andrew that he should return to their home, reside with and care for them for the balance of their lives, and should receive therefor all their property, including their unproven homestead, upon the death of both of them. Andrew thereupon made commutation proof upon his homestead near Balfour and sold it, realizing some $1,500 net from its sale. He immediately returned to the home of his parents, purchasing a quarter of school land adjoining, and making the first payments thereon to the state with a portion of the proceeds from the sale of his homestead. He took possession of all personalty on the father's homestead and cropped it, taking those also. The father soon afterward, in 1902, made proof upon his homestead and patent therefor presumably has been issued. In 1899 the father's homestead was worth approximately $10 per acre. The buildings were of sod. Substantial frame buildings, consisting of a house worth twelve or fifteen hundred dollars, a large hip-roofed barn, worth from ten to twelve hundred dollars, and several other frame buildings, as granaries and the like, have been built upon the father's homestead by Andrew since his return. There is substantial proof that a portion of the proceeds from the son's homestead went into the frame house, the first building erected. The buildings and improvements, in the aggregate of the value of approximately $3,500, upon the father's homestead, were placed

there by Andrew from part of the proceeds of the sale of his homestead, but in larger part from the crops he had raised upon the land in question and the school quarter. All the buildings and improvements were placed upon the father's homestead, instead of upon the school land quarter, and during all the years from 1899 until Andrew's death he had resided thereon.

Andrew married in 1907, and he and his family, together with his father and mother, have always lived there. During all this time the old people had been well and comfortably cared for by the son and his wife, and were apparently well satisfied during these fifteen years with their condition and with the performance of the agreement under which they were maintained. For some years before the son's death in 1914 he had been ailing, but no complaint has been made that during that time and up to his death the old people were not properly cared for. In fact, the contrary is the proof. During all this time peace and harmony prevailed, and at various times the old people have referred to the understanding with Andrew, and declared that his wife and children in case of his death should not be dispossessed, but should perform the contract the same as Andrew did when living, and receive the same benefits. They even consented to the giving of a deed for said purposes a few days before Andrew's death; but evidently for sentimental reasons such as the consideration for the feeling of the son during his last illness, they did not trouble themselves or him to make the transfer.

This original understanding or contract does not rest entirely in parol. Soon after the return of Andrew in 1899, and evidently to carry out the agreement and place it and the good faith of the parties beyond question for all time, the father and mother had a will prepared, and which they executed and attested in the presence of witnesses, and subsequently delivered to Andrew. In part, it reads: "We do hereby jointly and severally give, devise, and bequeath to our beloved son, Andrew Torgerson, all our estate whether held jointly or severally, of whatever name, title, or description, real, personal, or mixed. This will to become operative only upon the death of the survivor of us. We do hereby make, constitute, and appoint Andrew Torgerson the forenamed, sole executor of this last will and testament without being required to give bonds for the discharge of his trust as such executor." The possession of this will has been retained at all times by Andrew and since

his death by his widow or the plaintiffs. Its execution and delivery is admitted and also is established by the uncontroverted proof. Each and all of the defendants knew of its provisions and the arrangement under which the son Andrew, and later his wife, had occupied the premises in question and cared for and maintained the old people. As above stated, the son died first, and at a time when the father was very feeble and in poor health and needed continuous personal attention and care. At Andrew's death his widow was six months pregnant, and physically unable to render all the care to the aged parents of Andrew that was necessary, and was assisted by her sister and other hired help; and several times a week by another son, a brother of Andrew.

Some six weeks after Andrew's death, evidently under prearrangement for the purpose, but without informing Andrew's widow thereof until it occurred, a meeting of the surviving brothers and sisters of Andrew, the defendants in this action, took place at the home of the old people and the widow and children, at which time the father and mother were induced to make a second will, under the provisions of which the father's homestead, still standing of record in his name, was devised to all his children, share and share alike, devising to the three minor children of Andrew only a one-fifth share of this property. Its purpose was to disregard and annul the earlier will, and avoid any rights of the heirs of Andrew under it and the contract entered into in connection therewith and performed under for more than fifteen years. There is evidence in the record that the father and mother were reluctant to do this, but did it under the solicitation, if not under what amounted to the coercion and duress, of their other four surviving children, these defendants. There is evidence from which to conclude that the old lady and her remaining children, defendants, desired to keep this property from Andrew's widow. And on the same day the aged couple were removed to the residence of one of the defendants. Andrew's widow, realizing the drift that matters were taking, offered to care for the father and mother that they might remain with her, and that she would give them a home and fulfil the contract years before entered into with Andrew and frequently referred to in conversation with her or in her presence. This, they refused to do. Subsequently the administrator of Andrew's estate made a similar offer, and also offered to contribute

a portion of the crops or a monthly allowance for their support, in the performance and fulfilment of said previously existing contract. But this was declined.

Soon afterwards the father died, being some seventy-four years old at the time of his death. The mother was seventy-four at date of trial. This action is brought by Andrew's children by guardians, to enforce said contract by having the property decreed to be held in trust by the mother for her support, but subject to the vested interests therein of the plaintiff's minor children and heirs of Andrew Torgerson, deceased, and that the probating of the second will as establishing title adverse to the interest of plaintiff be enjoined, and that the interests of the plaintiffs and the widow be defined and declared, and that the other defendants take nothing. At trial the widow of Andrew filed a waiver in favor of her four children of any interest she might have had in said property. The relief asked was granted by the lower court. From its decree the defendants appeal, demanding a trial *de novo*. On retrial the facts are found as heretofore set forth in this opinion.

The points argued in briefs will now be considered. It is asserted "that it was error to hold that plaintiffs have an estate and vested interest in said real property," and "to hold that prior to his death Torger J. Hauge held the legal title to said land in trust for Andrew's heirs," and "that plaintiffs are entitled to the use, occupation, and possession of said land," and defendants claim that the parents have never waived nor conveyed their homestead rights in said premises, and that the mother, Britha Hauge, "cannot be devested of the absolute use, occupation, and possession of said land by any substitution of other means for her care and support." It is undisputed that a will was made and delivered, and the status of the parties was accordingly changed for fifteen years to conform to and comply with the agreement, the terms of which were definite and specific. The will was executed under and in performance of the original contract and for a valuable consideration moving to the contracting parties, i. e., the value of the support, care, and maintenance of the aged couple, worth $300 per year under the proof, while the value of the crops and advantages to Andrew, present and prospective, was considerable.

"A will executed under an agreement founded upon a valuable consideration is contractual as well as testamentary. In the latter aspect

it may be revoked without the consent of the beneficiary, but not in the former." Syllabus in Nelson v. Schoonover, 89 Kan. 388, 131 Pac. 147. The opinion also has the following: "An agreement in writing made upon sufficient consideration, to devise real estate, is enforceable by specific performance against the heirs or devisees of the testator. Newton v. Lyon, 62 Kan. 306, 310, 62 Pac. 1000; Bless v. Blizzard, 86 Kan. 230, 120 Pac. 351; Dillon v. Gray, 87 Kan. 129, 123 Pac. 878; 30 Am. & Eng. Enc. Law, 621," also citing and quoting from 36 Cyc. 735, as follows: "An agreement to make a certain disposition of property by will is one which, strictly speaking, is not capable of a specific execution, yet it is within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement. Such a contract is enforced after the death of the promisor by fastening a trust on the property in the hands of the heirs, devisees, and personal representatives and others holding the property with notice of the contract or as volunteers" 36 Cyc. 735.

"A will duly executed in pursuance of an agreement based upon a valuable consideration *becomes itself, in a sense, an enforceable contract.* The testator cannot by making a later will escape the obligation confirmed by the first one. 40 Cyc. 1068; Schouler, Wills, 3d. ed. § 452. The delivery of the will to the beneficiary has been treated as of importance in emphasizing the contractual feature of the transaction. 40 Cyc. 1068, note 2." Nelson v. Schoonover, 89 Kan. 388–392, 131 Pac. 147. "There is no dissent in the authorities from the proposition that one may make a valid contract with another to devise or bequeath property by his last will in a certain specified way." Morrison v. Land, 169 Cal. 580, 147 Pac. 259–261. An almost identical contract with this, except that the will had not been delivered to the beneficiary, was nevertheless enforced in like manner in Whitney v. Hay, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537, in an appeal from court of appeals of District of Columbia, in an opinion by Justice Harlan. Therein are found facts closely parallel to here. "His [plaintiffs] plans of life were materially altered in order that he might take care of Piper and wife during their respective lives. Piper put Hay in actual possession of the premises in question in execution of his agreement with Hay. But he failed to do that which was vital to Hay, namely, to put the absolute title to the property in him. Under all the circumstances, the

failure of Piper to invest Hay with the legal title was such a wrong to the latter as entitled him, under the established principles of equity, to the protection which would be given by a decree specifically declaring that the defendant holds the title in trust for him. We are of opinion that such relief is consistent with the objects intended to be subserved by the statute of frauds; for the decree in favor of Hay does not charge Piper upon his parol contract with him, but rests upon the equities arising out of the acts and conduct of the parties subsequent to the making of the original agreement."

Another closely analogous case is Baker v. Syfritt, 147 Iowa, 49, 125 N. W. 998, holding that "where the will has been made pursuant to a valid contract, testator cannot by the act of revocation escape the obligations of his contract, nor will his heirs take any advantage by such revocation," citing Robinson v. Mandell, 3 Cliff. 169, Fed. Cas. No. 11,959; Dufour v. Pereira, 1 Dick. 419, 21 Eng. Reprint, 332; Breathitt v. Whittaker, 8 B. Mon. 530; Carmichael v. Carmichael, 72 Mich. 76, 1 L.R.A. 596, 16 Am. St. Rep. 528, 40 N. W. 173; Bruce v. Moon, 57 S. C. 60, 35 S. E. 415; VanDuyne v. Vreeland, 12 N. J. Eq. 142; Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265; Bower v. Daniel, 198 Mo. 289, 95 S. W. 347; Amherst College v. Ritch, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; Ahrens v. Jones, 169 N. Y. 555, 88 Am. St. Rep. 620, 62 N. E. 666; Re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53. "The proposition is one which may be regarded as having been accepted generally," Baker v. Syfritt, supra, citing 1 Jarman, Wills, 27, 2 Story, Eq. Jur. § 785; Schouler, Wills, § 454; Walpole v. Orford, 3 Ves. Jr. 402, 30 Eng. Reprint, 1076, 4 Revised Rep. 38.

See also Best v. Gralapp, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 464; citing also Kofka v. Rosicky, 41 Neb. 328, 25 L.R.A. 207, 43 Am. St. Rep. 685, 59 N. W. 788; Price v. Price, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529, 531; Howe v. Watson, 179 Mass. 30, 60 N. E. 415; Svanburg v. Fosseen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; Owens v. McNally, 113 Cal. 444, 33 L.R.A. 369, 45 Pac. 710; Teske v. Dittberner, 65 Neb. 167, 101 Am. St. Rep. 614, 91 N. W. 181, and lengthy opinion in rehearing in 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57. See also Bird v. Pope,

73 Mich. 483, 41 N. W. 514, and Young v. Young, 45 N. J. Eq. 27, 16 Atl. 921.

Such is unquestionably the law. Early cases may be found as Cox v. Cox, 26 Gratt. 305, Snyder v. Snyder, 77 Wis. 95, 45 N. W. 818, and Bourget v. Monroe, 58 Mich. 563, 25 N. W. 514, in apparent conflict, but upon inspection are either later overruled or are distinguishable on facts from the one at bar. The legal title to these premises is held in trust for the plaintiffs, whose parents have substantially performed the contract as set forth under the facts.

As to the homestead rights of defendant Britha Hauge, mother, she is shown to have signed and executed the will jointly with her husband and to have received support for years under reliance by Andrew upon its validity and its being a part performance of the agreement of her husband, fee owner. She should not now be permitted to revoke her will with its contractual provisions performed to her advantage and to now assert that said contract is invalid. To do so will be equivalent of allowing her to defraud her son's heirs by revocation of her will and repudiation of her contract. Nelson v. Schoonover, 89 Kan. 388, 131 Pac. 147; Teske v. Dittberner, 70 Neb. 544, 113 Am. St. Rep. 802, 98 N. W. 57; Engholm v. Ekrem, 18 N. D. 185, 119 N. W. 35; Whitney v. Hay, 181 U. S. 77, 45 L. ed. 758, 21 Sup. Ct. Rep. 537. All that is sought is to sustain her own written instrument to enforce her own writing according to its terms, and meanwhile to maintain the *status quo* until it becomes operative. This is no invasion of her homestead rights, on the contract, they are duly respected and enforced for her benefit.

Appellants urge that the homestead, unproven when the will was executed and delivered, was not devisable by will or subject to alienation by will or contract under Federal statutes against alienation. On the contrary the Federal statutes recognize the right to make such a devise of an unproven homestead. U. S. Rev. Stat. § 2291, Comp. Stat. 1913, § 4532, declares that "no certificate however shall be given or patent issued therefor until [after] the expiration of five years from the date of such entry; and if . . . the person making such entry, or if he be dead his widow, or in case of her death *his* heirs or *devisee*" makes final proof, patent issues. It is not an alienation prohibited by the Federal Homestead Act. Newkirk v. Marshall, 35 Kan. 77, 10 Pac.

571, on facts very similar to those at bar. But the point has been ruled upon adversely, denying such contention in Adam v. McClintock, 21 N. D. 483, 131 N. W. 394, and Martin v. Yager, 30 N. D. 577, 153 N. W. 286. Defendants are estopped to assert such a claim. Title has vested in the father. The Federal government has had no interest for years in this tract, and it is the only one that could be heard to assert such to be an alienation contrary to law. The wife and these defendants, who seek to claim under the title of the parent, cannot question this vested interest in the son and his heirs on any such ground where the father himself could not have done so. Adam v. McClintock, supra. Nor can these heirs complain that the first will did not mention themselves. Its contractual features, not its testamentary ones, are before this court. It has become a contract; executed substantially and irrevocably as between sire and son, and is enforceable under all present-day authority. As a contract it is valid in equity, though perhaps as a will it would be invalid to operate to disinherit the defendants, they not being therein mentioned. Comp. Laws 1913, § 5667. It is further contended that as the will "runs to Andrew Torgenson only, not to his heirs or devisees," the services to be rendered by Andrew were personal in their character, and, this being the fact, no one could be substituted to complete his part of his contract, which was then subject to avoidance by the parents on the death of Andrew before either of them.

None of the cases sustain such a construction. In equity this contract was substantially performed. The father was virtually upon his death-bed when the son died, after fifteen years of observance of its terms. True the mother, seventy-four years of age, was alive at time of trial, but her expectancy is as short as her mind is enfeebled, as appears from her own testimony. To sustain appellants in this contention would place those who had sustained parents through their period of understanding into a ripe old age of childishness, at the irresponsible caprice of the enfeebled parent, and when such whim has been invited by the perhaps reprehensible conduct of envious relatives who for such years have shirked filial duties until in the late twilight of their parents lives is seen a chance to profit at the expense of the one who had, for filial reasons, or by valid contract, supported the parents for years.

Neither the contention that the personal care by Andrew or the fact of his death prior to that of his parents can bar equitable jurisdiction

to indirectly accomplish specific performance by enjoining violation of the contract. "Whether equity will decree the specific performance of a contract rests [entirely] in judicial discretion and always depends upon the facts of the particular case. As a rule when a definite contract to leave property by will has been clearly and certainly established, and there has been performance on the part of the promisee, equity will grant relief provided the case is free from objection on account of inadequacy, . . . and there are no circumstances or conditions which render the claim inequitable." Syllabus in Anderson v. Anderson, 75 Kan. 117, 9 L.R.A.(N.S.) 229, 88 Pac. 743. The performance by Andrew was complete until his death. The contract did not specify that his death should forfeit all rights of his heirs or estate obtained under such performance. Equity should not imply or construe such a forfeiture where none has been stipulated. In fact every equity and circumstance is in favor of enforcement of the contract, the contractual features of the will executed and delivered under it in partial performance of it.

The law and the equities of the case fully sustain the judgment appealed from and it is affirmed.

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1. Though it be assumed that a deposit was a special deposit, yet the loss thereof presumes negligence by defendant, and places it under the burden of affirmatively proving that it was not negligence if it would escape liability; and not making such proof, it must respond in judgment. Minnesota Mutual L. Ins. Co. v. Tagus State Bank, 566.

2. Where in a court a judgment is entered in an action wherein a certain person is named as plaintiff and another certain person as defendant, and an execution issued out of said court bearing identically similar names, the presumption will be that the execution was issued on the judgment referred to. Lee v. Dolan, 449.

3. Where there is evidence which tends to show that a drain way is a natural drain way, and that it has been obstructed by a lower landowner, and that such obstruction occasioned the flooding of and injuries to the property of an upper landowner, the burden of proof is upon the defendant or lower landowner, when sued for such damages, to prove that the storm which occasioned the flood was unprecedented; that it could not have been reasonably anticipated, and need not have been provided against. Soules v. Northern P. R. Co. 7.

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4. A bill of lading is at once a receipt and a contract. In its twofold character of receipt and contract, the bill of lading is subject to different rules of construction. In so far as it is merely a receipt, either party may explain or contradict it by parol evidence but as a contract it must be construed according to its terms. Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co. 466.

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6. Declarations and statements by one since deceased offered to establish his agency for another are not within the bar, of the statute excluding testimony of transactions with a person since deceased, under subd. 2, § 7871, Comp. Laws 1913. Lake Grocery Co. v. Chiostri, 386.
7. While without other basic proof, statements of the agent are not competent to prove the agency, yet where a prima facie case of agency has been made out of independent of any statements of the agent, such declarations by the agent, made in the prosecution of and relative to the business contemplated by such agency, are admissible against the principal on questions of agency and ownership of the business. Lake Grocery Co. v. Chiostri, 386.
8. The question of when a prima facie case of agency has been established by proof independent of statements of the agent is a matter of law for the court to determine, with the test being whether there is sufficient evidence of agency without said declarations to sustain a jury's finding of such agency. Where such a finding would be sustained, a prima facie case of agency has been established and the declarations and statements of the agent when so made are admissible against the principal. Lake Grocery Co. v. Chiostri, 386.
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3. Plaintiff, wife of Michael Hein, deceased, recovered a judgment for his death, occasioned through negligence of defendant based upon the state statutes, §§ 8321–8323, Comp. Laws, 1913. Deceased was killed in a collision while driving an engine of defendant, hauling a loaded gravel train *en route* from Palermo, North Dakota, into Montana. The gravel was for use in Montana as railway ballast. Motion for a directed verdict upon the ground that recovery was barred by the Federal Employers' Liability Act was denied. Verdict for $4,000 was returned; defendant appeals. *Held:* It is not necessary that the benefits of the Federal act be claimed by answer. The motion for a directed verdict invoked said statute. Hein v. Great Northern R. Co. 440.

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