REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

August 22, 1917 to January 31, 1918.

H. A. LIBBY
REPORTER

VOLUME 38

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OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

Hon. Andrew A. Bruce, Chief Justice.
Hon. A. M. Christianson, Judge.
Hon. Luther E. Birdzell, Judge.
Hon. Richard H. Grace, Judge.
Hon. James E. Robinson, Judge.

H. A. Libby, Reporter.
J. H. Newton, Clerk.

PRESENT JUDGES OF THE DISTRICT COURTS.

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

OFFICERS OF THE BAR ASSOCIATION.

HON. FRED T. CUTHBERT, President, Devils Lake, N. D.
HON. T. D. CASEY, Vice President, Dickinson, N. D.
HON. OSCAR J. SILER, Secretary and Treasurer, Jamestown, N. D.

CONSTITUTION OF NORTH DAKOTA.

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; 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.

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TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH DAKOTA

GREAT NORTHERN RAILWAY COMPANY, a Corporation, Nash Brothers, a Corporation, and Swift & Company, a Corporation, v. THE COUNTY OF GRAND FORKS, a Municipal Corporation, and the State of North Dakota, a Municipal Corporation.

(164 N. W. 320.)

Assessments of lands — description of — must be definite — certain.

1. Following Grand Forks County v. Frederick, 16 N. D. 118, the description of the land in the instant case is *held* so indefinite as to invalidate the assessment.

Assessments for taxes — lands — description of — uncertain — indefinite — void for such reason.

2. Following Grand Forks County v. Frederick, supra, and State Finance Co. v. Bowdle, 16 N. D. 193, it is *held* that § 2201, Compiled Laws 1913, does not apply to assessments void by reason of failure to describe the land definitely.

Opinion filed August 22, 1917.

NOTE.—Authorities discussing the question as to whether elevators, warehouses, etc., and their sites, on railroad right of way, are separate subjects of taxation, are collated in a note in L.R.A.1916E, 413.

From a judgment of the District Court of Grand Forks County, *Cooley*, J.

Affirmed.

Geo. E. Wallace and *O. B. Burtness*, for appellants.

There is no allegation that the assessments are unfair, unjust, excessive, or inequitable. Even if they were, equity furnishes no relief or ground for restraining collection or securing cancelation of the assessments and taxes. Comp. Laws 1913, § 2240, subd. 5; Holland v. Baltimore, 69 Am. Dec. 199, note, and authorities cited; State v. Duluth Gas & Water Co. 76 Minn. 96, 57 L.R.A. 63, 78 N. W. 1032; Frost v. Flick, 1 Dak. 139, 46 N. W. 508.

If the tax is in itself a legal one, and the property on which it is levied subject to taxation, then it cannot be said that any injury could result from its taxation. A court of equity will not interfere with the taxing powers of the state. The presumption is that the tax is valid, and this presumption extends to every act upon which the tax in any measure depends. Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386; Schaffner v. Young, 10 N. D. 252, 86 N. W. 733; Cooley, Taxn. p. 772 and cases in note 2; Clarke v. Ganz, 21 Minn. 387; Savings & L. Soc. v. Austin, 46 Cal. 417.

In tax cases the rule is settled that special facts must be inserted in the bill or complaint calling for equitable relief, and when there are no such averments, the suitor will be relegated to his legal remedies. 1 Spelling, Extr. Relief, § 658; 2 Desty, Taxn. p. 667, and cases cited in note 2; Wason v. Major, 10 Colo. App. 181, 50 Pac. 741; Linehan R. Transfer Co. v. Pendergrass, 16 C. C. A. 585, 36 U. S. App. 48, 70 Fed. 1; Shelton v. Platt, 139 U. S. 594, 37 L. ed. 275, 11 Sup. Ct. Rep. 646; Erskine v. Van Arsdale, 15 Wall. 77, 21 L. ed. 63; Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; St. Anthony & D. Elevator Co. v. Bottineau Co. (St. Anthony & D. Elevator R. Co. v. Soucie) 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212; Minneapolis, St. P. & S. Ste. M. R. Co. v. Dickey County, 11 N. D. 107, 90 N. W. 260.

In such cases the plaintiff must plead facts that will bring him within some recognized head of equity jurisprudence. Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; Bismarck Water Supply Co. v. Barnes,

30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454; Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386; Barnum v. Rallihan, — Ind. App. —, 112 N. E. 561; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357.

The statutes provide due process. The question of due process implies merely the right to be heard. In taxation matters including the meeting of the boards of review and boards of equalization, the law gives all the notice required. Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Bell's Gap. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; Palmer v. McMahon, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

Plaintiffs claim that they are denied the equal protection of the law. This provision of the Federal Constitution is satisfied when the means and methods shall be applied impartially to all the constituents of each class, so that the law shall act equally and uniformly upon all persons and under similar circumstances. Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; Florida C. & P. R. Co. v. Reynolds, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Michigan R. Tax Cases, 138 Fed. 236; Michigan C. R. Co. v. Powers, 201 U. S. 246, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

The legislature has directed that any portion of the right of way of a railroad company which is held under a lease for a term of years shall be taxed as the property of the lessee. Comp. Laws 1913, § 2118; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; Hackney v. Elliott, 23 N. D. 375, 137 N. W. 433; 37 Cyc. 1295; Doherty v. Real Estate Title, Ins. & T. Co. 85 Minn. 518, 89 N. W. 853; Maney v. Dennison, 110 Ark. 571, 163 S. W. 783; State ex rel. MacKenzie v. Casteel, 110 Ind. 174, 11 N. E. 219; Peckham v. Millikan, 99 Ind. 352; Sloan v. Sewell, 81 Ind. 180.

For assessment purposes the description is wholly sufficient. "An assessment of real estate need not describe the property with that cer-

tainty required in a deed; it is sufficient where the property can be located with reasonable certainty, from the description given." Ludlow v. Ludlow, 152 Ky. 545, 153 S. W. 783; Lancaster Sea Beach Improv. Co. v. New York, 161 App. Div. 469, 146 N. Y. Supp. 734; Ventrinigeia v. Eichner, 155 App. Div. 236, 140 N. Y. Supp. 395; People ex rel. National Park Band v. Metz, 141 App. Div. 600, 126 N. Y. Supp. 986; Abercrombie v. Simmons, 71 Kan. 538, 1 L.R.A.(N.S.) 806, 114 Am. St. Rep. 509, 81 Pac. 208, 6 Ann. Cas. 239; Houghton v. Kern Valley Bank, 157 Cal. 289, 107 Pac. 113; McLaughlan v. Bonynge, 15 Cal. App. 239, 114 Pac. 798; Fox v. Townsend, 152 Cal. 51, 91 Pac. 1004, 1007; Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188; Slaughter v. Dallas, 101 Tex. 315, 107 S. W. 48; Baird v. Monroe, 150 Cal. 560, 89 Pac. 352.

Where a tax debtor owned certain lots in a particular square the number and street boundaries of which are given, the property is sufficiently described for purposes of assessment and sale for taxes as "certain lots" in a "designated square" assessed to a person by name (the owner), and such description including all the lots owned by such person in the designated square. This is a sufficient description. Conzales v. Saux, 119 La. 657, 44 So. 332; Weber v. Martinez, 125 La. 663, 51 So. 679; People ex rel. Sweet v. Blake, 72 Misc. 646, 132 N. Y. Supp. 191; Continental Distributing Co. v. Smith, 74 Wash. 10, 132 Pac. 631.

The description, "south part of section 25, township 3, range 11, 80 acres" was held sufficient. Ontario Land Co. v. Yordy, 44 Wash. 239, 87 Pac. 257; Webb v. Mobile & O. R. Co. 105 Miss. 175, 62 So. 168; Hackney v. Elliott, 23 N. D. 373, 137 N. W. 433.

The test is "whether a man of ordinary intelligence would identify the land with reasonable certainty." Hackney v. Elliott, supra.

Our statute has for one of its principal objects the curing of irregularities in taxation proceedings, and relief therefrom is rather limited in such matters. Comp. Laws 1913, §§ 2193, 2201; Cooley, Const. Lim. 6th ed. 457; Ensign v. Barse, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; Wells County v. McHenry, 7 N. D. 256, 74 N. W. 241; Shattuck v. Smith, 6 N. D. 56, 69 N. W. 6.

This statute, being prospective, was of greater power and could

cure greater irregularities, and hence the alleged defects here are cured by such statute. Beers v. People, 83 Ill. 488.

Such curative statutes are liberally construed by the courts. Reynolds v. Bowen, 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; Eldridge v. Kuehl, 27 Iowa, 160; Townsen v. Wilson, 9 Pa. 270; Mitchell v. Bratton, 5 Watts & S. 451; Dietrick v. Mason, 57 Pa. 40; Laird v. Hiester, 24 Pa. 452; Polk County v. Kauffman, 104 Iowa, 639, 74 N. W. 8; Auditor General v. Sparrow, 116 Mich. 574, 74 N. W. 881; Boyce v. Stevens, 86 Mich. 549, 49 N. W. 577; Saranac Land & Timber Co. v. Comptroller (Saranac Land & Timber Co. v. Roberts) 177 U. S. 330, 44 L. ed. 792, 20 Sup. Ct. Rep. 642; Terry v. Anderson, 95 U. S. 628, 24 L. ed. 365; People v. Turner, 145 N. Y. 451, 40 N. E. 400, 117 N. Y. 238, 15 Am. St. Rep. 498, 22 N. E. 1022; Ensign v. Barse, 107 N. Y. 339, 14 N. E. 400, 15 N. E. 401; Re Lamb, 22 N. Y. S. R. 650, 4 N. Y. Supp. 858; People ex rel. Flower v. Bleckwenn, 55 Hun, 169, 7 N. Y. Supp. 914.

The legislature, having the power to pass such a law, likewise had the power to render valid an assessment which follows such proposed law. Reed v. Heard, 97 Miss. 743, 53 So. 400.

The statute forms a part of the contract between the state and the purchaser at such tax,—the defendant in this case. Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132; Dondna v. Harlan, 45 Kan. 484, 25 Pac. 883; Martin v. Garrett, 49 Kan. 131, 30 Pac. 168; Hiles v. LaFlesh, 59 Wis. 465, 18 N. W. 435; Coulter v. Stafford, 48 Fed. 266; Sherry v. Gilmore, 58 Wis. 324, 17 N. W. 252; Bardon v. Land & River Improv. Co. 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; Edwards v. Sims, 40 Kan. 235, 19 Pac. 710.

"A statute prescribing the time and place at which the board shall meet and hear complaints is sufficient." 27 Am. & Eng. Enc. Law, 707 and cases cited in note 2; Inland Lumber & Timber Co. v. Thompson, 11 Idaho, 508, 114 Am. St. Rep. 274, 83 Pac. 933, 7 Ann. Cas. 862; Baltimore v. State, 105 Md. 1, 65 Atl. 369, 11 Ann. Cas. 716; Monticello Distilling Co. v. Baltimore, 90 Md. 428, 45 Atl. 210; Billinghurst v. Spink County, 5 S. D. 84, 58 N. W. 272; Tripp v. Yankton, 10 S. D. 516, 74 N. W. 447; Carney v. People, 210 Ill. 434, 71 N. E. 365; Fell v. West, 35 Ind. App. 20, 73 N. E. 719;

Chicago, B. & Q. R. Co. v. Richardson County, 72 Neb. 482, 100 N. W. 950; State ex rel. Morton v. Back, 72 Neb. 402, 69 L.R.A. 447, 100 N. W. 952; Hacker v. Howe, 72 Neb. 385, 100 N. W. 1127, 101 N. W. 255; Ankeny v. Blakeley, 44 Or. 78, 74 Pac. 485.

It is generally held that personal notice to taxpayers is not necessary where a public statute so fixes the time and place. All persons are bound to take notice of the law. State R. Tax Cases, 92 U. S. 610, 23 L. ed. 672; Merchants & M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; Glidden v. Harrington, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 594; Michigan C. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; Comp. Laws 1913, §§ 2138, 5266; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; 4 Enc. U. S. Sup. Ct. Rep. 365 and note 5; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Kidd v. Pearson, 128 U. S. 1–26, 32 L. ed. 346–352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Cook v. Marshall County, 196 U. S. 261, 274, 49 L. ed. 471, 476, 25 Sup. Ct. Rep. 233.

Plaintiffs knew that their property ought to be assessed and that it would be assessed. They should have taken notice of the law. Meyer v. Rosenblatt, 78 Mo. 495; First Nat. Bank v. Bailey, 15 Mont. 301, 39 Pac. 83; Comstock v. Grand Rapids, 54 Mich. 641, 20 N. W. 623; First Nat. Bank v. St. Joseph, 46 Mich. 526, 9 N. W. 838; Smith v. Marshalltown, 86 Iowa, 516, 53 N. W. 286; Swenson v. McLaren, 2 Tex. Civ. App. 331, 21 S. W. 300; Motz v. Detroit, 18 Mich. 496; Republic L. Ins. Co. v. Pollak, 75 Ill. 300; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Noble v. McIntosh, 23 N. D. 59, 135 N. W. 663.

Where a court of equity has once acquired jurisdiction over the subject-matter, it will retain same until all matters involved in the litigation are finally disposed of and settled. 10 R. C. L. 370; 17 Cyc. 106.

Murphy & Toner, for respondents.

The equitable rules, so fully elaborated by appellants, do not apply in a statutory action to determine adverse claims, where the adverse

claims consist of taxes which the plaintiffs contend are jurisdictionally defective and void. In such a case no tender can be made, as there is no tax to pay. The rule is different in such a case to that applicable where there are irregularities in tax-sale proceedings or where it is claimed taxes are excessive or unjust. State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; Noble v. McIntosh, 23 N. D. 59, 135 N. W. 663; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Powers v. First Nat. Bank, 15 N. D. 469, 109 N. W. 361; State Finance Co. v. Halstenson, 17 N. D. 146, 114 N. W. 724.

Such a description of property as is here contended for is meaningless for any purpose. State Finance Co. v. Mather, 15 N. D. 394, 109 N. W. 350, 11 Ann. Cas. 1112; Grand Forks County v. Frederick, 16 N. D. 120, 125 Am. St. Rep. 621, 112 N. W. 839; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117.

And extrinsic evidence cannot be introduced to cure the defect in these descriptions. Sheets v. Paine, supra; Power v. Bowdle, 3 N. D. 107, 21 L.R.A. 323, 44 Am. St. Rep. 511, 54 N. W. 404.

The assessments are not only void for want of sufficient description, but because they include property not assessable by the county authorities. O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 993; State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; Griffin v. Denison Land Co. 18 N. D. 246, 119 N. W. 1041.

A bad description is not a mere irregularity; it is a jurisdictional matter and is fatal to the tax, and there is nothing to cure, and counsel's "curative statutes" do not apply. Hodgson v. State Finance Co. 19 N. D. 139, 122 N. W. 336; Grand Forks County v. Frederick, 16 N. D. 120, 125 Am. St. Rep. 621, 112 N. W. 839; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Sweigle v. Gates, 9 N. D. 538, 84 N. W. 481; State Finance Co. v. Bowdle, 16 N. D. 193, 112 N. W. 76; State Finance Co. v. Mather, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; Beggs v. Paine, 15 N. D. 436, 109 N. W. 322; Nind v. Myers,

15 N. D. 400, 8 L.R.A.(N.S.) 157, 109 N. W. 335; Scott & B. Mercantile Co. v. Nelson County, 14 N. D. 407, 104 N. W. 528.

The questions here involved go to the very foundation—the basic work—of the taxes, and are not mere irregularities. Therefore the rules urged by appellant do not apply. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; State Finance Co. v. Trimble, 16 N. D. 199, 112 N. W. 984.

The county auditor now has no authority to assess property that has escaped assessment and taxation. The law granting to him such authority had been repealed. Comp. Laws 1913, §§ 2088, 2217.

Burr, District J. This is an appeal by the defendants from the judgment of the district court of Grand Forks county, quieting title in plaintiffs to certain lands as against certain alleged taxes levied and assessed against said land. The complaint is in the usual statutory form set out in § 8147, Comp. Laws 1913; and the defendants, in their answer, set up the levy and assessment of these taxes. The plaintiffs Nash Brothers, a corporation, and Swift & Company, a corporation, leased from the Great Northern Railway Company, a corporation, certain real property, to be used for nonrailway purposes, and it appears that this real property so leased was a part of the right of way of the Great Northern Railway Company. That the interests of the Nash Brothers, a corporation, and of Swift & Company, a corporation, are taxable in addition to the taxes paid by the Great Northern Railway Company on its right of way has been settled by this court in the case of Northern P. R. Co. v. Morton County, 32 N. D. 627, L.R.A.1916E, 404, 156 N. W. 226. The question raised here, however, is the validity of the taxes levied and assessed, it being the contention of the plaintiffs that the taxes are void because of the insufficiency of the description of the real estate. The assessment record, in describing the real property to be assessed, sets out the description as follows:

Name of owner	Year of Lease	Description	Lot	Block
		Leased site on the		
Occupied by		G. N. right of way,		
Nash Brothers	1913	Grand Forks City		
		Original town northeast 100 ft.	7	28
" "	1912	" " " " "	"	"

—and the same record includes the assessment for the years 1908 to 1911 inclusive. The assessment of the tract leased by Swift & Company is similar for the years 1908 to 1913, inclusive, but describes it as 3,800 square feet, original town, opposite block 27. This is a fair sample of the assessment for the year 1913, and in the assessment for that year is included the assessment for the preceding years, as indicated.

We hold the assessment to be void, because of the insufficiency of the description. There is nothing in the description of "the northeast 100 feet of lot 7, block 28" or "3,800 square feet opposite block 27" to mark out the real property intended to be assessed. The northeast 100 feet may be a square 10 feet by 10 feet in the northeast corner, or it may be a portion of the northeast corner of the lots 100 feet in width or in depth. The same way with the expression 3,800 square feet. That might be a portion 60 feet by approximately 64 feet, or it might be 40 by 95 feet or in any other form. This court has already held in the case of Grand Forks County v. Frederick, 16 N. D. 118, 125 Am. St. Rep. 621, 112 N. W. 839, that a description of real property in lot 2 as "N. 23 x 200 ft. deep" was "void for indefiniteness, although the owner of the lot is correctly named in the assessment roll." In that case the court said: "No point is given as the starting point for the dimensions 23 by 200 feet." This court has held from time to time that land is not assessed unless described with sufficient accuracy for identification. It is not enough that the owner's name be given correctly, or even that he may not be misled by the description. He may know that his land is intended to be assessed; yet, this does not relieve the authorities from proceeding regularly in assessment matters. See Wells County v. McHenry, 7 N. D. 246, 74 N. W. 241; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117, and numerous other decisions of this court.

The defendants claim that even though there may be an irregularity or defect or illegality in assessing, laying, or levying such tax, the courts have the power, under § 2201 of Comp. Laws 1913, to amend and correct the irregularities or defects. As shown in the case of Grand Forks County v. Frederick, supra, this section does not apply to void assessments, by reason of failure to describe the land definitely. We have had occasion already to show that this section does not apply to assessment void on other grounds (Northwestern Improv. Co. v.

Oliver County, post, 57, 164 N. W. 315); and the case cited above settles the question of its application to assessments void for indefiniteness of description.

Defendants claim that the plaintiffs cannot be heard in this case, because these lease interests are assessable, have not paid taxes, and that no taxes are tendered. As we have held in the case of Northwestern Improv. Co. v. Oliver County, supra, no tender need be made in such case as this. This is a statutory action to determine adverse claims. There are no taxes to tender, for the assessment is void, and the nature of this action does not require a tender to be made. If the taxpayer were asking for equitable relief because of some irregularity in the tax proceedings, it would present a different situation. The judgment of the lower court is affirmed.

BIRDZELL, J., being disqualified, did not participate. Honorable A. G. BURR, Judge of the Ninth Judicial District, sat in his place.

CHRISTIANSON, J. (concurring specially). I concur in the opinion prepared by Judge Burr, solely for the reason that the questions involved are controlled by the former decisions of this court. It seems to me, however, the rule announced ought to be changed by legislative exactment.

ROBINSON, J. (concurring). This is an action to determine adverse claims to real property. The complaint avers and shows that the plaintiffs have some title or interest in certain property in the city of Grand Forks, to wit, a part of lot 7 in block 28, and a part of lots 9 and 11 in block 28, which parts are described by metes and bounds. It avers that the defendant claims some estate or interest in said property adverse to the plaintiffs.

The answer is in effect that, for several specified years, the property was duly listed and assessed for taxation, and taxes were duly levied against it, and for such taxes the property was duly sold to Grand Forks county.

The county appeals from a judgment holding void the assessment, the taxes, and the tax sale on the ground that the land description is fatally defective. In the assessment book for each year the description of

one tract is: Northeast 100 feet of lot 7 in block 28, Name of Owner —Nash Brothers, or lot 7 in block 28, name of owner—Gt. Nor. R. R. Co. The description of the other tract is: 3,800 square feet original town opposite block 27, city of Grand Forks, name of owner, Swift Company, or Gt. Nor. R. R. Co., lot 9, block 28.

There is a first and second description of each tract, and each description is in a different assessment book. All of lots 7, 9, and 11 are a part of the Great Northern right of way. Only a part of each lot is leased, and the part not leased is not subject to taxation. As the leased property consists of only a fractional part of each lot, it was not possible to describe it by giving the number of the lot, and the other descriptions are too vague. They describe nothing.

It is established by the decisions of this court from its organization that, before there can be any valid tax against land, there must be a description sufficiently accurate and definite to enable the owner and others to identify it. The description as given in the assessment roll is to be used in all subsequent proceedings. There is no provision for changing the description in order to correct it or make it more certain, and extrinsic evidence is not admissible to show what is meant by the description. A sufficient description is necessary, not alone for the benefit of the owner. It becomes the basis of all further proceedings and future titles. Grand Forks County v. Frederick, 16 N. D. 123, 125 Am. St. Rep. 621, 112 N. W. 839. Land is not assessed unless it is described with sufficient accuracy for complete identification. The reasoning of Judge Cooley and the authorities cited by him are absolutely conclusive, and show that there was no reason for taking this appeal.

In a statutory action like this it is sheer folly for counsel to talk about rules of equity. It is a case of strict law, and not of equity. The statute gives the right of action and the form of the complaint. It avers that defendant claims some title or interest in the land adverse to the plaintiff, and challenges the defendant to set forth and establish his title or to abandon it. The defendant becomes the plaintiff and tenders the issue, and of course the other party must have a right to defend against the claim of title, when the answer and evidence shows that a claim is based on a void assessment, tax sale, or tax deed, then it must be adjudged void as a matter of law, and there is no equity or

discretion about it. It is time to cease talking of equity unless, when the power of the court is invoked to relief against some hardship, penalty, or forfeiture, or to mitigate some severity of the law.

Judgment affirmed.

GRACE, J. I concur in the result.

JAMES BALLWEBER and George A. Edgerton, Copartners, Doing Business under the Firm Name and Style of Ballweber & Edgerton v. GEORGE A. KERN and W. A. Hart.

(164 N. W. 272.)

Action — trial of — uncertainty of issues — pleadings — evidence — new issues — case remanded — to lower court — for retrial — supreme court — power to so act — merits — ends of justice.

Where, in the trial of an action by the trial court, the issues formed by the pleadings are uncertain, or, if in the course of the trial the issues become uncertain by introduction of testimony of other causes of action than those alleged in the complaint, and there are no instructions of the court concerning the new issues in the case, and the case by reason thereof becomes so involved that it is practically impossible to discern what really were the issues in the case, and where it is impossible to determine what issues were presented to the jury and what were passed upon by them, upon an appeal from the judgment in such case, this court, in the exercise of its inherent power, may return such case to the trial court for a new trial, with instructions that the issues be more clearly and definitely formed and defined, to the end that the case may be tried upon its merits upon issues definitely formed.

Opinion filed July 21, 1917. Rehearing denied August 23, 1917.

Appeal from the District Court of Golden Valley County, *W. C. Crawford,* Judge.

Reversed.

F. C. Heffron and *Albert H. Hall,* for appellants.

When one desirous of selling or trading lands secures the services of a broker by promise of a commission, and such broker procures a purchaser to whom such sale is made, he must pay such broker his

commission regardless of whether the actual sale was finally consummated by the broker, or whether the principal took the matter out of the hands of the broker and made sale himself. Northern Immigration Asso. v. Alger, 27 N. D. 467, 147 N. W. 100; Gibson v. Hunt, — Iowa, —, 94 N. W. 277; Reishus-Remer Land Co. v. Benner, 91 Minn. 401, 98 N. W. 186; Hoadley v. Savings Bank, 44 L.R.A. 321 and notes, 71 Conn. 599, 42 Atl. 667; Hubachek v. Hazzard, 83 Minn. 437, 86 N. W. 426.

The principal cannot so deprive the broker of his commissions. 4 Am. & Eng. Enc. Law, 979, 980.

"After a broker has commenced negotiations for the sale of property, the owner cannot take the matter into his own hands and complete it, either at the price limited or at a less price, and refuse to pay the commissions. Chilton v. Butler, 1 E. D. Smith, 150.

One who destroys evidence in his possession favorable to the other party is presumed to have done so because its introduction into court would be against him. 16 Cyc. 1058.

R. F. Gallagher and *Keohane & Jones* for respondents.

Fundamentally it is the duty of the court to correct its orders when they have been made under mistake or inadvertence, and this right to do so has always been recognized. United States v. Young, 94 U. S. 259, 24 L. ed. 153.

An order granting a new trial is an appealable order. Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; St. Anthony & D. Elevator Co. v. Martineau, 30 N. D. 425, 153 N. W. 416; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419.

Where the trial court makes its order improperly denying a motion, such court, on proper application, may review its former order; and if it finds that such original order was entered through mistake or inadvertence, it may correct the same by its further order conforming to the true situation. Clein v. Wandschneider, 14 Wash. 257, 44 Pac. 272; Burnham v. Spokane, Mercantile Co. 18 Wash. 207, 51 Pac. 363; Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 170, 4 Pac. 1173; Morris v. DeCelis, 41 Cal. 331; Hall v. Polack, 42 Cal. 218; Crosby v. North Bonanza Silver Mill. Co. 23 Nev. 70, 42 Pac. 583.

The general rule here is that where a motion for a new trial has been granted, the court has power to vacate the order granting the motion,

and to enter its order denying the motion, where the showing of mistake, fraud, or inadvertence satisfies the court that an injustice has been done. Grantham v. United States, 28 Ct. Cl. 528; Dawson v. Wisner, 11 Iowa, 6; Com. v. Miller, 6 Dana, 315; 29 Cyc. 1028; Beckett v. Northwestern Masonic Aid Asso. 67 Minn. 298, 69 N. W. 923; Spalding v. Meier, 40 Mo. 176; Chandler v. Gloyd, 217 Mo. 394, 116 S. W. 1073; Snow v. Vandeveer, 33 Neb. 735, 51 N. W. 127; Bishop v. Kingston Gas & E. Co. 147 App. Div. 920, 131 N. Y. Supp. 1039; Douglass v. Seiferd, 18 Misc. 188, 41 N. Y. Supp. 289; Herzig v. Metzger, 62 How. Pr. 355; Newell v. Wheeler, 4 Robt. 190; Magnus v. Buffalo R. Co. 24 App. Div. 449, 48 N. Y. Supp. 490; Fry v. Bennett, 4 Duer, 651; Bloomingdale v. Steubing, 10 Misc. 229, 30 N. Y. Supp. 1056; Stierle v. Union R. Co. 11 Misc. 124, 31 N. Y. Supp. 1008; Van Gelder v. Hallenbeck, 49 Hun, 612, 15 N. Y. Civ. Proc. Rep. 333, 2 N. Y. Supp. 252; Coffield v. Warren, 72 N. C. 223; Huber Mfg. Co. v. Sweny, 57 Ohio St. 169, 48 N. E. 879; Hume v. John B. Hood Camp Confederate Veterans, — Tex. Civ. App. —, 69 S. W. 643; Watson v. Williamson, — Tex. Civ. App. —, 76 S. W. 793; Rhea v. Gibson, 10 Gratt. 215; Loveland v. Rand, 200 Mass. 143, 85 N. E. 948; Luke v. Coleman, Ann. Cas. 1913B, 485, note; Bishop v. Kingston Gas & E. Co. 147 App. Div. 920, 131 N. Y. Supp. 1039.

The power at subsequent terms to vacate an order granting a new trial has been sustained. Evans v. Freeman, 149 Fed. 1020, 86 C. C. A. 216, 159 Fed. 26; 17 Am. & Eng. Enc. Law, 2d ed. 813; Comp. Laws 1913, § 7350.

The rule established in this state is that the granting or refusing of a new trial is solely within the sound, judicial discretion of the trial court, and its decision will not be disturbed except for a clear abuse of that discretion. Pengilly v. J. I. Case Threshing Mach. Co. 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; Ross v. Robertson, 12 N. D. 27, 94 N. W. 765; State v. Howser, 12 N. D. 495, 98 N. W. 352; Galvin v. Tibbs, 17 N. D. 600, 119 N. W. 39; St. Anthony & D. Elevator Co. v. Martineau, 30 N. D. 432, 153 N. W. 416; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419.

"While it may be difficult to define exactly what is meant by abuse of discretion and whatever it may imply as to the disposition and

motives of the trial judge, it is fairly deducible from the cases that one of the essential attributes is that it must plainly appear to effect injustice." Clavey v. Lord, 87 Cal. 413, 25 Pac. 493, 4 C. J. 836, 837.

GRACE, J. The action is one by plaintiffs, land brokers, for the recovery of commissions from the defendants for the alleged procuring of purchasers for two certain sections of land in Billings county, state of North Dakota, which the defendants had authority to sell, and which plaintiffs allege the defendants agreed to sell to plaintiffs or any purchaser for such land produced by plaintiffs for the sum of $13,800, plaintiffs to have for their commission all they could sell such land for in excess of $13,800. Plaintiffs allege that on or about the 15th day of June, 1912, plaintiffs produced and tendered to the defendants a purchaser ready, able, and willing to purchase said real estate upon the terms required by said contract, and who agreed to pay the sum of $19,200 for said real estate. That said defendants refused to carry out said contract with the plaintiffs, to the plaintiffs' damage in the sum of $5,400.

The answer makes, first, a general denial; and, second, that on or about the 5th day of June, 1912, the defendants in all things revoked and rescinded the authority of the plaintiffs in said contract set forth in said complaint.

The facts in the case are as follows: In the years 1911 and 1912 plaintiffs were real estate brokers living in Minneapolis. Defendant Kern was cashier in a bank at Sentinel Butte, North Dakota, during the year 1911 and until about July 1, 1912. The defendant Hart during said time was a commercial traveler living at Sentinel Butte, North Dakota, and was engaged with Kern to some extent in the real estate business. The amount of land involved, the selling for which commission is demanded, is two sections of land in Billings county, North Dakota. It was owned, not by the defendants, but by some person residing out of the state, the net selling price for which the defendants should account to him being $10 per acre. If such land was sold by the plaintiffs for excess over $10 per acre, the defendants were to have as their commission $1,000, and the plaintiffs to have all

over $10 per acre plus the $1,000 commission to the defendants, as their commission for procuring a purchaser for such land. About May 1, 1912, one of the plaintiffs, Edgerton, brought one Joseph Huber to Sentinel Butte, and together with the defendant Kern looked over the land. No sale was perfected at this time. On June 4, 1912, Ballweber, Huber, and one Dr. Taylor left Minneapolis on a land-buying trip, Dr. Taylor going to Montana, the plaintiff Ballweber and Huber stopping at Sentinel Butte on June 6th, when the land was gone over by Huber, Kern, and Ballweber. Huber did not complete the purchase of the land that day, and returned on the night of June 6th to Minneapolis with Ballweber. The land was sold to the Hubers by the defendants, no notice of such sale being given to the plaintiffs.

The matters involved in this case are considerably involved and difficult of analysis, for the reason that to some extent there is uncertainty as to the issues of the case, and uncertainty as to whether the plaintiffs by their complaint intended to allege a cause of action only concerning the selling of the land in question to one Dr. Taylor, or whether the complaint was broad enough to admit testimony concerning the sale of the land to the Hubers also. The uncertainty of the issues is but little clarified by the bill of particulars, for which demand was made of the plaintiffs by the defendants in the course of such action. A copy of such bill of particulars furnished the defendants by the plaintiffs is as follows:

To the above-named defendants: In compliance with your demand for a bill of particulars, you are hereby advised that the name of the purchaser alleged in the complaint to have been produced by plaintiffs and ready, able, and willing to purchase the real estate described in the complaint upon the terms therein set forth, is Dr. E. A. Taylor, residing at Racine, Wisconsin. You are further advised that the purchaser to whom defendants sold such land in violation of the contract with plaintiffs, to wit, Joseph Huber and Paul Huber, were purchasers procured by and through plaintiffs, all of which facts defendants at all times had full knowledge.

F. C. Heffron,
A. H. Hall,
Attorneys for Plaintiffs.

An inspection of such bill of particulars discloses that the purchaser referred to in the complaint was Dr. E. A. Taylor. The bill of particulars so states. The bill of particulars, so far as it refers to the Hubers, simply calls the attention of the defendants to the fact that the defendants sold to the Hubers in violation of the contract with the plaintiffs, and that the Hubers were purchasers procured by and through the plaintiffs, of which facts the defendants had full knowledge; but the bill of particulars does not claim that the action is being maintained to recover for commissions on land sold to the Hubers by the defendants, neither does the complaint allege a cause of action for recovery of commissions by reason of land sold to the Hubers.

The answer would seem to be in fairly good form, containing, firstly, a general denial; and, secondly, an allegation of the revocation and rescinding of the authority of the plaintiffs under the alleged contract. The court, however, in instructing the jury, based its instructions, not upon the revocation or rescinding of the authority of the agent, but based its instructions upon, and applied them to, a rescission of the contract, and not to the revocation of the authority of the agent. The case involves only the law of agency and is to be governed by the law of agency, and is not governed by the law of rescission of contracts as generally understood, the question presented really being a revocation of agency, and not rescission of contract, except as the word "rescission" may be used in connection with the word "revocation," in revoking the authority of the agent. The appellants' 6th, 7th, and 8th assignments of error are as follows:

"6th. The district court erred in instructing the jury at the trial of this case as follows: 'If you believe from the evidence and by a fair preponderance that the defendants rescinded the contract and notified the plaintiffs, either orally or in writing, of the limitations upon which this contract would remain in existence, and the plaintiffs were made aware of these conditions, and the conditions expired prior to the 15th day of June, then such acts would amount to a rescission of the contract, and the plaintiffs would not be entitled to recover in the action.' 7th. The district court erred in instructing the jury at the trial of this case as follows: 'If there was no rescission, as the court has defined it, to you on or before the 15th day of June, then you will have to determine whether or not these plaintiffs procured a purchaser able and willing

to purchase the land at profit to the plaintiffs.' 8th. The district court erred in instructing the jury at the trial of this case as follows: 'Did the defendants rescind the contract prior to the 15th day of June? Did they notify the plaintiffs of the time in which they had to comply with these conditions? and upon their failure to comply with the conditions within that time, then all the agreements were off. If you believe that this was called to their attention and they assented thereto, then there would be such rescission that plaintiffs would not be entitled to recover by reason of the failure to comply with these conditions, because a rescission of the contract amounts to a nullifying of the conditions of the contract, and after such rescission the terms of that contract are not binding upon the defendants or binding upon the parties. Then, if you determine there was a rescission prior to the 15th day of June, 1912, your verdict should be for the defendants."

The issue presented by the answer of the defendants was not a rescission of the contract, but a revocation and rescission of the authority of the agent. A material part of the instructions of the court would appear to be directed and expressed upon a subject which was not part of the defendant's answer nor within the issues of the case, and caused the jury to consider a subject which was not involved in the case, which was prejudicial to the right of the plaintiffs in the action, and which we hold amounted to reversible error.

The testimony shows that the plaintiffs, at their own expense in time and money, procured and brought to defendants the Hubers as customers and purchasers for the land in question, and at a time long prior to the date upon which the defendants claim they revoked the authority of the plaintiffs to sell such land. If this be true, and if the plaintiffs were the procuring cause of such purchasers, that is, if they procured them and brought them to the defendants for the purpose of purchasing such land, and they did, even after the alleged time of revocation, if any, of the agency in question purchase such land, the plaintiffs having been the procuring cause of the sale of such land, the defendants after such purchasers had been procured and brought to them by the plaintiffs could not defeat plaintiffs' right to the agreed compensation or commissions by a revocation of authority after the bringing of such purchasers, and for this additional reason the court's instructions referred to were prejudicial to the rights of the plaintiffs

and constituted reversible error. In order that when the case is retried the issues assume a more definite form and the law of the case be more clear, we will refer to some of the more important principles of law applicable to the questions under consideration in this case.

The plaintiffs, if they are entitled to recover at all in this case, are entitled to recover either for a sale of such land made to Dr. Taylor or to the Hubers. If they show themselves entitled to recover, in any event, they can recover but one commission. If the sale was made to Dr. Taylor through the plaintiffs procuring and bringing him to the defendants as a purchaser for such land before the plaintiffs' authority to sell such land was revoked, if there were any revocation of the agency, and he was able, ready, and willing to purchase such land upon the terms stated to plaintiffs by the defendants, then the plaintiffs would be entitled to recover whatever amount of commissions or compensation they can show themselves entitled to under the terms of their contract of agency with the defendants. If they should recover their commissions by reason of any sale to Dr. Taylor, then the plaintiffs could recover no additional commission so far as the sale to the Hubers is concerned. But if the plaintiffs fail in showing that they made a sale of such land to Dr. Taylor as aforesaid, and they can show that they found the Hubers as purchasers, and brought them to defendants for the purpose of purchasing the land in question at a time prior to the alleged or actual revocation of the agency, and the Hubers were persons able, ready, and willing to buy the land in question upon the terms of the contract of agency, and the defendants did conclude a sale of such land with the Hubers, the plaintiffs would be entitled to recover whatever compensation they can show themselves entitled to under the contract by reason of such sale to the Hubers, whether such sale to them was completed either before or after the alleged or actual revocation of the agency.

The principal as a general rule of law has power to revoke the authority of his agent at his pleasure with or without reason. This is true even where the agency is a sole and exclusive one. There are, however, several well-defined exceptions to this general rule, among which may be mentioned a contract of agency which is based upon a valuable consideration. McMahan v. Burns, 216 Pa. 448, 65 Atl. 806; Montague v. McCarroll, 15 Utah, 318, 49 Pac. 418.

Again, the power of the agency may not be revoked at the will of the principal where there is a power of attorney stipulating that such agency shall continue for a definite time, or that it is irrevocable. 31 Cyc. at page 1296 sets forth the main divisions of these exceptions to the general rule, and there are others besides these. The first one is: An authority conferred for a valuable consideration cannot be revoked by the principal alone, in the absence of a stipulation of revocability, unless the consideration fails. And, again, if the authority granted constitutes part of a security or is necessary to effectuate a security, the power cannot be revoked by the act of the principal alone in the absence of a stipulation of revocability. And again, such authority cannot be revoked if coupled with an interest in the subject-matter of the agency, unless there is a stipulation of revocability. The general rules of agency, as well as the exceptions, apply to contracts made with brokers for the sale of real estate. Where one places property in the hands of a broker or agent for sale, even though he gives him an exclusive right to sell, if no definite time is fixed in the contract, and the broker has no interest in the property itself, the principal may revoke the authority of the agent at any time before a sale of the property is made. Dreyfus v. Richardson, 20 Cal. App. 800, 130 Pac. 161; Anderson v. Shaffer, 87 Kan. 346, 124 Pac. 423; Wright v. Waite, 126 Minn. 115, 148 N. W. 50; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Newman v. Dunleavy, 51 Mont. 149, 149 Pac. 970. The revocation of authority, if any, must be made before services have been rendered or expense incurred, otherwise the agent is entitled to reimbursement, unless the terms of the agreement imply otherwise. Hale v. Kumler, 29 C. C. A. 67, 54 U. S. App. 685, 85 Fed. 161. Revocation of an agent's authority, without liability for damages, is not permitted, and is unfair where the revocation was for the purpose of enabling the owner of the property to avoid paying the agent's commission for selling it, by making a sale of it himself on substantially the same terms which would have enabled the agent to claim a commission. Black, Rescission of Contracts, § 335; Hamilton v. Frothingham, 59 Mich. 253, 26 N. W. 486; Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Hancock v. Stacy, 103 Tex. 219, 125 S. W. 884; Sixta v. Ontonagon Valley Land Co. 157 Wis. 293, 147 N. W. 1042.

Upon a consideration of the 8th assignment of error where, in the instructions of law to the jury the following language is used: "Then, if you determine there was a rescission prior to the 15th day of June, 1912, your verdict should be for the defendants," we are of the opinion that such instruction amounts to the directing of a verdict for the defendants; and that the language of such instruction, including the directing of the verdict for the defendants, is reversible error, for the reason that the revocation of the authority of the agents might have been made prior to the 15th day of June, 1912, and nevertheless the plaintiffs might be in position to recover damages against the defendants. The Hubers were procured by the plaintiffs and brought as purchasers to the defendants during the very first part of May, 1912. It follows, therefore, that the agency might have been terminated prior to the 15th day of June, 1912, and yet the plaintiffs be in position to maintain an action for damages against the defendants for their commissions for land sold to purchasers procured by the plaintiffs and furnished to the defendants long prior to the 15th day of June, and prior to the time when any revocation of authority may have been made. If the plaintiffs did furnish any such purchasers, able, ready, and willing to buy the land of the defendants and to whom defendants did sell land, if the furnishing of such purchasers occurred prior to the revocation of the agency, even if such revocation of the agency was prior to the 15th day of June, the plaintiffs have a cause of action against the defendants for whatever commissions or compensation they may show themselves entitled to by reason of any sales of land made to the purchasers to whom the land was sold, procured by them, and brought to the defendants. Where one procures the services of a broker for the purpose of selling land, and the broker procures a purchaser to whom sale is made, the broker has earned his commission or compensation even if the principal took the matter out of the broker's hands and made the sale himself. Northern Immigration Asso. v. Alger, 27 N. D. 467, 147 N. W. 100; Gibson v. Hunt, — Iowa, —, 94 N. W. 277; Reishus-Remer Land Co. v. Benner, 91 Minn. 401, 98 N. W. 186.

There is also another appeal pending now in this court between the same parties, wherein the plaintiffs appealed from an order of the district court vacating its order granting the plaintiffs a new trial for

reasons which were set forth in the motion for such new trial in the court below, and which reasons afterwards ceased to exist. It is not necessary to go into details as to what the motion for new trial was about. It is sufficient to say that it concerned the loss or misplacement of some exhibits which were finally found. The misplacement and disappearance of these exhibits being the main ground for the motion for new trial, and having been found, the court vacated its former order granting a new trial. And this case, a new trial having been granted, disposes of the necessity of considering the appeal from the order of the district court vacating its order granting a new trial upon the motion for a new trial hereinbefore referred to.

On the retrial of this case, the issues should be definitely and clearly joined on whatever causes of action the plaintiffs may have or claim to have against the defendants, to the end that the case may be fairly and fully tried and determined as to all the issues involved, and in order that the jury may have a clear understanding of just what issues of fact are presented to them. For the foregoing reasons, the judgment of the trial court is reversed, and the case is remanded for retrial.

CHRISTIANSON, J. (concurring specially). I concur in the conclusions reached by Mr. Justice Grace, on both appeals in this case. I am not prepared to say that all the instructions referred to in his opinion are necessarily erroneous; but a consideration of the entire record, including the evidence introduced, instructions given, and the verdict returned, leads me to the conclusion that the ends of justice require that a new trial be had.

ROBINSON, J. (dissenting). In this case the plaintiffs bring suit to recover $5,400, as commission on the sale of two sections of land, and they appeal from a verdict and judgment and an order denying a motion for a new trial.

The complaint avers that the defendants agreed to sell to plaintiffs, or any purchaser by them produced, the two sections for the sum of $13,800, and to allow the plaintiffs, as a commission, any sum that they might obtain for the land in excess of $13,800; also, that on June 15, 1912, the plaintiffs produced a purchaser able and willing to pay $19,200; and that the defendants refused to sell the land.

The answer is: (1) A general denial; (2) that on June 5, 1912, the alleged contract of sale was revoked.

From letters and oral testimony it appears that the defendant Kern was a cashier at Sentinel Butte, and that he and the defendant Hart had a side business as real estate brokers; that the two sections in question were listed with them for sale. They made an oral agreement with the plaintiffs, who resided at Minneapolis, to save them a commission in case they found a purchaser for the land. The claim of the plaintiffs is that the owner of the land was to have $10 an acre net, and the defendants to have $1,000 as commission, and that the plaintiffs were to have as commission the excess of the sale price. Also, that about May 1, 1912, the plaintiff Edgerton went to Sentinel Butte with Joseph Huber and showed him the land; notified defendant Kern that if Huber did not take the land the plaintiffs had other customers who would take it, and on June 4, 1912, the plaintiff Edgerton, Joseph Huber, and Dr. Taylor left Minneapolis on a land-buying trip, and they stopped off at Sentinel Butte, and on June 6th they again looked over the land. Then it was claimed that while in Butte defendant Kern made a secret offer to Huber to sell him the land for $12 an acre; that on his way home Dr. Taylor stopped at Minneapolis and bargained with the plaintiffs for the two sections at $15 an acre, and notice by telegram was given defendants.

The motion for a new trial is based on alleged errors in the instructions to the jury and on surprise at the trial. The surprise is based on the fact that the defendants did not bring with them and produce in evidence on the trial correspondence with Huber in regard to the sale of the land to him; but there is no showing that defendants were under obligation to produce the letters, and hence there was no occasion for any surprise; and in regard to the instructions to the jury, they were based on the pleadings and issues. The complaint states a claim for $5,400 by reason of an alleged contract of sale made by the plaintiffs on July 15th. There was no claim made under any other sale. The charge of the court was correctly given in regard to the sale as alleged in the complaint, and the rescission and the sale contract by the parties.

The plaintiffs claim that the court erred by failing to instruct the jury in regard to their right to recover by reason of a sale made by the defendants themselves to Joseph Huber. The answer to that is that they did not request any such instructions and the complaint made no

claim to recover on a sale to Joseph Huber. The plaintiffs elected to base their claim on a sale contract, promising a commission for three times as much as the sale to Huber. They did not choose to make or to urge a claim to the lesser commission, as it would have lessened their claim to recover the greater commission. Had the court volunteered to do it for them, they might have assigned it as error. On the issues as presented, the plaintiffs had a fair trial. The verdict is sustained by the evidence and the judgment should be affirmed.

CARL WESTERLAND v. THE FIRST NATIONAL BANK OF CARRINGTON, NORTH DAKOTA, a Corporation, and G. S. Newberry.

(L.R.A.—, —, 164 N. W. 323.)

Contracts — money paid under — action to recover — insanity — incompetency — evidence — lapse of time — remoteness of evidence — prejudicial error.

1. Where one brings an action to recover money paid under a contract, on the ground that at the time of the making of the contract and the note and mortgage, which were parts of the same transaction, he was insane, evidence that at a point of time four years or more subsequent to the time of the making of the contract, he was adjudged insane by the board of insanity, is inadmissible and incompetent, and too remote to prove his mental condition at the time of the making of the contract; and when admitted over the proper and timely objections of the defendant is prejudicial and reversible error, for which new trial will be granted.

Contracts — capacity to make — determination of — true test — knowledge of nature of contract — at time made.

2. Capacity to make a contract is not determined by whether one has much or little intellect. The true test is, Had the party who seeks to avoid the contract on the grounds of incapacity by reason of alleged insanity, sufficient mental capacity to know the nature of the contract and the terms thereof? if he had, he may be required to perform it.

NOTE.—On admissibility, on issue as to mental condition, of evidence that one has been adjudged insane, or has been confined in an insane asylum, see annotation of this case in L.R.A.—, —.

Contracts — disaffirmance of — money paid — action to recover back — should be timely brought — ratifications.

3. Disaffirmance of contracts and actions brought to recover money paid thereunder should be timely, otherwise, long delay tends to prove ratification.

Opinion filed July 9, 1917. Rehearing denied August 23, 1917.

Appeal from the District Court of Foster County, *J. A. Coffey,* Judge. Reversed.

Edward P. Kelly, for appellants.

"The test of whether a person is competent to make a deed is that he should be qualified to do that particular business rationally; not, on the one hand, that he should be capable of doing all kinds of business with judgment and discretion, nor, on the other, that he should be wholly deprived of reason so as to be incapable of doing the most familiar and trifling work." Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; Jackson ex dem. Cadwell v. King, 4 Cow. 207, 15 Am. Dec. 354.

"Nonexpert witnesses are competent to give their opinion as to the mental condition of testatrix in a proceeding contesting the probate of the will on the ground of unsoundness of mind at the time of making the will." Halde v. Schultz, 17 S. D. 465, 97 N. W. 369; State v. Leehmam, 2 S. D. 171, 49 N. W. 3; People v. Conroy, 97 N. Y. 62; State v. Pennyman, 68 Iowa, 216, 26 N. W. 82; Territory v. Hart, 7 Mont. 489, 17 Pac. 718; Webb v. State, 5 Tex. App. 608; Hardy v. Merrill, 56 N. H. 227, 22 Am. Rep. 441; State v. Klinger, 46 Mo. 228.

"A court is not authorized to submit to a jury an issue as to which there is no evidence, and such submission by the court constitutes reversible error." Independent School Dist. v. Merchants' Nat. Bank, 68 Iowa, 343, 27 N. W. 255; Dondero v. Frumveller, 61 Mich. 440, 28 N. W. 712; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Sheffield v. Eveleth, 17 S. D. 461, 97 N. W. 367.

The question is whether or not the person was qualified to do the particular business in hand, rationally. Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; 1 Whart. & S. Med. Jur. §§ 2, 74; Titcomb v. Vantyle, 84 Ill. 371; Baldwin v. Dunton, 40 Ill. 188; Hovey v. Chase, 52 Me. 305, 83 Am. Dec. 514; Osmond v. Fitzroy, 3 P. Wms. 129, 24 Eng. Reprint, 997; Shelford, Lunatics, 27.

T. F. McCue, for respondent.

Findings of the county court and commissioners of insanity are proper evidence of the matters therein found.

Insanity, when once established by competent and lawful authority, is presumed to continue. 4 Wigmore, Ev. § 2530.

"A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or subsequent time." 1 Wigmore, Ev. § 233; Shailer v. Bumstead, 99 Mass. 112.

Evidence of mental condition before and after the act is admissible 16 Am. & Eng. Enc. Law, 614.

The evidence clearly shows fraud and deceit, and that an undue advantage was taken of a weak and incapable mind. Respondent did not know, nor did he understand, the meaning of the transaction. Comp. Laws 1913, § 5849.

"The paramount and vital principle of agency is good faith, for without it the relation of principal could not well exist." Morris v. Bradley, 20 N. D. 649, 128 N. W. 118.

The proof shows conclusively that respondent was insane prior to the transaction here involved, and the presumption is that insanity continued at least until the contrary is clearly shown. 16 Am. & Eng. Enc. Law, 614, and cases cited; Dawson v. Wisner, 11 Iowa, 6.

GRACE, J. The complaint, among other things, alleges that the defendant Newberry was the cashier of the first National Bank of Carrington, of which plaintiff was a customer and transacted his financial business. That is, such customer was in the habit of counseling with Newberry with reference to such financial business, and did confide in and take the advice of said Newberry in financial matters. That Newberry on the 28th day of September, 1909, advised the plaintiff that it was plaintiff's debts that were causing him to worry and producing his ill health, and that to relieve the same (debts) he should sell his farm. At said time Newberry produced a writing of which the following is a copy:

"For $1 in hand paid by G. S. Newberry I hereby grant on him an exclusive option for sixty days on purchase or sale of the following lands:

South ½ of 22, northwest ¼ of 26, all in 147, R. 65, including windmills, buildings and all other improvements on the farm. Price $23 per acre net to me. . Terms $3,000 cash, balance five annual payments at 6 per cent interest. Good paper. The privilege of withdrawing the option by notice in writing inside of thirty days is reserved. All plowing done to be paid for at $1.25 per acre and possession of buildings retained until April 1, 1910."

The plaintiff further alleges that at the time of the signing of said option the plaintiff did not know that said option provided for an exclusive sale, but plaintiff believed that such writing was necessary in order for the said Newberry to obtain a purchaser for said land. The plaintiff further alleges that at the time of signing such contract his mind was in such condition that he did not know what he was doing, or realize the binding effect of said writing,—all of which was known to Newberry and of which Newberry took advantage at said time. The plaintiff further states that on the 2d day of November, 1909, the defendant Newberry told the plaintiff he was ready to carry out said contract for the purchase of said land and buy the same himself, and demanded of plaintiff a deed to said land, advising said plaintiff at said time that he, the defendant, would place a mortgage upon the premises for the purpose of paying the plaintiff $3,000 cash provided in said option. Plaintiff refused to make such deed. Newberry demanded the sum of $480 by way of damages. Plaintiff further alleges that defendant threatened suit against the plaintiff for said amount of money, and alleges that on account of his mental condition he was put in fear, and caused to believe that if he did not settle with said Newberry he would lose his farm. The plaintiff then executed a note for $860, which also covered other amounts owing by the plaintiff to the bank, which was secured by a mortgage on the land in question. Plaintiff alleges that at the time said mortgage and note were paid by the bank at Barlow the plaintiff was insane, and was afterwards placed in the insane asylum at Jamestown, North Dakota. Plaintiff alleges that the offer which the defendant made to purchase said farm was not in good faith, and that the whole transaction was a conniving scheme for the purpose of defrauding the plaintiff of said money. That at the time the plaintiff's mind was deranged, all of which was well known to the defendant.

The defendant Newberry for his answer makes, first, a general

denial, and further by way of defense alleges that on the 28th day of September, 1909, the plaintiff solicited the defendant to purchase or procure the purchase of certain real estate then the property of plaintiff, and for a consideration did make, execute, and deliver to the defendant the option as hereinbefore set forth, which option was on the 28th day of October, 1909, assigned by the defendant to his wife, Mary G. Newberry. The answer further alleges that more than thirty days from the execution and delivery of said option, on the 2d day of November, 1909, the plaintiff again called upon the defendant and asked to withdraw said option, and that by mutual agreement of the parties and the consideration of the surrender of said option, the plaintiff agreed to pay, and did pay, to the defendant the sum of $1 per acre, amounting to the sum of $480. The answer further denies all allegations of fraud.

The facts in the case are as follows: The plaintiff was the owner of 480 acres of land. On the 28th day of September, 1909, he granted an option to the defendant for sixty days, which gave the said Newberry the right to find a purchaser to said land, or purchase the same himself, within the sixty-day period. The plaintiff also had a reservation in such option of withdrawing the same by notice in writing inside of thirty days. The plaintiff did not withdraw the option within thirty days, and did not attempt to do so until after the thirty-day period had expired. The plaintiff had transacted business for quite a long period of time prior to the date of the option contract, with the First National Bank of Carrington, of which Newberry was cashier. After receiving such option the defendant assigned the same to his wife. The plaintiff desired after the thirty-day period had expired to withdraw the option and cancel the same, which Newberry refused to do unless he was paid the sum of $480, which was agreed to by the plaintiff, and a note for $860 executed, which included, among other items, the $480, which was secured on the land in question.

The first assignment of error by the defendant is one in which he complains that the court erred in receiving in evidence over the objection of appellant exhibits F, G, H, I, J, K, L, and M inclusive, which exhibits constituted the record of the board of insanity for Foster county in the matter of the insanity proceedings against Carl Westerland, the plaintiff in this case, which proceedings as to the insanity of

the plaintiff were had on the 28th day of June, 1913, a period of time of four years subsequent to the date of the transaction complained of and involved in this suit. This record concerning the insanity of the plaintiff was offered at the very commencement of the trial of the case. The defendant made proper objections to the introduction of such records because of their incompetency, irrelevancy, and immateriality, which objection was overruled by the court, and such records were received in evidence.

The question presented is quite a novel one, and is as follows: Where it is claimed by the plaintiff that at the time of the execution of the contract he was insane and had no capacity to execute such contract, is it competent to introduce testimony that four years subsequent to the date of such contract the plaintiff was declared to be insane by the board of insanity of the county in which he resided? Adverting to the question of insanity, an inquisition finding that a person is insane at the time of such inquiry, such finding is not evidence that he was insane at a previous date, and especially is this true where the date is long prior to the date of the inquiry.

Southern Tier Masonic Relief Asso. v. Laudenbach, 5 N. Y. Supp. 901; Rippey v. Gant, 39 N. C. (4 Ired. Eq.) 443. Such finding by the insanity board is no presumption of insanity at an earlier date. Lilly v. Waggoner, 27 Ill. 395; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Koons v. Benscoter, 2 Kulp, 451. The admission of such testimony is only competent to prove the incapacity of the person to have charge of his property at the time of the inquiry as to the sanity of the person examined; and where such person is found to be insane on such inquiry and examination, it is no evidence of insanity at a prior date, but is evidence only of the insanity of the person examined when the adjudication was made. Burnham v. Mitchell, 34 Wis. 134. The only possible theory upon which such testimony could be admissible would be, where there was competent testimony adduced showing a continuance of the insanity from the date the act was done, or in case of a contract, from the date the contract was made, for all the succeeding interval of time down to the date of the inquiry and adjudication of insanity, and such continuance of such insanity during all the interval from the time of the making of the contract to the adjudication of insanity is shown by a clear preponderance of evi-

dence, of such a nature that it would strongly tend to prove the continuance of such insanity. Notwithstanding such connecting proof, the adjudication of insanity is not competent proof of insanity at a prior date, and the records of such adjudication of insanity of a certain date are entirely inadmissible, incompetent, irrelevant, and immaterial to prove insanity at a prior date. There is still another objection to the admission of the exhibits of the adjudication of the insanity of the plaintiff, in that the insanity was at a very remote time from the time of the making of the contracts in question, and because of such remoteness were inadmissible and incompetent, the time between the making of the contracts and the adjudication of insanity being a period of more than four years. As to remoteness of the testimony in this class of cases, see Dickinson v. Barber, 9 Mass. 225, 6 Am. Dec. 58; Harden v. Hays, 14 Pa. 91. A party alleging insanity has the burden of establishing it by a preponderance of evidence, and the ordinary rules of evidence as to admissibility, materiality, competency, and relevancy apply as in other cases.

The pivotal question in a case such as the one at bar is the capacity to contract with reference to property or its conveyance at the time the contract or conveyance was made. If a person at the time of making the conveyance or contract has sufficient mental capacity fully to comprehend the nature and effect of the act, the conveyance is valid. Willwerth v. Leonard, 156 Mass. 277, 31 N. E. 299; Parker v. Marco, 76 Fed. 510. It may be said to be a sound principle of law, to make a binding contract does not require a very high order of intellect. While the contracts of a lunatic or an idiot, except for necessaries, are of no binding force upon him, yet, if a man possess sufficient mental capacity to understand and know what he is doing, to know the nature of the contract, the terms thereof, and the time of its continuance, he may be required to perform it, unless the contract is unfair, fraudulent, or dishonest, when he might be relieved from the performance thereof, but most likely upon other grounds than insanity. The law does not presume to make a distinction between much and little intellect. Stewart, Legal Medicine, § 155. Sanity is always presumed to exist until the contrary appears.

The testimony in this case is quite voluminous. Much of it relates to the business transactions of Mr. Westerland prior to the time of the

execution of the contract in question. There is testimony that he transacted business with other business men in the vicinity. There is some testimony tending to show that Mr. Westerland worried about his debts; that he at times had crying spells; that he at times made disturbances with his family. There is also testimony that he used intoxicating liquors and sometimes to excess, and that at times he kept intoxicating liquors at home. All such testimony was proper to be considered by the jury, and to be weighed by them in assisting them in determining whether or not at the time of the execution of the contract in question the plaintiff was of sufficient mental capacity to enter into the contract which he did. The main question to be determined in the case is whether or not the plaintiff, Westerland, had sufficient capacity and intellect, and knew what he was doing, at the time he made the contract; and the business transactions of plaintiff not too remote from the time of the making of the contract, his general conduct, his actions, eccentricities, if any, his habits,—all may be shown by competent testimony as bearing upon his capacity to execute the contract in question at the time it was executed. The contract in question was one which it was lawful to make. If the plaintiff, Westerland, had capacity to make it at the time which he did make it, he is legally bound by the consequences of his making the contract.

Another question which should be taken into consideration is that a disaffirmance of a contract should be timely and the same disaffirmed within a reasonable time, or if money has been paid thereunder, an action brought to recover such money within a reasonable time after the contract is disaffirmed, otherwise long delay tends to show a ratification.

We are of the opinion that the admission of the records of the county court of Foster county which showed the result of the inquiry at which plaintiff was adjudged insane, which inquiry was some four years or more subsequent to the date of the making of the contract in question and the note and mortgage given in settlement, was too remote to be competent evidence; that it was inadmissible to prove the insanity of the plaintiff at a point of time four years or more prior thereto, and the admission of the same was prejudicial and reversible error. The judgment is therefore reversed and a new trial granted.

ROBINSON, J. (dissenting). In this case cashier Newberry appeals to this court from a verdict and judgment against him for obtaining from the plaintiff $480, and interest, by fraud and undue influence. By some smoothness he obtained from the plaintiff a one-sided land listing document, which is a fraud on its face. It is in this form:

September 28, 1909.

For $1 in hand paid by G. S. Newberry I hereby grant him an exclusive option for sixty days on purchase or sale of the following lands:

South ½ of 22, northwest of 26, all in 147, R. 65, including windmills, buildings, and all other improvements on the farm. Price $23 per acre net to me. Terms $3,000 cash, balance five annual payments at 6 per cent interest. Good paper. The privilege of withdrawing the option by notice in writing inside of thirty days is reserved. All plowing done to be paid for at $1.25 per acre and possession of buildings retained until April 1, 1910.

Carl Westerland.

Witnesses:
H. H. Steffens,
J. W. A. Fisher.

The plaintiff was a poor, illiterate, hard-working Norwegian, of weak and unsound mind. He called on his banker, who posed as his confidential friend, and heard his tale of woe, and advised him to get away from trouble by selling his land and by giving his friend, the banker, an exclusive right to sell it for him. The banker presented his listing document and said to the weeping and distracted man: Sign there; and he signed it. Then the banker assigned the document to his innocent spouse, and put it on record so as to cloud the title of plaintiff's land. Of course when the illiterate Norse came to think it over, the signing of that document caused him days and nights of worriment. Then he came to his banker friend and asked leave to withdraw the document, and was told that it had been transferred to some person (whom the banker declined to name); that the holder would give it up for $480, and so the banker kindly took a mortgage on the land and advanced the $480 to himself. In time the mortgage was paid; the maker went

insane, went to the insane asylum, got out, and recovered a verdict and judgment inviting the banker to refund his $480, and interest. How strange it is that any person should think of appealing such a case to the highest court of justice. Of course the claim is made that in signing the document the Norse knew just what he was doing, and that he was not mislead or deceived, but the claim is futile. The document is a fraud on its face. No sane man signs such a thing, only when he is deceived. It is needless to review the testimony showing the weak mental condition of the plaintiff, who finally committed suicide, and the way in which he was induced to sign the paper and to mortgage the land to pay $480, and interest, without receiving any value whatever. It is high time for bank cashiers and others to stop trying to get money or property from poor people by such sharp and smooth practices. In a way it is worse than theft, because it is more likely to prey upon the mind and to drive one to insanity and suicide. The judgment should be affirmed.

FIRST NATIONAL BANK OF DICKINSON, a Corporation v. BIG BEND LAND COMPANY, a Corporation.

(164 N. W. 322.)

Sale of land — executory contract — vendor — inability to perform — payments made by vendee — under contract — garnishment — judgment — satisfaction of — liability to assignee — relieved from — to extent of judgment.

1. Where the vendor, in an executory contract for the sale of land, is unable to perform and becomes obligated to repay the vendee the payments made under such contract; and where such vendor, when garnisheed at the suit of the vendee creditors, in good faith and without notice of a prior assignment of the vendee's interest, satisfies a judgment rendered against him in the garnishment proceedings, he is, to that extent, relieved from liability to the assignee.

Deeds — mortgages — instruments affecting title to real estate — recording — constructive notice — subsequent purchasers and encumbrancers.

2. By statute the recording of deeds, mortgages, and instruments affecting title to real property is constructive notice to all purchasers and encumbrancers subsequent to recording. It is not any notice to prior purchasers.

Opinion filed July 14, 1917. Rehearing denied August 23, 1917.
38 N. D.—3.

Appeal from the District Court of Dunn County, Honorable *W. C. Crawford,* Judge.

Reversed.

Thomas H. Pugh, for appellant.

The record of an instrument which cannot be classed as a "conveyance" of land does not give notice of itself to others. The record of it must be brought to the attention of parties dealing with the land; in other words, actual notice must be had. Comp. Laws 1913 §§ 5504, 5594, 5595; State ex rel. Dillman v. Weide, 29 S. D. 109, 135 N. W. 699; 1 Warvelle, Vend. & P. 2d ed. §§ 175, 176.

"A mere contract or covenant to convey at a future time on the purchaser performing certain acts does not create an equitable title. It is but an agreement that may ripen into an equitable title. Bartlesville Oil & Improv. Co. v. Hill, 30 Okla. 829, 121 Pac. 208.

Constructive notice from the record being dependent upon purely statutory provisions, it follows that such effect will not be given to any and every instrument which the register of deeds may see fit to record, but only to such as may fall within the statutes entitling them to record. The mere record of an instrument not entitled to be there is a nullity. 24 Am. & Enc. Law, 81, 141, 142; Nordman v. Rau, 86 Kan. 19, 38 L.R.A.(N.S.) 400, 119 Pac. 351, Ann. Cas. 1913B, 1068.

The doctrine of constructive notice has always been regarded as a harsh rule of necessity. Davis v. Ward, 109 Cal. 189, 50 Am. St. Rep. 29, 41 Pac. 1010; 4 Cyc. 33–35 and cases cited; 2 Am. & Eng. Enc. Law, 2d ed. 1077; Graham Paper Co. v. Pembroke, 124 Cal. 117, 44 L.R.A. 632, 71 Am. St. Rep. 26, 56 Pac. 627; Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426.

The contract which was assigned to plaintiff contains the following clause: "Either party hereto may assign his interest in this contract, subject to the consent of the other party hereto." To make the assignment binding on the defendant, its consent thereto must be shown. Mueller v. Northwestern University, 195 Ill. 236, 88 Am. St. Rep. 194, 63 N. E. 110; Lockerby v. Amon, Ann. Cas. 1913A, 228, and note, 64 Wash. 24, 35 L.R.A.(N.S.) 1064, 116 Pac. 463.

Action was brought against plaintiff's assignor of the contract, and this defendant was made a garnishee therein. It resulted in a judgment, which defendant as such garnishee paid in good faith. Such

judgment will receive in this court the same faith and credit that is accorded it at home, and plaintiff will not be heard in its attempt to attack it collaterally at this time. Under such judgment the court had the right to direct the payment of the garnished fund to the plaintiff in that suit. Gude v. Dakota F. & M. Ins. Co. 7 S. D. 644, 58 Am. St. Rep. 860, 65 N. W. 27; Van Norman v. Gordon, 172 Mass. 576, 44 L.R.A. 840, 70 Am. St. Rep. 304, 53 N. E. 267; Fred Miller Brewing Co. v. Capital Ins. Co. 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023; Parker v. Stoughton Mill Co. 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; Wis. Stat. § 2768; Comp. Laws 1913, § 7583.

Murtha & Sturgeon, for respondent.

The term "conveyance" embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills and powers of attorney. Comp. Laws 1913, § 5595.

Any instrument or judgment affecting the title to or possession of real property may be recorded. Comp. Laws 1913, §§ 5546, 5594, 6865; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210; Case v. Bumstead, 24 Ind. 432; 39 Cyc. 1673 (III.), 1730c, 1732ee, 2031d, 2033–2037; McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889; Davis v. William Rosenzweig Realty Operating Co. 20 L.R.A.(N.S.) 175, note; Weiss v. Schweitzer, 47 Misc. 297, 95 N. Y. Supp. 923.

Where the vendor fails in the covenants and agreements of his contract to convey, the vendee may recover the amount paid under the contract, and may have and enforce a vendee's lien therefor. Craft v. Latourette, 62 N. J. Eq. 206, 49 Atl. 711; Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249; Coleman v. Floyd, 131 Ind. 330, 31 N. E. 75; Wickman v. Robinson, 14 Wis. 494, 80 Am. Dec. 789.

The assignment herein was in effect a mortgage, and as such is enforceable by plaintiff. 39 Cyc. 1763, III. note 5; Burrows v. Hovland, 40 Neb. 464, 58 N. W. 947; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Meigs v. McFarlan, 72 Mich. 194, 40 N. W. 246; Niggeler v. Maurin, 34 Minn. 118, 24 N. W. 369; Lovejoy v. Chapman, 23 Or. 571, 32 Pac. 687.

Record of the assignment was notice to the defendant, and notice by

record was given prior to the payment of the money by defendant. Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483; Comp. Laws 1913, §§ 6742, 6743; 39 Cyc. 1720 (2); McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889; Shelly v. Mikkelson, 5 N. D. 22, 63 N. W. 210; Burrows v. Hovland, 40 Neb. 464, 58 N. W. 947; Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; 4 Cyc. 33; 5 C. J. 972, § 163; Lewis v. Bush, 30 Minn. 244, 15 N. W. 113; Ives v. Addison, 39 Kan. 172, 17 Pac. 797; Williams v. Pomeroy, 27 Minn. 85, 6 N. W. 445.

The contract was assignable without defendant's consent. Such contracts are mere securities at best. McPheeters v. Ronning, 95 Minn. 164, 103 N. W. 889; Johnson v. Eklund, 75 Minn. 195, 75 N. W. 14; Wagner v. Cheney, 16 Neb. 202, 20 N. W. 222; Shively v. Semi-Tropic Land & Water Co. 99 Cal. 259, 33 Pac. 848; Ross v. Page, 11 N. D. 458, 92 N. W. 822.

A clause in a contract against assignment does not prevent the holder from assignment of his equitable interest. Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462; School Dist. v. Whalen, 17 Mont. 1, 41 Pac. 849; 4 Cyc. 75, note 72; Ross v. Page, 11 N. D. 458, 92 N. W. 822.

Robinson, J. This case presents an appeal from a judgment in favor of the bank for $1,000, and interest from April 2, 1910. The plaintiff brought suit as the assignee of one John Brodie. Brodie had paid the defendant $1,000 on a kind of land contract by which defendant agreed to try to perfect title to certain lands and then to convey the same to Brodie, and, in case of failure to perfect title, to repay Brodie the $1,000. It failed to perfect title, and so it became indebted to Brodie in the sum of $1,000.

On June 5, 1911, Brodie made an assignment of his contract to the bank. It was acknowledged. Then on March 30, 1912, the contract and the assignment were recorded in the office of the proper register of deeds. On March 22, 1912, an action against Brodie was commenced in circuit court of Dane county, Wisconsin, and on March 24, 1912, the Big Bend Land Company and Brodie were duly served with garnishee process.

On April 29, 1912, judgment was given against Brodie for $5,000. The garnishee filed a written answer admitting an indebtedness to

Brodie of $1,000, and paid the same to the clerk of court, and by order of the court it was paid to the plaintiff in said garnishee action on the judgment against Brodie. The Big Bend Land Company had notice in regard to the assignment of its contract with Brodie, except such constructive notice as imputed from the recording of the contract and the assignment.

By statute the recording of deeds and mortgages and instruments affecting title to real property is constructive notice to all purchasers and encumbrancers subsequent to the recording. It is not a notice to a prior purchaser, and the recording of a mere obligation to pay money is not notice to anyone. The defendant was not a subsequent purchaser or encumbrancer, and hence the recording was not notice to the Big Bend Land Company, and without notice of the assignment it had a perfect right to pay the $1,000 to Brodie, or to pay it into court when garnisheed, and such payment was a discharge of its liability. It also appears that when the contract was assigned to the bank it was merely an obligation to repay the $1,000. It was a personal obligation of the defendant, and the plaintiff brings this suit and recovered judgment against the defendant on its mere personal obligation to repay Brodie $1,000; and as defendant paid the same into court in good faith and without notice, of course it is not liable in this action.

Judgment reversed and action dismissed.

BRUCE, Ch. J. I concur in the above opinion, though I prefer to express no opinion on the questions whether the contract was a mere personal obligation and as such not entitled to record, nor do I deem it necessary to do so.

CHRISTIANSON, J. (concurring specially): I concur fully in the result reached, and in the principle announced in the majority opinion prepared by Mr. Justice Robinson, to the effect that the recording of deeds, mortgages, or other instruments affecting title to real property, is constructive notice only to purchasers and encumbrancers subsequent to such recording, and is not notice to prior purchasers or encumbrancers. This rule was declared in the early history of this court in Sarles v. McGee, 1 N. D. 365, 26 Am. St. Rep. 633, 48 N. W. 231, and the correctness thereof has never been questioned.

While as between an assignee and a garnishing creditor, no notice to the garnishee is necessary, and the assignment will prevail over the subsequent garnishment even though the garnishee knew nothing of the assignment, a different rule applies as between the assignee and the garnishee. As between these parties, in the absence of a qualifying statute, there is generally no question but that an assignee must give notice to a garnishee of the assignment before final judgment is rendered in the garnishment proceeding, or at least before the garnishee has in good faith satisfied the judgment. See note in L.R.A.1916E, 86, 20 Cyc. 1148. The function of such notice is to protect the debtor garnishee, and prevent him from paying the funds to someone not entitled thereto.

As the recording of the assignment in the case at bar did not impart any notice to the defendant, the payment of the judgment rendered against it as garnishee will protect the defendant from liability for a second payment of the debt so paid, and may be pleaded as a defense. Ibid. Defendant has paid the claim upon which plaintiff's cause of action is based, and cannot be required to pay it a second time. If the plaintiff has any remedy, it is against the party to whom the defendant paid the moneys under the judgment rendered against it as garnishee. Note in L.R.A.1916E, 86.

BLANCHE S. WOODWARD v. KATIE M. BLAKE, Jessie A. King, and Charles P. Woodward.

(L.R.A.1918A, 88, 164 N. W. 156.)

Divorce — judgment and decree — effect of — unmarried state — restoration to — remarriage — neither party may — within three months — marriage before expiration of limitation — not void — may not be assailed collaterally — in probate proceedings.

Under chapter 70 of the Session Laws of 1901, which provides that the effect of a judgment decreeing a divorce is to restore the parties to the state of

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NOTE.—For a general discussion as to whether an unlawful or invalid marriage is void or voidable, see note in L.R.A.1916C, 690, from which it appears that the tendency of modern statutes is to make marriages voidable rather than void when-

unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted, a marriage contracted by a divorced person less than three months after the decree was rendered is not void, and may not be assailed collaterally upon probate of such person's estate.

Opinion filed July 21, 1917. Rehearing denied August 23, 1917.

From an order of the District Court of Wells County, *Coffey,* J., respondents appeal.

Affirmed.

J. J. Youngblood and *John O. Hanchett,* for appellants.

The appellee never became the lawful wife of decedent, because she married him within three months after decree of divorce was granted him from his then wife. That such marriage was in violation of the laws of the state and was void, and appellee never having been decedent's lawful wife, she is not now entitled to administration of his estate. Comp. Laws 1913, § 8657; Rev. Codes, 1899, § 2736; Laws 1901, chap. 70.

In states where the statute is penal in its nature, it is held that the incurring of the penalty provided by statute is the only consequence of a violation thereof by divorced parties, and that the new marriage is not void. Crawford v. State, 73 Miss. 172, 35 L.R.A. 224, 18 So. 848; Conn v. Conn, 2 Kan. App. 419, 42 Pac. 1007.

But there is a great distinction between such statutes and the statute of our state, and such difference has been observed by many courts. Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641; McLennan v. McLennan, 5 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802.

There can be no common-law marriage in this state. The marriage relation can only be entered into in this state in accordance with the provisions of the statute law of the state. Comp. Laws 1913, § 4360.

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ever the impediment is such as might not have been readily known to both parties before marriage, and where public policy does not rise superior to all consideration of private utility.

On the specific question as to validity and effect of marriage contracted within prohibited time after divorce, and the conflict of laws in regard thereto, see notes in 57 L.R.A. 155, 169; 11 L.R.A.(N.S.) 1082; 17 L.R.A.(N.S.) 800; 26 L.R.A.(N.S.) 179; 28 L.R.A.(N.S.) 753; 43 L.R.A.(N.S.) 355; and L.R.A.1916C, 748.

On validity of statute prohibiting remarriage of either party within certain time after divorce, see note in 128 Am. St. Rep. 1089.

A marriage is dissolved only by the judgment of a court of competent jurisdiction, decreeing a divorce of the parties, and the effect is to restore them to the state of unmarried persons, except that neither shall marry again within three months from the date of the decree, and that therefore the divorce is not absolute until three months have expired. Re Smith, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059.

These parties were entirely incapable of contracting the marriage relation at the time they attempted to do so, and no marriage between them having been solemnized thereafter, it follows that they were never husband and wife. Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Wilson v. Cook, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222; Re Elliott, 165 Cal. 339, 132 Pac. 439; Hooper v. Hooper, 67 Or. 187, 135 Pac. 205, 525; Eaton v. Eaton, 66 Neb. 676, 60 L.R.A. 605, 92 N. W. 995, 1 Ann. Cas. 199.

Under our law the decree of divorce does not dissolve the former marriage and restore the parties to a state of singleness until the expiration of three months. It was not necessary that this new statute should expressly declare that a marriage of either of the divorced persons within the time limit of prohibition should be null and void; for the old law expressly so provided, and was not repealed. Drummond v. Irish, 52 Iowa, 41, 2 N. W. 622; Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173; McLennan v. McLennan, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; Tozier v. Haverhill & A. Street R. Co. 187 Mass. 179, 72 N. E. 953.

Tracy R. Bangs and *Arthur L. Netcher,* for appellee.

The cases cited by appellant mostly relate to statutes providing that neither of the divorced parties shall marry again, until after the expiration of the time allowed for appeal, and declaring such remarriage null and void, should they violate the statute. Such statutes are very different in their meaning and application from the statutes of this state, and the distinction has been very clearly made by many of the courts, including those courts whose decisions appellant has cited. McLennan v. McLennan, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; Conn v. Conn, 2 Kan. App. 419, 42 Pac. 1006; Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173.

These authorities cited by appellant all hold that a divorced person

cannot enter into the marriage relation with a third person until the time for taking an appeal has expired. That is, they shall not be capable of contracting a new marriage with a third person. These statutes go directly to the ability and capacity of the parties to marry or to make such contract. These statutes declare such persons incapable of entering into the contract with a third person until the time for appeal has expired. In the other class of statutes we find the statutory prohibition penal in its nature. Under the first class we find the remarriage absolutely void, while in the other it is often held valid, although the party may be punished criminally for violating such prohibitory statute. Hooper v. Hooper, 67 Or. 187, 135 Pac. 205, 525.

Our statute does not provide that the parties shall be incapable of contracting marriage; it does not provide that the exception is made for the purpose of appeal. Laws 1901, chap. 70; Sess. Laws 1911, chap. 183.

Appellee's position is that chapter 70 means that a judgment of divorce has the effect of an absolute divorce and completely severs the marital relationship that the three months' exception relates to the personal status of the parties interested, and not to their former marriage status; that a remarriage in violation of the three months' provision subjects the offending party to the penalty provided by statute. Rev. Codes 1899, §§ 6812 & 7029.

Our statutes define "absolutely void" marriages, and they nowhere refer to the class of cases to which this case belongs. Rev. Codes 1899, §§ 2722, 2723, 2731, 2732, Comp. Laws 1913, §§ 4359, 4360, 4368, 4369.

The main essentials of the common-law marriage are recognized in this state. Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85; Mickels v. Fennell, 15 N. D. 188, 107 N. W. 53; 9 R. C. L. 503.

It was never the intention of the legislature that such marriages should be void. "What the legislature cannot do except by most positive enactment, courts should not do by strained construction. Luick v. Arends, 21 N. D. 614, 132 N. W. 353; Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641.

"Statutes seemingly mandatory will sometimes be construed to be directory only when necessary to sustain the validity of a marriage not

inexorably void." Mason v. Mason, 101 Ind. 25; Comp. Laws 1913, chap. 70, § 4379; Crawford v. State, 73 Misss. 172, 35 L.R.A. 224, 18 So. 848.

The Minnesota statutes single out and specify particularly those marriages which shall be absolutely void, but nowhere do they so declare upon cases like the one here presented, thus leaving a necessary inference that it was the intention that all other prohibited marriages should be voidable only. The Minnesota statutes are almost identical with our statutes. Rev. Codes 1899, §§ 2722 et seq; State v. Yoder, 113 Minn. 503, L.R.A.1916C, 686, 130 N. W. 10; State v. Walker, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279; Conn v. Conn, 2 Kan. App. 419, 42 Pac. 1006.

There is a great distinction between a statutory prohibition and a declaration of incapacity to contract. State v. Walker, supra; Bishop, Marr. & Div. § 283; Conn v. Conn, supra.

In this state we have absolute divorces,—nothing else. Hagert v. Hagert, 22 N. D. 296, 38 L.R.A.(N.S.) 966, 133 N. W. 1035, Ann. Cas. 1916B, 925; Tuttle v. Tuttle, 21 N. D. 506, 131 N. W. 460, Ann. Cas. 1913B, 1; Rindlaub v. Rindlaub, 19 N. D. 353, 125 N. W. 479; 14 Cyc. 578; Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870.

The decree of divorce in this state fixes the personal and individual status of the parties, and has no relation to the former marriage. The parties are by the decree restored to the state of unmarried persons, excepting the prohibition against remarriage within three months. Strand v. Marin, 30 N. D. 170, 152 N. W. 280.

CHRISTIANSON, J. On August 15, 1904, an absolute decree of divorce was entered in the district court of Wells County, in an action then properly pending therein, divorcing Plinn H. Woodward from Kate Woodward. Thereafter on September 30, 1904 said Plinn H. Woodward was married to the petitioner, Blanche S. Woodward, at Minot, North Dakota. From the date of such marriage the said Plinn H. Woodward and the petitioner lived together as husband and wife—up to the death of said Plinn H. Woodward, which occurred on October 22, 1916. The petitioner thereupon applied to the county court of Wells county for letters of administration of the estate of said Plinn H. Woodward. And the three respondents, who are the children of

Plinn H. Woodward by his first wife, filed an answer and cross petition, wherein they asserted that the marriage solemnized at Minot, North Dakota, on September 30, 1904, was and is wholly null and void for the reason that such marriage was prohibited by chapter 70 of the Session Laws of 1901, which reads as follows:

"Marriage is dissolved only,

"1. By the death of one of the parties; or

"2. By judgment of a court of competent jurisdiction decreeing a divorce of the parties.

"The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, except that neither party to a divorce may marry within three months after the time such decree is granted." Under the laws of this state "marriage is a personal relation arising out of a civil contract to which the consent of the parties thereto is essential, but the marriage relation may be entered into, maintained, annulled or dissolved only as provided by law." Comp. Laws 1913, § 4357.

The common-law marriage has not been recognized as valid in this state since July 1, 1890. See Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85.

Section 4359, Compiled Laws, declares that marriages between certain near relations shall be absolutely void. And § 4360, Compiled Laws, provides that "a marriage contracted by a person having a former husband or wife living, if the former marriage has not been annulled or dissolved, is illegal and void from the beginning unless such former husband or wife was absent and believed by such person to be dead for a period of five years immediately preceding."

Section 4368, Compiled Laws 1913, provides: "A marriage may be annulled by an action in the district court to obtain a decree of nullity for any of the following causes existing at the time of the marriage:

"1. When the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent and such marriage was contracted without the consent of his or her parent or guardian, unless after attaining the age of consent such party freely cohabited with the other as husband or wife.

"2. When the former husband or wife of either party was living and the marriage with such former husband or wife was then in force.

"3. When either party was of unsound mind, unless such party after coming to reason freely cohabited with the other as husband or wife.

"4. When the consent of either party was obtained by fraud, unless such party afterwards will full knowledge of the facts constituting the fraud freely cohabited with the other as husband or wife.

"5. When the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

"6. When either party was at the time of the marriage physically incapable of entering into the marriage state and such incapacity continues and appears to be incurable."

Section 4369, Compiled Laws, provides that "an action to obtain a decree of nullity of marriage for causes mentioned in the preceding section, must be commenced within the periods and by the parties as follows:

"1. For causes mentioned in subdivision one, by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent, or by his or her parent or guardian at any time before such party has arrived at the age of legal consent.

"2. For causes mentioned in subdivision 2, by either party during the life of the other, or by such former husband or wife.

"3. For causes mentioned in subdivision 3, by the party injured, or a relative or guardian of the party of unsound mind at any time before the death of either party.

"4. For causes mentioned in subdivision 4, by the party injured within four years after the discovery of the facts constituting the fraud.

"5. For causes mentioned in subdivisions 5 and 6, by the injured party within four years after the marriage."

It will be observed that in the section last quoted the legislature recognized certain marriages to be void and others to be voidable only. See Mickels v. Fennell, 15 N. D. 188, 107 N. W. 53.

The various statutory provisions above quoted were in force at the time chapter 70 of the Laws of 1901 was enacted, but the legislature did not see fit expressly to declare a marriage entered into within the prescribed three-month period to be either void or subject to annulment. Marriage existed before statutes were enacted with respect thereto. It is regarded with favor by the law, and statutes should not

be construed so as to make a marriage null unless the legislative intent is clear and unequivocal. See 1 Bishop, Marr. Div. & Sep. §§ 432, 708.

Appellant has cited a number of cases wherein marriages between a divorced person and a third party, during the time prohibited by statute, have been held void, but an examination of the various authorities cited, however, show that the statutes construed were entirely different from that involved in this case. Many of the decisions were based upon and construed statutes wherein divorced parties were prohibited from contracting marriage with a third person during the time in which an appeal from the judgment might be taken. Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787, and Wilson v. Cook, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222, were based upon statutes which expressly declared a marriage contracted by a divorced person within one year after the rendition of the degree of divorce to be null and void. Re Elliott, 165 Cal. 339, 132 Pac. 439, was based upon a statute which provided that the marriage of a divorced person within a year after the rendition of the decree of divorce is "illegal and void from the beginning." McLennan v. McLennan, 31 Or. 480, 38 L.R.A. 863, 65 Am. St. Rep. 835, 50 Pac. 802; Hooper v. Hooper, 67 Or. 187, 135 Pac. 205, 525, and Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173, were based upon a statute which provided that a divorced party shall not be *"capable of contracting marriage* with a third person, and if he or she does so contract, shall be liable therefor *as if such decree had not been given,* until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this Code to take such appeal." No decision has been called to our attention based upon a statute similar to that before us.

The principal purpose which actuated the different legislatures in the enactment of laws prohibiting divorced persons from remarrying with others during the time in which an appeal from the judgment might be taken was to prevent the complications which might arise from such marriage in event the decree of divorce was subsequently reversed on appeal. Obviously this purpose did not enter into or actuate the deliberations of the North Dakota legislature in the enactment of chapter 70 of the Session Laws of 1901, because at the time of the enactment of this statute an appeal from a judgment of divorce might

be taken at any time within one year after entry thereof by default, or after written notice of the entry thereof, in case the party against whom it was entered had appeared in the action (Rev. Codes 1905, § 7204, Comp. Laws 1913, § 7820), while the prohibition upon the remarriage of divorced persons was fixed at three months following the date of the rendition of the decree. Nor can we believe that the legislature intended that a marriage contracted in violation of the statute should be null and void. If it had so intended it would doubtless have so declared in express words. Whether a party who violated the statute by remarrying within the prohibited period would be subject to punishment is a matter upon which we express no opinion. See however 1 Bishop, Marr. Div. & Sep. § 708.

Some of the statutes construed in the various cases declare in terms that a marriage by a divorced person within the time in which an appeal from the judgment may be taken shall be null and void. Other statutes declare divorced persons to be incapable of contracting marriage during the prohibited period.

Manifestly, decisions based upon such statutes can furnish little or no aid in construing the statute before us. If a statute declares a marriage to be void, it is void so far as it is within legislative power to so declare. If parties are declared incapable of contracting marriage, then no valid contract can be made by them.

It has been said that the rule as to the distinction between void and voidable marriages is that certain canonical impediments render the marriage voidable, while the "civil disabilities" affecting the capacity of the parties to enter into the contract makes the contract void *ab initio,* not merely voidable; such disability does not absolve a contract already made, but they render the parties incapable of contracting at all; they do not sunder those that are joined together, but they previously hinder the junction. 44 Am. Dec. 54, note.

The North Dakota legislature had no intent to prohibit remarriage of divorced persons during the time in which an appeal from the judgment might be taken. It did not declare such parties incapable of contracting marriage, nor did it declare marriages by such parties during the proscribed period to be void.

The judgment appealed from must be affirmed. It is so ordered.

ROBINSON, J. (concurring). I have signed the opinion prepared by Mr. Justice Christianson, and concur fully therein. As the surviving wife of Plinn Woodward, the plaintiff duly applied for administration on his estate. His three children by a former marriage resist the claim and appeal from a judgment allowing it. Their claim is that the marriage between the plaintiff and their deceased father was illegal and their union adulterous, and yet under a marriage contract and a marriage right for twelve years they lived and worked together as husband and wife and saved up and earned and made the property in dispute. Now, if the wife will be deprived of her share in the property, there is manifestly something wrong with the law or the courts.

The objection to the marriage is based on chap. 70, Laws 1901. It is entitled, An act to amend a section of the Code relating to the dissolution of marriage. The only purpose of the act was to provide that neither party to a divorce may marry within three months after the decree. According to § 61 of the Constitution, the subject or purpose of every act must be expressed in its title. Otherwise, the act is void. Now the purpose of this act was to limit the time within which a party to a divorce may marry again, and that purpose is in no way expressed by the title of the act. Hence, we must hold the act void, or that its operation is harmless. It merely forbade a marriage, and did not make or declare it void. A marriage between near relations is not merely forbade; it is declared *absolutely void.* It were easy to have used this same explicit language in regard to the marriage of a divorced party, if the purpose of the legislature had been to make it *absolutely void.*

The rule is that a marriage shall not be held void unless the statute expressly declares it to be void. Where for years parties live and cohabit together as husband and wife, every marital and conjugal endearment becomes a ratification of the marriage right, and so of every day they live together as husband and wife.

Counsel for the defendant cites a Nebraska decision or *dictum* to the effect that there can be no valid marriage without the consent of the state. That is wrong. There were valid marriages and contracts to marry long before any state existed. The marriage of Adam and Eve and of Abraham, Isaac, and Jacob were perfectly valid, and yet they were not by consent of any state government. By the Catholic Church marriage is regarded as a sacrament, with which the state has no right

to interfere. The state is merely a corporation which the people make to serve their purpose, and not to obstruct their happiness or their natural rights. It has no claim to Divine right.

The effect of a judgment of divorce by a court of competent jurisdiction is to dissolve immediately the marriage contract and to leave the parties free to contract another marriage. Though for three months a marriage is forbidden, yet a marriage within that time is at most voidable. It is not declared void. It is not made a crime, and assuredly on every principle of law it may be ratified by cohabitation after the time limit. Under the present statute a decree of divorce must specify and limit the time to marry again, and any wilful disregard of the decree may be a contempt of the court, but the decree is not held up and suspended, like Mohammed's coffin, between the heavens and the earth.

Judgment affirmed.

BRUCE, Ch. J. (dissenting). I am compelled to dissent from the opinion and judgment of the majority. I am not willing to concede that it is yet the law in this country that a person can openly violate a public statute and then obtain the aid of the court to help him profit thereby. Here, the statute absolutely forbade the marriage of a divorced person within three months of the time the decree was granted. Here, the plaintiff who was a resident of the state, married the deceased within three months. After having defied the statute, she seeks the aid of the very courts she has defied, and to profit from the benefactions of inheritance laws which the bounty of the state has provided. Such a thing cannot, and should not, be done. I am fully aware of the general rule stated by Mr. Justice Christianson, that marriage is regarded with favor by the law, and statutes should not be construed so as to render a marriage void, unless the legislative intention is clear and unequivocal. This rule, however, was only made and has only been applicable for the protection of the innocent children of a marriage such as that before us. Surely it was not the intention of our legislature that the general rule, that marriages are favored, should be allowed to overcome its express statement, that a marriage within three months after a divorce should not be consummated, and to allow the guilty persons to reap rewards from their unlawful act.

The only cases, indeed, where I find the rule to have been adopted,

are cases in which the legitimacy or right of inheritance of innocent children was concerned, or the violation of the statute was not on the part of those who contracted the ceremony, but on the part of those who performed it, as, for instance, cases where minors were free to contract marriage, but the statute provided that ministers of the gospel should not solemnize such marriages without the consent of the parents. See Parton v. Hervey, 1 Gray, 119; 1 Bishop, Marr. & Div. §§ 431, 432.

Although, indeed, the majority opinion cites Mr. Bishop as authority for the proposition announced in it, Mr. Bishop takes entirely the other position. He, it is true, says, and cites authorities on the proposition, that a lack of qualification or right on the part of the minister or other official will not invalidate the marriage, but he expressly adds: "On the other hand, if the same statute which authorized the divorce provided that it should not operate to enable the divorced party to remarry, the case would seem to be that stated in the last section, and a new marriage in the same state would be void; though it would be good if contracted in another state or country,—the inhibition not being extraterritorial." See vol. 1, § 708. See also Dickson v. Dickson, 1 Yerg. 110–114, 24 Am. Dec. 444; Ponsford v. Johnson, 2 Blatchf. 51, Fed. Cas. No. 11,266; Re Webb, Tucker, 372; Thompson v. Thompson, 114 Mass. 566.

Even in § 707, referred to, he says: "But a statute conferring a capacity to marry, where it did not before exist, is to be rendered differently from one directing how an already existing right to marry shall be exercised; the terms of the capacitating provision furnish the measure of the right. Thus, a divorce statute having declared that 'where a marriage is absolutely annulled, the parties shall severally be at liberty to marry again, but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed during the life of the former husband or wife,' a marriage violative of the inhibiting clause was adjudged void; for all the parts of a law must be interpreted together."

The language used in the case cited by Mr. Bishop, indeed (Owen v. Bracket, 7 Lea, 448), is very suggestive; and answers well the argument of the majority opinion that there is a public policy superior to the public policy announced by the statute which forbids such marriages,

and which alleged rule of public policy, the majority hold, seeks to favor practically all marriages. "The statute," the Tennessee court says, "is plain and has been the law of this state since 1835. We are unable to appreciate the argument that 'the statute is opposed to public policy, is utterly void and in violation of common sense and the propagation of the human race.' We are of opinion it accords wih public policy, is predicated of common sense, and tends to assure a decent propagation of the human race."

The case was one very similar to that before us, and was one in which the alleged husband and wife claimed a homestead interest in a tract of land which had been levied upon in payment of a debt. The statute prohibited a defendant who had been guilty of adultery from marrying the person with whom the crime had been committed during the life of the former husband or wife, and the alleged marriage had taken place after a divorce between the first parties.

The rule, indeed, which makes the courts hesitant in setting aside and ignoring marriages has only, as a general rule, been recognized where the rights of innocent children have been involved, and I find no case where a party who has himself defied a statute has been allowed to go into the courts of the state where the act of defiance was committed and seek through it to profit thereby.

I am not even willing to concede that a marriage, even though solemnized in another state, but which was solemnized in defiance of the statute of North Dakota, would furnish a basis for the right to inherit in this state. I agree with the supreme court of Wisconsin, "that the statute under consideration is in no sense a penal law. It imposes a restriction upon the remarriage of both parties, whether innocent or guilty. Upon no reasonable ground can this general restriction be explained, except upon the ground that the legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages. The inference is unmistakable that the legislature recognized the fact that the sacredness of marriage and the stability of the marriage tie lie at the very foundation of Christian civilization and social order; that divorce, while at times necessary, should not be made easy, nor should inducement be held out to procure it; that one of the frequent causes of marital disagreement and divorce actions is the desire on the part

of one of the parties to marry another; that if there be liberty to immediately remarry, an inducement is thus offered to those who have become tired of one union, not only to become faithless to their marriage vows, but to collusively procure the severance of that union, under the forms of law, for the purpose of experimenting with another partner, and perhaps yet another, thus accomplishing what may be called progressive polygamy; and, finally, that this means destruction of the home and debasement of public morals. In a word, the intent of the law plainly is to remove one of the most frequent inducing causes for the bringing of divorce actions. This means a declaration of public policy or it means nothing. It means that the legislature regarded frequent and easy divorce as against good morals; and that it proposed not to punish the guilty party, but to remove an inducement to frequent divorce." See Lanham v. Lanham, 136 Wis. 360, 17 L.R.A.(N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787. See also opinion of Chief Justice Dunn in Wilson v. Cook, 256 Ill. 460, 43 L.R.A.(N.S.) 365, 100 N. E. 222.

I see nothing in the contention of respondent and in the contention of the majority opinion that there is no express provision of the statute which declares such marriages to be void. There is much, too, in the view taken by the supreme court of Washington in the case of Re Smith, 4 Wash. 702, 17 L.R.A. 573, 30 Pac. 1059, and that is, that "if the provision is to have any force, it seems to us it must limit the preceding part of the section, and the divorce cannot be held to be full and complete until the time mentioned in the provision has expired. It is full and complete for all purposes, excepting neither party shall enter into a marriage with any other person during the time specified, and it must be a limitation upon it in that respect. During this time, for this purpose, the decree of divorce is suspended and inoperative to that extent." Nor does the fact that after the three months' period the parties live and cohabit with one another make any difference, as common-law marriages are not recognized in North Dakota. See Schumacher v. Great Northern R. Co. 23 N. D. 231, 136 N. W. 85.

This fact serves to differentiate many of the cases cited by respondent, if differentiation is necessary. See also opinion of Chief Justice Dunn in Wilson v. Cook, supra.

Even if an expression of invalidity were necessary, which I do not

believe it to be, the North Dakota statute expressly declares illegal and void from the beginning, any marriage contracted by a person having a former husband or wife living, where the former marriage has not been annulled or dissolved. See § 4360 of the Compiled Laws of 1913. In my opinion and in the opinion of the Washington court, the decree as to a dissolution of the marriage bonds, as far as remarriage was concerned, was not operative until the expiration of the three months' period.

I am firmly of the opinion that the judgment of the district court should be reversed. It is also needless to say that I strenuously dissent from the theory of marriage and the public policy in relation thereto which is announced by Mr. Justice Robinson. It is to be remembered that this is not a case where the innocent children of the second marriage are seeking protection, but where the guilty parties themselves are alone involved.

FRED W. HINSEY v. H. C. ALCOX, Edwin A. Engebretson, and John R. McGibbon.

(164 N. W. 296.)

Attachment — bond — action on — place of trial — county of defendant's residence — venue — change of — absolute right.

1. In an action on an attachment bond the proper place of trial is the county in which the defendant or some of the defendants reside at the time of the commencement of the action. Under § 7417, Compiled Laws of 1913, the right of the defendants in this case to have the trial in the county in which they or some of them reside is an absolute right.

Change of venue — party entitled to — demand for — timely made — before time to answer expires — preserves right — order changing place — may be made after answering time has expired.

2. Where a party to an action is, under the law, entitled to a change of venue in civil actions, a demand for such change of venue served before the expiration of the time to answer preserves his right to a change of venue; if the demand for change of place of trial is not consented or agreed to by the party upon whom such demand is served, an application to the court may be made

for an order, and an order may be made changing such place of trial in pursuance of such application after the time for answering has expired.

Opinion filed July 21, 1917. Rehearing denied August 23, 1917.

Appeal from the District Court of Burleigh County, Honorable *W. L. Nuessle,* Judge.

Affirmed.

W. L. Smith, for appellant.

In a local action the venue is always in the county where the property is located.

This is a local action, and could not have occurred anywhere except in the county where the real estate is located. Comp. Laws 1913, § 7415, subdiv. 1, § 7418; Dhooghe v. Chicago, R. I. & P. R. Co. 91 Neb. 613, 136 N. W. 1075, and cases cited; Barbour v. Fidler, 31 S. D. 351, 141 N. W. 88; Small v. Gilruth, 8 S. D. 287, 66 N. W. 452.

McEnroe & Wood (*A. T. Faber,* of counsel), for respondent.

This action is based upon a written undertaking in attachment proceedings, and brought to recover damages. The action is purely transitory, and should be tried in the county of defendant's residence. 40 Cyc. 58 and 59; Comp. Laws 1913, § 7418.

Application for a change of place of trial must be made before time for answer expires. This is made by demand. If the other party does not consent, application may be made to the court for its order changing the place, and such order may be made even after the time for answer has expired. Comp. Laws 1913, § 7418; 40 Cyc. 144–2; Taylor v. Smith, 57 Hun, 587, 32 N. Y. S. R. 843, 11 N. Y. Supp. 29; Duche v. Buffalo Grape Sugar Co. 63 How. Pr. 516; Sherman v. Gregory, 42 How. Pr. 481.

Where the statute gives the right upon certain acts being done within a certain time, and the statute has been complied with, then the right is absolute and the court may make its order after the time for answer has expired. 40 Cyc. 147 and 148; Sumner County v. Wellington Twp. 39 Kan. 137, 17 Pac. 787; Willoughby v. Northeastern R. Co. 46 S. C. 317, 24 S. E. 308; Maharry v. Maharry, 5 Okla. 371, 47 Pac. 1051; Riley v. Pelletier, 134 N. C. 316, 46 S. E. 734.

Where the motion is heard and all parties participate therein without offering objection to the procedure or the jurisdiction of the court, they have waived any rights they may have had theretofore. Wood v. Herman Min. Co. 139 Cal. 713, 73 Pac. 588; Cartright v. Belmont, 58 Wis. 370, 17 N. W. 237; Willson v. Henderson, 15 How. Pr. 90; Ivanusch v. Great Northern R. Co. 26 S. D. 158, 120 N. W. 333.

GRACE, J. The question here presented involves the place of trial of a civil action, a demand for a change of venue for the trial of such action having been made and served prior to the time fixed by law for the defendant to answer the complaint of the plaintiff; to wit, thirty days had expired.

The complaint alleges a cause of action against H. C. Alcox, as principal, and Edwin A. Engebretson and John R. McGibbon, as sureties, who were principal and sureties on an attachment bond. At the time of bringing the action in which the warrant of attachment was issued and the attachment bond was given, the plaintiff was the owner of lot one (1), block 14 of the village of Moffit, in Burleigh county, North Dakota, upon which property the plaintiff had for several years engaged in general hardware, farm implement and merchandise business, the stock of which was alleged to be worth $1,400. It was alleged that the sheriff, in serving said warrant of attachment in such suit, entered upon plaintiff's property, fastened the doors and windows of the building, closing the same, and damaged the said real estate, seized and levied upon plaintiff's stock of merchandise, hardware, and farm implements. This action is brought on the attachment bond to recover for the damages to such real estate. All of the defendants reside and have their domicil in the city of Fargo, county of Cass, North Dakota. Plaintiff resides and has his family in Burleigh county, North Dakota.

Before the time of answering expired, the defendants' attorney made and served upon the attorneys for plaintiff after the complaint had been served upon them, and prior to the time for answering had expired, that is, the thirty-day period allowed by law for the defendant to answer the complaint of the plaintiff, a demand in writing for the change of the place of trial of such action from Burleigh county to Cass county, under § 7417, Compiled Laws of 1913, which is as follows: "In all other cases, subject to the power of the court to change the place of trial

as provided by statute, the action shall be tried in the county in which the defendant or some of the defendants reside at the time of the commencement of the action; provided, if such county is attached to another county for judicial purposes, the action shall be tried in the latter county; and if none of the defendants shall reside in the state, the action may be commenced in any county which the plaintiff shall designate in the summons."

In connection with this case it is also necessary to refer to § 7418, which is as follows: "If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county and the place of trial be thereupon changed by consent of the parties, or by order of the court as provided in this section. The court may change the place of trial in the following cases:

"1. When the county designated for that purpose in the complaint is not the proper county.

"2. When there is reason to believe that an impartial trial cannot be had therein.

"3. When the convenience of witnesses and the ends of justice would be promoted by the change."

The provisions of § 7415 are invoked by the plaintiff in this action, which section reads as follows: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute:

"1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property."

The remainder of such section has no application.

The appellant claims that the action at bar is one of recovery for injuries to real property. With this contention we cannot agree. The action is one upon an attachment bond.

The main element of damages, if any, in plaintiff's cause of action upon which damages were based, is the seizing and levying upon plaintiff's stock of merchandise, hardware, and farm implements, and the closing of plaintiff's business, and the alleged destruction of the same by

reason of the alleged wrongful attachment. This action is not to recover any personal property distrained by any process. Therefore, subdivision 4 of § 7415 does not apply. If the action were one brought by plaintiff against the defendants for damages only to plaintiff's real property by the defendants, then the action would properly be triable where the real property is situated, but such is not this action. This action is one to recover upon an attachment bond executed by the defendants and two sureties, and as such has no relation to the damages, if any, to the real property, excepting, where such damages are proved as an independent fact, then the principal on such bond and the sureties become liable for the payment of such amount. To make the question clear, let it be assumed that the plaintiff had maintained first a separate action to establish the damage, if any, to the real property; then, after judgment in this action, if any, was secured, should make demand upon the bond for the payment of such judgment, and in the event of the failure of the bondsmen to pay such judgment, an action should then be brought on the bond to recover an amount equal to the judgment so recovered. If this were done, it is clear that, in an action against the principal and sureties on the bond, they, living and having their domicil in a different county from that in which the real property is situated, would be, as a matter of right under §§ 7417 and 7418, Compiled Laws of 1913, entitled to have the place of trial at the county of their domicil, and their right to a change of the place of trial on a proper showing would be absolute. Where a party to an action is, under the law, entitled to a change of venue in civil actions, a demand for change of venue served before the expiration of the time to answer preserves his right to a change of venue, and in case the demand for the change of place of trial is not consented or agreed to by the party upon whom such demand is served, an application to the court may be made for an order to change such place of trial to the proper county, and an order may be made changing such place of trial in pursuance of such application, affidavit, or motion, or by motion in open court, at a term of the court in the county where such action was first pending, and all this after the time for answering had expired, it being made to appear that the demand for the change of place of trial was served before the expiration of the time specified by law for answering.

The motion in the case at bar for a change of venue to the proper

county where the defendants had their domicil was duly made in open court and while the attorneys for the respective parties were present. The court made an order granting a change of place of trial from Burleigh county to Cass county. In this we think the court was right and made a proper order in granting such change of venue.

The order of the District Court is therefore in all things affirmed, with costs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation, v. OLIVER COUNTY, a Municipal Corporation.

(164 N. W. 315.)

Complaint — statutory form of — cause of action — description of plaintiff's estate — interest or lien — description of land.

1. Under the statutory form of complaint set forth in § 8147 of the Compiled Laws, the complaint states facts sufficient to constitute a cause of action, so far as the description of plaintiff's estate is concerned, when the complaint shows that it "has an estate in, and interest in, the following described real property, situated in the above-named county and state, to wit: Mineral rights, assessed in Oliver county, North Dakota," and follows this with a detailed and itemized statement and description of the land, giving the section, township, and range.

Board of equalization — adjournment — description of real estate — inserted in assessor's books — by county auditor thereafter — value — computing taxes — extends same on tax lists — notice to plaintiff — no opportunity to be heard — assessments void.

2. Where the county auditor, after the adjournment of the board of equalization, inserts in the assessor's books a description of real property in the name of the plaintiff, and affixes a value thereto, computes the taxes thereon, extends the same on the tax list as taxes, advertises the land for sale for delinquent taxes, and sells the same at tax sale, all without notice to the plaintiff and without affording the plaintiff an opportunity to be heard on the assessment, such assessment is absolutely void.

Assessments — defects in — jurisdictional — courts — relief.

3. The defects in such assessment are of such a jurisdictional character that this court cannot afford relief under the provisions of § 2201 of the Compiled Laws.

Grantor — "mineral rights" reserved — reservation — interest in land — assessable — against grantor — taxes — payment by grantee — does not relieve grantor.

4. Where a grantor conveys land, reserving to itself the "mineral rights" as set forth in the opinion, such reservation is an interest in the land properly assessable against the grantor, and the payment of taxes by the grantee does not relieve the grantor from the duty of paying taxes on such reservations nor discharge the grantor's taxable obligations.

Opinion filed August 23, 1917.

Appeal from the District Court of Burleigh County, Honorable *W. L. Nuessle,* Judge.

Judgment affirmed.

George E. Wallace and *Robert Dunn,* for appellant.

Watson, Young, & Conmy, for respondent.

BURR, District Judge. The plaintiff brought this action under the statute to determine conflicting claims to real property. The complaint is in the usual statutory form, and requires the defendant to set forth all of its adverse claims to the property described, so that the validity thereof may be determined and that they be adjudged null and void, etc. The answer admits all of the allegations of the complaint, and, as affirmative relief, alleges "that during the year 1912 the defendant, by its proper officials, listed for taxation the lignite coal and minerals and the title to coal and minerals underlying the lands described in plaintiff's complaint, the ownership of which has been severed from the ownership of the overlying strata; and that theretofore the plaintiff has owned said land and sold the same, reserving to itself the ownership of the lignite coal and minerals underlying said land." The answer further alleges that, after the listing of the said lands for taxation, they were duly assessed for taxation purposes; that the same were equalized in the manner prescribed by law and the taxes duly levied; that said taxes were never paid and became delinquent March 1, 1913. The answer then sets forth a description of the lands so assessed, together with the taxes, penalty, and interest levied and assessed against each tract and prays that the said taxes be declared to

be and remain a lien upon the land, etc. The plaintiff's interest in the lands involved is set forth in paragraph 3 of the complaint, as follows:

That the plaintiff has an estate in, and interest in, the following described real property, situated in the above-named county and state, to wit:

Mineral Rights
Assessed in Oliver County, North Dakota.
1912.
Northwestern Improvement Company.

—following this with a columnized statement showing the description of the quarter, the section, township, and range in which the lands are situated and the number of acres in each parcel of land.

The facts in the case are stipulated by the parties, and from the stipulation we find: That all of the allegations in the complaint are true; that the title to the lands in question passed from the United States government to the Northern Pacific Railway Company; that the Northern Pacific Railway Company conveyed the land to the plaintiff; that the plaintiff conveyed said land to various owners, with the exception that in each instance of conveyance to said owners the plaintiff reserved all mineral rights, which reservations, contained in plaintiff's deeds, were in two forms, as follows:

Form 1. "Reserving and excepting from said lands as are now known, or shall hereafter be ascertained, to contain coal or iron, and also the use of such surface ground as may be necessary for mining operations, and the right of access to such reserved and excepted coal and iron lands, for the purpose of exploring, developing and working the same; the use of such surface ground and the right of access herein reserved to be for the use and benefit of said party of the first part, its successors, and its assigns of the lands hereby excepted."

Form 2. "Excepting and reserving unto the grantor, its successors and assigns, forever, all coal or iron upon or in said lands, together with the use of such of the surface as may be necessary for exploring for, and mining or otherwise extracting and carrying away the same. But the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are

commenced, of such portion of the surface as may be used for such operations, including any improvements thereon; the grantee, his heirs, and assigns shall notwithstanding have at all times the right to mine and remove such reasonable quantity of coal as may be necessary for his own domestic use."

That Oliver county had no organized townships in 1912, but the assessment was made by county assessors; that the assessment was made between the 1st day of April, 1912, and the 20th day of June, 1912; that the assessors' books were turned in and filed with the county auditor on or before June 20, 1912, and that the assessment made by the assessors included all of the lands described in the complaint; that the records so turned in contained no assessment of mineral reservations, and were in the same form as assessments of land where there were no mineral reservations; that the county board of equalization met in July, 1912, and adjourned without making or attempting to make any assessment of mineral reservations; that during the months of August and September, 1912, and after the adjournment of the board of equalization, the county auditor entered a valuation upon the assessors' books of $50 for the mineral reservation of each quarter; that no record action was taken by the board of county commissioners, no notice of such assessment given to the plaintiff, and no hearing had upon the valuation; that the county auditor had informed the board of equalization of his intention to make the assessment, and conferred informally with them, thereafter, on the subject of valuation; that after the assessment the county auditor copied the same into the tax lists and extended the same at the rate and in the amounts set forth in the answer; that the first information the plaintiff had as to the amounts claimed was contained in a notice sent by the county treasurer in the latter part of January, 1913, and that no notice was given nor opportunity afforded to appear before any board on the matter of the assessment in question; that the assessment, as inserted in the assessors' books, by the county auditor, was extended on the tax list for 1912 and the county auditor caused the same to be advertised and the land sold for delinquent taxes in December, 1913, and were bid in by the county, with the usual certificates of sale issued; that in the assessors' books, under the heading of "Owner of Land," the auditor wrote: "Owner of minerals and coal," and wrote, as and for the owner, "N. W. Imp. Co.," and in describing

all and every of the subdivisions of land used letters and figures in the following form: "2–3–141–86 321 '100' "—the letters and figures being varied to describe each parcel as occasion required; that in all descriptions of the lands, in books and lists, notices and certificates, the same symbolic characters were used; that the board of equalization, in passing upon the assessments of these lands, valued and equalized them without regard to mineral reservations, and that the county assessors in assessing the land did not add to or subtract from the values of the lands, because of the division of title or severance of the mineral reservations; that the values as affixed by the county auditor in the months of August and September, 1912, were in addition to the values as returned by the assessors and as equalized by the county board, and constituted a valuation in addition to that imposed upon similar land where the mineral rights had not been severed; that the plaintiff has never made any examination of the lands in controversy for the purpose of determining whether or not there are minerals in or upon it, and have no knowledge as to whether there is any mineral of any kind upon any of said tracts; and that the Northern Pacific Railway Company has never made any such examination and has no knowledge of any mineral on said tracts. By the stipulation of the parties this action was tried in the county of Burleigh, before the Honorable W. L. Nuessle, judge of the district court of said county, and in said court decision was rendered in favor of plaintiff, and judgment entered holding all claim and interest on the part of the defendant herein to be null and void, and quieting title to the lands involved in the plaintiff as against all asserted claims of this defendant. From this judgment the defendant appealed, asking a trial *de novo.*

The first question to be determined is whether the complaint states a cause of action in favor of the plaintiff. This issue is not raised by the parties but by a member of this court, and is based upon the description of the title or interest in the real property claimed by the plaintiff and set forth in its complaint. Paragraph 3 of the complaint alleges: "That the plaintiff has an estate in and interest in the following described real property, situated in the above-named county and state, to wit: Mineral rights assessed in Oliver county, North Dakota," —following this, with a detailed description of the several parcels of land, aggregating in all over 26,000 acres. There was no motion to

make the description of the interest in the real property more specific, the description follows the form set forth in § 8147 of the Compiled Laws, and the term, "mineral rights assessed in Oliver county, North Dakota," while qualifying to a certain extent the allegation that the plaintiff has an estate in the real estate thereinafter described, is the description of the real estate claimed by the plaintiff. Mineral rights in land are analogous to mining rights, and mining rights are considered a particular estate in land. Smith v. Cooley, 65 Cal. 46, 2 Pac. 880. In this case cited the grantor had conveyed an interest expressly conditioned as "a mining right on the premises above" described, and this "mining right" is held to be an estate in real property. In the case at bar the estate in land is described as mineral rights in certain land, and the stipulation of facts, as well as the answer, admit that the plaintiff has an estate in lands described consisting of mineral rights in said land. The whole case is based upon the attempt of the county to assess these "mineral rights," as real estate held by the plaintiff, and if the "mineral rights" claimed were too vague a description of real estate or suggested a possibility of personal property, the question should have been raised upon motion or demurrer. The admitted facts show an express reservation of title to a portion of the real estate, to wit, the minerals in and upon the land, with right to such use of the surface as may be necessary to use for the purpose of exploration and mining. The fact that it is not certain whether there is any mineral in said land or in portions of said land does not render the reservation void. The plaintiff still has the right to go upon the land and use such portion thereof as may be necessary for exploration and mining. We think the complaint states a sufficient estate in real property to maintain a cause of action.

It is clear that the assessment as made by the county auditor is null and void. The description of the lands as set forth on the assessment roll is in the form which has been repeatedly declared by this court to be insufficient as a basis of taxation. In Power v. Larabee, 2 N. D. 141, 49 N. W. 724, this court said: "No valid assessment was made or could be made on such pretended description." This rule was followed in numerous cases since. It is not necessary to determine here whether such rule should be abandoned, for the attempted assessment made by the county auditor is void on other grounds. Under the pro-

visions of § 2216 the county auditor, "if he has reason to believe . . . that the assessor . . . has omitted . . . any property which is by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer, to correct the return of the assessor, and to charge the owners of such property, on the tax lists, with the proper amount of taxes," but "the auditor in all such cases shall notify every such person before making the entry on the tax list that he may have an opportunity of showing that his statement on the return of the assessor is correct; and the county auditor shall, in all cases, file in his office a statement of the facts of evidence upon which he made such correction." The notice to "every such person" as required in this section is to the owner as well as to anyone "whom he may suppose to have knowledge of the articles or article of the property," and the stipulation of facts shows expressly that this was never done. No notice was ever given to the owners, and no statement of the facts filed in his office. It is clear, therefore that the assessment is void.

The appellant urges, however, that even though the act of the county auditor may not have been in compliance with the statute, yet, under the provisions of § 2201, the court has the power to reduce the amount of taxes, if the same are excessive, to give judgment accordingly, and to amend and correct all irregularities and defects in the form or manner of assessment. This section says: "In any action . . . for the . . . annulment of taxes levied . . . against any . . . property in this state and in any action or proceedings to determine adverse claims to real estate, no tax shall be set aside for any irregularity or defect in form or illegality in assessing, laying or levying such tax, if the . . . property upon which such tax is levied, assessed or laid is in fact liable to taxation, unless it be made to appear to the court that such irregularity resulted to the prejudice of the party objecting, . . . the court shall also have power to amend and correct all irregularities or defects in the form or manner of assessment." We hold that this section does not confer upon this court the power to make an assessment and levy taxes. The defects and irregularities in this case are not defects or irregularities in manner or form alone; they are jurisdictional in character. While we hold, as hereinafter stated, that said mineral rights are, in fact, liable to taxation, and while in such cases the statute says that a tax shall not be set aside for any illegality

in assessing or levying a tax in such cases; yet the illegality which may be corrected by the court is an illegality simply as to some portion of the proceedings only,—an illegality that does not destroy the attempted assessment *in toto,* but merely a part of the proceedings,—and, in any event, the action of the court in maintaining an assessment under the facts stipulated here would certainly result in prejudice to the plaintiff, unless the court would sit as an assessing and equalizing board. That this power and authority conferred upon the court by this section, in order to cure defects in assessment, does not apply to the case at bar. See State Finance Co. v. Bowdle, 16 N. D. 193, 112 N.W. 76. Neither is the plaintiff debarred from maintaining this action because no tender is made of any sum for taxes. There is no tax levied, and no offer need be made. There is ample remedy for the county so that the property will not escape taxation. Under the provisions of § 2217 of the Compiled Laws, it is the duty of the county auditor to keep a book in which he shall enter each year all real property which shall have been omitted in the assessment of any previous years, or the assessment of which has been set aside by the judgment of any court, in order that the said property will not escape taxation.

It is urged by respondent that no taxes should be levied upon this property, for the reason that all taxes have been paid by the surface owner. Counsel for respondent cites § 2076 in support of the contention that the mineral rights cannot be taxed separately from the land. This section states that "real property, for the purpose of taxation, includes the land itself—and all mines, minerals, quarries, in and under the same." The definition also includes "all rights and privileges" belonging to the land. The aim of this section is to include in real property everything which is connected therewith in its use and for which the ground itself is a constituent element. The statute undertakes to say what is defined as real estate, but it does not say in whose name the same shall be assessed. Here are parcels of land where the grantor reserved to himself certain specified interests. The interests conveyed by the grant and the interests reserved to the grantor are clearly ascertainable from the records. They are just as separate and distinct as if the grantor had conveyed an undivided one-half interest. The fact that the auditor was able, from the records alone, to ascertain the interests of the plaintiff herein, so as to place them

upon the assessment roll after the adjournment of the board of equalization, and that these reservations were of long-standing record, shows that they could have been placed upon the assessors' books before the delivery of the same to these officials. That such reservations as these should be assessed in the name of the plaintiff, if they have taxable value, is clear from the nature of the conveyance. Formerly all of the land—the surface and the mineral rights—was owned by the plaintiff. Plaintiff devested itself of the surface and the use of the land, but retained an interest therein for itself. This interest retained must necessarily detract from the value of the land to the grantee. If plaintiff's theory is correct the grantee would be compelled to pay all of the taxes, and then adjust with the plaintiff the proportion plaintiff should pay. The law does not contemplate putting this burden upon the grantee. To the extent to which it detracts from the value of the land it is an interest in the land belonging to the plaintiff. A decision of the supreme court of Montana delivered in July of this year—Northern P. R. Co. v. Musselshell County, — Mont. —, 169 Pac. 53, sustains this view. While it is true the presumption is that the public officers do their duty and that the assessors, in valuing these parcels of land, assessed them at their proper value, yet it is just as reasonable to presume that the assessors, in valuing the land, valued simply the interest of the owner named in the assessors' records. If that owner paid a larger tax than he should have paid, that is a matter of adjustment between him and the county. The records of the register of deeds show the reservations in favor of the plaintiff, and we have as much right to assume that the assessors, in valuing this land, were guided by their knowledge of these reservations and, therefore, assessed to the owner named simply his interest in the land, as that said assessors included in the interest of the owner named the value of these minerals and thus compelled the owner—the grantee—to pay the share of taxes that plaintiff should have paid. The value of these mineral rights can be ascertained. In the stipulation of facts it stated that certain persons, if sworn as witnesses, would testify that intending purchasers of these tracts, where the reservations had been made by the grantor, refused to carry out their contracts unless a reduction in the price of the land was made, the reduction running all the way from $1.50 an acre to $500 on a quarter. Where no mines have been opened, and where no deposits

of coal have been ascertained so as to be able to estimate the amount of mineral present in the land, the difference of the value of the land as sold with and without this reservation of title in the grantor would measure the value of plaintiff's interest in the land. Where the amount of mineral in the land has been ascertained, then the value of that mineral, together with the value of the rights to go upon the lands, would be a fair measure of the plaintiff's interest.

The judgment of the lower court is affirmed.

BIRDZELL, J., being disqualified, did not participate, the Honorable A. G. BURR, Judge of the Ninth Judicial District, sat in his place.

CHRISTIANSON, J. (concurring specially). I concur in the propositions announced in paragraphs 1, 2, and 3 of the syllabus, and this will result in an affirmance of the judgment. In this connection, however, I desire to say that I concur in the proposition announced in paragraph 3 of the syllabus, solely on account of the construction placed upon § 2201, Compiled Laws 1913, by this court in State Finance Co. v. Bowdle, 16 N. D. 193, 198, 112 N. W. 76, and Grand Forks County v. Frederick, 16 N. D. 118, 124, 125 Am. St. Rep. 621, 112 N. W. 839. If this was a case of original impression, I should unhesitatingly hold to the contrary.

My ideas with respect to curative statutes in tax proceedings were well expressed by the supreme court of New Jersey in Elizabeth v. State, 45 N. J. L. 157, 159. The court said: "It [the purpose of the legislature] was to assign to the court the province of seeing that its suitors who were liable, or whose property was subject to these assessments for public improvements and who were seeking to vacate any of such assessments, should in every event be made to bear their fair and legal share of the burden. This provision was well timed and most salutary; for while it preserves to the owner of the property the ability to relieve himself from so much of his tax as is unjust, it at the same time, and by a summary procedure, compels him to do justice to the public by paying such part of his assessment as is justly due. This law is, in the highest sense, remedial, and should be construed with liberality, so as to abate the mischief of taxpayers avoiding, by litigation, their honest dues to the government."

I also agree that a reservation of mineral right is an interest in real property, assessable against the grantor making the reservation, but express no opinion upon the other matters covered by paragraph 4 of the syllabus.

ROBINSON, J. (specially concurring). The plaintiff brings this action in the form of a suit to quiet title to land. It avers that it has some title or interest in some 120 tracts of land in Oliver county, to wit, "Mineral Rights" and that defendant claims certain liens adverse to the plaintiff. Defendant county by answer sets up a claim of lien, and it was duly adjudged that the claim of the county is void, and defendant appeals to this court.

The claim is based on certain tax proceedings for the year 1912, which are manifestly void, for the reason that in 1912 there was no assessment for taxation of the mineral rights described in the pleadings.

The only question is, Can the plaintiff maintain this action? It is not an action in equity, because the complaint makes no appeal to equity. It is based on the statute, which provides: "An action may be maintained by any person having an estate or interest in real property against another who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim." Rev. Codes 1899, § 5904. The plaintiff does not come within the statute. Neither the complaint nor the evidence shows that the plaintiff has any title or interest in the lands. The complaint avers merely that the plaintiff has an estate and interest in certain described lands, to wit, "Mineral Rights." It contains not a word to show that there is any mineral on either or any of the tracts of land. In the brief of the respondent it is said no examination of these lands has been made, and it is not known whether they contain mineral of any kind or not; and that is strictly in accord with the stipulation, § 19. Now as the pleadings and the evidence fail to show that the plaintiff has any title or interest in the lands, the case presents merely a moot question, and not any right to real property. Hence, the action should be dismissed. This court will not waste its time in considering and deciding cases about nothing.

THE STATE OF NORTH DAKOTA v. A. F. DAVIS.

(164 N. W. 698.)

Crows — shooting of — private diversion — public — not witnessed by — Sabbath breaking — crime of — does not constitute.

The shooting of crows as a private diversion, not witnessed by the public generally, and in such a way as not to attract a crowd or to injure anyone, does not constitute the crime of Sabbath breaking.

Opinion filed September 15, 1917.

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

Reversed.

Barnett & Richardson, for appellant.

Defendant and companions were out hunting and shooting on Sunday. This act, as well as the formation of the party, was for private diversion only, and not for the amusement or entertainment of the public. There was nothing in this intended or amounting to "public sports." Penal Code, § 9238, as amended by Senate Bill 137 being an act passed by the legislature of 1917.

This statute prohibits only such "shooting" as constitutes a "public sport," and does not prohibit "shooting" which is private and so indulged as a diversion. People v. Dennin, 35 Hun, 327; People v. Moses, 140 N. Y. 214, 35 N. E. 499.

Playing ball on Sunday if exercised privately, and it is shown that the religious repose of the community is not interrupted, does not come within the statute. People v. Poole, 44 Misc. 118, 89 N. Y. Supp. 773; Moore v. Owen, 58 Misc. 332, 109 N. Y. Supp. 585; Re Allen, 34 Misc. 698, 70 N. Y. Supp. 1017; People ex rel. Bedell v. DeMott, 38 Misc. 171, 77 N. Y. Supp. 249; N. Y. Penal Code, § 265; People ex rel. Poole v. Hesterberg, 43 Misc. 510, 89 N. Y. Supp. 498; People v. Finn, 57 Misc. 659, 110 N. Y. Supp. 22.

Any of the prohibited acts must be of a public nature, to constitute

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NOTE.—As to what amusements are prohibited by Sunday laws, see note in 30 L.R.A.(N.S.) 465.

crime. People v. Hemleb, 127 App. Div. 356, 111 N. Y. Supp. 690; William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594; People v. Roach, 61 Misc. 42, 114 N. Y. Supp. 742; Edwards v. McClellan, 118 N. Y. Supp. 181; Klinger v. Ryan, 91 Misc. 71, 153 N. Y. Supp. 937; People ex rel. Klinger v. Rand, 91 Misc. 276, 154 N. Y. Supp. 293.

The general trend of the authorities is to hold that innocent, healthful amusements may not unnecessarily be prohibited, where the public in its religious observation of the Sabbath is not disturbed—private sports are not included. Ex parte Roquemore, 60 Tex. Crim. Rep. 282, 32 L.R.A.(N.S.) 1186, 131 S. W. 1101; Re Hull, 18 Idaho, 475, 30 L.R.A.(N.S.) 465, 110 Pac. 256; State v. Prather, 79 Kan. 513, 21 L.R.A.(N.S.) 23, 131 Am. St. Rep. 339, 100 Pac. 57; Ex parte Neet, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025; State v. Chamberlain, 112 Minn. 52, 30 L.R.A.(N.S.) 335, 127 N. W. 444, 21 Ann. Cas. 679; State v. Penny, 42 Mont. 118, 31 L.R.A.(N.S.) 1155, 111 Pac. 727; Com. v. Alexander, 185 Mass. 551, 70 N. E. 1017; Cheeves v. State, 5 Okla. Crim. Rep. 361, 114 Pac. 1125; Rucker v. State, 67 Miss. 328, 7 So. 223.

William Langer, Attorney General, and *George K. Foster,* Assistant Attorney General, for respondent.

"All shooting, sporting, horse racing, gaming, or other public sports, upon the first day of the week, are prohibited." Comp. Laws 1913, § 9238; State v. Fargo Bottling Works Co. 19 N. D. 396, 26 L.R.A. (N.S.) 872, 124 N. W. 387; 2 Lewis's Sutherland, Stat. Constr. 2d ed. § 519; United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740.

"The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of its terms, with a view to effect its object and promote justice." Cal. Penal Code, § 4; People v. Fowler, 88 Cal. 136, 25 Pac. 1110; State v. McGillic, 25 N. D. 35, 141 N. W. 82; Rex v. Younger, 5 T. R. 449, 101 Eng. Reprint, 253, 2 Revised Rep. 638; Smith v. Sparrow, 4 Bing. 84, 130 Eng. Reprint, 700, 12 J. B. Moore, 266, 2 Car. & P. 544, 5 L. J. C. P. 80, 29 Revised Rep. 514; Williams v. Paul, 6 Bing. 653, 130 Eng. Reprint, 1433, 4 Moore & P. 532, 8 L. J. C. P. 280, 31 Revised Rep. 512; Fennell v. Ridler, 5 Barn. & C. 406, 108 Eng. Reprint, 151, 8 Dowl. & R. 204, 4

L. J. K. B. 207, 29 Revised Rep. 278; Tucker v. West, 29 Ark. 400; Scammon v. Chicago, 40 Ill. 149; Towle v. Larrabee, 26 Me. 469; Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; Northrup v. Foot, 14 Wend. 248; People v. Hoym, 20 How. Pr. 76; Brunnett v. Clark, Sheldon, 502; Albrecht v. State, 8 Tex. App. 313; Re Allen, 34 Misc. 698, 70 N. Y. Supp. 1017; Cook's Crim. Code, 1913 ed. § 2152; Nairn v. University of St. Andrews [1909] A. C. 147, 78 L. J. P. C. N. S. 54, 100 L. T. N. S. 96, 25 Times L. R. 160, 53 Sol. Jo. 161, [1909] S. C. 10, 46 Scot. L. R. 132; Ill. Crim. Code, § 23, div. 1; Hurd's Rev. Stat. (Ill.) ¶ 20, chap. 38, p. 753; 2 Ill. Anno. Stat. 1911, chap. 38, ¶ 3505; Hall v. State, 48 Wis. 688, 4 N. W. 1068; Pooler v. State, 97 Wis. 627, 73 N. W. 336; Utah Rev. Stat. 1898, § 4334, amended by Sess. Laws 1905, chap. 19, p. 16; State v. Hows, 31 Utah, 170, 87 Pac. 163; Ala. Code 1907, § 7814; Smith v. State, 50 Ala. 159.

"It is thus seen that among the acts specifically prohibited on Sunday is fishing. That is absolutely prohibited on Sunday everywhere and under all circumstances. It may be done in a community where it does not offend the sensibilities of anyone—and in such manner as not to disturb the peace or interrupt the repose of religious liberty of the community, and yet the law is violated. It is quite unreasonable to suppose that the legislature meant that whenever any of these acts are charged as a violation of the law, an issue can be framed and tried as to their public, offensive, or disturbing character. The legislature has settled that matter by prohibiting them absolutely." People v. Moses, 140 N. Y. 216, 35 N. E. 499; Johnston v. Com. 22 Pa. 111.

Robinson, J. This case comes here on appeal from a judgment against defendant on an information charging that on August 26, 1917, the defendant did commit the crime of Sabbath breaking. That he, with a private hunting party of one or more persons, went a hunting for the shooting of crows, and that for their private diversion Davis and his party did hunt and shoot crows on divers tracts of land; that the hunting and shooting was not open to participation on the part of the public, and it was not for the amusement or entertainment of the public, and that said parties had legal hunting permits.

Nothing is said of the kind or character or number of crows shot, or as to whether they were bad crows or good crows. The prosecution

is under an old section of the Penal Code of 1877. It reads: The following acts are forbidden to be done on the first day of the week, for the doing of which is Sabbath breaking.

1. Servile labor excepting work of necessity and charity.
2. Public sports.
3. Trades, manufactures, and mechanical employment.
4. Public traffic.
5. Serving process.

All shooting, sporting, horse racing, gaming, and other public sports upon the first day of the week are prohibited.

As amended in 1917 this last section reads:

All shooting, sporting, horse racing, and other public sports on the first day of the week are prohibited. The word "gaming" was omitted by inadvertence or mistake, and the rest of the amendment relates to baseball playing.

So, the charge against the defendant is based on an old Sunday statute as it has stood on the books during fifty-two years. By its plain words the statute refers to and prohibits only public shooting and other public sports. The shooting charged against Davis was a private sport. It was not given as a public entertainment or a public exhibition. It was not done in such a way as to attract a crowd of people or to injure or offend any person. It was a mere private diversion. Hence, the judgment is reversed and the defendant discharged.

ALFRED M. KVELLO et al. v. CITY OF LISBON et al.

(164 N. W. 305.)

City council — plans — specifications — estimates — for special assessments — levy of — for city improvements — findings and declarations of council — prerequisite — mandatory.

1. A finding and declaration by the city council which is based upon and refers intelligently to the plans, specifications, and estimates, is a prerequisite to the levying of a special assessment for the erection of a standpipe, under the provisions of article 20 of chapter 44 of the Compiled Laws of 1913. Such requirement is held to be mandatory, and not to have been complied with in the case at bar.

Statutes — provisions — lots to be assessed — personal inspection of — for local improvement — benefits — amount of — determination of — mandatory.

2. The provisions of § 3726 of the Compiled Laws of 1913, which require a personal inspection of the lots sought to be assessed for a local improvement and a determination from such inspection of the amount to which they will be benefited, are mandatory, and are *held* not to have been complied with in the case at bar.

Standpipe — erection of — contract let for — special assessment levied — waterworks district — not created — reassessment — remanded to district court — for such purpose — supreme court has no power to so order.

3. Where a contract is let for the erection of a standpipe, and a special assessment levied therefor without a preliminary creation of a waterworks district, or a preliminary finding of necessity by the city council, the supreme court has no power under the provisions of §§ 3714 and 3715, Compiled Laws of 1915, alone to remand the case to the trial court for a reassessment.

Standpipe — erection of — contract let for — special assessment levied — without preliminary finding — reassessment may be made — council may go back — improvement necessary — finding of city council — resolutions of council — may correct errors.

4. Where a contract is let for the erection of a standpipe, and a special assessment levied therefor without a preliminary creation of a waterworks district, or a preliminary finding of necessity by the city council, a reassessment can be made under the provisions of § 3713, Compiled Laws of 1913; and in such a case the municipality is given power by the statute to go back and pick up the thread of its proceedings where it has been broken off, to establish a waterworks district, to pass a resolution of necessity,—if they, in fact, find the improvement to be necessary,—publish such a resolution, allow the statutory period for hearing objections, make the proper orders if objections are not made or are overruled, and proceed to the ultimate end of the collection of the assessment, and this although the improvement may already have been completed.

Parties similarly interested — suit by one — for benefit of all — lot owners — join as plaintiffs — nominal — must come into action — and claim and accept thereunder — decree — what parties to be included.

5. One of several lot owners may sue on behalf of all others similarly situated to enjoin the collection of an illegal special assessment. Where, however, the other lot owners are not specifically made parties plaintiff, and have not personally joined in the action, but have merely stood by and allowed the action to be brought for all others similarly situated, and their names and lots and property to be mentioned in the body of the complaint, and the relief prayed to be asked for them as well as for the nominal plaintiffs, before they can be

benefited by the judgment, they should come in in some way and claim thereunder and accept the same, and the decree in such case should be that the cause is remanded with directions to enter judgment for the nominal plaintiff as prayed for in the complaint, and also for such of the other parties whose names and property are mentioned in the said complaint and who shall make application to the court to come under the judgment, and who shall prove themselves entitled thereto.

Opinion filed September 24, 1917.

Action to set aside a special assessment.

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

Judgment for defendants. Plaintiffs appeal.

Reversed.

Rourke, Kvello, and *Adams,* for appellants.

The proceedings of the city council were invalid, and the council lacked jurisdiction because it never, prior thereto, had created a "waterworks district" as by law required, or in any other manner. Price v. Fargo, 24 N. D. 440, 139 N. W. 1054; Rev. Codes 1905, § 2772, Comp. Laws 1913, §§ 3698, 3701–3703, etc.; Laws 1913, chap. 74.

It is the law that statutory requirements relating to special assessments should be strictly construed to the end that inequalities and confiscations should be reduced to the minimum. McLauren v. Grand Forks, 6 Dak. 397, 43 N. W. 710; Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249; Whittaker v. Deadwood, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590; Haggart v. Alton, 29 S. D. 509, 137 N. W. 372; Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544; Morse v. Omaha, 67 Neb. 426, 93 N. W. 737.

Whatever may be the basis of apportionment for a special assessment a taxing district must necessarily be established. Hoyt v. East Saginaw, 19 Mich. 39, 2 Am. Rep. 76; Whitney v. Hudson, 69 Mich. 189, 37 N. W. 184; Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544.

It is the law that statutes authorizing the laying off or creation of improvement districts in municipalities are mandatory and jurisdictional. McCaffrey v. Omaha, 91 Neb. 184, 135 N. W. 552; Wiese v. South Omaha, 85 Neb. 844, 124 N. W. 470; Improvement Dist. v. Cotter, 71 Ark. 556, 76 S. W. 552; Asheville v. Wachovia Loan & T. Co. 143 N. C. 360, 55 S. E. 800.

The law gives no authority for the construction by special assessment of a standpipe, where a waterworks system already exists, and the council was without jurisdiction for such reason. Clay v. Grand Rapids, 60 Mich. 451, 27 N. W. 596; Comp. Laws 1913, § 3698, Laws 1913, chap. 74.

The proceedings were also invalid because the city engineer never prepared plans, specifications, and estimates for the work. Comp. Laws 1913, § 3703; Baker v. La Moure, 21 N. D. 140, 129 N. W. 464.

The proceedings were invalid, and the council had no jurisdiction, for the further reason that no resolution finding and declaring the work necessary to be done was ever passed or published by the council. Comp. Laws 1913, § 3704; McLauren v. Grand Forks, 6 Dak. 397, 43 N. W. 710; Stephan v. Daniels, 27 Ohio St. 527; Caldwell v. Carthage, 49 Ohio St. 334, 3 N. E. 602; Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544; German Lutheran Church v. Mt. Clemens, 179 Mich. 35, 146 N. W. 287; Pacific Paving Co. v. Verso, 12 Cal. App. 362, 107 Pac. 590; Michigan C. R. Co. v. Huehn, 59 Fed. 335; Hoyt v. East Saginaw, 19 Mich. 39, 2 Am. Rep. 76.

No notice of the proposed improvement was ever given the taxpayers because the purported resolution of necessity did not "intelligently" refer to the plans, specifications, and estimates of the work to be done. Comp. Laws 1913, § 3704; Whittaker v. Deadwood, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590; Code, § 1303; 28 Cyc. 981; Atlanta v. Gabbett, 93 Ga. 266, 20 S. E. 306; Holden v. Chicago, 172 Ill. 263, 50 N. E. 181; State ex rel. Bowen v. Sioux Falls, 25 S. D. 3, 124 N. W. 963.

The proceedings were invalid because neither the city engineer nor any other competent person employed by the city supervised or inspected the construction of the standpipe or certified that the work had been done and completed in accordance with the contract. Comp. Laws 1913, §§ 3703, 3709, 3725; Baker v. La Moure, supra.

The proceedings were void and the council had no jurisdiction because the assessment made by the special assessment commission was illegal and invalid in every respect. There was no personal inspection of the lots or property which might be subjected to the special assessment, and no determination as to benefits. Robertson v. Grand Forks,

27 N. D. 556, 147 N. W. 249; McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808.

Plaintiffs are neither estopped nor are they guilty of laches. It is wholly immaterial whether or not they entered protests or objections. If the council and assessment commission were without jurisdiction, then their acts are invalid and "protests" would not validate them. They were engaged in doing an act where their method of procedure was fully outlined to them, by statute, and they are not allowed to act or perform in any other manner. McKenzie v. Mandan, and Robertson Lumber Co. v. Grand Forks, supra; McLauren v. Grand Forks, 6 Dak. 397, 43 N. W. 710; Lyon v. Tonawanda, 98 Fed. 362; Morse v. Omaha, 67 Neb. 426, 93 N. W. 734; Steckert v. East Saginaw, 22 Mich. 110; Hamilton, Taxn. by Special Assessments, §§ 723, 738.

J. V. Backlund, City Attorney, *P. H. Butler,* and *Chas. S. Ego,* for respondents.

"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." Const. art. 2; Rolph v. Fargo, 7 N. D. 640, 42 L.R.A. 651, 76 N. W. 242.

The power to impose special assessments goes back to the year 1691 in America. Holley v. Orange County, 106 Cal. 420, 39 Pac. 790; "The Better Tax in America," by John Rae, Contemporary Review, May, 1890; Hamilton, Taxn. by Special Assessments, § 7; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451.

The principles of taxation by special assessment are sustained by the great weight of authority. Special assessments are derived from an exercise of the taxing power of government, rather than from an exercise of the police power or right of eminent domain. Holley v. Orange County, 106 Cal. 420, 39 Pac. 790; Nichols v. Bridgeport, 23 Conn. 189, 60 Am. Dec. 636; McComb v. Bell, 2 Minn. 295, Gil. 256; Adams County v. Quincy, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624; State, Sigler, Prosecutor, v. Fuller, 34 N. J. L. 227; Schenley v. Allegheny, 25 Pa. 128; Reelfoot v. Dawson, 97 Tenn. 151, 34 L.R.A. 725, 36 S. W. 1041; Norfolk v. Young, 97 Va. 728, 47 L.R.A. 574, 34 S. E. 886; Allen v. Drew, 44 Vt. 174; Hackworth v. Ottumwa, 114 Iowa, 467, 87 N. W. 424; Weeks v. Milwaukee, 10 Wis. 243; Gould v. Baltimore, 59 Md. 378.

The only restrictions which are recognized are that such assessment must be for a public purpose, the property charged therewith must be specially benefited by the improvement, and the assessment must be apportioned according to the benefits, and must not be in excess thereof. State ex rel. Stateler v. Reis, 38 Minn. 371, 38 N. W. 97; Const. § 130; Code, subd. 5, § 3599.

These laws are liberally construed with reference to local improvements. Laws 1905, §§ 137, 154, chap. 62; Laws 1911, § 1, chap. 70; Laws 1913, chap. 74, § 1; Comp. Laws 1913, §§ 3698, 3714.

Such statutes should receive a construction which will, if possible, avoid an unjust or absurd conclusion. Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; People ex rel. Atty. Gen. v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243; Gray v. Cumberland County, 83 Me. 429, 22 Atl. 376; Crocker v. Crane, 21 Wend. 211, 34 Am. Dec. 228; Kane v. Kansas City, Ft. S. & M. R. Co. 112 Mo. 34, 20 S. W. 532.

The city council was authorized to create a "waterworks district." This can be extended and made to cover and include a greater area than the water-main district. Laws 1913, chap. 74.

If the council made a mistake in such proceedings, that should not vitiate the assessment. Comp. Laws 1913, § 3714.

The city council had power to build a standpipe, even though a waterworks system already existed. Appellant's argument would result in the conclusion that such cities as have no waterworks system may establish one by special assessment; but cities that have part of such a system may not complete it and make it efficient through the same means. This is not the law. Comp. Laws 1913, § 3698; 36 Am. Dig. Century ed. title "Municipal Corporations," ¶ 810; 28 Cyc. 1004, ¶ (iii) "Declarations of Necessity and Utility;" Hughes v. Parker, 148 Ind. 692, 48 N. E. 243; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Barber Asphalt Paving Co. v. Edgerton, 125 Ind. 455, 25 N. E. 436.

Our statute does not say or even contemplate that the procedure provided therein shall be strictly or technically followed. The statutes do provide that mistakes shall not vitiate the proceedings, but may be

corrected. Shapard v. Missoula, 49 Mont. 269, 141 Pac. 544; Comp. Laws 1913, § 3704.

The statute does not require that the resolution of necessity shall do more than so declare, and give the location and a general description of the standpipe to be erected. It is not necessary to give the dimensions. Whittaker v. Deadwood, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590; State ex rel. Bowen v. Sioux Falls, 25 S. D. 3, 124 N. W. 963.

The improvement as constructed was accepted and used and the contract under which it was built fully performed. Appellants knew the pipe was being erected; they knew it was for a public use; they knew it was to be paid for by special assessments, and yet they stood by and maintained a silent attitude until all these things had transpired, and made no objection. They are estopped now to complain. Tone v. Columbus, 39 Ohio St. 281, 48 Am. Rep. 438; People v. Weber, 164 Ill. 412, 45 N. E. 723; Hawthorne v. East Portland, 13 Or. 271, 10 Pac. 342; Chadwick v. Kelley, 187 U. S. 542, 47 L. ed. 293, 23 Sup. Ct. Rep. 175; Blake v. People, 109 Ill. 504; Hall v. Slaybaugh, 69 Mich. 484, 37 N. W. 545; Houston v. Wheeler, 52 N. Y. 641; State ex rel. Schintgen v. La Crosse, 101 Wis. 208, 77 N. W. 167; Hoefgen v. Harness, 148 Ind. 224, 47 N. E. 470; Givins v. People, 194 Ill. 150, 88 Am. St. Rep. 143, 62 N. E. 534; Stewart v. Wyandotte County, 45 Kan. 708, 23 Am. St. Rep. 746, 26 Pac. 683; Power v. Helena, 43 Mont. 336, 36 L.R.A.(N.S.) 39, 116 Pac. 415; Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686; English v. Arizona, 214 U. S. 359, 53 L. ed. 1030, 29 Sup. Ct. Rep. 658; Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 315, 43 L. ed. 460, 19 Sup. Ct. Rep. 205; O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Spalding v. Denver, 33 Colo. 172, 80 Pac. 126; New Haven v. Fair Haven & W. R. Co. 38 Conn. 422, 9 Am. Rep. 399; Anderson v. Ocala, 67 Fla. 204, 52 L.R.A.(N.S.) 287, 64 So. 775; Draper v. Atlanta, 126 Ga. 649, 55 S. E. 929; Brownell Improv. Co. v. Nixon, 48 Ind. 195, 92 N. E. 693, 95 N. E. 585; Boswell v. Marion, 40 Ind. App. 289, 79 N. E. 1056; Mackay v. Hancock County, 137 Iowa, 88, 114 N. W. 552; Union P. R. Co. v. Leavenworth County, 89 Kan. 72, 130 Pac. 855; Barber Asphalt Paving Co. v. Garr, 115 Ky. 334, 73 S. W. 1106; Bacas v. Adler, 112 La. 806, 36 So. 739; Taber v. New Bedford, 135 Mass.

162; Harwood v. Huntoon, 51 Mich. 639, 17 N. W. 216; Tuller v. Detroit, 126 Mich. 605, 85 N. W. 1080; Stewart v. Detroit, 137 Mich. 381, 100 N. W. 613; Geib v. Morrison, 119 Minn. 261, L.R.A.—,—, 138 N. W. 24; Walsh v. First Nat. Bank, 139 Mo. App. 641, 123 S. W. 1001; Nelson v. Florence, 94 Neb. 847, 144 N. W. 791; State, Stewart, Prosecutor, v. Hoboken, 57 N. J. L. 330, 31 Atl. 278; Ashton v. Rochester, 133 N. Y. 187, 28 Am. St. Rep. 619, 30 N. E. 965, 31 N. E. 334; Loomis v. Little Falls, 176 N. Y. 31, 68 N. E. 105; Schank v. Asheville, 154 N. C. 40, 69 S. E. 681; Erickson v. Cass County, 11 N. D. 494, 92 N. W. 841; Kellogg v. Ely, 15 Ohio St. 64; Bartlesville v. Holm, 40 Okla. 467, L.R.A. —, —, 139 Pac. 273; Clinton v. Portland, 26 Or. 410, 38 Pac. 407; Smith v. Pence, 33 S. D. 516, 126 N. W. 709; Spence v. Milwaukee, 143 Wis. 47, 146 N. W. 22.

Not only does plaintiff's failure to act until after the completion of the work, but likewise his failure to appear before the assessment commission and make objections, estop him to attack the assessment and proceedings by injunction. Minnesota & M. Land & Improv. Co. v. Billings, 50 C. C. A. 70, 111 Fed. 972; Birmingham v. Abernathy, 178 Ala. 221, 59 So. 180; Webster v. Ferguson, 95 Ark. 575, 130 S. W. 513; Denver v. Dumars, 33 Colo. 94, 80 Pac. 114; Cosgrove v. Chicago, 235 Ill. 358, 85 N. E. 599; Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007; Durst v. Des Moines, 150 Iowa, 370, 130 N. W. 168; State v. Norton, 63 Minn. 497, 65 N. W. 935; Alexander v. Tacoma, 35 Wash. 366, 77 Pac. 686.

It is too late to object to irregularities that do not in themselves cause a failure of jurisdiction upon the part of the council. Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125; State, Cunningham, Prosecutor, v. Merchantville, 61 N. J. L. 466, 39 Atl. 639; Clinton v. Portland, 26 Or. 410, 38 Pac. 407; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723; Towne v. Newton, 169 Mass. 240, 47 N. E. 1029; Harney v. Benson, 113 Cal. 314, 45 Pac. 687; Muscatine v. Chicago, R. I. & P. R. Co. 79 Iowa, 649, 44 N. W. 909; Clements v. Lee, 114 Ind. 397, 16 N. E. 799; Jenkins v. Stetler, 118 Ind. 275, 20 N. E. 788; Walker Twp. v. Thomas, 123 Mich. 290, 82 N. W. 48.

There is no claim of bad faith, and though the officers may have been guilty of irregularities, yet injunction will not issue for one who

has waited until the completion of the work, its acceptance by the city, and the accruing of benefits. Traphagen v. Jersey City, 29 N. J. Eq. 206; Re Millvale, 162 Pa. 374, 29 Atl. 641; Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; 1 Dill. Mun. Corp. ¶ 463; Frost v. New Orleans, 28 La. Ann. 417; State v. Norton, 63 Minn. 497, 65 N. W. 935.

Bruce, Ch. J. This is an action in equity to restrain the levying, spreading upon the records, and collection of a special assessment in the city of Lisbon, North Dakota, and this opinion is written after a rehearing. The improvement involved is a standpipe which is to take the place of a water tank, and is to be used for the purposes of fire protection. The lower court held all the proceedings regular and valid, and in addition found the plaintiff guilty of laches. Plaintiff has appealed and has asked for a trial *de novo*.

The first point raised by plaintiff and appellant is that the city council lacked jurisdiction because it never created a waterworks district as required by § 3698 of the Compiled Laws of 1913. Section 3698 provides that "any city shall have power to create sewer, paving and water main-districts and waterworks districts, for the purpose of constructing a waterworks system, including the construction and erection of a pumping station, settling basins, filtration plant, standpipes and water towers, reservoirs and other contrivances and structures necessary for a complete waterworks system, etc." Section 3701 provides that "such water-main districts and waterworks districts, etc. . . . shall be of such size and number as the city council, after consultation with the city engineer, shall decide most practicable." Section 3711 provides: "All special assessments levied under the provisions of this article shall constitute a fund for the payment of the cost of the improvement for the payment of which they are levied, and shall be diverted to no other purpose, and those for the payment of sewer improvement shall be designated respectively 'sewer district no. . . . fund,' and such funds shall be numbered according to the number of the sewer district in which it is raised. Those collected for paving improvements shall be designated as 'paving district no. . . . fund,' and such fund shall be numbered according to the paving district in which it is raised; and those levied for the payment of water

mains shall be known as 'water-main district no. . . . fund,' and such fund shall be numbered according to the number of the water-main district in which it is raised, those levied for waterworks improvements shall be designated as 'waterworks district no. . . . fund,' and such fund shall be numbered according to the number of the waterworks district; etc."

It would appear that this objection is well taken. Prior to the passage of chapter 74 of the Session Laws of 1913, there was no law in North Dakota whereby a waterworks system or a standpipe could be constructed by a city and paid by a special assessment. See Price v. Fargo, 24 N. D. 440, 139 N. W. 1054. And it was only after the amendment referred to that assessments for such purposes could be levied. Prerequisite to the levying of such assessment was the creation of a waterworks district. It is true that before such time water-main districts could be created and water mains could be paid for by special assessments, and that such a district was created in the city of Lisbon prior to the present improvement. It does not, however, necessarily follow that water-main and waterworks districts are the same and cover the same territory. We have held that the fundamental requirements of the special assessment laws must be complied with. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249, and it seems to be a general holding that the formation of the improvement district is the foundation for all subsequent proceedings. McCaffrey v. Omaha, 91 Neb. 184, 135 N. W. 552; Whitney v. Hudson, 69 Mich. 189, 37 N. W. 184.

Not only is this the case, but no resolution was adopted declaring that the work was necessary to be done, and which resolution is required by § 3704 of the Compiled Laws of 1913. Section 3704 provides among other things that "after the plans, specifications and estimates . . . shall have been filed . . . and approved as provided in the preceding section the city council shall by resolution declare such work or improvement . . . necessary to be done, such resolution shall refer intelligently to the plans, specifications and estimates therefor, and shall be published twice. . . . If the owners of a majority of the property liable to be specially assessed for such proposed improvement shall not, within fifteen days . . . file with the city auditor a

written protest against such improvement, then the majority of such owners shall be deemed to have consented thereto, etc."

It is true that on June the 2d a resolution and ordinance was adopted directing the city engineer to prepare plans and specifications, and that said resolution contained the following words: "Whereas it appears to the city council that it is absolutely necessary that something be done to provide adequate water supply to afford fire protection." It is also true that later and on the 16th day of June, 1913, another resolution was passed and was published twice, on the 19th and 26th days of June, to the effect that "whereas the plans, specifications, and estimates are now on file and have been approved for the construction of a standpipe, now, therefore, be it resolved by the city of Lisbon, state of North Dakota, that the standpipe be and the same hereby is ordered and declared to be constructed." These resolutions, however, fall far short of a compliance with the statute. To say that the construction of a standpipe is necessary is not the same thing as saying that the construction of a standpipe, according to certain plans and specifications, is necessary, nor is a direction or order to construct a standpipe, according to such plans, a finding of necessity. The statute requires not merely a resolution of necessity, but a resolution that shall refer intelligently to the plans and specifications. Its purpose is clear and is twofold. It is that the city officers shall themselves carefully consider the question of necessity as applied to the plans, and themselves be confronted with the determination of the question of actual necessity as well as of desirability. It means that they shall really consider the matter, and from every standpoint. The statute also purposes that the property owner may have the plans and specifications before him, or a proper reference thereto, in order that he may determine for himself whether in reason he should protest against the improvement. Whittaker v. Deadwood, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 593. These requirements are mandatory, and the property owner is entitled to a reasonable compliance therewith. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249; Morrison v. Chicago, 142 Ill. 660, 32 N. E. 172.

But this is not all. Section 3726 of the Compiled Laws of 1913 provides for a personal inspection of all of the lots, and the determination from such inspection of the particular lots which will be

benefited and the amount to which such lots will be so benefited. It also provides that the Commission shall "assess against such of said lots and parcels of land such sum not exceeding such benefits as shall be necesary to pay its just proportion of the total cost of such work."

All that the chairman of the Commission can be made to testify to is that they spent one or two hours in examining the lots; that they took an automobile and went from one part of the city to another, and that some of them may have gotten out; that he couldn't tell whether he got out or not and looked at any of them; that to arrive at the amount necessary to be raised, they ascertained the cost of the standpipe, and then took that amount and divided it by the number of lots; that they didn't discriminate in any way as to the benefit that might accrue to one lot and the benefit that might accrue to some other lot; that they merely took as a basis lots that were within 1,200 feet of hydrants, as they understood that the city hose would cover 1,200 feet; and "that they simply established an arbitrary standard of their own by dividing the total cost of the standpipe by the number of lots within the radius they purported to assess."

We have repeatedly held that the matter of assessing property cannot be trifled with, and that owners thereof are entitled to at least the expenditure of some time on the part of the Commission. Robertson Lumber Co. v. Grand Forks, supra; McKenzie v. Mandan, 27 N. D. 546, 147 N. W. 808.

Nor do we believe that the fact that the plaintiff lived within 400 feet of the standpipe and did not complain until after the standpipe was completed estop the plaintiff from proceeding in this case. The notice of special assessment was dated May 28, 1914, and called for a hearing on June 15, 1914. The present action was commenced on July 17, 1914. Plaintiff testified that, until he saw the notice of special assessment on May 28, 1914, he had no notice that the work was to be paid for by special assessment and that such notice was not filed with the city auditor until August 11, 1914. The defects, too, were fundamental and the failure to sooner protest was not fatal. Robertson Lumber Co. v. Grand Forks, supra; Keese v. Denver, 10 Colo. 112, 15 Pac. 825; Chicago v. Wright, 32 Ill. 192.

The next question to be determined is whether the injunction prayed for by the petitioner should be summarily issued and the case thus

disposed of, or whether an opportunity can be afforded for the correction of the errors complained of and for a new assessment. If the opportunity may be afforded it must be under the provisions of either §§ 3713, 3714, or 3715 of the Compiled Laws of 1913. A reading of §§ 3714 and 3715 leads us to believe that they were not intended to cover jurisdictional defects such as we have held to have existed in the failure to create the waterworks district and to adopt and publish the resolution of necessity, though they would relate to the defects in the method of the assessment. Section 3713, however, is much more comprehensive. It provides that "in all cases where any assessment, or any part thereof, as to any lot, lots or parcels of land assessed under any of the provisions of this article, or of any law of any city prior to this article, *for any cause whatever, whether jurisdictional or otherwise,* shall be set aside, *or declared void* by any court, the city council shall, without unnecessary delay cause a reassessment or new assessment to defray the expense of such improvement to be made, whether such improvement was made under this article or under any law of any city prior to this article, and such reassessment or new assessment shall be made as nearly as may be, as herein provided for making the assessment therefor in the first instance; and may bear interest from the date of the approval of such assessment so set aside, and when the same shall have been made and confirmed by the city council, it shall be enforced and collected in the same manner that other assessments are enforced and collected under this article, and in all cases where judgment shall hereafter be refused or denied by any court for the collection or enforcement of any special assessment, or where any court shall hereafter set aside or declare void any assessment upon any lot or parcel of land for any cause, the said lot or parcel of land may be reassessed or newly assessed from time to time, until each separate lot, piece or parcel of land has paid its proportionate part of the costs and expenses of such improvement, as near as may be; provided, that when any special assessment shall be declared void, or set aside by judgment of the supreme court, for a cause affecting other like assessments, all assessments so affected may be vacated by resolution of the city council, and thereupon a reassessment of the property affected thereby shall be made as herein provided, and may bear interest as hereinbefore provided."

In the case of Wiese v. South Omaha, 100 Neb. 492, 160 N. W. 890, a very similar statute was passed upon. That statute, being § 4748 of the Revised Statutes of Nebraska of 1913, provided that "whenever an assessment for any of the improvements provided for herein or for any local improvement which has been heretofore made, or which hereafter may be made, is void or has been, or may be declared void, or its enforcement under the laws of this state or the charters of cities of this class, is not possible or is refused, or for any other cause the same is void or may be declared void by any court, either directly or by virtue of any decision of such court, the mayor and council of such city shall, by ordinance, order and make a new assessment or reassessment upon the lots, blocks, land and parcels of lands which have been or will be benefited by such local improvements, it being the true intent and meaning of this chapter to make the cost and expense of all local improvements payable by the real estate benefited to the extent of the improvements by the same, either by reason of the first assessment or reassessment therefor, and notwithstanding the proceedings of the mayor and council, or of any of the officers of the city, may be found to be defective, irregular or void, including among other things the want of jurisdiction, and the city council or such officer to proceed in the premises, as well as other defects, except where such assessments may be made for an unauthorized purpose, or there is an entire and complete want of authority in the council to proceed in the premises."

It only differed from the statute of North Dakota in its clear expression of intention, and its mandatory provisions were practically identical. The court in its opinion called attention to the fact that the assessment in question had, in a prior proceeding, been declared void on the ground that the city council *was without jurisdiction to make the assessment, since the ordinance creating the improvement district failed to properly define the limits of the district.* See Wiese v. South Omaha, 85 Neb. 844, 124 N. W. 470.

It then held that it was competent under the provisions of § 4748, Revised Stat. of 1913, just quoted for the city council to pass a new ordinance for the creation of the improvement district, and still another for the assessment of the benefits. In passing upon this question it said:

"Plaintiffs contend that the section quoted does not authorize a

reassessment under the circumstances of this case. Does the statute authorize a reassessment where the original assessment has been declared void on the ground that the ordinance creating the improvement district failed to properly define the limits thereof? It is the contention of plaintiffs that in such a case there is an 'entire and complete want of authority in the city council to proceed in the premises,' and for that reason a reassessment was not authorized. In the former opinion it was held that failure of the ordinance to properly define the limits of the district rendered the assessment void for want of jurisdiction. In one sense want of jurisdiction is 'want of authority in the city council to proceed in the premises.' The statute, however, provides that reassessments may be made though the proceedings may be found to be void for 'the want of jurisdiction.' Without attempting a definition, it may be said that the city council did not proceed with 'entire and complete want of authority' merely because the ordinance creating the improvement district did not properly define the limits thereof. The proceedings of the city council were based upon a petition filed with the city clerk which was signed by owners representing a majority of the taxable feet front upon the street to be improved. The city council did not proceed with 'entire and complete want of authority' within the meaning of that term as used in the section quoted.

"Is the reassessment statute unconstitutional as contended by plaintiffs? The power of the legislature to authorize a reassessment in case the first assessment has been declared invalid for failure to comply with provisions *which the legislature might in the first instance have dispensed with is generally upheld* [citing cases]. The first assessment was declared void for failure of the ordinance creating the improvement district to properly define its limits. The legislature *might have authorized the city council on its own initiative to improve the street, and, after the improvement had been completed, to create an improvement district* and provide for the assessment of the property benefited, if notice thereof and opportunity were given to property owners to be heard upon the assessment."

Again, in the case of Thayer Lumber Co. v. Muskegon, 157 Mich. 424, 122 N. W. 189, the court passed upon the question of reassessment where the original assessment was held void because the resolution adopted by the said city council did not designate the territory to be

covered by the sewer district, and because the published notice of the council meeting was insufficient. In doing this it construed § 15 of article 2 of the city charter, which provided that "whenever any special assessment shall, in the opinion of the council, be invalid by reason of any irregularity and informality in the proceedings, and if any court of competent jurisdiction shall adjudge such assessment to be illegal, . . . the council shall . . . have power to cause a new assessment to be made."

It held that the council might cause a new assessment to be made, and it sustained such an assessment, although it was not only necessary to create the improvement district, *but to find the necessity for the work after most of it had been done.*

This rule was also applied in Upington v. Oviatt, 24 Ohio St. 232, and *as to the whole assessment.* Where "the first assessment was made during the progress of the work, and was intended to cover only a part of the expense of the improvement, the second assessment ordinance made no reference to the first, but it, together with the first, was intended to cover the entire cost. At the time it was made, however, the improvement had not been completed. A substantial part of the work at the time the suit was commenced, and at the time of the trial in the district court, still remains unperformed."

Again, in the case of Keese v. Denver, 10 Colo. 112, 15 Pac. 825, and where the improvement, a sewer, had been *entirely completed* at the time of the bringing of the action, the court said: "It is urged by counsel for appellees that plaintiffs are estopped from now questioning the legality of the assessment, because they allowed the work to progress to completion without making any objection. The legality of the assessment is attacked upon the ground that the city council was not authorized to cause the sewer to be constructed, and hence not authorized to levy an assessment to pay for its construction. The objection goes to the origin of the proceedings, and is jurisdictional. The principles of estoppel have no application to the facts in this case. Chicago v. Wright, 32 Ill. 192; Re Sharp, 56 N. Y. 256, 15 Am. Rep. 415."

Again, in the case of Enid v. Gensman, — Okla. —, 158 Pac. 377, although the court held that in the particular case the statutory provisions had not been complied with, it specifically upheld the validity

of §§ 576 and 644 of the Revised Laws of Oklahoma, 1910, which provided that:

Section 576: "In case the corporate authorities of any city have attempted to levy an assessment for improvements, which assessment may have been informal, *illegal or void* for want of sufficient authority or other cause, the council of such city shall reassess any such assessment in the manner provided in this chapter."

Section 644: "In the event that any such assessment shall be found to be invalid or insufficient, in whole or in part, for any reason whatsoever, the city council may at any time in the manner provided for levying an original assessment proceed to cause a new assessment to be made and levied which shall have like force and effect as an original assessment."

These sections are almost identical in language with the North Dakota provisions, which expressly provide that the new assessment shall be "as nearly as may be, as herein provided for making the assessment therefor in the first instance," and the case is important in that it outlines the procedure to be followed and which must necessarily follow under the statute.

"It will be seen," says the court, "that the former section provides for making the reassessment in the manner provided in this chapter," which is the manner provided for levying an original assessment referred to in the latter section.

"It seems clear that 'levying an original assessment' does not, in a case of lack of jurisdiction in the first instance, consist alone in the resolution, appointing the appraisers, the reception and consideration of their report, and the final determination of the apportionment, but consists rather in taking all those requisites and jurisdictional steps which have been omitted, beginning with the resolution of necessity (in a case not initiated by petition), if that resolution has been improperly passed or published. In other words, the municipality is given power to *go back and pick up the thread of its proceedings where it has been broken,* and to proceed to the ultimate end of the collection of the assessment; but it is not authorized to begin in the middle without connecting the line of proceedings with the property owner."

We are satisfied that the procedure in the case at bar is for the city council to "pick up the thread of its proceedings where broken," estab-

lish a waterwork's district, pass a resolution of necessity, if they in fact find the improvement to be necessary, publish such resolution, allow the statutory period for hearing objections, make the proper orders if objections are not made or are overruled, and proceed to the ultimate end of the collection of the assessment. In other words, make such reassessment as nearly as may be in the manner provided for making the assessment in the first instance.

We are not unmindful of the Oregon Case of Birnie v. La Grande, 78 Or. 531, 153 Pac. 415, in which it was held that "where a street-improvement assessment was invalid because the notice thereof to property owners, made a jurisdictional prerequisite by the charter, was defective, no subsequent reassessment of the cost of the improvement under the provisions of the charter was valid. Since the giving of notice in the terms described by the charter, which was the organic law under which the city acted, was a condition precedent to securing jurisdiction to make an improvement and to cure the invalidity in the proceedings, it was necessary that they be had *de novo* with valid notice and compliance with the charter in all respects to give jurisdiction," and that the charter contemplated work to be done in the future, and, if the improvement had been already made, it was impossible to make a reassessment *in like* manner for the same purpose.

We realize also the pertinence of the following language used in the case of Murray v. La Grande, 76 Or. 598, 149 Pac. 1020;

"The quasi process in the present instance, by which alone the city could acquire jurisdiction, is the notice described in the quoted provisions of the charter. It is required, among other things, that there shall be contained therein a description of the improvement proposed, the boundaries of the district to be affected or benefited thereby, and the estimated cost thereof. This language plainly contemplates a work to be done in the future. It had no reference to past improvements. It manifestly gives to the property holder who is to be assessed the right to be heard in advance, not only as to the amount of the levy, but also as to the kind of improvement. It is conceded by the answer that this was not done in the first instance. In respect to the final effort to tax the realty of the plaintiffs, the improvement had already been made, whatever its kind or nature; the question about the sort to be adopted had been irrevocably decided; the payment, whether good

or bad, was in place,—all without a previous opportunity for plaintiffs to be heard upon that subject. Confessedly, as disclosed by the answer, this charter right of the taxpayer was utterly ignored in the beginning for want of notice. . . . When the improvement is already made, it is impossible to make a reassessment 'in like manner for the same purpose' as required by the charter. In other words, after the doing of the work, whether good, bad, or indifferent, a situation is presented to which the present provisions of the La Grande charter cannot be applied. The giving of notice in the terms described by the excerpts of the organic law under which that municipality operates is a condition precedent which must be observed before the city can acquire jurisdiction to make an improvement. The contention of the defendants would make the acquisition of jurisdiction a condition subsequent. The plain logic of their position is that, notwithstanding the provisions of the charter, they may first decide and afterwards hear. No independent or different proceeding is established by the charter for collecting such a tax. It simply provides for a reiteration of the same process, and does not dispense with any of the charter rights reserved to the property holder. The situation is simply one where the water of jurisdiction has run past the mill of opportunity. The time to have asserted the power to reassess was before the right of the taxpayer to be heard on the kind of improvement had been ignored and rendered worthless. If jurisdiction had been acquired regularly at the outset, it would have been permissible as the charter now stands to return and correct errors in the apportionment of the expense by a reassessment. In any case, if the city would retrace its steps for corrective purposes, it must go clear back to where it obtained jurisdiction, to which alone it can tack renewed efforts to tax property. It would have been competent for the legislative power of the town to dispense with all previous notice of intention to install betterments, and to empower the council to call upon the taxpayer for the first time after the work was completed, but it has not done so. By failing to give sufficient previous notice and yet persisting in the prosecution of the work, the city has reversed the chronological order of the process enjoined by its charter.

"The case presented by the defendants is one in which they have decided beforehand against the taxpayer in one of the most important particulars of the assessment scheme. Jurisdictional power cannot, like

the phenix, rise from its own ashes; and where the case presented is one in which full compliance with the essentials of jurisdiction cannot be had, repetition of the same process will never confer jurisdiction. In short, it appears by the record that, on account of the improvement having been previously made and not still in contemplation, it is impossible for the council, in the language of the charter, to cause a new assessment 'to be made in like manner for the same purpose.' "

We believe, however, that the question is, after all, of legislative intention and of legislative power. We believe, indeed, that the legislature could, in the first instance, have provided for the creation of public improvements by the municipality, and then have provided for the payment for the same by special assessment; provided that their reasonable necessity was shown and the property owners were in fact benefited and had an opportunity to be heard as to the amount of their assessment, and that such assessment was not in excess of the benefit. This was held in the case of Wiese v. South Omaha, supra. This, in fact, is what § 3713 of the Compiled Laws of 1913 of the state of North Dakota authorizes. It, in fact, provides for the assessment to be made "whether such improvement *was made* under this article or under any law." It uses the words, "was made," and not, "is made," or, "is to be made." The intention is clear, and we believe that the power exists.

There is still another question to be determined, and that is whether the relief prayed for should be confined merely to the plaintiff's lots, or whether the lots of others similarly situated should also be affected. The action was originally instituted by Alfred M. Kvello "on behalf of himself and all others similarly situated who would come in and contribute to the expense of the action;" and in the complaint was contained a full list of all of the other lots affected, a reference thereto throughout, and a prayer for an injunction "from spreading such assessment upon the records of said city or county, and that the treasurer be enjoined from collecting or attempting to collect any of such assessment so attempted to be levied upon the said lots or parcels of land so specified in exhibit A." It is true that later on and on motion of plaintiff, but without any objection on the part of the defendant, the words, "who will come in and contribute to the expense of this action," were stricken out. This, however, was mere generosity on the part of the

plaintiff, and cannot seriously affect the situation. The action was none the less brought on behalf of all of the lot owners mentioned in exhibit A.

There is no doubt that this can be done, and that the judgment can be made applicable to and be taken advantage of by such persons. Section 7406 of the Compiled Laws of 1913 provides: "When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." This is merely a statement of the general rule, and the general rule is applicable to controversies over special assessments. See Hamilton, Taxn. by Special Assessments, § 805; Phillips, Code Pl. § 458; Upington v. Oviatt, 24 Ohio St. 232; 15 Enc. Pl. & Pr. 627; 22 Cyc. 912; 28 Cyc. 1188.

In the case of Keese v. Denver, 10 Colo. 112, 15 Pac. 825, the improvement, a sewer, had been entirely completed at the time of the bringing of the action; and not only was it urged that the plaintiffs were estopped from questioning the legality of the assessment because they allowed the work to progress to completion without making any objection, but a demurrer was interposed to the complaint on the ground that "there are seven plaintiffs and each has a separate interest in distinct portions of said real estate, and there is no joint interest of any of the plaintiffs in any portion of such real estate, and the same relief is asked *for all other persons similarly situated* and interested as for themselves." The court, however, said: "The ruling of the court below upon the demurrer to the complaint being favorable to appellants, their appeal does not necessarily require an expression of opinion upon that ruling; but as counsel for both appellants and appellees have argued the questions presented by the demurrer at considerable length, we will, without going into a review of the arguments made and authorities relied upon, state our conclusions upon the questions presented. The two grounds of the demurrer may be treated unitedly. Mr. Pomeroy, in his able treatise on Equity Jurisprudence, has collated all the important cases upon the question of equity jurisdiction in cases of this character, and, after an exhaustive review and comparison of the cases, has expressed his conclusions, and from which we quote the following: 'Under the greatest diversity of circumstances,

and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right' or of 'interest in the subject-matter,' among these individuals, but where there is, and because there is, merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. 1 Pom. Eq. Jur. § 269. Equity assumes and exercises jurisdiction in cases of this character in order to prevent a multiplicity of suits. 1 Pom. Eq. Jur. § 260. The rule that one or more plaintiffs may sue for the benefit of all others similarly situated and interested is well settled, and in some states it is held that an allegation of this kind is necessary to confer equity jurisdiction. Bull v. Read, 13 Gratt. 78; Kennedy v. Troy, 14 Hun, 308; Wood v. Draper, 24 Barb. 187; McClung v. Livesay, 7 W. Va. 329. The demurrer was properly overruled."

It would seem, however, that the decree or judgment could hardly be "that the treasurer be enjoined from collecting or attempting to collect any of such assessment so attempted to be levied upon said lots or parcels of land so specified in exhibit A," as is prayed for in the complaint, but should rather be that the treasurer be enjoined from collecting or attempting to collect any of such assessment so attempted to be levied upon said lots or parcels of land so specified in exhibit A and the owners of which come in and accept the benefit of the judgment.

It seems, indeed, quite obvious that a person cannot be compelled to be a plaintiff in a lawsuit; that is to say, to be made an objector to a special assessment without his consent, and that this consent should in some way or other be obtained, and this even though the party is specifically named and identified in the complaint. The same rule in this respect, we believe, applies to parties who are specifically named, as to those who are only generally referred to. They should come in in some way and accept the benefit of the judgment or claim under it.

The rule, however, seems to be that "the general averment, descriptive of the persons as a whole, is enough, and the question whether any particular individual is included within it will arise and must be decided upon his application to be admitted as a participant in the suit while in progress or in the relief after judgment. If any opposition is made to his application, the matter will be sent to a master or referee to hear and report, and upon his report the court will make the proper order admitting or rejecting the applicant." Pom. Remedies & Remedial Rights, §§ 296–298; Stevens v. Brooks, 22 Wis. 695–706.

The judgment of the District Court is reversed and the cause is remanded, with directions to enter judgment for the plaintiff as prayed for in the complaint, and also for such of the other parties whose names and property are mentioned in the said complaint, and who shall make application to the court to come under the judgment, and who shall prove themselves entitled thereto. This decree or judgment, however, will be without prejudice to a reassessment under the provisions of § 3713 of the Compiled Laws of 1913, and as outlined in this opinion.

CHRISTIANSON, J. (dissenting). I am unable to concur in the conclusions reached by my associates on many of the questions discussed in the majority opinion in this case. And in view of the importance of these questions, I deem it desirable to indicate wherein I differ from my associates.

I agree with the majority with respect to the validity of statutes providing for reassessments. These statutes have almost universally been sustained. Hamilton, Taxn. by Special Assessments, §§ 823 et seq.; Welty, Special Assessments & Taxn. § 305; Page & J. Taxn. by Local & Special Assessments, §§ 956 et seq., Sutherland, Stat. Constr. § 675.

Gray, in his able work on Limitations of the Taxing Power, in dealing with the subject of "jurisdictional" defects and requirements divides them into two classes,—those which are jurisdictional for the local taxing officers, and those which are jurisdictional in the legislature itself,—because the people, the superiors of the legislature, have, in written constitutions or inherent restraints upon the legislative

The proceedings outlined by the statute with respect to public improvements to be paid for by special assessments are as follows:

1. Creation of the improvement district. Comp. Laws, § 3698. 2. Preparations of plans and specifications of the proposed improvement by the city engineer at the direction of the city council. Comp. Laws, § 3703. 3. Passage and publication of resolution declaring work necessary. Comp. Laws, § 3704. 4. Advertisement for bids for construction of improvement, and letting of contract for such improvement. Comp. Laws, §§ 3705–3709. 5. After completion of the improvement, assessment of benefits, publication of notices and hearings with respect thereto. Comp. Laws, §§ 3724–3728.

The city council of Lisbon had created a water-main district, but failed to adopt a formal ordinance or resolution creating a waterworks district. It did, however, adopt the following resolution, which was duly published in the manner and for the length of time required for the publication of a resolution declaring a proposed improvement to be necessary, *viz.*:

"Whereas, it appears to the city council that it is absolutely necessary that something be done to provide adequate water supply to afford proper fire protection for the city of Lisbon, and whereas, in the judgment of the city council, the only proper way to procure such water supply and fire protection is by the erection of a standpipe, therefore, be it resolved that the city engineer be, and is hereby, empowered to prepare plans and specifications."

It was stipulated as a fact upon the trial that "the defendant city of Lisbon through its officers, the city council, and under and by their direction, erected or caused to be erected a standpipe; . . . that said standpipe within said city is centrally located; that said standpipe was erected for, and will supply water to, the whole of the inhabitants of said city wherever there are water mains located and laid to convey such water, and adequate fire protection within 800 feet of said water mains."

It was further stipulated as a fact upon said trial "that during all the time consumed by the construction of the standpipe by the city council, plaintiff knew the standpipe was being built and erected, and could see the operation of the mechanics from his dwelling house, and offered no objection to the construction of the same."

Plaintiff in his testimony admits that in the summer of 1913 there was considerable complaint over a shortage of city water, and a general discussion by the citizens as to the advisability of providing for an adequate supply of water so as to insure fire protection. Plaintiff's own testimony shows the necessity of the improvement. The only complaint he makes is not that the improvement was made, but the manner in which it is to be paid for. It was his desire that it be paid for by general taxation, and not by special assessment. Of course the courts are not permitted to sit in review upon the fiscal or governmental policies of legislative bodies.

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, . . . to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion [cases cited]. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The legislature has declared that the public improvement under consideration is one for which a special assessment may be levied upon the property benefited. The legislature has also provided for notice to, and hearing of, each person assessed before the special assessment commission and before the city council on appeal from such special assessment commission. And it is undisputed that such notice was given in the case at bar.

The legislature not only adopted § 3713 (quoted in the majority opinion), providing for reassessments by the city council in cases where an assessment, or any part thereof, as to any lot or parcel of land is set aside, but in the same statute and immediately preceding said section it expressly declared that—*"no error or omission which may be made in the proceedings of the city council, or of any officer of said city in referring, reporting upon, ordering or otherwise acting concerning any local improvement provided for in this article, or in making or certifying any assessment, shall vitiate or in any way affect any such assessment, but if it shall appear that by reason of such error or omis-*

sion substantial injury has been done to the party or parties claiming to be aggrieved, the court shall alter such assessment as may be just, and the same shall then be enforced." Comp. Laws, § 3714.

And the legislature directed that "*whenever any action or proceeding shall be commenced and maintained before any court to prevent or restrain the collection of any special assessment or part thereof, made or levied by the officers of any city for any purpose authorized by law,* . . . and maintained as aforesaid to vacate or set aside any sale of real estate for such special assessment, or to cancel any tax certificate or deed given under such sale, *and such assessment shall be held to be void by reason of noncompliance with this article, the court shall determine the true and just amount which the property attempted to be so assessed by said special assessment should pay,* to make the same uniform with other special assessments for the same purpose, and the amount of such assessments as the same appears on the assessment list thereof shall be prima facie evidence of such true and just amount, *and judgment must be rendered and given therefor against the party liable for such special assessment, without regard to the proceedings had for the levy thereof,* and such judgment shall be a lien upon the property upon which a special assessment shall have been levied, of equal force and effect as the lien of special assessments, and the lien of such special judgment shall be enforced by the court in such action; provided, that no action for either of said purposes shall be maintained unless it is commenced within six months after such special assessment is approved, and in case of such assessment heretofore approved, within six months after this article takes effect." Comp. Laws, § 3715.

It will be noted that the language of §§ 3714 and 3715 is very broad.

In my opinion these sections are a clear and unequivocal declaration on the part of the legislature that, when a local improvement has been constructed for which a special assessment may be levied, a person assessed cannot after the local improvement has been constructed, in an action to enjoin the collection of assessment, assail the assessment for any error or omission in the proceedings which it was within legislative power to dispense with, unless he shows "that by reason of such error or omission substantial injury has been done to the party or parties claiming to be aggrieved," in which case "the court shall alter such

assessment as may be just, and the same shall then be enforced." § 3714, supra. And in such case "such assessment shall be held to be void by reason of noncompliance with this article [the provisions of law relative to special assessments], the court shall determine the true and just amount which the property attempted to be so assessed . . . should pay . . . and judgment must be rendered and given therefor against the party liable for such special assessment, without regard to the proceedings had for the levy thereof." § 3715, supra. Where is there any room for doubt as to what the legislature meant by these statutory provisions? It is inconceivable how intent could have been more clearly and positively expressed.

As was said by the court of New Jersey, in considering a similar statute: "The language here employed appears to leave no doubt as to the purpose of the legislature. It was to assign to the court the province of seeing that its suitors who were liable, or whose property was subject to these assessments for public improvements and who were seeking to vacate any of such assessments, should in every event be made to bear their fair and legal share of the burden. This provision was well timed and most salutary; for while it preserves to the owner of property the ability to relieve himself from so much of his tax as is unjust, it, at the same time and by a summary procedure, compels him to do justice to the public by paying such part of his assessment as is justly due. This law is, in the highest sense, remedial, and should be construed with liberality, so as to abate the mischief of taxpayers avoiding, by litigation, their honest dues to the government." Elizabeth v. State, 45 N. J. L. 157, 159.

It has been suggested that the legislature could not confer upon the courts the power to assess taxes. While statutes authorizing courts to assess taxes have generally been held invalid, those authorizing the exercise by the court of a certain supervision over, and rendition by it of final judgment in, special assessment or tax proceedings, are generally recognized as valid. 8 Cyc. 836; 37 Cyc. 1111.

In Wells County v. McHenry, 7 N. D. 246, 254, 74 N. W. 241, this court, speaking through Chief Justice Corliss, said: "We are not aware of any principle of law which prevents the legislature from vesting in the ordinary courts of justice the duty of revising the action

of assessors whenever their valuation of property is challenged by the citizen, or even the power to act as equalizing boards before which all assessments shall be brought for revision prior to their becoming final."

The Federal courts have frequently, under their general equitable powers, reviewed actions of boards of equalization. And the Federal Supreme Court recently sustained decrees of a United States district court enjoining the board of valuation and assessment of Kentucky from enforcing that portion of a certain tax which the court determined to be in excess of that which the taxpayer was justly obliged to pay upon a fair valuation of his property. Louisville & N. R. Co. v. Bosworth, 209 Fed. 380, 230 Fed. 191; Greene v. Louisville & Interurban R. Co. 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673; Louisville & N. R. Co. v. Greene, 244 U. S. 522, 61 L. ed. 1291, 37 Sup. Ct. Rep. 683; Illinois C. R. Co. v. Greene, 244 U. S. 555, 61 L. ed. 1309, 37 Sup. Ct. Rep. 697.

The omissions or defects in the proceedings in the case at bar related to and affected acts the performance of which the legislature might dispense with if it so desired. The legislature could unquestionably have authorized the improvement to be constructed upon proceedings such as those which were actually had by and before the city authorities of Lisbon. I do not believe that under these circumstances the court in any event should order any proceedings whatever, except a reassessment. Can it be contended that the legislature intended to commit to future city councils the power and authority to determine whether a local improvement for an authorized purpose fully constructed and in actual use was necessary? It seems to me too clear for argument that the legislature intended that when a local improvement for an authorized purpose had been fully constructed, a property owner should be required to pay his proportionate share of the cost of the improvement, not exceeding, however, the amount in which his property had been benefited.

The majority opinion also holds that the special assessment commission arbitrarily assessed the different tracts without personal inspection. I do not believe that the record justifies this conclusion. The only evidence with respect to the proceeding had before the assessment commission is the testimony of Norton, one of the members of the commission.

Upon questions propounded to him by plaintiff's counsel, Norton testified in part:

Q. Mr. Norton, you are a resident of the city of Lisbon?

A. Yes, sir.

Q. And you have resided here for how many years?

A. Oh, about thirty years, anyway.

Q. Were you on the 28th day of May, and prior thereto, one of the special assessment commissioners of the city?

A. Yes, sir.

Q. And one of the commissioners who filed the report of the special assessment of the city for the expense of a water tower?

A. Standpipe, yes.

Q. What did you do, Mr. Norton, in ascertaining the location and valuation of the property that you assessed?

A. For the location we took as a basis, we took a map of the water district, covering the water district.

Q. You did, as a matter of fact, spend some time in looking at the lots, didn't you?

A. Well, we spent some time, yes.

Q. About how much time?

A. I am not certain; one or two hours.

Q. You took an automobile and went from one part of the city to another, and never got out of the automobile to look at any of the property?

A. I couldn't say as to that; some of us may have gotten out; we didn't all at any one time.

Q. Did you get out and look at any of the property?

A. I couldn't tell you now.

Q. To arrive at the amount necessary to be raised, you first ascertained the amount of the cost of the standpipe, did you not?

A. We had that furnished to us by the city auditor, certified to by the city auditor what the cost was.

Q. Then you took that amount, Mr. Norton, and divided it by the number of lots that you took to levy an assessment on, to ascertain how much each lot should bear?

A. Yes, the number of lots in that district.

Q. And this result was accomplished without any particular refer-

ence to the benefit to any or either of the lots would receive from the erection of such standpipe.

A. That is what we did take into consideration, the benefit.

Q. How did you arrive at the benefit?

A. By assessing the number of lots in that district equally. . . .

Q. I understand from your answer, that you did not assess all the lots in the city of Lisbon?

A. No, sir.

Q. What lots did you exclude from that assessment, you needn't give the particular lots, but generally?

A. My recollection is that we used as a basis, as a benefit, lots that were within 1,200 feet of a hydrant.

Q. Why 1,200 feet instead of from 800 to 1,000 feet?

A. We understood the city would provide hose to cover 1,200 feet.

Q. So that you were fixing the lots that should be assessed, according to the number of feet of hose the city would furnish?

A. Yes, that the hose would.

Q. The result was that several hundred lots, or their equivalent, were excluded from the assessment?

A. Yes, they were outside of the limit, nearly so, probably not exactly, but that was the way we figured.

Q. In assessing this benefit, you didn't take into consideration whether the lots were improved or unimproved?

A. No, sir.

According to the state census of 1915, Lisbon then had a population of 1,553. Men, like Norton, who had lived there for a long time, were probably familiar with every tract of land in the city. An inspection would convey to them no information which they did not already possess. When these facts are taken into consideration, it seems to me that no one can say either as a matter of law or fact that the members of the assessment commission did not sufficiently inspect the different tracts of land before making the assessment.

While it is true the assessment commission assessed an equal amount against every lot benefited, it does not necessarily follow that their determination was clearly and unquestionably wrong.

The statute, it is true, requires special assessments to be levied in pro-

portion to, and in no case in excess of, the benefits conferred. The statute, however, contains no direction as to how such benefits shall be measured, but this as well as other matters connected with the determination of the amount of benefits is left to the judgment and discretion of the assessment commission. The special assessment commission is a quasi judicial body and its judgments are final unless fraud or some other ground justifying equitable interference is shown to exist. Ellison v. La Moure, 30 N. D. 43, 151 N. W. 988. And while this court has held that the judgment of the special assessment commission is not conclusive, and will be set aside by the court where it appears that the commission, as a matter of fact, has exercised no judgment or discretion at all, but merely assessed the cost of construction on an area basis (Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249), this court has recognized the generally prevailing rule that under a statute like ours an assessment according to area or frontage is not necessarily invalid provided that, after inspection, the commission finds the increased value or benefit to the different lots to be in proportion to such area or frontage. Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 566, 147 N. W. 249. It should be remembered that the water mains in the city of Lisbon had been constructed long prior to the construction of the standpipe. The standpipe was constructed because the then existing water supply was deemed inadequate in case of fire. The testimony of Norton shows that the assessment commission, in assessing benefits, took into consideration and assessed only those tracts which would actually receive fire protection, by reason of the standpipe, from the water mains already laid and hydrants formerly established.

There is no evidence whatever to show that any of the lots assessed received any particular, immediate, or permanent benefit not received by other lots.

The evidence shows that the plaintiff is the owner of two lots. It appears from the facts stipulated that plaintiff had a dwelling house in Lisbon, and it is a reasonable inference from the entire record that this dwelling was situated upon the two lots. The special assessment commission found that each of these two lots had been benefited in the sum of $15, and levied an assessment of $7 against each lot. There is no evidence to show that this is incorrect, nor is there any evidence

tending to show that the assessment against plaintiff's property is excessive or unjust. Nor is there any showing that the plaintiff has been prejudiced by reason of the action of the assessment commission or by reason of any of the defects in the proceedings. So far as the record shows, it is just as likely that the amount assessed against plaintiff's property is too low. Under these circumstances, how can plaintiff be heard to complain? It is a general rule that the equitable remedy of injunction is available only where the legal remedies are inadequate. Pom. Eq. Jur. §§ 221, 1346. And a person who seeks to enjoin the collection of a tax is ordinarily required to show that he will suffer irreparable injury unless injunctive relief is granted. High, Inj. § 491. The plain and unmistakable legislative intent as expressed in § 3714, Comp. Laws 1913, is that a court should interfere only in case a plaintiff shows *"that by reason of error or omission substantial injury has been done"* to him. In this case there is absolutely no showing of injury to the plaintiff.

The majority opinion also holds that plaintiff may maintain the action not only for himself, but for all other property owners affected by the assessment.

The opinion in effect holds that this action and the judgment therein inures to the benefit of any property owner who chooses to come in and make claim thereunder.

I do not care to discuss the matter further than to say that the quotation from Pomeroy's Equity Jurisprudence, principally relied upon by the majority, is from that portion of this work devoted to a discussion of the doctrine that equity jurisdiction exists in order to prevent a multiplicity of suits. It is well to remember that the doctrine is equitable, and should be invoked in aid of, and not to defeat, equity.

I fail to see any reason for its application in the case at bar. In this case plaintiff's testimony shows that he brings the suit for himself alone. No other property owner has in any manner interested himself in the matter; nor has any other property owner brought a similar action. The time within which such action may be brought has elapsed, and the rights of any other property owner to maintain an independent suit is barred by the Statute of Limitations. Comp. Laws 1913, § 3715. So far as the record before us shows, all the other property owners have paid those portions of their assessments which have already fallen due.

And now under the holding of the majority an assessment for $10,-225, made and confirmed by the proper authorities for the payment of a local improvement fully constructed and in actual use, must be set aside because a property owner against whose property an aggregate tax of $14, payable in annual instalments covering a period of years, has been levied, is dissatisfied. And the city authorities must not only make a reassessment, but go through the form and ceremony of passing resolutions whose functions are peculiarly preliminary to the construction of an improvement. The cost and expense incident to the publication of the resolutions and notices will probably amount to at least twenty times the amount assessed against plaintiff's property.

In my opinion the judgment should be affirmed. And in any event the inquiry in this suit should be limited to whether the assessment against plaintiff's property is unjust or excessive, and, if so, the court should determine the proper amount of such assessment, and thereby put an end to this litigation.

J. N. BLACK v. THE NORTH DAKOTA STATE FAIR ASSOCIATION FOR GRAND FORKS.

(164 N. W. 297.)

Fair association grounds — grand stand — cigar and drink privileges — license for — purchaser of license — conditions — takes his own chance on.

The purchaser of a license to sell cigars and drinks in the grand stand of a fair association, takes his own chance on the crowd and the conditions.

Opinion filed March 22, 1917. On rehearing filed September 24, 1917.

Appeal from the District Court of Grand Forks County, Honorable *Chas. M. Cooley,* J.

Affirmed.

J. F. T. O'Connor and *Sveinbjorn Johnson,* for appellant.

It is a well-established rule that when a contract, doubtful in meaning as to any of its terms, has been prepared by one party, it shall be construed favorably to the other party and most consistent with the right

of the case, and so as to accomplish the objects and purposes the parties had in view and so as not to impair or render nugatory the rights of either party. Wyatt v. Larmer & W. Irrig. Co. 18 Colo. 298, 36 Am. St. Rep. 280, 33 Pac. 144; Noonan v. Bradley, 9 Wall. 395, 19 L. ed. 757; Kentzler v. American Mut. Acci. Asso. 88 Wis. 589, 43 Am. St. Rep. 934, 60 N. W. 1002; Christian v. First Nat. Bank, 84 C. C. A. 53, 155 Fed. 705.

It is presumed that the promisor caused the ambiguity in a contract. Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.

A contract should be so construed as to render it operative, reasonable, and lawful. Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101; Horton v. Rohlff, 69 Neb. 95, 95 N. W. 36; 2 Page, Contr. § 1121.

In ambiguous contracts, parol evidence is admissible not to determine what the parties said, but "to understand what they wrote." Thomas v. Scutt, 127 N. Y. 141, 27 N. E. 961; Juilliard v. Chaffee, 92 N. Y. 535; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512.

If a writing is incomplete, even if the incompleteness does not appear on its face from a mere inspection of it, but appears from the attendant circumstances, the subject-matter and the purposes intended to be accomplished. Putnam v. Prouty, 24 N. D. 525, 140 N. W. 93; Comp. Laws 1913, §§ 5907, 5908; Thomas v. Scutt, 127 N. Y. 138, 27 N. E. 961.

Also where some material clause, phrase, or term in the contract is of doubtful, indefinite, or ambiguous meaning. Phœnix Pub. Co. v. Riverside Clothing Co. 54 Minn. 207, 55 N. W. 912; Cameron Mill & Elevator Co. v. Charles F. Orthwein's Sons, 56 C. C. A. 613, 120 Fed. 463; Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083; Bagley & S. Co. v. Saranac River Pulp & Paper Co. 135 N. Y. 626, 32 N. E. 132; Behrman v. Linde, 47 Hun, 530; Durant v. Henry, 33 Wash. 38, 73 Pac. 775; Thomas v. Scutt, supra; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Gould v. Boston Excelsior Co. 91 Me. 214, 64 Am. St. Rep. 221, 39 Atl. 554; Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Windsor v. St. Paul, M. & M. R. Co. 37 Wash. 156, 79 Pac. 613, 3 Ann. Cas. 62; Union Special Sewing Mach. Co. v. Lockwood, 110 Ill. App. 387.

Also to complete the instrument which the parties did not intend to

embrace the entire agreement between them. Halliday v. Mulligan, 113 Ill. App. 177; Domestic Sewing Mach. Co. v. Anderson, 23 Minn. 57; Beyerstedt v. Winona Mill Co. 49 Minn. 1, 51 N. W. 619; Minnesota Mfg. Co. v. Grant City Lumber & Hardware Co. 81 Mo. App. 255; Casners' Estate Mills v. Stafford, 86 Ill. App. 469; Niles v. Sire, 46 Misc. 321, 94 N. Y. Supp. 586; Glos v. Bain, 223 Ill. 343, 79 N. E. 111; Reeves & Co. v. Bruening, 13 N. D. 163, 100 N. W. 241; Wigmore, Ev. §§ 2427ff, 2472.

In such cases it may become necessary to resort to extrinsic evidence to ascertain the meaning and intent of the parties in the light of the information thus acquired. Cunningham v. Washburn, 119 Mass. 224; Eaton v. Smith, 20 Pick. 150; Burnham v. Allen, 1 Gray, 496; Smith v. Faulkner, 12 Gray, 251.

Where the extrinsic facts concerning an ambiguity are subjects of conflicting testimony, the inferences to be drawn are questions for the jury, and not for the court. Thorne & H. Line & C. Co. v. St. Louis Expanded Metal Fire Proofing Co. 77 Mo. App. 21; Rosenthal v. Ogden, 50 Neb. 218, 69 N. W. 779; Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454; First Nat. Bank v. Rothschild, 107 Ill. App. 133; Mackenzie v. Seeberger, 22 C. C. A. 83, 40 U. S. App. 188, 76 Fed. 108; J. W. Reedy Elevator & Mfg. Co. v. Mertz, 107 Mo. App. 28, 80 S. W. 684; Hix v. Edison Electric Light Co. 27 App. Div. 248, 50 N. Y. Supp. 592.

Where the parties have themselves construed and acted upon an ambiguous contract, it is binding upon them and is accepted as controlling by the courts. Such conduct is the best evidence of its meaning. Hubbard City v. Bounds, — Tex. Civ. App. —, 95 S. W. 69; 2 Page, Contr. § 1126; Geithman v. Eichler, 265 Ill. 579, 107 N. E. 180; Chicago v. Sheldon, 9 Wall. 54, 19 L. ed. 596; Indiana Natural Gas & Oil Co. v. Stewart, 45 Ind. App. 554, 90 N. E. 384; Sattler v. Hallock, 160 N. Y. 291, 46 L.R.A. 679, 73 Am. St. Rep. 693, 54 N. E. 667; Parmelee v. Hambleton, 24 Ill. 609; Pratt v. Prouty, 104 Iowa, 419, 65 Am. St. Rep. 472, 73 N. W. 1035; Haddock v. Woods, 46 Iowa, 433; Moore v. Beiseker, 77 C. C. A. 545, 147 Fed. 367.

Where the contract is ambiguous and where there is a dispute between the parties as to its meaning, evidence of the terms and nature of provisions, similar contracts between the same parties, and the practical

construction thereof, is admissible. Richards v. Millard, 56 N. Y. 574; Gray v. Gannon, 4 Hun, 57.

A contract ambiguous or indefinite in its terms is to be construed in the sense in which the promisor has reason to believe it would be interpreted by the promisee. Inman Mfg. Co. v. American Cereal Co. 133 Iowa, 71, 8 L.R.A.(N.S.) 1140, 110 N. W. 287, 12 Ann. Cas. 387; Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.

Evidence that defendant construed the contract as plaintiff did, is admissible. Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257; Off v. J. B. Inderrieden Co. 74 Ill. App. 105.

The complaint alleges, and the proof offered but rejected, tended to show, that the agreement to keep the aisles open was a part of the consideration of the contract with defendant, and the principal inducement that led to the execution of the same. First Nat. Bank v. Prior, 10 N. D. 150, 86 N. W. 362; Klemik v. Henricksen Jewelry Co. 128 Minn. 490, 151 N. W. 203; Tylee v. Illinois C. R. Co. 97 Neb. 646, 150 N. W. 1015; Dunnell's Dig. (Minn.) § 3373, note 87; Hughes, Ev. p. 240; Stephen's Dig. Ev. art. 90.

Our statute on the admissibility of such evidence embraces the common law on the subject, and goes no further, and the rule has full application only within very narrow limits. Courts are careful to avoid an application of it which will further and protect, rather than prevent, fraud and oppression. Other and collateral agreements relating to the same subject and between the same parties are admissible, and should be received and considered as throwing light upon the situation and as evidencing the intent and purpose of the parties. Comp. Laws 1913, § 5889; Putnam v. Prouty, 24 N. D. 517, 140 N. W. 93; Juilliard v. Chaffee, 92 N. Y. 534; Wigmore, Ev. §§ 2425, 2429.

The trial court ignored and failed to apply the distinction of the highest importance in the law of damages for breach of contract, between uncertainty as to whether or not damages did result from the breach, uncertainty as to the cause, and uncertainty as to amount of damages, when there is no doubt that some damage has been suffered because of the breach. Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 315, 31 Pac. 647; Thayer-Moore Brokerage Co. v. Campbell, 164 Mo. App. 8, 147 S. W. 550; Comp. Laws 1913, § 7146; Needham v. Halverson, 22 N. D. 594, 135 N. W. 203.

Where the value of the benefit which the party is to derive from the performance of the contract may be certain, yet if the benefit be certain, but only uncertain in value or amount, the rule that damages to be recoverable must not be contingent or uncertain does not apply. The court will not refuse redress to a litigant because the problem of solving the amount of damages is difficult, if there is substantial evidence in the record. Blagen v. Thompson, 23 Or. 239, 18 L.R.A. 321, 31 Pac. 647; Richey v. Union Cent. L. Ins. Co. 140 Wis. 486, 122 N. W. 1030; Blagen v. Thompson, 23 Or. 239, 19 L.R.A. 315, 31 Pac. 647; Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Schumacker v. Heinemann, 99 Wis. 251, 74 N. W. 785.

There is ample in the record in this case to enable a jury to arrive at the amount of damages with no less an approximation to exact justice than in the cases of lost limbs, losses by fire, and in other like cases. Tootle v. Kent, 12 Okla. 674, 73 Pac. 310; Gilbert v. Cherry, 57 Ga. 128; Cranmer v. Kohn, 7 S. D. 247, 64 N. W. 125; World's Fair in Chicago, 1893; World's Columbian Exposition v. Pasteur-Chamberland Filter Co. 82 Ill. App. 94; Nash v. Thousand Island S. B. Co. 123 App. Div. 148, 108 N. Y. Supp. 336; San Antonio v. Royal, — Tex. —, 16 S. W. 1101.

Clearly plaintiff could and would have made profits on his sales on the two days in question, had he been permitted to carry on his business according to the contract. San Antonio v. Royal, — Tex. —, 16 S. W. 1101; Cranmer v. Kohn, 7 S. D. 247, 64 N. W. 125; Bryson v. McCone, 121 Cal. 153, 53 Pac. 637; Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250; Schumaker v. Heinemann, 99 Wis. 251, 74 N. W. 785.

In such cases the court should instruct the jury that they are not to conjecture or guess, but to draw reasonable and safe conclusions from the evidence in the case as it has been developed on the trial. Treat v. Hiles, 81 Wis. 280, 50 N. W. 896; Emerson v. Pacific Coast & N. Packing Co. 96 Minn. 1, 1 L.R.A.(N.S.) 445, 113 Am. St. Rep. 603, 104 N. W. 573, 6 Ann. Cas. 973; Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Wells v. National Life Asso. 53 L.R.A. 33, 39 C. C. A. 476, 99 Fed. 222.

A person under the circumstances of this case, who has sold like goods and refreshments to crowds in the open air for thirty years, and for many seasons at the same place, may be permitted to estimate what his

sales each day, under normal conditions, would be. World's Columbian Exposition v. Pasteur-Chamberland Filter Co. 82 Ill. App. 94; Wells v. National Life Asso. 53 L.R.A. 33, 39 C. C. A. 476, 99 Fed. 222; Enlow v. Hawkins, 71 Kan. 633, 81 Pac. 189; Fredonia Gas Co. v. Bailey, 77 Kan. 296, 94 Pac. 258; Brown v. Hadley, 43 Kan. 267, 23 Pac. 492.

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

If defendant, a branch of the state government, engaged in the performance of the functions of the state, or a department, or if it manages, controls, or operates a department of the state government, it is exempt from suit. A sovereign state cannot be subjected to the process of its own courts or the courts of a sister state, or, save as permitted by the Constitution, of the courts of the United States. 36 Cyc. 911; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; State ex rel. Mille Lacs County v. Dike, 20 Minn. 363, Gil. 314; Rice v. Austin, 19 Minn. 103, 18 Am. Rep. 330, Gil. 74; State ex rel. Thompson v. Whitcomb, 28 Minn. 50, 8 N. W. 248; Western R. Co. v. DeGraff, 27 Minn. 1, 6 N. W. 341.

So, also, a suit against a department of the state government, a board, or corporation created by the state for governmental purposes, is a suit against the state, and cannot be maintained without its consent. 36 Cyc. 919; Alabama Girls Industrial School v. Reynolds, 143 Ala. 579, 42 So. 115; Alabama Industrial School v. Addler, 144 Ala. 555, 113 Am. St. Rep. 58, 42 So. 116; Moody v. State Prison, 128 N. C. 12, 53 L.R.A. 855, 38 S. E. 131; Oklahoma Agri. & Mechanical College v. Willis, 6 Okla. 593, 40 L.R.A. 677, 52 Pac. 921; State Bkg. Board v. Oklahoma Bankers' Trust Co. — Okla. —, 151 Pac. 566; Lankford v. Platte Iron Works Co. 235 U. S. 461, 59 L. ed. 316, 35 Sup. Ct. Rep. 173; Murray v. Wilson Distilling Co. 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; Jobe v. Urquhart, 98 Ark. 525, 136 S. W. 663; State Hospital v. Robertson, 115 Va. 527, 79 S. E. 1064.

Public corporations are formed or organized for the government of a portion of the state. Comp. Laws 1913, § 4499.

The legislative assembly shall take such steps as may be necessary to promote industrial, scientific, and agricultural improvements. Comp. Laws 1913, §§ 1847 et seq.; Const. § 151.

The state fair association is a mere state agency or department cre-

ated for the purpose of carrying on the business of the state imposed upon it under the Constitution, and it is not subject to suit for acts done by it in connection with the performance of this state function. Lane v. Minnesota State Agri. Soc. 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382; Berman v. Minnesota State Agri. Soc. 93 Minn. 125, 100 N. W. 732; Berman v. Cosgrove, 95 Minn. 353, 104 N. W. 534; George v. University of Minnesota Athletic Asso. 107 Minn. 424, 120 N. W. 750; Hern v. Iowa State Agri. Soc. 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092; Bathe v. Decatur County Agri. Soc. 73 Iowa, 11, 5 Am. St. Rep. 651, 34 N. W. 484; Minear v. State Bd. of Agri. 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290; Morrison v. Fisher (Morrison v. MacLaren), 160 Wis. 621, L.R.A.1915E, 469, 152 N. W. 475; Zoeller v. State Bd. of Agri. 163 Ky. 446, 173 S. W. 1143; Melvin v. State, 121 Cal. 16, 53 Pac. 416.

"Agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state created for the purpose of assisting in promoting our most important industry." State ex rel. Custer County Agri. Soc. & L. S. Exch. v. Robinson, 35 Neb. 401, 17 L.R.A. 383, 53 N. W. 213.

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Comp. Laws 1913, §§ 5889, 5938; C. L. 1913; 2 Elliott, Contr. § 1635, p. 949; Mast v. Pearce, 58 Iowa, 579, 43 Am. St. Rep. 125, 8 N. W. 632, 12 N. W. 597; Nichols v. Wyman, 71 Iowa, 160, 32 N. W. 258; Warbasse v. Card, 74 Iowa, 306, 37 N. W. 383; Brintnall v. Briggs, 87 Iowa, 538, 54 N. W. 531; Jolliffe v. Collins, 21 Mo. 338; Lamb v. Crafts, 12 Met. 353; Groome v. Ogden City Corp. 10 Utah, 54, 37 Pac. 90; York v. Stewart, 21 Mont. 515, 43 L.R.A. 125, 55 Pac. 29.

Parol evidence is not admissible to add covenants, agreements, or warranties where the parties have accepted a written agreement or statement executed and delivered as embodying the terms of the agreement. Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243; McCormick Harvesting Mach. Co. v. Thompson, 46 Minn. 15, 48 N. W. 415; Bradford v. Neill, 46 Minn. 347, 49 N. W. 193; Wheaton Roller Mill Co. v. John

T. Noye Mfg. Co. 66 Minn. 156, 68 N. W. 854; McNaughton v. Wahl, 99 Minn. 92, 116 Am. St. Rep. 389, 108 N. W. 467; Tietjen v. Snead, 3 Ariz. 195, 24 Pac. 324; DeWitt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; Wilson v. New United States Cattle Ranch Co. 20 C. C. A. 244, 36 U. S. App. 634, 73 Fed. 994; Sanford v. Gates, T. & Co. 21 Mont. 277, 53 Pac. 749; Gaffney Mercantile Co. v. Hopkins, 21 Mont. 13, 52 Pac. 561; Fisher v. Briscoe, 10 Mont. 130, 25 Pac. 30; Western Electric Co. v. Baerthel, 127 Iowa, 467, 103 N. W. 475; Diebold Safe & Lock Co. v. Huston, 55 Kan. 104, 28 L.R.A. 53, 39 Pac. 1035; Miller v. Municipal Electric Lighting & P. Co. 133 Mo. 205, 34 S. W. 585; McCray Refrigerator & Cold Storage Co. v. Woods, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Johnson v. Oppenheim, 55 N. Y. 280; Engelhorn v. Reitlinger, 122 N. Y. 81, 9 L.R.A. 549, 25 N. E. 297; Uihlein v. Matthews, 172 N. Y. 154, 64 N. E. 792; Finnigan v. Shaw, 184 Mass. 112, 68 N. E. 35.

If plaintiff suffered any damage, there is no evidence in the record from which the same can be determined. The evidence does not disclose the cause, nature, or origin of the alleged loss of profits which is sought to be recovered here. Any attempted computation thereof would be conjectural and speculative. North Star Trading Co. v. Alaska-Yukon-Pacific Exposition, 68 Wash. 457, 123 Pac. 605; Deslandes v. Scales, 187 Ala. 25, 65 So. 393; Hedrick v. Smith, — Tex. Civ. App. —, 146 S. W. 305; Silurian Mineral Springs Co. v. Kuhn, 65 Neb. 646, 91 N. W. 508; Beck v. West & Co. 87 Ala. 213, 6 So. 70; Winston Cigarette Mach. Co. v. Wells Whitehead Tobacco Co. 141 N. C. 284, 8 L.R.A.(N.S.) 255, 53 S. E. 885; Griffin v. Colver, 16 N. Y. 489, 69 Am. Dec. 718; Atchison, T. & S. F. R. Co. v. Thomas, 70 Kan. 409, 78 Pac. 861; Smuggler-Union Min. Co. v. Kent, 47 Colo. 320, 112 Pac. 223; Lane v. Storke, 10 Cal. App. 347, 101 Pac. 937; Merritt v. Adams County Land & Invest. Co. 29 N. D. 496, 151 N. W. 11.

Robinson, J.: The plaintiff brings suit to recover $500 damages for the alleged failure of defendant to observe a written concession giving

to him exclusive grand-stand privileges during fair days in July 20–24, 1915, to sell eats, drinks, candy, etc. He appeals to this court from a directed verdict and judgment, and from an order denying a new trial. There is no claim that plaintiff did not have the usual sale privileges of the grand stand, and it appears that he had all he bargained for. But defendant claims that on two of the days of the fair, when the crowds were large and the people very hungry and thirsty, the defendant permitted the aisles to become crowded and filled with people, so that it became difficult or impossible to serve them. And so the plaintiff failed to make a large expected profit. Of course the crowd was just what the plaintiff and the fair association wanted, but it seems there was too much of a good thing. And so it is possible that plaintiff might have made more sales to a smaller crowd. However, it is folly to think of the defendant bargaining to limit sales to the fair grounds or to the grand stand, or that the defendant agreed with plaintiff to police the stand or to aid him in selling his drinks. As the trial court said: "The agreement was simply a license to do business on the grand stand, and Mr. Black was bound to take the conditions there as he found them." The case does not seem to involve any real question of law or of fact. The judgment is clearly right, and is affirmed.

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

BRUCE, Ch. J. (dissenting). This is an action for the breach of a concession for the sale of ice cream and similar articles in the grand stand at the state fair. The written concession was as follows:

Grand Forks, N. D., 7–7–15.

This agreement witnesseth, That the North Dakota State Fair Association for Grand Forks leases to J. N. Black, concessioner, space as follows: Grand-stand privilege, eats, drinks, candy, etc., to be used exclusively for eats, drinks, candy, etc., during July 20–24, for which the concessioner agrees to pay $200 on demand.

Receipt of $50 is hereby acknowledged. It is mutually agreed that the terms, conditions, and stipulations printed on the back hereof are a part of this concession contract.

On the back of the concession were provisions to the effect that the

representatives of the fair association should have access to the premises at all times; that the buildings, tents, and inclosures should be under the approval of the superintendent; that the prices charged should be posted, as well as the number of the concession; that such concessions should not be assignable; that the violation of the concession should be the subject of forfeiture; that the premises should be left in good repair and surrendered to the fair association without notice to quit at the expiration of the contract; that the fair association should have a lien upon the property of the concessioner for its claims.

The complaint alleged that this printed concession only contained some of the terms of the agreement, and that others were oral, and that such additional terms not included were: "That the defendant promised and agreed with this plaintiff that the aisles and passages between the groups of seats into which the grand stand is divided upstairs would be kept free and clear of obstructions and spectators so that this plaintiff and his servants could pass freely along the said aisles and passages, and among the people occupying seats, for the purpose of selling and offering for sale things to eat and drink among the occupants thereof."

The complaint then alleged that on the 22d and 24th days of July, 1915, in total disregard of his promises and agreements, the defendant caused the aisles and passages between the sections and groups of seats in the said grand stand to be filled with people, and so completely obstructed by spectators, placed there by the defendant, that it was impossible for the plaintiff or his servants to pass along or through the said aisles, and that by reason thereof the plaintiff lost profits on sales of things to eat and drink in the sum of $500.

The answer is a general denial, though defendant admits the fact of the holding of the fair, the execution of the written contract, and the attendance of large crowds.

At the close of the trial the defendant moved for a directed verdict in the following language:

"At this time, if the court please, the defendant moves the court to direct the jury to return a verdict for the defendant, the State Fair Association of Grand Forks, on the ground and for the reason that the plaintiff has failed to establish facts sufficient to constitute a cause of action in this: First, that the contract or agreement that has been

introduced in evidence showing the relations existing between the plaintiff and the defendant, and what is known as plaintiff's exhibit D, evidences a mere license condition, and discloses the fact that the plaintiff Black was a mere licensee, authorized to vend certain articles in the grand stand and the portions of the grand stand immediately connected therewith.

"Further, there is no evidence showing or tending to show any violation of the agreement or of the conditions of any agreement entered into between the plaintiff and defendant, and hence no way in which the jury could determine the issues in this case in favor of the plaintiff."

The motion was granted by the trial court and the trial judge directed the jury as follows:

"Gentlemen of the Jury: In view of the conditions arising here, I deem that it is not best to allow this case to go to the jury, that is, the plaintiff, even upon the plaintiff's own showing, has not made out a case against the defendant here; *that even if the case was allowed to go to the jury and the jury should find in favor of the plaintiff in this case,* it would be my duty *to set the verdict aside,* so in view of the condition, why it is my duty to direct the jury to find a verdict for the defendant in this case."

Later the trial court filed the following memorandum decision:

"I think that in this case the only condition shown under the terms of the agreement which has been introduced here in evidence is simply a mere license to do business in the grand stand; that is, Mr. Black's privilege to sell goods in the grand stand,—and he was to take the conditions there as he should find them; that, the fair association perhaps might not have a right to wilfully keep Mr. Black from selling goods there, but in the condition which arose from the numerous patronage of the grand stand,—the selling of tickets for the grand stand, I think that condition was assumed by Mr. Black in taking the contract from the State Fair Association. There was no contract entered into between the plaintiff and defendant to keep the aisles clear; there was no duty on the defendant to police the grand stand in such a way as to make all of the patrons of the grand stand behave in a perfectly gentlemanly way towards the venders of pop and cigars. Moreover, it does not seem to me *that the testimony is sufficient* to warrant the case to go to the jury upon the question of *whether the aisles were obstructed*

so as to prevent the *boys from selling goods* in the grand stand. And on that question alone I think there is a failure of proof, *even from the testimony* that has been introduced on behalf of the plaintiff, moreover, the testimony with regard to the damage suffered is so indefinite and uncertain that it would be impossible for the jury to arrive at any definite, or any legal, rule of estimating the damage; that is, the damage due simply to the obstruction of the aisles, if any such obstruction took place. The testimony, I think, shows that it was possible for the boys to get up there—it might not have have been as convenient for them as it would have been if the aisles had been kept entirely clear, but it does not show—the testimony does not show, that it was impossible for them to get up. In fact, whatever testimony there is on that question it seems to me tends to show that it was possible, so that the motion will be granted."

The first question to be determined is whether the court erred in refusing to permit the plaintiff to prove any other terms than those set out in the printed contract, and in holding that the printed instrument was complete and unambiguous.

Did he err in denying the plaintiff's following offers of proof?

Mr. Johnson: "Plaintiff offers at this time to prove by this witness that a similar memorandum with respect to the grand-stand privilege as the one attached to the complaint already introduced in evidence and marked plaintiff's exhibit C was issued to the plaintiff and accepted by him for the same concession by the defendant in the year 1911, and during said year the question of blocking of the aisles was brought to the attention of the defendant by the plaintiff, and at that time the defendant agreed with the plaintiff that the plaintiff had the right under this contract to have free access to the aisles and the right to pass through them at all times, and at that time the defendant kept the aisles free and clear, and did not permit people to sit or stand and block said aisles in the grand stand so as to interfere with the business of the plaintiff in offering for sale, selling, and delivering refreshments to spectators in the grand stand."

Mr. Johnson: "At this time the plaintiff offers to prove through or by this witness that, during the preliminary negotiations leading up to the signing, execution, and delivery of the contract marked exhibit C, the plaintiff and defendant used the term 'grand-stand privilege'

incorporated in said exhibit, understanding that the same was to include and embrace the right of the plaintiff to unobstructed passage through the aisles in the grand stand, and that the said expression, 'grand-stand privilege,' did not contemplate the right of the defendant to fill the aisles with spectators so as to render passage through them impossible by the plaintiff or by plaintiff's servants."

Mr. Johnson: "At this time the plaintiff offers to prove by this witness that plaintiff's exhibit C is, in all its terms with respect to the grand-stand privilege, identical with the contract entered into between plaintiff and defendant in 1911, pertaining to the privilege of maintaining and conducting a refreshment stand during the state fair under the management of the defendant in that year; that the contract of 1911, relating to the grand-stand privilege, was interpreted by the plaintiff and by defendant to entitle plaintiff to demand and require of the defendant that the aisles in the grand stand be kept clear and free of spectators sitting therein, so that plaintiff's servants could at all times pass along said aisles to offer for sale and sell and deliver refreshments to spectators in the grand stand. That in the said year 1911 when, for the first time, spectators began to occupy the aisles as seats, plaintiff demanded of defendant and of the superintendent of concessions (the witness) that the aisles be not filled and obstructed by spectators, that the defendant and the witness acquiesced in said demand, and that the defendant did not sell tickets to more people than could be seated in the seats without seating spectators in the aisles; that thereupon the superintendent of concessions removed such spectators as had begun to obstruct the aisles, and directed that no more tickets be sold than would be sufficient to fill the seats in the grand stand; that these acts were done by the said superintendent of concessions, pursuant to a demand from the plaintiff, for the reason that the superintendent of concessions so construed the contract between plaintiff and defendant as to entitle plaintiff to free and unobstructed passage through the aisles.

"Plaintiff also, in connection with this offer of proof, offers in evidence exhibit D."

I think it erred. The contract was surely not complete on its face. It provided for a grand-stand privilege. What was that grand-stand privilege? It is conceded by counsel for the defendant that this grand-

stand privilege extended not merely to the grand stand, but to the bleachers. It is conceded that it applied not merely to a place or booth beneath the grand stand, but to the seats above. On its face it merely used the terms, "space as follows: Grand-stand privilege—eats, drinks, candy, etc., to be used exclusively for eats, drinks, candy, etc., during July 20–24."

Surely parol evidence was competent to show what that grand-stand privilege was. How comprehensive! Whether it included the bleachers as well as the grand stand proper, whether it implied the free access of the servants of the concessioner to the grand stand and bleachers, or whether it did not. If it included their free access, did it include the right to have the passage and alleyways unobstructed so that sales could readily be made? The evidence was admissible not to vary the terms of the instrument, but to show what they meant. Thomas v. Scutt, 127 N. Y. 141, 27 N. E. 961. The contract was not complete in itself, and the circumstances were such as to indicate its incompleteness, and in such a case, parol evidence is admissible. Putnam v. Prouty, 24 N. D. 525, 140 N. W. 93; Phoenix Pub. Co. v. Riverside Clothing Co. 54 Minn. 207, 55 N. W. 912; Polebitzke v. John Week Lumber Co. 163 Wis. 322, 158 N. W. 62.

Nor was the attempt to prove the right to the access to the aisles one to add a warranty to the contract. It was rather to show what that contract included, and whether a grand stand with unobstructed aisles had been contracted for or one that was obstructed. Even if a warranty, there was evidence to show, or the plaintiff at any rate was entitled to show, that the written instrument was nothing more than a receipt and that the real contract was oral.

But defendant contends that the damages sought to be recovered are purely speculative. He cites the well-known rule laid down in the case of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502, and enacted in this state in § 7146, Comp. Laws 1913, see Needham v. Halverson, 22 N. D. 594, 135 N. W. 203, that damages for the breach of a contract must have been contemplated by the parties or have been so likely to follow that they would have been anticipated if the matter had been considered. He argues that no separate books of account were kept of the receipts of

the grand stand and of the bleechers. He also argues that the cost of production was not definitely shown. He quotes from 13 Cyc. 36, where it is said: "In order to recover profits in case of a breach of contract, such profits must have been within the contemplation of the parties, at the time that the contract was made. . . . In all cases the damages claimed should be capable of being definitely ascertained. Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof, with any reasonable degree of certainty, no recovery can be had."

It is undoubtedly the rule that the damages must be certain, both in their nature and in respect to the cause from which they proceed. 8 R. C. L. 438. It is now generally held, however, that this certainty must be as to the fact and cause of the damage, rather than as to the amount, and that, where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery. 8 R. C. L. 442. In the case at bar two methods of arriving at the damages were applicable and could have been resorted to. One, the difference between the value of the license or concession with and without the free and unobstructed use of the passageways or aisles; and one, the loss of profits caused by the obstruction of the aisles. What this difference in value was, was a matter principally for the jury to determine; and though the evidence was more or less indefinite, I yet believe that it was not entirely inadequate. The plaintiff, it is true, did not testify as to the actual cost of production, except as to the pop, but he did testify as to his usual percentage of profit. It is true that the number of sales that would have been made was not, and could not be, accurately shown, but he did show the attendance on the days when the aisles were and were not obstructed, and the receipts for these days, and the atmospherical conditions prevailing during this time. From this evidence we believe the jury could estimate either the difference in value of the concession or what is practically the same thing, the loss of profits.

The rule is laid down by the superior court of New York in the case of Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676–678, 4 N. E. 264, where the court says: "It is frequently difficult to apply the rules of damages and to determine how far and

when opinion evidence may be received to prove the amount of damages; and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the applica-

tion of rules of law which have been laid down for the guidance of the courts and jurors."

But was the fair association suable at all? The defendant contends that the North Dakota Fair Association is a private corporation created to perform governmental functions and to act as an agent for the state, and that as such it is not subject to suit. "The fair association," he says, "is a corporation, it is true, but it has no property and can acquire none. It does not own the land purchased by it nor the buildings thereon, but this property is conveyed to and owned by the state. If a judgment were rendered against the defendant it could not be satisfied, for the defendant owns no property. It could not be seriously urged that the gate receipts of a fair carried on by the state could be levied upon for the debt of the association."

The defendant was incorporated under § 1847 of the Compiled Laws of 1913. This section provides that: "For the purpose of promoting and improving the condition of agriculture, etc., a state fair or exposition shall be held biennially at or near the city of Grand Forks, . . . during each odd-numbered year, and biennially at or near the city of Fargo, . . . during each even-numbered year."

Section 1848 provides that: "If an organization, to be known and designated as the North Dakota State Fair Association for Grand Forks, or by some similar name, shall be, during the year 1905, created and organized under and pursuant to the general laws of this state, in relation to corporations, with a paid-up capital stock of not less than $20,000, such association shall become entitled to receive the appropriations hereinafter named upon the conditions set forth in this article. The said association may acquire the title to not less than 70 nor more than 160 acres of ground at or near the city of Grand Forks, in said state, and such association may, and it is hereby empowered and authorized to convey the title to the land so acquired by it, unto the state of North Dakota, which property, when so conveyed, shall be held by the state of North Dakota forever for the following purposes and no other: For the purpose of exhibiting thereon under the management of such association, or its successors, biennially, during each odd-numbered year the agricultural, stock breeding, horticultural, mining, mechanical, industrial and other products and resources of the state of North Dakota, including proper exhibits of the arts, sciences and all other public dis-

plays pertinent to and dependent upon exhibitions and expositions of human art, industry and skill. The said association may use so much of its paid-up capital stock as may be necessary for the acquisition of title to the land so to be purchased by it for use as fair grounds, and the balance thereof shall be and constitute a fund toward the construction of buildings and other permanant improvements thereon."

Section 1849 is similar to § 1848, save that it relates to Fargo rather than Grand Forks.

Section 1850 provides that: "The custody and control of the premises upon which said fair at Grand Forks is located shall be vested in said North Dakota state fair association for Grand Forks, and the general offices thereof shall be located and maintained either upon the premises so acquired or at some suitable place in the city of Grand Forks, and said association is hereby authorized, required and empowered to maintain its said offices as aforesaid wherein shall be contained the property and records of such association, and the entire care, custody, management and control of said premises, and the structures thereon, shall be vested in said association."

Section 1851 is the same as § 1850, except that it relates to Fargo rather than to Grand Forks.

Section 1852 is as follows: "When the state of North Dakota accepts the title to the land so acquired by either of said associations, which acceptance shall be made by the governor and attorney-general, thereupon, and not before such time, shall the deed of conveyance of said property to the state be accepted and recorded. Should the state of North Dakota cease to appropriate the sum of at least $5,000 annually to be awarded as premiums in connection with said fairs then the title of said premises shall revert to and become the property of the association that transferred the same to the state; provided, further, that the state shall never become liable for any of the debts and liabilities of said associations, save as appropriations shall be made therefor from time to time by the legislative assembly. The provisions of this article shall not become binding upon the state as to either fair association until the stockholders of such association shall adopt and file with the secretary of state an irrepealable by-law consenting and providing that its board of directors shall consist of fifteen persons; that the governor, commissioner of agriculture and labor and the state auditor

shall *ex officio,* constitute three of such directors; that five of the directors of such association shall be residents of the judicial district in which said fair is to be held, and that one director shall be selected from each other judicial district of this state, and shall be a resident of the same."

Section 1853 is as follows: "The board of directors of each association shall appoint an executive committee which shall keep an accurate account of the expenditures of all moneys appropriated to it by the state and of all other receipts and expenditures, and shall collect, arrange and collate all the information in their power in relation to the nature and preparation of soils, the cultivation and growth of crops, the breeding and management of stock, the application and character of manure and fertilizers, the introduction of new cereals and other grains and other agricultural subjects, and reports the same together with a statement of their doings, and such account of their expenditures, to the governor on or prior to the 1st day of January each year following the holding of a fair, such report to be audited by the governor, Commissioner of Agriculture and Labor and the auditor, and by the governor laid before the legislative assembly. All moneys hereby appropriated shall be paid over to the treasurer of the association entitled to the same on the order of the president attested by the secretary."

Section 1854 is as follows: "It shall be the duty of the directors of any fair association to require the treasurer thereof to give a sufficient bond to such directors, conditioned for the faithful keeping of such money as may come into his hands as such treasurer."

Section 1856 is as follows: "For the purpose of enabling said association to suitably inclose their grounds and to aid them in the erection thereon of proper buildings, structures and other improvements suitable for the purposes of giving expositions or fairs the sum of $10,000 is hereby appropriated out of the moneys in the state treasury, not otherwise appropriated, one half of which amount shall go to each association; provided, nevertheless, that no part of said appropriation shall be payable until after a deed of conveyance of the premises upon which the fair is to be held, has been made and accepted by the state as hereinbefore provided; provided, further, that this appropriation

shall lapse and shall only be available to the association whose conveyance is made and accepted by the state on or prior to June 1, 1906."

Section 1857 is as follows: "There is hereby appropriated out of any funds in the treasury of the state of North Dakota not otherwise appropriated, the sum of $10,000 for premiums and $5,000 for maintenance, annually, to be expended by the directors of said association as follows:

"For premiums in the way of live stock, poultry and agricultural products for better farming interests. Such appropriation to be paid to the North Dakota Fair Association for Grand Forks in the odd-numbered years, and to the North Dakota Fair Association for Fargo in the even-numbered years."

Section 1858 is as follows: "The provisions of this article shall not become binding or effective upon the state as to either of such associations until the stockholders of such association shall adopt a by-law expressly accepting and agreeing to all of the conditions hereof, and file a certified copy of said by-law with the secretary of state."

Section 1859 is as follows: "In the event of the failure of either of such associations to comply with the provisions of this article then the other association shall be entitled to hold a state fair upon its grounds during each year and receive the appropriation herein made for the association failing thus to comply with this article, and such failure on the part of either association shall operate to permanently establish the state fair upon the grounds of the other association; provided, that nothing in this article contained shall be construed to prohibit the fair association leasing said grounds and buildings for the purpose of holding stock and agricultural exhibits when they deem it advisable."

It can hardly be held, after a perusal of these statutes, that the fair association is entirely and exclusively a public institution. It is true that it is the recipient of state funds and that such state funds must be used for premiums. The land, it is true, is deeded to the state, but the deed becomes inoperative as soon as the allowance for premiums is discontinued. It is true that among its directors must, *ex officio,* be certain of the state officers. But there is nothing to show that these state officers act in any other capacity or have greater powers than ordinary directors.

Outside of its legitimate and educational features of stock and agricultural displays and contests, it grants concessions to fortune tellers, vaudeville artists, and all manner of ring throwing and other semi-gambling device promoters. It harbors mountebanks. It conducts automobile and motorcycle races. Its purpose is to attract crowds as much as it is to promote agriculture. The state has no control over these matters or over the revenues derived therefrom. The sum appropriated by the state is no doubt a trust fund and can no doubt neither be levied upon nor used for any purpose but the furnishing of agricultural premiums, but over the other funds the state has no control. The real estate, no doubt, may not be levied upon as long as the state furnishes money for premiums, and, perhaps, as suggested by counsel, the association makes no profits, but its stock is privately subscribed and it nonetheless conducts a private as well as a public enterprise, and as such is liable to private suit.

I find, indeed, in the adjudicated cases no little authority for this position, and, if we carefully examine the statutes of the several states, practically none are against it. Among these is the case of Tongue v. State Bd. of Agri. 55 Or. 61, 105 Pac. 250, the syllabus of which is as follows: "Laws 1899, p. 208 (B. & C. Comp. §§ 4135–4147), provides that five citizens of the state, to be named by the governor, shall constitute a board of agriculture which shall be charged with the exclusive management of the state agricultural society, have the direction of its entire business affairs, and be authorized to purchase and hold real estate. The board is required to provide for an annual fair, and in no event is the state to be liable for any premium awarded or debt, created beyond the amount annually appropriated therefor. The act also provides for an annual appropriation from the state treasury to aid in carrying on the purposes of the board; no part of such allowance to be paid as a premium for trials of speed. Held, that the board is a 'corporation,' and not a branch of the state government, nor for the administration of state affairs; it not being accountable to the state for money received by it, except the legislative appropriation, and it having the power to make contracts, and, as a necessary incident thereto, the right to appeal to the courts for the enforcement of them, it may be sued for a like purpose."

See also Lane v. Minnesota State Agri. Soc. 62 Minn. 175, 29

L.R.A.708, 64 N. W. 382; Downing v. Indiana State Bd. of Agri. 129 Ind. 443, 12 L.R.A. 664, 28 N. E. 123, 614; Dunn v. Brown County Agri. Soc. 46 Ohio St. 93, 1 L.R.A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; Yarmouth v. North Yarmouth, 34 Me. 411, 56 Am. Dec. 666; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72; 1 R. C. L. 784.

I have carefully examined the cases cited by counsel for respondent, but none of them appear to be applicable to the case which is before us. In Minnesota and California, for instance, the fair associations under consideration were made public corporations by express statute. See Minn. Gen. Stat. 1913, § 6491; Cal. Stat. 1880, p. 49; Melvin v. State, 121 Cal. 16, 53 Pac. 416.

In the cases of Bathe v. Decatur County Agri. Soc. 73 Iowa, 11, 5 Am. St. Rep. 651, 34 N. W. 484, and Hern v. Iowa State Agri. Soc. 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092, the associations were held not to have been organized for profit, to have had no stockholders, their powers to have been expressly limited by the statute, and the acts complained of to have been *ultra vires.*

In the cases of Zoeller v. State Bd. of Agri. 163 Ky. 446, 173 S. W. 1143, and Morrison v. Fisher (Morrison v. MacLaren) 160 Wis. 621, L.R.A.1915E, 469, 152 N. W. 475; and Minear v. State Bd. of Agri. 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914B, 1290, not only were the fairs controlled by state boards of agriculture, but the actions were tort actions for personal injuries. In all of them it seems to have been conceded that the association or board could sue and be sued on its contracts, and it was only tort liability that was considered. None of the cases, in fact, which are cited by counsel for respondent, are contract cases.

I am also of the opinion that there was at least some evidence tending to prove that the aisles had been obstructed.

In my opinion the judgment of the district court should be reversed and a new trial be ordered.

CHRISTIANSON, J. (concurring specially): I concur in an affirmance of the judgment. I shall not attempt to state the facts at length, or discuss all the legal questions involved and referred to in the dissenting opinion, prepared by Mr. Chief Justice Bruce.

The plaintiff seeks to recover damages for the violation of a certain stipulation, not contained in the written agreement involved in the case. Plaintiff claims that the writing does not constitute the entire agreement, but that an oral stipulation was entered into under which "the defendant promised and agreed with the plaintiff that the isles and passages between the groups of seats into which the grand stand is divided would be kept free and clear of obstructions and spectators so that the plaintiff and his servants could pass freely among said aisles and passages and among the people occupying seats, for the purpose of selling and offering for sale things to eat and drink, among the occupants thereof." Plaintiff made certain offers of proof with respect to such alleged oral stipulation, which offers were rejected. These offers of proof are set forth in the dissenting opinion for Mr. Chief Justice Bruce, to which I refer. It will be noted that two of the offers of proof relate to the construction placed upon an agreement made in 1911 between the plaintiff and the then superintendent of concessions of the defendant. The written agreement made in 1911 was offered in evidence as part of the offer of proof, and an examination of this agreement discloses that it is wholly different from the writing involved in the case at bar. The term, "grand-stand privilege," is nowhere found in the 1911 agreement. The 1911 agreement recites "that the party of the first part has leased and let unto the party of the second part the following privilege only, to wit: The exclusive privilege to operate a refreshment stand and to sell refreshments in the grand stand and bleachers. Said privilege so leased and let, to be conducted upon the premises described as follows: In the southeast corner of the grandstand."

While the contemporaneous construction placed by the contracting parties on an ambiguous agreement tends to show what the parties intended by the ambiguous terms, and is persuasive evidence of the intent of the parties, it seems obvious that the construction placed by parties upon a different agreement couched in wholly different language would furnish no evidence of such intent. I do not, however, intend to devote any more time or space to this feature of the case, but will, for the purposes of this opinion, assume that the agreement was as alleged in the complaint (although Moore, the secretary of the de-

fendant, on cross-examination specifically denied any such agreement or understanding).

The evidence shows that the fair was conducted for five days: July 20th, 21st, 22d, 23d and 24th. The evidence also shows that the plaintiff maintained a refreshment stand under the grand stand; that, in addition to the sales there made, he engaged certain boys to make sales in the grand stand and bleachers, and a so-called paddock or lobby. These boys received for their services 20 per cent of their sales. In answer to the question, "How many men did you have working the grandstand?" the plaintiff answered, "Different amounts, different times." He thereupon testified that he had thirteen boys on July 21st, twelve boys on July 22d, and ten boys on July 24th. He states that he does not know how many he had on July 23d, nor does he venture any statement as to how many he had on July 20th. The two days on which plaintiff claims the aisles were blocked and for which damages are sought were July 22d and 24th. It therefore appears that on these two days he had fewer boys working than on the other days. It also appears that on the afternoon of July 24th, when it is claimed the principal injury was sustained, certain automobile races were being held. Two of the boys engaged in making sales were called as witnesses for the plaintiff, and they both testified that the people were tremendously interested in the races; that the crowd objected not only when the boys were in the aisles, but also when they were endeavoring to pass between the rows of seats. Of course, this was the only way in which they could pass, and these complaints would have existed even though the aisles had not been blocked. The witnesses also admit that they were, themselves, greatly interested in the races, which it appears were the first automobile races ever held on these fair grounds. It also appears that on July 22d certain horse races were held, and that these races aroused a great deal of interest, and in a measure duplicated the condition which existed at the time of the automobile races on July 24th.

The only evidence furnished by plaintiff as a basis for assessment of damages was a statement of the total amount of cash received by him, and the number of admissions to the grounds and grand stand on each of the different days. The cash received by plaintiff included the moneys received at the stand and by the different venders who sold

refreshments in the grand stand, bleachers, and paddock. Plaintiff admits that he has no knowledge and can furnish no evidence of the cash received from sales made in the grand stand on the different days.

I have no quarrel with the legal proposition advanced by the appellant and sustained by the opinion of the chief justice, that "where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." 8 R. C. L. p. 442. It is true, the rule as against the recovery of uncertain damages has been generally directed as against uncertainty of cause, rather than uncertainty as to measure or extent. This does not, however, mean that in case of breach of contract a party, by merely showing a breach, will be entitled to have a jury speculate upon the amount of damages. It is still true that "the damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect to the cause from which they proceed. Therefore uncertain, contingent, or speculative damages cannot be recovered either in actions *ex contractu,* or in actions *ex delicto.* Several reasons are assigned, one of which is that uncertain or speculative damages are not susceptible of the exactness of proof that is required to fix a liability." 8 R. C. L. p. 438. The party injured by the breach of a contract is entitled to a just and adequate compensation for the injury, and no more; and where he asks to recover profits, he must show that the profits which he claims to have been deprived of were reasonably certain and probable, and that he lost them on account of the breach of the contract.

It is therefore a general rule that "where an established business is *wrongfully* injured, destroyed, or interrupted, the owner of such business can recover damages sustained, but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one; that it had been successfully conducted for such a length of time and had such a trade established that the profits thereof are reasonably ascertainable." 13 Cyc. 59. But that, "where a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." Ibid.

While profits are allowed when they form a consistent element of the contract and the amount can be estimated with reasonable certainty from established data, profits which are speculative, conjectural, or contingent and which cannot be measured by the rules of evidence to a reasonable degree of certainty, or which are not the natural, direct, and certain result of the breach, are not recoverable as damages in actions for breach of contract. A party asserting injury is not entitled to damages for any fancied or probable advantage he might have derived from his contract, and the jury cannot be permitted to speculate whether damages have or have not been occasioned. A party claiming damages by reason of a breach of contract must show not only the breach, but further prove that by reason of the breach, he has sustained injury, and he must furnish data from which the amount of such injury can be estimated with reasonable certainty.

It seems to me that the plaintiff in this case has wholly failed to sustain this burden, and has proved rather than the decrease in his sales was occasioned by causes other than the alleged breach of contract.

While there is evidence tending to show that people were sitting in the aisles, the evidence also shows that some sales were made in the grand stand, and that so far as the first four or five rows were concerned the alleged blocking of the aisles did not interfere with the sales. Although the evidence tends to show the alleged blocking made passage more difficult, I do not believe that the evidence shows that this necessarily prevented the salesmen from passing among the persons sitting in the grand stand.

The testimony of the salesmen called as witnesses by the plaintiff show that the people resented any interference with their view of the races. This resentment was expressed not only when the salesmen were attempting to get through the aisles, but when they were passing between the rows of seats, and when they were passing their wares among those seated in the first rows. If the evidence shows any predominant cause for the decrease of sales, it was the interest taken by the spectators in the races and their expressed desire to be permitted to observe them without interruption by reason of venders of refreshments passing back and forth in front of them.

The conceded interest taken in the races by the audience as well as

by the salesmen; the difference in number and personnel of salesmen; the total failure and conceded inability to show the cash received from the sales in the grand stand on the different days,—all inject elements of uncertainty. Taking the record as a whole I am unable to find any evidence upon which any person could base an intelligent guess whether, or to what extent, plaintiff was injured by reason of the alleged breach of contract. In my opinion there is no data upon which an intelligent estimate as to injury or its extent could be based. And, taking the evidence as a whole, it seems inconceivable that any evidence could be adduced upon a new trial upon the question of damages, which would warrant any jury in awarding more than nominal damages.

On Rehearing.

ROBINSON, J. (after rehearing had). In this case the petition for rehearing is not based on the decision as a whole, nor on any matter overlooked in the decision. It is based on eight points covered by eight separate sentences of the decision, and unfortunately it is true that the reasoning of the case is not all expressed in one sentence. As the decision shows, the plaintiff bargained for the exclusive grand-stand privileges during the fair week to sell eats, drinks, candy, and such like to the patrons of the fair on the grand stand inclosure. We say the plaintiff had such privileges, and he had all he bargained for, and there is no claim that he did not have the usual and exclusive sale privileges of the grand stand. His license was on printed form which had been prepared for general use by the directors and managers of the fair association. He bought it from a salesman or special agent of the fair association. His claim is that he had a special oral contract with the special agent that the fair association should keep open the aisles of the grand stand so as to give him ready access to the people for the purpose of selling his eats and drinks—and this they failed to do—and his offer of proof to that effect was rejected. He made no offer to prove that the directors had given the special agent any authority to make such a special contract. The obvious and unusual purpose of the grand stand is to make money by seating patrons on the stand, both on the seats, and when necessary in the aisles. This obvious

right and purpose the holder of special privileges had no right to limit or vary. The judgment is clearly right, and it is affirmed.

GRACE, J. I concur in the result.

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

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

(164 N. W. 326.)

Banks — assistant cashier — instructions to — by president and director — to give him credit in certain sum — conversion — action for — against such former president — ratification by directors — evidence — issue of fact.

1. Defendant, acting in the capacity of president and director of a bank, gave assistant cashier directions to credit him with $1,500 on account of salary and expense, which was done. He later sold his stock in the bank at book value. Subsequent to this he was sued by the bank for the conversion of its funds. The evidence is examined and *held* to present an issue of fact as to ratification of defendant's acts by the board of directors.

Verdict of jury — evidence — to sustain.

2. Evidence examined and *held* to substantiate the verdict of the jury, which found for the defendant.

Bank — officer of — board of directors — all stockholders — ratification of acts of officer — effect of.

3. Where the board of directors of a bank, consisting of all the stockholders of the bank, ratifies an act of an officer in paying to himself an allowance as salary and expenses, the ratification, though informal, is binding.

NOTE.—On the general rule that a stockholder may vote to ratify his own act as director, although he has a personal interest in the ratification of such act and owns a controlling share of the stock, where such a ratification would not be fraudulent or unreasonable and oppressive as to minority shareholders, see note in 36 L.R.A.(N.S.) 199, on ratification of acts of directors by vote of stockholders including those who are directors.

Trial — testimony — introduction of — subjects of inquiry — presented by party — issue raised — submission to jury — cannot complain — instructions — pleadings — issues.

4. Where, in the trial of a case, a party, in introducing his testimony, opens up a subject of inquiry and introduces testimony relative thereto, he cannot later complain of the submission of the issue of fact thus presented to the jury, where it is fairly presented under appropriate instructions, nor can he complain that the issue is not within the pleadings.

Opinion filed July 28, 1917. Rehearing denied September 24, 1917.

Appeal from Emmons County District Court, *W. L. Neussle,* J.

Judgment for defendant.

Plaintiff appeals.

Affirmed.

Lynn & Lynn and *C. F. Kelsch* and *Langer & Nuchols,* for appellant.

Ratification must be pleaded as an affirmative defense, and, if not so pleaded, evidence thereof cannot be offered. Comp. Laws 1913, § 7448, subd. 2; Erickson v. First Nat. Bank, 44 Neb. 622, 28 L.R.A. 577, 48 Am. St. Rep. 753, 62 N. W. 1078; 31 Cyc. 218, § 2.

No ratification can take place in the absence of a full and complete knowledge of all the facts concerning the act or matter involved. 10 Cyc. 1063 (4, 5), and 1073 (e); 7 R. C. L. §§ 665, 666.

And ratification must be clearly established, either by positive acts or by conduct from which it clearly appears that ratification was intended, and this with a full knowledge of all the facts. 10 Cyc. 1080 (2).

The directors of the bank could not legally ratify that which they had no power to authorize. 10 Cyc. 787, 919; Comp. Laws 1913, §§ 7986, 7987; 5 Thomp. Corp. §§ 5482, 5877; 2 Thomp. Corp. 2d ed. § 1768.

The president of a corporation is liable for his torts, fraud, and conversion. 2 Thomp. Corp. 2d ed. §§ 1489, 1490, 1765.

Where a party is a stockholder of a corporation, and renders services to such corporation, he cannot recover therefor except under express contract. He cannot recover under an implied contract. 10 Cyc. 921 (1) and (2); Winfield Mortg. & T. Co. v. Robinson, 89 Kan. 842,

132 Pac. 979, Ann. Cas. 1915A, 451; Lowe v. Ring, 123 Wis. 370, 101 N. W. 699, 3 Ann. Cas. 731; National Loan & Invest. Co. v. Rockland Co. 36 C. C. A. 370, 94 Fed. 335; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Accommodation Loan & Sav. Fund Asso. v. Stonemetz, 29 Pa. 534; Thomp. Corp. 2d ed. §§ 1715, 1728; 26 Am. & Eng. Enc. Law, 2d ed. 905; Kilpatrick v. Penrose Ferry Bridge Co. 49 Pa. 118, 88 Am. Dec. 497; Monmouth Invest. Co. v. Means, 80 C. C. A. 527, 151 Fed. 159; Hayes v. Canada, A. & P. S. S. Co. 104 C. C. A. 271, 181 Fed. 289; Title Ins. & T. Co. v. Home Teleph. Co. 200 Fed. 263; Notley v. First State Bank, 154 Mich. 676, 118 N. W. 486; McMullen v. Ritchie, 64 Fed. 253.

The case at bar does not come within the exception to the rule above noted, that where an officer or director, while a stockholder, gives all his time and renders valuable services outside the line of his duties, and where it is eventually understood that he is to receive compensation therefor. Bassett v. Fairchild, 132 Cal. 637, 52 L.R.A. 611, 61 Pac. 791, 64 Pac. 1082.

Even if there was a so-called ratification it was illegal for the reason that the board of directors had no power to authorize an allowance as compensation for services after their performance, in the absence of a positive agreement or resolution. National Loan & Invest. Co. v. Rockland Co. 36 C. C. A. 370, 94 Fed. 335; Jones v. Morrison, 31 Minn. 140, 16 N. W. 858; Wood v. Lost Lake Mfg. Co. 23 Or. 20, 37 Am. St. Rep. 651, 23 Pac. 848; First Nat. Bank v. Drake, 29 Kan. 330, 44 Am. Rep. 646; Holder v. Lafayette, 71 Ill. 106, 22 Am. Rep. 89; Winfield Mortg. & T. Co. v. Robinson, Ann. Cas. 1915A, 454 and note, 89 Kan. 842, 132 Pac. 979.

Chas. Coventry, and *Armstrong & Cameron,* for respondent.

A defeated party in the lower court will not be permitted in the supreme court, for the first time, to urge matters not raised and considered in the lower court, nor will he be permitted for the first time to urge a reversal on the ground that ratification had not been pleaded. Nor will he be permitted to urge a new or different theory from that upon which the trial proceeded in the lower court. Delaney v. Western Stock Co. 19 N. D. 630, 125 N. W. 499; 2 Cyc. 670–672.

On motion for new trial the party is confined to those objections noted

in his specifications of error served with the notice of motion. 29 Cyc. 944 et seq.

The sufficiency of the evidence cannot be raised on appeal unless the question was presented to and considered by the trial court on motion for new trial. First Nat. Bank v. Comfort, 4 Dak. 167, 28 N. W. 855; 29 Cyc. 747, 748; Henry v. Maher, 6 N. D. 413, 71 N. W. 127.

"The right to take advantage of errors in the admission or rejection of evidence will be deemed waived unless a new trial is demanded on that ground, even though exceptions to the rulings claimed erroneous have been taken." 29 Cyc. 742.

Appellant having voluntarily and without objection by defendant entered into the question of approval of defendant's acts, it thereby waived any objection to that question being considered by the jury, and waived the right to object to evidence on that question being offered by defendant. 3 Cyc. 244.

Plaintiff having offered evidence of ratification, it thereby opened the door for defendant to avail himself of that defense even though ratification had not been pleaded. Under such circumstances, and where evidence on that point has been offered and received, and submitted to the jury, and the jury having passed upon the same, the question becomes settled. 2 Enc. Pl. & Pr. 1029; Esshom v. Watertown Hotel Co. 7 S. D. 74, 63 N. W. 229.

The principle is settled, that any person capable of contracting can ratify any act that he would have the right to authorize. 10 Cyc. 1072B.

A ratification may be made, whether by formal action or by passive acquiescence, by any corporation, body, or agency that might have authorized the act in the first instance, and so with the directors of a corporation. 10 Cyc. 1073 (D); Edwards v. Fargo & S. R. Co. 4 Dak. 549, 33 N. W. 100.

BIRDZELL, J. This action is for the recovery of $1,500 which was alleged to have been wrongfully taken and converted by the defendant. From a judgment of dismissal and costs, rendered upon the verdict of a jury, and from an order of the trial court denying a motion for a new trial, the plaintiff appeals to this court. The facts are as follows: The defendant, when president and a director of the plaintiff bank, made a claim of $1,500 for services and expenses as an official of the bank.

Upon this statement defendant made or caused to be made a credit slip, crediting him with the amount claimed and debiting the bank. This was on the 15th or 16th of November, 1912, and, in pursuance of the direction afforded by the slip, the assistant cashier of the plaintiff bank caused the necessary entries to be made upon the books. These entries simply credited the defendant with $1,500 and increased the expense account by a similar amount, thereby reducing the undivided profits of the bank. At the time this was done the defendant was the largest stockholder in the bank, owning sixty of the one hundred shares. Immediately following the foregoing transaction the defendant sold his shares upon the basis of their book value, and the book value was the value reflected by the statement of the condition of the bank after the entry of the above transaction in its books. A special meeting of the board of directors, which comprised all of the stockholders of the bank, was held on the 16th of November, 1912, at which, defendant claims, the attention of the directors was called to the credit that he had caused to be entered in his favor. Defendant claims that at this meeting the directors ratified the transaction, but some of the plaintiff's witnesses who were present at the meeting testified that the subject was not drawn to the attention of the board at all. It appears to be undisputed, however, that the defendant disposed of all of his stock in the bank at this meeting, to persons who were present at the meeting, at its book valuation as determined by the books of the bank after the $1,500 item was placed to the credit of the defendant.

The trial judge instructed the jury that an assumption of dominion over the funds of the plaintiff bank, such as was alleged and proved, would constitute a conversion by the defendant, and that, unless the same was later ratified by the board of directors, the defendant would be liable to the bank. There is no question but what the instructions of the trial court were sufficiently favorable to the plaintiff throughout, unless the court erred in charging that the defendant would not be liable if the board of directors ratified his acts. This part of the instruction is the chief ground of the plaintiff's complaint on this appeal.

The assignments of error raise two main points for the consideration of this court. First, whether, in the absence of an express agreement, a stockholder, a director, and officer of a corporation may retain moneys of the corporation as compensation for services rendered; and, second,

assuming that the attempt by the defendant to obtain compensation for past services, not being in pursuance of an express contract, was wholly unauthorized and amounted to a conversion of the funds of the corporation, could his acts in so doing be ratified by the board of directors? As to the first proposition, we are not prepared to say that the law is as contended for. On the contrary, it would seem that, under certain circumstances, the law implies an obligation on the part of a corporation to pay for services rendered by an officer or director, but it is true that in such cases the claim to compensation will be closely scrutinized. See 10 Cyc. 1035. Under the facts of this case, this question is not so important as the question of ratification. This is not an action by an officer of a corporation to recover compensation, but an action by the corporation to recover back moneys which the defendant procured as compensation.

As to the question of ratification: The record discloses a dispute as to the facts going to establish a ratification, and it appears that the jury were properly instructed as to such issue. There is ample evidence to substantiate the verdict. The testimony of Henn, the assistant cashier, who was plaintiff's witness, tends to corroborate that of the defendant. Henn testified that, at the meeting of the board of directors on the 16th of November, "Mr. Fischer said that he had charged up $1,500, I believe, and that he had taken credit for it,—something similar to that." Furthermore, the undisputed facts, with reference to the purchase of defendant's stock at the book valuation, tend strongly to corroborate the defendant's version of the entire transaction. In the face of this testimony, and of the circumstances disclosed, it cannot be doubted that an issue of fact was presented for the consideration of the jury. Appellant contends that there can be no ratification short of action which would be sufficiently formal to authorize the payment of salary to an officer in the first instance before it is earned, but this is untenable. We are aware of no arbitrary rule of law requiring that effect shall not be given to an informal ratification made, as it is contended this ratification was made, by all of the stockholders of the bank, convening as a board of directors. To hold with the appellant on this contention would be to regard the corporate fiction as the whole substance, and ignore entirely the acts of the owners and managers of the corporation.

Appellant also argues that the evidence concerning the ratification by the directors of the plaintiff bank was inadmissible because such defense was not pleaded in the answer. In response to this contention it need only be observed that the plaintiff was the first to go into the question of ratification upon the trial, and that the question was not raised in the court below, except by a motion to strike out testimony relating to the ratification after considerable evidence touching this issue had been submitted without objection. Under these circumstances it is manifest that no error was committed in denying the motion to strike out the testimony and in submitting the question to the jury.

The judgment of the trial court is affirmed.

SAM JOHNSON et al. v. IVER JOHNSON.

(L.R.A.—, —, 164 N. W. 327.)

Rented land — proceeds of — conversion — action to recover for — cotenants — between — possession by cotenant sought to be held liable — consent of others — assumpsit — accounting.

An action for a share in the proceeds of rented land, which is based on the theory of conversion, will not lie on behalf of several cotenants against another cotenant who was in the uninterrupted possession of the land, and who rented it to a third party, when the possession of the cotenant sought to be held liable was without any protest on the part of the plaintiffs, and there was no attempt by him in any way to oust the plaintiffs, and the plaintiffs at no time prior to the demand for their share of the rental set up any claim to share in the possession. Actions, however, in the nature of assumpsit or for an accounting will lie.

Opinion filed July 25, 1917. Rehearing denied September 24, 1917.

Action in trover for the proceeds of property rented to a third person by a cotenant.

Appeal from the County Court of Cass County, *A. G. Hanson*, J.

Judgment for defendant. Plaintiffs appeal.

Affirmed.

Statement of facts by BRUCE, Ch. J.

This is an action for the conversion of wheat and wood grown on a 40-acre tract of land in Ransom county, North Dakota, during the inclusive years, 1911 to 1915, the title to the land being in the name of all of the parties to the action including the defendant. The complaint is the ordinary one in conversion, and alleges "that the plaintiffs herein are the owners and entitled to the immediate possession of certain personal property, to wit, 284 bushels of wheat and 18 cords of wood, being five sixths of the crop sown, grown, and harvested and of the wood cut" on the land in question and during the years 1911 to 1915 inclusive; that on or about the 11th day of April, 1916, the defendant, then being in possession of said grain and wood, or the proceeds thereon, wrongfully converted the same to his own use. A demand is then alleged to have been made of the defendant on the 12th day of April, 1916, for said property, or the proceeds thereon, and a refusal is alleged.

The facts of the case are substantially these: On January 21, 1911, Malene Johnson died intestate the owner of 40 acres of land. The plaintiffs and defendant are the children and grandchildren of the decedent. A decree of heirship was made by the county court of Cass county on April 11, 1916, on plaintiffs' petition. The defendant, Iver Johnson, is a son of the decedent, and is the owner of an undivided one sixth of the real property. The plaintiffs are the owners of the remaining undivided five sixths. Prior to her death, Malene Johnson had rented the land for a number of years, and upon her death, the defendant, who was at home with his mother, continued to look after the land and rented it upon the same conditions that his mother had rented it. There is no proof or offer of proof that the plaintiffs have ever been in possession of the land,—at least not since their mother's death, nor that they have ever taken any part in the farming or leasing of it, or ever asserted any right to occupy, or claimed any interest in the rents and profits until April 11, 1916, the date of decree of heirship. The decree of heirship purports to vest the title to the rents and profits in controversy in the several parties and in the proportions given. It is clear, however, that this portion of the decree can have no effect, because the rents and profits in controversy arose after the death of the decedent, did not belong to her, and the court had no jurisdiction

over them. The plaintiffs alleged that on the 12th day of April, 1916, they made the demand, and that the conversion took place on the 11th day of April, 1916. There is no evidence showing any wrongful act on the part of the defendant in excluding the plaintiffs from the possession of the land. The evidence merely tends to show that after the death of his mother, and during the years 1911 to 1915 inclusive, he rented the land and received the profits of such rental or a portion of the crops, and that he sold these crops.

J. V. Backlund, for appellants.

Evidence tending to prove a fact must be submitted to the jury, however slight it may be. Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. 722; Flemming v. Marine Ins. Co. 4 Whart. 59, 33 Am. Dec. 33; Rodgers v. Stophel, 32 Pa. 111, 72 Am. Dec. 775.

It is competent, relevant, material, and admissible though it may not be such as of itself to establish a fact, if it is such that the jury may, in connection with it and other facts properly alleged, make a finding respecting some issue material to the cause. Cleveland, C. C. & I. R. Co. v. Closser, 126 Ind. 348, 9 L.R.A. 754, 22 Am. St. Rep. 593, 3 Inters. Com. Rep. 387, 26 N. E. 159; Clark v. Patapsco Guano Co. 144 N. C. 64, 119 Am. St. Rep. 931, 56 S. E. 858; 10 R. C. L. p. 927, ¶ 89.

In admitting testimony, the court does not conclusively adjudge that the evidence establishing its competency is sufficient fully to prove the requisite fact. It simply declares that there is some evidence tending to make the testimony competent. Cleveland, C. C. & I. R. Co. v. Closser, supra; 10 R. C. L. p. 927, ¶ 89.

Where one cotenant actually receives money from a third person for the use of the common property, he is liable to the other cotenants for all that he receives over and above his just share. 7 R. C. L. p. 826, ¶ 22; Tarleton v. Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296; Pico v. Calumbet, 12 Cal. 414, 73 Am. Dec. 550; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; McCord v. Oakland Quicksilver Min. Co. 64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863; Crane v. Waggoner, 27 Ind. 52, 89 Am. Dec. 493; Coleman v. Hutchenson, 3 Bibb, 209, 6 Am. Dec. 649; Nelson v. Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387; Hudson v. Coe, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249; Israel v.

Israel, 30 Md. 120, 96 Am. Dec. 571; Flack v. Gosnell, 76 Md. 88, 16 L.R.A. 547, 35 Am. St. Rep. 413, 24 Atl. 414; Peck v. Carpenter, 7 Gray, 283, 66 Am. Dec. 477; Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384; Bates v. Hamilton, 144 Mo. 1, 66 Am. St. Rep. 407, 45 S. W. 641; Izard v. Bodine, 11 N. J. Eq. 403, 69 Am. Dec. 595; McPherson v. McPherson, 33 N. C. (11 Ired. L.) 391, 53 Am. Dec. 416; Puckett v. Smith, 5 Strobh. L. 26, 53 Am. Dec. 686; Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 649, 14 Mor. Min. Rep. 271; Ward v. Ward, 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746.

Generally trover will not lie in favor of one tenant against another except where one acquires and retains exclusive possession of the common property with intent to appropriate it to his own use or otherwise to deprive the other cotenant of its equal use and benefit. The rule that conversion will not lie in such cases has, however, no application to such articles or commodities as are readily divisible by sale, or measure into portions exactly alike in quality. 7 R. C. L. p. 894, ¶ 91; Weeks v. Hackett, 104 Me. 264, 19 L.R.A.(N.S.) 1201, 129 Am. St. Rep. 390, 71 Atl. 858, 15 Ann. Cas. 1156; Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Ripley v. Davis, 15 Mich. 75, 90 Am. Dec. 262.

Where one cotenant in possession of such common property uses more than his share or refuses to allow the other to take his share, he is guilty of conversion and liable to his cotenant. Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Pickering v. Moore, 67 N. H. 533, 31 L.R.A. 698, 68 Am. St. Rep. 695, 32 Atl. 828; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701; 7 R. C. L. p. 824, art. 17.

The injured cotenant may hold the other liable in an action of trover. 7 R. C. L. p. 886, art. 82; Carter v. Bailey, 64 Me. 458, 18 Am. Rep. 273; Tuttle v. Campbell, 74 Mich. 652, 16 Am. St. Rep. 652, 42 N. W. 384; Rains v. McNairy, 4 Humph. 356, 40 Am. Dec. 651; Ashland Lodge v. Williams, 100 Wis. 223, 69 Am. St. Rep. 912, 75 N. W. 954; Grigsby v. Day, 9 S. D. 585, 70 N. W. 881; 7 R. C. L. p. 896, art. 93 and cases cited.

Attempt has been made to distinguish between the sale of a chattel and a tortious destruction, but this is not correct. There is a difference in the meaning of the terms, but their legal effect upon tenants in

common is the same, and trover will lie for either in favor of the injured party. 7 R. C. L. p. 986, art. 93.

When a person has been wrongfully deprived of the possession of personal property, he may elect either to sue to regain possession of sue in conversion for the value thereof. 9 R. C. L. p. 967, art. 14; Woodruff v. Zaban & Son, 133 Ga. 24, 134 Am. St. Rep. 186, 65 S. E. 123, 17 Ann. Cas. 974; Greer v. Newland, 70 Kan. 310, 70 L.R.A. 554, 109 Am. St. Rep. 424, 77 Pac. 98, 78 Pac. 835; Bradley v. Brigham, 149 Mass. 141, 3 L.R.A. 507, 21 N. E. 301; Putnam v. Wise, 1 Hill, 234, 37 Am. Dec. 309; Baird v. Howard, 51 Ohio St. 57, 22 L.R.A. 846, 46 Am. St. Rep. 550, 36 N. E. 732.

Pierce, Tenneson, & Cupler, for respondent.

It was incumbent upon plaintiffs to show the nature of the testimony of their witnesses and that the answers sought to be elicited would be material to the issues. No offer was made to show any wrongful act on the part of the defendant with reference to the crops. There is not even an intimation in the record of any wrongful appropriation or conversion. Regan v. Jones, 14 N. D. 595, 105 N. W. 613; Bristol & S. Co. v. Skapple, 17 N. D. 271, 115 N. W. 841; Madson v. Rutten, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; Soules v. Brotherhood of American Yeomen, 19 N. D. 23, 120 N. W. 760; Van Cise v. Pratt, 26 S. D. 194, 128 N. W. 619.

Defendant acted in good faith, and he has the right to set off against any claim plaintiffs may have for a share of the crops or the proceeds thereof, the plaintiffs' proportion of taxes and repairs and improvements paid by him. If defendant can be sued in tort, he loses the right to counterclaim and to have all matters of dispute settled between them. 7 R. C. L. pp. 837 et seq.; Gage v. Gage, 28 L.R.A. 829, and note, 66 N. H. 282, 29 Atl. 543; Schuster v. Schuster, 29 L.R.A.(N.S.) 224, and note, 84 Neb. 98, 120 N. W. 948, 18 Ann. Cas. 1078; Comp. Laws 1913, §§ 7165, 7168, 7449.

Plaintiffs have mistaken their remedy. They should have sued in assumpsit or by an action in equity for an accounting. Comp. Laws 1913, §§ 5264, 5265, 5718; 7 R. C. L. pp. 820 et seq.; 38 Cyc. 14 et seq.

One cannot complain of the mere possession of a cotenant so long as he refrains from setting up any claim to share in that possession. 7 R. C. L. pp. 829, 830.

Cotenants may be made to account for the use and occupancy or for rents and profits to each other. Gage v. Gage, 66 N. H. 282, 28 L.R.A. 829, 29 Atl. 543; Schuster v. Schuster, 84 Neb. 98, 29 L.R.A. (N.S.) 224, 120 N. W. 948, 18 Ann. Cas. 1078.

A cotenant is not liable for the value of the use and occupancy of real estate, in the absence of agreement or ouster of his cotenant. Schuster v. Schuster, 84 Neb. 98, 29 L.R.A.(N.S.) 229, 120 N. W. 948, 18 Ann. Cas. 1078, and cases cited; Cheney v. Ricks, 187 Ill. 171, 58 N. E. 234; McCrum v. McCrum, 36 Ind. App. 636, 76 N. E. 415; Williamson v. Jones, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19; Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145; Pico v. Columbet, 73 Am. Dec. 550 and note, 12 Cal. 414.

"One who sows, cultivates, and harvests a crop upon the land of another is entitled to the crop as against the owner of the land, whether he came into possession of the land lawfully or not, provided he remains in possession till the crop is harvested." Comp. Laws 1913, § 7166; Nash v. Sullivan, 32 Minn. 189, 20 N. W. 144; 12 Cyc. 977; Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511; Calhoun v. Curtis, 4 Met. 413, 38 Am. Dec. 380; 15 Cyc. 206.

This is true of a tenant in common who is in the sole possession of the land. His interest in the crop grown thereon is not that of a tenant in common of a specific chattel; but on the contrary as soon as he appropriates it he has a good title thereto and a sale thereof will pass complete title to the purchaser. 7 R. C. L. 823, 834, 835, 887.

Even if plaintiffs had title to a portion of the crops they could not maintain conversion, because defendant came into possession of them lawfully, and he never refused to deliver possession of the crops to them, and no claim to any interest in the crops was made until after the crops had been sold. 38 Cyc. 84; Olin v. Martell, 83 Vt. 130, 138 Am. St. Rep. 1072, 74 Atl. 1060; Waller v. Bowling, 12 L.R.A. 266 and note, 108 N. C. 289, 12 S. E. 990.

BRUCE, Ch. J. (after stating the facts as above). The principal question to be determined is whether one or many tenants in common may sue, on the theory of conversion, another tenant in common, who has been uninterruptedly and peaceably in the possession of the premises,

and without any protest on the part of the other tenants, for the interest of the said tenants in the crops raised on said land, or the rental thereof, or whether the action, if any, should be an action in the nature of accounting or assumpsit, or whether in fact any action at all exists.

"The decided preponderance of the authorities, both in England and in America, affirms the right of each cotenant to enter upon and hold possession of the common property, and to make such profit as he can by proper cultivation or other usual means of acquiring benefit therefrom, and to retain the whole of such benefits, provided that in having such possession, and in making such profits, he has not been guilty of an ouster of his cotenant, nor hindered the latter from entering upon the premises and enjoying them as he had a right to do. One tenant in common cannot be deprived of the right to use and enjoy the common property because his cotenants are willing to let the property lie idle, or fail or refuse to set up any claim to it; and while he is thus left in sole possession, he may manage the common property in any way he pleases, provided he does not injure his cotenant. He may cultivate or improve the property, and he is permitted to enjoy the fruits of his own labors, unless that result involves some infringement upon the rights of his cotenants who stand off and forbear to make any use of the property. The tenant out of possession may at any time assert his right to share in the possession, or he may have the property partitioned by a division among the cotenants in severalty, each taking a distinct part according to the extent of his interest. He cannot complain of the mere possession of a cotenant so long as he refrains from setting up any claim to share in that possession." 7 R. C. L. p. 829.

The rule, however, seems to be that if the tenant in possession receives rent from a third person he must account to his cotenants for their proportion thereof. There is some question and confusion in the authorities as to whether the action of assumpsit will lie in such cases and as to what the measure of damages will be. See note to Schuster v. Schuster, 29 L.R.A.(N.S.) 224 (84 Neb. 98, 120 N. W. 948, 18 Ann. Cas. 1078). We are satisfied, however, that this matter is immaterial, and that either an action in accounting or in assumpsit will lie. In an action of assumpsit he could be held liable as for money had and received to the amount of the interest of his cotenants, but could, of course, offset against that sum taxes paid and other legitimate expenses

incurred. This, of course, could be done in an action of accounting, and whether an accounting should be resorted to or not depends largely upon the complexity of the transactions and the accounts. McCaw v. Barker, 115 Ala. 543, 22 So. 131; Dorrance v. Ryon, 35 Pa. Super. Ct. 180.

There is, indeed, a serious question whether the plaintiffs in the case which is before us have any right to recover at all. The original rule of the English common law was that "where one cotenant occupied the common property and took the whole profit, the other had no cause of action against him unless the acts of the occupant amounted to an ouster of his companion, or unless the occupant held under an agreement by which he became bailiff for the other as to his share. . . . The lack of any suitable means of redress, when one cotenant had received more than his share of the rents and profits, led to the enactment of the Statute of Anne (4 & 5 Anne, chap. 16). Under its provisions, one cotenant became the bailiff of the other by receiving more than his share, and could be called to account; but, as interpreted by the courts of England, he could be held to account only when he received more than his share from *another person.*" Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145.

A number of the states have specifically adopted the Statute of Anne, but among these are not to be found the state of North Dakota. And some states, noticeably Montana, have gone even further and provided that, "if any person *shall assume and exercise exclusive ownership over,* or take away, destroy, lessen in value or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist." Mont. Code Civ. Proc. 1895, § 592, as amended by Laws 1899, p. 134. See Ayotte v. Nadeau, supra.

It is not necessary for us, however, to pass upon the proposition whether, if the land had not been rented to a third person, any recovery could be had, as in the case before us the land was rented to a third person. Even then, however, we are confronted with the question whether the rule of the Statute of Anne exists in North Dakota. We hold that it does, and we hereby adopt it. It is not only inherently

just, but it was thoroughly ingrafted into the common law of England more than a century and a half before the state of North Dakota was created, and at least half a century before the Declaration of Independence. If, then, we adopt the general principles of the common law in regard to tenancies in common, and we have nothing in our statute in relation thereto, we should surely adopt the modification that was made by this statute.

The cases, however, in which trover will lie against the tenant in common are only those in which something has been done to destroy the common property, or there has been a direct and positive exclusion of the cotenant in common from the common property. Waller v. Bowling, 12 L.R.A. 261, and note on page 266 (108 N. C. 289, 12 S. E. 990).

The defendant came into possession of the property lawfully, and no claim to any interest was made until April, 1916, after it had been sold. Olin v. Martell, 83 Vt. 130, 138 Am. St. Rep. 1072, 74 Atl. 1060.

As has been suggested by counsel for respondent, to hold that a tenant in common who is rightfully occupying the common property, protecting the interest of absent cotenants by keeping the property in a state of cultivation, paying taxes, and making repairs and improvements, and renting the property so as to make it productive, is liable to be mulcted in conversion by a returning cotenant in after years, would not only be unjust, but would be ruinous to the agricultural interests of the state. If, indeed, one purchasing crops thus grown by a cotenant, or acquiring liens thereon, does so at the peril of having a cotenant return in after years to sue him in conversion, as he might if the tenant in possession was likewise liable, the occupying tenant would find it difficult to dispose of his crop and finance his farming operations, and many tracts of land would lie idle.

We therefore hold that the theory and nature of the action should be that of assumpsit or accounting, and not that of trover or conversion.

We, of course, realize that all common-law forms have been abolished in North Dakota by the statute. The substance, however, remains. Essential differences do not depend upon forms and always outlive them, and the distinctions between the various theories of actions involved are essential and fundamental.

The judgment of the County Court is affirmed.

O. M. HATCHER v. H. C. PLUMLEY and J. P. Edwards, Defendants, and FORUM PRINTING COMPANY and H. F. Emery, as Receiver of said Company, Garnishee Defendants and Respondents.

(164 N. W. 698.)

Garnishee — liability of — measured by responsibility to defendant — plaintiff — recovery by — no greater.

1. A garnishee's liability is measured by his responsibility and relation to the principal defendant. A plaintiff cannot by garnishment place himself in a superior position as regards a recovery, than is occupied by the defendant.

Garnishment liens — other liens — priority of — time — determined by — right first acquired — generally superior.

2. Priority between garnishment liens and other liens or claims upon the same property is generally determined by priority of time. The right first acquired is, as a rule, superior.

Garnishment proceedings — fund in — equitable claimants — rights of.

3. The rights of equitable claimants to funds involved in a garnishment proceeding will be recognized and protected in such proceeding.

Opinion filed August 20, 1917. Rehearing denied October 3, 1917.

From a judgment of the District Court of Cass County, *Pollock,* J., plaintiff appeals.

Affirmed.

Fowler & Green, for appellant.

"The service of garnishee papers upon the garnishee operates as an equitable levy upon such of the debtor's property and credits as were at the time of such service in the hands of the garnishee." Winner v. Hoyt, 68 Wis. 278, 32 N. W. 132; Globe Mill. Co. v. Boynton, 87 Wis. 619, 59 N. W. 136; Morawetz v. Sun Ins. Office, 96 Wis. 175, 65 Am. St. Rep. 43, 71 N. W. 110; Maxwell v. Bank of New Richmond, 101 Wis. 286, 70 Am. St. Rep. 926, 77 N. W. 149.

"The protection of the plaintiff against danger of the garnishee's placing the property beyond the reach of the court is the right to a personal judgment against the garnishee, defendant, or an injunction to restrain the garnishee from in any way parting with the property pend-

ing the proceedings and the right to follow the property as against persons deriving title from the garnishee with notice of equitable lien." La Crosse Nat. Bank v. Wilson, 74 Wis. 391, 43 N. W. 153; North Star Boot & Shoe Co. v. Ladd, 32 Minn. 381, 20 N. W. 335; Mahon v. Fansett, 17 N. D. 104, 115 N. W. 79.

"A lien is created on debtor's property in the hands of garnishee when summons is served upon garnishee, providing it is subject to lien at all." Burcell v. Goldstein, 23 N. D. 257, 136 N. W. 243; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587; Hartzell v. Vigen, 6 N. D. 117, 35 L.R.A. 451, 66 Am. St. Rep. 589, 69 N. W. 203.

The appointment of a receiver for defendant debtor in no way affects the lien by garnishment already acquired. Baldwin v. Hosmer, 101 Mich. 119, 25 L.R.A. 739, 59 N. W. 432, s. c. 101 Mich. 432, 59 N. W. 669; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; 34 Cyc. 228 and cases.

The agreement of Plumley did not give the creditors any right, title, or interest in or to or lien upon the debt, but on the contrary was merely a personal covenant of Plumley. Bray v. Booker, 6 N. D. 526, 72 N. W. 933; Nebraska Moline Plow Co. v. Fuehring, 60 Neb. 316, 83 N. W. 69; Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 20 L. ed. 762.

"The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund holder is bound from the time of notice." Fairbanks, M. & Co. v. Welshans, 55 Neb. 362, 75 N. W. 865; Brandt, Suretyship & Guaranty, § 85.

"The oral promise of an officer and stockholder of a corporation, who is liable as an indorser on its paper and for debts or obligations assumed by the corporation to pay for goods sold and delivered to it, is collateral and within the statute; the benefit accruing to him from such sale and delivery being remote and indirect." Hurst Hardware Co. v. Goodman, 68 W. Va. 462, 32 L.R.A.(N.S.) 598, 69 S. E. 898, Ann. Cas. 1912B, 218; Wood v. Dodge, 23 S. D. 95, 120 N. W. 774; 1 Brandt, Suretyship & Guaranty, p. 163; Miami County Nat. Bank v. Goldberg, 133 Wis. 175, 15 L.R.A.(N.S.) 1115, 113 N. W. 391; Millard v. Steers, 9 App. Div. 419, 41 N. Y. Supp. 321, 158 N. Y. 741, 53 N. E.

1128; Mine & Smelter Supply Co. v. Stockgrowers' Bank, 98 C. C. A. 229, 173 Fed. 859; Winne v. Mehrbach, 130 App. Div. 329, 114 N. Y. Supp. 618; Bauer v. Ambs, 144 App. Div. 274, 128 N. Y. Supp. 1024.

In order to constitute a defense to plaintiff's garnishment, it must be an agreement which the garnishee could enforce on its own behalf, as a defense to a suit by Plumley. Blasdel v. Erickson, 157 Ill. App. 615; Shortridge v. Sturdivant, 32 N. D. 154, 155 N. W. 20.

If this is an agreement which is only available to the creditors, then it is not available to the garnishee or the receiver who steps into its shoes, and cannot be gratuitously set up as a defense by either of them. Comp. Laws 1913, § 5841; Parlin v. Hall, 2 N. D. 473, 52 N. W. 405.

Without attempting to lay down any general rule which shall mark the line between cases where a stranger to a contract may, and cases where he may not, sue upon the agreement to which he is not a party, we are clear that under the law the plaintiff could not maintain an action upon this written instrument. Garnsey v. Rogers, 47 N. Y. 233, 7 Am. Rep. 440; Merrill v. Green, 55 N. Y. 270; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Lorillard v. Clyde, 122 N. Y. 498, 10 L.R.A. 113, 25 N. E. 917; Wright v. Terry, 23 Fla. 160, 2 So. 6; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100.

"Where two persons, for a consideration sufficient as between themselves, covenant to do some act which, if done, would incidentally result in the benefit of a mere stranger, the stranger has not the right to enforce the covenant, although one of the contracting parties might enforce it as against the other." Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 222; Comp. Laws 1913, § 3840; Vrooman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; Fish & H. Co. v. New England Homestake, 27 S. D. 221, 130 N. W. 841; 2 Elliott, Contr. § 1413 and cases; Kramer v. Gardner, 104 Minn. 370, 22 L.R.A.(N.S.) 492, 116 N. W. 925; Johnson v. Bamberger, — Ark. —, 19 S. W. 920.

The contract is not one between the creditors for their common benefit. Nebraska Moline Plow Co. v. Fuehring, 60 Neb. 316, 83 N. W. 69; Wade, Garnishment, § 514.

"The contract, to affect the garnishee's liability, must be one to which he is a party, unless it amounts to an assignment or encumbrance of the property." Wade, Garnishment, § 445; Roberts v. First Nat. Bank, 8 N. D. 474, 79 N. W. 993.

Watson, Young, and Conmy, for respondents.

No judgment shall be rendered upon the liability of a garnishee by reason of any money or other thing owing from him to the defendant, unless before judgment against the defendant it shall have become due absolutely and without depending upon any further contingency; but judgment may be given for any money or other thing owing after it shall have become due absolutely and without depending on any contingency. Comp. Laws 1913, §§ 7575, 7583, 7584.

The garnishee stands liable to plaintiff for the credit disclosed, "to the extent of defendant's right or interest therein." Comp. Laws 1913, § 7583.

While the creditor may obtain all that belongs to the defendant-debtor he cannot get more. He cannot secure a better position than that occupied by the debtor as to the fund or property garnished. The debtor's rights are the source of all the creditor's rights. Dickinson v. Davis, 164 Iowa, 449, 145 N. W. 957; Ford v. Ætna L. Ins. Co. 70 Wash. 29, 126 Pac. 69; North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710.

"Plaintiff's right to recover against the garnishee is predicated upon the defendant's right to recover in his own name against the garnishee." Shortridge v. Sturdivant, 32 N. D. 154, 155 N. W. 20; Shinn, Attachm. & Garnishment, § 516, pp. 158, 159.

The statements made by Plumley to the creditors amounted to an equitable assignment. It is objected that such assignment was not valid because not in writing. But it is well established that such an assignment need not be in writing. It is good if made by parol. Smith v. Meyer, 84 Minn. 455, 87 N. W. 1122; Oppenheimer v. First Nat. Bank, 20 Mont. 192, 50 Pac. 419; Williams v. Ingersoll, 89 N. Y. 508; Roberts v. First Nat. Bank, 8 N. D. 474, 79 N. W. 993.

CHRISTIANSON, J. The defendant Plumley was the president of the Forum Printing Company, and he and the defendant Edwards owned practically all the capital stock of the corporation. On January 19, 1912, these defendants entered into a contract with the plaintiff O. M. Hatcher whereby they agreed to sell their stock in said corporation to said Hatcher on or before April 1, 1912, for a stipulated consid-

eration. Thereafter, on April 2, 1912, the plaintiff brought an action to rescind said contract, and to recover certain moneys paid to defendants thereunder, and to recover special damages alleged to have been sustained in connection with said transaction. On the same date, to wit, April 2, 1912, the plaintiff instituted, ancillary to said main action, a garnishment action against the Forum Printing Company as garnishee. On April 30, 1912, the Forum Printing Company served an affidavit admitting an indebtedness to the defendant Plumley in the sum of $12,902.42, and an indebtedness to the defendant Edwards in the sum of $11.10. On August 16, 1912, an action was commenced in the district court of Cass county wherein S. S. Lyon was plaintiff and the Forum Printing Company defendant, in which action the garnishee H. F. Emery was duly appointed receiver of the Forum Printing Company by an order duly entered in said last-mentioned action on August 16, 1912. Thereafter the receiver published notice to creditors to present their claims, and on January 3, 1913, the plaintiff Hatcher filed a claim reciting the facts above stated. On January 2, 1915, a stipulation was entered into between the parties in the main action, wherein the preceding stated facts, including the facts with respect to the appointment of the receiver of the Forum Printing Company and the presentation by Hatcher of his claim to such receiver, were fully stated. The stipulation provided for entry of judgment adjudging that the contract of purchase be rescinded, and that Hatcher recover judgment against Plumley and Edwards for the moneys paid upon the purchase price, namely $4,583.33, with 7 per cent interest from March 1, 1912. The stipulation further provided, however, that no execution should issue on such judgment against the defendants, personally, but that such judgment should be collected only out of the indebtedness of the Forum Printing Company to the defendants, and by and through the garnishment proceedings, and the claim of the plaintiff filed against the receiver. Judgment was duly entered upon and in accordance with the terms of such stipulation on July 5, 1915. On February 23, 1915, the garnishee defendant asked for and obtained leave to serve an amended disclosure. In such amended disclosure it is asserted "that at the time of the service of the garnishment summons in the above-entitled matter upon the said above garnishee, to wit, on April 2, 1912, it, the said Forum Printing Com-

pany, was indebted to the said defendant H. C. Plumley, upon open book account covering salary for services as president and general manager of said company for preceding years in the sum of $12,902.43; that except as aforesaid, the Forum Printing Company then had no property, money, or effects of the said defendant in its possession or under its control, save that it was at said time further indebted to the said H. C. Plumley in the sum of $184.03 upon a claim which, by decree of the court herein, has heretofore been established as a prior lien upon the assets of the Forum Printing Company.

"That said debt above mentioned, to wit, $12,902.43, of the Forum Printing Company to H. C. Plumley, was on and prior to April 2, 1912, in all things subject to prior equities and claims as follows: Said sum, as a claim against Forum Printing Company, was subject to the prior payment in full of all the other creditors of the Forum Printing Company; that payment of said debt of $12,902.43 to the said H. C. Plumley by said Forum Printing Company had been by him, the said H. C. Plumley, long prior to April 2, 1912, waived, and the payment thereof postponed in favor of all other creditors of said Forum Printing Company; that such waiver and agreement for postponement of the payment thereof, thus made by the said H. C. Plumley, had been acted upon by creditors of the Forum Printing Company in the matter of their granting credit, making loans, and renewals and extensions, all of which things were done long prior to April 2, 1912; that the Forum Printing Company, prior to April 2, 1912, received credit, obtained loans of money, and obtained extensions of previously negotiated loans and notes, upon the basis and strength of the said H. C. Plumley's waiver of his said claim of $12,902.43, and upon the strength and basis of said last-mentioned claim being at all times held and taken to be subordinate and inferior to, and subject to, the payment of all other creditors of the said Forum Printing Company, in full, before any payment whatever should be made or should become liable to be made by the Forum Printing Company in favor of the said H. C. Plumley; and that the said H. C. Plumley, long prior to April 2, 1912, consented and agreed to and with the other creditors of the said Forum Printing Company, that as consideration for the making of loans, the granting of credit, and the extension of maturing loans of creditors of the Forum Printing Company, he, the said H. C. Plumley, would

and did waive and agree that he would never assert said claim of $12,902.43 unless, or until, all other creditors of said Forum Printing Company were first paid in full their claims against said company; that the interest, if any, of the plaintiff, O. M. Hatcher, in and to said claim of $12,902.43 against the Forum Printing Company, is subject and subordinate to the claims of all other creditors of said Forum Printing Company which were in existence on or prior to April 2, 1912."

The receiver, H. F. Emery, who was joined as a party, adopted the disclosure of the Forum Printing Company as his answer in the garnishment action, and that action was tried upon the issue joined by plaintiff on such disclosure.

The undisputed evidence showed that Plumley and Edwards were and had been owners of practically all the capital stock of the Forum Printing Company; that Plumley, up to May 4, 1912, was the president of the company; that the Forum Printing Company was indebted to Plumley in the sum of $12,902.42; that Plumley at various times prior to April 2, 1912, had negotiations with various large creditors of the company and induced them to extend credit to such company upon his promise that his (Plumley's) claim would be secondary and subordinate to the claims of the other creditors of the company; that such promises were made to and relied upon by the following specific creditors, whose claims were as follows:

Wright, Barrett, & Stillwell Co.	$6,671.49
A. E. Bestic,	3,205.94
First National Bank of Fargo,	5,790.88
Merchants National Bank of Fargo,	13,512.55
James Kennedy,	5,015.42
Total	$34,196.28

(In addition to his claim above mentioned, James Kennedy had executed notes, as accommodation maker, or as an accommodation had guaranteed payment of notes, for the Forum Printing Company, which notes are held and have been filed as claims against the Forum Printing Company, by the State Bank of Erie, First National Bank of Page, and the Fargo National Bank, in amounts aggregating $7,146.60. And

it appears from the evidence that Kennedy not only extended the credit evidenced by his claim, but also assumed the liability as accommodation maker or indorser upon the claims mentioned, in reliance upon Plumley's promise that his (Plumley's) claim would be secondary to the claims of all other creditors.)

It further appears that all the assets of the corporation have been sold and converted into cash; that the total amount of cash in the hands of the receiver, after payment of claims secured by mortgages upon the property, taxes, and other claims of a preferred character, is $33,410.89, and that the unsecured claims allowed aggregated $57,301.99. (The claim of Plumley was not allowed, and is not included in this amount.)

The trial court ordered a dismissal of the garnishment action, and plaintiff appeals.

The sole question on this appeal is whether the agreement on the part of Plumley, made with and acted upon by certain creditors of the Forum Printing Company prior to the institution of the garnishment action, is valid as against, and takes precedence over, the garnishment.

Under our statute, a creditor is "entitled to proceed by garnishment . . . against any person . . . who shall be indebted to or have any property . . . in his possession or under his control belonging to such creditor's debtor." Comp. Laws 1913, § 7567. When a garnishee is indebted or under liability to the defendant named in the garnishee summons, he should set forth in his answer a description of the indebtedness and whether the same is "an absolute or contingent liability and all the facts and circumstances necessary to a complete understanding of such liability or indebtedness or when the garnishee shall be in doubt respecting any such liability or indebtedness, he may set forth all the facts and circumstances concerning the same and submit the question to the court." Comp. Laws 1913, § 7575.

When the answer of the garnishee discloses that any other person than the defendant claims the indebtedness or property in his hands, the court may order such claimant to be interpleaded as a defendant to the garnishment action. Comp. Laws 1913, § 7582.

The garnishee from the time of the service of the summons stands "liable to the plaintiff to the amount of the property, money, credits and effects in his possession or under his control belonging to the de-

fendant, or in which he shall be interested, *to the extent of his right or interest therein,* and of all debts due or to become due to the defendant, except such as may be by law exempt from execution." Comp. Laws 1913, § 7583. And "no judgment shall be rendered upon a liability of the garnishee arising . . . by reason of any money or other thing owing from him to the defendant, unless before judgment against the defendant it shall have become due absolutely and without depending upon any future contingency; but judgment may be given for any money or other thing owing after it shall have become due absolutely and without depending on any contingency." Comp. Laws 1913, § 7584.

The manifest purpose of garnishment process, and the intent of the legislature as evinced by these statutory provisions, is to subject the property owned by, or debts due to, a defendant in an action, to the payment of the judgment obtained therein. But it is equally evident that only the actual interest of the defendant in such property or indebtedness can be reached by such garnishment proceedings. The creditor cannot by garnishment obtain any more than actually belongs to his debtor. The rights of the debtor are the source of the creditor's rights. The stream cannot rise higher than its source. And if there are any legal or equitable bars standing in the way of the defendant enforcing his right or interest against the garnishee (or claimants interpleaded), the same bars will stand in the way of the plaintiff in the garnishment action. The plaintiff in a garnishment action at the most becomes subrogated to the rights of the defendant in the main action. He can obtain no greater or better title to the property or indebtedness garnished than that possessed by the defendant in the main action. If it appears that for some reason the defendant in the main action could not successfully have maintained an action in his own name for his own use against the garnishee defendant by reason of the rights of the garnishee, or some third person, manifestly, these rights will equally bar the rights of the plaintiff. Under no circumstances can the plaintiff be placed in a more favorable, or the garnishee in a worse, position than if the defendant was himself enforcing his claim. Smith v. Clarke, 9 Iowa, 241, 245. For the plaintiff cannot by garnishment place himself in a superior position as regards a recovery than is occupied by the principal defendant. The garnishee's liability is meas-

ured by his responsibility and relation to the defendant. And he can be charged only in consistency with the subject of his contract with the defendant. And if, by any pre-existing bona fide contract, his accountability has been removed or modified, it follows that the garnishee's liability is correspondingly affected. The garnishment cannot change the nature of a contract between the garnishee and the defendant, nor prevent the garnishee from performing his contract with third persons. Shortridge v. Sturdivant, 32 N. D. 154, 158, 155 N. W. 20; Shinn, Attachm. & Garnishment, § 516; Petrie v. Wyman, 35 N. D. 126, 159 N. W. 616.

"Priority between garnishment liens, and other liens or claims upon the same property, is generally determined by priority of time. *The right first acquired is, as a rule, superior.* Rights under garnishment are subordinate to a good pre-existing equitable assignment, though the latter is not perfect at law. . . . Again, the right of subrogation which arises upon payment by sureties of a judgment against the principal debtor takes priority over a lien acquired by garnishment entered after the judgment." 12 R. C. L. p. 848, § 90.

As already stated, it appears from the undisputed evidence in this case, that certain creditors of the Forum Printing Company extended existing obligations and advanced new credits in reliance upon the agreement and representations of Plumley that his claim against the Forum Printing Company would be subordinate and inferior to the claims of other creditors of the company. When Plumley made these promises and representations, it was greatly to his interest to have the credit sought extended to the Forum Printing Company. He was vitally interested in the maintenance and continuation of the business of that company. And we are wholly unable to see any reason why he could not legally waive his claim against the Forum Printing Company as to other creditors. Suppose Plumley, instead of making the agreement referred to, had in good faith absolutely canceled his claim against the Forum Printing Company in order to enhance the financial standing of the company, could the plaintiff in the present action have contended that the claim was still existent so far as he was concerned? Manifestly not. In the case at bar, Plumley, in effect, told the creditors that he would release his claim in so far as their claims were con-

cerned. And, in reliance upon his promise, they extended credit to the Forum Printing Company accordingly.

Appellant has assailed the arrangement between Plumley and his creditors upon various grounds, but apparently overlooked the fact that the plaintiff is not a creditor of the Forum Printing Company,—he is Plumley's creditor. And in this action he stands in Plumley's shoes. He has as much right as, and no more right than, Plumley would have had to assail such arrangement in event Plumley had endeavored to file a claim in the receivership proceedings in disregard of his agreement with the creditors.

The instant garnishment action "is, in substance, an equitable proceeding for the settlement of the ownership of a fund, especially since a claimant to the fund has appeared and become party to the proceeding, though arising in an action at law. . . . 'As between the plaintiff and claimant, equitable considerations must prevail, so far as the nature of the process will admit.'" Jenness v. Wharff, 87 Me. 307, 32 Atl. 908; Haynes v. Thompson, 80 Me. 125, 13 Atl. 276.

Plaintiff's right to enforce or collect the account is burdened with all claims or rights, legal or equitable, which might have been urged by the Forum Printing Company, or the creditors against Plumley. Rood, Garnishment, §§ 66, 349; Jenness v. Wharff, supra; Cram v. Shackleton, 64 N. H. 44, 5 Atl. 715; Haas v. Old Nat. Bank, 91 Ga. 307, 18 S. E. 188; Chamberlain v. Gilman, 10 Colo. 94, 14 Pac. 107; Carr v. Waugh, 28 Ill. 418; Dressor v. McCord, 96 Ill. 389; Smith, T. & Co. v. Clarke, 9 Iowa, 241; North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710; Dickinson v. Davis, 164 Iowa, 449, 145 N. W. 957.

The judgment appealed from must be affirmed. It is so ordered.

GRACE, J. I dissent.

JOHN W. CARR v. PETER NEVA, John Neva, and Joe Koenig.

(164 N. W. 729.)

Verdict — convincing evidence — based on — harmless error — not vacated for.

1. A verdict based on clear and convincing evidence will not be vacated for harmless error.

Assault and battery — counterclaim — defendant asserting plaintiff was aggressor — stricken out on motion — if error, same was harmless — verdict finding defendant wrongdoer.

2. In an action for assault and battery wherein the defendant by way of counterclaim asserts that the plaintiff was the aggressor and that the defendant is entitled to recover damages against plaintiff for injuries sustained during the altercation, the error if any in striking out such counterclaim is harmless where the jury by its verdict finds that the defendant was the wrongdoer.

Evidence — admission of — incompetent — error — cured by later withdrawal — general rule.

3. As a general rule error in the admission of incompetent evidence is cured by the subsequent withdrawal thereof.

Exemplary damages — verdict allowing — against three joint wrongdoers — compensatory damages — against two only — setting aside — not ground for.

4. A verdict awarding exemplary damages against three joint wrongdoers will not be set aside as to one of them, merely because the jury returned a verdict for compensatory damages against only two of such three joint tortfeasors, where, in addition to the general verdict, the jury returned special findings under which all three were clearly liable for compensatory damages.

Opinion filed September 26, 1917. On petition for rehearing filed October 5, 1917.

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

Affirmed.

Knauf & Knauf, and *Edward P. Kelly,* for appellants.

One tort may be counterclaimed against another tort where the two arise out of the same transaction.

The statute means something more than matters of contract—arising out of the same transaction; it may be a "performance" or an "affair;" it may mean two persons engaged in performing torts against each other. Comp. Laws 1913, § 7449; Webster; Advance Thresher

Co. v. Klein, 28 S. D. 177, L.R.A.1916C, 514, 133 N. W. 51; Hannahs v. Provine, 28 S. D. 200, 133 N. W. 53; Pelton v. Powell, 96 Wis. 473, 71 N. W. 887; Rev. Stat. U. S. §§ 2655, 2656; Vilas v. Mason, 25 Wis. 310; McArthur v. Green Bay & M. Canal Co. 34 Wis. 139; Gilbert v. Loberg, 86 Wis. 661, 57 N. W. 982; Collins v. Morrison, 91 Wis. 324, 64 N. W. 1000; Wood v. Pierson, 45 Mich. 313, 7 N. W. 888; Ryan v. Lewis, 3 Hun, 429; Heigle v. Willis, 50 Hun, 588, 3 N. Y. Supp. 497; Slone v. Slone, 2 Met. (Ky.) 339; Schnaderbeck v. Worth, 8 Abb. Pr. 37; Sheehan v. Pierce, 70 Hun, 22, 23 N. Y. Supp. 1119.

A counterclaim must be a cause of action arising out of the same transaction, and that this prescription includes actions of tort is plainly indicated by the fact that it is contradistinguished from that contained in subdivision 2, which is confined to actions on contract. Comp. Laws 1913, § 7449, subd. 1; Heigle v. Willis, 50 Hun, 588, 3 N. Y. Supp. 497.

Where two parties engage in a fight, and the party who thinks himself to have been assaulted and beaten brings action for damages, the other party may counterclaim and show the excessive and unnecessary force and violence used against him. Dole v. Erskine, 35 N. H. 510; Elliott v. Brown, 2 Wend. 499, 20 Am. Dec. 644; Cooley, Torts, 165; Darling v. Williams, 35 Ohio St. 63; Gizler v. Witzel, 82 Ill. 322; Cockcroft v. Smith, 2 Salk. 642, 91 Eng. Reprint, 541; State v. Wood, 1 Bay, 351; Curtis v. Carson, 2 N. H. 539; Philbrick v. Foster, 4 Ind. 442; Bartlett v. Churchill, 24 Vt. 218; Brown v. Gordon, 1 Gray, 182; Ogden v. Claycomb, 52 Ill. 365; Riddle v. State, 49 Ala. 389; Williams v. State, 44 Ala. 41, and cases cited; Carpenter v. Manhattan L. Ins. Co. 93 N. Y. 556; Murphy v. McQuade, 20 Misc. 671, 46 N. Y. Supp. 382; Rev. Codes 1899, § 5274; Hanson v. Skogman, 14 N. D. 447, 105 N. W. 90.

Where questions call for the mere conclusion of the witness and proper objection is made, it is error to admit such testimony. Porter v. Valentine, 18 Misc. 213, 41 N. Y. Supp. 507; Morrissey v. Ingham, 111 Mass. 63.

The justice court had no authority to enter any judgment, and evidence thereof was incompetent and immaterial. Code, § 8961; Crisp v. State Bank, 32 N. D. 263, 155 N. W. 78.

Where the court erroneously admits testimony, but afterwards strikes it out, the original error is generally cured. But there is a well-defined exception to the rule, which is also established as a general rule itself, and that is "where the evidence thus admitted is so impressive that, in the opinion of the appellate court its effect is not removed from the minds of the jury by its subsequent withdrawal, or by an instruction of the court to disregard it, the judgment will be reversed on account of its admission and a new trial granted." 38 Cyc. 1441–1443; State v. McGahey, 3 N. D. 293, 55 N. W. 753; Bishop v. Chicago, M. & St. P. R. Co. 4 N. D. 536, 62 N. W. 605; Thomp. Trials, § 723; Armour & Co. v. Kollmeyer, 16 L.R.A.(N.S.) 1110, 88 C. C. A. 242, 161 Fed. 78; Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup Ct. Rep. 614; Waldron v. Waldron, 156 U. S. 363, 39 L. ed. 453, 15 Sup. Ct. Rep. 383; Whittaker v. Voorhees, 38 Kan. 71, 15 Pac. 874; Tourtelotte v. Brown, 4 Colo. App. 377, 36 Pac. 73; Taylor v. Adams, 58 Mich. 187, 24 N. W. 864; Foster v. Shepherd, 258 Ill. 164, 45 L.R.A.(N.S.) 167, 101 N. E. 411, Ann. Cas. 1914B, 572; Chicago Union Traction Co. v. Arnold, 131 Ill. App. 599; Sinker v. Diggins, 76 Mich. 557, 43 N. W. 674; Wojtylak v. Kansas & T. Coal Co. 188 Mo. 260, 87 S. W. 506; Chicago, M. & St. P. R. Co. v. Newsome, 98 C. C. A. 1, 174 Fed. 394; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054.

It was proper to show all that defendant said by way of admissions in the court below,—the justice court,—but it was error to show all that was done and what the justice said to him, and the admission of such evidence could have no other effect than to prejudice the jury. Breitenbach v. Trowbridge, 64 Mich. 393, 8 Am. St. Rep. 829, 31 N. W. 404; 1 Greenl. Ev. § 537, note; Phillipps Ev. 523, note 4; Clark v. Irvin, 9 Ohio, 132; Crawford v. Bergen, 91 Iowa, 675, 60 N. W. 205; Root v. Sturdivant, 70 Iowa, 55, 29 N. W. 802; Rudolph v. Landwerlen, 92 Ind. 34; Birchard v. Booth, 4 Wis. 67; Wisnieski v. Vanek, 5 Neb. (Unof.) 512, 99 N. W. 258; 1 Greenl. Ev. 16th ed. § 527; Risdon v. Yates, 145 Cal. 210, 78 Pac. 642.

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury in addition to the actual damages may give damages for the sake of example; and, by way of punishing the defendant, actual damages against Koenig were not found by the

jury. Therefore there was no ground for exemplary damages. Comp. Laws 1913, § 7145; Kuhn v. Chicago, M. & St. P. R. Co. 74 Iowa, 137, 37 N. W. 116; Maxwell v. Kennedy, 50 Wis. 545, 7 N. W. 657; Boardman v. Marshalltown Grocery Co. 105 Iowa, 445, 75 N. W. 343; Schippel v. Norton, 38 Kan. 567, 16 Pac. 804.

S. E. Ellsworth, and *James Carr* for respondents.

Where judgment is entered and motion for new trial is made and an order made denying the motion and appeal is taken, and in the undertaking on appeal the judgment is the only adverse proceeding specified whereby appellant feels aggrieved, the appeal is only from such judgment, and that so far as an appeal is attempted to be taken from the order denying a new trial, it is ineffectual. Sucker State Drill Co. v. Brock & Richardson, 18 N. D. 598, 120 N. W. 757.

Specifications to avail the party must be served with the notice of appeal, and be legitimately brought into the record. Comp. Laws 1913, § 7656.

The test of whether or not the cause of action made the subject of a counterclaim arises out of the same transaction as that set forth in the complaint, depends upon a judicial examination of the pleadings. It is not sufficient for a party to allege in the beginning of his counterclaim that the facts pleaded arise out of the same transaction and fracas set forth in the complaint. It must appear from the facts pleaded that the counterclaim does arise out of the same cause of action set forth in the complaint. Comp. Laws 1913, § 7749; Wrege v. Jones, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 Ann. Cas. 482.

It is held that one assault cannot be the subject of a counterclaim against the cause of action for another assault, even though they are alleged to have occurred in the same affray. Schnaderbeck v. Worth, 8 Abb. Pr. 37; Prosser v. Carroll, 33 Misc. 428, 68 N. Y. Supp. 542.

The fact that the defendants act in unison in making the assault, and contribute effort or encouragement to bring it about or to further the carrying out of the same, is sufficient to establish joint liability. Herron v. Hughes, 25 Cal. 556; 8 Cyc. 657, 677.

"At least nominal damages may be recovered where a legal right is infringed. Punitive damages may be awarded in a legal action though

only nominal damages are recovered." Press Pub. Co. v. Monroe, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196.

This is also true though no actual damages are sustained. Lampert v. Judge & D. Drug Co. 238 Mo. 409, 37 L.R.A.(N.S.) 533, 141 S. W. 1095, Ann. Cas. 1913A, 351; Vlasservitch v. Augusta & A. R. Co. 85 S. C. 291, 67 S. E. 307.

ROBINSON, J. This is an action to recover damages for a grave and unprovoked assault and battery. On evidence showing the guilt of each defendant beyond a reasonable doubt, the jury found a verdict against them. From the judgment they appeal to this court and assign about eighty errors, based on objections and exceptions. To nearly every simple question the counsel has appended needless objections and exceptions or motions to strike. But such objections and exceptions are not a legal tender, and are no cause for vacating a verdict and judgment based on clear and convincing evidence. When a party commits a brutal and unprovoked assault and battery, it is folly to think of paying off and making a settlement by any number of legal quibbles. The only real question is, Has the defendant had a fair trial and is the verdict well sustained by the evidence?

The plaintiff is an attorney of Jamestown, and at the time of the assault he was on the farm of Andrew Neva booking and superintending proceedings of a friendly chattel-mortgage sale. The defendants are related. They went together and sought an opportunity to insult and quarrel with the plaintiff. He is not a fighter. He had no officer present at the sale to protect him, and he tried to avoid a quarrel, and said he did not want any trouble with them. When his eyes were turned away, Peter Neva struck him a violent blow on the mouth, breaking out two of his front teeth. The parties clinched and in the struggle Peter fell or was brought to the ground. The plaintiff let him up on demand of the other defendants. Plaintiff then started for his car, and was about to enter it when Peter Neva struck him a violent blow on the nose, fracturing the bone. The other defendants stood by and urged Peter to go after him. Peter was arrested and brought before a justice of the peace. He pleaded guilty and paid a fine of $25. On the trial in district court there was a question con-

cerning the jurisdiction of the justice of the peace and the admissibility of his docket in evidence. Hence, the offer of such evidence was withdrawn, and the justice testified the same as any other person might to the admissions made to him by Peter Neva. The record of the trial covers 348 pages. It appears that Joe Koenig is a brother-in-law of the Nevas, who are brothers. The sale was at the farm of Andrew Neva. The three defendants were there during the sale. John Neva claimed a prior mortgage on a small part of the property, and he said to plaintiff: "What are you sons of bitches going to do about my mortgage?" During the sale every time plaintiff came near John Neva he would say: "I would like to see those sons of bitches foreclose a mortgage on my property. I would like to see them after dark." He said at different times: "Why don't the sons of bitches pay my mortgage?" The other defendants would say: "That is right John; make him pay you."

Plaintiff testifies: "I went to the door of the barn to see the cattle, and he stepped up to me and said 'When are you sons of bitches going to pay my mortgage?' The other defendants were standing by him. Then Joe Koenig came out of the barn and walked around in front of me, and walked directly up against me, and said: 'Oh! Excuse me; I did not see you.' In two or three minutes later he came back from the barn and again bumped against me from the back. Then he said: 'Excuse me; I did not see you.' And the other defendants smiled. They watched and laughed. He used the words 'sons of bitches' about continuously for about two hours prior to the close of the sale. At the close of the sale, when most of the people had gone home, defendants came up and stood around. Finally, Peter stepped up and said: 'Do you know what I would do if you sons of bitches were foreclosing a mortgage on my farm?' He said, 'I would like to see you sell the stuff that I had a mortgage on you cowardly sons of bitch.' I turned my eye from him a moment. He drew back and struck me across the mouth. The blow broke out these teeth (his two front teeth). He struck me again, and I warded off the blow and grabbed hold of his arm and shoulder and pushed him back. He kicked me with his right foot on the abdomen, and John Neva and Joe Koenig said at this time: 'Go after the son of a bitch; go after him.' He continued trying to

strike me. I wrestled with him and threw him down, and he fell on his stomach. I let him up, started toward the automobile. He followed me up and finally landed another blow on the end of my nose. It caused the blood to sputter all over my face, and as I took out my handkerchief to wipe it off, he came up quietly and struck me on the left side of the nose and fractured the bone on the left side of my nose."

Bonhus was at the sale and fully corroborates the plaintiff, and he testifies that the other defendants made no effort to rescue Carr from Pete; they said, "Go after him Pete." I heard Koenig's voice say: "The son of a bitch." They urged him on. John Neva hollered: "Give him another one, Pete." So Pete came over and struck him again.

Dr. Gerrish examined and treated Carr the morning after he was injured. He testifies that Carr's mouth and lips were cut in two or three places and very badly swollen. He had two front teeth broken out or off. He had a broken nose right along the side. He had a black eye. The doctor saw him once or twice every day for two weeks, and thinks the fracture of the nose is a permanent affliction. The doctor's bill was seventy-five or a hundred dollars.

Dentist Reardon testifies that on examination of the plaintiff he found two front teeth broken off the upper jaw and the gums were badly bruised.

Hammerstaedt, the auctioneer, well corroborates the plaintiff's testimony.

Theodore Anderson saw the conflict, and he saw Neva strike Carr.

John Neva testified thus: "I said little brother go to him. Go to the son of a bitch." (197.)

No person can read over the testimony without being satisfied that the verdict is just and in moderation. Indeed, it should have been for a much larger sum.

As a counterclaim Peter Neva by answer averred that he was damaged to the amount of $1,000, by injury received in the scuffle with Carr. To this there was a demurrer, which was sustained by an oral ruling, and the parties went to trial. The ruling is of no consequence. The parties went to trial, and were given ample opportunity to prove all the facts and circumstances in regard to the matter of dispute, and the testimony shows beyond all question that the defendants were the

aggressors from start to finish, and they were each guilty of an unprovoked and brutal assault and battery. Judgment affirmed.

BRUCE, Ch. J. (specially concurring). I concur in the result and judgment announced in the opinion of Mr. Justice Robinson. I do so because I think that no proof was necessary of a prior agreement or conspiracy on behalf of the defendants to make the assault. There was, to my mind, evidence of a joint tort, and that those who did not actually make the assault aided and abetted in its consummation. This I believe is all that is necessary.

GRACE, J. (dissenting). The appeal in this case is in a very complicated condition. There are many irregularities in the same, making it exceedingly difficult for this court to give proper consideration to all the questions presented in the appeal. It would seem that matters coming before the supreme court should be so presented to this court in the proceedings concerning appeals that it would not be necessary for the court to strain statutes relative to appeals in order to reach the consideration of the merits of the questions presented on appeal.

The first matter under consideration is a demurrer to the counterclaim pleaded in the answer of Peter Neva, one of the defendants. The order sustaining such demurrer was made on the 20th day of December, 1915, in open court, in the course of the preliminary part of the trial. After the trial of such action the defendant Peter Neva appealed from such order allowing such demurrer, to the supreme court, serving notice of such appeal, and an undertaking in the sum of $250. Afterwards an appeal was taken from the judgment in said action, and a proper notice of appeal and undertaking also perfected therein. The defendant also undertook to appeal from the order denying motion for judgment *non obstante* and the order denying motion for a new trial, but did not mention such orders in his undertaking in the appeal from the judgment. There is therefore no appeal from such orders. Sucker State Drill Co. v. Brock & Richardson, 18 N. D. 598, 120 N. W. 757. In that case this court said: "On an appeal from both a final judgment and from an order denying a new trial but one undertaking is required to perfect such appeals. . . . Such undertaking must refer to each of the appeals, and if it merely recites the

appeal from the judgment, the appeal from the order is ineffectual and may be dismissed on motion." In this case, in the undertaking in the appeal from the judgment no mention is made of the appeal from the orders denying judgment *non obstante* or motion for a new trial, and such appeals are therefore ineffectual. The defendant, in the lower court, in serving his motion for judgment *non obstante* or for a new trial, served therewith proper specifications of error. The appellant in appealing from the final judgment served notice of appeal and undertaking, but did not serve a statement of errors of law complained of, but stated in such notice of appeal from such judgment as follows: "And you will also take notice that there was heretofore served upon you an assignment and specification of errors in said matter, served upon you with the motion for judgment notwithstanding the verdict or for a new trial, and this appeal is also taken from the order of said court dated the 24th day of December, 1915, overruling the motion for judgment notwithstanding the verdict, and from the order denying and overruling the motion for a new trial in the above-entitled matter, and from the whole thereof."

We have seen that from the failure to mention the appeals from such orders in the undertaking, such appeals are ineffectual. We have also seen that in the appeal from the judgment no new specifications of error were served, but the specifications of error served in the two motions were referred to and made the specifications of error in the appeal from the judgment.

We will for the purpose of disposing of this case consider that the specifications of error served with such motions are the specifications of error in the appeal from the judgment, but in doing this we do not uphold that such method of considering specifications of error can be allowed as a general rule, but that such procedure is taken in order to find some way to consider the matters involved in the appeal. Section 7656, Compiled Laws of 1913, says in plain language what shall be done with reference to serving statement of errors of law complained of, and it would seem that the language and meaning thereof is so plain that it could hardly be misunderstood. The procedure therein provided for should have been followed.

Referring now to the demurrer, we will consider the merits thereof in connection with and as a part of all the other matters appealed

from, including the judgment. The matters pleaded in the answer by way of counterclaim in the case at bar were a proper counterclaim. The damages alleged in the counterclaim arose out of the same transaction. The alleged assault and battery of the plaintiff upon the defendant was directly connected with the subject-matter of the action. It was a part of the same affray and a part of the same transaction. One tort may be counterclaimed against another tort where the tort counterclaimed is connected with the subject of the action. McArthur v. Green Bay & M. Canal Co. 34 Wis. 139; Walsh v. Hale, 66 N. C. 233; Slone v. Slone, 2 Met. (Ky.) 339; Heigle v. Willis, 50 Hun, 588, 3 N. Y. Supp. 497.

It is a general rule, however, that one tort cannot be counterclaimed against another unless the tort counterclaimed arose out of the same transaction or is connected with the subject-matter of the action. In the case at bar there is no doubt but that the tort sought to be counterclaimed arose out of the same transaction. It was directly connected with the subject-matter of the action. It is a proper subject, therefore, of counterclaim. The plaintiff's cause of action is based upon injuries which he claims defendant inflicted upon him in an assault and battery, and the defendant sets up counterclaim for damages claimed to have resulted by reason of injuries inflicted upon him by the plaintiff in the same assault and battery occurring at the same time in one transaction. If the claim for damages by plaintiff against the defendant, and the claim for damages by the defendant against the plaintiff, are logically related so as to show that they arose out of the same transaction, that is, in this case, the same general fight or fracas, there would seem to be no doubt but that the one tort might be counterclaimed against the other. Gutzman v. Clancy, 114 Wis. 589, 58 L.R.A. 744, 90 N. W. 1081.

The purpose of the statutes allowing counterclaim in favor of the defendant against the plaintiff, arising out of the same transaction or connected with the same subject-matter, is to allow parties to the same suit to settle in such suit as far as convenient and practicable all controversies arising out of the same transaction set forth in the complaint. Pelton v. Powell, 96 Wis. 473, 71 N. W. 887. The word "transaction" where used in a statute providing that counterclaim may be interposed when arising out of the same transaction set forth in the

complaint as the foundation of plaintiff's claim includes actions of tort. Deagan v. Weeks, 67 App. Div. 410, 73 N. Y. Supp. 641; Heigle v. Willis, 50 Hun, 588, 3 N. Y. Supp. 497. This is not in conflict with Wrege v. Jones, 13 N. D. 267, 112 Am. St. Rep. 679, 100 N. W. 705, 3 Ann. Cas. 482, wherein the court declined to take the position that where the complaint is one for slander, another slander uttered at the same time and place and in the same conversation could be counterclaimed against the cause of action set forth in the complaint, for the reason that each slander constitutes a separate transaction. That is an entirely different matter from the one at bar. In that case, as soon as the slander was uttered by the defendant concerning the plaintiff in the hearing of a third person, the cause of action immediately accrued and became complete in favor of the plaintiff, and if the plaintiff after the utterance of the slanderous words by the defendant also uttered slanderous words concerning the defendant, it became a separate cause of action in favor of the defendant, and it was an entirely different transaction from the first one, and did not arise out of the first one. In that case the first transaction was complete in itself, that is, the first slander, and the second transaction or second slander was also complete in itself and had no relation to the first slander, did not arise out of it, nor was it a part of the first transaction. And we think in all probability, strictly speaking, under the rule regarding counterclaims, the court decided rightly in such case. That case, however, is not at all similar to the one at bar. In the case at bar, the transaction, the fight or fracas, or assault and battery, or whatever it may be termed, was one continuous transaction out of which all damages arose both concerning plaintiff and defendant, if any. The trial court should have permitted the counterclaim and should have received the testimony offered by the defendant Peter Neva to prove the injuries to his person, if any, that he received in the manner in which he claims he did receive them, and he should have been allowed to introduce expert testimony to show the extent of such injuries, and to refuse to allow the counterclaim to stand as part of defendant's pleadings and to receive competent testimony to prove the allegations of such counterclaim, was reversible error. The fact that the whole transaction of assault and battery was quite fully described in the testimony, and even if it be assumed that it was quite fully considered

by the jury, would not cure the error of denying the defendant the right to plead his counterclaim, it being a proper counterclaim; and he should have been permitted an opportunity to make an affirmative showing thereon by expert or other competent testimony as to the actual extent of his injuries. A counterclaim is defendant's alleged cause of action against the plaintiff; and where it is a proper one, he should be allowed to plead it, and have an opportunity to prove and establish the truth of it, and in this case it is reversible error not to have allowed him to do so.

There are seventy-six errors assigned in this record, and they are in no manner grouped, and to consider each error would mean an opinion long enough to make up very nearly one of the North Dakota Reports. We will consider, therefore, but a few of the remaining errors in disposing of this case.

Concerning assignments of error Nos. 15, 16, 17, 18, 19, 20, 21, 22, and 23, all of which relate mostly to the reception of the evidence of J. A. Murphy, who is a justice of the peace residing at Jamestown, we conclude as follows: As we understand the matter, Stutsman county has a county court with increased jurisdiction, and where such is the case, under the laws of this state, justices of the peace have no power to try and determine any criminal matter which comes before them, even though the same would otherwise be within their jurisdiction but for the existence of such county court. Such justice courts have only the power of binding persons over to the county or district courts, where there is sufficient testimony to show that some crime has been committed and that the person who is charged with such crime has probably committed it. This being true, J. A. Murphy as such justice had no power to try and determine the assault and battery matter with which Peter Neva was charged and to which charge he pleaded guilty before the said J. A. Murphy and a fine imposed upon him. The said justice having no jurisdiction to hear and determine such action, all the testimony and proceedings in his court with reference to the guilt of the defendant and with reference to his plea of guilty, fine, etc., were inadmissible in the trial of the case at bar, and the admission of the records of such justice showing the arrest, plea of guilty, and the fine, etc., of the defendant Peter Neva, was prejudicial error and should not have been received, and the objection of the defendant to their

admission should have been sustained. It was prejudicial error not to sustain the objection to such testimony, and such error was not cured by subsequent withdrawal of the objectionable testimony and instruction by the court to the jury to disregard such testimony.

Section 9441, Compiled Laws of 1913, defines conspiracy. Such section has six subdivisions, the first of which only is material here, which is as follows: "If two or more persons conspire to commit a crime, each of them is guilty of a misdemeanor." Webster defines conspiracy as follows: "To conspire is to make an agreement, especially a secret agreement, to do some act, as to commit treason or a crime, or to do some unlawful deed; to plot together, to concur to one end; to agree." In Words & Phrases, page 1461, Bishop says that it "is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or as an end." "To constitute a conspiracy there must be not only an agreement to co-operate to do a certain thing or act, but the act must be unlawful. Connor v. People, 18 Colo. 373, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159."

There is no testimony in the record showing there was any agreement entered into, or conspiracy, to do an unlawful act. John Neva used a great deal of abusive and vile language according to the testimony of the plaintiff, but this vile and profane language standing alone does not prove a conspiracy. John Neva had a claim on some of the property of Andrew Neva by way of chattel mortgage, which he claims was a prior mortgage on some of the stock to the mortgage which was being foreclosed. With all the vile language used by John Neva, we may include in this discussion that of Joe Koenig, the act of John Neva in pulling off his coat, and the act of Joe Koenig, purposely or accidentally bumping into the plaintiff; and their vile language, if any, may be sufficient to tend in the direction of proof of the overt act which is necessary to occur or be performed by the party charged with conspiracy, except where the agreement or conspiracy, if any, relates to a felony upon the person of another or arson or burglary. Section 9444, Compiled Laws of 1913, reads as follows: "No agreement except to commit a felony upon the person of another, or to commit arson or burglary amounts to a conspiracy, unless some act beside such agreement is done to effect the object thereof, by one or more of the parties to such agreement."

The conspiracy, if any, in this case, would not be a conspiracy unless there was also an overt act. The abusive and vile language used by John Neva, and the pulling off of his coat, and the stumbling about by Joe Koenig and his bumping into the plaintiff, may be held sufficient to constitute the overt act, but there is no other testimony tending to show there was an agreement, conspiracy, combination, or confederacy, between the parties to commit an unlawful act. All of the parties might to a certain extent have acted together, but not by reason of any conspiracy or agreement. If it so happened that the three parties did appear to act together by reason of all of the transactions taking place within a short period of time and being continuous, that is, the use of the vile language by John Neva and the bumping into the plaintiff by Joe Koenig, and finally, assault and battery by the defendant Peter Neva, nevertheless, if this so happened, not as a result of a conspiracy or an agreement to commit an unlawful act, but in a spontaneous manner without premeditation, they or any of them could not be adjudged to have entered into a conspiracy. Conspiracy is a deliberate act. Conspiracy need not be any great length of time before the commission of the unlawful act, but it nevertheless must have existed prior to the time the overt act, or unlawful act, was committed, otherwise it could not come within the definition of conspiracy. In a case such as the one at bar, the agreement and conspiracy must be shown by competent testimony or by such facts and circumstances as to convince the average mind that such agreement existed, and the overt act also proved, to constitute conspiracy. Considering the whole case, and also all of the testimony, all of which has been carefully examined, we are clear there is an entire failure to prove any conspiracy. This being true, and John Neva and Joe Koenig having had nothing whatever to do with the actual assault and battery, that is, with the infliction of any punishment or damage upon the plaintiff, the case as to each of them should have been dismissed, and the court should have granted the motion of each of such defendants for a directed verdict, dismissing the case as to each of them.

On Petition for Rehearing.

PER CURIAM: Appellants have filed a petition for rehearing.

It is first contended that the court failed to decide the question of

the right of Peter Neva to counterclaim for damages claimed to have been sustained by said Peter Neva during the altercation with the plaintiff. And in this connection it is contended that "there was strong testimony tending to show that the plaintiff provoked and began the assault." The question of defendant's liability was submitted to the jury under appropriate instructions. The jury was instructed that the plaintiff must establish his cause of action by a preponderance of the evidence. It is inconceivable that a jury could under these instructions have returned a verdict in favor of the plaintiff if it had actually believed him to be the aggressor and the defendant Peter Neva to have been the innocent and injured party. It seems too clear for argument that the error, if any in sustaining the demurrer to the counterclaim was error without prejudice.

It is also contended that the court failed to pass upon the question of the admissibility in evidence of the justice's docket containing the record of the admission of guilt of Peter Neva in the prosecution for assault and battery. As stated in the former opinion this docket was withdrawn, and we are agreed that the error, if any, in its admission, was cured by such withdrawal.

It is also contended that the court failed to pass upon the question of whether the verdict for exemplary damages returned against the defendant Joe Koenig can be permitted to stand in view of the fact that the jury returned no verdict for actual damages against him. This point was overlooked in the former opinion. We are entirely agreed with appellant's counsel that exemplary damages cannot be awarded unless actual damages in some amount, either nominal or compensatory, are proved. It is true the jury in this case did not in its verdict assess actual damages against the defendant Joe Koenig, but in special interrogatories submitted to the jury and returned with its verdict it specifically found both that the injuries inflicted upon the plaintiff by Peter Neva were inflicted by him pursuant to a conspiracy between all three defendants, Peter Neva, John Neva, and Joe Koenig, and that all these three parties worked in conjunction with each other. Under these facts as found by the jury the plaintiff was clearly entitled to recover actual damages against the defendant Joe Koenig, and according to the jury's own finding such actual damages had been proved. The error on the part of the jury, therefore, in not assessing actual damages

against Joe Koenig was clearly error in his favor, of which he ought not to complain.

We are satisfied that the verdict was just and right.

A rehearing is denied.

MARY ROSS, as Surviving Wife of J. F. Ross, Deceased, v. HARRY J. COOPER.

(164 N. W. 679.)

Action to recover damages for the killing by McLain Cooper, son and employee of defendant, of one James F. Ross, foreman of defendant's farm. McLain Cooper shot three times at Ross without injuring him; then discharged Ross from defendant's employment ordering him to "leave the place." Subsequently, while Ross was over 50 yards distant from where the first shots had been fired and en route to the dwelling house, McLain Cooper overtook him and immediately and without warning shot Ross through the back, mortally wounding him, exclaiming, "I have got plenty more," meaning bullets. McLain Cooper and Ross had quarreled the night before, ending in an altercation in which Ross had thrown Cooper and had choked him. When Ross saw him at 7 o'clock next morning, McLain Cooper met him with a drawn revolver and stated that he "was going to shoot" Ross and immediately fired three shots at him. An appreciable interval then elapsed during which Ross was discharged by young Cooper. A short time later Ross was shot. It is admitted that McLain Cooper had authority as an employee of defendant to discharge Ross, and that he did so. The defendant during this time was away, without the state, and knew nothing of these events. *Held:*

Findings of jury — no evidence to sustain — liability of one — for acts of another.

1. There is no proof to sustain the finding of the jury that, in shooting Ross, McLain Cooper was acting in furtherance of or to facilitate the discharge of, or the ejectment of, Ross from the defendant's farm following such discharge, or in any way acting for the defendant; and hence there is no liability of defendant to plaintiff for the malicious killing of Ross by the son.

Evidence — without substantial conflict — reasonable presumption — inference — or construction — killing of party — circumstances amounting to murder — party acted independently — master and servant — no such relation existed.

2. The evidence, without substantial conflict, under every reasonable presumption, inference from, or construction of it, affirmatively establishes that,

in killing Ross under circumstances amounting to murder, McLain Cooper was acting independently and for himself in the execution of his premeditated design to kill Ross, and that he was not in any degree or particular acting for his father, the defendant. In the making of this murderous assault upon Ross, no relation of master and servant as to it existed between the father and son.

Opinion filed December 19, 1916. Rehearing denied October 5, 1917.

Appeal from a judgment of the District Court of Traill County, *Pollock*, J.

Reversed and ordered dismissed.

P. G. Swenson and *Bangs, Hamilton, & Bangs*, for appellant.

Statements made with a view to the apprehension of the offender do not form part of the *res gestæ*. 34 Cyc. 1645; Westcott v. Waterloo, C. F. & N. R. Co. 173 Iowa, 355, 155 N. W. 255; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165.

The *res gestæ* rule, together with examples or illustrations of its application, may be found well stated in the following cases. The rule is that statements made by a party must be contemporaneous with the principal act to which they relate, and there must not be such a lapse of time as to give opportunity to premeditate and to fabricate a story. Puls v. Grand Lodge, A. O. U. W. supra; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L.R.A. 520, 9 Am. St. Rep. 883, 19 N. E. 453; Britton v. Washington Water Power Co. 59 Wash. 440, 33 L.R.A.(N.S.) 109, 140 Am. St. Rep. 858, 110 Pac. 20; State v. Deuble, 74 Iowa, 509, 38 N. W. 383; Pittsburgh, C. C. & St. L. R. Co. v. Haislup, 39 Ind. App. 394, 79 N. E. 1035; Waldele v. New York C. & H. R. R. Co. 95 N. Y. 274, 47 Am. Rep. 41; Hill v. Ætna L. Ins. Co. 150 N. C. 1, 63 S. E. 124.

The statements must not be mere recitals of past events, and the court will reject them where there has been such a lapse of time as to afford opportunity to premeditate or to fabricate a story that will tend to uphold the claim. Westcott v. Waterloo, C. F. & N. R. Co. 173 Iowa, 355, 155 N. W. 255.

Dying declarations cannot be used or offered in a civil action. Barfield v. Britt, 47 N. C. (2 Jones, L.) 41, 62 Am. Dec. 190; 1 Phillipps, Ev. Cowen & Hill's notes, 610; 1 Greenl. Ev. § 156, and cases cited; Jackson ex dem. Coe & Kniffen, 2 Johns. 31, 3 Am. Dec. 390; Marshall

v. Chicago G. E. R. Co. 48 Ill. 475, 95 Am. Dec. 561; Wilson v. Boerem, 15 Johns. 286; Wooten v. Wilkins, 39 Ga. 223, 99 Am. Dec. 456; Daily v. New York & N. H. R. Co. 32 Conn. 356, 87 Am. Dec. 176; Thayer v. Lombard, 165 Mass. 174, 52 Am. St. Rep. 507, 42 N. E. 563; People v. Hodgdon, 55 Cal. 76, 36 Am. Rep. 30; People v. Stison, 140 Mich. 216, 112 Am. St. Rep. 397, 103 N. W. 542, 6 Ann. Cas. 69; State v. Meyer, 64 N. J. L. 382, 45 Atl. 779; Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625; Worthington v. State, 92 Md. 222, 56 L.R.A. 360, 84 Am. St. Rep. 506, 48 Atl. 355.

The defendant in this case was in no manner responsible for or connected with the act of the killing of plaintiff's husband. There was no relation of master and servant existing between the person who did the act and this defendant, and the court seriously erred in admitting evidence on such feature of the case. Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; Everingham v. Chicago, B. & Q. R. Co. 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912C, 848; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823; Kincade v. Chicago, M. & St. P. R. Co. 107 Iowa, 682, 78 N. W. 698, 6 Am. Neg. Rep. 64; 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.

Where a master is sought to be held liable in damages for the wrongful act of his servant, this relationship must first be clearly established, and then it must also clearly appear that the servant was acting within the scope of his employment, and not acting for himself individually, and outside and independent of his employment. Dolan v. Hubinger, 109 Iowa, 408, 80 N. W. 514, 6 Am. Neg. Rep. 506; Kincade v. Chicago, M. & St. P. R. Co. 107 Iowa, 682, 78 N. W. 698, 6 Am. Neg. Rep. 64; Golden v. Newbrand, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; Porter v. Chicago, R. I. & P. R. Co. 41 Iowa, 358; Everingham v. Chicago, B. & Q. R. Co. 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912C, 848; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472.

The act of Cooper (McLain) was clearly wilful; it was as wrongful as it was wilful; it could not be characterized as less than mali-

cious, and it was inspired by a feeling of personal resentment to punish Ross, and these facts and conditions completely take his act out of the category of acts which would impose a liability upon the defendant. Ducre v. Sparrow-Kroll Lumber Co. 168 Mich. 49, 47 L.R.A.(N.S.) 959, 133 N. W. 938, 2 N. C. C. A. 596.

"A master is responsible for the negligent and wilful tort of his servant only when committed in the sphere of the servant's duty, and while acting in the master's behalf." Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823; Smith v. Louisville & N. R. Co. 95 Ky. 1, 22 L.R.A. 72, 23 S. W. 652; Curtis v. Dinneen, 4 Dak. 245, 30 N. W. 148; Waller v. Great Northern R. Co. 22 S. D. 256, 18 L.R.A. (N.S.) 297, 117 N. W. 140; Morier v. St. Paul, M. & M. R. Co. 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; Lovejoy v. Campbell, 16 S. D. 231, 92 N. W. 24.

"Where the deviation from duty is very marked and unusual, the court may determine that the servant was not on the master's business at all, but on his own." Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Howe v. Newmarch, 12 Allen, 49; Brennan v. Merchant & Co. 205 Pa. 258, 54 Atl. 891, 15 Am. Neg. Rep. 672; Kincade v. Chicago, M. & St. P. R. Co. 107 Iowa, 682, 78 N. W. 698, 6 Am. Neg. Rep. 64; Farber v. Missouri P. R. Co. 116 Mo. 81, 20 L.R.A. 350, 22 S. W. 631, 8 Am. Neg. Cas. 475; Roberts v. Southern R. Co. 143 N. C. 176, 8 L.R.A.(N.S.) 798, 55 S. E. 509, 10 Ann. Cas. 375.

Chas. A. Lyche, for respondent.

"When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. Metaphorically, it may be said the act speaks through him and discloses its character." Murray v. Boston & M. R. Co. 72 N. H. 37, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289.

"If it is so connected with the transaction as a whole that the utterance, in the opinion of the court, may be regarded as an expression of feeling forced instinctively from the declarant by pressure of the circumstances under which it is made, rather than be deemed the narrative result of thought, it is evidence of what it asserts even

though it constitutes part of no particular fact in the *res gestæ*." 16 Cyc. 1248; Herren v. People, 28 Colo. 23, 62 Pac. 833; T. & H. Pueblo Bldg. Co. v. Klein, 5 Colo. App. 348, 38 Pac. 608; State v. Hunter, 131 Minn. 252, L.R.A.1916C, 566, 154 N. W. 1083; 16 Cyc. 1249, and cases cited.

"No precise rule can be formulated, and each case stands upon its own footing." The element of time, therefore, has no controlling effect. 16 Cyc. 1250–1252, 1254, and cases cited; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165; Bessierre v. Alabama City, G. & A. R. Co. 179 Ala. 317, 60 So. 82; Andrews v. United States Casualty Co. 154 Wis. 82, 142 N. W. 487; Louisville & N. R. Co. v. Owens, 164 Ky. 557, 175 S. W. 1039; Grant v. Kansas City Southern R. Co. 172 Mo. App. 334, 157 S. W. 1016; Davis v. State, 70 Tex. Crim. Rep. 37, 155 S. W. 546.

A declaration by a person made more than two minutes after the shooting and while he was excited and seeking to get away, to the effect that he had been robbed and shot, was held admissible as a part of the *res gestæ*. Wilson v. State, 70 Tex. Crim. Rep. 627, 158 S. W. 512; Hedlund v. Minneapolis Street R. Co. 120 Minn. 319, 139 N. W. 603; 16 Cyc. 1255; International & G. N. R. Co. v. Smith, — Tex. —, 14 S. W. 642, 6 Am. Neg. Cas. 585; McCambridge v. Chicago, 178 Ill. App. 513; Middleton v. Cedar Falls, 173 Iowa, 619, 153 N. W. 1040; Smith v. Stoner, 243 Pa. 57, 89 Atl. 795; Murray v. Boston & M. R. Co. 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289; Fulcher v. State, 28 Tex. App. 465, 13 S. W. 750.

"A condition of severe bodily injury, unmitigated by medical or other attendance, makes it provable that a statement made while this condition continues is spontaneous, even if made during the effort to secure such help." 16 Cyc. 1255, and cases cited; Ohio & M. R. Co. v. Stein, 19 L.R.A. 733, and note, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831; Puls v. Grand Lodge, A. O. U. W. 13 N. D. 559, 102 N. W. 165; 3 Wigmore, Ev. ¶ 1747, pp. 2250, 2252, and cases cited; Alsever v. Minneapolis & St. L. R. Co. 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; Gant v. State, 73 Tex. Crim. Rep. 279, 165 S. W. 142; Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437.

The tendency of recent adjudications is to extend, rather than to

narrow, the scope of the doctrine. When sickness is the subject of inquiry, the sickness is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence and its extent and character. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. 11 Enc. Ev. 330; Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Washington & G. R. Co. v. McLane, 11 App. D. C. 220; Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; Fish v. Illinois C. R. Co. 96 Iowa, 702, 65 N. W. 995; Alsever v. Minneapolis & St. L. R. Co. 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 24; Louisville & N. R. Co. v. Shaw, 21 Ky. L. Rep. 1041, 53 S. W. 1048; State v. Robinson, 52 La. Ann. 541, 27 So. 129, 13 Am. Crim. Rep. 357; People v. Simpson, 48 Mich. 474, 12 N. W. 662; People v. Brown, 53 Mich. 531, 19 N. W. 172; Head v. State, 44 Miss. 731; Elkins v. McKean, 79 Pa. 493; Farris v. State, — Tex. Crim. Rep. —, 56 S. W. 336; Smith v. State, 21 Tex. App. 277, 17 S. W. 471; Gantier v. State, — Tex. Crim. Rep. —, 21 S. W. 255; Craven v. State, 44 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311; Berry v. State, 44 Tex. Crim. Rep. 395, 72 S. W. 170; Chapman v. State, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 894, 65 S. W. 1098; Drake v. State, 29 Tex. App. 265, 15 S. W. 725; Bowles v. Com. 103 Va. 816, 48 S. E. 527; 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; Hooker v. Chicago, M. & St. P. R. Co. 76 Wis. 542, 44 N. W. 1085; Lexington v. Fleharty, 74 Neb. 626, 104 N. W. 1056; De Walt v. Houston, E. & W. T. R. Co. 22 Tex. Civ. App. 403, 55 S. W. 534.

The mere fact that the statement was made in response to a question does not deprive it of its character as *res gestæ,* if otherwise competent. Murray v. Boston & M. R. Co. 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289; Fish v. Illinois C. R. Co. 96 Iowa, 702, 65 N. W. 995; Crookham v. State, 5 W. Va. 510; State v. Martin, 124 Mo. 514, 28 S. W. 12; Rex v. Foster, 6 Car. & P. 325; Sutcliffe v. Iowa State Traveling Men's Asso. 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Thomas v. State, 47 Tex. Crim. Rep. 534, 122 Am. St. Rep. 712, 84 S. W. 823; State v. Maxey,

107 La. 799, 32 So. 206; Sullivan v. Henry Guth & Co. 148 Ill. App. 538.

The fact that the dying statement was made under a sense of impending death may always be proved by the express words of the deceased if made a part of his declaration. 21 Cyc. 982 (9), and cases cited.

It is the impression of immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. 1 Greenl. Ev. § 158; State v. Reed, 53 Kan. 767, 42 Am. St. Rep. 322, 37 Pac. 174; People v. Weaver, 108 Mich. 649, 66 N. W. 567; Rakes v. People, 2 Neb. 157; People v. Simpson, 48 Mich. 474, 12 N. W. 662; Fitzgerald v. State, 11 Neb. 577, 10 N. W. 495; State v. Sadler, 51 La. Ann. 1397, 26 So. 390; Reynolds v. State, 68 Ala. 502, 4 Am. Crim. Rep. 153; State v. Nash, 7 Iowa, 347; Com. v. Birriolo, 197 Pa. 371, 47 Atl. 355; State v. Nocton, 121 Mo. 537, 26 S. W. 551; People v. Chase, 79 Hun, 296, 29 N. Y. Supp. 376; Jones v. State, 71 Ind. 66; State v. Banister, 35 S. C. 290, 14 S. E. 678; Com. v. Haney, 127 Mass. 455; Rex v. Mosley, 1 Moody, C. C. 97, 1 Lewin, C. C. 189; Baxter v. State, 15 Lea, 657.

These declarations are admissible in civil actions. "The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive of falsehood is silenced and the mind is induced, by the most powerful considerations, to speak the truth, a situation so solemn being considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." 21 Cyc. 975, 976, and cases cited; Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; Luker v. Com. 9 Ky. L. Rep. 385, 5 S. W. 354; People v. Beverly, 108 Mich. 509, 66 N. W. 379; Payne v. State, 61 Miss. 161, 4 Am. Crim. Rep. 155; People v. Knickerbocker, 1 Park. Crim. Rep. 302; State v. Saunders, 14 Or. 300, 12 Pac. 441.

"If the sole reason for the admissibility of dying declarations lies in the reliability resting on the solemnizing influence of approaching death, there would seem to be no reason why the declarations, if material, should not be used in civil as well as criminal cases." 1

Elliott, Ev. § 351; Clymer v. Littler, 3 Burr. 1244, 97 Eng. Reprint, 812, 1 W. Bl. 345, 96 Eng. Reprint, 192; Aveson v. Kinnaird, 6 East, 188, 102 Eng. Reprint, 1258, 2 Smith, 286, 8 Revised Rep. 455; Durham v. Beaumont, 1 Campb. 211; Goodwin v. Harrison, 1 Root, 80.

To exclude such declarations in civil actions "appears to be straining" to do justice at the expense of a violation of well-known rules. M'Farland v. Shaw, 4 N. C. (2 Car. Law Repos. 102); Worthington v. State, 92 Md. 222, 56 L.R.A. 353, 84 Am. St. Rep. 506, 48 Atl. 355.

If such declarations would be competent and admissible in a criminal case based upon the same facts, and because of their inherent value under the principles of evidence, the argument would be unanswerable that they should be admitted in a civil action in which the only issue is exactly the same. Cosgrove v. Schafer, 9 Ohio Dec. Reprint, 550; 2 Wigmore, Ev. § 1431.

"Although the rule of *stare decisis* is entitled to great weight, and is adhered to in most courts, yet it is not followed to the exclusion in all cases of a departure therefrom; and it is a doctrine generally recognized that the rule will not be invoked to sustain and perpetuate a principle of law which is established by a series of decisions, clearly erroneous, unless property complications have resulted therefrom, and a reversal would result in greater injury and injustice than would ensue by following the rule." 1 Am. L. J. 366; 11 Cyc. 749 and cases cited, McFarland v. Pico, 8 Cal. 626; Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167; Paul v. Davis, 100 Ind. 422; Jasper County v. Allman, 142 Ind. 573, 39 L.R.A. 58, 42 N. E. 206; State v. Hill, 47 Neb. 456, 66 N. W. 541; Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625; 1 Greenl. Ev. 15th ed. § 156; 1 Wigmore, Ev. §§ 578, 1436; 11 Cyc. 749; Fish v. Poorman, 85 Kan. 237, 116 Pac. 898.

The common doctrine as to dying declarations has become so embedded in our judicial system that it should be left untouched. Harrington v. Lowe, 73 Kan. 1, 4 L.R.A.(N.S.) 547, 84 Pac. 570.

To the dying declaration here involved there was no objection offered as to its competency. It is in writing and "relates to such facts only as the declarant would have been competent to testify to if sworn as a

witness in the case." Oliver v. State, 17 Ala. 587; Whitley v. State, 38 Ga. 50; Brock v. Com. 92 Ky. 183, 17 S. W. 337; People v. Knapp, 26 Mich. 112; State v. Reed, 137 Mo. 125, 38 S. W. 574; State v. Carrington, 15 Utah, 480, 50 Pac. 526.

They are equally admissible even if they are only in answer to leading questions. 4 Enc. Ev. 983, 984.

It is not necessary that they be reduced to writing. 4 Enc. Ev. 987; Brown v. State, 32 Miss. 443; Reg. v. Steele, 12 Cox, C. C. 168; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; Mockabee v. Com. 78 Ky. 380; Young v. Com. 6 Bush, 312; State v. McEvoy, 9 S. C. 208; Snell v. State, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722; Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625; Ellison v. Georgia R. & Bkg. Co. 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167.

The answer admits that at the time in question, McLain S. Cooper (the man who killed Ross), in the exercise of the power vested in him by this defendant, did "discharge" said Ross from the employment of this defendant, and the jury found that he was engaged in the furtherance of his master's business. Richberger v. American Exp. Co. 73 Miss. 161, 31 L.R.A. 390, 55 Am. St. Rep. 522, 18 So. 922.

From a consideration of the evidence in this case and from a careful study of the authorities, there can be no question but that McLain S. Cooper was acting for the defendant and in the discharge of his employment, when he shot Ross. Ross was still working for defendant in his regular employment, and the same is also true of young Cooper. Anderson v. International Harvester Co. 104 Minn. 49, 16 L.R.A. (N.S.) 440, 116 N. W. 101.

In the case at bar the charge given at the request of the appellant states the proposition much more favorably for the defendant than the law justifies in such cases. Penas v. Chicago, M. & St. P. R. Co. 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926.

A master owes his servant duties which are nondelegable on proof of the breach of which by another servant the master is liable, irrespective of the motive of the servant. 1 Thomp. Neg. 2d ed. 553, 554; Penas v. Chicago, M. & St. P. R. Co. supra.

Appellant's assignments of error not argued are presumed abandoned. Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Supreme Court Rule No. 34.

Goss, J. This is an appeal from the final judgment and from an order denying motion for judgment notwithstanding the verdict. Sufficiency of the evidence to sustain the verdict will be first inquired into.

The action arose out of the killing of James Franklin Ross on March 11, 1911, by McLain S. Cooper, the twenty-one-year-old son of defendant, Harry J. Cooper. Plaintiff is the widow of deceased. Ross, with his wife and family, had worked for defendant for more than two years, living on defendant's farm. The homicide occurred on said farm in Traill county. Defendant was South for the winter, and at no time in controversy was present at, or had knowledge of, events transpiring and upon which this action is based. On leaving for the South for the winter defendant had told Ross that "McLain Cooper would be on the farm that winter; that he (defendant) would be too far away to communicate with, and if anything out of the ordinary came up to go to McLain; I wasn't anticipating anything out of the ordinary coming up."

Otherwise Ross was in charge as farm foreman. McLain Cooper had been on the farm prior to that winter and was there during that winter. On March 11, 1911, at about 7 o'clock in the morning, McLain Cooper discharged Ross after shooting three times at him. While Ross was afterward walking to the dwelling house some hundred yards away, McLain Cooper overtook him and, without warning, shot Ross through the back, mortally wounding him.

The complaint predicates liability upon the fact that the son had been left "to manage and control the operation of said farm, with full and complete authority and power to hire, employ, and discharge such servants, agents, and employees as he, McLain Cooper, might deem necessary and convenient; that on March 11, 1911, McLain Cooper in exercise of the power delegated to and vested in him by the defendant, did discharge Ross from the employment of the defendant, and while so exercising such power and authority and while Ross was peaceably preparing to leave, and without giving Ross the slightest chance to leave

said farm and employment peaceably, proceeded to eject him therefrom; and while so engaged, and while acting for defendant therewith in the scope of his employment, and exercising the powers and authority so conferred upon him, he, McLain Cooper, in utter disregard of the safety of said Ross, did, without the slightest cause, excuse, or justification, with unnecessary violence wilfully, intentionally, maliciously, and unlawfully assault Ross, and with force and violence shoot and mortally wound him, of which he died on August 6, 1911."

Damages in the sum of $50,000 is demanded. A verdict for plaintiff for $3,500 was returned. The answer admits Ross was the servant of the defendant, as superintendent of said farm, when killed, "and that after the 13th day of December, 1910, he so worked and labored under the charge and authority of said McLain Cooper by virtue of the employment of said McLain Cooper by his father, and that he so continued to render service until March 11, 1911." The answer further admits "that on March 11, 1911, McLain Cooper, in the exercise of the power delegated to and invested in him by Harry J. Cooper, did discharge Ross from the employment of said Harry J. Cooper, and admits that on March 11, 1911, McLain Cooper did shoot and mortally wound Ross. But defendant denies that said McLain Cooper proceeded to eject Ross from said farm at the time, and denies that said McLain Cooper shot or wounded Ross while engaged in ejecting Ross from said farm, or while acting for Harry J. Cooper or within the scope of his employment, or while exercising any power or authority conferred upon him by this defendant or by virtue of his employment or agency."

This presents the issues. In brief, the employment of both Ross and McLain Cooper as employees of defendant, Harry J. Cooper, is admitted, as is the fact that the son had due authority to and did in the exercise thereof discharge Ross from defendant's employment. As defendant by his motion for judgment *non obstanti* has challenged the sufficiency of the evidence to sustain plaintiff's cause of action on the merits, and asserts that it affirmatively discloses no cause of action, all the evidence bearing on the discharge will now be set forth.

Plaintiff's case is made up of the dying declaration of Ross, narrating his employment and events up to and surrounding the shooting. It reads:

"The way this trouble started on the 10th of March, 1911, this Jack

Hulet was milking— . . . he was doing the milking, and we had a cow that nobody could milk; I couldn't milk her, and he told McLain that he couldn't. Just before dinner, McLain come to me and asked if I could send that cow down to the Sutton farm. I told him, 'After dinner,' and so he came around after dinner and he says, 'You don't need to take the cow down.' He said, 'The kid would milk her;' the kid is George. . . . And so when they started to milk he couldn't do anything, and he couldn't get no milk from her, and McLain was helping him and they couldn't do anything and they was mad, jumping around there, but didn't say anything, and that is where you might say the row started. So, when I asked him at 7 o'clock if he wasn't going to supper, he said 'he would go when he damn pleased.' My wife was around the house sick, and she didn't feel like keeping meals all night, so he said he would get supper when he damned please, and he started toward the door and I started toward him. He looked pretty mad and we clinched right at the door. We laid down on the ice a little bit, and I told him, 'If you want to get up and be a man and go in and get your supper, I will let you up,' and finally he says, 'all right.' . . . When we had this trouble, John Hulet come along, and he says, 'Let up Frank.' I says, 'I ain't hurting him, any time he wants to get up and behave, I will let him up.' . . . During the trouble with McLain I didn't strike him. I choked him a little, but it never made a mark on him. I didn't have any weapons with me at the time. I didn't make any threats against him at that time, not a thing, and I didn't injure him. I had the prettiest chance in the world if I wanted to, but I didn't want to. I had never made any threats against McLain Cooper during the time that I was there, and I had had no trouble with him up to this time. He had never asked me to leave the farm. I didn't see him again that night after he went to the Sutton farm. All that I did to him was to put him down on the ground and hold him there. He didn't get a scratch. I must have throwed him. We were right at the door and he was making for me and I for him and I catched him. It was all ice and water and it wasn't much of a trick to throw anyone there, it was so slippery there. . . . I didn't throw him over the fence, and didn't injure him a bit; there wasn't a scratch on him; I don't think there was a scratch on me. I next saw McLain Cooper, after this scrap, about 7

or 7:15 the next morning. We had breakfast at 7 o'clock and we went out to the barn. I went back in the barn and got a pail of feed for the pigs, and when I come to the door, the barn door, I met the gun. McLain Cooper, the son of Harry J. Cooper, held that gun. He says, 'I am going to shoot you.' He threw the gun in my face, and he said, 'I am going to shoot you, Frank.' I says, 'Go ahead and shoot'—something like that, and I walked down a little further and I went into the other door and getting down to this door he shot at me twice—that is the sheep-shed door—he shot at me twice; when I got down to the sheep shed, he shot again. When he fired the third shot I was inside. Nobody said anything during the time that he was firing. The first two shots my back was to him and when I got to the shed I wouldn't say. None of these shots hit me. The first two struck the barn, I couldn't swear to that. The only thing—there is witnesses that saw the bullet holes in the building, but I couldn't say for I never got back to the barn. I think when the third shot was fired I was emptying the feed out. Up to this time he never said a word. The only remark I heard was, 'I am going to shoot you'—that was the first thing. Then John Hulet hitched up the team and he was just going around the corner of the barn and I got back there and I says, 'Put your team in the barn, Jack. It is getting too hot here for me.' 'Well,' Jack says, 'throw up your hands—why don't you throw up your hands and find out what he wants.' So I did; I throwed up my hands and I says, 'What do you want?' He says 'I want you to leave the place.' That is, McLain Cooper said that. I said, 'I will get my coat and go.' I didn't make any threats against him at that time. I never made any threats against McLain Cooper. I never used any weapon on him. I never had any trouble with him other than the trouble I have just referred to. During this time my wife was in the house, and she wanted to go to town that day; so when I started to the house to get my coat, I got about half way to the house and there is where he shot me, and she come around, she had to come around the old bunk house to see where we were at the barn, you know, and she was going to find out about the team, and when she come around and looked up there, McLain was standing there looking at me with the gun in his hand; I was lying down then and he had shot me. That morning McLain Cooper and I and my wife and John Hulet, the witness who is now in jail, and my ten-year-old step-

daughter and my boy, about six years old, were on the farm that morning. George wasn't there that morning. When that last shot was fired, I was going to the house after my coat—from the barn to the house—I was about half way. McLain Cooper come along behind, and he was walking up on a kind of a ridge, and I got about half way to the house when he shot. He had the gun in his hand during all this time, every time I see him he had that gun in his hand. I didn't see him shortly before he fired the last shot. I started for the house for my coat, and I got down quite a ways before he caught up with me, and I didn't expect him to shoot or anything, and I wasn't looking. Just as soon as he shot he walked around me, and he says, 'I have plenty more—I have got plenty more;' that is all he said. He fired four shots that morning to my knowledge and it was the fourth shot that dropped me. When I started for the house, John Hulet was putting the team in the barn. He had a team hitched up and he was putting them in the barn. The barn is, I should judge, about 75 yards from the house; it might be a little bit the other way. The barn is north and a little bit west from the house. I don't think McLain Cooper remained on the farm over five or ten minutes after he had shot me; until he got his team. I didn't hear him say anything after the shooting, except what I have told, and I told him to tell Hulet to help me in the house, and I heard him say to Hulet, 'There is a fellow down there wants you to help him in the house.' Just after the shooting my wife come out and she see him with the gun and she hollered to me, 'Are you shot, Frank?' and I says, 'Yes,' and I says, 'Phone for a doctor.' I didn't see whether McLain Cooper had the gun in his hand when I told him to tell John Hulet to help me in the house; he had the gun with him, he had no place to put it. We had no trouble that morning outside of this shooting—not a word—and he never asked me to leave the farm until that morning, and there never was a word in the world about settlement. . . . I was conscious shortly after I was shot—I was always conscious, and I remember everything as well as I am sitting here. Hulet didn't interfere when we had this scrap on the evening of the 10th; he just talked to us. McLain promised to be good and get his supper that night, and then I let him up immediately. There was nothing further said or done after we got up; there was no further trouble until I was shot. After this scrap McLain Cooper got up and went in the sheep

shed for a few minutes, and he walked down to the house and stepped inside the door and walked out. The two of them started toward the Sutton farm that night; I couldn't say whether they ever got there or not. . . . When he fired the shot that struck me and dropped me to the ground, he was walking behind me and a little bit to the left side. I was walking toward the house and he come up behind me; only a little bit on the left side. I don't think he was over 10 feet away from me when he shot. He didn't say anything when he fired that shot; never said a word when he was walking behind me. I was going to the house to get my coat and leave the farm. I was going to take my coat and leave word for my wife to pack up and I would help move after the trouble was over. . . . I made no threats against McLain Cooper when I went to the house from the barn that morning; there wasn't a word spoken. I didn't intend to get any weapon; I intended to get my coat and get out of there and leave, and that is all I intended to do. I never had any trouble in particular with any of the men. . . . I never had any trouble with McLain Cooper about the men. I heard the gun report when I dropped, at least that is what I thought I heard, you know. McLain Cooper was right behind me, and then he walked right around me. I went with my head that way, and he walked right around me, and he says, 'I got plenty more.' He had the gun in his hand, and he is the one that shot me."

The court gave the following instructions:

"The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a wrong which the master neither directed in fact, nor could be supposed from the nature of his employment to have authorized or expected the servant to do; and where a servant steps aside from the performance of the business for which he was employed by his principal and embarks upon a matter of his own, the principal is not liable for the consequences of the agent's act while so engaged. If, while engaged in the execution of the employment of the principal, he so conducts himself, whether negligently or maliciously, so as to injure another, his principal will be liable. If, however, he forsakes such employment, and purely, for his own benefit or to gratify some personal hate, does an act uncon-

nected with the service of his principal, the latter—that is the principal —is not responsible for its consequences, and as applied to this case the sharp question of dispute which you are to determine is whether McLain S. Cooper while so employed as the agent of his father did step aside from the performance of the business for which he was employed by his principal, and embarked upon a matter of his own, either to avenge some supposed wrong, or for any other reason be that reason whatsoever it may, if it was unconnected with the business for which he was engaged and in which he was at the time acting. It will be for you to say in this case whether when McLain fired the fatal shot he was still in the act of discharging the man Ross from the employment of his father. . . . The defendant claims that when Ross said that he would leave that that of itself settled the matter and fixed the relations as between the parties, so that McLain had accomplished in full such discharge, and therefore any act after that statement on the part of McLain Cooper, and that point of time, could not have been in furtherance of his father's business; while the plaintiff insists that such point of time does not mark the boundary line of McLain S. Cooper's authority to act, but that the whole transaction was a part of an entire act of discharging said Ross and occurred without giving the said Ross the slightest chance to leave said farm and employment peaceably, but while ejecting him therefrom. This sharply disputed question of fact is for you to determine,—that is to say, from the evidence which has been offered you are to conclude just when McLain S. Cooper was acting for his father within the scope of his employment, and when he acted for himself. . . ."

"As I have said before if McLain Cooper forsook his employment purely for his own benefit or to gratify some personal hate, and shot Ross, then his father would not be liable. I cannot impress too strongly upon the minds of the jury that great importance of determining just when the act of discharge was complete, because this case must go one way or the other measured from such point of time; for, whenever the servant stepped aside from his master's business for however short a time and committed a wrong not connected with such business, the relation of master and servant is suspended. . . . If you find from the evidence, that at the time of the shooting Ross, McLain Cooper was in the act of discharging Ross, then I charge you as a matter of

law that Harry J. Cooper is liable for the methods employed by McLain Cooper in so discharging said Ross."

These instructions are correct. But was there any substantial proof to warrant such instructions? If the evidence can be said to present a basis for them, the verdict should stand; if not, it must fall.

With these issues in mind, the evidence will be scrutinized. It will be assumed here as it was assumed on trial, that the right to discharge Ross necessarily carried with it the right to use reasonable force to eject him from the premises if necessary, as a responsibility naturally following from the exercise of the right to discharge. Penas v. Chicago, M. & St. P. R. Co. 112 Minn. 203, 30 L.R.A.(N.S.) 627, 127 N. W. 926. Although upon this question there seems to be some conflict in the authorities, whether the presumption of right to use force can be indulged here without proof. Labatt, Mast. & S. § 2534. The question then resolves to whether Cooper killed Ross in discharging him from defendant's employment, or an incident to effecting such discharge or in ejecting Ross from the premises afterward. If so, or if there is sufficient evidence to fairly warrant that deduction, the verdict must stand. But if McLain Cooper had no such intent, but merely executed his own design to injure, or without any definite purpose shot in reckless disregard of whether or not he killed Ross, the verdict should be set aside. And this, too, even though Cooper used as a pretense or as an excuse therefor his right and authority to discharge Ross. If the servant "is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious, or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. . . . And when it is said that the master is not responsible for the wilful wrong of the servant, the language is to be understood as referring to

an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders." Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129–136, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536, which is, as was said in Illinois C. R. Co. v. Latham, 72 Miss. 32, 16 So. 757, approved "as an admirable statement of the law." This New York case has been quoted from and approved in 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; and see Clancy v. Barker, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161, 16 Am. Neg. Rep. 664, and hotel liability case. See also the well-reasoned case of Penas v. Chicago, M. & St. P. R. Co. 112 Minn. 203, 30 L.R.A.(N.S.) 627, 140 Am. St. Rep. 470, 127 N. W. 926.

What, then, was McLain Cooper's intent that morning in doing the things he did? Is it a fair inference under the proof that he intended by such acts to accomplish the discharge of Ross, and that he shot Ross in furtherance thereof? Or was he engaged in wreaking vengeance and doing Ross injury? Giving full faith and credence to every statement in the dying declaration of Ross, it tends to entirely exculpate defendant from liability. He repeats that the slight difficulty of the night before the shooting was the first trouble he had ever had with young Cooper. Hence, it must be that Cooper had no reason for enmity and held no grudge against Ross, and that, as Ross asserts, the trouble really began that night. This comparatively trivial affair was the provocation and moving cause of the occurrence early next morning. Nothing intervened between the night before and 7 o'clock in the morning, when, as Ross says, he "ran into the gun" in the hand of Cooper, in the barn, accompanied with his threat, "I'm going to shoot you," followed with immediate action in execution of such declared intent by the taking of two shots at Ross while the latter's back was turned toward him, as he was getting out of sight; pursuit followed, and an instant later a third shot was taken at Ross in the sheep shed. Ross then realized that young Cooper meant what he said when he declared he was going to shoot him. He in effect said so to Hulet in the words, "it is getting too hot here for me." Up to that time there had been no attempt at discharge of Ross from defendant's employment; not a word said about that, but instead his every move up to that moment evidenced a deliberate premeditated purpose and intent to do Ross great

bodily injury. A felony had been committed by Cooper upon Ross at this stage of the proceeding, to wit, an assault with a dangerous weapon with intent to do great bodily injury, if not an intent to kill him. Were these facts before a trial jury upon indictment for such crime, the jury might properly be instructed that it must be presumed that Cooper intended the probable and necessary consequence of such unlawful acts. Up to this point it must be held as a matter of law unless something subsequently occurred to otherwise characterize to the contrary the acts of Cooper, that he was not acting for the defendant nor in behalf of anyone except himself; that he had not his master's business in mind, but had acted independently and of his own malice, under a desire to avenge himself presumably of what Ross did to him the night before. The motive actuating his conduct, the acts themselves, and the intent to be derived from them, and his statement, with all surrounding facts, clearly establish that at the commencement of the shooting and throughout his first attempt to do Ross great bodily harm or kill him, there was nothing upon which liability against his employer could be predicated. And during the following interval at the cessation of his first malicious attack with a deadly weapon, and upon the advice of the hired man, Ross throws up his hands in acknowledgment of his helplessness and in token of his surrender, and inquiries of his assailant what is wanted, to which Cooper replies, "I want you to leave the place." To this Ross agreed and says, "I will get my coat and go." After an interval of time Ross started for the house, as he says, to tell his wife to pack up and get ready to move. He had walked 160 feet, nearly two thirds the way to the house, when without any warning or another word spoken, with Ross walking away from Cooper and with his back to him, Cooper overtook and shot Ross through the middle of the back with the first shot at that time fired. Ross fell to the ground, Cooper with the gun in hand walked around Ross, and exclaimed to him, "I have plenty more—I have got plenty more," and Ross says, "That is all he said."

These are the facts as narrated by Ross, and the only evidence bearing on the shooting. It establishes the commission of a cold-blooded deliberate killing with malice aforethought, with every ingredient present of murder in the first degree, including a deliberate and premeditated intent to kill; to do exactly what was done. The expression, "I

have got plenty more," is indicative of a frame of mind to shoot again if necessary a man already mortally wounded. It is contrary to fact and every reasonable presumption to say that this was done in the execution of and in the furtherance of the master's business, the mere discharging of Ross from the master's employment, or ejecting him from the premises or facilitating it. It is difficult to arrive at any conclusion upon any reasonable probability of purpose and intent in Cooper upon which it can be said that he intended to do any act toward discharging Ross in thus shooting him. On the contrary every reasonable presumption from the evidence must be that Cooper was in a frenzy of rage imbued with bitter revengeful hatred, and maliciously bent on doing Ross injury. With such intent, and for such purpose, he had armed himself during the night, and in the morning at once proceeded to do what he had set about, that is, injure or kill the party with whom he had quarreled the night before; and that in so doing he had no intent nor even thought about discharging Ross.

It may be assumed, however, that when Ross was told to leave the place Cooper was for the time exercising the powers of the master. It does not follow that, upon renewal of the malicious assault, that he was then continuing to perform the master's business. The contrary is the record, Ross says, "I started for the house for my coat, and got down quite aways before he caught up with me, and I didn't expect him to shoot or anything, and I wasn't looking." The map in evidence establishes the distance traveled during the interval as at least 160 feet. It was 159 feet from the nearest corner of the sheep shed to where Ross fell. The situation is analogous to where a brakeman or conductor after ejecting a passenger leaves the train at such a distance and in pursuit of his own quarrel, maliciously assaults another. Such an assault is deemed to be the personal act of a servant, and not the act of the master. "Where an appreciable interval intervenes between the acts of protection which are exercised by persons in the guarding of 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." Syllabus in Kinnonen v. Great Northern R. Co. 34 N. D. 556, 158 N. W. 1058, citing Spencer v. Kelley (C. C.) 32 Fed. 838; Roberts v. Southern R. Co. 143 N. C. 176, 8 L.R.A.(N.S.) 789, 55 S. E. 509, 10 Ann. Cas. 375, to which might

be added Illinois C. R. Co. v. Latham, 72 Miss. 32, 16 So. 757; Firemen's Fund Ins. Co. v. Schreiber, 150 Wis. 42, 45 L.R.A.(N.S.) 314, 135 N. W. 507, Ann. Cas. 1913E, 823. "There are numerous cases holding that an assault is to be deemed the personal act of the servant where there is an appreciable interval between the performance of the master's work and the assault." Annotator's note in 9 L.R.A.(N.S.) 475. And there was here clearly such an interval between the order to Ross to leave the place and the homicide later and occurring 50 yards away. And it must not be overlooked that the rule of exceptional liability of common carriers for servants' acts toward patrons and guests is here absent. To recover, the doctrine of *respondeat superior* must apply. No good reason exists why, where the master's liability hangs on a more slender thread under the doctrine of *respondeat superior* than in cases against common carriers for assaults upon its invitees, that the appreciable interval here present between the alleged act of discharge of the employee and the renewal by pursuit followed by assault, should not warrant the application of said presumption of law that under the facts the subsequent assault was but the personal act of the servant, and was not an act performed for the employer.

Most certainly it is a dangerous rule of perhaps far-reaching consequences that would be declared by this precedent should the employer be held in damages for this murder committed by the employee under the circumstances in evidence. It is going beyond all rules of liability to permit such a bare conjecture, that the homicide was done in furtherance of any duty to the master, to stand as a finding of fact, where as here a wilful, deliberated, premeditated killing resulted, and where every act done bespoke a defined purpose and intent in the assailant, born of his own malice to injure or kill another.

That the cause of the quarrel of the night before was the milking of the cow or delaying supper, and concerned the business of the master, is wholly immaterial. That business was a closed incident, having no relation in law to subsequent events, except as it furnished the motive and engendered the hatred that gave vent in murder the next morning. Alabama & V. R. Co. v. Harz, 88 Miss. 681, 42 So. 201, and Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; Danforth

v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; all automobile chauffeur cases; McCarthy v. Timmins, 178 Mass. 378, 86 Am. St. Rep. 490, 59 N. E. 1038, where a three-minute "appreciable interval" absolved the master from liability. The cases cited by respondent, *viz.*, Avondale Mills v. Bryant, 10 Ala. App. 507, 63 So. 932; McKeon v. Manze, 157 N. Y. Supp. 623; Scibor v. Oregon-Washington R. & Nav. Co. 70 Or. 116, 140 Pac. 629, all recognize the general rules of law here applied, but refuse them application under the particular facts of each case. Missouri seems inclined toward a rule of its own, one of extreme liability of the master in such cases. Whimster v. Holmes, — Mo. —, 164 S. W. 236 (another automobile chauffeur case). This is mentioned because much is said in respondent's brief about the trouble beginning over the business of the master.

For the purposes of this decision placed upon the facts recited in the dying declaration, it has been assumed that such declaration is admissible in this civil action over all objections taken. Its admissibility is not determined, but is assumed as unnecessary of decision here. However, it may be observed that beyond all question the great weight of precedent is against the admission of dying declarations in civil cases. Against admission see Barfield v. Britt, 47 N. C. (2 Jones, L.) 41, 62 Am. Dec. 190; Jackson ex dem. Coe v. Kniffen, 3 Johns. 31, 3 Am. Dec. 390, in which Justice Kent participated; Thayer v. Lombard, 165 Mass. 174, 52 Am. St. Rep. 507, 42 N. E. 563; People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; People v. Stison, 140 Mich. 216, 112 Am. St. Rep. 397, 103 N. W. 542, 6 Ann. Cas. 69; State v. Meyer, 64 N. J. L. 382, 45 Atl. 779; Daily v. New York & N. H. R. Co. 32 Conn. 356, 87 Am. Dec. 176, and other cases cited in extensive note in 56 L.R.A. 353, and Bionto v. Illinois C. R. Co. 125 La. 147, 27 L.R.A.(N.S.) 1030, 51 So. 98; and Yates v. Huntsville Hoop & Heading Co. — Ala. —, 39 So. 647 and Escalier v. Great Northern R. Co. 46 Mont. 238, 127 Pac. 458, Ann. Cas. 1914B, 468. For admission see Thurston v. Fritz, 50 L.R.A.(N.S.) 1167 and note (91 Kan. 468, 138 Pac. 625).

There was no issue of fact under the evidence upon which, under the instructions given and the law applicable, the defendant could be held liable for the consequences of young Cooper's felonious conduct,

and the motion for judgment notwithstanding the verdict should have been granted. The judgment appealed from is ordered reversed, and judgment of dismissal is directed to be entered accordingly.

On Petition for Rehearing.

PER CURIAM. In this case a rehearing was ordered and had before the court as now constituted; and, after a full and careful consideration of the questions involved, a majority of the court is of the opinion that the former decision prepared by Mr. Justice Goss is correct, and must stand.

The proposition has been advanced that McLain Cooper was a vice principal, and that therefore Harry J. Cooper would be responsible for the wrongful acts committed by him. It is clear that McLain Cooper was a superior servant or vice principal. In fact, this proposition has never been denied by anyone. But it seems equally clear that this fact does not in any manner change the legal principles upon which defendant's liability in this case must be determined. A servant represents and acts for the master in the performance of those duties which have been intrusted to him. And when a master has delegated to his servant certain duties to perform, or intrusted him with certain business to transact, the master becomes liable for the acts of this servant in the course of such employment. When a master employs a servant to supervise, oversee, give orders to, and generally manage, other servants in the performance of certain work, he becomes what is known as a superior servant or vice principal, and represents his master in his dealings with the subordinate servants in the course of the work to be performed. And the courts have generally held that, in the performance of such duties, the superior servant or vice principal represents his master, and is therefore not a fellow servant, so as to exempt the master from liability under the fellow servant doctrine. And it is therefore generally held that the master is liable to subordinate servants for injuries sustained by reason of any act performed, or duty neglected, by such superior servant within the course of his employment. The mere engagement of a superior servant or vice principal does not, however, render a master liable for all his acts. The liability of the master still depends upon whether the acts upon which liability are predicated were incidental to the discharge of the functions of the vice principal. That is, the acts complained of must have some

relation to the normal functions of the superior servant, and must have been performed within the course of his employment or in connection with some duty expressly or impliedly delegated to him by his principal, or have some relation to the business or interest intrusted to him by his principal. See Labatt, Mast. & S. § 1466. In the case at bar no one questions the defendant's liability, provided the act involved was performed by McLain Cooper within the course of his employment or in the performance of business intrusted to him. This fact was clearly recognized in the former opinion. But we do not believe that there is any evidence in this case from which it can be found that McLain Cooper, when he shot Ross, was acting within the course of his employment, in the performance of any duty expressly or impliedly delegated to him, or in the furtherance of the defendant's business or interest intrusted to him.

The proposition has also been advanced that the defendant was negligent in intrusting the management of the farm to McLain Cooper. While there were certain allegations in the complaint tending to predicate liability on this ground, it was conceded on the oral argument that no evidence was introduced to substantiate these allegations. And an examination of the record shows that not one word of testimony was offered tending to show that McLain Cooper had ever during his entire life by any word, act, or deed shown himself unfitted for the position in which he was placed by his father. Under these circumstances, not only was this ground of liability not substantiated by evidence, but it must be assumed that the plaintiff was unable to produce any evidence in support of such alleged ground of liability.

It will be noted from the former opinion that the question of the admissibility of the so-called dying declarations was not expressly passed upon, although it was intimated that such declarations are inadmissible in civil actions. The principal reason for the admissibility of dying declarations is what has been termed the "principle of necessity;" that is, if such declarations were not admitted in evidence, it would be impossible to produce any other evidence from the same source, that is, from the declarant. Wigmore, Ev. §§ 1421, 1436. Manifestly, this reason does not exist and cannot be invoked for the introduction of the dying declarations in the instant case. The shooting took place on March 11, 1911. The so-called dying declaration was

subsequently prepared some two or three weeks before it was signed. It was finally signed by the declarant on June 29, 1911. Under our laws, provision has been made, not only for the taking of depositions in pending actions, but for the perpetuation of testimony in probable or possible actions. Comp. Laws 1913, § 7927. It appears from the record in this case that the dying declaration was first taken by the then court reporter in the form of answers given to questions propounded by plaintiff's attorney, and that subsequently the statements so elicited were prepared in narrative form and submitted to, and gone over by, the declarant while in the possession of all his faculties, and eventually signed by him on June 29, 1911. Manifestly, plaintiff could have had this testimony perpetuated in the manner provided by statute with no greater hardship to the declarant than that to which he was subjected in the preparation of the dying declaration, and with no greater expense to plaintiff. While the rule that dying declarations are inadmissible in civil cases has been criticized, it is nevertheless true that such rule has been established and settled by the overwhelming weight of judicial authority in this country, and it is now so well established that it would in effect constitute legislation on the part of the courts to change it. In fact, Professor Wigmore in concluding his criticism of the rule recognizes this to be so; as he says: "They (the limitations) should be wholly abolished *by legislation.*" Wigmore, Ev. § 1436. It may also be observed that the courts and legal writers who have criticized the rule have apparently failed to consider the fundamental distinction between civil and criminal actions with respect to the reception of evidence therein. In pending civil actions the testimony of witnesses may be taken by deposition. In anticipated civil actions the testimony of witnesses may be perpetuated. But not so with respect to criminal actions, as the Federal Constitution, and the Constitutions of most of the states, secure to the accused the right to be confronted with the witnesses against him. 12 Cyc. 543. In this state the right to take depositions in a criminal action is granted to a defendant therein only. (Comp. Laws 1913, §§ 11039–11062.) In the case at bar, for instance, the testimony of Ross could not have been taken either by deposition or under proceedings for its perpetuation so as to render it admissible under the laws of this state in the criminal action against McLain

Cooper, but such testimony could have been taken—and there was ample time in which to do so—for use in this or any other civil action.

We are agreed that the former opinion must stand.

GRACE, J. (dissenting). The case presented to this court involves an appeal from the final judgment, and also from an order denying motion for a judgment *non obstante.*

The case is one of great importance and vast and far-reaching consequence; and, in order that a correct and full understanding of the issues involved may be readily comprehended, we deem it advisable to set out in full the pleadings. The complaint is as follows:

"The plaintiff for a cause of action against the defendant herein complains and alleges:

"That the defendant Harry J. Cooper for a great many years prior to, and at the time of, the commission of the grievances hereinafter mentioned, owned, used, and operated a large farm known as the West Cooper farm, situated, lying, and being in the county of Traill, in the state of North Dakota, and particularly described as follows, to wit: All of sections nine (9) and seventeen (17), and the north half (N.½) of section twenty (20), in township one hundred forty-five (145), north of range fifty-one (51), west of the fifth principal meridian.

"That the said defendant Harry J. Cooper, during all the times herein mentioned, was also the owner of a great deal of personal property, by him used in the operation and management of said farm, and consisting of horses, cattle, sheep, hogs, and other domestic animals, and farm implements and machinery of great variety, and including particularly threshing machines, binders, drills, plows, mowers, wagons, buggies, and other like property.

"That said defendant Harry J. Cooper is also the owner of other real and personal property in great abundance, the particular description of which is to this plaintiff unknown.

"That the value of the real and personal property so owned by the defendant, Harry J. Cooper, exceeds the sum of $100,000.

"That the defendant McLain S. Cooper is the son of said Harry J. Cooper, and he also is the owner of an abundance of property, the

particular description, worth, and value of which is to this plaintiff unknown.

"That on the 13th day of December, A. D. 1910, the defendant Harry J. Cooper employed his said son, the said McLain S. Cooper, to manage and control the operation of the so-called 'West Cooper farm,' described in the first paragraph of this complaint, and hired and engaged him to take charge of, care for, guard, protect, handle, and operate the same and all the personal property thereon, thereunto belonging and used in connection therewith; and at said time, for such purpose, did install him, the said McLain S. Cooper, in full and complete possession, and place him in supreme and active control, charge, and custody thereof, with full and complete authority, power, and jurisdiction to hire, employ, and discharge such assistants, servants, agents, and employees as he, the said McLain S. Cooper, might deem necessary or convenient; and did in all things grant and intrust unto the said McLain S. Cooper as full and complete power and authority as he the said Harry J. Cooper had in and about the premises.

"That at the time of the commission of the grievances hereinafter mentioned, and for more than two years prior thereto, this plaintiff's husband, James Franklin Ross, for hire and reward, was the servant and employee of the said Harry J. Cooper, in, on, and about the said West Cooper farm, and was, during said time, there faithfully engaged in the performance of his duties in connection with said farm, as superintendent thereof, and since the said 13th day of December, A. D. 1910, so worked and labored, under the charge and authority of the said McLain S. Cooper, by virtue of the employment of the said McLain S. Cooper by his father, as set forth in the 6th paragraph hereof, and so continued to render service as aforesaid until the 11th day of March, A. D. 1911.

"That on the said 11th day of March, A. D. 1911, the said McLain S. Cooper, in the exercise of the power and authority so delegated to, and vested in, him, by the said Harry J. Cooper, did discharge the said James Franklin Ross from the said employment of the said Harry J. Cooper, and while so exercising such power and authority, and while the said James Franklin Ross was peaceably preparing to leave, and without giving him, the said James Franklin Ross, the slightest chance to leave said farm and employment peaceably, proceeded to eject him

therefrom, and while so engaged, and while acting for the said Harry J. Cooper, and within the scope of his employment, and exercising the powers and authority so conferred upon him, he the said McLain S. Cooper, in utter disregard of the safety of the said James Franklin Ross, did, without the slightest cause, excuse, or justification, with unnecessary violence, wilfully, intentionally, maliciously, and unlawfully, assault and with force and violence shoot and mortally wound the said James Frankin Ross, with a revolver then and there loaded with gunpowder and leaden bullets, and then and there, and for that purpose, in his the said McLain S. Cooper's hands had and held, and by him shot off and discharged at, to, against, into, and upon the person and body of him, the said James Franklin Ross, in the thoracic region of his spine, and by force of the gunpowder aforesaid, with the leaden bullets aforesaid, out of the revolver aforesaid, by the said McLain S. Cooper so discharged and shot off as aforesaid, did strike and penetrate the person and body of him, the said James Franklin Ross, in the said thoracic region of his spine, thereby and therewith inflicting upon the said person and body of him, the said James Franklin Ross, in the said thoracic region of his spine, a mortal wound, of which mortal wound the said James Franklin Ross, from the said 11th day of March, A. D. 1911, until the 6th day of August, A. D. 1911, did languish, and languishing did live, and on which said 6th day of August, A. D. 1911, he, the said James Franklin Ross, of the mortal wound aforesaid died.

"That during all the times herein mentioned the defendant McLain S. Cooper was a man of violent temper, quarrelsome disposition, and a turbulent character, accustomed to carry firearms and other dangerous weapons, and disposed to use them on, and otherwise maltreat, both man and beast.

"That the defendant Harry J. Cooper on the said 13th day of December, A. D. 1910, when he placed the said McLain S. Cooper in supreme authority and control on said farm, and over said James Franklin Ross, well knew that his said son, the said McLain S. Cooper, was possessed of such temper, disposition, character, and habits, and he has so known all of such facts during all the times herein referred to.

"That since the commission of the grievances hereinbefore referred to, up to, and after the death of the said James Franklin Ross, the defendant Harry J. Cooper has in all things and in every manner,

wilfully and maliciously, by word and act, ratified the act of his said son, the said McLain S. Cooper, in so discharging, shooting, and killing the said James Franklin Ross, and has in every and all ways wilfully and maliciously, by word and act, approved thereof.

"That the plaintiff herein is the surviving wife of the said James Franklin Ross, and at the time of his death she was, and for more than six years prior thereto, had been, his lawful wife.

"That at the time of his death said James Franklin Ross was forty-one years, five months and eighteen days of age; and at the time of the shooting aforesaid, and for many years prior thereto, he had been capable of, and was earning an income of from $1,500 to $2,000 per year.

"That, besides this plaintiff, his widow, the said James Franklin Ross, left surviving him his son Harry, about six years of age, and an adopted daughter, Ethel, about eleven years old.

"That this plaintiff and said children were entirely dependent upon the said James Franklin Ross for their support, sustenance, maintenance, nurture, and education, which has been lost by his death.

"That by reason thereof, they have also lost his company, society, and counsel.

"That the death of her said husband, the said James Franklin Ross, has also caused this plaintiff intense grief, resulting in actual physical illness.

"That by reason of the premises, this plaintiff has been damaged by the death of the said James Franklin Ross as aforesaid in the sum of $50,000.

"Wherefore, plaintiff demands judgment against the defendants: (1) For the sum of $50,000; (2) for her costs and disbursements in this action; (3) for such other and further relief as may seem just and equitable in the premises."

The answer to such complaint is as follows:

"Now comes the defendant Harry J. Cooper, and for his answer to the complaint of the plaintiff herein, admits the allegations of paragraphs 1, 2, 6, 12, and 14 of said complaint.

"Admits that for more than two years prior to the transactions alleged in said complaint to have taken place on the 11th day of March,

1911, James Franklin Ross was the servant and employee for hire of the said Harry J. Cooper, in, on, and about the West Cooper farm, as superintendent thereof, and that after the 13th day of December, 1910, he so worked and labored under the charge and authority of the said McLain S. Cooper, by virtue of the employment of said McLain S. Cooper by his father, and that he so continued to render service until the 11th day of March, 1911.

"Admits that on the 11th day of March, 1911, the said McLain S. Cooper, in the exercise of the power delegated to, and invested in, him by the said Harry J. Cooper, did discharge the said Ross from the employment of the said Harry J. Cooper.

"Admits that on the 11th day of March, 1911, the said McLain S. Cooper, did shoot and mortally wound the said Ross with a revolver then and there loaded with gunpowder and leaden bullets and held in the hands of the said McLain S. Cooper, and by him shot off and discharged at and into the body of the said Ross, in the thoracic region of the spine, thereby and therewith inflicting upon the person and body of the said Ross a mortal wound, of which wound the said Ross subsequently, and on the 6th day of August, 1911, died. But this defendant denies that the said McLain S. Cooper proceeded to eject said Ross from said farm at the time, in the manner or under the conditions and circumstances alleged in said complaint, or at all; and denies that the said McLain S. Cooper assaulted, shot, or wounded the said Ross while engaged in ejecting said Ross from said farm or while acting for this defendant, Harry J. Cooper, or within the scope of his employment, or while exercising any power or authority conferred upon him by this defendant or by virtue of his employment or agency. Denies that he, the said McLain S. Cooper, assaulted, shot, or wounded the said Ross in disregard of the safety of said Ross, or without cause, excuse, or justification; denies that the said McLain S. Cooper assaulted, shot, or wounded the said Ross with unnecessary violence, wilfully, intentionally, maliciously, or unlawfully. But this defendant alleges that the said McLain S. Cooper shot and wounded the said Ross in the lawful defense of his own person, at a time when he believed and had reasonable grounds to apprehend that the said Ross intended to do him great bodily injury, and there was imminent danger of such intention being accomplished.

"Admits that McLain S. Cooper is the son of this defendant, but denies that he is the owner of any property whatsoever.

"Denies that the value of the real and personal property owned by this defendant exceeds the sum of $100,000, and alleges that the value of such property over and above his just debts and liabilities does not exceed the sum of $15,000.

"Denies the allegations of paragraphs 3, 9, 10, 11, 15, 16 and 17 of said complaint.

"Denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 of said complaint.

"Denies that the plaintiff, by reason of any of the matters or things alleged in said complaint, has been damaged in the sum of $50,000, or in any other sum whatsoever.

"Denies each and every allegation in said complaint contained not hereinbefore admitted, or specifically denied.

"Wherefore, this defendant respectfully asks that the plaintiff's complaint be dismissed, and that he do have judgment against plaintiff for his costs and disbursements herein."

The facts in the case which are material are substantially as follows: The plaintiff, Mary Ross, is the surviving widow of one James Franklin Ross, who formerly lived with her husband upon a farm known as the Cooper farm, near the city of Hillsboro, North Dakota. The plaintiff was born on the 1st day of January, 1878, and on the 11th day of June, 1904, was married to James Franklin Ross. At the time of their marriage Ross was working in a livery stable in Fargo, but later worked on a farm near Argusville, where Mrs. Ross also worked. It seems they had worked on that farm prior to the time of their marriage. Afterwards they worked for a person named Eggert on a farm near Davenport, where Ross was foreman. It appears that in the fall of 1907 Mrs. Ross went to Minnesota near where her people lived at Beaulieau, and she did not see Ross, her husband, until she came to the Cooper farm near Hillsboro in October, 1908. At about such time or shortly thereafter arrangements were made by which Ross and his wife entered the employment of Harry J. Cooper, who is the defendant in this case. Ross became foreman of a large farm which

was owned by Cooper, and Mrs. Ross took charge of the house on such farm and took care of the help about the farm, Cooper furnishing the supplies, and additional help during the threshing season. Mrs. Ross became acquainted with McLain Cooper in 1909, he being at that time about eighteen or nineteen years of age. There were four buildings upon this farm, known as the Cooper farm, at the time of the happening of the events involved in this action, the most northerly one being a large barn, east of which stood a sheep barn, and south of the barn and a little east stood a small one story and a half house called the "bunk house," and immediately beyond stood another small house one and a half stories in height in which Ross and his wife, together with two children, one of whom was adopted, and John Hulet, the hired man, lived. McLain Cooper had a room in the sheep barn, but had his meals with the Rosses at the house. A boy named Tom Fowler slept with McLain Cooper and also took his meals at the Ross house. There was a shed on the south side of the big barn; there was a fence running east and west between the bunk house and the barn, and not far from the bunk house, and a gate opening through this fence at a point near the bunk house. The entrance to the house in which Mr. and Mrs. Ross were living was on the east side, and a small shed was built on the east side of the house, which inclosed the door into the main part of the house, the door of the shed being on the south side.

On the evening of the 10th of March, 1911, there was some trouble between McLain Cooper and James Franklin Ross. There appears to have been some trouble about the milking of a cow and some talk about sending such cow down to the Sutton farm. McLain Cooper and James Franklin Ross on the evening of March 10th seem to have had a personal encounter, which, however, does not appear to have been very vicious and of any great consequence, except there was a clinch and they went to the ground, and Ross appears to have choked McLain Cooper some at this time. On the morning of March 11th, and soon after breakfast, Mrs. Ross heard a shot fired. She went out of the house and through the door on the east side of the main building into the shed, and through the door on the south side of the shed, then around and north along the east side of the shed to the northeast corner of the building in which she lived. When she reached that spot she saw her husband lying alongside the beaten path which leads from the gate

in the fence to the barn door, on the side of the fence toward the barn, but nearer the house than he was to the barn. McLain Cooper, at the time she saw her husband, was standing alongside of him with a revolver in his hand. When Mrs. Ross saw her husband on the ground she called to him and said, "Frank, are you shot?" He answered: "Yes, call Dr. Anderson as quick as you can." She then asked him where he was shot, and he said, in the back. On the morning of the 11th of March, at the barn McLain Cooper fired three shots at Ross, none of which hit Ross. Immediately after this, Ross started for the house, and got about half way to the house. McLain Cooper followed him and shot him in the back, from the effects of which wound Ross subsequently died on the 6th day of August, 1911. McLain Cooper at the time of the shooting of Ross was of the age of about twenty-one years.

We will now proceed to analyze the legal propositions involved in this case. The first question presented to this court is, Are declarations made in extremity, when a person is at the point of death, when death is imminent and certain and the mind is induced by every consideration to speak the truth, and the occasion is so solemn and influencing in its effect as to be considered equivalent to an obligation imposed by an oath administered by a court of justice or one having authority to administer an oath, admissible in the trial of a civil action? While authorities differ materially on this subject, we think the liberal rule, the one founded in reason and justice, and the one tending to establish and promote justice, is the rule that admits dying declarations as proper evidence in either criminal cases or in civil actions, and this even if the exigencies of the case do not require it; that is, even though the matter to which the dying declaration relates might and could be proved by other competent testimony. The theory upon which dying declarations are admitted as competent testimony is that they are part of the *res gestæ*. One of the leading cases holding that such dying declarations are competent testimony as part of the *res gestæ* is Travellers' Ins. Co. v. Mosley, 8 Wall. 397, 19 L. ed. 437. Mr. Justice Swayne, speaking for the majority of the court, said: "In the complexity of human affairs, what is done and what is said are often so related that neither can be detached without leaving the residue fragmentary and distorted. There may be fraud and falsehood as to both, but there is no ground of objection to one that does not exist equally

as to the other. To reject the verbal fact would not infrequently have the same effect as to strike out the controlling member from a sentence, or the controlling sentence from its context. . . . Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress. Where sickness . . . is the subject of inquiry, the sickness . . . is the principal fact. The *res gestæ* are the declarations tending to show the reality of its existence, and its extent and character. The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results. There is none which rests on a more solid basis of reason and authority. . . . In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason." In the Encyclopedia of Evidence, vol. II, page 330, we find the following language: "The mental and physical condition of the declarant at the time of the declaration is a very important consideration in determining whether too great an interval of time has elapsed between the main transaction and the statement; since there must not only be time, but also opportunity, for deliberation. If the declarant was suffering physical pain, or was still under great mental stress as a result of the principal transaction at the time the statement was made, it might be a part of the *res gestæ*, although a considerable interval of time had elapsed, the question being, of course, whether his condition had rendered premeditation impossible or improbable."

The time when the declaration is made is really not of as much importance as the condition of the declarant, which may be such that the desire and opportunity for premeditation and fabrication is entirely precluded; and where a statement has been elicited by questions from a third party, when opportunity for premeditation and fabrication is absent, which is true of the case at bar, such statements have the quality of spontaneity and reliability, and are competent testi-

timony as a part of the *res gestæ* and should be admitted without hesitation. Little Rock, M. R. & T. R. Co. v. Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; Washington & G. R. Co. v. McLane, 11 App. D. C. 220; Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; Fish v. Illinois C. R. Co. 96 Iowa, 702, 65 N. W. 995; Alsever v. Minneapolis & St. L. R. Co. 115 Iowa, 338, 88 N. W. 841; Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 227; Louisville & N. R. Co. v. Shaw, 21 Ky. L. Rep. 1041, 53 S. W. 1048; State v. Robinson, 52 La. Ann. 541, 27 So. 129, 13 Am. Crim. Rep. 357; People v. Simpson, 48 Mich. 474, 12 N. W. 662; People v. Brown, 53 Mich. 531, 19 N. W. 172; Head v. State, 44 Miss. 731; Elkins v. McKean, 79 Pa. 493; Farris v. State, — Tex. Crim. Rep. —, 56 S. W. 336; Smith v. State, 21 Tex. App. 277, 17 S. W. 471; Gantier v. State, — Tex. Crim. Rep. —, 21 S. W. 255; Craven v. State, 44 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311; Berry v. State, 44 Tex. Crim. Rep. 395, 72 S. W. 170; Chapman v. State, 43 Tex. Crim. Rep. 328, 96 Am. St. Rep. 874, 65 S. W. 1098; Drake v. State, 29 Tex. App. 265, 15 S. W. 725; Bowles v. Com. 103 Va. 816, 48 S. E. 527; 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; see Hooker v. Chicago, M. & St. P. R. Co. 76 Wis. 542, 44 N. W. 1085; Lexington v. Fleharty, 74 Neb. 626, 104 N. W. 1056; DeWalt v. Houston, E. & W. T. R. Co. 22 Tex. Civ. App. 403, 55 S. W. 534; Murray v. Boston & M. R. Co. 72 N. H. 32, 61 L.R.A. 495, 101 Am. St. Rep. 660, 54 Atl. 289; Fish v. Illinois C. R. Co. 96 Iowa, 702, 65 N. W. 995; Crookham v. State, 5 W. Va. 510; Sutcliffe v. Iowa State Traveling Men's Asso. 119 Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90; Springfield Consol. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; State v. Maxey, 107 La. 799, 32 So. 206; Sullivan v. Henry Guth & Co. 148 Ill. App. 538.

The dying declaration in this case is as follows:

"My name is James Franklin Ross. I was born in Cleveland, Ohio, February 18, 1870. I wasn't there over nine months—less than a year. My mother died and my father moved away when I was less than a year old. My father has been dead some years. He died along about 1890, I think. From Ohio we moved to Lafayette, Indiana. We were there only a short time and went to Missouri. I was something like

four years old when we moved to Missouri. From Missouri we went to Independence, Kansas, where I lived in the country on a farm. My father was a farmer. I left home when I was thirteen years old, and come up to Storm Lake, Iowa, where I worked on a farm. I was at Storm Lake, Iowa, about two years working on a farm all the time. From there I come up to St. Paul and was traveling around through Wisconsin, Minnesota, and Dakota, back and forth, working in the woods and taking in the harvest and threshing, working on farms. I have worked on farms mostly, nearly all my life has been spent on a farm, except winters working in the woods. I came to North Dakota in 1888, I think; in the fall of 1888, for harvesting and threshing. I was in Montana a couple of years teaming, hauling supplies up in the mountains. With the exception of the time that I was in Montana, I have lived in North Dakota, Minnesota, and Wisconsin. During these different times I have worked on a farm in the summer time, and in the winter time in the woods. I am a married man. My wife's name was Mary Terway. We were married in June, 1904; I wouldn't just say the date; it slipped my memory. I have been married only once. I know Harry J. Cooper. I have known him about two years and a half. I worked for him about that long on the farm. He has a farm of his own. He has two sections and a half out here. He did have a quarter right out here. His farm is 2 miles south and about 6 miles west from Hillsboro. The other quarter that he had was a half a mile south and 1 mile west. That is sold. It was sold while I was working on the other farm, the farm I described as being 2 miles south and 6 miles west. Mr. Cooper is a married man, and has a family,—his wife, two daughters, and one son. The son's name is McLain S. Cooper. He lived on this farm, the quarter, the first six months I worked for him, and then he boarded here in town, and then in the spring he sold the quarter, and then he went on to the Sutton farm, where he was superintendent. In 1910 I was on the two places and Harry J. Cooper was on the Sutton farm until February and then he moved to town,—to Hillsboro, and then I chased around from one farm to the other. From about the middle of November, 1910, and on during the time that I was there, he was not at the farm. He was in Florida and Georgia. His wife and youngest daughter were with him. The other daughter is married and living up here at Inkster, North

Dakota. The boy, McLain Cooper, was on the west farm during the time that Harry J. Cooper was down South. He boarded with us on the farm. My wife was working on the Cooper farm. I was foreman there. I was foreman two years. I was not foreman the first six months I was there, but after I had been there six months I was hired as a foreman on the farm. Harry J. Cooper never was on the farm during the time I was foreman, except that he would drive out to the farm once in a while. McLain Cooper, during the time I was foreman on the farm, was there from April, last year, until this spring. I and my folks belonged to the Methodist Church. I was working on the Cooper farm on the 10th day of March. The 11th was the day I quit work about half-past 7. The 10th of March, 1911, was Friday. McLain Cooper was at the farm at that time; he was there taking care of some lambs. Up to the 10th of March, 1911, McLain Cooper and I would sometimes speak to one another and sometimes we didn't. Sometimes he would come along and speak to you and sometimes he wouldn't and pass right along. There was no particular trouble at all before that time. He had a bunch of sheep that he bought; he had a bunch of full-blooded Hampshire sheep, he had about eighty, and they put up a new building for them and they put him up a bedroom for himself, with the sheep. Sometimes he would go away nights and we wouldn't see him next day until 10 or 11 o'clock. I hadn't had any trouble with McLain Cooper during the time I was there up to the 10th of March. During that time I was hired as foreman and I had charge of the farm. On the evening of the 10th of March, 1911, we had some trouble. My wife had been sick quite a while, and he never wanted to go to meals, and every place I ever worked I always had a meal hour, summer and winter. Take it out there, we had our regular hours, and I was down here for Billy Herman four years and a half, 2 miles east of Argusville, where I was straw boss and working on the farm, and we had our regular meal hours. During the time I was at the Cooper farm we had breakfast in the summer time at half-past 5 and supper—well that would depend on where we was working. We had some lands where we would have to go 2 miles. We generally had breakfast half-past 5 and supper generally at about 7. In the month of March, 1911, we had supper at 6 o'clock. The way this trouble started on the 10th of March, 1911, this Jack Hulet was milking—he is the man who

is now in jail being held as a witness in the case of the State of North Dakota against McLain Cooper,—he was doing the milking, and we had a cow that nobody could milk; I couldn't milk her, and he told McLain that he couldn't. Just before dinner, McLain come to me and asked me if I could send that cow down to the Sutton farm. I told him, after dinner; and so he come around after dinner, and he says, 'You don't need to take the cow down.' He said the kid would milk her. The kid is George, that is the only name he went by there. I understood he was a cousin of the Coopers, but I couldn't say. And so when they started to milk, he couldn't do anything, and he couldn't get no milk from her, and McLain was helping him and they couldn't do anything, and they was mad, jumping around there, but didn't say anything, and that is where you might say, the row started from. So, when I asked him at 7 o'clock if he wasn't going to supper, he said he would go when he damn pleased. My wife was around the house sick and she didn't feel like keeping meals all night, so he said he would get supper when he damned please, and he started toward the door and I started toward him. He looked pretty mad and we clinched right at the door. We laid down on the ice a little bit, and I told him, 'If you want to get up and be a man and go in and get your supper, I will let you up,' and finally he says, 'All right.' While I had him down, he called this George, the kid, to go down and call the sheriff, and I told the kid to keep away from that telephone. So, after this row, him and the kid, they hitched up to drive down, and I won't say whether they both went down to the Sutton farm or not, but they hitched up the team and drove around the corner of the barn, and that is the last that I see them. This was in the evening. It was about 7 o'clock when our trouble came up, and it was about half-past 7 or a quarter to eight when they got started to go to the Sutton farm. When we had this trouble John Hulet come along, and he says, 'Let up, Frank;' I says, 'I ain't hurting him,' I says, 'Any time he wants to get up and behave, I will let him up.' McLain Cooper didn't call for help while we had this trouble, and he didn't call Jack Hulet to come over there. We was working, the two of us, Jack Hulet and I, right close to his sheep shed. He was chopping ice away from the well, pretty close to the water trough. We had so much trouble with the water backing up higher than the water trough, and we finally got the water started under-

neath, and we used to go out evenings to finish this water and was chopping the ice so the water could get away. There was an artesian well there on the place, and that was the cause of our trouble and lots of it. During the trouble with McLain I didn't strike him. I choked him a little, but it never made a mark on him. I didn't have any weapons with me at the time. I didn't make any threats against him at that time, not a thing, and I didn't injure him. I have the prettiest chance in the world if I wanted to, but I didn't want to. I had never made any threats against McLain Cooper during the time that I was there, and I had had no trouble with him up to this time. He had never asked me to leave the farm. I didn't see him again that night after he went to the Sutton farm. All that I did to him was to put him down on the ground and hold him there. He didn't get a scratch. I must have throwed him. We met right at the door, and he was making for me, and I for him, and I catched him. It was all ice and water, and it wasn't much of a trick to throw anyone there, it was so slippery there. There was a fence run west from the sheep-shed door, where we met; it was right up close, there is a gate comes right up to the building, and I think that gate was open all winter. I didn't throw him over the fence, and didn't injure him a bit; there wasn't a scratch on him; I don't think there was a scratch on me. I next saw McLain Cooper, after this scrap, about 7 o'clock or 7:15 the next morning. We had breakfast at 7 o'clock, and we went out to the barn. I went back in the barn and got a pail of feed for the pigs, and when I come to the door, the barn door, I met the gun. McLain Cooper, the son of Harry J. Cooper, held that gun. He says, 'I am going to shoot you.' He threw the gun in my face and he said, 'I am going to shoot you, Frank,' I says, 'Go ahead and shoot,'—something like that, and I walked down a little further and I went into the other door and, getting down to this door, he shot at me twice—that is the sheep-shed door—he shot at me twice; when I got down in the sheep shed he shot again. When he fired the third shot I was inside. Nobody said anything during the time that he was firing. The first two shots my back was to him, and when I got to the shed I wouldn't say. None of these shots hit me. The first two struck the barn, I couldn't swear to that. The only thing—there is witnesses that saw the bullet holes in the building, but I couldn't say for I never got back to the barn. I

think when the third shot was fired I was emptying the feed out. Up to this time he never said a word. The only remark I heard was, 'I am going to shoot you'—that was the first thing. Then John Hulet hitched up the team and he was just going around the corner of the barn, and I got back there, and I says, 'Put your team in the barn, Jack. It is getting too hot here for me.' 'Well,' Jack says 'Throw up your hands—why don't you throw up your hands and find out what he wants.' So I did; I throwed up my hands, and I says 'What do you want?' He says, 'I want you to leave the place.' That is, McLain Cooper said that. I said 'I will get my coat and go.' I didn't make any threats against him at that time. I never made any threats against McLain Cooper. I never used any weapon on him; I never had any trouble with him other than the trouble I have just referred to. During this time my wife was in the house and she wanted to go to town that day, so when I started to the house to get my coat, I got about half way to the house and there is where he shot me, and she come around, she had to come around the old bunk house to see where we were at the barn, you know, and she was going to find out about the team, and when she come around and looked up there, McLain was standing there looking at me with the gun in his hand; I was lying down then and he had shot me. That morning McLain Cooper and I and my wife and John Hulet, the witness who is now in jail, and my ten-year old step-daughter and my boy about six years old, were on the farm that morning. George wasn't there that morning. When that last shot was fired, I was going to the house after my coat—from the barn to the house—I was about half way. McLain Cooper come along behind, and he was walking up on a kind of a ridge, and I got about half way to the house when he shot. He had the gun in his hand during all this time, every time I see him he had that gun in his hand. I didn't see him shortly before he fired the last shot. I started for the house for my coat, and I got down quite a ways before he caught up with me, and I didn't expect him to shoot or anything, and I wasn't looking. Just as soon as he shot he walked around me, and he says, 'I have plenty more—I have got plenty more;' that is all he said. He fired four shots that morning, to my knowledge, and it was the fourth shot that dropped me. When I started for the house, John Hulet was putting the team in the barn. He had a team hitched up and he was

putting them in the barn. The barn is, I should judge, about 75 yards from the house; it might be a little bit the other way. The barn is north and a little bit west from the house. I don't think McLain Cooper remained on the farm over five or ten minutes after he had shot me; until he got his team. I didn't hear him say anything after the shooting except what I have told, and I told him to tell Hulet to help me in the house, and I heard him say to Hulet, 'There is a fellow down there wants you to help him in the house.' Just after the shooting my wife come out, and she see him with the gun and she hollered to me, 'Are you shot, Frank?' and I says, 'Yes,' and I says, 'Phone for a doctor.' I didn't see whether McLain Cooper had the gun in his hand when I told him to tell John Hulet to help me in the house; he had the gun with him, he had no place to put it. We had no trouble that morning outside of this shooting,—not a word,—and he never asked me to leave the farm until that morning, and there never was word in the world about settlement. When Harry J. Cooper left the farm he didn't give me any instructions as to the running of the farm. He just called me up by phone and he told me, 'Hello,' he says, 'I wanted to come out to see you, but I couldn't get out,' he says, 'I am going to take the evening train. Nothing was said between us as to McLain Cooper at that time. I was in charge of the farm. I was hired by the year to take charge of the farm in the summer and help to take care of the stock in the winter. Hulet had worked for Cooper not quite a month. He worked on the Sutton farm about three weeks, and they brought him from the Sutton farm. I was conscious shortly after I was shot,—I was always conscious and I remember everything as well as I am sitting here. Hulet didn't interfere when we had this scrap on the evening of the 10th; he just talked to us. McLain promised to be good and get his supper that night, and then I let him up immediately. There was nothing further said or done after we got up; there was no further trouble until I was shot. After this scrap McLain Cooper got up and went in the sheep shed for a few minutes, and he walked down to the house and stepped inside the door and walked out. The two of them started toward the Sutton farm that night; I couldn't say whether they ever got there or not. There was only one telephone in the house at that time. Jack and I was both in the house when he come in, and he didn't use the telephone after the trouble. The tele-

phone was located on the west side of the house, about the center of the room. When he fired the shot that struck me and dropped me to the ground he was walking behind me and a little bit to the left side. I was walking toward the house and he come up behind me; only a little bit on the left side. I don't think he was over ten feet away from me when he shot. He didn't say anything when he fired that shot; never said a word when he was walking behind me. I was going to the house to get my coat and leave the farm. I was going to take my coat and leave word for my wife to pack up and I would help move after the trouble was over. My coat was in the house. John Hulet didn't have any weapon that morning. Nobody else on the farm had any weapon that morning, or at any time that I know of. When Hulet was told he come and dragged me down to the house. The doctor was called,—Doctor Anderson. I told my wife to call him, and she did and he came. I couldn't say how long after the shooting he was there. He carried me in and laid me down on the cot, I couldn't say the length of time, for I was in terrible pain, and he took me a mile in a single buggy, and we had to stop and change with a farmer, and I was taken into the hospital and have remained here ever since. I couldn't say what kind of a gun McLain Cooper used; it looked like a Smith & Wesson; it was a nickel plated gun. I would say it was a 32 or 38; they look larger than they really are. After the shooting McLain Cooper took the team and went to the Sutton farm; I think George was down there. I have seen McLain since the shooting. It was when they changed me to a double rig and he was with the sheriff, with Osmon, and the deputy got out and come over to help change me. I made no threats against McLain Cooper when I went to the house from the barn that morning; there wasn't a word spoken. I didn't intend to get any weapon; I intended to get my coat and get out of there and leave, and that is all I intended to do. I never had any trouble in particular with any of the men. We used to have little chewing matches with some of them, but you know how it is with a big crew of men. I sent a few of them down the line for the money. That is as much trouble as I ever had there, which Mr. Cooper always upheld; that is, Harry J. Cooper. I never had any trouble with McLain Cooper about the men. I heard the gun report when I dropped, at least that is what I thought I heard, you know. McLain Cooper was right behind

me and then he walked right around me. I went with my head that way and he walked right around me, and he says, 'I got plenty more.' He had the gun in his hand and he is the one that shot me.

"The foregoing statement, consisting of seven typewritten pages and six lines on the eighth page, is my dying declaration, in my own words, and is a true and correct statement of the facts concerning the matter referred to therein. The same has just been read to me, and I now solemnly say and declare that the same is true and correct, believing that I am dying. My doctor and the nurses have just told me that I must now die, and I fully realize that death is near when I make this solemn declaration of facts, and I now sign my name hereto in the presence of these witnesses who have also subscribed their names hereto as witnesses this 29th day of June, A. D. 1911."

The testimony of Dr. Anderson, B. C. Boyd, and William C. Green shows conclusively that the dying declaration of James Franklin Ross was made under the conviction on his part that his death was unavoidable and near at hand. Special emphasis may be drawn to that portion of the declaration which deals with his firm conviction that his death was inevitable and near at hand, and every inference seemed to be at hand to induce the telling of the truth. The words specially emphasized are as follows: "The foregoing statement, consisting of seven typewritten pages and six lines on the eighth page, is my dying declaration, in my own words, and is a true and correct statement of the facts concerning the matter referred to therein. The same has just been read to me, and I now solemnly say and declare that the same is true and correct, believing that I am dying. My doctor and the nurses have just told me that I must now die, and I fully realize that death is near when I make this solemn declaration of facts, and I now sign my name hereto in the presence of these witnesses, who have also subscribed their names hereto as witnesses this 29th day of June, A. D. 1911."

We are firmly convinced that such testimony is of the highest character. The solemnity of the occasion, the fact that all earthly hopes and desires were about to disappear, no reason for deception, every reason for telling the truth, the end of all time for the declarant ebbing away, all eternity steadily and rapidly approaching, are significant reasons for giving credit to such testimony. What more binding force

could an oath duly administered by a proper officer have? An oath is simply a declaration that one will tell the truth, the whole truth, and nothing but the truth, concerning a certain subject-matter about to be inquired into. That which gives the solemnity to an oath are the concluding words, "So help me God." That means that God is called as a witness to the oath, and the responsibility of the one taking the oath is that he is made to realize that, if he testifies falsely, God as his witness does know it, and that he will be confronted by his lying statements at the eternal bar of justice. Comparing the surrounding conditions of a person about to die and his dying declaration, the binding force of such reasoning is equally present with him without the administration or necessity of an oath. The dying person knows and realizes and has been told that death is near; he feels its approach he is almost gathered into the arms of death; he realizes that he must soon appear before that same bar of justice to be adjudged as to every act of life, and it is almost beyond comprehension that he should approach the great bar of justice with a lie trickling from his lips.

To this point the discussion has largely been confined to the admission of dying declarations in criminal cases. It is said that dying declarations are in the nature of hearsay evidence, and for that reason are not admissible, but in criminal cases an important exception has been made on the ground of public policy. If the rule, however, be founded in reason and justice, it should be applicable in any case where a valuable right is involved, whether that right be a personal right or a property right. If, as in the trial of a case of homicide, where the person accused of a crime has at stake at such trial possibly his life, or where he may lose his liberty by being confined in the penitentiary for the term of his natural life, the dying declarations of his victim are admissible as evidence against the accused's right to life or liberty as the case may be. It would seem by analogy that dying declarations would be admissible in support of a right less valuable than life or liberty, that is, a property right; and where such dying declaration is admitted for the purpose of proving the homicide, connecting the accused with its commission, it would seem it should be admissible to prove a property right which may have had its origin out of the homicide and facts connected therewith. Wigmore on Evidence, § 1436, says: "We are confronted with a restrictive rule of evidence commend-

able only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason, and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and, if no reason ever existed, that fact furnishes additional justification." In Thurston v. Fritz, 91 Kan. 468, 50 L.R.A.(N.S.) 1167, 138 Pac. 625, the court said: "The history of the rule, and its application as given by the leading text-writers on evidence, shows that at a very early time it was thought with the fathers of the civil law that one would tell the truth on his deathbed, and for a time dying declarations were admitted in cases both civil and criminal; but later they were confined to cases of homicide, the idea having become prevalent that so exceptional and dangerous a class of evidence should be restricted in its use and application to the 'public necessity of preserving the lives of the community by bringing manslayers to justice.' . . . Some have sought to base the change which restricts such evidence to the one class of cases on the fact disclosed by experience, that some really do not tell the truth even *in articulo mortis,* and hence it is argued that it was deemed safer to exclude such statements except when the exclusion might let a murderer go free. If this was ever seriously deemed the basis of the change, it certainly lacked the merit of logic or consistency, for some are not truthful when under the sanction of an oath duly administered, and in no class of cases should doubtful evidence be received more charily than in those involving the life and liberty of the one on trial. And by so much the more should any sort of evidence safe to be admitted in such a case be deemed proper in an action involving mere property rights. Professor Wigmore suggests that 'the notion that crime is more worthy the attention of courts than a civil wrong is a traditional relic of the days when civil justice was administered in the royal courts as a purchased favor, and criminal prosecutions in the King's name were zealously encouraged because of the fines which they added to the royal revenues. The sanction of a dying declaration is equally efficacious whether it speaks of a murder or a robbery or a fraudulent will; and the necessity being the same, the admissibility should be the same.' "

The learned trial court, after a careful consideration of the law, held that the dying declaration in this case was admissible, and the same was

admitted as evidence in the case and as part of the *res gestæ*. The dying declaration was in writing and relates only to facts to which he would have been competent to testify if sworn as a witness. Oliver v. State, 17 Ala. 587; Whitley v. State, 38 Ga. 50; Brock v. Com. 92 Ky. 183, 17 S. W. 337; People v. Knapp, 26 Mich. 112; State v. Reed, 137 Mo. 125, 38 S. W. 574; State v. Carrington, 15 Utah, 480, 50 Pac. 526.

Dying declarations may be made to anyone competent as a witness to testify to the transaction of the person accused. They may be made to the prosecuting attorney, and, if so, he is a competent witness, or it may be made to various persons, and not necessarily to just one. 4 Enc. Ev. 982.

Dying declarations are not inadmissible in evidence because they are made in answer to questions which were propounded to the declarant. 4 Enc. Ev. 983. Declarations may be reduced to writing by the declarant or someone for him, and such declarations are admissible in evidence. 4 Enc. Ev. 984. It has also been held that reading is not a necessary prerequisite to its admissibility in evidence. It is sufficient if the declarant retains his reasoning faculties and affirms the correctness of the statements made after he has given up all hope of recovery. Reg. v. Steele, 12 Cox, C. C. 168; People v. Gray, 61 Cal. 164, 44 Am. Rep. 549; People v. Hodgdon, 55 Cal. 72, 36 Am. Rep. 30; Mockabee v. Com. 78 Ky. 380; Young v. Com. 6 Bush, 312; State v. McEvoy, 9 S. C. 208; Snell v. State, 29 Tex. App. 236, 25 Am. St. Rep. 723, 15 S. W. 722.

The former opinion of this court handed down at the December, 1916, term, the writer of this opinion believes is not based upon sound principles of law applicable to this case, and, in addition to that, is based upon a misconception of the true relations existing between all the parties, and before a true conception of the legal principles which apply to this case can be had, the definite relationship, duty, or authority of James Franklin Ross, McLain Cooper, and Harry J. Cooper, must be ascertained. It is undisputed that James Franklin Ross was in the employ of Harry J. Cooper as a servant, and as the testimony shows, to some extent at least, as the foreman for a large farm of Harry Cooper. The testimony also shows that McLain Cooper was engaged in rendering service to Harry J. Cooper upon said farm; that

his employment commenced on or about the 13th day of December, 1910. Prior to this time James Franklin Ross had been the foreman, and as such had the direction of the affairs of such farm under his control, subject only to the directions of the master, Harry J. Cooper. That on the 13th day of December, 1910, a very important matter which bears upon the issues of this case took place, which was the delegation of all the powers heretofore possessed by Harry J. Cooper as master to his son, McLain Cooper, so that as between James Franklin Ross and McLain Cooper, whatever orders, directions, control, or authority McLain Cooper exercised over or concerning James Franklin Ross, while upon such farm, were given or exercised by reason of the authority of the master delegated to him. He was exercising the master's authority for the master. Harry J. Cooper had gone South for the winter. The allegations of the complaint in paragraph 6 thereof allege the delegation of authority from Harry J. Cooper as master, to McLain Cooper, in the following words: "That on the 13th day of December, A. D. 1910, the defendant Harry J. Cooper employed his said son, the said McLain S. Cooper, to manage and control the operation of the so-called 'West Cooper farm,' described in the first paragraph of this complaint, and hired and engaged him to take charge of, care for, guard, protect, handle, and operate the same and all the personal property thereon, thereunto belonging and used in connection therewith; and at said time, for such purpose, did install him, the said McLain S. Cooper, in full and complete possession, and place him in supreme and active control, charge, and custody thereof, with full and complete authority, power, and jurisdiction to hire, employ, and discharge such assistants, servants, agents, and employees as he, the said McLain S. Cooper, might deem necessary or convenient; and did in all things grant and intrust unto the said McLain S. Cooper as full and complete power and authority as he, the said Harry J. Cooper, had in and about the premises."

The answer of the defendant in paragraph 1 admits all of the allegations contained in paragraph 6, so that for the purpose of managing, directing, and controlling all the matters of business of such farm and the conduct thereof, the powers and authority of the master Harry J. Cooper were for the time in question at least delegated to McLain Cooper, and in the exercise of such delegated powers and authority in

a proper manner with due respect and consideration for the rights of third parties, Harry J. Cooper would be responsible in damages if McLain Cooper wrongfully exercised such delegated powers so as to injure third persons, and Harry J. Cooper's liability for any damages thus arising would not be determined by assuming the position of McLain Cooper to be that of a servant who turned aside from the exercise of his regular duties and did some wrongful and injurious act to a third person, but this liability must be determined by the position of McLain Cooper as acting under the delegated powers of the master.

Jaggard on Torts, page 1043, says: "Positively one employee becomes vice principal of another only when he is intrusted with the performance of some absolute and personal duty of the master himself. These duties are not only absolute, but they are also inalienable and nonassignable. They may be devolved on others by the master, but not without recourse to him. For negligence in the discharge of these duties he is liable. It is immaterial whether such negligence is his own or that of his servant. In this sense the servant is *alter ego* of the master, or vice principal." James Franklin Ross was a servant of Harry J. Cooper. If Harry J. Cooper was going to employ another servant to whom he would delegate his authority as master, who should govern, control, and direct the acts, and work of the servant James Franklin Ross, it was the bounden and absolute duty of Harry J. Cooper, in selecting such servant to whom he delegated his powers as master, to know and to use that degree of care which an employer should take in employing and providing such servant to whose orders James Franklin Ross would be subject, and who would have the control and direction of the work James Franklin Ross was doing. The employer, the master, is not justified in subjecting his servant, James Franklin Ross, to injury from an incompetent, negligent, or otherwise unfit servant. He is liable if he knew, or, in the exercise of reasonable diligence, could have known, of the unfitness, incompetency, or insufficiency from any reason, of the servant he employed to exercise the authority of master over other servants of the master. McLain Cooper was a very young boy to intrust with the management, control, and direction of men a great deal older than himself, and was very young to assume the heavy responsibility delegated to him to perform by Harry J. Cooper. McLain Cooper was the son of Harry J. Cooper. Whatever weak-

nesses of character, of temper, disposition, or habits that McLain Cooper had were known to the father, or in the exercise of ordinary care and observation could have been known to the father. McLain Cooper must have been possessed of an ungovernable, uncontrollable temper, when, as the record shows, without any provocation, or after firing three shots at James Franklin Ross in the barn, within a few minutes afterwards, while James Franklin Ross was on his way to the house where his family lived, no doubt for the purpose of preparing to leave the premises as per the orders of McLain Cooper, he followed James Franklin Ross, and while James Franklin Ross had his back towards McLain Cooper, McLain Cooper deliberately shot James Franklin Ross in the back, from which wound he shortly afterwards died. We repeat, the record contains no provocation for such an act, and when such act was done under the circumstances and conditions under which it was done in this case, we cannot help but reach the conclusion that McLain Cooper had an ungovernable and vicious temper, which must have been known, or should have been known at least, to Harry J. Cooper; and if Harry J. Cooper knew, or should have known in the exercise of ordinary intelligence and observation, and by reason of the close association and relation of father and son, of the character, temper, and habits of McLain Cooper, he then also knew or should have known that McLain Cooper was not a fit and proper person to whom to delegate his powers and authority as master, to have control, authority, and direction over other servants employed upon the large farm hereinbefore described, upon which James Franklin Ross was employer. Harry J. Cooper, therefore, as a matter of law, would be liable for any damages or injury which was occasioned to third parties by the improper use of the powers and authority delegated to McLain Cooper by Harry J. Cooper, and which were exercised in a wrongful, improper, and injurious manner by McLain Cooper. Harry J. Cooper is liable, therefore, for the negligence of McLain Cooper while exercising the powers delegated to him to which we have heretofore referred.

The plaintiff in this case, in the court below, recovered a judgment for $3,500. She is the wife of James Franklin Ross. They had two children,—one of their own and one adopted. It was the duty under the law for James Franklin Ross to support his wife, this plaintiff, and the two children. McLain Cooper, while exercising the powers and

authority heretofore referred to, delegated to him by Harry J. Cooper, as we have heretofore described, shot and killed James Franklin Ross and thereby took away the only means of support that plaintiff and her children in this case had; and considering all the facts and circumstances in this case, the damages are very small, as compared by the great loss sustained by this plaintiff, and we think from all that has been said, and from the analysis of the law of the case, that the judgment of the district court is a just one, and should be affirmed.

On Second Petition for Rehearing.

ROBINSON, J. See also — N. D. —. This case has been well and thoroughly argued by counsel and by the judges in conference. By a majority of the judges a decision was given in favor of the defendant, and a motion for rehearing was denied. Now a second petition for rehearing is filed on the same grounds as presented in the former petition, and on an affidavit in regard to the supposed disqualification of Justice Birdzell to sit as a judge in the case.

The affidavit shows that long prior to the time of the presentation of this case on rehearing, and under the supposition that the case would be disposed of before Justice Birdzell would become a member of the court, on a train Chas. A. Lyche, attorney for defendant, had some conversation with Justice Birdzell, in which he intimated that he had a decided view on the law of the case, and expressed some doubts concerning his qualification to sit as a judge. Prior to the argument that question was submitted to the attorneys, and it was agreed that there was no objection to Judge Birdzell. There is no claim that he was related to either party, that he had ever been consulted or retained as counsel, or that he had any personal interest in the case. The fact that he may have had a decided opinion concerning the law was no disqualification. Doubtless Justice Robinson had a more decided opinion concerning the law and the facts of the case, and it was shown by his strenuous dissent.

The case involved mixed questions of law and fact on which judges might well differ. It is proper and right that every judge should know the law and have a decided opinion concerning the law of every case,

and there would be no propriety in now reopening and referring this case for decision to some judge of the district court. There must be an end to litigation. The motion is denied.

WILLIAM STEINBACH v. STEPHEN BAUCLAIR and Ellen Bauclair.

(164 N. W. 672.)

Fraud not presumed — circumstantial evidence — may be established by — reasonableness of evidence — conclusion of fraud — must preponderate towards — good faith — honest mistake — may be inferred — law presumes innocence — guess — work — conjecture — jury — must not indulge in.

1. "Fraud is not to be presumed. It must be proved. And while it may be established by circumstantial evidence, yet if the reasonable inference from all such evidence does not preponderate toward the conclusion of fraud, then such evidence will not sustain such finding. If, from the entire evidence on the subject, good faith, or an honest mistake even, may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence. Though the inference of fraud may be drawn from facts and circumstances, such fraud must not be the guesswork or conjecture of a jury, but the inference must be the rational and logical deduction from the facts and circumstances."

Jury — findings of — evidence — sustained by.

2. A finding by the jury that no fraud was committed is *held* to be sustained by the evidence.

Fraud — evidence — finding by jury of no fraud — sale of stallion — defects — examined by purchaser — evidence.

3. Evidence that, at the time of the sale of a stallion, a defect or bruise was found on its front feet, and that the purchaser examined the same, and that the seller said that he believed it was occasioned by the horse stepping upon itself, in connection with the fact that the sale of the horse was not urged upon the purchaser, but others were offered in preference thereto, does not as a matter of law prove fraud and deceit as to the breeding capacity of such animal, even though later on sidebones developed.

Opinion filed July 25, 1917. Rehearing denied October 5, 1917.

NOTE.—For authorities discussing the question as to what amounts to breach of warranty of soundness of a horse, see note in 32 L.R.A.(N.S.) 182.

Action for the purchase of a horse. Counterclaim in fraud and deceit.

Appeal from the District Court of Eddy County, Honorable *C. W. Buttz,* Special Judge.

Judgment for plaintiff. Defendants appeal.

Affirmed.

Statement of facts by BRUCE, Ch. J.

This is an action to recover on two promissory notes, each for the sum of $400. The answer is a qualified, general denial. It admits the execution of the notes. It alleges that, in addition to the two notes mentioned, the defendants at the same time executed still another for the sum of $350, and paid the plaintiff the further sum of $350 in cash. All of this, defendants allege, was in payment of a certain French draft stallion named "Tapen." It then alleges: "That said plaintiff warranted and represented to these defendants said stallion to be in all respects sound and healthy, a good breeder, and in good breeding condition; that these defendants expressly relied upon said warranties and representations in all things and believed the same, and that by reason of said warranties and representations so expressly made by said plaintiff, these defendants executed and delivered the notes aforesaid and paid said plaintiff the sum of $50.

"That said horse was not sound or in good health, and was not a good breeder, and that it was at the time of said sale suffering from a disease of the throat known as acute laryngitis, and suffering from the disease of the legs known as sidebones, and that said stallion was not a good breeder, and was of little or no value for breeding purposes or otherwise, and that said plaintiff further represented the said horse to be of the value of of $1,200, but that by reason of his diseased condition, his unsoundness, poor health, and that he was a poor breeder, said horse was valueless and of no value whatsoever, and that by reason thereof said defendants received no consideration for the said notes described in plaintiff's complaint, or the other note executed and delivered to plaintiff, or the cash paid by said defendants to plaintiff at said time; that the said unsoundness of said stallion, his want of health, diseased condition as to sidebones and as to his throat, was known to the said

plaintiff at the time of the sale and delivery of the said stallion to these defendants by said plaintiff."

In addition to this answer a counterclaim was filed which substantially sets forth the facts pleaded in the answer, and alleges that the defects complained of and the warranty before mentioned were well known to the plaintiff, and the defendants relied upon the warranty; that said warranty and representations were false and were made with intent to cheat and defraud the defendants; and that as soon as the defendants discovered that said stallion was unsound and unfit for breeding purposes, as hereinbefore stated, they offered to return him to the plaintiff and demanded the return of said notes, but the said plaintiff refused to accept said stallion, and that said stallion died in October, 1913.

It then alleges damages to the extent of $1,200.

The jury returned a verdict for the plaintiff for the sum of $800 and interest, and from the judgment entered thereon the defendant appeals.

James A. Manly and *Knauf & Knauf,* for appellants.

The fact that defendant retains the property, or that it died in his possession, does not prevent him from recovering damages by reason of the breach of the conditions, as such knowledge is not a bar to the reliance on the warranty. Northwestern Cordage Co. v. Rice, 5 N. D. 432, 57 Am. St. Rep. 563, 67 N. W. 298; Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513; Andrews v. Peck, 83 Conn. 666, 32 L.R.A. (N.S.) 184, 78 Atl. 445, 21 Ann. Cas. 1000.

The defendants were clearly within their rights in pleading their damages and the whole thereof, even though the notes had not been paid and there was one still outstanding and unpaid. Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Northwestern Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372.

Defendants are required to plead the total amount of their damages, and cannot plead the same into several actions. This action was brought when the first note became due, and defendants are entitled to have the total of their damages sustained on first cause and cannot split the same into several defenses, and in this defendants were clearly within

the requirements of the law. Bowe v. Minnesota Milk Co. 44 Minn. 460, 47 N. W. 151; Jungnitsch v. Michigan Malleable Iron Co. 121 Mich. 460, 80 N. W. 245; Case Mfg. Co. v. Moore, 144 N. C. 527, 10 L.R.A.(N.S.) 734, 119 Am. St. Rep. 983, 57 S. E. 213; 23 Cyc. 1201.

A party has the privilege of keeping the property and suing for damages for breach of warranty, and the court cannot invade the province of the jury and in any manner determine for them the amount of damages they shall find except to limit the jury to the amount stated in the prayer for relief. Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513; Spaulding v. Pitts, 26 S. D. 78, 127 N. W. 610.

Plaintiff refused to take back the stallion when tendered to him by defendants; and the horse, within the period allowed for such return, died, making it impossible to make return. Defendants cannot be held liable as for a failure to return. Lyons v. Stills, 97 Minn. 514, 37 S. W. 280.

One is not required to perform a useless act, and when plaintiff refused to take back the horse when offered to him by defendants within the allowed time, the law did not require defendants to perform further, and they should have been allowed to prove the worthless breeding qualities of the horse, and under these circumstances the court erred in refusing such offered proof. Ohio Thresher & Engine Co. v. Hensel, 9 Ind. App. 328, 36 N. E. 716.

In the sale of a horse the vendor may make both a false warranty and a false representation, and become liable to the vendee for the deceit and for the breach of warranty; and the vendee would correspondingly have two grounds of recovery, but would only be entitled to one relief in damages. The vendee in such a case can sustain an action based upon either right of action alone, or, since both arise out of the same transaction, he may base his action upon both grounds. Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Humphrey v. Merriam, 39 Minn. 502, 35 N. W. 365; Larson v. Calder, 16 N. D. 248, 113 N. W. 103.

The court charged the jury to disregard the solemn and express warranty of soundness made by plaintiff; not to give defendants the benefit of the breach of contract, the court wholly failing to recognize the two elements of the defense—one on contract of warranty or arising on

contract, and the other on tort for false representations and deceit and fraud. This was error for which a new trial should be granted. Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; Humphrey v. Merriam, 37 Minn. 502, 35 N. W. 365; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917.

Rinker & Duell, for respondent.

While an action of fraud and deceit may be joined with an action for breach of warranty, an action for fraud and deceit may lie where there would be no action for breach of warranty, and the court adopted the correct theory when the jury was instructed to the effect that they had nothing to do with the matter of warranties, but only with reference to the defendants being induced to make the contract through fraud, deceit, and false representations on the part of plaintiff. McQuaid v. Ross, 77 Wis. 470, 46 N. W. 892.

Where property is sold under written contract containing express warranties as to certain matters, no other warranties can be implied, nor can evidence of other warranties be offered. DeWitt v. Berry, 134 U. S. 306, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013; Davis v. Iverson, 5 S. D. 295, 58 N. W. 796; Sockman v. Keim, 19 N. D. 325, 124 N. W. 64; Hitchcock v. Gothenburg Water Power & Irrig. Co. 4 Neb. (Unof.) 620, 95 N. W. 638.

Fraud is never presumed, but must be pleaded and proved. The proof must be clear and distinct. New York L. Ins. Co. v. Davis, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; Ely Walker Dry Goods Co. v. Smith, — Okla. —, 160 Pac. 898.

"If from the entire evidence on the subject good faith or honest mistake may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence.' Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667; Webb v. Darby, 94 Mo. 621, 7 S. W. 577; 9 Decen. Dig. "Fraud," Key No. 58 (1) and (2).

On the sale of a stallion where the seller gives to the purchaser all information at hand concerning such horse, statements made in such manner do not constitute fraud and deceit. McCabe v. Desnoyers, 20 S. D. 581, 108 N. W. 341.

The evidence fails to show that plaintiff knew anything concerning the horse which, if it had been communicated to defendant, would have

destroyed the inducement which led defendant to buy. Webb v. Darby, 94 Mo. 621, 7 S. W. 577; Davis v. Iverson, 5 S. D. 295, 58 N. W. 796.

There was no tangible evidence of fraud, deceit, or misrepresentation. Sockman v. Keim, 19 N. D. 325, 124 N. W. 64, and cases cited; Davis v. Iverson, and McCabe v. Desnoyers, supra; Fitzhugh v. Nirschl, 77 Or. 514, 151 Pac. 735.

If defendant's evidence does not disclose misrepresentation, fraud, or deceit on the part of the plaintiff, erroneous instructions on that subject, or on other subjects in the case, would not amount to prejudice, for defendants can recover only on the theory of fraud and deceit. South Omaha v. Fennell, 4 Neb. (Unof.) 427, 94 N. W. 632; Braddock v. Louchheim, 87 Fed. 287, 34 C. C. A. 684, 94 Fed. 1021.

Upon a sale of personal property under a conditional warranty, and providing for a return of the property, a return is necessary before suit, as in the contract provided. Simonson v. Jenson, 14 N. D. 417, 104 N. W. 513.

The point of time to which the evidence must be directed is that of the date of which the contract of warranty was made. The object of evidence must always be to show the condition at the time of the sale. 2 Enc. Ev. 611.

Plaintiff disclosed to defendants the basis of his information and knowledge as to the horse. This refutes the idea of fraud and deceit. McCabe v. Desnoyers, supra.

One who impugns a transaction as fraudulent is not sustained by his own assertion alone in case he is disputed, but has the burden of making his allegation good by independent evidence. Hutchinson v. Poyer, 78 Mich. 337, 44 N. W. 327.

The jury having found the defendants were not entitled to recover anything, an erroneous instruction in this connection would be harmless. Fitzhugh v. Nirschl, 77 Or. 514, 151 Pac. 735; 2 Decen. Dig. Appeal and Error, Key No. 1068; South Omaha v. Fennell, supra; Sockman v. Keim, 19 N. D. 325, 124 N. W. 64; McCabe v. Desnoyers; Davis v. Iverson; and McQuaid v. Ross,—supra.

BRUCE, Ch. J. (after stating the facts as above). The principal error alleged is based upon the action of the court in limiting the testi-

mony to matters concerning fraudulent and deceitful representations, alleged to have been made during the sale, as to the general physical condition of the animal, but precluding the defendants from offering any evidence as to the lack of breeding capacity of the animal, as the same was covered by a specific warranty; and the conditions attached to such specific warranty were neither alleged nor proved to have been complied with. In this, however, we believe no error was committed. The specific warranty, and in fact the only warranty, was as follows: "It is agreed that if said stallion in proper health and condition and properly fed, nourished, and cared for and bred to not more than two mares daily during the next regular season of 1913, said season to begin April 15th and end July 15th, does not get 50 per cent of the mares of breeding age and in breeding condition, bred to him, in foal, and said stallion is delivered back to me at New Rockford, North Dakota, in as good health and condition and as sound as he now is not later than January 1, 1914, I will deliver to said purchaser in exchange for said stallion another stallion of equal value. Provided, however, that said buyer mail me by registered mail at New Rockford, North Dakota, not later than August 1, 1913, a full list of the mares bred to said stallion, with names of owners, description, age, and names of mares, with their dates of service and trial, it is agreed by said buyer that said stallion is accepted by him sound and healthy and in good breeding condition. Further, vendor sayeth not."

There is some testimony in the case which tends to show that the defendants tendered the horse back to the plaintiff sometime in August, 1913, but this merely on the ground that the animal was afflicted with sidebones. There is also evidence that the horse died in October, 1913. There is no evidence, however, that at that time any complaint was made of the lack of breeding qualities of the animal, and there is absolutely no contention or evidence that the list of the mares bred to said stallion, with the names of owners, description, age, and names of mares, with their dates of service and trial, was ever furnished or offered to be furnished to the plaintiff; at any rate, before the date of the trial or prior to August 1, 1913, as provided for in the warranty.

There can be no question of the importance and materiality of the requirement of the list of the mares bred. It was incorporated into the contract so that an investigation could be made while the evidence

was yet fresh, and that opportunity might be afforded to investigate dishonest claims. "The purpose of such a stipulation is not to escape liability, but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy." See opinion of Mr. Justice Holmes in Georgia, F. & A. R. Co. Blish Mill. Co. 241 U. S. 190, 60 L. ed. 948, 36 Sup. Ct. Rep. 541.

This being the case, it seems perfectly clear that, as far as the answer is concerned, the warranty as to breeding capacity cannot be relied upon, and that the evidence objected to was properly excluded. There is certainly nothing in this agreement or warranty, or in this requirement of a list of the mares bred, that is in any way harsh, or unreasonable or violative of sound rules of public policy, and as far as the answer is concerned, therefore, the action of the court was unquestionably correct.

But was the evidence admissible in so far as the counterclaim is concerned? We think that it was not. We also are of the opinion that no error was committed in the instructions which were given.

The counterclaim alleged that "at the time of the execution of said notes mentioned in the complaint, to wit, July 15, 1912, defendants purchased of the plaintiff a French draft stallion named "Tapen" for breeding purposes; . . . that at the time of the purchase of said stallion and the execution of said notes the plaintiff warranted and represented to the defendants that said stallion was in all respects sound and healthy, a good breeder, and in good breeding condition as warranted and represented.

"That the defendants believed and relied upon said warranty and representations, and purchased said stallion for the sum of $1,200 and executed and delivered to the plaintiff said notes as aforesaid; that at the time of said warranty and representations and sale said stallion was not sound and healthy, was not a good breeder and in good breeding condition as warranted and represented by plaintiff, but was suffering from a disease of the throat known as acute laryngitis, was not a good breeder and in good breeding condition, all of which facts were well known to the plaintiff at the time he sold and warranted said stallion as aforesaid.

"That said warranty and representations were false and were made

by the plaintiff with the *intent to deceive the defendants* and to induce them to purchase said stallion, and that defendants were deceived and defrauded by the falsity of said warranty and representations.

"That the plaintiff sold said stallion to the defendants, knowing that defendants wanted him for breeding purposes, and knowing that defendants relied upon his warranty and representations as to the soundness and health of said stallion, and also as to the fitness of said stallion for breeding purposes, and knowing that said stallion was diseased and unfit for breeding purposes as aforesaid, and that he was unsound and not in good health, and *knowing that defendants would not have bought said stallion* or executed said notes had they known the condition of said stallion; yet the plaintiff fraudulently and deceitfully concealed the true condition of said stallion from defendants, and failed and neglected to inform the defendants of said diseased condition of said stallion and his unfitness for breeding purposes."

The question is whether, under such a counterclaim and in the absence of a fulfilment on the part of the defendants of the conditions in regard to the list of mares served, etc., it was competent for the defendants to show, as they offered to show, that 111 mares were bred between April 15 and July 15, 1913, and the result of such breeding; that the stallion was in good hands and properly cared for and served not to exceed two mares a day, and that of all the mares so served, not to exceed forty-four, were gotten in foal, including dead as well as living colts; and did the court err in instructing the jury that they did not have anything to do with the foal-getting qualities of the horse?

We think that it did not err.

The counterclaim is based not upon the warranty, but on frand and deceit. The bill of sale contained an agreement on behalf of the defendants that it was "agreed by said buyer that said stallion is accepted by him sound and healthy and in good breeding condition." The question on the counterclaim was whether the agreement entered into by the defendant was brought about by deceit or fraudulent representations made to him with reference to such soundness and health and breeding capacity.

The only question then is whether there was any evidence which tended to show fraud and deceit on behalf of the plaintiff at or before the time of the sale and in regard to the breeding capacities of the

animal. If there was, the evidence which is objected to is competent as tending to show the falsity of the representations.

On this subject the defendant Bauclair testifies in effect:

Well, I went out there to see what he had to offer, and he showed me what horses he had on the place, and he took me to see the horse, and we talked about the horse. He suited me pretty well, the size and everything, and I asked him if the horse was sound and all right. He says, "This horse is sound and all right;" and he says, "I will show you his papers." He showed me the papers of the horse and license, and then, too, we spoke several times in regard to the condition of the horse. I asked him if the horse was sound and all right, and he particularly said that he was sound and all right, and showed me his papers and license to show he was sound. I have never had any experience with horses of this kind before. I never owned a stallion before.

Q. Now, Mr. Bauclair, what, if anything, was said by him to you about his breeding qualities?

A. He said he was sure.

Q. What, if anything, was said by him to you about what per cent he would get, if anything?

A. It was, he figured, about 80 per cent. That was the talk between us. He said about 80 per cent.

Q. What did he say about guaranteeing any per cent?

A. He said 60 per cent, he would guarantee that. That is what he told me at the farm in the house. The next time I saw the horse is when I took it home; that was when we closed the deal, probably pretty near a month afterwards. At the time we had this conversation the horse was in view. I had been looking at the horse.

Q. Did you tell him for what purposes you wanted the horse?

A. Yes, sir. We talked of many things and a good many things were said. I told him what I wanted him for, and he said what he thought he would do, and so on. I couldn't just give the conversation. When he told me that the animal was sound I believed his statement. I relied on that statement. I had never seen the horse before this occasion and knew nothing about him. When he told me he would get 60 per cent and he was a good foal getter, I believed his statement in that regard. I relied on it in making the deal.

Q. What do you mean?

A. Why, I relied on 80 per cent. He told me he would guarantee 60 per cent.

The veterinarian, E. H. Fitch, testifies that he examined the horse in July, 1912, and that he found that it had sidebones and that the cartilage was ossified. He testified that a stallion afflicted with sidebones has a tendency to transmit the same to its offspring, and that a stallion is not supposed to be used for breeding purposes that has sidebones. An objection was then made and sustained to a question asking him if he owned any colts out of the horse Tapen. He then testified that a horse with sidebones would be apt to produce offspring that didn't have them, but more frequently that did, and he didn't think they should be used. He testified that he believed that the State Registration Law provides for the giving of certificates in certain cases, and citing therein that the horse has sidebones, and they license him to go ahead and stand.

Bauclair further testifies that before purchasing the horse he looked him over as to size, and examined some of his colts,—some seventy or eighty,—as many as he kept, and that he was relying partly on his own investigation in buying the stallion. He says that Steinbach told him in the house that the horse was sound. "He said that the horse was sound and all right, and, 'I will show you the papers;'" and that he showed him the papers, and he looked them over a little and he looked over the horse then a little later on. "At the time he sold the horse he delivered to me the pedigree and license,—the whole bunch of papers; that Steinbach told me that the horse was a sure breeder, and that he believed I could figure on 80 per cent. He said I could figure on that, and then later he substituted that for the year's work. The last year. I saw what the horse had done before that. He didn't tell me about the past of that horse. He may have told me about the record of that horse or what he had done before, which I believe he told me, that he came into the possession of the horse in the spring of 1912, so that I knew he hadn't used the animal for a year before.

Q. And didn't he tell you that the man he bought the horse from had told him that he could figure on 75 or 80 per cent of the colts?

A. I would not say positively whether he did or he didn't. He might have.

Q. Now, don't you remember he told you those were what the man he bought him from told him that he could figure on 80 per cent?

A. I don't remember that. At the time when I looked at the horse, before the notes were given, I looked at the front feet. I ran my hands over them; felt of them. I called Mr. Steinbach's attention to something on the front legs. It was on this one here. I asked him what that was. He said it was nothing.

Q. What did you say?

A. I had his word for it that it was a bruise or something like that. I called his attention to that at that time. Neither he nor I said anything about sidebones.

Q. And never knew anything about the horse having sidebones until you got this certificate you testified to, the next year?

A. I found out then. I didn't know my horse had them. I found it out about the 1st of May, when I got those papers back. Then I spoke to Mr. Steinbach about the matter, and told him the horse had sidebones. He told me he did not. I told him my paper shows that he has. He said if the horse was affected that way he would throw off $200. He said he didn't want to take the horse back and that he would come down $200. Until I found the horse had what is called "sidebones" I was well pleased with it in every particular. I told Mr. Steinbach that several times. In none of my talks with Mr. Steinbach did he admit that the horse had sidebones when he sold him to me, and so far as I know, Mr. Steinbach himself didn't know any more than I did that the horse was affected with sidebones at the time he sold him to me. I first noticed those lumps on the horse's feet that are spoken of as sidebones when the papers came back. He wasn't limping at the time that I got him,—not that I noticed. He began to limp the same fall that I got him. I noticed him favoring his feet—limping.

Q. Did you notice that in the summer when he was traveling?

A. I thought it was his shoes, and I had them changed.

Q. Did he limp then?

A. The next spring I didn't notice it so much. When I bought the horse I could pick out any I wanted.

Louis Bauclair, the son of the defendant, testifies that at the time he brought the horse home in July, 1912, he noticed growths on the feet.

Dr. Babcock, a state veterinary inspector, testified that he examined the horse in 1910, and more than a year prior to the sale; that the disease of sidebones lessens the value of a horse as a breeding animal; that when he examined the horse there was nothing in particular in the front feet to indicate sidebones; that he again examined the horse in 1913; that he treated it in the spring of 1912 for acute laryngitis; that he made no examination for sidebones in 1912; that there were sidebones in the spring of 1913; that it would take about three months to develop sidebones.

Q. I believe you examined him in 1910, didn't you?

A. Yes, sir. I examined his front feet at that time.

Q. Well, Doctor, what did you observe about these front feet at that time?

A. Nothing in particular in regard to the front feet.

Q. I mean the general conformation of the legs or feet,—anything that would indicate a predisposition to the disease of sidebones that you observed?

A. The conformation was faulty. The pasterns were too short and too straight.

Q. I will ask you whether or not a horse with that faulty conformation is more subject to sidebones than a horse with a proper conformation? (Objected to by counsel for defendant, and objection sustained.)

Q. From your examination at that time of that horse, did it appear to you at that time that the horse, in all probability in your judgment, would develop sidebones; basing your answer upon the examination of the horse at that time? (Objected to by counsel for the defendant, and objection sustained.)

Q. You say you examined the horse in 1910?

A. Yes, but that wasn't my first knowledge of the horse.

Q. What sort of an impression or what kind of an impression did you form of this horse as a breeder at that time?

A. Barring faulty conformation of the front feet, I considered him a very fair animal.

Q. And at that time I believe you stated there were no sidebones on the horse?

A. Yes, sir, there were no sidebones in evidence.

Q. And while there was that faulty conformation, it was possible that no sidebones would ever occur on the horse at the age he was, wasn't it?

A. It would be possible with proper care that they never would develop.

The testimony of the plaintiff, Steinbach, absolutely denies any knowledge of the existence of sidebones. He states that the defendant was given the choice of taking any horse that he wanted, and was not urged to take the one in question, and that he examined his legs before taking him. He also testifies that he based his representations of the soundness of the animal on what Dr. Babcock told him and on the papers he had received from the Agricultural College, and that he told the defendant of this fact.

It would seem from all of this evidence that the only suggestion of fraud is the possible fact that at the time of the purchase there was a swelling of the foot of the animal which might develop into a sidebone, and that the plaintiff stated that the swelling might have been occasioned by a bruise, and the later fact that sidebones developed. There is absolutely no proof that the plaintiff knew that the horse had sidebones beyond this fact, and there is positive proof that defendant himself examined the horse to a greater or lesser extent and himself examined the feet, and relied largely on his own judgment.

"Fraud is not to be presumed. It must be proved; and, while it may be established by circumstantial evidence, yet if the reasonable inference from all such evidence does not preponderate toward the conclusion of fraud, then such evidence will not sustain such finding. In other words, if, from the entire evidence on the subject, good faith or an honest mistake even may be as rationally and reasonably inferred as fraud, then the law leans to the side of innocence. While, to prove fraud direct evidence is not essential, and the inference of fraud may be drawn from facts and circumstances, such inference must not be the guesswork or conjecture of a jury, but the inference must be the rational and logical deduction from the facts

and circumstances from which it is inferred." Alter v. Bank of Stockham, 53 Neb. 223, 73 N. W. 667; New York L. Ins. Co. v. Davis, 96 Va. 737, 44 L.R.A. 305, 32 S. E. 475; Ely Walker Dry Goods Co. v. Smith, — Okla. —, 160 Pac. 898; Webb v. Darby, 94 Mo. 621, 7 S. W. 577.

We are unable to find any evidence on which we can premise any suggestion of fraud, and which would justify us in overturning the verdict of the jury. Especially as the undisputed evidence shows that the plaintiff was in no manner anxious to sell the particular horse; that he stated to the defendant that he wanted to keep it for breeding purposes and to fill some breeding contracts; that he offered the defendant other horses; and that he was in fact urged into the sale by the defendant himself.

The only defect in the breeding capacity, and this did not go to capacity, but merely to whether persons would desire the services of the horse and whether a sidebone might be transmitted to the offspring, was a possible tendency to a sidebone or the beginning of such a disease. The only claim made is that the plaintiff said that the horse was a good breeder, and it is absurd to contend that this statement was fraudulently made, or was in fact false, merely because of the possible defect in the foot.

Such being the case, not only was there no exclusion of competent testimony, but such exclusion was not prejudicial.

We agree with counsel for appellant that if the jury believed the testimony of the defendant to the effect that he called the plaintiff's attention to the swelling on the foot of the horse at the time of the sale, and that the plaintiff told him that it was nothing, and that the horse had probably been stepped on, that fraud might be found if they found that he stated something as a fact which he did not know to be true or was deliberately false. We believe, however, that this matter was properly submitted to the jury. It is true that the court told the jury that they didn't have anything to do with the foal-getting qualities of the horse. This, however, was correct, as the only possible effect that the sidebones or tendency to sidebones would have had would have been in the possible transmission of the tendency to colts, and there is no evidence or attempt to prove that any of the colts had this tendency. The evidence sought to be introduced, in-

deed, was that but few colts were produced, and not that the colts that were produced were in any way defective.

The court specifically charged the jury that "there is a matter, however, with which you are concerned, and that is this: 'It is agreed by said buyer that said stallion is accepted by him sound and healthy and in good breeding condition.' Now, if Mr. Bauclair made such an agreement as that, and I say to you that he did by reason of having accepted this bill of sale, he is bound by that unless he was induced or gotten to enter into this contract through fraud and deceit of Mr. Steinbach. Now, a contract that one has entered into through fraud and deceit is not binding upon him. In order to make a contract, the minds of the men making it must meet upon the same propositions; and the law says that, if their consent is not free, then they are held not to have a contract, because their minds didn't meet freely, fairly, and openly; and the law says further that, if a man is induced to enter into a contract by fraud or deceit, then his consent to the contract wasn't free, and he is not bound by it. Now, it is for you to determine, under all the evidence in this case, whether or not Mr. Steinbach got Mr. Bauclair to enter into this contract, with reference to the buying of this horse, by deceit or fraudulent representations to him, with reference to the soundness and health conditions of this horse. Remember you don't have anything to do with the foal-getting qualities of this horse. Now, gentlemen of the jury, the first matter for you is this: What were the representations made by Mr. Steinbach to Mr. Bauclair with reference to the health and conditions of this horse, as to the soundness and the other matters spoken of? What those representations were, you must get from the evidence as given by the witnesses on the witness stand in this case. You have heard the evidence and testimony given by witnesses on both sides of this case as to what those talks were between those men and what those representations were, and it is for you to determine what the real truth is, and exactly what representations were made by Mr. Steinbach to Mr. Bauclair with reference to those matters. Did Mr. Steinbach make the representations to Mr. Bauclair which Mr. Bauclair claims he made to him? And if he did make such representations to Mr. Bauclair as Mr. Bauclair claims, were those representations fraudulent under our law? Now, our Code says: 'Actual fraud, within the meaning of this

chapter, consists in any of the following acts committed by a party to the contract or with his connivance with the intent to deceive another party thereto, or to induce him to enter into the contract:

"'(1) The suggestion as a fact of that which is not true by one who does not believe it to be true.

"'(2) The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true,' and that last proposition is the one involved in this case so far as any element of fraud may be concerned. I will read it again. 'The positive assertion in a manner not warranted by the information of the person making it of that which is not true, though he believes it to be true.'

"Now, then, in the first place did Mr. Steinbach make any representations to Mr. Bauclair which were not true? If you find he didn't, why then, of course, you will be through with that. If you find he made representations to Mr. Bauclair which were not true, though he believed them to be true, the question in the case would then be, Would the information that Mr. Steinbach had about those matters warrant him fairly as an honest man in making those statements? . . .

"Remember you haven't anything to do in this case with the matter of warranties so far as the warranties are concerned, but you should only go back to talks leading up to this sale,—the talks between these men,—in order to determine whether or not Mr. Bauclair was led into the making of this contract through misrepresentations, through fraud and deceit by Mr. Steinbach as I have defined those matters to you."

It would appear to us that these instructions, and the instructions as a whole, clearly presented the only issue in the case to the jury. That sole issue was whether the plaintiff was guilty of fraud and deceit in regard to the question of sidebones; for, as we have before stated, the question of the warranty of the breeding capacity of the animal was out of the case.

The judgment of the District Court should be and is affirmed.

GRACE, J. (dissenting). It will be noticed that the warranty contained in the bill of sale is a specific warranty, and relates exclusively to the certainty of the propagating qualities of such stallion, and the percentage is fixed at 50 per cent of all mares of breeding age and in

breeding condition, bred to such stallion, to be in foal. It will be noticed that this specific warranty had attached to it certain conditions which were to be performed by the purchaser, such as the proper feeding, nourishing, and caring for of such horse, and other conditions, which are all set forth in such bill of sale, all of which relate to the specific warranty.

It appears from an examination of the answer that the defendants have set forth and relied upon two defenses to the collection of said notes, and in addition to these two defenses pleaded a cause of action against the plaintiff by way of counterclaim. The defenses relied upon by the defendants are: (1) A specific written warranty that the stallion was a good breeder and in good breeding condition; (2) that the plaintiff fraudulently and deceitfully concealed the true condition of said stallion.

We are of the opinion that the express written warranty in a bill of sale excludes proof of any oral warranty made at the time or prior to the sale of the property in question. No further attention, therefore, need be paid to the defendants' claim based upon the oral warranty. 35 Cyc. 379, subd. 7, and list of cases cited thereunder.

In this case the defendants could offer testimony and proceed under every defense or cause of action which they had. Each cause of action which the defendants had arose out of the same transaction. They had a cause of action for the breach of the specific warranty as to the breeding qualities of the stallion; a cause of action arising out of the alleged fraudulent and deceitful representations concerning the stallion; and a cause of action based upon their counterclaim. Out of all such causes of action arising out of the same transaction they are entitled to only one relief in damages. The defendants, under such conditions, could have maintained an action based upon either right of action alone, or based upon all their rights of action arising out of the same transaction, but would receive only one relief in damages. Needham v. Halverson, 22 N. D. 594, 135 N. W. 203; Murphy v. McGraw, 74 Mich. 318, 41 N. W. 917; Larson v. Calder, 16 N. D. 248, 113 N. W. 103; Humphrey v. Merriam, 37 Mich. 502, 35 N. W. 365; Freer v. Denton, 61 N. Y. 492.

The defendants had a legal right, even though the notes were not paid, to plead the breach of warranty and the damages consequent to

such breach of warranty as a defense, and had the further right to plead their damages by way of counterclaim, the notes being non-negotiable, and have such damages, if any, applied toward the reduction of the amount of said notes; or, stated in another way, have such notes applied in liquidation of such damages. Fahey v. Esterley Mach. Co. 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Northwest Port Huron Co. v. Iverson, 22 S. D. 314, 133 Am. St. Rep. 920, 117 N. W. 372.

The action was brought when the first note became due, and the total amount of damages due, if any, are entitled to be pleaded and proved in this first action, and such damages, if any, applied to the notes in question. Bowe v. Minnesota Milk Co. 44 Minn. 460, 47 N. W. 151; Jungnitsch v. Michigan Malleable Iron Co. 121 Mich. 460, 80 N. W. 245.

It appears from some testimony in this case that the defendants tendered the horse back to the plaintiff, and that plaintiff would not receive the horse back. It appears, also, that the horse afterwards died while in the possession of the defendant. Having tendered the horse back, if we may consider such testimony as true, the fact that the horse afterwards died does not prevent the defendant from recovering whatever damages he may have sustained by reason of the breach of the warranties. The specific warranty contained a condition that the stallion should be returned if it did not correspond to the specific warranty and another stallion of a certain value should be exchanged. Even with such a condition in the specific warranty, if the horse died before any offer to return the same, still it seems that it would be proper for an action for damages to be maintained for the difference in the value of the stallion as warranted and represented at the time of the sale, and as he actually was.

The defendants assign forty-five causes of error. We feel that it is entirely unnecessary to consider all of them, for most of them result from a wrong theory of the case assumed by the trial court. The trial court limited the testimony to matters concerning fraudulent and deceitful representations, if any, made during the sale of the stallion, and would not permit the introduction of any testimony concerning the specific warranty contained in the bill of sale, on the ground that the conditions attached to such specific warranty were alleged not to have

been complied with, and therefore the testimony offered was claimed to be incompetent. The trial court refused to receive testimony concerning the performance of or compliance with the specific warranty as to the breeding qualities of the stallion. We are convinced the court was in error in this regard, and the court should have admitted testimony concerning the conditions which were to be observed under the specific warranty. The exclusion of all such testimony relating to such warranty contained in the bill of sale constitutes prejudicial and reversible error.

Considering errors Nos. 6, 7, and 8, it is evident that the court erred in not admitting the testimony as to the number of mares bred to the stallion in the year 1913. The court having excluded the testimony concerning the breeding of such mares, and the defendant reduced his offer to writing, and with Stephen Bauclair on the stand testifying, the defendants in this case offered to show that one hundred eleven mares were bred between April 15, and July 15, 1913, and that the stallion was in the hands of a competent caretaker, properly cared for, and served not to exceed two mares a day, and of the mares so served not to exceed forty-four were gotten in foal, including dead as well as living colts. This testimony went to the very conditions which were set forth in the bill of sale concerning the specific warranty. It was the proper time and place to prove all the conditions which were contained in such specific warranty and such bill of sale. The defendant had a right to bring competent testimony into court to show and prove by such witnesses under oath, that each and every condition in such specific warranty contained in such bill of sale had been fully complied with. It was not incumbent upon the defendants to show that they had compiled the list of mares spoken of in the specific warranty, and sent such list of mares to the plaintiff by August 1, 1913. The parties were now in court under oath, with able counsel employed on either side capable of then and there determining the actual questions of fact under consideration. It cannot be said that the testimony of the defendant and his witness concerning such facts as to the number of mares bred, and their age, etc., would not furnish certainly just as true and correct information to the plaintiff as to all of such facts as could possibly be furnished by the defendants to the plaintiff by such written statement, which was referred to in the specific warranty. The

defendants were present in court with their witnesses to prove all these facts by competent testimony under solemn oath, and the plaintiff would have every opportunity to inquire into the truthfulness of such statements, to procure the names, residences, and locations of the parties owning the mares, and any other information concerning the feeding and care of such stallion, and all the other facts set forth in such specific warranty. It was prejudicial error to exclude such testimony.

The majority opinion in effect holds that the furnishing of a list of mares prior to August 1, 1913, which list was claimed to be part of the warranty, was a precedent condition to the right of the defendants to recover on the breach of warranty. In other words, as we view it, the majority opinion in fact holds that parties contracting with reference to any subject-matter may also by the contract exercise control over the introduction of evidence in court in a subsequent action concerning the subject-matter, by making the furnishing of such evidence to one of the contracting parties a condition precedent to the right to maintain an action concerning the subject-matter of the contract, such as a breach of warranty. It is easily understood that the list of mares referred to is part of the evidence which would go to prove the breeding qualities of the stallion in question. It has no other purpose. It bears no other relation to the subject-matter of the action. The main question in the case, in fact, the only question is, Did the stallion in question comply as to breeding qualities with the warranty which was made concerning such breeding qualities? Any matter which would tend to prove or disprove whether the stallion was of the requisite breeding qualities as warranted would be merely evidence, and would not be part of the subject-matter of the contract. As we view it, it gives the parties the right, in contracting with reference to any subject-matter, to control and prevent the introduction in court of any evidence which is desired to be excluded concerning the subject-matter of the contract, or any of the qualities or conditions relating to such subject-matter, unless there is a full compliance with all precedent conditions concerning the service of the copy of the evidence, in the same manner and to the same effect as in this case. The list was tendered in the court, and Steinbach had the opportunity to examine it, and if he desired more time for a more thorough examination he could have applied to the trial court for an extension of time or a continuance of the case until such time as he

could have made fuller investigation of the list of mares so furnished, if he desired to do so. Eventually, then, after such examination, if Steinbach had desired to make it, the case could have been tried upon its merits, and the only merits or contention in the case is whether or not the stallion came up to the breeding standard as represented. This question now can never be determined. The merits of this action, that is, the breeding qualities of this stallion, can never be determined. Bauclair can never have any standing in court to prove that the stallion was not as warranted. The merits must remain always undetermined, and, as we have before said, the merits in this case, and the only real issue in the case, is the breeding qualities of the stallion.

Referring to defendants' assignments of error Nos. 9 and 10, it is prejudicial error against the defendants to refuse to receive exhibits 5 and 9. Exhibit 9 was a complete record of said stallion in servie between April 15 and July 15, 1913, the plaintiff could have had an opportunity to examine such record and acquired all the information concerning the matters therein stated at the time of the trial. Referring to defendants' assignment of error No. 41, wherein the court instructed the jury as follows: "Remember, you have not anything to do in this case with the matter of warranties, so far as the warranties are concerned, but you should only go back to talks leading up to this sale,—the talks between these two men, in order to determine whether or not Bauclair was led into the making of this contract through misrepresentation, through fraud and deceit, by Mr. Steinbach, as I have defined those matters to you." Such instructions constituted prejudicial error as to the defendant.

The defendant in his answer, by way of counterclaim, set up a claim for damages against the plaintiff in the sum of $1,200, which damages were claimed by defendant to have resulted from a breach of warranty concerning the breeding qualities of the stallion in question.

Paragraph 5 of defendants' answer contains the following allegations: "That the plaintiff sold said stallion to the defendants, knowing that defendants wanted him for breeding purposes, and knowing that defendants relied upon his warranty and representation as to the soundness and health of said stallion, and also as to the fitness of said stallion for breeding purposes, and knowing that said stallion was diseased and unfit for breeding purposes, as aforesaid."

Paragraph 4 of said answer contains the following allegation: "That at the time of said warranty and representations and sale said stallion was not sound and healthy, was not a good breeder and in good breeding condition as warranted and represented by plaintiff, but was suffering from a disease of the legs known as sidebones, and also from a disease of the throat knows as acute laryngitis; was not a good breeder and in good breeding condition, all of which facts were well known to the plaintiff at the time he sold and warranted said stallion as aforesaid. That said warranty and representations were false and were made by the plaintiff with the intent to deceive the defendants and to induce them to purchase said stallion, and that the defendants were deceived and defrauded by the falsity of said warranty and representations."

Paragraph 6 contains the following allegations: "That as soon as the defendants discovered that said stallion was unsound and unfit for breeding purposes as hereinbefore stated, they offered to return him to the plaintiff, and demanded a return of said notes, but that said plaintiff refused to accept said stallion, and that said stallion died in October, 1913."

It appears, therefore, that the counterclaim in question was largely based upon the allegations in the answer concerning the falsity and breach of the warranty with reference to the breeding qualities of such horse, which breeding qualities had been warranted in the bill of sale. Leaving out all the allegations which refer to the soundness and health of the stallion, there yet remains in such allegations in paragraphs in such answer just mentioned a good cause of action in favor of the defendants against the plaintiff, which they have properly pleaded by way of counterclaim. The matters which are set forth and alleged as the basis of such counterclaim are parts of and originated out of the same transaction, and therefore were properly pleaded as a counterclaim. It is a well-settled principle of law where there has been a breach of warranty, express or implied, the buyer may set off or counterclaim his damages sustained by reason of such breach, in an action for the price of goods. 35 Cyc. 441, and list of cases therein cited from almost every jurisdiction within the United States sustaining this principle of law. The court clearly committed prejudicial error in refusing to admit testimony tending to prove the allegations of the answer which were the

basis of the counterclaim. Questions concerning whether the stallion was properly fed, nourished, and cared for, the number of mares bred, their age and breeding condition, and the percentage which became in foal, were all important and material, and directly connected with and relative to the warranty contained in the bill of sale, which related to the breeding qualities of the stallion, and the exclusion of testimony bearing upon such questions was reversible, prejudicial error.

There is some testimony in the case relative to poisoned hay having caused the death of this stallion, together with several others of plaintiff's horses. It is immaterial from what cause the stallion died. The fact that the stallion did die makes no difference in the cause of action. The right of action is based upon a breach of warranty in the bill of sale, as well as other alleged rights of action. As to the warranties, the measure of damages is the difference between the value of the stallion as warranted and his value in the condition in which he was, and this could be shown whether the horse was living or dead.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General for the State of North Dakota, v. EMIL SCOW and J. A. Power.

(164 N. W. 939.)

State board of regents — members of — governor — nominations by — confirmation by senate — during same session of legislature — offices — title to.

1. The provisions in § 2 of chapter 237 of the Laws of 1915, empowering the governor to nominate and the senate to confirm nominations for the offices of members of the state board of regents during the same session of the legislature at which the act creating the offices was enacted, do not vest title to the offices in the appointees, which continue beyond July 1, 1917.

Officers — continuing to hold — after right to hold ceases — governor — may declare vacancies — may appoint to fill — vacancy appointees.

2. Where officers continue in office after their right to hold and occupy the office has ceased, the governor may declare the offices vacant and appoint successors who will hold as vacancy appointees.

Opinion filed September 27, 1917.

Original proceeding by the state on the relation of William Langer, Attorney General, upon an information in the nature of quo warranto against Emil Scow and J. A. Power to oust the defendants from the offices of members of the state board of regents.

Judgment of ouster entered.

William Langer, Attorney General, *H. A. Bronson* and *D. V. Brennan,* Assistants Attorney General, for petitioner.

Lawrence & Murphy, for respondents.

BIRDZELL, J. There is involved in this case the right of the defendants, Scow and Power, to continue in office, as members of the board of regents of this state, after July 1, 1917. The facts with reference to their original appointment and confirmation are fully set forth in the writer's dissenting opinion in the case of State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 725. The statement of facts found therein is adopted for all purposes of this opinion, and in addition it need only be stated that, prior to the institution of this proceeding, Totten and Muir were appointed by the governor, at a time subsequent to the 1st of July, 1917, to succeed the defendants.

Reference to the case of State ex rel. Langer v. Crawford, supra, will disclose that the members of this court were, at that time, unable to agree upon any common legal ground sustaining the title of the defendants to their offices as members of the state board of regents. It will be found, however, that, in the opinion of the writer, concurred in by Mr. Justice Grace, the defendants in that action were never legally appointed for the full terms embraced in their respective commissions. The presentation of this case has only served to strengthen the views entertained and expressed in the former opinion.

The case of Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 447, is in no sense an authority against the propositions maintained in my dissenting opinion. In that case, as in the case of State ex rel. Clarke v. Irwin, 5 Nev. 111, the officer whose appointment was upheld, was named in the act of the legislature. The following is the language of the statute:

"Section 3. Until otherwise provided by law, Con P. Cronin is appointed reference librarian, and shall serve until his successor is appointed. Any vacancy shall be filled by the board of curators." In

the majority opinion in that case, reliance was had upon the cases of People ex rel. Graham v. Inglis, 161 Ill. 256, 43 N. E. 1103, and State ex rel. Clarke v. Irwin, supra. The application of these authorities to the facts involved in this case has already been fully discussed and a well-grounded distinction, which has been recognized and applied by the courts deciding those cases as well as by other courts, was elaborated upon in the former opinion heretofore referred to. State ex rel. Langer v. Crawford, supra. No case has been called to our attention where either an election of an officer or an appointment of an officer has been held valid where the power to elect or to appoint depended solely upon the authority of an act of the legislature which had not yet gone into effect. The reasoning upon which the contrary authorities are based is, to my mind, too clear to admit of successful contradiction. See People ex rel. Herdman v. Rose, 166 Ill. 422, 47 N. E. 64; State ex rel. Wolcott v. Kuhns, 4 Boyce (Del.) 416, 89 Atl. 1; the opinion of Mr. Justice Shaw in the Supplement to 3 Gray, 601–607; Com. v. Fowler, 10 Mass. 290; State ex rel. Cook v. Meares, 116 N. C. 582, 21 S. E. 973; Santa Cruz Water Co. v. Kron, 74 Cal. 222, 15 Pac. 772; People ex rel. McDougal v. Johnston, 6 Cal. 673; State ex rel. Heim v. Williams, 114 Wis. 402, 90 N. W. 452. Laws are made and changed only in conformity with the mandates of the Constitution. The executive, the legislature, and the judiciary are equally bound by its limitations. It should be no longer necessary in this state to cite authority for the proposition that the exercise of the appointive power by the governor must be based upon either a constitutional provision or upon a law that is in force. See State ex rel. Standish v. Boucher, 3 N. D. 389–395, 21 L.R.A. 539, 56 N. W. 144. There never has been any serious doubt in this state that the legislature (not the senate alone) could make appointments to office, neither is there any doubt that the legislature (not the senate alone) can make a prospective appointment which may take effect at the same time as other provisions of the law when the law goes into effect. But I do not understand that it is yet the law of this jurisdiction that an officer who derives his appointive power from our Constitution and from laws passed by the legislature can, either alone or in conjunction with the senate, confer upon individuals title to offices extending over a period of years, before the law under which the authority is exercised can constitutionally become a law of the state.

It is unnecessary to assign reasons in addition to those expressed in the former opinion referred to, and reiterated here, for the entry of a judgment of ouster against the defendants in this action. Being satisfied that their appointments had no legal effect beyond the legislative session of 1917, there existed, at the time of the appointments of Messrs. Totten and Muir, vacancies which could properly be filled by the governor.

I express no opinion upon the question of the right to hold over after the expiration of a definite term, for which an appointment has been made,—this for the reason that, as I view the case, legal appointments have never been made for the terms for which the defendants claim to be appointed.

The judgment of this court is that a judgment of ouster be entered in favor of the plaintiff and against the defendants, and that the relators be admitted into the offices in question. It is so ordered.

ROBINSON, J. This is a kind of second edition of the Board of Regents' Case decided some three months ago. A majority of the judges held that there had been a valid appointment of the five members of the board then in office. Two members were appointed to hold office for two years from the 1st day of July, 1915; and under the plain words of the statute their term of office expired on July 1, 1917. The governor has appointed their successors, who have duly qualified, but the respondents claim the right to hold over because the appointment of their successors has not been confirmed by the senate.

Under the statute the governor may remove any member of the board for incompetency, neglect of duty, immorality, malfeasance in office, or for any other good cause; and in case of a vacancy in the membership of the board, whether occurring by reason of removal or otherwise, the governor may declare the office vacant and fill the same by appointment until the convening of the next session of the legislative assembly. And that is just what the governor has done; but the respondents insist that, by reason of their holding over after their term of office had expired, there was no vacancy for the governor to fill by an appointment. The point is quite nice and technical, but it is manifestly contrary to the letter and spirit of the statute. Under such a construction of the statute all members once appointed might

the majority opinion in that case, reliance was had upon the cases of People ex rel. Graham v. Inglis, 161 Ill. 256, 43 N. E. 1103, and State ex rel. Clarke v. Irwin, supra. The application of these authorities to the facts involved in this case has already been fully discussed and a well-grounded distinction, which has been recognized and applied by the courts deciding those cases as well as by other courts, was elaborated upon in the former opinion heretofore referred to. State ex rel. Langer v. Crawford, supra. No case has been called to our attention where either an election of an officer or an appointment of an officer has been held valid where the power to elect or to appoint depended solely upon the authority of an act of the legislature which had not yet gone into effect. The reasoning upon which the contrary authorities are based is, to my mind, too clear to admit of successful contradiction. See People ex rel. Herdman v. Rose, 166 Ill. 422, 47 N. E. 64; State ex rel. Wolcott v. Kuhns, 4 Boyce (Del.) 416, 89 Atl. 1; the opinion of Mr. Justice Shaw in the Supplement to 3 Gray, 601–607; Com. v. Fowler, 10 Mass. 290; State ex rel. Cook v. Meares, 116 N. C. 582, 21 S. E. 973; Santa Cruz Water Co. v. Kron, 74 Cal. 222, 15 Pac. 772; People ex rel. McDougal v. Johnston, 6 Cal. 673; State ex rel. Heim v. Williams, 114 Wis. 402, 90 N. W. 452. Laws are made and changed only in conformity with the mandates of the Constitution. The executive, the legislature, and the judiciary are equally bound by its limitations. It should be no longer necessary in this state to cite authority for the proposition that the exercise of the appointive power by the governor must be based upon either a constitutional provision or upon a law that is in force. See State ex rel. Standish v. Boucher, 3 N. D. 389–395, 21 L.R.A. 539, 56 N. W. 144. There never has been any serious doubt in this state that the legislature (not the senate alone) could make appointments to office, neither is there any doubt that the legislature (not the senate alone) can make a prospective appointment which may take effect at the same time as other provisions of the law when the law goes into effect. But I do not understand that it is yet the law of this jurisdiction that an officer who derives his appointive power from our Constitution and from laws passed by the legislature can, either alone or in conjunction with the senate, confer upon individuals title to offices extending over a period of years, before the law under which the authority is exercised can constitutionally become a law of the state.

It is unnecessary to assign reasons in addition to those expressed in the former opinion referred to, and reiterated here, for the entry of a judgment of ouster against the defendants in this action. Being satisfied that their appointments had no legal effect beyond the legislative session of 1917, there existed, at the time of the appointments of Messrs. Totten and Muir, vacancies which could properly be filled by the governor.

I express no opinion upon the question of the right to hold over after the expiration of a definite term, for which an appointment has been made,—this for the reason that, as I view the case, legal appointments have never been made for the terms for which the defendants claim to be appointed.

The judgment of this court is that a judgment of ouster be entered in favor of the plaintiff and against the defendants, and that the relators be admitted into the offices in question. It is so ordered.

ROBINSON, J. This is a kind of second edition of the Board of Regents' Case decided some three months ago. A majority of the judges held that there had been a valid appointment of the five members of the board then in office. Two members were appointed to hold office for two years from the 1st day of July, 1915; and under the plain words of the statute their term of office expired on July 1, 1917. The governor has appointed their successors, who have duly qualified, but the respondents claim the right to hold over because the appointment of their successors has not been confirmed by the senate.

Under the statute the governor may remove any member of the board for incompetency, neglect of duty, immorality, malfeasance in office, or for any other good cause; and in case of a vacancy in the membership of the board, whether occurring by reason of removal or otherwise, the governor may declare the office vacant and fill the same by appointment until the convening of the next session of the legislative assembly. And that is just what the governor has done; but the respondents insist that, by reason of their holding over after their term of office had expired, there was no vacancy for the governor to fill by an appointment. The point is quite nice and technical, but it is manifestly contrary to the letter and spirit of the statute. Under such a construction of the statute all members once appointed might

hold for life unless the governor and the senate should agree on their successors. The respondents cite and rely on an early decision of this court under a statute providing that an officer appointed should hold over after his term, unless his successor was duly appointed. In construing this statute the court said: It not only fixes a definite term of office for the term of two and four years, but also with equal clearness annexes to the definite term another period or term of indefinite duration which period has been aptly described as a defeasible term of office. The statute expressly declares that, after the limited term has expired, the trustees shall continue in office for a further period and until their successors are appointed and qualified. State ex rel. Standish v. Boucher, 3 N. D. 397, 21 L.R.A. 539, 56 N. W. 142. This decision was on an appointment by our Populist Governor Shortridge, and neither the legislature nor the courts had any disposition to favor his appointments. However, it is certain that the statute in question does not provide for a definite and then an indefinite or defeasible term of office. The members are appointed and commissioned to hold office only for a definite term, and when that term ends there is a vacancy which the governor may fill by appointment. There is nothing to be gained by a prolonged discussion of the statute.

The judgment of this court is that the respondents have no right to withhold or retain office as members of the board of regents, and they may no longer hold the office, and that their successors be let into office.

BRUCE, Ch. J. (dissenting). I dissent from the opinions and conclusions of the majority. My views on the question are quite fully expressed in my specially concurring opinion in the case of State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 711. I merely desire to add to what I have therein said the following suggestions:

The question is after all *merely one of legislative intention.* What did the legislature intend when it passed the act creating the board of regents, and containing the provision that:

"And thereafter during the session of the legislative assembly, and prior to the 15th day of January in each year in which the term of office of any member so appointed shall expire, he *shall in like manner nominate,* and, *subject to such consent of a majority of the senate,* appoint a successor or successors to such member or members of said

board whose term will expire with *July 1st of that year,* which said appointee shall hold office for the full term of six years from and after the expiration of the full term of office for which such predecessor or predecessors were appointed."

Did the legislature, when it passed this provision, intend that it should be nugatory, and that, in spite of its requirement that the members of the board of regents should be appointed *subject to the consent of a majority of the senate,* the appointment could be made without that consent? Did it intend that the governor could ignore the plain terms of the statute, and, by thus ignoring them, assume to himself the unlimited and uncontrolled power of appointment?

I think not. If the governor can do this in this case he can do it in the case of all other boards and appointive officers, and he can do it indefinitely. If he could refuse to submit nominations and to yield to the will of the senate in 1917, he can refuse to do so in 1919 and in 1921, and he can indefinitely usurp to himself the sole and exclusive appointing power. Ulrich v. Koustmern, 135 Ky. 562, 122 S. W. 857.

The office of the board of regents is one of great consequence. It involves the control of the most important educational institutions in the state and the disposition of immense sums of money. When the legislature created the board of regents, and took the control of the various state institutions from their separate boards of trustees, it clearly intended that *it itself* should have the ultimate power of appointment, and that such trustees as had been legally appointed by it should hold their offices until their successors *were also legally appointed.* It, and not the governor, was the master and the source of power. It was it that created the appointing or nominating power of the governor, and it alone. The inherent right of appointment, indeed, is in the legislature, and not in the governor; and the governor has no power in the matter except such as the legislature chooses to confer upon him.

The Constitution merely gives him the right to alone fill vacancies when *no other method is provided by law,* § 78. When the legislature created the board of regents it, in the same act, provided how its members should be appointed; and though it granted to the governor a certain voice and power in the matter, it *especially* limited that voice and that power, and made it ultimately subject to its own will. The legislature, in short, merely created a nominating committee in the

person of the governor, who should suggest appointments or nominations. It did not create an agent of unlimited power. A representative assembly or association is not required to accept the report of one of its nominating committees, and the report of a nominating committee does not amount to an election. In the same manner a nomination by the governor does not in itself and without the consent, that is to say, a vote of the majority of the senate, amount to an appointment. It is clear that the present incumbents must hold office until their successors are legally appointed. Any other holding would be a mockery, a trifling with words, and a playing with the cause of popular government. The Constitution of North Dakota makes of the governor an executive officer, and not an autocrat. He is a constitutional officer, and his powers are defined by the law and by the Constitution.

The only vacancies which he can fill without the consent of the senate are those which necessarily and unavoidably occur. They are not those of his own arbitrary and illegal creation. It was his duty to submit nominations to the senate, and to keep on submitting them until its consent and approval were obtained. He could not by a neglect of this official duty seek to create a vacancy and then by an assumption of power seek alone to fill it. There in short was no vacancy, or, if there was, there was none which the statute authorized him alone to fill. See discussion and cases cited in my former opinion in State ex rel. Langer v. Crawford, supra. See also People v. Parker, 37 Cal. 639; People ex rel. Mitchell v. Sohmer, 209 N. Y. 151, 46 L.R.A. (N.S.) 1207, 102 N. E. 593; State v. Howe, 25 Ohio St. 588, 18 Am. Rep. 321; Baxter v. Latimer, 116 Mich. 356, 74 N. W. 728; People ex rel. Parsons v. Edwards, 93 Cal. 153, 28 Pac. 832; Brady v. Howe, 50 Miss. 607; Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 447.

Nor does the fact that the original appointment was for a fixed term, and that nothing is said as to the right to hold until a successor is legally appointed, create a vacancy; nor does the fact that the statute provides that new appointments shall be made when the term of office *expires*. These points I discussed in my former opinion. I merely wish to add to that discussion a reference to the following authorities: 2 McQuillin, Mun. Corp. pp. 1057, 1058, and cases cited in note 91; Robb v. Carter, 65 Md. 321, 4 Atl. 282; People ex rel. Baird v. Tilton,

37 Cal. 614; Kreidler v. State, 24 Ohio St. 22; People ex rel. Hinton v. Hammond, 66 Cal. 654, 6 Pac. 741.

As far as the position taken by Justices Birdzell and Grace is concerned, that vacancies existed as far back as July 1, 1915, that the original appointment of the members of the board constituted a vacancy appointment merely, and that vacancies then existed which the governor alone could fill,—I am of the same opinion as I was before, and my views are expressed in my opinion in State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710. In addition to this, however, I may add that at about the same time that the above case was decided the supreme court of Arizona passed upon a similar question, and came to the same conclusion as did Justices Christianson and myself in the case mentioned. See Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 447.

There is simply nothing in the argument that the present appointees would, under the holding suggested by me and argued for by the defendants, be given a longer term of office than the legislature first intended. Which, I ask, is better and more in accordance with the principles of a democratic government,—that men legally appointed by and with the consent of the senate should hold their offices until their successors are legally appointed and elected, or that men illegally appointed, and by the *ipse dixit* of the governor alone, and against the will of the people as expressed by their representatives in the senate, should hold such offices? The days of the "Rump Parliaments" are over. Our Constitution has made of our governor an executive officer, and not an Oliver Cromwell. The majority opinion, however, has created a dictator, and, for the time being, abolished the parliamentary government, which it has taken the English-speaking and the liberty-loving world generally centuries of bloodshed and suffering and heroism to formulate and to create.

CHRISTIANSON, J. (dissenting). The attorney general has applied to this court for a writ of quo warranto to oust the respondents Scow and Powers from the offices of members of the state board of regents, on the grounds (1) that their original appointments were invalid; and (2) that, even though such appointments were valid, the respective terms of office for which the respondents were appointed have expired,

and vacancies exist, which vacancies, it is asserted, the governor has filled by proper appointment.

The first ground urged, namely, that the original appointments of the respondents were invalid, was the question involved and determined in State ex rel. Langer v. Crawford, 36 N. D. 385, 162 N. W. 710. In my specially concurring opinion in that case I expressed my views on this question so fuly that there is nothing for me to add at this time except to say that time has only confirmed the views I then expressed. I might also add that some of those views are sustained by the decision of the Arizona supreme court in Dunbar v. Cronin, 18 Ariz. 583, 164 Pac. 452.

In support of the second ground the attorney general contends that inasmuch as the terms for which the respondents were appointed expired on July 1, 1917, vacancies existed in the offices claimed by them, which vacancies the governor was authorized to fill by appointment.

The attorney general bases this contention upon two propositions: (1) That under the express terms of the Board of Regents Act itself a vacancy is declared to exist at the end of the appointive term of the members of the board, which vacancies the act empowers the governor to fill by appointment; and (2) that, if the act is not susceptible of such construction, vacancies exist under the general rules of law which the governor is empowered to fill by appointment under § 78 of the state Constitution. The opinion prepreared by Mr. Justice Robinson is based upon and sustains the first proposition thus advanced. I am unable to concur in the reasoning adopted by Mr. Justice Robinson.

The power and duty of the governor with respect to appointments, both permanent and temporary, are specifically defined by the act itself. Under the terms of the act, the then governor was empowered, and it was made his duty, "to nominate, and with the consent of the majority of the members of the senate in executive session to appoint," the first members of the state board of regents.

The act further provides that "during the session of the legislative assembly and prior to the 15th day of January in each year in which the term of office of any member so appointed shall expire, he [the governor] shall in like manner nominate, and *subject to such consent of a majority of the senate, appoint* a successor or successors to such member or members of said board whose term will expire with July 1st of that year,

which said appointee shall hold office for the full term of six years from and after the expiration of the full term of office for which such predecessor or predecessors were appointed. *In event any nomination made by the governor to such board is not consented to and confirmed by the senate as hereinbefore provided the governor shall again nominate a candidate or candidates for such office at any time while the legislative* assembly is in session." Laws 1915, § 2, chap. 237.

The following section of the act authorizes the governor to remove "any member of the board *so appointed* for incompetency, neglect of duty, immorality, malfeasance in office, or for other good cause; and in case of a vacancy in the membership of the board *so appointed by the governor or his predecessor in office,* whether occurring by reason of removal or otherwise, [the governor] may declare the office vacant and fill the same by appointment until the convening of the next session of the legislative assembly, when he shall nominate some qualified person as a member of such board for the balance of such unexpired term *and upon the consent of the senate as hereinbefore provided, shall appoint said nominee as member of said board.*" Laws 1915, § 3, chap. 237.

The legislature had previously defined the term "vacancy." It had said that an office becomes 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. Comp. Laws 1913, § 683.

Under well-known rules of construction, the express mention by the legislature of certain causes creating vacancies must be deemed, in so far as it was within legislative power to do so, an exclusion of all other causes. 36 Cyc. 1122. Is there anything said in the Board of Regents Act manifesting an intent to define the term "vacancy" or enlarge upon the then existing statutory definition of the term? Manifestly not. The act merely empowers the governor to fill vacancies. And, in the absence of plain and express language to the contrary, it must be assumed the legislature contemplated such vacancies only as were then defined by the laws of this state.

No one can deny that the legislature intended that permanent appointments should be made only with the consent of the senate. Certain language used by this court in discussing somewhat analogous propositions in State ex rel. Standish v. Boucher, 3 N. D. 389, 398, 21 L.R.A. 539, 56 N. W. 142, is applicable here. The court said: "It is the policy of the statute, as well as its clearly expressed purpose, to require the action of both the governor and senate in filling the important offices of trustees of state institutions, and not to allow them to be selected by the independent action of the executive, except in those cases of vacancies, not frequently occurring, where an executive appointment can be made temporarily to fill an actual vacancy. It has been said that the law abhors a vacancy in an office; but, in our judgment, a vacancy in the office of a trustee of one of the public institutions of this state does not come about from the mere expiration of the limited term, even when that event is coupled with the fact that the senate had adjourned without confirming successors of those whose terms had expired by limitation of time. It seems quite clear to us that the vacancy referred to in the statute, and which alone gives the executive the right to make a temporary appointment, relates only to such actual vacancies as may arise from death, resignation, and the like. The expiration of a definite term, and failure of the senate to confirm successors to those whose terms have expired, are certainly not among the causes enumerated in the Code which will create a vacancy in office."

The attorney general, however, also contends that as the statute under

consideration fixes a definite term of office and makes no provision for an incumbent holding over until his successor is appointed and qualified, he ceases to be an officer, and a vacancy exists at the expiration of his term. He further contends that under § 78 of the Constitution the governor is authorized to fill any vacancy so occurring. This contention, therefore, embraces two propositions: (1) That the official authority of a person elected or appointed to an office, the term of which is definitely fixed by law, ceases upon the expiration of such term; (2) that the legislative enumeration of causes constituting a vacancy is not exclusive; that if it be deemed exclusive it in effect contravenes § 78 of the state Constitution by limiting the appointing power conferred upon the governor by that section.

The fact that the act refers to the terms of office of members of the state board of regents as expiring on July 1st certainly is not susceptible of being construed as a legislative declaration that the offices shall become vacant at the end of the terms of office of the respective members of the board.

In this state all terms of office are for specified periods of time (although as to most of them it is provided that the incumbents shall hold over until their successors are elected and qualified). And, except when otherwise expressly provided, the terms of elective state and county officers commence on the first Monday in January next succeeding their election, and the terms of the then incumbents of such offices end, and in form expire, on the date fixed by law for the commencement of the official terms of their successors. But while the term has in form expired, the ending is not effectual until followed by the qualification of the successor.

It makes no difference whether you say that an official term shall commence on a certain day, and that the incumbent thereof shall hold his office for a term of two, four, or six years; or whether you say that his term shall commence on a certain day and expire two, four, or six years later. The two modes of designating the length of official terms is used by legislative bodies, courts, and legal writers throughout the country indiscriminately; and so far as I can find it is the first time in the history of legal jurisprudence that any attempt has been made to attribute a different meaning to one mode of expression from that attributed to the other. Both modes fix a definite term. The purpose

of the legislature in fixing definite dates for the commencement and expiration of official terms is manifestly not to create vacancies at the expiration of such terms. But such dates are fixed for the sake of convenience, to obtain uniformity in official terms, or a proper order of succession therein. O'Laughlin v. Carlson, 30 N. D. 219, 152 N. W. 675. If such dates were not fixed, it would frequently result in confusion and uncertainty, as to the time of commencement of official terms and the proper time for successors to qualify.

Take the Board of Regents Act, for instance; if there was no date specified for the commencement and expiration of the terms of offices of members of the board, there might have been considerable doubt with respect thereto, and, if the different new members had qualified at different dates in the course of time, considerable confusion might have arisen. To say that a term of office expires on a certain day merely means that the designated official term in form ends on that day. It does not amount to a legislative declaration to the effect that the office shall be deemed vacant from and after the date on which the term of office of an incumbent is said in form to end. Consequently, I am of the opinion there is no basis for the contention that the Board of Regents Act itself either defines or enlarges the statutory definition of the term "vacancy."

The attorney general does not, however, rest his second ground solely upon the language of the Board of Regents Act itself. But, as already stated, he also contends that vacancies exist in the offices in question under the general rules of law, independent of statute, and that § 78 of the state Constitution empowers the governor to fill such vacancies. This contention embraces two propositions: (1) That the official authority of a person elected or appointed to an office the term of which is definitely fixed by law ceases upon the expiration of such term; (2) that the legislative enumeration of causes constituting a vacancy is not exclusive; that, if deemed exclusive, it in effect contravenes § 78 of the state Constitution by limiting the appointing power conferred upon the governor by that section.

The legal questions thus presented are by no means simple. Upon the first proposition there is great diversity of judicial opinion. Some courts hold that, where an officer is elected or appointed for a definite, fixed term, and the law contains no provision for his holding over until

a successor is elected and qualified, his rights, duties, and authority as a public officer cease *ipso facto* upon the expiration of the term fixed. Other courts hold, and according to a noted legal writer, "the prevailing opinion in this country seems to be, that unless expressly or impliedly forbidden, the incumbent" of an office (except judicial or legislative) may continue to hold his office until someone is chosen and qualified to assume the office. Mechem, Pub. Off. § 397. This rule, when applied to administrative officers, seems to be supproted by the weight of authority, and has received the unqualified approval of learned legal writers. See Mechem, Pub. Off. §§ 128, 397; Throop, Pub. Off. § 325; 2 McQuillin, Mun. Corp. pp. 1057, 1058; 1 Dill. Mun. Corp. § 158; 23 Am. & Eng. Enc. Law, 412. Mechem (Mechem, Pub. Off. § 397) says: "Such a rule seems to be demanded by the most obvious requirements of public policy, for without it there must frequently be cases where, from a failure to elect or a refusal or neglect to qualify, the office would be vacant and the public service entirely suspended."

If this rule is adopted, there was no vacancy, and the governor had no power to appoint. If the contrary rule is adopted, the governor would likewise be unauthorized to appoint, unless it can be said that it was beyond legislative power to define and limit the causes creating vacancies, to the ones enumerated by the legislature in § 683, Compiled Laws 1913. This latter question has not been argued. As already stated there is an irreconcilable conflict among the authorities on the first proposition, and it merely resolves itself into a question of which is the better rule. Inasmuch as the opinions of the majority members are not based upon and do not consider these propositions, any discussion thereof in this opinion would be largely academic, and of little practical value.

So far as the actual intent of the legislature is concerned, it seems to me that when the legislature in the Board of Regents Act referred to vacancies, and authorized the governor to fill the same by appointment, it had in mind such vacancies, and such vacancies only, as had been recognized by the laws of this state for the last quarter of a century. Comp. Laws 1913, § 683. Whether it is beyond legislative power to enumerate, and in a measure limit, the causes which create vacancies, and whether § 683, supra, contravenes § 78 of the state Constitution, are questions upon which I express no opinion.

IN THE MATTER OF CERTAIN PROCEEDINGS CONCERNING W. F. DOHERTY.

(164 N. W. 948.)

Attorney — disbarment — charges — proceedings.

Evidence examined and *held* not to sustain disbarment charges.

Opinion filed October 2, 1917.

An original proceeding in the Supreme Court looking to the disbarment of W. F. Doherty.

Dismissed.

C. L. Young and *John Carmody,* members of the disbarment committee of the State Bar Association, for the prosecution.

John E. Greene and *D. C. Greenleaf,* for the accused.

ROBINSON, J. This is a disbarment proceeding. The first charge is that about six years ago in an attachment suit Doherty did some wrong in changing a preliminary justice court summons, by inserting the name of an additional defendant. If Doherty made the change, it was made before the service of the summons and before it became a matter of record. It was of no serious consequence and it did no injury to anyone. It was such a change as the justice should have made as a matter of course. The suit was for coal furnished at the request of one party and for the use and benefit of two parties who were made defendants. This charge is doubly outlawed, and it amounts to nothing.

The second charge is in regard to the sale of wheat which was the property of E. A. Wanless, a superannuated clergyman of Illinois. This wheat Doherty sold for $329.90 and applied the proceeds to a debt justly due to him from Wanless. Wanless resided in Illinois. He had a farm of 320 acres some 30 miles from Minot and 7 miles from Berthold. The farm was rented, and he retained Doherty to look after the farm and the tenant and the crops grown thereon, and to make reports to him concerning the same; and also to foreclose a mortgage on a half section of land and to do everything necessary to protect his

interest in regard to the farm, and for that purpose he gave Doherty a general and special power of attorney.

Doherty looked well after the farm and the tenant. He watched the harvesting and threshing of the grain; he made numerous trips to the farm, going by motor cycle and by automobile, incurring much danger and discomfort and expense. On one trip he remained at the farm nearly two days and one night with Wanless, to aid him in settling his matters with the tenant. He gave counsel to Wanless in all matters concerning the farm and other matters. He commenced an action to foreclose a mortgage, commenced an attachment suit for $650 and a replevin suit against the tenant. He furnished the bonds, prosecuted the suits to final judgment, and paid all the costs. In the replevin suit he recovered a judgment against the tenant for 778 bushels of wheat and 590 bushels of oats, and the costs of the action, $33.40. And he did for Wanless many other things too numerous to mention. The result was that Wanless received some $1,400 that he might have lost. The services of Doherty were faithful and efficient, and his charges were moderate and reasonable. Under his general authority to look after the farm he caused 400 bushels of wheat to be hauled to the elevator at Berthold and to be sold. He received the price, $329.90, which he applied on his expenses and fees. He still claimed a balance of $50, which was paid him, and so the matter was settled. This proceeding was commenced by parties who never had any interest in the matter of the complaint. The testimony was taken before Judge Fisk, and he found in favor of Doherty, and the finding is manifestly correct. The matter is dismissed.

C. A. CROSS v. HILLSBORO NATIONAL BANK, a Corporation.

(164 N. W. 695.)

Garnishment — judgment against garnishee — vacating — motion for — order on — grounds for — mistake of fact — discretion — order not disturbed — except for abuse.

1. When the trial court, in the exercise of its discretion, vacates and sets aside a judgment obtained against the garnishee on the ground of some mistake

of fact or for any other good reason which appeals to the sound judgment and discretion of the trial court, the order of the trial court vacating and setting aside such judgment will not be interfered with in the appellate court, unless it clearly appears there is an abuse of the discretion vested in the trial court.

Trial court — inherent power — satisfaction of judgment — may order it set aside — where mistake of fact appears — substantial justice.

2. The trial court, by and through its inherent powers, has the power to set aside a satisfaction of a judgment, where such satisfaction was given or brought about through a mistake of fact, or by misapprehension of the facts, brought about by statements, letters, representations, or circumstances made by the attorneys or parties interested in having the satisfaction placed of record, to the party who caused the satisfaction of such judgment by the payment of money held in its possession as garnishee.

Opinion filed August 3, 1917. Rehearing denied October 3, 1917.

Appeal from an order of the County Court of Cass County, *A. G. Hanson,* J.

Affirmed.

Barnett & Richardson and *Lyman N. Miller,* for appellant.

Where the relief sought is the setting aside of a satisfaction of a judgment, the statute relied upon and under which the action is brought does not apply. Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563.

The judgment had been actually and in good faith satisfied and the person entitled to receive payment had received the amount and had satisfied the judgment. There was no longer any judgment and the parties were out of court. Hatch v. Central Nat. Bank, 78 N. Y. 487; McCredy v. Thrush, 37 App. Div. 465, 56 N. Y. Supp. 68; Rochester Distilling Co. v. Devendorf, 72 Hun, 622, 25 N. Y. Supp. 529; Fluegelman v. Armstrong, 59 Misc. 506, 110 N. Y. Supp. 967; 17 Am. & Eng. Enc. Law, 2d ed. 862; Penfold v. Singleton, 36 Ga. 556; Skillings v. Massachusetts Ben. Asso. 151 Mass. 321, 23 N. E. 1136; Davis v. Blair, 88 Mo. App. 372; Foster v. Hauswirth, 5 Mont. 566, 6 Pac. 19; Cooper v. Galbraith, 24 N. J. L. 219; Alverson v. Alverson, 2 R. I. 27; Enders v. Burch, 15 Gratt. 64; Boos v. Morgan, 130 Ind. 305, 30 Am. St. Rep. 237, 30 N. E. 141; 30 Century Dig. (Judgment) 675; 23 Cyc. 1495; 20 Cyc. 1140 (3).

The discretion of the trial court, while broad, is not limitless, but

it is a discretion which must not be abused; and, in the event the record discloses plain abuse of such discretion, the action of the trial court will be reversed. Bazal v. St. Stanislaus Church, 21 N. D. 602, 132 N. W. 212; Hunt v. Swenson, 15 N. D. 512, 108 N. W. 41.

The garnishee made no application to amend the disclosure made, and formal judgment was entered and later satisfied. There was no mistake of fact. It would be ridiculous to say that a party to an action could make a mistake of law, but that a reliance upon same by his attorney would be a mistake of fact. Plano Mfg. Co. v. Murphy, 16 S. D. 380, 106 Am. St. Rep. 692, 92 N. W. 1072; Corson v. Smith, 22 S. D. 501, 118 N. W. 705; Bacon v. Mitchell, 14 N. D. 454, 4 L.R.A.(N.S.) 244, 106 N. W. 129; Keenan v. Daniells, 18 S. D. 102, 99 N. W. 853.

An assignment of a fund in the hands of the garnishee must be brought to the attention of the garnishee prior to the service upon the garnishee of the summons in garnishment, and if, at the time of the service of the summons upon the garnishee, he has not been advised of the third-party claim, such third-party claim or assignment becomes subsequent as a matter of law, to the rights of the plaintiff under his prior garnishment summons. 4 Cyc. 54.

Where a party moves to vacate a judgment, and it is clearly disclosed that as a matter of law he has no valid defense, the court will not exercise its discretion and open the judgment. The moving party must affirmatively show that he has a valid, enforceable defense. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228; Getchell v. Great Northern R. Co. 24 N. D. 487, 140 N. W. 109; Naderhoff v. Benz, 25 N. D. 165, 17 L.R.A.(N.S.) 853, 141 N. W. 501.

Theo. Kaldor, for respondent.

"The right to vacate satisfactions is based upon the inherent rights of courts to correct its records to conform to the facts." Acme Harvesting Co. v. Magill, 15 N. D. 116, 106 N. W. 563; Kinports v. Oberholtzer, 111 Iowa, 744, 82 N. W. 1012; 23 Cyc. 1500; 17 Am. & Eng. Enc. Law, 2d ed. 871.

The satisfaction of a judgment may be vacated and set aside by the trial court on the ground of undue influence, misrepresentation, and

fraud. 17 Am. & Eng. Enc. Law, 2d ed. 871; Voell v. Kelly, 64 Wis. 504, 25 N. W. 536.

Here the attorney presumably acted without conscious bad faith, but the effect was the same, and the court has power to grant relief. Watkins v. Brant, 46 Wis. 419, 1 N. W. 82; Bussian v. Milwaukee, L. S. & W. R. Co. 56 Wis. 325, 14 N. W. 452; Voell v. Kelly, supra; Comp. Laws 1913, §§ 7483, 7581.

Courts are inclined to be more liberal in attachment and garnishment proceedings than in cases of judgments. Waples, Attachm. & Garnishment, § 501; First State Bank v. Krenelka, 23 N. D. 570, 137 N. W. 824; Wheeler v. Castor, 11 N. D. 347, 61 L.R.A. 746, 92 N. W. 384; Mason v. Thomas, 24 Ill. 285.

Courts will go far to relieve a garnishee from a default judgment where he has disclosed under a misapprehension or mistake of the facts, as is clearly shown in this case. Evans v. Mohn, 55 Iowa, 302, 7 N. W. 593.

The affidavit of merits presented is entirely sufficient, and shows a valid, enforceable defense. Bismarck Grocery Co. v. Yeager, 21 N. D. 550, 131 N. W. 517.

The assignment of a fund in the hands of a garnishee will be complete as to the garnishee and to creditors of the assignor, only when notice of the assignment has been given to the garnishee in time to permit him to disclose the assignment in his answer to the garnishment process. 20 Cyc. 1016 and 1131, and cases cited; Greenwich Ins. Co. v. Columbia Mfg. Co. 73 Ill. App. 560.

The garnishee acted with due diligence in taking steps to set aside the satisfaction. Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 228, 130 N. W. 228; 20 Cyc. 1118; First State Bank v. Krenelka, 23 N. D. 570, 137 N. W. 824.

Grace, J. Appeal from an order of the county court of Cass county setting aside a satisfaction of, and opening and vacating, a judgment entered against the garnishee.

The plaintiff brought an action against the defendant to recover for certain indebtedness. The defendant made no appearance in the action, and judgment was entered against him by default.

In the course of the proceedings a garnishee summons was issued

and served upon the garnishee on the 24th day of February, 1915. The garnishee took no further steps in the matter until the 2d day of March, 1915, when he wrote a letter to L. N. Miller, attorney for the plaintiff, wherein he called attention to the fact that Justin E. Safford and his attorneys, Marx & Conger, did not seem to know the amount or nature of the claim of Cross against Safford in which garnishment summons was served on the garnishee. The garnishee asked Miller to write Marx & Conger, giving to Miller the exact postoffice address of Marx & Conger in Tacoma, Washington. The plaintiff's attorney, Miller, replied to the letter from the garnishee, stating that he had taken the matter up with Mr. Safford's lawyers. He further stated that the garnishee had money in its possession and under its control belonging to the defendant Safford, and that he would take it for granted that the garnishee intended to admit liability to the defendant prior to the ten days allowed for answer, and prepared and inclosed with his letter an original and copy of a garnishment affidavit admitting liability, which he stated that the garnishee might use if it should see fit. He further stated that it was not the desire of the plaintiff to entangle the garnishee in a lawsuit, and the garnishee's affidavit, admitting liability, would relieve it from any further proceedings and leave the matter entirely between the plaintiff and defendant. The garnishee then signed the affidavit, admitting liability, and in a letter dated March 8, 1915, to plaintiff's attorney, Miller, inclosed therewith the affidavit, admitting liability from the garnishee to the defendant. Prior to the time of the mailing and delivery to plaintiff's attorney of the affidavit, admitting liability, the garnishee had received notice of the claim of Marx & Conger, of which claim the letter, exhibit D, signed by both Safford and Marx & Conger, is the basis, and constitutes the agreement with reference to the claim of ownership of Marx & Conger of the moneys then in the hands of the garnishee. On the 16th day of March, 1915, an oral conversation over the long-distance telephone occurred between Arnegard, the cashier of the Hillsboro National Bank, the garnishee, and the attorney for the plaintiff, which, according to Arnegard's affidavit, was substantially as follows: That the affiant Arnegard on the 16th day of March, 1915, had personal knowledge of an indebtedness, and the claim of ownership of Marx & Conger of the money in controversy. That Arnegard had personal knowl-

edge that Arthur P. Marx, an attorney at law who claimed to represent the rightful owner of the money covered by said garnishment proceeding, was then in Fargo, North Dakota, and had seen and talked with Mr. Miller, the attorney for the plaintiff, and that it was represented to the affiant by Attorney Miller and said Marx that they would probably reach an amicable adjustment as to the money in controversy. That Miller and Marx called up the affiant over the same telephone, both being present when the talk was had, directing him to send the money to the First National Bank of Fargo, North Dakota, and was told by both Miller and Marx that they were representing the two claimants to the money held by the garnishee; and, further, that the affiant believed that the information given by either or both would be reliable and proper for him to follow.

On the 27th day of March, 1915, Attorney Miller called the affiant over the telephone, stating that he had obtained judgment against the defendant and garnishee in said action, and requested the affiant to immediately telephone the First National Bank of Fargo, who had come into possession of the money in controversy following the conversation of March 16th, when the demand certificate for $1,277.05 was sent to the First National Bank of Fargo. The affiant Arnegard, knowing that said Marx and plaintiff's attorney had been trying to reach an amicable adjustment, and that, if they had not been able to do so, the ownership of the money controlled by the garnishee would be decided by the judgment of the court in which the action was pending, and relying upon the representations made by plaintiff's attorney, and believing that the matter had been settled in a legal manner, telephoned the First National Bank of Fargo, as requested by plaintiff's attorney, and instructed the bank to pay the judgment of the county court obtained by the plaintiff against the garnishee, which was done, and the plaintiff's attorney filed a satisfaction of such judgment in such court.

The main question presented in this appeal is, Did the court abuse its discretion in setting aside the judgment against the garnishee and in permitting it to make a further disclosure? It must be conceded that the trial court has a wide discretion in such matters, and, unless there is plain abuse of the exercise of such discretion, the order of the trial court in such matters should be sustained. The appellant contends that the garnishee, at the time of the disclosure having had knowledge

of the claim of Marx & Conger to such money, and thereafter having made his disclosure admitting liability, and judgment having been entered against it, and such judgment paid and satisfied from the money which the garnishee disclosed, by the affidavit, it owed Safford, the defendant in the case, the garnishee cannot now be afforded any relief. However, we must not lose sight of the fact that the garnishee in this case had no direct interest in the matter except to pay the money to some person entitled to receive the same. To the garnishee it made no difference who received the money. No benefit of any kind or character accrued to the garnishee. It merely had a duty under the law to make a proper disclosure of the amount of property or money it had in its possession owing Safford. It must also be conceded that the garnishee has acted in the highest of good faith; and it also appears that it relies largely upon the advice or statements of Miller, the attorney for the plaintiff, and also upon the statements of Miller and Marx made during the long-distance telephone conversation which the garnishee had with each of them. The garnishee knew that Miller was an attorney, and also that Marx was an attorney, and each had knowledge of the right and proper thing to do in such cases. The garnishee, in view of all the correspondence and conversations had, and under all the circumstances, was justified in believing that Miller and Marx were adjusting the matter amicably; and if they did not do so, they would arrange the matter in some way so that when the garnishee paid the money over to whomsoever it did pay it, it would not have any more trouble in regard thereto, and no further liability. If, therefore, the garnishee, through a misapprehension of the real state of facts by reason of the letter written to it by Miller at the time Miller sent it, the affidavit of disclosure for admission of liability, and by reason of the conversation with Miller and Marx over the telephone, and all the other circumstances of the case, in good faith made an improper disclosure, and the money was paid to the wrong party when it should have been held to abide the final result of all the claims to such money, surely such a case is one in which the court would be justified in using its discretion and exercising its inherent power to set aside and vacate the judgment against the garnishee, and permit an amended disclosure. If the garnishee believed at the time it made such disclosure and paid such money

over, that it was doing the right, proper, and legal act, and yet it should subsequently appear that it was mistaken, and it had at all times acted in good faith, and in this case the good faith of the garnishee must be conceded, there could be no more proper case for the exercise of the discretion of the court. First State Bank v. Krenelka, 23 N. D. 568, 137 N. W. 824 (Meyer, garnishee). It was held in the case of Racine-Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228, that the ruling of the trial court on a motion to vacate a default judgment will not be reversed except in cases of manifest abuse of the wide judicial discretion vested in the trial court. The test of the court's discretion in such matters is that the exercise of the court's discretion, on an application to vacate a judgment, should tend in a reasonable degree to bring about a trial on the merits. Such is the expression in the syllabus of such case. We believe this is a sound rule. The only thing desired in the case at bar is a disclosure upon the merits. That is, the garnishee should be allowed to show and disclose its liability to Safford, and then it is for the court to say which of the several claimants to such money is entitled to receive the same. Acme Harvester Co. v. Magill, 15 N. D. 116, 106 N. W. 563, recognizes the inherent power of the court to set aside a satisfaction of a judgment entered through mistake of facts. The principle laid down in such case is applicable to the case at bar, even though the circumstances and facts of the cases are different. The court has the inherent power to set aside a satisfaction of a judgment entered through mistake of fact, or for any other reason that appeals to the sound discretion of the court, when the granting of the order vacating the judgment would tend to do justice between all the parties, and to have the matters involved disposed of entirely upon their merits. As before stated, the garnishee in this case had no interest except to pay the money to the party entitled to receive the same. It is evident that it would not have paid the money where it did, if it had not actually and in good faith believed the party entitled to receive it who did receive it. If it was mistaken in this, it was the duty of all the parties, the claimants of the fund and the attorneys connected with the case, to act in the utmost good faith with the garnishee, so that it would become involved in no difficulty, as the garnishee claimed none of the money itself, and claimed no offsets against the money, and had but one desire, that being to pay

the money to the party entitled to receive the same. We think the court below gave the matter a thorough consideration, and acted wisely and clearly within its sound discretion.

The order of the court is therefore in all things affirmed, with costs.

ROBINSON, J. (concurring). This is an appeal from an order vacating a judgment against the garnishee and permitting it to serve an answer. On March 17th judgment was given against the defendant for $1,048.75. On March 27, 1915, judgment was given against the garnishee for $1,044.25, reciting that it appeared that the garnishee was indebted to the defendant in that sum. The judgment was obtained by the mistake and inadvertence of the cashier of the garnishee, and by his trusting the counsel for plaintiff. The garnishee summons was served February 24, 1915. On March 3d Lyman Miller, attorney for plaintiff, wrote the bank that as he understood the bank had money of defendant and intended to admit the same. He inclosed the draft of an affidavit of disclosure, which he invited the bank cashier to sign, saying it would relieve the bank from further proceedings and place the matter with the plaintiff and the defendant. So, it appears that, relying on the kind advice of counsel for the plaintiff, the bank cashier made the disclosure as requested. Yet at the time of making the same the bank had been notified that a third party claimed the money. The garnishee innocently supposed that the parties would take no advantage of him through the snaps of the law, and that counsel for plaintiff and defendant and the court would probably dispose of the money; and so on a phone from the attorney for plaintiff the money was paid into court on March 27, 1915. The third party demands that the bank pay the same money to him, and so the bank was between the Devil and the deep sea, and the court very properly vacated the judgment against the garnishee, and permitted the plaintiff and the third party to fight out their claims for the money.

If perchance the third party owns the money, would it be proper to make the bank pay it a second time, because it was misled by the smoothness of the plaintiff's counsel? Would that not be the same as simple robbery? It is certain that, at the time of taking the judgment against the garnishee, the attorney for the plaintiff had positive notice of the third-party claim, which was represented by Engerud, Holt, &

Frame. He knew that the garnishee could not safely pay the money on his judgment, and that the garnishee had been misled by him. Under the facts disclosed, there was no legal or moral justification for taking a judgment against the garnishee, or for taking the money of the garnishee in satisfaction of the judgment against the defendant. The order of the county court is well approved, and it should be affirmed, except that neither the plaintiff nor his attorney should have $25, or any sum, as costs on the motion.

CHARLES ASSID v. GREAT NORTHERN RAILWAY COMPANY, a Corporation.

(164 N. W. 949.)

Goods — transportation of — initial carrier — loss or injury — while in possession of connecting carrier — action for damages against initial carrier — demand for proof — failure to furnish.

When a person seeks, under § 6260, Compiled Laws of 1913, to recover against

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NOTE.—A comprehensive discussion, discussing the liability of a connecting carrier for loss beyond its own line, both in the absence of statute and under Federal and local state statutes, will be found in note in 31 L.R.A.(N.S.) 1.

The English rule as expressed in that note is to the effect that in the absence of an express stipulation to the contrary, an undertaking to carry the shipment to its ultimate destination is implied from the mere act of acceptance, and the carrier is responsible for loss or injury occurring on the line of any succeeding carrier to which the shipment is intrusted to continue or complete the transportation; while the American rule is that the duty of a carrier receiving a shipment marked for a destination beyond its own line is discharged in the absence of a special agreement or course of business to the contrary, by safely carrying the goods over its own line and delivering them to the next succeeding carrier, to continue or complete the transportation. These two doctrines differ solely in the weight which they attach to the mere acceptance of the goods, and courts in jurisdictions where the English rule obtains frequently say that, in the absence of a special contract, the first carrier is only bound to deliver the shipment to the next connecting carrier in good order. The North Dakota statute, as stated in the opinion, modifies the strict rule of liability.

On burden of proof as between connecting carriers to show who is at fault for loss or injury of goods, see note in 101 Am. St. Rep. 392.

the initial carrier for goods lost or injured while in the possession of a second connecting carrier, he must prove a demand on such initial carrier for satisfactory proof that the loss or injury did not occur while it was in its charge, and a failure of such carrier to furnish such proof.

Opinion filed October 5, 1917.

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

Action to recover against common carrier for loss of goods.

Plaintiff appeals.

Affirmed.

John A. Pearson and *L. J. Wehe,* for appellant.

Plaintiff having demanded his goods of the carrier into whose hands he placed them for proper transportation, it was incumbent upon such carrier to give plaintiff, within a reasonable time, satisfactory proof that the loss or injury did not occur while the goods were in its possession. Failing to do so, such carrier itself is liable. Taugher v. Northern P. R. Co. 21 N. D. 111, 129 N. W. 747; Comp. Laws 1913, § 6260.

Flynn & Traynor and *Murphy & Toner,* for respondent.

The bill of lading here expressly provides that "this company will transport over its own line only. This company shall not be liable for loss, damage, or injury not occurring on its own line.

"A common carrier receiving goods consigned to a point beyond its own line may limit its undertaking to one for safe carriage over its own line, and delivery to the next succeeding carrier." Roy v. Chesapeake & O. R. Co. 61 W. Va. 616, 31 L.R.A.(N.S.) 1, 57 S. E. 39; Ohio & M. R. Co. v. Emrich, 24 Ill. App. 245; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Atchison, T. & S. F. R. Co. v. Canton Mill. Co. 70 Kan. 766, 79 Pac. 656; Louisville & N. R. Co. v. Crozier, 13 Ky. L. Rep. 175; Louisville & N. R. Co. v. Cooper, 13 Ky. L. Rep. 496; Louisville & N. R. Co. v. Bourne, 15 Ky. L. Rep. 445; Louisville & N. R. Co. v. Tarter, 19 Ky. L. Rep. 229, 39 S. W. 698, 2 Am. Neg. Rep. 154; Caldwell v. Cincinnati, N. O. & T. P. R. Co. 21 Ky. L. Rep. 397, 51 S. W. 575; Coates v. United States Exp. Co. 45 Mo. 238; Snider v. Adams Exp. Co. 63 Mo. 376; McLendon v. Wabash R. Co. 119 Mo. App. 128, 95 S. W. 943; Atlantic Coast Line R. Co. v.

Riverside Mills, 219 U. S. 205, 55 L. ed. 181, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Southern R. Co. v. Vaughn, 86 Miss. 367, 38 So. 500; Moody v. Southern R. Co. 79 S. C. 297, 60 S. E. 711; McEacheran v. Michigan C. R. Co. 101 Mich. 264, 59 N. W. 612; Cincinnati N. O. & T. P. R. Co. v. N. K. Fairbanks & Co. 33 C. C. A. 611, 62 U. S. App. 231, 90 Fed. 467; Dodge v. Chicago, St. P. M. & O. R. Co. 111 Minn. 123, 126 N. W. 629; Tolman v. Abbott, 78 Wis. 192, 47 N. W. 264.

A shipper accepting such a bill of lading is bound thereby. American Hay Co. v. Bath & H. R. Co. 85 N. Y. Supp. 341; Mulligan v. Illinois C. R. Co. 36 Iowa, 181, 14 Am. Rep. 514.

It is immaterial whether or not the shipper read the bill of lading. Stevens v. Lake Shore & M. S. R. Co. 20 Ohio C. C. 41, 11 Ohio C. D. 168; Mills v. Weir, 82 App. Div. 396, 81 N. Y. Supp. 801; Grindle v. Eastern Exp. Co. 67 Me. 317, 24 Am. Rep. 31.

An agent for the owner has authority to make such a contract. Shelton v. Merchants' Dispatch Transp. Co. 59 N. Y. 258.

Such a bill of lading is binding even though not signed by the shipper. Cincinnati, H. & D. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391.

In the absence of fraud, such a contract is binding. New York, C. & St. L. R. Co. v. Fremont, E. & M. Valley R. Co. (Union State Bank v. Fremont, E. & M. Valley R. Co.) 66 Neb. 159, 59 L.R.A. 939, 92 N. W. 131; Chicago & N. W. R. Co. v. Church, 12 Ill. App. 17; Mulligan v. Illinois C. R. Co. 36 Iowa, 181, 14 Am. Rep. 514; McCann v. Eddy, 133 Mo. 59, 35 L.R.A. 110, 33 S. W. 71, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; Dimmitt v. Kansas City, St. J. & C. B. R. Co. 103 Mo. 433, 15 S. W. 761; Crockett v. St. Louis & H. R. Co. 147 Mo. App. 347, 126 S. W. 243; Fremont, E. & M. Valley R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225, 1 Am. Neg. Rep. 314; Miller Grain & Elevator Co. v. Union P. R. Co. 138 Mo. 658, 40 S. W. 894; Burtis v. Buffalo & State Line R. Co. 24 N. Y. 269; Atchison, T. & S. F. R. Co. v. Canton Mill Co. 70 Kan. 766, 79 Pac. 656; Gulf, C. & S. F. R. Co. v. Short, — Tex. Civ. App. —, 51 S. W. 262; San Antonio & A. P. R. Co. v. Turner, 42 Tex. Civ. App. 532, 94 S. W. 214; San Antonio & A. P. R. Co. v. Mayfield, 4 Tex. App. Civ. Cas. (Willson) 223, 15 S. W. 503; Central R. & Bkg. Co. v. Skellie,

86 Ga. 686, 12 S. E. 1017; Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Hinkley v. New York C. & H. R. R. Co. 56 N. Y. 429; Moses v. Port Townsend Southern R. Co. 5 Wash. 595, 32 Pac. 488; Southern R. Co. v. Vaughn, 86 Miss. 367, 38 So. 500; Moody v. Southern R. Co. 79 S. C. 297, 60 S. E. 711; Savannah, F. & W. R. Co. v. Harris, 26 Fla. 148, 23 Am. St. Rep. 551, 7 So. 544; Keller v. Baltimore & O. R. Co. 174 Pa. 62, 34 Atl. 455; McNeill v. Atlantic Coast Line R. Co. 161 Ala. 319, 49 So. 797; Rawson v. Holland, 59 N. Y. 611, 18 Am. Rep. 394; Plantation No. 4 v. Hall, 61 Me. 517.

The burden of proof is upon the shipper to show loss on the line of respondent. The mere delivery of the goods for shipment raises no presumption of loss on its line. Berkowitz v. Chicago, M. & St. P. R. Co. 109 App. Div. 878, 96 N. Y. Supp. 825; Farmington Mercantile Co. v. Chicago, B. & Q. R. Co. 166 Mass. 154, 44 N. E. 131; St. Louis & S. F. R. Co. v. McGivney, 19 Okla. 361, 91 Pac. 693; Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. R. Co. — Tex. Civ. App. —, 95 S. W. 751; Montgomery & E. R. Co. v. Culver, 75 Ala. 587, 51 Am. Rep. 483; Crouch v. Louisville & N. R. Co. 42 Mo. App. 248; Louisville & N. R. Co. v. Jones, 100 Ala. 263, 14 So. 114; Michigan C. R. Co. v. Chicago Electric Vehicle Co. 124 Ill. App. 158; Connolly v. Illinois C. R. Co. 113 Mo. App. 310, 113 S. W. 233; St. Louis, I. M. & S. R. Co. v. Renfroe, 82 Ark. 143, 10 L.R.A.(N.S.) 317, 118 Am. St. Rep. 58, 100 S. W. 889.

Bruce, Ch. J. This is an action for the value of goods delivered to the Great Northern Railroad at Devils Lake, North Dakota, and consigned to Jamestown, North Dakota. The Great Northern does not run into Jamestown, and a transfer to the Northern Pacific Railroad at the junction point of Leeds, North Dakota, was necessary. All points are within the state of North Dakota, so that the transaction was purely intrastate, and the so-called Carmack Amendment was not involved. The action then being brought against the initial carrier, the recovery, if any, must be had under the provisions of the following provisions of the North Dakota statutes [Comp. Laws 1913]:

"Section 6259: 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.

"Section 6260: If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must within a reasonable time *after demand,* give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor."

Mr. Justice Robinson considers the latter of these sections to be penal in its nature and as such to be strictly construed; and since, in his opinion, the plaintiff has neither pleaded the statute nor provided a strict compliance therewith, he cannot recover. Although I agree with him in his general conclusions and in the general result arrived at, I do not agree with him in his particular reasoning and in his particular conclusions.

I do not consider that § 6260 of the Compiled Laws of 1913 is in any manner penal in its nature.

At the time of the passage of the act in question there was in the United States, and, in the absence of a specific statute upon the subject, a conflict of authority as to the liability of an initial carrier who had accepted goods consigned to a point beyond its own line. See 4 R. C. L. 882, 886. This doubt the statute (Comp. Laws 1913, § 6260), sought to obviate, and in doing so adopted what may be called the English and minority American rule of strict liability of such initial carrier, unless "within a reasonable time after demand" he gives "satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge." This is not a penal statute, and as such to be strictly construed, but rather a modification in the carrier's favor of the strict rule of liability for the entire length of the shipment which some American courts (following the English rule) have adopted, and which the legislature of North Dakota (as has the National Congress in interstate matters and by the passage of the so-called Carmack Amendment) could itself, and if it saw fit, have adopted.

The liability of the initial carrier, however, must none the less, and even in this view of the statute, be based upon the statute; and the statute places no liability upon the initial carrier for a loss which does not occur while the goods are in its actual control, unless "within a reasonable time after *demand*" it fails to "give satisfactory proof to

the consignor that the loss or injury did not occur while it (the goods) was in his charge."

This proof was furnished on the trial of the case, and I can find nowhere in the record any evidence which tends to show that before this time any *demand* was made of the company for its furnishing and production. All that the evidence shows is a demand for the value of the goods alleged to have been shipped, or, at the most, for their production. Since I construe the word "demand" as used in the statute to apply to a demand for the proof that the loss did not occur while the goods were under the control of the initial carrier, rather than to a demand for the goods or for the value thereof, I believe that the judgment of the District Court should be affirmed.

ROBINSON, J. (specially concurring). This action was brought in justice court to recover from the defendant $200 for the loss of a peddler's box and contents which he shipped over the line of the defendant from Devils Lake to Jamestown. In justice's court and in the district court, judgment was given against the plaintiff, and he appeals to this court, making fifty-five assignments of error.

As the district court directed a verdict in favor of the defendant, the only question is on the sufficiency of the evidence to sustain the complaint. The complaint is that on April 11th at Devils Lake the plaintiff delivered the box and contents to the defendant, consigned to himself at Jamestown. "That defendant is indebted to and owes the plaintiff $200 damages for the loss and conversion and failure to return and safely ship said box of freight." Now the evidence is clear and positive that in due course the defendant did safely carry the box and deliver it in good condition to its connecting line the Northern Pacific Railway Company, at Leeds, North Dakota, and that was the proper point of delivery. Hence, under the complaint there was no question to submit to the jury, but in his brief counsel for plaintiff bases the claim on this statute [Comp. Laws, 1913]:

Section 6260: "If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor."

This statute is of a penal character. It must be strictly construed. A party who seeks to recover the penalty of the statute must plead and prove facts which entitle him to recover. This, the plaintiff has not done. The pleadings do not fairly present an issue under the statute.

Under date of July 8, 1916, defendant wrote plaintiff's attorney a letter marked exhibit "4," saying: "Our records show that we delivered the case to N. P. Railway Co., at Leeds, N. D., in good condition." That letter should have been received by plaintiff's attorney in one or two days after it was written. This action was commenced on July 12th, which was four days after the date of the letter. In his brief, counsel for plaintiff says: "The first intimation of any kind tending to show that the loss did not occur while the box was in defendant's charge came with defendant's letter" (exhibit 4) stating, under date of July 8th, "defendant's records show we delivered this case to the N. P. Ry. Co., at Leeds, N. D., in good condition." He adds: "This letter was not received by plaintiff's attorney until after the summons had been prepared and just before it was issued." Now the preparation of the summons is a matter of no consequence. It was a small matter, and the notice contained in that letter was sufficient. It was notice of a fact which counsel for plaintiff might well have anticipated and which he might have easily verified. With that notice in hand, there was no reasonable cause for commencing this action. In such cases the parties and their counsel are bound to act in a spirit of good faith and fairness. The statute does not impose on defendant the burden of proof. There was no issue of fact to submit to the jury.

FANNIE NORRIS and Des Lacs Farmers Co-operative Elevator Company, a Corporation, v. GERMAN-AMERICAN STATE BANK OF BURLINGTON, NORTH DAKOTA, a Corporation, Walter Durbin, and Jourgen Olson.

(165 N. W. 570.)

Chattel mortgage — property — sale of — effect of sale — title — vests in purchaser — subject to redemption — intention to redeem — notice of.

Where one holding a chattel mortgage on property forecloses such mortgage

and complies with all the requirements of law regarding the holding of such foreclosure sale, and such sale is held in accordance with all the provisions of law relating thereto, the title of the property so sold at such foreclosure sale vests absolutely in the purchaser, subject only to the right of the mortgagor or owner, or either of their assignees, or of any other person having an interest in such property subject to a lien inferior to another, to redeem the same within five days and to be subrogated to all the rights of the purchaser at such sale; provided, that on the day of sale they give written notice to the person making such sale of their intention to make such redemption.

Opinion filed October 8, 1917.

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

Reversed.

McGee & Goss and *James Johnson,* for appellants.

The right to redeem is statutory. Civ. Code 1877, § 1714; Rev. Codes 1899, § 4691, Rev. Codes 1905, §§ 6141, 6143, Comp. Laws 1913, §§ 6717–6719.

The sale of personal property under chattel mortgage foreclosure, as to everyone however interested in the property, whether an owner or junior encumbrancer, is an actual transfer of title. Rogers v. Eagle F. Ins. Co. 9 Wend. 611; Wiltsie, Mortg. Foreclosure, § 951.

"A foreclosure by advertisement has the same binding force as foreclosures by action in which the parties are personally served with process." Grove v. Great Northern Loan Co. 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

Unless written notice of intention to redeem is given at the time of sale, the right of redemption is waived and the purchaser's title and right of control over the property become fixed and settled at once. Brown v. Smith, 13 N. D. 586, 102 N. W. 171.

A junior mortgagee or lien holder against property sold at chattel mortgage foreclosure sale, and all such, must give the required notice of intention to redeem. The fact that the second mortgagee gave the required notice and redeemed does not give other subsequent lien holders the right to redeem. This would continue the redemption period indefinitely. Comp. Laws 1913, §§ 6717, 8134.

It is well settled in this state that the word "assignee" includes mortgagee and junior encumbrancer, and such holding has run into a rule of property. Brown v. Smith, supra; Sess. Laws 1893, chap. 79.

"A grantee of a judgment debtor after foreclosure sale is a successor in interest of the judgment debtor, and not a redemptioner." Comp. Laws 1913, § 8085; Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 483; Styles v. Dickey, 22 N. D. 525, 134 N. W. 702.

John J. Coyle, for respondents.

Upon the payment of the amount necessary to redeem, the mortgagor, or person to whom the same is paid or tendered, shall execute and deliver to the redemptioner a certificate of redemption, and this shall operate as a release of said property from the mortgage. Comp. Laws 1913, § 8136.

Mortgaged property should be made to go as far as possible towards paying the liens against it. Fox v. Nelson, 30 N. D. 589, 153 N. W. 396; North Dakota Horse & Cattle Co. v. Serumgard, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

"An injunction is not the proper method of evicting a party from the actual possession of land. Nor will injunction be granted when its effect would be to take possession from the defendant, if the complainant's title has not been established in a court of law. An injunction will not be granted against a defendant who is claimed to be in wrongful possession of property who is not doing irreparable damages, since the remedy at law by ejectment is ample and complete." 22 Cyc. 828 and 829; Doige v. Bruce, 141 Iowa, 210, 119 N. W. 624; Hall v. Henninger, 145 Iowa, 230, 139 Am. St. Rep. 412, 121 N. W. 6.

"A court has no power to grant a preliminary mandatory injunction removing a party from the possession of real property pending the action, and the transferring of such property to the adverse party." Catholicon Hot Springs Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539; Forman v. Healey, 11 N. D. 563, 93 N. W. 866; Dickson v. Dows, 11 N. D. 404, 92 N. W. 797.

GRACE, J. This action is one maintained by the plaintiff for the purposes of securing a permanent injunction against the defendants restraining them from molesting, disturbing, or trespassing upon the property of the plaintiffs described in the complaint, and for other relief. The property in question consists of a grain elevator and equipment, and flour and coal sheds.

Plaintiffs' complaint alleges ownership and possession of such property. Defendants interpose a general denial to the allegations of the complaint, and also set forth other allegations in the answer, which allege the possession of such property in the German-American State Bank of Burlington, North Dakota, on February 23, 1917, and continuance thereof ever since, such possession being given to such bank by the former owner of such property, H. T. Hoge.

The facts in the case are as follows: H. T. Hoge was the owner of such grain elevator and other personal property mentioned in the complaint. He executed a chattel mortgage to the German-American State Bank of Burlington for $4,575, a second chattel mortgage to Fannie W. Norris in the sum of $3,200, a third chattel mortgage to the German-American State Bank of Burlington in the sum of $13,500. The bank foreclosed its first mortgage by advertisement. On the day of sale the second mortgagee gave notice of intention to redeem, and made redemption within the five-day period permitted by law for such redemption. H. T. Hoge was the original owner of all the property involved in this action, and was the mortgagor in each of such mortgages. The sale of the property by reason of the foreclosure of the first mortgage was on the 23d day of February, 1917. The respondent, the owner of the third mortgage as well as of the first mortgage, gave no notice upon the day of sale of such property of its intention to make redemption. In July, 1917, the defendant commenced foreclosure proceedings by advertisement upon the third mortgage upon the same property, and such foreclosure was enjoined on July 13, 1917, by the plaintiffs. Afterwards the defendant commenced an action to foreclose its third mortgage.

The legal propositions at the bottom of this case arise from the construction to be placed upon redemption statutes which govern the redemption of property sold at chattel mortgage sale by advertisement. Such redemption is governed by §§ 6717–6719, and 8134 of the Compiled Laws of 1913, which are as follows:

"Section 6717: Every person having an interest in property, subject to a lien, has a right to redeem it from the lien, at any time after the claim is due and before his right of redemption is foreclosed.

"Sec. 6718: One who has a lien inferior to another upon the same property has a right: 1. To redeem the property in the same manner as

its owner might from the superior lien; and, 2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby.

"Sec. 6719: Redemption from a lien is made by performing the act for the performance of which it is a security, and paying the damages, if any, to which the holder of the lien is entitled for delay, or by offering to perform such act and pay such damages; provided, that if the act requires the delivery of money, property or a conveyance of property the same shall be deposited and notice thereof given as provided in § 5263."

"Sec. 8134: Any mortgagor of personal property, or his assignee, may redeem the same from a sale upon foreclosure of any mortgage within five days after such sale, exclusive of the day of sale, by paying or tendering to the owner of the mortgage at the time of sale, his agent or attorney, or the person making the sale, the amount for which said property was sold with the costs of sale and interest at the rate of 7 per cent per annum from the date of the sale. The mortgagor or his assignee desiring to redeem such property shall at the time of sale give written notice to the person making the sale of his desire to make such redemption; otherwise he shall be deemed to have waived his right to do so. In case such notice is served, the person making such sale shall retain the possession of the property sold until the expiration of said five days and shall be entitled to his reasonable expenses in caring for the same. In case a part only of the property sold is redeemed the redemptioner shall pay or tender in addition to the price for which such part was sold such proportion of the costs of sale as said price bears to the entire price of all the property sold and also the reasonable expense of caring for the property redeemed and interest."

It will be noticed that § 8134 provides the method and manner in which the mortgagor or his assignee may make redemption. If the mortgagor did not wish to make redemption he could assign all his interest to another person, who would then be the assignee of the mortgagor, and such assignee could make redemption in the same manner and with the same effect as the mortgagor, and with the same rights and privileges as such mortgagor. This section makes no provision for redemption by one holding a lien inferior to another upon the same property, but, as we shall hereafter see, the provisions of this

section are also rules to be observed by redemptioners holding inferior liens upon the same property. Under § 6717 every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due and before his right of redemption is foreclosed. Passing from this section to the immediate consideration of § 6718, we find one who has a lien inferior to another upon the same property has a right to redeem the property in the same manner as its owner might from a superior lien, and be subrogated to all the benefits of the superior lien when necessary for the protection of his interests upon satisfying the claims secured thereby. The rule then to be followed by a redemptioner holding an inferior lien upon the same property is the same as that of the mortgagor or the owner of the property. If, therefore, we determine what the owner or mortgagor must do in order to place himself in position to make a redemption, we will have at the same time determined what rule must be followed by one holding an inferior lien upon the same property, who desires to make redemption. The mortgagor or owner of personal property, or his assignee, may redeem the same from a sale upon foreclosure of any mortgage within five days after such sale, exclusive of the day of sale. In what manner may he do this? By paying or tendering to the owner of the mortgage at the time of sale, within five days after time of sale, his agent or attorney, or the person making the sale, the amount for which such property was sold, with the costs of sale and interest at the rate of 7 per cent per annum from the day of sale. Provided, however, that the owner or mortgagor or his assignee shall at the time of sale give written notice to the person making the sale of his desire to make such redemption; otherwise he shall be deemed to have waived his right to do so. These are the requirements with which the mortgagor or owner of the property must comply before he has any right of redemption. If he fails to comply with them he has lost his redemption right, and the absolute title of the property on sale would pass to the purchaser on such sale in the event of failure of the mortgagor or owner to comply with these requirements, assuming there were no other redemptioners. All that has been said in regard to the mortgagor or owner of the property applies with equal force and effect to the holder of an inferior lien upon the same property. In order to put himself in position to redeem, he must follow

the same method and rule as that followed by the mortgagor or the owner, or the assignee of either. He must tender, within five days after the time of sale, the amount for which said property was sold at the mortgage foreclosure sale, together with costs and interest; and he must also at the time of the sale serve written notice of his intention to redeem; and if he omits to do either one of these things he is not a redemptioner, and is not in position to claim any of the rights and privileges of redemption. Applying this reasoning to the case at bar, the first mortgage to the German American State Bank of Burlington in the sum of $4,500 was foreclosed on the 23d day of February, 1917. Upon said day there existed other and inferior liens upon said property, of $3,200 to Fannie W. Norris, the appellant, and one of $13,500 to the German American State Bank of Burlington, being the same party as the owner of the first mortgage. Upon the day of sale Fannie W. Norris, the holder of the second mortgage, legally served upon the proper party written notice of her intention to redeem, tendered the proper amount of money, and was allowed to make redemption, and procured a certificate of redemption, which operated as a discharge of the first mortgage. The owner of the third mortgage failed to serve notice of redemption, and failed to tender either the amount for which the property was sold at the mortgage foreclosure sale, or that due any other prior inferior lien holder who had made redemption. In fact, the third mortgagee or inferior lien holder made absolutely no tender of any kind or character, and failed to serve any written notice, or any notice, on the day of sale, of intention to make redemption; and therefore, as we view it, by such failure lost all right to make redemption. The second mortgagee, or inferior lien holder, having properly made redemption, was subrogated to all the rights of the purchaser at the sale. What are the rights of the purchaser to which the inferior lien holder is subrogated in case redemption is properly made? To answer this question clearly it is necessary to determine the effect of a chattel mortgage sale. If the chattel mortgage sale is legally held, and all the requirements of law complied with, and the sale is actually and properly made of the property covered by the mortgage, if there is no lawful tender of the amount for which the property was sold at such mortgage sale, and no tender of such other matters as are required to be tendered, and no written notice of redemption is served at the

time of sale, either by the owner, mortgagor, or their assignees, if any, or by any other redemptioner having an interest in the property, immediately upon the close of such sale the absolute title to the property so sold passes from the original owner or mortgagor to the purchaser of such property at such sale, whether it be the mortgagee, or some other person. Where, however, there is a legal redemptioner, which is one who has complied with all the requirements enjoined upon a redemptioner, the purchaser at such foreclosure sale holds the absolute title to the property subject to the right of the redemptioner to succeed to such right in case a redemption is legally effected. In other words, the redemptioner succeeds and is subrogated to all the rights which the purchaser at such sale has, including the absolute right and title to the property. The title to the property becomes absolute in the purchaser at the time of sale as to all persons who have not made any tender as required by law, or served any written notice of intention to redeem. This applies to the mortgagor and owner as well as others who might have become redemptioners. The purchaser at such foreclosure sale, therefore, has absolute title to the property, subject only to the right of other proper and legal redemptioners, to be subrogated to that right by the payment of all that is properly due to the purchaser of such property at the sale, so that each legal redemptioner as he made the redemption and paid the amount due to prior lien holders who have qualified as redemptioners, if done within the five-day period, would in turn be subrogated to the absolute right and title to the property.

The defendants and respondents claim that the statute makes no provisions for a redemption from a redemptioner, and contend that, in order for the third mortgagee to have a chance to make redemption, it is necessary for the second mortgagee, after making his redemption from the purchaser at the foreclosure sale, to foreclose his second mortgage in order to give the third mortgagee a chance to redeem. If this logic is sound, then, when the second mortgagee foreclosed his mortgage and the third mortgagee made redemption, paying the whole amount for which the property was sold at the foreclosure sale of the second mortgage, and in addition thereto the amount which the second mortgagee had paid as purchaser for the property at the first foreclosure sale, then, when the third mortgagee had made such redemption under

the theory of the defendants, he would also have to foreclose his third mortgage so as to afford the fourth mortgagee the same opportunity that the third mortgagee had, and so on with the fifth, sixth, and seventh, and any number of mortgages.

We are positive that the defendants' theory is unsound, illogical, and fails to take into consideration the plain language of our statute. All chattel mortgagees of any given property have a perfect right and remedy under our law to make redemption. All they need do is, on the day of sale, to serve written notice upon the proper person of their intention to make redemption, and make a lawful tender of the amount necessary to pay the amount to the purchaser for which the property was sold upon foreclosure sale, together with the actual amount due upon other senior mortgages and which are prior liens to their mortgage, where such senior mortgagees have legally qualified and brought themselves within the law regarding redemptioners concerning chattel mortgage sales. We are satisfied that every mortgagee of personal property under the law has a plain and adequate remedy of redemption in his proper order as shown by the order in which such chattel mortgages are filed, by complying with the requirements of law and qualifying himself as a redemptioner by serving written notice of his intention to redeem and making a proper tender,—all in accordance with law and at the proper time and place as defined by law.

The second mortgagee herein having made proper and legal redemption from the purchaser of the property at the foreclosure sale, as we have seen, became the absolute owner of the property, there being no other redemptioners, and she became entitled to, and was subrogated to, all the rights of the purchaser of such property at the mortgage foreclosure sale. The rights of the purchaser at the mortgage foreclosure sale were the possession and right of possession, ownership, and absolute title to the property which the purchaser at such foreclosure sale purchased. These are the rights to which the second mortgagee herein succeeded. The purchaser at such sale was the first mortgagee. It accepted all its money for the purchase price of such property on such sale from the second mortgagee, the only redemptioner, and a certificate of redemption was issued to the second mortgagee; and the redemption having been made as required by law, she became the absolute

owner of such property, and the absolute title to such property passed to her by reason of her redemption, as hereinbefore set forth.

At the inception of this action a temporary injunctional order was applied for by plaintiff, restraining the defendants or any of them from intruding upon or entering upon said premises, or any part thereof, or interfering with the full, absolute, and undisputed possession of such premises pending the suit. Such order was based upon the complaint, which alleged ownership and possession of the property and a conspiracy on the part of the defendants to deprive the plaintiffs of the possession thereof. The plaintiffs further state that the defendants have no right, title, or interest, property or estate, in or to any of said property. The court accordingly issued such injunctional order to be effective pending the litigation. Subsequently an application was made by the defendants upon affidavit to vacate the injunctional order, which application was granted upon the theory and reasons contained in the memorandum decision of the court below. It appears from plaintiffs' complaint that they are entitled to the relief therein demanded; and having attached an appropriate prayer to such complaint, and the case being one in which a restraining order pending suit should be granted, as we view the case, the court was in error in vacating such restraining order pending suit, and was in error in making its order vacating such injunctional order, and was in error in refusing to continue in force such injunctional order pending the litigation.

Plaintiffs in the court below, and also during the argument before this court, offered to take all their money, which included the whole amount paid the purchaser at the foreclosure sale of the first mortgage, the amount of the second mortgage, together with all the interest due on either, and all the costs and expenses of the litigation,—all to be paid in cash by the defendants. This court, acting upon such offer, and in the interests and spirit of equity, if any equity there be in this case, permits and orders that the defendants may have ten days from the day the remittitur of the court is filed in the court below in which to pay the plaintiffs in cash all the amounts of money hereinbefore referred to as owing to the plaintiffs by reason of their making redemption from the purchaser at the foreclosure sale, the amount of their second mortgage, together with all costs and expenses which they have

paid out or disbursed and which they are entitled to recover, together with interest on all such sums.

The order of the District Court vacating and setting aside such injunctional order pending litigation is reversed, and the case is remanded, with instructions that the injunctional order of date August 3, 1917, be reinstated by the Honorable K. E. Leighton, judge of the district court of Ward county, North Dakota, and be continued in full force pending the litigation and the determination of this case upon its merits at the trial thereof, and for other proceedings in harmony with this opinion. Plaintiffs are granted their costs upon this appeal.

ROBINSON, J. (dissenting). The plaintiff appeals to this court from an order dated August 8, 1917, discharging an injunctional order. The order was that the defendants refrain from holding possession of a grain elevator described in the complaint, the St. Anthony Elevator of Des Lacs, North Dakota.

At the time of issuing the injunction the defendants were in possession of the elevator under a third mortgage made to the German-American State Bank of Burlington to secure $13,000. On February 23, 1917, a first mortgage on the property was foreclosed and on February 28, redemption was made by Fannie Norris under a second mortgage for $3,200 and interest. The plaintiff Fannie Norris claims absolute title under the second mortgage, and she has contracted to sell the property to the other plaintiff. Her claim of title is based on a redemption from a foreclosure of the first mortgage by payment of $4,575. She claims that her investment amounts to $8,500, and that it is more than the property is worth, and yet she refuses to permit a redemption.

The German-American State Bank, by the other defendants, holds possession of the elevator by permission of H. T. Hoge, the owner and mortgagor; and, under a mortgage for $13,000, the bank asserts that by redemption from the foreclosure sale the plaintiff acquired merely the lien of the prior mortgage, and not the title.

The statutes read thus [Comp. Laws 1913]:

Section 6717. "Every person having an interest in property, subject to a lien, has a right to redeem it from the lien, at any time after the claim is due and before his right of redemption is foreclosed."

Section 6718. "One who has a lien inferior to another upon the same property has a right:

"1. To redeem the property in the same manner as its owner might from the superior lien; and,

"2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby."

Section 8134. "Any mortgagor of personal property, or his assignee, may redeem the same from a sale upon foreclosure of any mortgage within five days after such sale, exclusive of the day of sale, by paying or tendering to the owner of the mortgage at the time of sale, his agent or attorney, or the person making the sale, the amount for which said propery was sold with the costs of sale and interest at the rate of 7 per cent per annum from the date of the sale. The mortgagor or his assignee desiring to redeem such property shall at the time of sale give written notice to the person making the sale of his desire to make such redemption."

Section 8136. "Upon the payment or tender of the amount necessary to redeem, the mortgagee, or person to whom the same is paid or tendered, shall execute and deliver to the redemptioner a certificate of such redemption, particularly describing the property redeemed and the mortgage under which the same was sold, which certificate may be filed in the office of the register of deeds of the county in which the mortgage is filed and shall operate as a release of said property from the mortgage."

The statute is that a redemption shall operate as a release of the property from the mortgage, and not that any title shall vest in the redemptioner, and assuredly a person claiming under a statute can assert no greater right or title than the statute gives him. It is said: Had there been no redemption from the sale, both the second and the third mortgages would have found their rights in the property forever gone. That is not exactly true. It is too narrow a view of the law. A party should not be robbed of his property or his liens under the forms and technicalities of the law, or under an unjust and unconscionable summary foreclosure. Hence, when a foreclosure is not made in good faith and fairness it may become the duty of the court to set it aside and to allow a redemption after the time fixed by the statute.

All creditors have an interest in the property of their debtors, and, when such property is sold to pay a debt, it should be sold fairly and for as much as possible, and as far as possible it should be made to pay all the debts. No one creditor should be permitted to exclude others by unjustly taking the property at much less than its value. At the foreclosure sale the property in question was sold for not more than half its value. Otherwise the third mortgagee would have no interest in offering to redeem and the second mortgagee would have no interest in opposing the redemption. Hence, under a proper and timely showing, the mortgagor or any subsequent lien holder should be permitted to redeem from the foreclosure sale regardless of any notice of intention or any five-day period. Of course the statute fixes a general rule, and when a party brings himself within the rule redemption is a matter of course. Otherwise there must be a proper equitable showing.

In this case the first and second mortgagors are as it were merged, and the right of the third mortgagee to redeem by paying the amount due on the two first mortgages is a matter of course. But, even if the plaintiff had acquired a perfect title to the elevator, the court is right in dissolving the injunction. It is entirely certain that the third mortgagee was in possession of the grain elevator, and injunctional orders may not be used to dispossess a party of either real or personal property.

FRANCIS J. McGINNITY v. J. I. CASE THRESHING MACHINE COMPANY, a Corporation.

(164 N. W. 955.)

New trial — motion for — trial court — discretion of — abuse of — accident — surprise.

Upon examination of the motion for a new trial herein and the showing and evidence adduced in favor of and against such motion for a new trial, it is *held* that the trial court abused its discretion in not granting such new trial, under subdivision 3 of § 7660, Compiled Laws of 1913, relating to accident and surprise which ordinary prudence could not have guarded against.

Opinion filed October 11, 1917.

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

Reversed.

John J. Murphy and *Ivan V. Metzger,* for appellant.

Excusable neglect on the part of the attorney of record is sufficient ground to warrant the court in granting a new trial. Where legal surprise is clearly shown a new trial should be granted. Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

Bosard & Twiford (*Upham, Black, Russell & Richardson,* of counsel), for respondent.

Where motion for new trial is made on the grounds of accident, surprise, or inadvertence of the plaintiff or the plaintiff's attorney, the order is granted or denied at the discretion of the trial court. Slocum v. McLaren, 109 Minn. 49, 122 N. W. 871; Wingen v. May, 92 Minn. 255, 99 N. W. 809; Matoushek v. Dutcher, 67 Neb. 627, 93 N. W. 1049; State v. Morgan, 80 Iowa, 413, 45 N. W. 1070; Crowell v. Harvey, 30 Neb. 570, 46 N. W. 709; Sapp v. Aiken, 68 Iowa, 699, 28 N. W. 24; Key, New Trials, § 91.

Where it is shown clearly on such motion that the facts on which such claim is based were known during the trial, and it is not shown that an effort was made to meet these conditions, it cannot be said that there was an abuse of discretion in denying the motion. Matoushek v. Dutcher, 67 Neb. 627, 93 N. W. 1049.

There must be shown some detrimental surprise. Something injurious that the party could not, with diligence, meet, and when newly discovered evidence is also relied upon, it must not only appear that the same is material and not cumulative, but that the applicant, by the exercise of reasonable diligence, could not have discovered and produced at the trial. Fitzgerald v. Brandt, 36 Neb. 683, 54 N. W. 992; Zimmerer v. Fremont Nat. Bank, 59 Neb. 661, 81 N. W. 849.

Forgetfulness, or overlooking of material testimony or witnesses, or failure to amend pleadings when necessary, is not sufficient ground on which to base a motion for a new trial. Crowell v. Harvey, 30 Neb. 570, 46 N. W. 709; Ernster v. Christianson, 24 S. D. 103, 123 N. W. 711; Callahan Constr. Co. v. Williams, 160 Ky. 814, 170 S. W. 203; Roediger v. Kraft, 152 N. Y. Supp. 327.

GRACE, J. This is an appeal from an order denying motion for a new trial.

The plaintiff brings an action to cancel and set aside a certain contract entered into with the defendant for the purchase of a certain tractor gas-engine plowing outfit, the contract price of which was $2,525, and the freight, amounting to $150, which was accompanied at the time of its execution by a written warranty, a copy of which is as follows: "Said machinery is purchased upon and subject to the following mutual and interdependent conditions, and none other, namely: It is warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportion, working under the same condition on the same job, if properly operated by competent persons, with suitable power, and the printed rules and directions of the manufacturers intelligently followed. The conditions of the foregoing warranty are that if, after a trial of ten days by the purchaser, operated in the manner specified, said machinery shall fail to fulfil the warranty, written notice thereof shall at once be given to the J. I. Case T. M. Company, at Racine, Wisconsin, and also to the dealer from whom received, stating in what parts and wherein it fails to fulfil the warranty, and reasonable time shall be given to said company to send a competent person to remedy the difficulty (unless it be of such a nature that a remedy may be suggested by letter), the purchaser rendering necessary and friendly assistance and co-operation, without compensation for labor or material furnished, and the company reserving the right to replace any defective part or parts. If, after giving the notice and opportunity to remedy the difficulty complained of, as above provided, the company fails to send a representative to remedy said difficulty (or to suggest an efficient remedy by mail), or if, upon its attempt to remedy the same, the machinery cannot be made to fill the warranty, the part that fails is to be returned immediately by the purchaser, free of charge to the place where it was received, and the company notified thereof; whereupon the company shall have the option either to furnish another machine, or part, in place of the one so returned, which shall fill the warranty, or to return the notes, or money received for the machine or part so returned, and the con-

tract shall be rescinded to that extent, and no further claim made on the company."

The plaintiff, at or about the time of the completion of the first contract, paid cash for freight $150, and in addition thereto turned over to the defendant two horses and two mules of the agreed value of $525. The balance, $2,000, according to the terms of the first contract, was to be divided into four payments of $500 each, for which notes were to be given, the first of such notes being due October 1, 1914, and one of the remaining notes to be due on October 1st in each of the years 1915, 1916, and 1917, with interest thereon at 7 per cent from date until paid. To secure the notes for $2,000 plaintiff gave a chattel mortgage on all the machinery purchased from the defendant, and also a real estate mortgage upon certain real estate described in the complaint. After such first contract was entered into, the defendant desired to change the amount of the notes and reduce the time for payment from four years to three years, so that the payments would be as follows: $667 due October 1, 1914, $667 due October 1, 1915, and $666 due October 1, 1916. Such change was assented to by the plaintiff, and the notes and mortgages accordingly executed, bearing interest at 7 per cent per annum. Such notes and mortgages were executed by plaintiff to the defendant before the machinery had been tried or tested by the plaintiff. In addition to the express warranty, plaintiff relies upon an implied warranty. The machinery in question, in the latter half of October, 1913, was delivered by the defendant to L. A. McGinnity, the brother and agent of the plaintiff, at Hamlet, Williams county, North Dakota. An expert for the defendant came with the machinery for the purpose of starting it to work and trying it. The ground, however, was frozen, and no trial of the machinery was at this time had. The testimony shows that experts of the defendant came the following spring to such place and tried to make the engine and plows work, but largely failed. The plows did not seem to work and the engine would not pull all of them uphill. In addition to this it appears from the testimony that the company had sent out experts at five different times. An expert went out in the fall, another the following spring, in April, and one in the month of June, one in the month of July, and one in the month of September. The same expert was on three of these trips. It appears

from the greater weight of the testimony that the engine would not develop power and the plows would not plow straight, and neither would give any satisfaction for the work for which they were constructed. That there was serious trouble with the power of the engine is conclusively shown by the greater weight of the testimony, which shows the change of carburetors, the addition of the oiler, the fact that the engine would die down immediately when the plows were attached and put in operation, the repeated efforts of the experts to make such machinery do the work for which it was intended, their complete failure to do so, the letters and demands sent the defendant by F. J. McGinnity, the plaintiff, demanding of the defendant that such machinery do the work or that other machinery be substituted therefor which would, and notifying defendant that unless such action was taken such machinery would be returned to it.

The plaintiff concedes there was to be a change in the contract so that the balance owing on such machinery would be fully paid in three yearly payments instead of four, but earnestly maintains that there was no other change asked for by the defendant. That such change in the contract was the only one spoken of. To bring about such change in the contract L. A. McGinnity, the agent of F. J. McGinnity, wrote "exhibit 2" to F. J. McGinnity, which the agent, or agents, of the defendant read, partly read, or had opportunity to read, which letter the plaintiff received and which is as follows:

McGregor, North Dakota, September 22, 1913.

Dear Brother:—

Rec. your letter O. K. & hope you are feeling better by this time. Was expecting you up until I got your telegram. The threshing machine pulled out last night. we threshed your wheat it made 23½ bu. they are on my place now laid up for win. the J. I. Case agent Erickson from Minot is here today & said he made a mistake on the terms of contract as he ment 4 payments instead of 4 years. Now he asked me to drop you a line & explain the change so you would understand it to change the payments from 4 years to 4 falls, or four payments, this fall one payment & 3 falls for balance. I compared contracts they are exactly the same, only change being in payments. He will send you also one & copy after you sign second. Eng. & plows are ready

at Hamlet. ans. at once & let me know what you done. every one O. K.

Your Bro.
L. A. McGinnity.

From the testimony of L. A. McGinnity and from the letter which he wrote, and from the testimony on behalf of plaintiff relating to such subject, it would appear that it was clearly understood by the plaintiff that was to be the only change in the contract.

"Exhibit A" was the proposed new contract. It is very similar to the first contract, which is "exhibit 1," with the exception of that part of the contract relating to the warranty of the machinery. The warranty in the proposed new contract is radically different from the admitted warranty in the first contract. The warranty in the new contract is as follows:

"It is expressly agreed that the property herein ordered is not warranted either expressly or by implication, except that the company warrants ownership thereof at the time and place of delivery."

It will be seen, therefore, that in the first contract there was a complete warranty of the machinery sold, and in the second contract there was no warranty whatever concerning the machinery other than that which related to ownership.

It must be conceded that the matter of the warranty of the quality, construction, and the capability of such machinery to do the work for which it was constructed and intended to do was a very material part of the first contract, and conferred upon the purchaser of such machinery a very valuable and protective right. Such warranty was no doubt seriously considered by the purchaser at the time of the purchase of such machinery, and assured his mind that he had full protection against all defects which might exist in such machinery, or its failure to do the work for which it was constructed and intended; and it must have been relied upon by the purchaser of such machinery for his protection.

The letter, "exhibit 2," a letter from L. A. McGinnity to F. J. McGinnity, was written at a time when there was no dispute of any kind concerning such machinery, either as to the material out of which such machinery was constructed, or whether or not it would perform the

service which it was intended to perform. There was at this time no dispute between the seller and the purchaser of the machinery, the only matter which was endeavored to be changed being the time of payment. Such letter, "exhibit 2" written by L. A. McGinnity, positively states that he compared contracts, which would be the first contract containing the full and complete warranty, and the second proposed contract which he said was exactly the same, the only change being in payments. The second contract in evidence is entirely different from the first contract so far as the matter of warranty is concerned. They are wholly and entirely dissimilar. F. J. McGinnity denies the execution of the second contract which is in evidence, and even went so far as to deny his signature thereto entirely. It also appears from the evidence that the witnesses Marius Erickson and M. S. Donovan, whose names appear as witnesses on the second contract, were not present at the time said contract was executed, and were not in fact witnesses to the execution of said contract, if it were ever executed.

To execute a contract legally does not merely mean that a person has signed the same, but in addition to this means that he signed such contract with full knowledge of its contents, or with an opportunity to acquire full knowledge of its contents, and that he was in no manner deceived as to the terms of the contract. A contract is only legally made where the minds of the contracting parties meet as to the terms of such contract. If "exhibit 2" is true, if L. A. McGinnity did compare the proposed second contract with the first contract and there was no difference except as to the terms of payment, then the second contract signed by F. J. McGinnity, if he did sign the same, was not the same contract which L. A. McGinnity examined and referred to in "exhibit 2," the letter which he wrote to his brother. It is not for us to say at this time what were the circumstances surrounding the execution of the new contract, whether or not it was a different contract than that examined by L. A. McGinnity and referred to in his letter to his brother, or whether a different contract from that was substituted at the time of the execution of the second contract, or supposed execution thereof; but all such matters would be susceptible of proof by the testimony of competent witnesses upon a retrial of the action, upon issues fully and properly formed by additional pleadings to be made and served before a retrial of the case. The sole questions, therefore,

in this case is the propriety of granting a new trial; and under all the circumstances of the case saying whether or not the trial court abused its discretion in refusing to grant plaintiff's motion for a new trial. No case is ever tried unless it is tried upon its merits. Courts exist largely for the purpose that causes of action brought therein may be tried upon their merits, and that the disputes between parties and their differences, when legally presented, may be fully examined, and the testimony thereof given by competent witnesses in court, and therefore finally determined by the court. The plaintiff in this case, after judgment in favor of the defendant, in the court below, made a motion for a new trial supported by affidavits, principal among which was the affidavit of J. A. Van Wagen. Some of the principal grounds upon which the motion for the new trial was based were accident and surprise, which ordinary prudence could not have guarded against. There are several other grounds mentioned as the basis for said motion for a new trial, but we think the ones above mentioned are all that need to be considered in disposing of this case. Section 7660, Compiled Laws of 1913, among several other causes therein stated, any one of which is sufficient ground for a new trial, contains in subdivision 3 of said section the following language: "Accident or surprise which ordinary prudence could not have guarded against."

So far as the plaintiff is concerned, taking into consideration that he signed the first contract containing the full warranty; and had full knowledge of its contents, and that the machinery was first purchased under and by virtue of such contract and warranty, and plaintiff's repeated demands and letters to the defendant to make such machinery work, and all the other circumstances and testimony in the case which relate to the failure of the machinery to work and the bringing by plaintiff of the action upon a warranty which is the same as the one in the first contract, leads to the conclusion that plaintiff acted in good faith, and at all times believed, up to the very trial of the case, that he was protected by a warranty similar to that contained in the first contract. So far as the plaintiff then is concerned we conclude that he was entirely surprised at the time of the trial to find the defendant producing and relying upon a contract which contained absolutely no warranty other than that of ownership, which in no sense was a protection to plaintiff against any of the defects of the machinery, whether

as to construction, adaptability, power, or usefulness for the work which it was intended to do. The plaintiff, however, had an attorney in the case, one C. A. M. Spencer, who from a reading of the record we are convinced was an able and learned attorney of wide professional experience. Plaintiff's attorney, Mr. Spencer, had correspondence with the defendant, and prior to the time of the trial procured a copy of exhibit A, which was sent to a certain bank, and which contract, exhibit A, Mr. Spencer examined. After such examination, Mr. Spencer, plaintiff's attorney, wrote the defendant the following letter:

Williston, N. D. June 2, 1915.

Messrs. Upham, Black, Russell, & Richardson,
Milwaukee, Wis.

Gentlemen:—

Your favor of May 29th relative to the contract which you sent to the bank here in the case of McGinnity vs. J. I. Case Co. duly received and noted. I have been out of town for the past few days, hence the delay in this matter. I called at the bank this morning and looked the contract over which you claim he executed instead of the one upon which I sued, and I am satisfied that McGinnity never signed any such contract as you sent to the bank, because nobody but a natural born fool would buy an outfit of machinery such as was bought in this case, without any warranty or trial so as to see whether it would work or not, and execute his notes for $2,000 secured by real and chattel mortgages, pay $150 freight money and turn over stock to the value of $500, without any warranty that the machinery would work satisfactory; that would be worse than buying a "pig in a poke;" and while I have not seen the plaintiff in this case, as he lives in Minnesota, still I take the responsibility under all the circumstances to stand upon my complaint as served, and on the contract which I set up and which he *did sign,* and which looks to me would be much more reasonable to assume that he executed said contract than the one sent to the bank. You, no doubt, have examined the contract sent to the bank, and it expressly provides that there is no warranty of said machinery except as to title, and I never heard a man in this country buying machinery to this amount or less under such contract. You had better make out your answer and send it here to me as soon as you get around to it,

and I will admit service, as that is customary among attorneys in this country.

I may have to reply to your answer, so that the sooner you get it around the better it will be, as I presume you want to dispose of this case as soon as possible, and I surely will show you all of the professional courtesy in this matter that is consistent with the interest of my client. This case will probably be a court case, except there may be some question of fact raised by the pleadings which will require it to be submitted to the jury, as that is often done; and as our court convenes the 28th of June, the sooner we get the issues settled the better, and I will arrange so as to get the case set for some specific date in order that your counsel can be here and lose as little time as is possible, although you may have a local attorney to represent you, as I do not presume one of your firm will be here.

Yours truly,

C. A. M. Spencer.

It has been to some extent held in various kinds and classes of cases that the knowledge of the attorney is imputed to his client. There no doubt have arisen, and will arise, many cases to which such rule may be very properly applied. Whether such rule is a proper one to apply should be determined, we think, by the particular circumstances and conditions existing in each particular case; if the application of the rule to a given case would operate to thwart a trial of the case on its merits, the rule should have no application where the party to the action against whose interests the rule is invoked, and his attorney, have reasonable excuse to offer or can show they have reasonable grounds for the position which they have taken, it also appearing they acted in good faith, and were surprised, and there are reasonable grounds upon which surprise may be based. It must be conceded in the case at bar that the plaintiff relied fully upon the contract of warranty upon which he based his action. His reliance upon such warranty continued up to and including the trial, where for the first time he finds the defendant claiming he gave no warranty to such machinery. Certainly, this state of affairs must have been surprise to plaintiff. From the letter written by plaintiff's attorney to the defendant, it appears that his attorney took the position that plaintiff never signed

such contract, meaning the second contract, stating in such letter that "nobody but a natural born fool would buy an outfit of machinery such as was bought in this case without any warranty." If, then, the second contract produced at the trial was actually, though possibly inadvertently, signed by the plaintiff, the plaintiff's attorney must have been also greatly surprised. He could not have believed that any such contract as the second was signed by the plaintiff, otherwise he would have amended his pleadings so as to form new issues, which plaintiff's substituted attorneys are now in effect asking the privilege to do, or, in other words, asking the privilege of a new trial, at which new trial he could try additional issues affecting the merits of the case other than those considered at the first trial. Courts favor trial on the merits; and, there appearing to be reasonable excuse for the failure of the plaintiff and his attorney in not alleging and submitting proof of the misrepresentations, if any, of defendant or its agents in and about procuring the second contract, which contained no warranty at all, and it appearing that the plaintiff was greatly surprised, and the plaintiff's attorney fully believing that the plaintiff never executed the second contract, it was an abuse of discretion on the part of the trial court to deny plaintiff's motion for a new trial, thus preventing a new trial upon the real merits of the case.

The case under consideration is not unlike in principle an application to open a default judgment where there is an affidavit of merits presented and answer tendered, and a sufficient showing to excuse the default. In the case of Citizens' Nat. Bank v. Branden, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102, the court in defining "surprise" used the following language: "In a case in which a party to an action employs counsel of good reputation and large experience, the neglect by such counsel of matters necessary to the ordinary procedure of the case is a 'surprise' to the party within the meaning of the statute entitling him to relief in such case."

Applying this definition to subdivision 3 of § 7660, Compiled Laws of 1913, which provides for new trials, we are satisfied that the plaintiff and his attorney were entirely surprised that the motion for a new trial should have been granted; that it was an abuse of discretion not to grant such motion for a new trial.

The judgment of the lower court is therefore reversed and the case

remanded to it for a new trial and further proceedings in harmony with this opinion. All costs to abide the final determination of the case.

ROBINSON, J. (concurring). The plaintiff brings this action to undo and cancel a contract for a gas-tractor plowing outfit at $2,525 and freight $150. The plaintiff appeals from the judgment for the defendant and from an order denying a new trial. For the outfit the plaintiffs sold and delivered to the defendant, two horses and two mules at the agreed price of $525, and he paid in cash, freight $150, and he agreed to pay the balance of $2,000 in four equal annual payments, with interest at 7 per cent, and to secure the same by mortgage on the outfit and on real estate. "In making the contract L. A. McGinnity, of McGregor, North Dakota, acted as agent for his brother, Francis J. McGinnity, of Thief River Falls, Minnesota. The outfit was to be delivered to and used by McGinnity at McGregor, North Dakota. The original order-contract was signed by Francis J. McGinnity, and it was agreed on by the two brothers and the salesman of defendant. It contained a full and complete warranty of the plowing outfit which was to be shipped to McGregor, North Dakota, and it provided for the payment of $2,000 according to four promissory notes, each for $500, and interest at 7 per cent.

"Soon after the making and delivery of the order-contract, the salesman of the company went to the brother at McGregor and said that the company refused to accept the contract unless the fi2,000 were made payable in three equal annual payments. The change was agreed to, and our McGinnity wrote his brother a letter concerning it as follows:

. . . Erickson from Minot is here today & said he made a mistake in the terms of contract as he meant 4 payments instead of 4 years now he asked me to drop you a line & explain the change so you would understand it to change the payments from 4 years to 4 payments or four payments, this fall one of payment & 3 falls for ballance. I compared contracts they are exactly the same only change being in payments. He will send you also one & copy after you sign

second. Eng. & plows are ready at Hamlet. ans. at once & let me know what you done. every one O. K.

Your Bro.

L. A. McGinnity.

"The letter was read and given to the sales agent, and at the same time he wrote out a second contract conforming to the agreement, and the same was sent to the office at Fargo. Then the Fargo agent took the letter and the blanks and went immediately to Thief River Falls. There he at once met the plaintiff, and took him to the office of their local agent, and presented to him the letter from his brother and the new order-contract, and also a bill of sale for him to sign, transferring his title to two horses and two mules, a chattel mortgage on the outfit, a real estate mortgage, and three promissory notes:

One note for $667 due Oct. 1, 1914;

One note for $667 due Oct. 1, 1915;

One note for $666 due Oct. 1, 1916.

The agent testified he met McGinnity at Thief River Falls about 11 o'clock; then he went to our dealer's place of business and we talked the matter over. He took the papers all home with him and looked them over. He took them all, the whole thing. He said he wanted to look them over and to have his brother look them over, and he brought the papers back in the afternoon. Then we went over to Halvorson's office and the papers were signed in Halvorson's office. Abst. 105.

On the real merits of the case there is not much room for dispute. The outfit was practically worthless. It was not delivered until about November 1st, when the ground was frozen, and at that time of course the experts could not make it work, and they put off their tests until the following spring. Then they tried again and again to make it work, and they failed, and the plaintiff gave it up, and the defendants foreclosed on the outfit, and so they have it all, and the horses and the mules and a mortgage on the plaintiff's land; and he has nothing, only his sad experience.

Now the first order-contract was advisably made, and it contains a full and complete warranty of the outfit. The second order-contract contained no warranty whatever except this:

"It is expressly agreed that the property herein ordered is not warranted, either expressly or by implication, except that the company warrants ownership thereof at the time and place of delivery.

"Any breach of this agreement or any omission on the part of the company does not confer any right of damage for delay or loss of work or earnings, or to other damages, and shall not affect the rights of the parties with respect to any other machinery sold the purchasers, and no cause of action arising out of this contract or transaction shall be offset or counterclaimed against any liability of the purchaser arising out of any other contract or transaction."

Except in regard to the warranty, the two order-contracts are as much alike as two peas in a pod. They are in a bluish printed form of the same size, and present the same general aspect. Each has the same marginal space, with the same matter printed on each margin. The testimony of the plaintiff and his brother shows, beyond mistake, that they did not purpose to buy an unseen outfit without a warranty, and when they agreed to change the original contract in regard to the terms of payment, there was not a word said about any change in any other respect. No agent of the company has testified that a word was ever spoken about any other change; and yet the second contract, which was produced with the signature of McGinnity, wholly omitted the warranty and expressly covenants that there was no warranty. And yet McGinnity took the papers home with him, and looked them over so carefully to see that there was no change only in regard to the payments, that when he saw his signature on the second order-contract he could not believe it to be his signature, and he disowned it and denied it, but in that he was wrong. However, the order-contract which McGinnity took home with him and examined was not the contract he signed. When he came to sign the lot of papers they "slipped one over on him," and obtained his signature to a contract that he had never seen. Indeed there was no special reason for going to the expense and trouble of making the second contract to change the terms of payment. The real purpose of the second contract was to change the warranty, though not a word was said about that change. In any view that can be taken of the evidence, the change was made by gross and manifest deception, and it was made by smoothness and in a way that McGinnity did not know of it. The manner of doing

it is of little consequence. Doubtless it was done in the easiest and smoothest manner. Where a party is signing a lot of papers, there is nothing easier than to substitute one paper for another, especially when the papers present the same general appearance. Indeed, the trick is altogether too common. Signatures are obtained by any device, and then the signer is asked: Can you not read? Why were you not more careful? What are you going to do about it? And the naked signature is presented as conclusive.

In the forum of law, justice, and common sense this case does not present any real question of law or fact. The judgment must be reversed, with costs and new trial granted.

BIRDZELL, J. (concurring specially). An examination of the pleadings and of the facts presented by affidavit in support of the motion for a new trial makes it to appear beyond question that there are important issues which are properly triable in this action, upon which no trial has been had. The one important question for the determination of this court is whether or not the circumstances which are responsible for the failure to try these issues are such as amount to legal surprise within the meaning of § 7660, Compiled Laws of 1913. If a case of legal surprise existed, it became the duty of the trial judge to grant a new trial.

It must be borne in mind that this is an equitable action, that it was tried as a court case, and that the granting of a new trial upon the issues presented by the circumstances surrounding the obtaining of the second order would not involve the delay and expense attendant upon a second jury trial. As I view the matter, courts are justified in being much more liberal in granting new trials in court cases, under § 7660, Compiled Laws of 1913, than in jury cases; and there is less reason for accepting the findings of a trial judge as a basis for final judgment in a court case where, for an excusable reason, a trial has not been had upon important issues, than in cases where the issues have been submitted to a jury. In my judgment a new trial should be had in this case for the purpose of determining the terms of the contract entered into by the parties, if a contract was in fact consummated. It is true that, upon the first trial, the plaintiff relied upon the order of September 15th, and the defendant upon the order of September 22d,

as constituting the terms of the contract; and, while it seems clear that the order of September 15th did not result in a contract, the record discloses that there is grave doubt as to whether the order of September 22d expressed the contractual understanding of the parties. The granting of a new trial should be confined to this issue under appropriate amendments.

It appears that the plaintiff's attorney, in drafting his complaint, relied upon a copy of an order which had been supplied by one of the defendant's agents. This order was dated September 15, 1913. The answer of the defendant sets up an order alleged to have been signed by the plaintiff September 22, 1913. The reply is a general denial of the new matter set up in the answer. Nowhere in the pleadings are there any allegations of fact with reference to the circumstances surrounding the rescission of the contract evidenced by the order of September 15th, and of the reincorporation of the terms of this order into the order of September 22d. The letters referred to in the opinion of Mr. Justice Grace explain the efforts of the defendant's attorneys to induce the plaintiff's attorney to shift his ground before the trial, and to rely upon the order of September 22d. Plaintiff's attorney, however, upon an examination of the second order and apparently in ignorance of the circumstances surrounding its execution, wrote defendant's attorneys relative to the second order as follows: "That would be worse than buying a 'pig in a poke,' and while *I have not seen the plaintiff in this case,* as he lives in Minnesota, still I take the responsibility under all the circumstances to stand upon my complaint as served and on *the contract which I set up and which he did sign,* and which looks to me would be much more reasonable to assume that he executed said contract than the one sent to the bank. You no doubt have examined the contract sent to the bank, and it expressly provides that there is no warranty of said machinery except as to title, and I never heard a man in this country buying machinery to this amount or less under such contract." It appears that the writer of the above letter, Mr. C. A. M. Spencer, was an old man, who had been practising law for forty years or more. That he was at the time under a mental strain due to the contemplation of the severance of social and business relations extending over a period of a lifetime, and of moving to new surroundings in a milder climate. It is true that the letters of defend-

ant's attorneys and the copy of the order forwarded to the bank for plaintiff's examination showed clearly their intention to rely upon the second order, but it is equally true that the second order was taken by defendant's agents and substituted for the first. No explanation of any sort is found in the correspondence preceding the trial, as to how the second order came to be executed, nor is there even an admission of the execution of the first order. In view of the facts that the plaintiff's attorney had no opportunity to consult his client concerning the second order; that the second order had been executed at the solicitation of the defendant's agent; and that in executing his purpose he had carried to the plaintiff a letter written by plaintiff's brother and agent, suggesting that the defendant's agent had "made a mistake on the terms of the contract, as he meant four payments instead of four years," and that "he (defendant's agent) asked me to drop you a line and explain the change so you would understand it to change the payments from four years to four falls, or four payments, this fall one payment and three falls for balance. *I compared contracts they are exactly the same, only change* being in payments," it seems that the plaintiff's failure to secure the trial of the issues surrounding the execution of the second order or contract is excusable, and that, when upon the trial the issues were confined to the second contract, the plaintiff was compelled to try issues that had previously been regarded by him as having little to do with the case. While it is true that there was perhaps culpable negligence on the part of the plaintiff's attorney in not investigating the facts more closely before the trial, it is equally true that, if defendant had pleaded the rescission of the order of the 15th, according to the facts within its own knowledge, the issues would have been squarely presented. I can see no reason why in a case of this character, under the peculiar circumstances, the consequences of this negligence should be visited upon a suitor.

CHRISTIANSON, J. (dissenting). I dissent. The sole question presented on this appeal is whether the trial court erred in denying plaintiff's motion for a new trial based on the ground of accident or surprise, which ordinary prudence could not have guarded against.

The undisputed evidence shows that on September 15, 1913, the plaintiff executed and delivered to the local sales agents of the defend-

ant an order or purchase contract for a certain gas-tractor plowing outfit. The order specifically provided that it was "taken subject to approval, and is to be sent to the company for acceptance or rejection." The defendant refused to sell the machinery upon this order or purchase contract, and a new order or purchase contract was prepared, which bears date September 26, 1913. The second order or purchase contract was, together with the notes and mortgages involved herein, signed by the plaintiff at Thief River Falls, Minnesota, where he resides. He took all the papers to his home and read them over, before he signed them.

On May 15, 1915, plaintiff instituted this action for the purpose of rescinding the contract of purchase, and to cancel the notes and mortgages, on the sole ground that the machinery failed to fulfil certain alleged express warranties, and that for that reason the consideration for said notes and mortgages had failed. In his complaint plaintiff specifically refers to the contract dated September 15, 1913, and pleads at length certain warranties, terms, and stipulations which it is averred are contained in such contract. On May 24, 1915, defendant's attorneys wrote plaintiff's attorney as follows:

Mr. C. A. M. Spencer, May 24th, 1915.
Attorney at law,
Williston, N. D.

Dear Sir:—

The summons and complaint in the suit of Francis J. McGinnity against the J. I. Case T. M. Company has to-day been referred to us as its general counsel, and on reading the same we note that you set forth in paragraph 5 the form of conditional warranty that was contained in the form of order formerly used by the company in North Dakota, but which was not in use at the time Mr. F. J. McGinnity gave his order, and which form of warranty is not contained in his order; on the other hand, his order contains this stipulation:

"It is expressly agreed that the property herein ordered is not warranted, either expressly or by implication, except that the company warrants ownership thereof at the time and place of delivery."

Under date of March 11th, the company received a request from Mr. George H. Molering, as attorney for Mr. McGinnity, for a copy

of the order, which request was referred to the company's general collector, F. C. Upton, of Minot, for attention, and we are apprehensive that through some oversight he got hold of and sent Mr. Molering the old form of order, which presumably has found its way into your hands, and has possibly misled you in the drafting of the complaint.

We have no desire that you be misled or put at any disadvantage through any error on the part of the company if such is the case, and so take the liberty of writing you. If you desire further assurance of the correctness of our statement, we would be pleased to forward the original order bearing Mr. McGinnity's signature to your bank for your inspection, with the understanding that the bank return it to us. It would serve no useful purpose for either side to litigate this case under a misapprehension of the contract between the parties; and if our surmise is correct we desire to put you right.

Yours very truly,
Upham, Black, Russell, & Richardson.
Per Black.

Thereafter, in response to a request of the plaintiff's attorney, the attorneys for the defendant forwarded the original order or purchase contract to the Williston State Bank, in order that plaintiff and his attorney might call there and examine it. After plaintiff's attorney had made such examination, he elected to stand on the contract as pleaded in the complaint. Defendant thereon interposed an answer which was served on plaintiff's attorney on June 12, 1915, wherein it specifically denied that it entered into the contract pleaded in the complaint, and alleged affirmatively that the contract under which the machinery was sold contained no warranty whatever, but specifically provided that the property was not warranted, either expressly or by implication, except as to ownership; and a copy of the contract dated September 26, 1915, was attached to and specifically made a part of the answer. Plaintiff's counsel thereupon interposed a reply denying the affirmative allegations of the answer. The case came on for trial on February 23, 1916, and resulted in findings in favor of the defendant. Upon the trial plaintiff was represented by Mr. Spencer, the attorney who prepared the summons and complaint and who had been in charge of the cause from its beginning.

Plaintiff's theory upon the trial and his positive testimony was to the effect that the contract pleaded in the answer was a forgery. The issue of forgery was in reality the only one presented to the trial court for determination. The trial court held that the contract was not a forgery. This finding was unquestionably correct. In fact its correctness is virtually conceded on this appeal.

Subsequent to the trial plaintiff engaged new counsel, who moved for a new trial on the ground of accident or surprise, which ordinary prudence could not have guarded against. The theory on the motion for a new trial was that plaintiff was in error when he testified that the contract set forth in the answer was a forgery, and that the trial court's findings that he actually did execute the contract were correct. The new theory is apparently that plaintiff was induced to sign the contract by deception.

The motion for a new trial was based upon the affidavit of one Van Wagen, an attorney, who was not engaged in practice when the action was commenced and who took no part in the trial thereof, but first became actively connected with the case subsequent to the trial. No affidavit was made by the plaintiff to the effect that he was mistaken in his testimony as given, or surprised upon the trial, nor was any affidavit to this or any other effect made by his brother L. A. McGinnity or by attorney Spencer, or by anyone else. The only affidavit submitted in support of the motion was the affidavit of Van Wagen.

It appears, both from the evidence and from the affidavit, that L. A. McGinnity was in charge of the farm, and that practically all of the negotiations between the parties were had by said L. A. McGinnity acting for the plaintiff. In fact the entire correspondence contained in the record was had between L. A. McGinnity and the defendant. Not only is that so, but the claim of surprise contained in the affidavit filed in support of the motion for a new trial is to the effect "that said L. A. McGinnity, agent, was taken by surprise at the same, and, if any order was signed or substituted, said L. A. McGinnity or plaintiff did not know of its existence, and, being so taken by surprise, was unable to present such matter under proper pleadings to the court." There is no other averment in the affidavit claiming any surprise on the part of the plaintiff personally. The affidavit also stated that L. A. McGinnity employed Mr. Spencer to bring the action, and it clearly appears that

he (L. A. McGinnity) was the moving spirit in the entire transaction. According to his testimony the engine failed to give satisfaction, and certain correspondence was had between him and the defendant with respect thereto. During these negotiations a letter dated August 11, 1914, was written by the defendant to and received by L. A. McGinnity, which was in part as follows:

"When our expert Holder was with you on July 13th, if you had allowed him to explain to you how to take care of this tractor, treated him with courtesy, as we surely expect our customers to do, you would have been benefited by it. You will please note the clause in the order which your brother gave us, which reads plainly as follows:

" 'It is expressly agreed that the property herein ordered is not warranted, either expressly or by implication, except that the company warrants ownership thereof at the time and place of delivery.'

"This, however, does not mean that we are not ready to give our customers assistance, as we have also shown you in the part of giving you help whenever you called for it, but owing to the discourtesy you have shown our Mr. Holder, we certainly will not furnish any more experts under these conditions.

"We have forwarded copy of this letter to your brother at Thief River Falls, Minn., so he will understand the situation."

L. A. McGinnity further stated in his testimony that on August 26, 1914, a representative of the defendant, in a conversation, also stated to him that the order or contract of purchase last signed contained no warranty whatever. And, as already stated, the answer of the defendant not only denied the existence of the first contract, but specifically referred to and attached a copy of the second contract.

In Van Wagen's affidavit it is asserted that at the time of the trial plaintiff's attorney Spencer was "quitting" the practice of law and removing from his associates, "covering a period of some forty years, and going to a new and strange part of the country, which caused him anxiety and serious thought, and he could not concentrate his mind on matters he had in charge; and therefore, to affiant's best knowledge and belief, coupled with the fact of surprise, as hereinbefore stated, was legally excused and exonerated from presenting and asking amendments to plaintiff's plea to cover the matter on legal questions arising

on the trial of above cause." Spencer was formerly attorney general of this state; he prepared the summons and complaint and reply in the action; he also examined the second contract. This took place some twenty months before the trial of the action. Even though the approaching departure for California might have caused Spencer "anxiety and serious thought" at the time of the trial, I don't assume that this mental condition existed some twenty months prior thereto, when he examined the contract. The record of the trial bears no evidence of any incapacity or inability on the part of plaintiff's attorney. The cause was well tried on the theory outlined by the pleadings and the testimony given by the plaintiff.

In view of plaintiff's testimony there was no occasion for plaintiff's counsel to ask for an amendment. The very form of the now proposed amendment would have constituted an admission that plaintiff's testimony then given was untrue. As already stated plaintiff has in no manner indicated that he was mistaken in his former testimony, or that the actual facts are as outlined in Van Wagen's affidavit.

It is a cardinal principle that a party must submit to the court the best evidence in his power. Manifestly, plaintiff and his brother L. A. McGinnity knew best whether their testimony given upon the former trial was erroneous, or whether they were surprised by the evidence offered by the defendant. Yet there is complete silence on their part, and a party who was a complete stranger to the proceedings had at the trial makes an affidavit with respect to the alleged accident or surprise.

It should be borne in mind that the trial judge who saw and heard the parties and their counsel, and was familiar with every incident of the trial, refused to grant a new trial. It is elementary that a motion for a new trial on the ground of surprise or accident is addressed to the discretion of the trial court, and that its ruling will not be disturbed on appeal, unless a plain abuse of such discretion appears. Hayne, New Tr. & App. § 86. The statute says that a new trial may be granted for "accident or surprise, which ordinary prudence could not have guarded against." How can it be said that the plaintiff or his agent, L. A. McGinnity, was surprised by the introduction of the second contract, or that ordinary prudence on their part could not have guarded

against such surprise? The undisputed facts are that both the plaintiff and his brother L. A. McGinnity had actual knowledge of the fact that the plaintiff had executed two different orders or purchase contracts, with the understanding that the latter superseded the first. In his complaint plaintiff asked for a rescission of the order or purchase contract dated September 15, 1913, yet at the time he commenced the action he had in his possession the letter from his brother L. A. McGinnity dated September 22, 1913 (set out in the opinion of Mr. Justice Grace), which plaintiff claims was delivered to him at the time he signed the second contract. Not only were they possessed of this knowledge, but on August 11, 1914, some nine months prior to the commencement of the action, they were both specifically notified by letter to the effect that the second contract contained no warranties. After the commencement of the action, plaintiff's counsel was specifically notified by defendant's attorneys that the contract or order on which the goods were sold contained no warranties, and the original contract was submitted to plaintiff's attorney for examination, and a copy thereof attached to and made a part of defendant's answer.

"Accident and surprise, in order to furnish a basis for new trial," says Spelling (Spelling, New Tr. & App. Pr. § 189), "must be such in legal sense. Mere neglect to prepare for what may be reasonably anticipated, and consequent surprise, do not present the condition contemplated by statutes giving the remedy only where ordinary prudence could not have guarded against it.

Where the pleadings indicate with reasonable certainty the line of proof which may be expected to be pursued by either party, the other and losing party cannot predicate surprise solely upon the introduction by his opponent of evidence different from what he expected would be offered. Where a plaintiff has simply proved the allegations of his pleadings, the defendant cannot complain of surprise."

In discussing the same subject Hayne (Hayne, New Tr. & App. § 79) says: "The general rule is that each party must understand his case, and come prepared to meet the case made by his adversary. Therefore a party cannot be surprised that his adversary introduces testimony in support of the issues made by the pleadings, even though such testimony be false; nor can he be surprised at the introduction of a document mentioned in the pleadings." See also Ernster v. Christianson, 24

S. D. 103, 123 N. W. 711; Crowell v. Harvey, 30 Neb. 570, 46 N. W. 709; Matoushek v. Dutcher, 67 Neb. 627, 93 N. W. 1049.

In my opinion the order denying a new trial should be affirmed.

BRUCE, Ch. J. I concur in the dissenting opinion of Mr. Justice Christianson.

STATE OF NORTH DAKOTA v. ROBERT STANLEY.

(164 N. W. 702.)

Crime of bootlegging — prosecution for — information — sufficiency of — — charging clause.

1. In a prosecution for the so-called crime of bootlegging, under the provisions of § 10,144 of the Compiled Laws of 1913, an information is sufficiently definite which charges that the crime was committed in a barn on a certain block in a certain city and county, and the name of the owner of such barn is not necessary.

Bootlegging — crime of — how committed — premises — owner of — permission of — licensee merely.

2. Under § 10144, Compiled Laws of 1913, which provides that "the crime of bootlegging . . . is committed by any person who sells . . . intoxicating liquor . . . in the buildings of any person, . . . without the permission of the owner [or] of the person entitled to the possession of such . . . buildings," no such ownership or right of possession exists in one who merely has an agreement with a livery-stable keeper that he may keep a horse in a barn which may be rented out, and, in lieu of charging for the stabling and hay, the livery-stable owner may keep one half of the proceeds of such renting, the owner of such horse being *held* to be a licensee merely.

Evidence — sufficiency of — jury — verdict.

3. Evidence examined and *held* sufficient to justify a finding of the jury that there was an illegal sale.

Court — instructions to jury — waiver of written — consent to oral — defendant asked if he so consented — in presence of jury — no error.

4. Where no error has been committed in the instructions to the jury, no complaint can be made upon the ground that the defendant was suddenly asked at the close of the evidence, and in the presence of the jury, if he would waive written, and consent to the giving of oral, instructions.

Bootlegging — prior sales — in same place — by same defendant — admissible — may show purpose — intent — and plan of defendant — treating.

5. Evidence of prior sales in the same place and of prior shipments may be admitted in a prosecution for the crime of bootlegging, in order to show purpose, intent, and plan, and when the defense is that the transaction was a joint purchase and treat, and not a sale.

Opinion filed June 28, 1917. Rehearing denied October 13, 1917.

Prosecution for the crime of bootlegging.

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

Judgment for plaintiff.

Defendant appeals.

Affirmed.

M. H. Brennan, for appellant.

The commitment was void because of no indorsement on the complaint by the magistrate, and defendant should have been released on habeas corpus. State v. Rozum, 8 N. D. 548, 80 N. W. 480; Comp. Laws 1913, §§ 10,616, 11,375; Ex parte Branigan, 19 Cal. 138.

In a legal sense a person is drunk when he is visibly excited, or his judgment is impaired by liquor. He is not, under such circumstances, capable of making a contract, and cannot be capable of understanding the matter of waiving an examination in a criminal action. State v. Pierce, 65 Iowa, 85, 21 N. W. 195; 1 Whart. & S. Med. Jur. p. 13.

Where the charge of selling liquor is made in a certain city, it is insufficient if it does not state a definite place in that city at which the sale is claimed to have been made. Arrington v. Com. 87 Va. 96, 10 L.R.A. 242, 12 S. E. 224.

Ownership of the building or property where the sale took place must be alleged and proved. 6 Cyc. 204; State v. Trapp, 17 S. C. 470, 43 Am. Rep. 614.

In this case the state should have pleaded and proved a partnership. 6 Cyc. 215; State v. Rivers, 68 Iowa, 611, 27 N. W. 781; Emmonds v. State, 87 Ala. 12, 6 So. 54; Davis v. State, 54 Ala. 88.

The owner of a building cannot be convicted of this crime merely because some person entered the building and began to sell liquor there. Knowledge and consent must be clearly shown. State ex rel. Kelly

v. Nelson, 13 N. D. 125, 99 N. W. 1077; Merryfield v. Swift, 103 Iowa, 167, 72 N. W. 444; State v. Lawler, 85 Iowa, 564, 52 N. W. 490; Morgan v. Koestner, 83 Iowa, 134, 49 N. W. 80; State v. Severson, 88 Iowa, 714, 54 N. W. 347; State v. Price, 92 Iowa, 181, 60 N. W. 514.

The defendant, charged with selling to three persons jointly, cannot be convicted of an illegal sale to but one of the three named. State v. Williams, 20 S. D. 492, 107 N. W. 830; State v. Julius, 29 S. D. 638, 137 N. W. 590; State v. Gordon, 32 N. D. 31, 155 N. W. 59.

On the trial of a person accused of crime, proof of a distinct, independent offense is inadmissible. People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; State v. Miller, 20 N. D. 509, 128 N. W. 1034; State v. Fallon, 2 N. D. 510, 52 N. W. 318; Johnson v. State, — Tex. Crim. Rep. —, 62 S. W. 755; Freedman v. State, 37 Tex. Crim. Rep. 115, 38 S. W. 993; Walker v. State, 44 Tex. Crim. Rep. 546, 72 S. W. 861; State v. Dooley, 89 Iowa, 584, 57 N. W. 414; State v. Murphy, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133.

Intent will be inferred from the act. Consequently the extraneous incidents were all inadmissible on the pretext of showing intent, and such evidence will be presumed to be harmful. Rock v. State, — Ind. —, 110 N. E. 212; Hood v. State, 56 Ind. 275, 26 Am. Rep. 21, 2 Am. Crim. Rep. 165; Marmont v. State, 48 Ind. 31, 1 Am. Crim. Rep. 447; Porter v. State, 173 Ind. 703, 91 N. E. 340.

Where evidence of other offenses is offered, a complete case must be made out, that is, a crime must be shown. Baxter v. State, 91 Ohio St. 167, 110 N. E. 456; Baldwin v. State, 11 Okla. Crim. Rep. 228, 144 Pac. 634; People v. Plummer, 189 Mich. 415, 155 N. W. 533; Chipman v. People, 24 Colo. 520, 52 Pac. 677; State v. Fulwider, 28 S. D. 622, 134 N. W. 807; State v. Benson, 154 Iowa, 313, 134 N. W. 851; State v. Hakon, 21 N. D. 133, 129 N. W. 234; Elliott, Ev. § 156.

It is not sufficient to offer evidence of other crimes, even though remote intent may appear. State v. Foxton, 166 Iowa, 181, 52 L.R.A. (N.S.) 919, 147 N. W. 347, Ann. Cas. 1916E, 727.

The court erred in asking the parties immediately after argument if they would waive written instructions and consent to oral, especially

when in open court and in the presence of the jury. Forzen v. Hurd, 20 N. D. 42, 126 N. W. 225.

Defendant was entitled to an instruction requiring the state to apprise him of what transaction it relied on and requiring it to elect on which it proposed to stand. State v. Poull, 14 N. D. 557, 105 N. W. 717; State v. Boughner, 7 S. D. 103, 63 N. W. 542.

William Langer, Attorney General, and *Rollo F. Hunt,* State's Attorney, for respondent.

In appeal cases the court must give judgment without regard to technical errors or defects or exceptions, which do not affect the substantial rights of the parties. Comp. Laws 1913, § 11,013.

All the law requires in an information is that it shall contain a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended. Comp. Laws 1913, chap. 8, Code Crim. Proc.; State v. Longstreth, 19 N. D. 268, 121 N. W. 1114, Ann. Cas. 1912D, 1317; State v. Lewis, 13 S. D. 166, 82 N. W. 406; State v. Hellekson, 13 S. D. 242, 83 N. W. 254; State v. Kent, 4 N. D. 577, 27 L.R.A. 686, 62 N. W. 631; State v. Burchard, 4 S. D. 548, 57 N. W. 491; Deadwood v. Allen, 8 S. D. 618, 67 N. W. 835.

It is not necessary to describe with particular accuracy the exact location where the offense of selling intoxicating liquors is committed. State v. Rozum, 8 N. D. 548, 80 N. W. 477; State v. Donaldson, 12 S. D. 259, 81 N. W. 299; State v. Cambron, 20 S. D. 282, 105 N. W. 241; Arrington v. Com. 87 Va. 96, 10 L.R.A. 242, 12 S. E. 224.

Bootlegging in a building consists in selling or bartering intoxicating liquors without the permission of the owner or person entitled to the possession of such building. The information clearly charges such offense. Comp. Laws 1913, § 10,144.

The question of making the information more definite and specific is a matter of discretion with the trial court. State v. Hakon, 21 N. D. 135, 129 N. W. 234.

The testimony discloses a complete sale of intoxicating liquor by defendant to the three persons named and at the time and place stated in the information, and defendant's efforts to evade consist of the most meager technicalities. State v. Dellaire, 4 N. D. 312, 60 N. W. 988; Nelson v. United States, 30 Fed. 112; McCuen v. State, 19 Ark. 630;

Hill v. Dalton, 72 Ga. 314; Parmenter v. United States, 6 Ind. Terr. 532, 98 So. 340; State v. Brooks, 33 Kan. 708, 7 Pac. 591, 6 Am. Crim. Rep. 299; State v. Whisner, 35 Kan. 271, 10 Pac. 852; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073; State v. Moseli, 49 Kan. 142, 30 Pac. 189; Lincoln Center v. Linker, 5 Kan. App. 242, 47 Pac. 174.

It is proper to offer evidence of independent offenses committed by defendant where they tend to disclose motive, intent, or system on the part of defendant. Jones, Ev. 2d ed. §§ 143, and 144; People v. Giddings, 159 Mich. 523, 124 N. W. 546, 18 Ann. Cas. 844; Pitner v. State, 37 Tex. Crim. Rep. 268, 39 S. W. 662; Walker v. State, 49 Tex. Crim. Rep. 345, 94 S. W. 230; Archer v. State, 45 Md. 33, 2 Am. Crim. Rep. 404; Com. v. Sinclair, 138 Mass. 493, 5 Am. Crim. Rep. 330; State v. Miller, 20 N. D. 509, 128 N. W. 1034; State v. Fallon, 2 N. D. 510, 52 N. W. 318; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69, 2 Am. Crim. Rep. 506; State v. Murphy, 17 N. D. 48, 17 L.R.A.(N.S.) 609, 115 N. W. 84, 16 Ann. Cas. 1133; People v. Molineux, 168 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286; State v. Hakon, 21 N. D. 133, 129 N. W. 234; State v. O'Brien, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006; State v. Peterson, 98 Minn. 210, 108 N. W. 6.

The statute does not require the court to give written instructions in all cases. Where the parties and counsel are all in court, and consent is asked by the court and given by counsel, oral instructions may be given. It is not a question of ethics or propriety. Forzen v. Hurd, 20 N. D. 42, 126 N. W. 224; State v. Poull, 14 N. D. 557, 105 N. W. 717; State v. Boughner, 7 S. D. 103, 63 N. W. 542.

Robinson, J. In this case the defendant has been convicted of the crime of bootlegging, and he appeals to this court. The conviction is under Comp. Laws, § 10,144. The crime is committed by any person selling intoxicating liquors one or more times to one or more persons upon public roads, streets, or alleys, or upon lands and buildings of any person, without the permission of the owner of such land or buildings. The charge against the defendant is that on July 3, 1915, in Devils Lake, Ramsey county, he did sell to each of three certain persons intoxicating liquors as a beverage, in a frame barn of one Maher & Lock, and that he did it without the permission of the owners of

said barn. Clearly the information states an offense within the statute, and the evidence shows beyond all doubt that the defendant is guilty. It also shows that he got drunk, and contracted to sell a case of beer, and received the money without delivering the goods. Six dollars and fifty cents was paid to Stanley for a case of beer. He pocketed the money, as he himself admits, and failed to deliver the beer. He quarreled with the purchasers, and became aggressive, and struck one of them when requested to return the money or to deliver the beer.

Five express orders made to a wholesale liquor house in St. Paul were put in evidence in connection with testimony of the defendant himself and other witnesses. These make a conclusive showing that, during the month of June, defendant sent five orders to St. Paul for whisky, and every order was for 24 pints.

Defendant is a married man. He called as witnesses his wife and his son, a boy of seventeen years. He was a witness for himself and against himself. His own testimony strongly corroborates the positive testimony against him, though he positively denied selling any liquor, as charged against him.

The long record shows needless objections to nearly every question. It contains an assignment of numerous exceptions and errors, but the objections and exceptions merit no consideration when the information is clearly sufficient and when the evidence shows, as it does, the guilt of the defendant beyond a doubt. This statute is drastic, but its purpose is good. It was to put a stop to such a nefarious proceeding as disclosed by the evidence in this case. Judgment affirmed.

On a Petition for a Rehearing.

BRUCE, Ch. J. A petition for a rehearing has been filed in which counsel for appellant maintains that errors have been made in the principal opinion in the statement of facts, and that some material points urged by him have not been passed upon.

He first complains that the opinion states that the charge against the defendant was that he sold liquor "in a frame barn of one Maher & Lock," when as a matter of fact the information stated that the "crime was committed in a certain frame barn situated in block No. 1 of Maher & Locke's addition to the city of Devils Lake."

Counsel is correct in this contention. We believe, however, it makes no difference. The block is specifically mentioned, and though counsel assumes that there may have been eight or ten barns in the block, and that the information was therefore indefinite, the record only discloses two,—the feed barn and the small barn in close proximity thereto, both of which were resorted to and involved in the illegal transaction. See State v. Donaldson, 12 S. D. 259, 81 N. W. 299.

Counsel also criticizes the statement in the opinion that the defendant got drunk and contracted to sell a case of beer, and *received money without delivering the goods.* This we concede to be immaterial, but its immateriality does not affect the results of the decision and the merits of the case.

Counsel also criticizes the remark in the opinion that "when the evidence leaves no doubt of the defendant's guilt, the court will not consider objections or exceptions." This, of course, goes too far. The defendant must, of course, be convicted according to due process of law and upon competent evidence. We will, however, we believe, hereafter show that no errors existed which were material or which prejudiced his rights; and we now come to the points which appellant contends the court overlooked or neglected to mention in its principal opinion.

It is first claimed that the opinion failed to consider the defendant's right to a discharge on habeas corpus. It is very clear to us, however, that this particular matter may not now be reviewed.

Counsel also contends that the court did not consider the question whether the defendant had previously had a preliminary examination. This question resolves itself into a determination whether such preliminary examination was waived or not. Appellant contends that he was drunk at the time, while the respondent contends that he was not. As all these matters, however, were fully gone into on two writs of habeas corpus, we do not feel called upon at this late day to go into the matter and to determine from the conflicting affidavits the various stages of intoxication which make acts binding or invalid; it being apparent that since that time the defendant has had ample opportunity to prepare for his trial, and the jury in the case at bar having found that the commitment was justified.

Should a new trial be granted because the testimony of the witnesses

J. A. Moran and William Moran and Charles Kaufman and A. Dick, and the exhibits known as the express money orders, were inadmissible? Should the defendant have been acquitted on the ground that the evidence showed that he was an occupant of, and had the right to the possession of, the premises where the liquor was sold, if sold at all, and he was therefore technically not guilty of the crime of bootlegging, and also because there is no proof of any sale being made by him? Should a new trial be granted on account of the fact that the clerk's minutes stated that an oral charge was consented to when "after so long a case so bitterly contested it was not in accordance with the law to spring upon the attorneys just after a heated argument the question whether they consented to an oral charge?"

And first as to the oral charge. We have no fault whatever to find with the language of this court in the case of Forzen v. Hurd, 20 N. D. 42, 126 N. W. 225, wherein it said: "It is apparent that this exception [in the case of a consent] was not intended to abrogate the rule requiring that instructions be in writing, but was enacted for the purpose of permitting the giving of an oral instruction in an exceptional class of cases, usually of small importance, in which both parties have voluntarily consented that this may be done. The contemplation of the statute is evidently that this consent shall be volunteered by the party, or, at least, that, if requested by the court, the request should be made at a time when there is still abundant opportunity for the court to prepare its instructions in case such consent is refused by either party, without interfering with the progress of the trial. . . . A proper respect for the rights of litigants would seem to dictate that such request should not be made in the presence of the jury, or in such manner that either party, if he sees fit to refuse assent, will suffer prejudice in the minds of the jury on account of resulting delay."

It is clear, however, that under the numerous decisions of this court this reasoning can only apply where error has been committed in the instructions, and we are satisfied that no such defect exists in the charge which is before us.

But should the jury have been advised to return a verdict for the defendant on the ground that the crime charged was the crime usually known as "bootlegging," and that the evidence showed that he was

an occupant of and had the right to the possession of the premises where the liquor was alleged to have been sold?

We think not. It is true that the crime of "bootlegging" cannot ordinarily be committed on one's own property, and that the statute provides that "the crime of bootlegging . . . is committed by any person who sells or barters . . . one or more times [any intoxicating liquor] to one or more persons . . . in the buildings of any person . . . without the permission of the owner [or] of the person entitled to the possession of such . . . buildings." See § 10,144, Comp. Laws 1913.

We think, however, that the ownership in another, and lack of permission, was sufficiently alleged by the paragraph of the information which charged that "the said barn *not then* and there *being the property of the said* defendant, Robert L. Stanley, and he, the said Robert L. Stanley, not then and there having permission of the owner thereof or the person entitled to the possession thereof to sell and barter intoxicating liquors thereon."

We also are of the opinion that the only proof as to ownership or right of possession of the said defendant was the fact or alleged fact that he had a team in the barn, which was being used as a livery team under an agreement with the owner of the premises that the latter was to have one half of the earnings of such team in lieu of the regular charges for stable room and hay. It is clear to us indeed, that the said defendant was in no sense the owner of or entitled to the possession of the building, but was a licensee merely.

We think, too, that there was sufficient evidence from which the jury might properly find that an illegal sale had been made.

Uriens testified that he and the two Brissler boys met the defendant at 4 o'clock; that one Fursteneau pointed out Stanley to them; that he and the Brissler boys made up a purse of $6 to get a case of beer; that Fursteneau wanted to chip in and get a quart of whisky; that they raised $2; that they gave it to Fursteneau; that Fursteneau went straight to the barn; that Stanley was standing in front of the barn; that they walked inside; that Fursteneau came back with a quart of whisky; that later on he, Fursteneau, and the two boys, went to the barn and there saw Stanley and the fellow who was running the barn; that they got some more whisky from Stanley at the barn; that they were upstairs.

Q. Did you see any more gotten in your presence of Stanley?

A. Yes, sir. We were upstairs. Stanley went down and got a quart of whisky, and came up and said he would stand one half, and Walter Brissler gave him a dollar for the other half, and we drank that. I saw Stanley give Bob the whisky. I saw Bob give Stanley the dollar. Stanley brought the whisky up from downstairs. We didn't get the beer that we chipped in for. The money was given to Stanley. Louie Fursteneau gave him the money, and he took it, and put it in his pocket, and took a roan mare and rode off down town and came back, and we asked him how he made it, and he said "all right, coming up."

Q. Did it ever come?

A. No, sir. We got ready to go home, and I told the Fursteneau boy it was getting late, and I says, "We want our beer or our money," and he says, "I will go and get it," and he says, "We want the liquor or our money." He says he didn't have our money, and he called him a liar, and Stanley struck him.

Q. Did you take part in any dice game there that day?

A. I think I did upstairs. Walter Brissler, Arthur Brissler, myself, and several others were in the party. They shook for a bottle of whisky. I was high and went out. Stanley was the last man who got stuck. He went down and got a quart. He was gone just a short bit. When Stanley came up Brissler gave Bob a dollar. Bob got stuck for the drinks. He got stuck for the pint. I think Bob said somebody would have to come across for the other pint, and Walter throwed him a dollar. When Stanley came back he had a quart bottle, and he said someone would have to come across for the other pint, and Walter took out a dollar and gave it to him.

Other witnesses testify to the same effect, and this, to our minds, in conjunction with the testimony of the witness Christenson, of a sale to him at the same place on the day preceding, and the records of the express office showing that, during the sixty days preceding the offense, the defendant secured extensive shipments of liquor, was sufficient to sustain the verdict of the jury.

We are also of the opinion that evidence of this prior sale and of these shipments was admissible as tending to show a motive or intent and system and a plan. 15 R. C. L. 398; Matkins v. State, — Tex.

Crim. Rep. —, 58 S. W. 108; State v. O'Brien, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006; People v. Giddings, 159 Mich. 523, 124 N. W. 546, and note to 18 Ann. Cas. 844, 846.

We are therefore of the opinion that the petition for a rehearing should be denied, and it is so ordered.

CHARLES BREADY v. EMIL MOODY.

(164 N. W. 946.)

Agent — commissions for selling land — action to recover — must tender a purchaser — terms and conditions — compliance with — ready — willing and able.

In order that an agent may recover commissions for selling land, he must tender a purchaser having ability and being ready and willing to pay for the same upon the terms and conditions under which the land was listed and the agent was authorized to sell.

Opinion filed October 16, 1917.

Action for commission on sale of land.

NOTE.—The general rule that a real estate broker, to be entitled to commissions, must find a purchaser able, willing, and ready to purchase on terms prescribed in the contract between the principal and such broker, is applicable if the owner refuses to consummate the sale, even though the only deviation from the broker's authority is the stipulation in regard to the cash payment, or length of time given to make the various payments, as will be seen by an examination of the cases discussed in note in 21 L.R.A.(N.S.) 935, on the right of a broker to commissions where he procures a purchaser at the price stated by his principal, but on slightly different terms in regard to cash or time of payment, and the owner refuses to consummate the sale. How much more is this true when, as in the case above, the contract was not in any substantial sense in compliance with the terms and conditions of the broker's authority to sell.

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

Judgment for defendant.

Plaintiff appeals.

Affirmed.

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

The purchaser tendered by appellant was ready, willing, and able to buy the land on the terms and conditions of the sale authorized, and therefore appellant is entitled to recover his commissions. Elwood Emerson Land Co. v. Bleasdela, — Iowa, —, 139 N. W. 554; Ketcham v. Axelson, 160 Iowa, 456, 142 N. W. 62.

"The test of the agent's right to a commission for finding a purchaser is not whether his agreement with the purchaser is specifically enforceable, but whether he has found a purchaser able, ready, and willing to take the property on the terms prescribed by the principal." McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; McDonald v. Smith, 99 Minn. 42, 108 N. W. 291; Northern Immigration Asso. v. Alger, 27 N. D. 467, 147 N. W. 100; Jones v. Buck, — Iowa, —, 120 N. W. 112; Sullivan v. Milliken, 51 C. C. A. 79, 113 Fed. 93; Chaffee v. Widman, 139 Am. St. Rep. 225, note.

Flynn & Traynor, for respondent.

A real estate agent has authority to effect a purchase or sale only at the price and on the terms and conditions fixed by the principal, and he has no authority to change any of the terms imposed by the principal, such as the price, time of payment, or rate of interest, or any other material condition. 9 C. J. 525, 595, and 603; Ballou v. Bergvendsen, 9 N. D. 285, 83 N. W. 10; Grangaard v. Betzina, 33 N. D. 267, 156 N. W. 1035; Speer v. Craig, 16 Colo. 478, 27 Pac. 891; Balkema v. Searle, 116 Iowa, 374, 89 N. W. 1087; Fairchild v. Cunningham, 84 Minn. 521, 88 N. W. 15; Schultz v. Griffin, 121 N. Y. 294, 18 Am. St. Rep. 825, 24 N. E. 480.

The broker cannot sell the land to himself without consent of his principal. Chezum v. Kreighbaum, 4 Wash. 680, 30 Pac. 1098, 32 Pac. 109; Tate v. Aitken, 5 Cal. App. 505, 90 Pac. 836; Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808.

Bruce, Ch. J. The controversy in this case is over the commission

for selling a piece of land on the 8th day of March, 1915. The defendant, Moody, gave to the plaintiff a written list containing the following provision:

"I hereby grant to Charles Bready, of Mohall, North Dakota, the exclusive sale of said property for a period of eight months from the date hereof, and thereafter, until I shall revoke the same by a notice in writing, for seven thousand dollars ($7,000), land and crop on the following terms, *viz.:*

"Five hundred dollars cash, and the balance in crop contract, all payments payable in five years from date of sale, and in case of the sale of said premises I agree to pay to Charles Bready a commission of all over my price besides any sum said land shall sell for in excess of my price as is named above; said commission to be paid in cash, and to be deducted from the first money paid by the purchaser of said property."

On the 2d day of October, 1915, no sale having yet been made, the plaintiff wrote to the defendant as follows:

"I have been making an extra effort to sell your land for you, and taken it up with eastern parties, who are bringing men here. One of these parties had a man here last week, during the rainy, disagreeable weather; and I was unable to close with him, for the reason that it was practically impossible to drive, and conditions were not right. Now, if I can succeed in making a deal, it will be necessary to sell for quite a little above your price, as I will have to pay two different agents commissions, and I believe it will be possible to sell your land and make these different fellows wait until you have your pay out of the land before they get anything. This party coming from Minnesota would be in good shape in the way of having stock and horses, and would agree to dig the stone and break 100 acres this coming spring, would fix all of the buildings in the way of painting them, and put on other little improvements and make the place worth quite a little more than it is at present. They are not in the habit of paying over 6 per cent, but this party I could probably arrange so that he could start his interest from December 1st, or thereabouts, and that would be much better than a higher rate beginning the interest in the spring. If terms of this kind would be agreeable to you, we could likely get you net to you, $7,000, and draw the papers in such a way that the party moving on this place would have to make these improvements and

put in all his crop. His contract would then terminate on the 16th day of July, next year, in event of him failing to live up to his contract in the way of improving and breaking. Now, while this party would not make any payment, I am personally acquainted with the party, and feel that a contract with him without a payment would be much better than a small payment from the average man, because I am thoroughly convinced, if I am able to close a contract at all, that he is the kind of a farmer that would pay out on this land in a very short time.

"Now, Mr. Moody, you can rest assured that, if I was not thoroughly convinced that this party would pay out, I would not ask you to make this deal, for the reason that I am bound to be under quite a little expense, and will necessarily have to see your deal through and complete, as *I would figure in drawing the papers, you should get all of your money first.* If I get hold of this party again, I will try and draw a contract with him, which of course will be subject to your approval, but it will be along the lines mentioned. If for any reason you do not think it would be a good contract for you, you had better let me know by return mail, as I have already been to some little expense, and I cannot make him do any better. I will see to it that, in drawing the contract, that within a very few years your whole place will be under cultivation and it would then be a nice farm."

In reply to this letter, and on October 9th, the defendant wrote the plaintiff as follows:

"Your letter of the 3d is at hand. I would be glad if you could make a deal and to a good man that will improve the land. I would also be glad if you can make some money out of the deal so that everything will be satisfactory. It will be hard for me to meet my bills this fall if I do not get any money down, but it will not be any better if I should not make a deal. So, you make a deal if you can. I do wish I knew what I could get out of that crop. I can get anything I want but money. Well, do the best you can and as quick as you can, that will suit me."

On November 5, 1915, the plaintiff wrote to the defendant as follows:

"I am herewith inclosing you a crop contract for the sale of your half section of land to William McMahon, of Fairbault, Minnesota, at $8,000. Mr.McMahon is to fix over the buildings and put them in a

habitable condition, also to paint them. He is to dig the rock and break 100 acres of the land before August 1, 1916. There is also a privilege in this contract for you to increase the indebtedness against the farm up to $4,500. Now it looks to me as though this is a very favorable contract for you. I am on the ground here, and intend looking after that contract and see that it is fulfilled right to the scratch, especially the first year. However, after he gets the 100 acres broke and the buildings painted and fixed up, and half of the first crop turned toward the farm, I do not think it will need as constant attention as it will during the first year. Now then, Mr. Moody, I have got to pay out quite a large commission on this deal, in fact I have to pay $2 per acre, so *I have drawn a note and mortgage, which accompanies the contract,* and if you will read the mortgage over carefully, you will note that this note and mortgage does not cut any figure unless the contract is fulfilled, so I want you to read them all over carefully and have them examined by anybody there whom you do business with, and see that they are in proper form to your satisfaction. *Then sign them, yourself and your wife, before a* notary public, both the crop contract and the mortgage, and return them to me, and this deal is then closed.

"I will assure you, however, unless Mr. McMahon falls down in the spring that you have made a sale of your farm, because if he will dig the rock and break 100 acres of that land, as is called for in that contract, and also get the buildings fixed up, I will assure you that there will be no trouble in me taking over the place and selling it to somebody else. Mr. McMahon is the party who has purchased the Nels W. Carlson farm, and he is starting up two big farms there,—a section in one farm and three quarters in the other. He is bringing some young men here from Minnesota, so I do not believe there is any question but what you will get your money very soon. Kindly sign the inclosed note contract and the mortgage, and return them to me as soon as possible."

In this letter was inclosed a crop contract for the purchase of the said land, signed by one William McMahon, and a note and mortgage for the sum of $1,000, which mortgage was security upon the premises for payment of said note, and was intended to represent the plaintiff's commission. The mortgage contained the following provision:

"The purpose of the mortgage is to secure a commission due Charles Bready on account of a contract for sale of the above-described land. It is understood between the mortgagee and the mortgagor that, in the event of William McMahon failing to perform the agreements in the referred-to contract of sale between himself and Emil Moody and Hulda Moody, that in that case this mortgage becomes inoperative. But it is further understood and agreed that the said Charles Bready shall have a reasonable time to perform the agreements entered into by William McMahon's contract, and that, in the event of the said Charles Bready completing the said contract, the title of the land shall run to Charles Bready or his assigns. It is further understood that, in the event of Charles Bready or his assigns completing the William McMahon contract, in that case, this mortgage shall be of full force and effect."

This contract the defendant refused to sign, and the plaintiff brings this action for the recovery of the $1,000 commission, which was the amount of money which he made on the sale of the land, he having sold it for $8,000 and having had a list price of $7,000 from the defendant.

The trial court found for the defendant and entered judgment dismissing the complaint on the ground that the plaintiff had wholly failed to prove that he had procured a purchaser for the above-described land, having ability to pay for the same upon the terms under which the same was listed, and that the cropping contract signed by McMahon was not in any substantial sense in compliance with the terms and conditions upon which the plaintiff was authorized to sell the said land.

In these findings the learned trial judge was correct.

The signing of the note and mortgage (and these were required to be signed by both the defendant and his wife) was a part of and a condition of the proposed sale. The offer to the defendant contained in the plaintiff's letter of October 2d expressly stated that the defendant *should get all of his money first.* It also stated that the contract when drawn should be subject to defendant's approval and along the lines mentioned. It said nothing about the execution of a commission mortgage by the defendant and his wife, nor did it say anything about the right of the plaintiff to himself take up the contract in case of the failure of the original vendee. Though it is true the defendant told

the plaintiff in general terms to do the best he could and that that would suit him, it must have been intended that the plaintiff should proceed along the general lines outlined in his letter of October 2d, and it could never have been intended or presumed that the plaintiff himself should be the purchaser. Northup v. Bathrick, 80 Neb. 36, 113 N. W. 808; Tate v. Aitken, 5 Cal. App. 505, 90 Pac. 836.

Although, also, the listing agreement provided that all payments should be made in five years from the date of sale, and this was not changed by the letters in any way, the contract provided that McMahon should have seven years in which to make the same.

There are also other variations from the terms of the original agreement and the letter of October 2d, but which need not be emphasized here.

The judgment of the District Court is affirmed.

Judge GRACE, being disqualified, did not participate.

ROBINSON, J. (concurring specially). The plaintiff appeals from a judgment against him in this suit to recover $1,605, commission on an alleged listing contract for the sale of a half section of land. The listing contract was to the effect that plaintiff might contract for the sale of the land at $7,000 net to the owner, $500 cash, and the balance on crop contract, payable in five years. The plaintiff wrote defendant offering to contract with a party for the sale of the land on different terms, "which will be of course subject to your approval." To this the answer was: "Do the best you can and as quick as you can, that will suit me." The plaintiff obtained from one William McMahon a crop contract for the purchase of the land on crop payments in seven years, without any cash payment. He mailed that proposed contract to defendant, in California, for the signature of himself and his wife, with a mortgage on the land for $1,000, payable to the plaintiff, to be executed by the defendant and his wife. He writes defendant: "I want you to see that they are in proper form, to your satisfaction." Well, they were not in proper form to the satisfaction of defendant and he returned them. He did not care to give plaintiff a mortgage on his land for $1,000 and a half of the crop grown on it during the season of 1915, worth $605, in exchange for a seven-year cropping contract with a per-

son not able to make any cash payment and of no assured responsibility. Defendant was not such a fool. It is exceedingly nervy for anyone to appeal such a case to this court or to any court.

JOHN R. McCOY and W. F. Bryan v. H. A. DAVIS and J. W. Bowen, Copartners as Davis & Bowen.

(164 N. W. 951.)

Real estate — record owner — judgment against — unrecorded deed — void as judgment lawfully obtained — execution on such judgment — sale — certificate — purchaser — notice of deed.

1. Under § 5594, Comp. Laws 1913, an unrecorded deed is void as against a judgment lawfully obtained against the person in whose name the title to real property appears of record. And the certificate of sale issued to a purchaser upon a sale legally held under an execution issued upon such judgment is valid as against an unrecorded deed, of which the judgment creditor and purchaser had no notice.

Real estate — record owner — judgment against — lawfully obtained — sale under execution — certificate — valid as against unrecorded deed.

2. Under the stipulated facts in this case, it is *held* that an unrecorded deed held by the plaintiffs is void as against a judgment lawfully obtained by the defendants against the then record owner of the premises involved, and the certificate of sale issued to them upon a sale under the execution issued upon the judgment.

Statutes — constitutionality of — first raised on appeal — general rule.

3. As a general rule the constitutionality of a statute cannot be first raised on appeal in a civil action.

Constitutional question — court — must be properly before — action — necessarily involved in.

4. A court will pass upon a constitutional question only when such question is properly before it and necessarily involved.

Statutes — annulment — record — courts should not go outside of.

5. Courts should not, of their own volition, go outside of the record and

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NOTE.—The priority of liens of a judgment or of a prior unrecorded conveyance seems to be a matter of the wording of the local statute, as will be seen by an examination of the cases on the subject in note in 16 L.R.A. 668.

search for reasons for annulling a statute, nor should they conjure up theories to overturn and overthrow it.

Opinion filed October 20, 1917.

From a judgment of the District Court of Stark County, *Crawford,* J., plaintiff appeals.

Affirmed.

H. C. Berry and *J. P. Cain,* for appellants.

The judgment of a justice court properly transcribed to the district court records of the county becomes a lien upon the real estate owned by the judgment debtor, outside of his homestead. Comp. Laws 1913, § 8446; N. D. Rev. Codes 1905, § 7751; Comp. Laws 1913, § 8386.

A judgment acquired under any circumstances creates no lien as against realty previously conveyed, whether the deed be recorded or not. It only attaches to the interest of the judgment debtor. Wilcoxson v. Miller, 49 Cal. 193; Lytle v. Black, 107 Ga. 386, 33 S. E. 414; Bailey v. Bailey, 93 Ga. 768, 21 S. E. 77; Pierce v. Spear, 94 Ind. 127; Runyan v. McClellan, 24 Ind. 165; Bird v. Adams, 56 Iowa, 292, 9 N. W. 224; Smith v. Savage, 3 Kan. App. 556, 43 Pac. 847; Shaw v. Padley, 64 Mo. 519; Black v. Long, 60 Mo. 181; Trenton Bkg. Co. v. Duncan, 86 N. Y. 221; Schroeder v. Gurney, 73 N. Y. 430; Baker v. Woodward, 12 Or. 3, 6 Pac. 173; Coleman v. Bank of Hamburg, 2 Strobh. Eq. 285, 49 Am. Dec. 671; Stanhilber v. Graves, 97 Wis. 515, 73 N. W. 48.

Murtha & Sturgeon, for respondents.

When one obtains a deed to real estate it becomes his duty to at once have it recorded to protect his title. The appellants must be presumed to know the law. The respondents had no knowledge or notice of the deed. They acted innocently, lawfully, and in good faith. Rev. Codes 1905, § 5038, Comp. Laws 1913, §§ 5594 and 7705; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390, 21 N. D. 25, 129 N. W. 1024; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061.

A lien by attachment or execution levy upon lands is superior to an unrecorded deed, where the creditor acts in good faith and without notice. Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 523, 123 N. W. 390, 21 N. D. 25, 129 N. W. 1024.

Property rights are not infringed by provisions made for the reasonable protection of purchasers of property, such as are afforded by registration laws. 8 Cyc. 891 (6)–908 (n); Citizens' State Bank v. Julian, 153 Ind. 655, 55 N. E. 1007; Van Husan v. Heames, 96 Mich. 504, 56 N. W. 22; Boston v. Cummins, 16 Ga. 102, 60 Am. Dec. 717.

The time for redemption cannot be extended except for good cause. Little v. Worner, 11 N. D. 382, 92 N. W. 456; Kenmare Hard Coal, Brick & Tile Co. v. Riley, 20 N. D. 182, 126 N. W. 241; Summerville v. Sorrenson, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938; Nichols v. Tingstad, 10 N. D. 172, 86 N. W. 694; Gates v. Ege, 57 Minn. 465, 59 N. W. 495, 17 Cyc. 1324, D, 1329 (5), 1331; Keith v. Losier, 88 Iowa, 649, 55 N. W. 952; Tilley v. Bonney, 123 Cal. 118, 55 Pac. 798; Davidson v. Gaston, 16 Minn. 230, Gil. 202; Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417.

CHRISTIANSON, J. This is an action to set aside a certificate of sale issued by the sheriff of Stark county to the defendants for a tract of land purchased by them upon an execution sale. The case was submitted upon a stipulated statement of facts. The material facts are: On August 30, 1909, Robert O'Connor became the owner in fee of the premises involved herein by virtue of a patent issued to him on that day by the United States government. The patent was recorded in the office of the register of deeds on May 11, 1910, and the record title to the premises remained in said Robert O'Connor until November 5, 1915. The defendants obtained a judgment against said Robert O'Connor, which was duly docketed in the office of the clerk of the district court of Stark county on October 1, 1915. Execution was issued upon the judgment, and, on October 20, 1915, the sheriff duly levied upon the premises involved herein, and caused to be filed for record in the office of the register of deeds of said county, a notice of levy as provided by law. The sheriff advertised the premises for sale, and on November 29, 1915, sold the same to the defendants for the full amount due upon the judgment, including interest and costs. The levy, notice of sale, and sale were in all things made, given, and conducted according to law. The proper certificate of sale was issued to the defendants, and recorded in the office of the register of deeds of said county on November 30, 1915. No redemption was made. Robert O'Connor

was a single man. The land was vacant and wholly unoccupied at the time defendants commenced the action on which their judgment was obtained, and so remained until after the execution sale. On August 7, 1915, the said Robert O'Connor executed and delivered to the plaintiffs a warranty deed for said premises, but the deed was not recorded until November 5, 1915. And at the time of the levy under the execution, "the apparent title in and to said premises, as shown of record in the office of the register of deeds of said Stark county, was in said Robert O'Connor."

Upon these facts, as stipulated, the trial court made findings of fact in favor of the defendants sustaining the validity of the said certificate of execution sale, and the title based thereon. The plaintiffs appeal from the judgment and assail the correctness of the conclusions of law drawn by the trial court from the facts found.

Our statute provides: *"Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void* as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance whether in the form of a warranty deed or deed of bargain and sale, deed of quit claim and release, of the form in common use or otherwise, is first duly recorded; or *as against* any attachment levied thereon *or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance."* Comp. Laws 1913, § 5594.

This statute clearly places judgments on par with deeds and mortgages. It makes every unrecorded conveyance "by deed, mortgage, or otherwise," void as against the lien of a judgment lawfully obtained and docketed against the record owner, by a judgment creditor who has no actual knowledge or notice of the unrecorded conveyance. And title based upon a sale legally held under an execution issued upon such judgment is valid as against an unrecorded deed of which the judgment creditor and purchaser had no notice. Not only do the plain words of the statute say so, but this court has several times declared that to be the meaning and effect of the statute. See Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; Nordhagen v. Enderlin

Invest. Co. 21 N. D. 25, 129 N. W. 1024; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105; Mott v. Holbrook, 28 N. D. 251, 148 N. W. 1061.

Plaintiff also contends that the statute is unconstitutional. This question was not raised in the court below, nor has appellant supported this contention to any extent by argument, or pointed out with any degree of particularity wherein it is claimed that the statute violates any provision of either the state or Federal Constitution. It is a general rule supported by the unanimous weight of authority, that the constitutionality of a statute cannot be first questioned on appeal in a civil action. 3 C. J. § 608, p. 710; 6 R. C. L. p. 95, § 96. It is equally well settled that he who declares a statute to be unconstitutional has the burden of showing that such constitutionality exists, and should point to the particular constitutional provision violated. State ex rel. Linde v. Taylor, 33 N. D. 76, 86, L.R.A.1918B, 156, 156 N. W. 561.

The question of constitutionality has, however, been raised by a dissenting member of this court. It is contended by such member: (1) That the statute was not passed in a constitutional manner; and (2) that it is in conflict with the 14th Amendment to the Constitution of the United States, for the reason that it deprives persons of property without due process of law.

While it is the duty of the judiciary, when required in the regular course of judicial proceedings, to declare void any act which violates the Constitution, it will not do to make of the courts "a sort of superior upper house to consider and pass, in general and particular as well, upon legislative enactments." Wadhams Oil Co. v. Tracy, 141 Wis. 150, 123 N. W. 785, 18 Ann. Cas. 779. The power to revoke or repeal a statute is not judicial in its character, and the courts ought not to pass on the question of constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court. 6 R. C. L. p. 90. A statute is presumed to be constitutional. This presumption becomes conclusive unless it is clearly shown that the enactment is prohibited by the Constitution of the state or of the United States. State ex rel. Linde v. Taylor, supra.

The statute under consideration has been authenticated by, and has

received the approval of, two of the three great co-ordinate departments of the state government. It is well to remember that the responsibility of upholding the Constitution does not rest upon the courts alone; that the members of the legislature and the governor are required to take an oath to support the Constitution; and that the presumption is that they have obeyed this oath, and observed the constitutional requirements. 6 R. C. L. p. 101.

"*Courts will not assume to pass upon constitutional questions unless properly before them,* and the constitutionality of a statute will not be considered and determined by the courts as a hypothetical question. It is only when a decision on its validity is necessary to the determination of the cause that the same will be made, and not then at the instance of a stranger, but only on the complaint of those with the requisite interest. These principles have been recognized by the Supreme Court of the United States. That tribunal has announced that it rigidly adheres to the rule never to anticipate a question of constitutional law in advance of the necessity of deciding it, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, and never to consider the constitutionality of state legislation unless it is imperatively required." 6 R. C. L. pp. 76, 77.

We are aware of no instance where a court has, of its own volition, gone outside of the record to search for reasons for annulling a statute. On the contrary the courts have recognized it to be their primary duty to construe statutes with reference to the Constitution (Escambia County v. Pilot Comrs. 52 Fla. 197, 120 Am. St. Rep. 196, 42 So. 697); that the power to pass upon the constitutionality of laws, even when the question arises in the course of ordinary litigation, is one to be exercised with the greatest possible caution and wisdom (State ex rel. Bolens v. Frear, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147); and that the courts should not conjure up theories to overturn and overthrow the solemn declarations of the legislative body. State ex rel. Shepard v. Superior Ct. 60 Wash. 370, 140 Am. St. Rep. 925, 111 Pac. 233, but should resolve every reasonable doubt in favor of their validity. (6 R. C. L. pp. 97, 98.)

While we do not deem the question of constitutionality before us,

we deem it proper to observe that the system of registration of conveyances has been in operation in this country from its earliest history. It was in general use in the colonies, and prevailed in New England from its earliest settlement. Webb, Record of Title, § 3. It may, indeed, be said that our whole system of land titles and conveyances has, during the entire period of our national existence, "rested upon the plan and policy of registration." Webb, Record of Title, § 3; 24 Am. & Eng. Enc. Law, 76. The constitutional power of a legislature to enact recording acts has seldom been questioned. Such power was expressly sustained by the Supreme Court of the United States in the case of Jackson ex dem. Hart v. Lamphire, 3 Pet. 280, 7 L. ed. 679, decided in 1830. In the opinion in that case the court said: "It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such, too, is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment." See also 6 Enc. U. S. Sup. Ct. Rep. 879; 10 Enc. U. S. Sup. Ct. Rep. 588. The validity of recording acts as applied to judgments is universally recognized. Webb, Record of Title, §§ 198, 199; Pom. Eq. Jur. § 724; Black, Judgm. § 446; 23 Cyc. 1385. Webb (Webb, Record of Title, § 199) says: "Where the lien of the judgment has attached and is held under the recording acts paramount to an unregistered conveyance, a purchaser at a sale under the judgment will not be affected with notice, unless the judgment creditor had received notice before his lien attached. The purchaser holds the land free from all such claims not of record, on the ground that when a right has once been vested and made absolute, it cannot be devested or defeated by any mere notice. The policy of

the recording acts requires this rule, as without it, the protection they afford could be taken away, and the lien devested by the subsequent acts of the party having an adverse claim by virtue of an unregistered conveyance." Professor Pomeroy states the rule in substantially the same language. See 2 Pom. Eq. Jur. § 724.

Plaintiffs have filed a motion wherein we are asked to allow them to file an amended complaint, and to permit them to introduce certain evidence, and to remand the cause for the taking of such evidence. The motion is based solely upon the affidavit of one of plaintiffs' attorneys to the effect that plaintiffs' attorney, after the levy of the execution and prior to the sale of the premises, applied to the district judge for an order restraining the defendants and the sheriff from making sale under the execution, and at that time was informed by the judge that they had better permit the land to be sold and bring an action to set aside the sale. It is further averred that the trial judge, at the time the cause was submitted, informed plaintiffs' attorneys that, in event he sustained the execution sale, he would later permit them to file briefs on the question of the right to redeem. The affidavit further avers that, in the event the cause is reopened, plaintiffs will offer evidence to show: (1) That the land at the time of the sale was worth not less than $15 per acre; (2) that the plaintiffs purchased the same from said Robert Connor for a good, sufficient, and valuable consideration; and (3) that as a part of the purchase price plaintiffs executed and delivered to said Connor a mortgage, which it is averred was recorded in the office of the register of deeds of Stark county, on September 8, 1915, and constituted notice of the fact that Robert Connor had conveyed his interest in the land to the defendants prior to the docketing of the judgment.

The record shows that this action was commenced in 1916, and that defendants' answer was served on June 5, 1916. The stipulation of facts was signed on January 17, 1917. Judgment was entered and notice of entry served on March 7, 1917. No application was made to the trial court to reopen the case, in order to enable plaintiffs to introduce further evidence, and the affidavit submitted in support of the motion shows no reason whatever for the failure to make an appropriate application in the district court.

The motion papers do not indicate in what particular it is desired to

amend the complaint. Nor is there any contention that the proposed evidence was not known to the plaintiffs and to their attorney before the cause was submitted in the court below. Counter affidavits submitted by the defendants contradict plaintiffs' affidavit in most particulars.

In a proper case this court might possibly have authority to order a pleading amended to conform to the proof. And this court might probably remand a cause so as to enable a party to make certain motions in the court below, but we are aware of no rule under which an appellate court can, in the first instance, properly entertain a motion to file an amended pleading or to reopen a cause for the introduction of evidence. Motions of this kind should be made in the trial, and not in the appellate, court.

Nor is it apparent that the introduction of the proposed evidence would in any manner change the result. The recording acts apply to all conveyances; and the fact that the deed from Connor to the plaintiffs was supported by a valuable consideration would in no manner affect the result. It is undisputed that the plaintiffs knew of the proceedings under which defendants claimed title, even before a sale was made under the execution, and the sale was regularly held and in every respect conducted in the manner provided by law. There is no contention that there was any fraud. Under these circumstances a court cannot permit a redemption after the statutory period has expired. In this connection it may also be stated that the counter affidavits served by defendants preponderate on the question of the value of the land, and show the land to be worth only about $1,800, and that the amount of the outstanding encumbrances and taxes prior to the judgment under which defendants purchased, together with the amount of such judgment, amount to approximately the value of the land. It should be remembered that there is no contention that the defendants in this case had actual knowledge of the record of the mortgage from plaintiffs to Connor. On the contrary it is stipulated as an absolute fact that they had no actual knowledge or notice whatever. There is no contention that the stipulation of facts was erroneous, nor is any desire expressed to be relieved from the stipulation. The sole contention is that the mere record of the mortgage constituted sufficient notice to charge the defendants with knowledge of plaintiffs' interest in the land.

The rule supported by the weight of authority is that "a record gives constructive notice only to persons in the same line of title, or, in other words, only to persons who must trace their title back through the same grantor." 24 Am. & Eng. Enc. Law, 2d ed. 148. South Carolina has refused to apply this rule to a purchase-money mortgage from the grantee in an unrecorded mortgage. It has been said in an eminent legal work that the South Carolina court "went astray on this point," and that it so held "apparently without due consideration." See 24 Am. & Eng. Enc. Law, 2d ed. 149, 150, and note 2.

The overwhelming weight of authority is to the effect that "where land is conveyed by a deed which is not recorded, and the grantee gives a purchase-money mortgage back to the grantor, which is duly recorded, the record of such mortgage will not operate as constructive notice to a subsequent purchaser of the land from the grantor in the unrecorded deed." 24 Am. & Eng. Enc. Law, 2d ed. 149.

The supreme courts of South Dakota and Wyoming have held that record of an instrument out of the chain of title constitutes constructive notice. See Fullerton Lumber Co. v. Tinker, 22 S. D. 427, 118 N. W. 700, 18 Ann. Cas. 11; Balch v. Arnold, 9 Wyo. 17, 59 Pac. 434. These decisions are based on the ground that the reason for the rule does not exist when the law requires the register of deeds to keep a numerical index of deeds, mortgages, or other instruments of record in his office, affecting or relating to the title to real property.

The system of numerical indexes was introduced during territorial days, and has been in operation in this state during the entire period of statehood. With such system in full operation this court, in Doran v. Dazey, 5 N. D. 167, 169, 57 Am. St. Rep. 550, 64 N. W. 1023, held that "the mere recording of an instrument out of the chain of the title will not, of itself, constitute constructive notice of such instrument, so as to bind one who deals with the apparent owner of the land according to the record, in ignorance of the existence of such instrument." Doran v. Dazey, supra, was decided October 30, 1895. In 1899 the legislature adopted the rule announced in Doran v. Dazey, supra, and made the same part of the statutory law of this state. Laws 1899, chap. 167.

The statute then enacted has remained in force ever since. It reads: "An unrecorded instrument is valid as between the parties thereto and

those who have notice thereof; *but knowledge of the record of an instrument out of the chain of title does not constitute such notice.*" Comp. Laws 1913, § 5598. The first clause of this statute had been in force since territorial days. See § 3297, Comp. Laws 1887. The second clause (which we have italicized) was added by the legislature in 1899. This legislative declaration is clearly at variance with and establishes a rule in this state contrary to that announced by the supreme courts of South Dakota and Wyoming.

It follows from what has been said above that the motion must be denied, and the judgment affirmed.

It is so ordered.

ROBINSON, J. (dissenting). In August, 1915, Robert O'Connor owned a quarter section of land which he conveyed to the plaintiffs, taking a purchase-money mortgage for $1,710, recorded September 8, 1915. The deed was not recorded until November 5th. As the mortgage was to the owner of the title, it was in the chain of title, and it was constructive notice to purchasers. It showed clearly that O'Connor had transferred title and taken back a mortgage. Subsequently a justice's court judgment was docketed against O'Connor, and the land was sold on execution. Then in January this action was commenced to set aside the sale. If the action was prosecuted with efficiency and in good faith, the record fails to show it. It does not show the value of the land or any controlling equities which should appeal to the court, to prevent one man from stealing the land of another. It does not show any evidence, only a stipulation altogether in favor of the defendants. It is stipulated that they knew nothing of the plaintiffs' title when the recorded mortgage was ample notice to them.

Defendants base their claim of title on Laws of 1903, chap. 152, "An Act Amending §§ 3504 and 3505 of the Revised Codes Relating to the Recording of Conveyances and the Effect Thereof." The amendment is an addition, to the effect that every conveyance of land not recorded shall be void against an attachment levied thereon or a judgment obtained at the suit of any party against the person in whose name the title to such land appears of record. The amendment is void for several reasons:

1. It was not passed by the legislative assembly. The act was Senate Bill 205.

On March 5, 1903, it was passed by the senate. On March 4, 1903, the bill was read in the house and referred to the "Steering committee." On March 4th, at the close of the day, the bill was put upon final passage, and it was lost. The vote against it was, ayes, 23; nays, 54. Davis gave notice of a motion to reconsider. House journal, 809. The motion to reconsider was never made, but on March 6th, the last day of the session, without any motion to reconsider, the lost bill was taken up and passed. That is as the records show it, and after the passage the title was amended by adding thereto the words, "relating to the recording of conveyances and the effect thereof." House Journal 914–915. That was on March 6, 1903, the last day of the session; but as the senate journal shows, on March 6, 1903, the bill with the title as amended was reported back to the senate (Journal, 612). On March 6th, late in the day, without a record vote, it is written the senate concurred in the amendment. Then, on the passage of the bill as amended, there were, ayes, 34; nays, none. And thus during the last two or three days of the session this bill without a title was rushed through both houses.

Section 61 of the Constitution is mandatory. Under it every bill for an act must embrace only one subject, which must be expressed in its title. The title of an act must go with it from the beginning to the end, so as to give notice to the lawmakers and the people, of the subject and purpose of the act. The title may not be formulated after the passage of the act; and when a bill has been voted on and lost it may not be again submitted for passage without a prevailing motion to reconsider it. *Hence, the act in question was never passed, and it is not a law.*

2. The act is in conflict with the 14th Amendment, that no state shall deprive any person of property without due process of law. The amendment declares every conveyance of land to be void as against an attachment levied thereon or a judgment at the suit of any party against the person in whose name the title to the land appears of record prior to the record of such conveyances. Under such a statute no person could safely take title to land unless he stood in the office of the register of deeds and filed his conveyance immediately. A party paying $10,000 cash for a tract of land, and filing his deed in two minutes, might find that a judgment for $10,000 had just been docketed against

his grantor. Thus, by paying to docket a judgment, a purchaser in good faith, nowise in fault, might be deprived of his land. A person may put a dollar in the slot with a positive assurance of gaining several thousand at the expense of some innocent purchaser. *That is no due process of law.* Under our statute on transfers a grant of land vests in the grantee the title without any recording of the conveyance, and a vested title to land may not be set aside in a twinkling by merely filing a paper claim against it. When a claimant pays merely the expense of filing a claim he pays no consideration for the land. He is not a bona fide purchaser, and the law cannot make him such.

Counsel for plaintiff has not presented these points in his brief, but that does not relieve this court of responsibility. Every lawyer has a certificate from the court that he is competent and may safely be trusted to conduct the trial of a case. Suitors have a right to rely on such certificate. Hence, it is the duty of this court to protect them against errors of their lawyers.

STATE OF NORTH DAKOTA v. TOM BROWN.

(165 N. W. 520.)

Legislature — acts — title of — one subject — shall only be embraced — provisions of body of act — expressed in title.

The title, "An Act to Provide for the Punishment of Any Person Carrying Concealed Any Dangerous Weapon or Explosive or Who Has the Same in His Possession, Custody, or Control," is sufficiently comprehensive to cover a provision in the act, which makes the carrying concealed of revolvers and other dangerous weapons unlawful and provides for the punishment of the same, and is not in violation of § 61 of the Constitution of North Dakota, which provides that "no bill may embrace more than one subject, which shall be expressed in its title."

Opinion filed November 7, 1917.

Prosecution for carrying concealed weapons.

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

Judgment for plaintiff. Defendant appeals.

Affirmed.

Pfeffer & Pfeffer, for appellant.

No bill shall embrace more than one subject and such subject shall be expressed in its title. Const. § 61.

The act in question violates the Constitution in that the body of the act contains provisions relating to other matters and subjects which are not expressed in its title. N. D. Sess. Laws 1915, chap. 83, § 1.

If these provisions of such act are void, then the old law of the state governs. Comp. Laws 1913, § 9770.

It was incumbent upon the state to show whether the "concealed weapon" was loaded or partly loaded. Sess. Laws 1915, chap. 83, § 1; Comp. Laws 1913, § 9770; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703.

"Although the courts may eliminate parts of an act as unconstitutional and sustain and give effect to the remaining portions, it is sometimes difficult to apply this process to penal statutes, because they are always construed strictly." 6 R. C. L. 132; 36 Cyc. 1183, and cases cited.

The act in question is an original act, and is not an amendment, and therefore the general rule, "that it is sufficient if the amendment is germane to the subject of the act of which the amended section is a part, and the same is within the title of the original act," does not apply. School Dist. v. King, 20 N. D. 614, 127 N. W. 515; State v. Fargo Bottling Works Co. 19 N. D. 396, 26 L.R.A.(N.S.) 872, 124 N. W. 387; Comp. Laws 1913, § 9770; Divet v. Richland County, 8 N. D. 65, 76 N. W. 993; State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; Ives v. Norris, 13 Neb. 252, 13 N. W. 276; 23 Am. & Eng. Enc. Law, 232, § 23, note 6; People v. Congdon, 77 Mich. 351, 43 N. W. 986; Somerset County v. Pocomoke Bridge Co. 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; Stiefel v. Maryland Inst. 61 Md. 148; Fout v. Frederick County, 105 Md. 563, 66 Atl. 487; Cooley, Const. Lim. 3d ed. 158.

Wm. Langer, Attorney General, and *A. W. Fowler,* State's Attorney, and *W. C. Green,* Assistant State's Attorney, for respondent.

As shown by the title, the subject of chapter 83, the act in question, is the punishment of persons carrying dangerous weapons and explosives. The body of the act simply elaborates the title by enumerating various kinds of dangerous weapons, among which is included an unloaded revolver. The act is not unconstitutional. State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; Powers Elevator Co. v. Pottner, 16 N. D. 359, 113 N. W. 703.

BRUCE, Ch. J. The information in this case alleges that the defendant "did commit the crime of carrying concealed weapons, committed in the following manner, to wit: "That at said time and place the said defendant did wilfully, unlawfully, and feloniously carry concealed in his clothes a firearm, to wit, a revolver, a more particuar description of which is to informant unknown. That said defendant was not at said time a public officer, and was not carrying said weapon in the prosecution of or to effect a lawful and legitimate purpose."

The defendant and appellant seeks a reversal of the judgment on two grounds: (1) That chapter 83 of the Laws of 1915, under which the defendant is sought to be convicted, is unconstitutional in that the act embraces a subject not expressed in the title; and (2) that since the said act is unconstitutional, § 9770 of the Compiled Laws of 1913 alone applies, and that this section contemplates a loaded or partially loaded weapon, and there is no proof of such fact in the case at bar.

Chapter 83 of the Laws of 1915 is as follows: "An Act to Provide for the Punishment of Any Person Carrying Concealed any Dangerous Weapons or Explosives, or Who Has the Same in His Possession, Custody, or Control, unless Such Weapon or Explosive is Carried in the Prosecution of a Legitimate and Lawful Purpose."

"Be it enacted by the legislative assembly of the state of North Dakota:

"§ 1. Any person other than a public officer, who carries concealed in his clothes any instrument or weapon of the kind usually known as a blackjack, slung shot, billy, sand club, sand bag, bludgeon, metal knuckles, or any sharp or dangerous weapon usually employed in attack or defense of the person, or any gun, revolver, pistol, or other dangerous firearm, loaded or unloaded, or any person who carries concealed nitroglycerin, dynamite, or any other dangerous or violent explosive, or has the same in his custody, possession or control, shall be guilty of a

felony, unless such instrument, weapon or explosive is carried in the prosecution of or to effect a lawful and legitimate purpose.

"§ 2. The possession, in the manner set forth in the preceding section, of any of the weapons or explosives mentioned therein, shall be presumptive evidence of intent to use the same in violation of this act.

"§ 3. Penalty. Any person upon conviction of violating the provisions of this act, shall, in the discretion of the court, be imprisoned in the state penitentiary not more than two years," etc.

Appellant contends that § 1 of this act contains a subject which is not expressed in the title. He contends that the only subject expressed in the title is that of the punishment of any person carrying concealed or dangerous weapons, etc. He maintains that nothing is said in the title as to the definition of the crime.

There is, in our opinion, no merit in this contention. The only purpose of the constitutional provision is "that neither the members of the legislature nor the people shall be misled by the title." Sun Mut. Ins. Co. v. New York, 8 N. Y. 241; State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924. The title states that the act provides for the punishment of *any* person carrying concealed *any* dangerous weapon. Surely neither the legislature nor the people were misled by the provision therein, which enumerated revolver (whether loaded or unloaded) among the dangerous weapons the carrying of which was sought to be prohibited.

If the title had used the words, "to make it unlawful for," instead of "for the punishment of," there would have been no doubt of its validity or comprehensiveness; and the body of the act, after stating that the carrying of such weapons was prohibited, could have provided for a penalty. We can see no difference between the two methods of statement.

Nor does the fact that the prior act (Comp. Laws 1913, § 9779) declares it to be a misdemeanor to carry concealed certain weapons, and applies only to loaded or partly loaded firearms, alter the situation. It nowhere defines the term "dangerous weapons," and the act before us covers *all* persons and *any* dangerous weapons.

The judgment of the District Court is affirmed.

GRACE, J. I concur in the result.

E. B. WAREHIME v. JOHN ALBERT HUSEBY and Clarence Ellithorpe, Individually and as Copartners Doing Business under the Firm Name and Style of Huseby & Ellithorpe, and Elwell Ellithorpe.

(165 N. W. 502.)

This is a personal injury case. The law of the case is this:

Personal injury — damages — action to recover — ordinary care — negligence of injured party.

1. Every person is responsible for an injury occasioned to another by his want of ordinary care and skill in the management of his property, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself.

Employer — employee — directions to — by employer — amount lost or expended — in performance of duties — indemnity for.

2. An employer must indemnify his employee for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer.

Losses — ordinary risks of the business — negligence of coemployee — — in same line of work — employer not liable — ordinary care — want of.

3. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

Ordinary care — want of — by employer — must indemnify employee — for losses.

4. An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care.

NOTE.—On statutory liability of employers for the negligence of employees exercising superintendence, see notes in 58 L.R.A. 33; 16 L.R.A. (N.S.) 146, and 21 L.R.A. (N.S.) 601.

On vice principalship as determined with reference to the character of the act which caused the injury, see note in 54 L.R.A. 33.

As to servant's right of action for injuries received in obeying direct command accompanied by assurance of safety, see note in 30 L.R.A. (N.S.) 453.

On duty of master to exercise reasonable care in providing suitable machinery, instruments, means, and appliances for his servants in their work, see note in 12 Am. St. Rep. 530.

Master — proper machinery — must provide — competent servants — negligence.

5. The master must not only provide safe and proper machinery, but must place it in the control of competent servants.

Opinion filed November 12, 1917.

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

Affirmed.

Palmer, Craven, & Burns, for appellants.

The plaintiff and others employed by defendants in the same line of work were fellow servants. "The negligence of a foreman of a gang, in failing to block a pile which was shoved against plaintiff, injuring him, because it was not blocked, is the negligence of a fellow servant, although the foreman had authority to employ and discharge plaintiff and the plaintiff was under his superintendence and control in doing the work in the performance of which they were engaged." Ell v. Northern P. R. Co. 1 N. D. 336, 12 L.R.A. 97, 26 Am. St. Rep. 621, 48 N. W. 222.

The negligent performance or omission to perform a duty which the master owes to his employees is, at common law, the negligence of the master, whatever the grade of the servant who is in that respect careless. The negligence of the servant engaged in the same general business with the injured servant is the negligence of a fellow servant, whatever position the former occupies with respect to the latter, as to all acts which pertain to the duties of mere servants, as contradistinguished from the duties of the master to his employee. Lang v. Bailes, 19 N. D. 582, 125 N. W. 891; Ness v. Great Northern R. Co. 25 N. D. 572, 142 N. W. 165; Jackson v. Chase, 26 N. D. 367, 144 N. W. 235; American Bridge Co. v. Seeds, 11 L.R.A.(N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605; Stevens v. Chamberlin, 51 L.R.A. 513, 40 C. C. A. 421, 100 Fed. 378; Kern v. De Castro & D. Sugar Ref. Co. 125 N. Y. 50, 25 N. E. 1071; Casey v. Pillsbury Flour Mill Co. 122 Minn. 474, 142 N. W. 726; Corey v. Joliet Bridge & Iron Co. 151 Mich. 558, 115 N. W. 737; Richter v. Union Lime Co. 153 Wis. 261, 140 N. W. 1126; Baltimore & O. S. W. R. Co. v. Hunsucker, 33 Ind. App. 27, 70 N. E. 556.

If there are two known ways of performing an act, one of which is safer than the other, it is contributory negligence to voluntarily adopt the more dangerous method because it is the most convenient. Rohlfs v. Fairgrove Twp. 174 Mich. 555, 140 N. W. 908; Allen v. Green Bay Mfg. Co. 150 Wis. 545, 137 N. W. 766; Lynch v. Saginaw Valley Traction Co. 153 Mich. 174, 116 N. W. 983; Hussey v. Coger, 112 N. Y. 614, 3 L.R.A. 559, 8 Am. St. Rep. 787, 20 N. E. 556; Tedford v. Los Angeles Electric Co. 54 L.R.A. 117, note.

"The general rule is that a master is not responsible for the errors which a servant of superior grade may commit in regard to the choice of methods for carrying out the work intrusted to his management." Morgridge v. Providence Teleph. Co. 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328; Knutter v. New York & N. J. Teleph. Co. 67 N. J. L. 646, 58 L.R.A. 808, 52 Atl. 565, 12 Am. Neg. Rep. 109; Tedford v. Los Angeles Electric Co. 54 L.R.A. 109, note; Petaja v. Aurora Iron Min. Co. 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; Bell v. Lang, 83 Minn. 228, 86 N. W. 95.

Here the plaintiff and Elwell Ellithorpe were fellow servants, and the releasing of the "cage" was but a detail of the work as to which the master owed no duty. Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; Perry v. Rogers, 157 N. Y. 251, 51 N. E. 1021, 5 Am. Neg. Rep. 68; Capasso v. Woolfolk, 163 N. Y. 472, 57 N. E. 760; Vogel v. American Bridge Co. 180 N. Y. 375, 70 L.R.A. 725, 73 N. E. 1, 17 Am. Neg. Rep. 689; Morgan Constr. Co. v. Frank, 86 C. C. A. 168, 158 Fed. 964; Goddard v. Interstate Teleph. Co. 56 Wash. 536, 106 Pac. 189; Broderick v. St. Paul City R. Co. 74 Minn. 163, 77 N. W. 28; Saxton v. Northwestern Teleph. Exch. Co. 81 Minn. 314, 84 N. W. 109.

There is no joint liability shown in this case, and there is no right of recovery on such basis. Fergason v. Chicago, M. & St. P. R. Co. 63 Fed. 177; Schlosser v. Great Northern R. Co. 20 N. D. 406, 127 N. W. 502; 1 Jaggard, Torts, p. 281.

Wm. G. Owens and *E. R. Sinkler* for respondent.

Negligence, contributory negligence, and assumption of risk are primarily questions for the jury in this jurisdiction. Johnson v. Fargo, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 676; Solberg v. Schlosser, 20 N. D.

307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 316, 122 N. W. 390; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Hollingshead v. Minneapolis, St. P. & S. Ste. M. R. Co. 20 N. D. 642, 127 N. W. 993; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718; Messer v. Bruening, 32 N. D. 515, 156 N. W. 241.

Elwell Ellithorpe was a vice principal of the other two defendants here, and therefore any negligence of his which was the proximate cause of the injury is the negligence of the other two defendants, or of the partnership. Swanson v. Schmidt-Gulack Elevator Co. 22 N. D. 571, 135 N. W. 207; Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; 28 Cyc. 1115.

"It is well settled by all the authorities that the master must provide his servant with a safe place in which to work, and must furnish him with suitable machinery and appliances with which to work, and to keep such machinery in good repair." 26 Cyc. 1115, and cases cited; Fink v. Des Moines Ice Co. 84 Iowa, 321, 51 N. W. 155.

The rules of law, applicable to principal and agent, must apply in such cases. Shearm. & Redf. Neg. 4th ed. 194, 204; Lang v. Bailes, 19 N. D. 582, 125 N. W. 891.

The law will not excuse the master from liability where a "cage" falls into a mine by reason of defective brakes. The brake is one of the important instruments in such work, which the master must see and keep safe. Myers v. Hudson Iron Co. 150 Mass. 125, 15 Am. St. Rep. 176, 22 N. E. 631; Texas & P. Coal Co. v. Daves, 41 Tex. Civ. App. 289, 92 S. W. 275; 26 Cyc. 1097, 1104.

It was the master's duty when he gave plaintiff orders to go upon the car, to know that the car and the brake were safe. Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Haas v. Balch, 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 984; O'Brien v. Nute-Hallett Co. 177 Mass. 422, 59 N. E. 65; 4 Labatt, Mast. & S. 3913.

The doctrine of assumption of risk is based upon contract and the relationship of master and servant. One cannot assume that which he does not know. Umsted v. Colgate Farmers' Elevator Co. 18 N. D. 316, 122 N. W. 390.

A servant cannot be paid to assume a risk when he acts in obedience

to orders of his master or of orders of the master's agent. Webb v. Dinnie Bros. 22 N. D. 377, 134 N. W. 41; Choctaw, O. & G. R. Co. v. Jones, 7 Ann. Cas. 435, note; Haas v. Balch, 6 C. C. A. 201, 12 U. S. App. 534, 56 Fed. 984; 4 Labatt, Mast. & S. pp. 3928, 3936, 3960, 3965, 3967; Miller v. Bullion-Beck & C. Min. Co. 18 Utah, 358, 55 Pac. 59; McKee v. Tourtelotte, 167 Mass. 69, 48 L.R.A. 542, 44 N. E. 1071; Brown v. Lennane, 155 Mich. 686, 30 L.R.A.(N.S.) 453, 118 N. W. 581; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N. E. 876.

Whether plaintiff acted recklessly in obeying orders, or whether he acted as a reasonably prudent person should act, are questions of fact for the jury, and the jury having passed on them, they are settled. 4 Labatt, Mast. & S. pp. 3960 to 3974; Graham v. Newburg Orell Coal & Coke Co. 38 W. Va. 273, 18 S. E. 584; Harder & H. Coal Min. Co. v. Schmidt, 43 C. C. A. 532, 104 Fed. 282, 9 Am. Neg. Rep. 227; Bradbury v. Goodwin, 108 Ind. 286, 9 N. E. 302; Lake Superior Iron Co. v. Erickson, 39 Mich. 492, 33 Am. Rep. 433, 10 Mor. Min. Rep. 39; Stomme v. Hanford Produce Co. 108 Iowa, 137, 78 N. W. 841; Gundlach v. Schott, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; Shadford v. Ann Arbor Street R. Co. 121 Mich. 224, 6 Am. Neg. Rep. 579, 80 N. W. 30; Van Duzen Gas & Gasoline Engine Co. v. Schelies, 61 Ohio St. 298, 55 N. E. 998.

Robinson, J. The plaintiff brings this action for personal injury. He recovered a verdict and judgment for $2,500, and defendant appeals.

The complaint is that defendant John Huseby and Clarence Ellithorpe are partners, engaged in the operation of a lignite coal mine in Williams county, and the other defendant is the foreman of the partners. That on February 22, 1915, and prior thereto, plaintiff was in the employ of said partnership, under the supervision and direction of said foreman. That for carrying on the operations of the mine the defendants owned and operated a hoisting engine and apparatus, consisting of pulleys, lifts, tracks, scales, etc., which machinery was under direct supervision of said foreman. That on February 22, 1915, they allowed the hoisting apparatus to get out of repair so the same became dangerous and the part known as the tipple became disarranged and broken; that pursuant to the direction of the defendants the plaintiff

climbed upon the works to make necessary repairs and to replace the hoisting cable onto the pulley from which it had slipped, and that while at work on the same, under the immediate direction of the foreman, the car fell with him to the bottom of the shaft, by which he sustained injury to the amount of $10,000.

By answer defendants claim that the injuries to plaintiff was due to his own negligence and want of care, and that he virtually assumed the risk of his dangerous employment, and that he was guilty of contributory negligence.

The law of the case is this:

Comp. Laws, § 5948. Every person is responsible for an injury occasioned to another by his want of ordinary care and skill in the management of his property, except so far as the latter has wilfully or by want of ordinary care brought the injury upon himself.

Comp. Laws, § 6106. An employer must indemnify his employee for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer.

Sec. 6107. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee.

Sec. 6108. An employer must in all cases indemnify his employee for losses caused by the former's want of ordinary care.

The master must not only provide safe and proper machinery, but must place it in the control of competent servants.

Manifestly the complaint states a good cause of action, and the case presents no question only on the sufficiency of the evidence to sustain the verdict.

In the brief of the appellant it is said: "Prior to the time of the accident, on each day about 75 tons of coal were mined, and in loads of 2,400 it was loaded on a car, and the car and coal were elevated in a cage and tower about 75 feet to the receiving platform, about 12 feet above the surface of the ground, and there the car was by hand run off on a track to a tipple and dumped, and the car returned to the

cage and back to the mine. The car was elevated by means of a steel cable passed over a pulley at the top of the elevating car. It was worked by a steam engine, located on the surface of the ground near the elevator shaft. On September 22, 1915, and for months prior thereto, the hoisting apparatus was worked by Elwell Ellithorpe as the foreman of the other defendants. He had control of the car, the engine, and by means of a brake he could stop the car at any place; that on September 22, through an oversight and omission on the part of the engineer, the car of coal was elevated so high that the steel clamps on the cable became stalled in the tower, and could not be raised or lowered by means of the engine. The cable got off the pulley. Then it seems the engineer tried various means to get the cable back on the pulley, and directed the plaintiff to assist; and, as they worked to get the cable on the pulley, the car became released and fell to the bottom of the shaft, and the plaintiff fell with it.

"From October 10, 1915, until the time of the accident, plaintiff did different kinds of work at $60 a month. He hauled coal to different places in town and slack of coal from the mines. Clarence Ellithorpe and Elwell Ellithorpe, the foreman, gave orders to him. He says just before he went to the top of the tipple Clarence had told him, 'Go up and help Elwell.' He went up, and Elwell told him to go down and loose the cable drum. He did so. Then he and Elwell worked with bars to pry the cable onto the pulley. Elwell said to plaintiff: 'I have placed cross timbers under the car, and it is safe.' He said: 'Step right on, right over, it is safe; I have cross timbers under it.' 'The last thing I remember was something hit me just as I took hold of the bar. I remember just as I pulled the bar he jarred it with a short-handled ax. Clarence had told me that, when he was not there, Elwell was my boss. I was standing on the braces of the ladder and the hoist when Elwell put the crowbar in and told me to take hold of it. I started to take hold of it, and he told me to step over onto the car and take hold of it. I stepped on the car of coal, and took hold of the bar, and started to pull it. Something hit me, and that is the last I remember.'

"The partners claim that at the time of the accident plaintiff was in the employ of their foreman, and not in their employ, but that looks like a shallow pretense, on which the jury found against them. At

the time of the accident he was in the employ of, and did work for, the partnership, and under the immediate direction of the foreman who operated the hoisting outfit. By negligence he had run the car up several feet too high and run the hoisting cable off its pulley. He had left the engine without any control to prevent the car from dropping; while to prevent a drop of the car he negligently nailed under it some common plank, in place of good strong timber. Then he assured the plaintiff that it was safe, and directed him to assist in replacing the cable, and this he did while standing on the car and using iron rods or crowbars, as directed by the foreman. And as the chain was replaced on the pulley, the car had no support, except by the plank which broke and precipitated him to the bottom of the pit. When the plaintiff was asked if he did not have the same opportunity as the foreman to observe the danger incident to replacing the cable, his answer was: 'No, because Elwell could take his time and I could not take my time.' He was there to obey orders, and not to contrive or think and consider. The right to give orders imposes the duties to protect and guard the servant from danger."

This is no case for hairsplitting or fine theories of law and fact. As the jury has found, and as the evidence shows, at the time of the accident the foreman represented the other defendants. He ordered, and in effect pushed, the plaintiff into a position of danger from which he narrowly escaped with his life. His injury was more than twice the amount of the verdict. There is nothing to be gained by further litigation.

Judgment affirmed.

GRACE, J. I concur in the result.

GREAT NORTHERN EXPRESS COMPANY v. A. L. GULBRO, Doing Business as Gulbro Implement Company.

(165 N. W. 513.)

Justice court — appeal from — district court — jurisdiction — defects as to form — clerical errors — undertaking in — amendments — new undertaking.

1. On appeal from a justice of the peace, the district court has jurisdiction to permit clerical errors or defects of form in the undertaking on appeal to be corrected by amendment or by the giving of a new undertaking.

Appeal bond — judicial proceeding — statutory requirements — executed by surety only — valid and enforceable.

2. In absence of statutory requirement to the contrary, a judicial bond signed by the surety alone is valid and enforceable.

Opinion filed November 15, 1917.

From a judgment of the District Court of Nelson County, *Cooley*, J., plaintiff appeals.

Reversed.

Murphy & Toner, for appellant.

"The provisions of the Code of Civil Procedure shall govern the proceedings in justices' courts as far as applicable, provided by this Code." Comp. Laws 1913, §§ 7840, 9009, 9163 and 9165.

The Justice's Code makes no provision for remedy in case a defective notice or undertaking is served and filed, and therefore we have to look to the Code of Civil Procedure for the remedy for such defect. Comp. Laws 1913, § 7840; Morgridge v. Stoeffer, 14 N. D. 430, 104 N. W. 1112; Hilbish v. Asada, 19 N. D. 684, 125 N. W. 556.

In judicial proceedings there is a great difference between an instrument that is irregular as to form, and one that is a nullity because of substantial defects. Any pleading, process, or proceeding may be amended by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect. Comp. Laws 1913, § 5297.

Courts are not only authorized, but they are required, to disregard any error or defect in the pleadings or proceedings which shall not

affect the substantial rights of the adverse party. Hilbish v. Asada, 19 N. D. 684, 125 N. W. 556; Rev. Codes, 1905, § 6886, Comp. Laws 1913, § 7485.

The undertaking here is not a nullity. It is amply sufficient in substance. The only defects are as to form, and consist of purely clerical errors, and an amendment or a new undertaking would not affect any substantial right of the respondent. It is unlike a case where no undertaking at all was filed. Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616.

The undertaking is not misleading. Its title is correct, and if the intent and purpose of its execution and filing are clearly apparent to anyone of ordinary intelligence, it is sufficient. The errors found in it are clerical only, and the merest reference to the context would remove all uncertainty as to what was intended, and the amendment should have been allowed. Morgridge v. Stoeffer, 14 N. D. 430, 104 N. W. 1112; Hilbish v. Asada, supra; Brock v. Fuller Lumber Co. 82 C. C. A. 402, 153 Fed. 272; Tolerton & S. Co. v. Casperson, 7 S. D. 206, 63 N. W. 908; Sucker State Drill Co. v. Brock, 18 N. D. 8, 118 N. W. 348; Burger v. Sinclair, 24 N. D. 315, 140 N. W. 231; McClelland Bros. v. Allison, 34 Kan. 155, 8 Pac. 239; Coleman v. Newby, 7 Kan. 83; Mitchell v. Goff, 18 Iowa, 424; Irwin v. Bank of Bellefontaine, 6 Ohio St. 81; Shelton v. Wade, 4 Tex. 148, 51 Am. Dec. 722; Helden v. Helden, 9 Wis. 558; Falk v. Goldberg, 45 Wis. 94; Brobst v. Brobst, 2 Wall. 96, 17 L. ed. 905; Seymour v. Freer, 5 Wall. 822, 18 L. ed. 564; Gobbi v. Refrano, 33 Or. 26, 52 Pac. 761; Freeman v. McAtee, 4 Kan. App. 695, 46 Pac. 40; Wilson v. Me-ne-chas, 40 Kan. 648, 20 Pac. 648; Wasem v. Bellach, 17 S. D. 506, 97 N. W. 718; State Sav. & L. Asso. v. Johnson, 70 Neb. 753, 98 N. W. 32; Chase v. Omaha Loan & T. Co. 56 Neb. 358, 76 N. W. 896; Voss v. Feurmann, — Tex. Civ. App. —, 23 S. W. 936; Fullerton Lumber Co. v. Tinker, 21 S. D. 647, 115 N. W. 91; Keehl v. Schaller, 6 Dak. 499, 50 N. W. 195; Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057; Briggs v. Swales, 29 How. Pr. 201; Lake v. Kels, 11 Abb. Pr. N. S. 37; Ross v. Markham, 5 N. Y. Civ. Proc. Rep. 81; St. Louis & S. F. R. Co. v. Hurst, 52 Kan. 609, 35 Pac. 211; Denton v. Denton, 77 Miss. 375, 27 So. 383; People ex rel. Detroit & B. Pl. Road Co. v. Wayne Circuit Judge, 27 Mich. 303; Gray v. Superior Ct. 61 Cal. 337; Murphy v.

Steele, 51 Ind. 81; State v. Lavalley, 9 Mo. 834; Burger v. Sinclair, 24 N. D. 315, 140 N. W. 231.

But it is not necessary that the person in whose behalf such an undertaking is given, should sign the same, unless specifically required so to do by the statutes. Our statute does not so require. Russell v. Chicago, B. & Q. R. Co. 37 Mont. 1, 94 Pac. 488, 501; King v. Pony Gold Min. Co. 24 Mont. 470, 62 Pac. 783; Booker v. Smith, 38 S. C. 228, 16 S. E. 774.

Statutory undertakings must be read and construed in connection with the statute under which they are given. Whitney v. Darrow, 5 Or. 442.

In this case even if the undertaking is not binding on the express company, it is good and is binding on the surety, and that of itself makes it a good bond. Stimson Mill Co. v. Riley, 5 Cal. Unrep. 218, 42 Pac. 1072; Haskins v. Lombard, 16 Me. 140, 33 Am. Dec. 645; Adams v. Bean, 12 Mass. 137, 7 Am. Dec. 44; State ex rel. Moore v. Sandusky, 46 Mo. 377; Mullen v. Morris, 43 Neb. 596, 62 N. W. 74; Davis v. Gillett, 52 N. H. 126; Wood v. Ogden, 16 N. J. L. 453; State Use of Treasurer of State v. Bowman, 10 Ohio, 445; Young v. Union Sav. Bank & T. Co. 23 Wash. 360, 63 Pac. 247; Grim v. Jackson Twp. 51 Pa. 219; Lovett v. Adams, 3 Wend. 380.

Mistake or fraud in the execution of an undertaking is only a defense in case the obligee was a party to it. Gaines v. Griffith, 13 Ky. L. Rep. 263.

Where the intention can be clearly gathered from the undertaking itself, minor omissions, mistakes, or irregularities are disregarded and the instrument is upheld. Field v. Schricher, 19 Iowa, 119; Hawes v. Sternheim, 57 Ill. App. 126; Daggitt v. Mensch, 141 Ill. 395, 31 N. E. 153; Wile v. Koch, 54 Ohio St. 608, 44 N. E. 236; Pray v. Wasdell, 146 Mass. 324, 16 N. E. 266; Stillings v. Porter, 22 Kan. 17; Landa v. Heermann, 85 Tex. 1, 19 S. W. 885; Handy v. Burrton Land & Town Co. 59 Kan. 395, 53 Pac. 67; Cooke v. Crawford, 1 Tex. 9, 46 Am. Dec. 93; Martin v. Davis, 2 Colo. 313; Lynch v. Lynch, 150 Pa. 336, 24 Atl. 625; Johnson v. Noonan, 16 Wis. 688; Riggs v. Bank of State, 11 Ala. 160; Merrick v. Farwell, 33 Me. 253; Ten Hopen v. Taylor, 103 Mich. 178, 61 N. W. 265; Gille v. Emmons, 61 Kan. 217, 59 Pac. 339; Mix v. People, 86 Ill. 329; Courson v. Browning, 78 Ill. 208; Mitchell v. Thorp, 5 Wend. 287.

Frich & Kelly, for respondent.

The appellant was required to observe and comply with the provisions of the Justice's Code relating to appeals. This it did not do because of its failure to make and file the undertaking for the appeal. The undertaking was not one on behalf of appellant, but one for a stranger to the record, and there was nothing to amend. Comp. Laws 1913, § 9163.

The district court on appeal from a justice's court does not obtain jurisdiction until the notice is given and a proper undertaking filed. Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616.

CHRISTIANSON, J. From the record transmitted to this court it appears that on the 14th day of May, 1917, this action came on for trial before J. C. Lewis, a justice of the peace in Nelson county, in this state, and resulted in a judgment in favor of the defendant. The plaintiff appealed from such judgment upon questions of law and fact, and demanded a new trial in the district court. The notice of appeal and undertaking on appeal was served upon defendant's attorneys on May 18, 1917, and together with proof of service thereof, were filed in the office of the clerk of the district court on May 22, 1917. The notice of appeal was in every respect in proper form. The undertaking was as follows:

State of North Dakota
County of Nelson

In Justice Court
Before J. C. Lewis,
Justice of the Peace.

Great Northern Express Company, Plaintiff,

vs.

A. L. Gulbro, Doing Business as Gulbro Implement Company, Defendant.

Undertaking on Appeal.

Whereas on the 14th day of May, 1917, before J. C. Lewis, justice above named, the above-named defendant and respondent recovered a judgment in an action pending in said court by the Great Northern Express Company, plaintiff and appellant herein, for the dismissal of said action, and costs against the plaintiff in the sum of $26.85, and the

above-named plaintiff, feeling aggrieved thereby, intends to appeal therefrom to the district court of said county.

Now, therefore, we, Great Northern Railway Company as principal, and National Surety Company as surety, of the county of Grand Forks, and state of North Dakota, do hereby undertake, promise, and agree to and with said A. L. Gulbro, that the said Great Northern Railway Company, plaintiff, will pay the amount of all costs which may be awarded against it on the appeal, not exceeding in all, however, the sum of $100.

And we, said Great Northern Railway Company as principal, and National Surety Company as surety, do further undertake, promise, and agree to and with said A. L. Gulbro, defendant, that if the appeal is dismissed the said Great Northern Railway Company, plaintiff and appellant, will pay the amount of the judgment appealed from and all costs, or if judgment is rendered against said plaintiff, Great Northern Railway Company in the appellate court, that it, said Great Northern Railway Company, will pay the amount of said judgment and all costs, not exceeding the sum of $100.

Dated this 17th day of May, 1917.

Great Northern Railway Company,
By C. J. Murphy,
Attorney.
National Surety Company,
By Chas. E. Garvin,
Attorney in Fact.

(The undertaking was acknowledged by the parties whose signatures are attached thereto.)

The undertaking was attached to, and served and filed with, the notice of appeal. The written admission of service of defendant's attorneys is indorsed upon the notice of appeal, and is in the following language:

Due service of the within notice of appeal and undertaking is hereby admitted on us at Lakota this 18th day of May, 1917.

Frich & Kelly,
Attorneys for defendant.

The cause was placed upon the calendar of the July, 1917, term of the district court for trial. Upon the call of the calendar, defendant's counsel gave oral notice of a motion to dismiss the appeal, because no sufficient undertaking on appeal had been furnished; the specific ground being that the use of the word "railroad," instead of the word "express," in the name of the principal obligor in various places in the undertaking, rendered it invalid. Plaintiff's counsel thereupon filed a written motion asking leave to correct the error by filing an amended undertaking. This motion was supported by the affidavits of C. J. Murphy, attorney for the plaintiff and appellant, and one Frank Kilgore, who prepared the undertaking, and who as notary public took the acknowledgments of the parties thereto. These affidavits are to the effect that in the preparation of the undertaking the word "railroad" was inadvertently used, instead of the word "express," in stating the name of the appellant in certain places in the undertaking. The application was also accompanied by an amended undertaking in proper form, duly executed and acknowledged by the appellant and by the same surety which had executed the former undertaking. The trial court denied the application to file the amended undertaking, and thereupon granted defendant's motion to dismiss the appeal. Judgment was entered in accordance with the court's order, and plaintiff has appealed from the judgment.

Our statute relative to appeals from justice's court provides that "to render an appeal effectual for any purpose, an undertaking must be executed on the part of the appellant by sufficient surety to the effect that the appellant will pay all costs which may be awarded against him on the appeal not exceeding $100, which undertaking shall be approved by and filed in the office of the clerk of the district court of the county to which the appeal is taken." Comp. Laws 1913, § 9165.

Under the decisions of this court the undertaking referred to in this section is jurisdictional, and must be served and filed within the time fixed by the statute. Richardson v. Campbell, 9 N. D. 100, 81 N. W. 31; Lough v. White, 14 N. D. 353, 104 N. W. 518; Deardoff v. Thorstensen, 16 N. D. 355, 113 N. W. 616. It does not follow, however, that clerical errors or defects in matters of form will render an undertaking wholly void, so as to preclude an amendment or the giving of a new undertaking. The territorial supreme court held that an

undertaking wherein a condition required by the statute had been omitted might be amended. Keehl v. Schaller, 6 Dak. 499, 50 N. W. 195. And the supreme court of our sister state, South Dakota, held that where the undertaking contained no condition to pay the costs of appeal, it nevertheless was "sufficient to give the court jurisdiction of the appeal, and therefore it had jurisdiction to allow the undertaking to be amended or a new one to be filed." Wasem v. Bellach, 17 S. D. 506, 97 N. W. 718.

It will be noted that the undertaking involved in this case is properly entitled in the action in which it was intended to be given. It will further be noted that the first paragraph identifies and correctly describes the judgment appealed from, and names the parties thereto. Not only is the judgment correctly described and the parties properly named, but it is further stated that "the above-named plaintiff," feeling aggrieved by the judgment, intends to appeal therefrom.

The statute requires that "an undertaking be executed *on the part* of the appellant by sufficient surety." It does not in terms require the undertaking to be signed by the appellant. "The current of modern authority is," said Chief Justice Deemer (Brown v. Melloon, 170 Iowa, 49, 152 N. W. 77, Ann. Cas. 1917C, 1070), "to the effect that, in the absence of statute expressly requiring it, a judicial bond signed by sureties alone is valid and may be enforced. They proceed upon the theory that as the signature of the principal adds nothing to his liability, and the want of it takes nothing away from the sureties, and in no manner increases their burdens or robs them of any of their rights, the failure of the principal to sign does not affect the validity of the bond." See also Clark v. Strong, 14 Neb. 229, 15 N. W. 236.

We are satisfied that the defects in the undertaking in this case did not render it wholly invalid. The surety would not have been released from liability by reason thereof. Adler v. Staude, 136 Cal. 182, 68 Pac. 599; Chase v. Omaha Loan & T. Co. 56 Neb. 358, 76 N. W. 896. The undertaking was sufficient to give the district court jurisdiction of the appeal, and hence it had jurisdiction to allow the undertaking to be amended. Keehl v. Schaller and Wasem v. Bellach, supra; Towle v. Bradley, 2 S. D. 472, 50 N. W. 1057; Northrup v. Bathrick, 78 Neb. 62, 110 N. W. 685; Chase v. Omaha Loan & T. Co. supra; 24 Cyc. 682. The affidavits submitted by the appellant clearly

showed that the mistakes in the undertaking were occasioned by inadvertence. The district court should have allowed the amended undertaking to be filed.

The judgment appealed from is reversed, and the cause remanded to the District Court, with directions to permit the appellant to file the amended undertaking upon such terms as may, to it, seem just and proper.

No costs will be allowed on this appeal.

ROBINSON, J. (concurring). The case is governed by the maxim, *Demonstratio falsus non nocet.* Reading the notice of appeal and the undertaking down to the point where occur the words, "Great Northern Railway Company," it is clear to a demonstration that the words are false and are used by mere inadvertence. *Striking out and disregarding such obviously false words, the undertaking is clearly sufficient to bind the surety company to pay the defendant the amount of all costs which may be adjudged against the plaintiff on the appeal.* Since the notice of appeal and the undertaking on appeal go together and commence with the title of the case, every word and sentence that follows must have reference to the title of the case and to an appeal from the judgment, which is correctly described. A judgment was entered before J. C. Lewis, justice of the peace in and for Nelson county on the 14th day of May, 1917, in favor of the defendant for the dismissal of the action, and for the sum of $2,685 costs. The plaintiff appeals from the whole of said judgment, and demands a new trial in the district court.

There are other maxims of law which apply with more or less force, namely: Surplusage does not vitiate; That is certain which can be made certain; An interpretation which gives effect is to be preferred to one which makes void; Law respects form less than substance.

The use of the words, "Great Northern Railway Company," is false to a demonstration. No boy in law could read the notice of appeal and undertaking without knowing that it was and is an obvious mistake, the name being used by inadvertence for the "Great Northern Express Company." But, after the title of the action was given, it was in no way necessary to repeat the names of either the plaintiff or the defendant. It was enough to designate the parties as plaintiff and ap-

pellant, and to designate the defendant as defendant, and that has been done without any mistake.

The conclusion is that the original appeal bond is legal and valid, and the judgment of the district court must be reversed, without cost.

W. T. GODMAN v. MARTIN OLSON, as Sheriff of Ramsey County, North Dakota.

(165 N. W. 515.)

Chattel mortgage — bill of sale — in the form of — properly filed — absence of fraud and deception — not void.

1. In this case it is *held* that a chattel mortgage in the form of a bill of sale is not void when duly made and filed, without fraud or deception, to secure an honest debt.

On Rehearing.

Transfer — made in fraud of creditors — question of fact — generally.

2. Whether a transfer is made in fraud of creditors is generally a question of fact.

Bill of sale — absolute on face — given as security only — for present indebtedness — future advances — not fraudulent — as a matter of law.

3. A bill of sale absolute on its face, but given to secure the payment of a present indebtedness and future advances, is not fraudulent as against creditors as a matter of law.

Possession of property — retention of — by vendor — not conclusive of fraud — merely presumptive.

4. Under § 7221, Compiled Laws of 1913, the retention of possession of personal property by the vendor is not conclusive, but merely presumptive, evidence of fraud in the transaction.

Unrecorded chattel mortgage — valid as to persons with actual knowledge.

5. An unrecorded chattel mortgage is valid as against all persons who have actual knowledge thereof.

Bill of sale — vendee — other security for debt — fact of — not defense.

6. The fact that the vendee in a bill of sale, absolute on its face, but given to secure an indebtedness, had other security sufficient to satisfy his demand, is not available as a defense in an action brought by the vendee against an officer who, in disregard and defiance of the vendee's special interest, levies upon and sells some of the chattels covered by such bill of sale.

Opinion filed July 13, 1917. Rehearing denied November 16, 1917.

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

Affirmed.

R. Goer (*Cowan & Adamson* and *H. S. Blood,* of counsel), for appellant.

Henry G. Middaugh and *Rollo F. Hunt,* for respondent.

ROBINSON, J. This is an action to recover from the sheriff the value of two horses levied and sold under an execution against Richard Godman, the property of the plaintiff. The plaintiff recovered a verdict and judgment for $180. A motion for a new trial was made and denied, and defendant appeals.

The defense was that the horses were duly taken and sold under a writ of attachment and an execution issued from a justice court in an action by Emil Plath against Richard Godman, and that the bill of sale was in fraud of creditors and that the horses were in fact the property of Richard Godman, the defendant in the execution.

The bill of sale was in regular form. It was made to the plaintiff by Richard Godman. It was signed by two witnesses. It was dated, acknowledged, and filed in the office of the proper register of deeds on October 21, 1915. It was made in good faith to secure an actual bona fide debt of about $1,500. It was made subject to a prior mortgage on the same property dated March 25, 1915, for $418.50, due October 1, 1915, and on this the plaintiff had to pay $446.55; he paid hired help $125 and some other debts.

Before the attachment was issued the plaintiff conversed with Emil Plath concerning the bill of sale, and told him it was made to secure $1,500 due and owing to him, and that on a sale of the property any surplus would be paid to the creditors of Richard Godman.

When Emil Plath obtained his judgment he had a legal right to pay the plaintiff and to step into his shoes, but it would have been a losing venture in case Richard Godman had claimed his exemptions.

As the jury found and as the trial judge found, it is clear that the bill of sale was in fact a mortgage, and it was made in good faith to secure an honest debt, and Emil Plath had full notice of the facts. He was not in any manner deceived, and he had a perfect legal right to treat the bill of sale in the same manner as if it were in the regular and usual form of a mortgage. The form did not in any manner de-

ceive or mislead him. The form was adopted at the suggestion and advice of a banker who drafted the paper to secure the debt. Under the statute this bill of sale was in truth a mortgage, and as such it was duly made and filed. Comp. Laws, §§ 6725, 6727, 6729.

This is no case for hairsplitting and it really involves no question of law or of fact. Even if it were not free from doubt, the court should hesitate to reverse the judgment of the trial court and a jury of twelve men, and to award a new trial on a matter of $180. There should be an end to petty litigation.

Judgment affirmed.

On Rehearing.

CHRISTIANSON, J. Defendant's counsel filed a petition for a rehearing, wherein it was asserted that the statement or conclusion of facts in the former opinion was erroneous, and that the court had failed to consider and decide points raised by appellant and fairly appearing upon the record. A rehearing was ordered, and the cause resubmitted and reconsidered.

While we are agreed that the conclusion reached in the former opinion and the basic principle enunciated therein are, under the facts in this case, correct, we will consider more fully the different propositions advanced.

Plaintiff brought this action to recover from the defendant the value of two horses. In his complaint, plaintiff avers that on or about October 21, 1915, one Richard Godman, the then owner of said two horses, made, executed, and delivered a bill of sale to the plaintiff, covering said two horses and certain other property; that said bill of sale was to secure certain loans made by plaintiff to said Richard Godman and also to secure future advances; that said bill of sale was on October 21, 1915, duly filed for record in the office of the register of deeds of Ramsey county, being the county wherein said property was situated and wherein Richard Godman resided; that on or about November 6, 1915, the defendant, as sheriff of Ramsey county, under a warrant of attachment issued to him in an action then pending in a justice's court in Ramsey county, wherein one Emil Plath was plaintiff and said Richard Godman defendant, seized and levied upon said two horses as the property of said Richard Godman; that at the time of said levy there

was due to the plaintiff from said Richard Godman a sum in excess of $1,500, for which indebtedness said bill of sale stood as security, and which sum is still wholly unpaid; that after the seizure of the horses by the defendant, and while they were still in his possession as such officer, the plaintiff served upon him a notice of demand and affidavit in form as provided by law, stating plaintiff's interest therein, that said sheriff refused and still refuses to deliver possession of the horses to the plaintiff; and that the horses were worth $225. The defendant in his answer admits that he took the horses into his possession under the writ of attachment mentioned in the complaint, and, by way of justification, alleges that the horses were the property of Richard Godman; and that at the time of the execution and delivery of said bill of sale the plaintiff "did then and there agree to convert the said property into cash, with a secret understanding and agreement between them that the surplus that would be in the hands of the plaintiff herein from the sale of said property, over and above the amount required to pay the indebtedness from the said Richard Godman to the plaintiff herein, should be returned to or held for the benefit of Richard Godman." The answer further alleges that the property remained in the possession of Richard Godman subsequent to the execution and delivery of the bill of sale, and was in his possession at the time of the seizure by the defendant; and that consequently the bill of sale was fraudulent and void as to the creditors of said Richard Godman. The case was submitted to a jury, which returned a verdict in plaintiff's favor for $180. Judgment was entered pursuant to the verdict, and defendant has appealed from the judgment and from the order denying his alternative motion for judgment notwithstanding the verdict, or for a new trial.

The evidence shows that the plaintiff and Richard Godman are brothers. Richard Godman was a tenant farmer. He was in debt. His live stock and machinery were mortgaged. He owed various parties, including his hired man. He also owed the plaintiff for moneys loaned. Richard requested further loans from the plaintiff. Plaintiff desired security. They thereupon went to Churchs Ferry and consulted their banker, one Hanson. Hanson advised that the best way to secure plaintiff was to have Richard execute a bill of sale of certain personal property.

The plaintiff testified in part:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. You are a brother of Richard Godman?

A. Yes, sir. . . .

Q. Whereabouts did your brother Richard Godman live in the months of October and November, 1915?

A. He lived north of Churchs Ferry, probably 4 or 5 miles. . . .

Q. He was in Ramsey County?

A. Yes, sir.

Q. Was your brother a landowner or renter?

A. Renter.

Q. Whose place did he rent?

A. N. O. Sather's.

Q. Was he there during all the season of 1915?

A. Yes.

Q. Did you have any dealings with your brother during the summer of 1915, and prior to the 21st day of October?

A. Yes.

Q. To get down to the point, had you been advancing him money?

A. Yes, sir.

Q. During the spring—how much had you advanced him up until the 21st day of October—what was it at that time in money?

A. Over $1,500.

Q. Was all that money advanced to him?

A. Some of it was for some horses he bought from me to start up with, and the other was money I loaned him. I loaned him money when he first came to this country, in fact to get his family up here. And I bought some machinery for him from Mr. Sylvester at Churchs Ferry, and he had the use of that during the two years he farmed. I also paid up a mortgage and paid off some hired help who were working on the place last summer.

Q. He was unable to pay his help?

A. He couldn't pay the help and kept them longer than he should have kept them, until I raised the money to pay them off with.

Q. About the 21st day of October did you and your brother go down to Churchs Ferry?

A. Yes, sir.

Q. And you went into the bank?

A. Yes, sir.

Q. Mr. Hansen's bank?

A. Yes, sir.

Q. Did you and your brother go into the rear end with Mr. Hansen?

A. Yes, sir.

Q. Did you tell him what you wanted to do—that Richard wanted to secure you for these advances?

A. Yes, sir.

Q. What did Mr. Hansen say?

A. He suggested that I take a bill of sale—that was good enough for me.

Q. He suggested that?

A. Yes—that would be good enough security.

Q. You asked him how to go about it?

A. We asked him how to fix it up to get security for me for the money I had advanced, and he suggested a bill of sale was good enough for me.

Q. Was a bill of sale drawn?

A. Yes, sir.

Q. And you sent it down for record?

A. Yes, sir.

Q. Now, was there included in that bill of sale these two horse which are described in the notice of levy as one sorrel gelding, tw white hind feet, weight about 1,150 pounds, and one bay mare, white right hind foot, star in face?

A. Yes, sir.

Q. You went to Mr. Olsen yourself and served the notice upon him, and the affidavit?

A. Yes, sir.

Q. You went up and served that yourself?

A. Yes, sir.

Q. After you had it drawn up for you?

A. Yes, sir.

Q. Did you ever get those horses?

A. No, sir.

Q. Or either of them?

A. No, sir, I haven't seen either of them since.

Q. That is, you understood that the sheriff sold them after being indemnified by the plaintiff?

A. Yes, sir.

Q. At the time of this seizure by the sheriff under the attachment you say that Richard Godman owed you in excess of $1,500.

A. Yes, sir.

Q. Has that amount, or any of it, been paid to you since?

A. No, sir.

Q. None of it?

A. No, sir.

Hansen, who was examined as a witness, testified that Richard and the plaintiff came to him on October 21, 1915. Plaintiff wanted to get security for what Richard owed him and be protected for further advances. Hansen suggested that Richard Godman execute a bill of sale to the plaintiff. During the conversation Hansen was informed that there was a chattel mortgage against the property held at a bank in Leeds. Hansen used the telephone and found out the amount. Plaintiff gave Hansen's bank, the First National of Churchs Ferry, a check for the amount then owing on the chattel mortgage, $446.17, and Hansen forwarded it to the Bank of Leeds. Hansen's suggestion with respect to the bill of sale was adopted, and he drew the bill of sale. The bill of sale was immediately forwarded to the register of deeds of Ramsey county for record, and was received by him, and duly filed for record in his office on the day of its execution.

At the time of the execution and delivery of the bill of sale, Richard owed the plaintiff $800 and interest. On that day plaintiff made the further advancement of $162.78 for one of Richard's hired men. Thus plaintiff on the day he took the bill of sale paid off a chattel mortgage for $446.17 and hired help $162.78, making a total of $608.95. And shortly afterwards he advanced $125 more for a hired man. These items aggregate $1,500 or over. Defendant claims that the $125 was not advanced until after the levy had been made. But it is undisputed that the other indebtedness either existed prior to, or came into existence on, October 21, 1915.

The defendant called two witnesses,—Johnson and Sylvester,—who both testified that plaintiff had informed them that he would sell the property covered by the bill of sale at public auction the following spring, and divide the proceeds among the creditors. Defendant also called one John F. Plath, who testified in part:

Q. What is your name?
A. John F. Plath. . . .
Q. You are the son of Emil Plath?
A. Yes, sir.
Q. You are acquainted with W. T. Godman, the plaintiff here?
A. Yes, sir.
Q. And do you recollect any conversation that took place between your father and Mr. Godman, the plaintiff in this action, with reference to your father's claim or bill against Richard Godman last fall?
A. Yes, sir.
Q. When was this?
A. The latter part of October.
Q. The latter part of last October?
A. Yes, sir.
Q. Where was this?
A. That was the Copeland farm.
Q. You may just relate that conversation if you can remember it.
A. Father asked him if he had a bill of sale of Dick's stuff, and he says, "Yes." And father says, "Where will I come in at?" and he says, "I don't know." He says, "We will have a sale in the spring—we will sell it, and I will take the money and divide it among the creditors what there is left."
Q. What did he refer to, do you know, when he said that?
A. Richard Godman's property.

Under our laws "every transfer of property or charge thereon made . . . with intent to delay or defraud any creditor or other person of his demands is void as against all creditors of the debtor." Comp. Laws 1913, § 7220. This does not mean, however, that a debtor is precluded from preferring one or more of his creditors. On the contrary, our laws provide that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Comp. Laws 1913, § 7218. The question whether a transfer is made in fraud of creditors is generally one of fact. Comp. Laws 1913, § 7223. In this case this question was submitted to the jury, and the jury found that no fraudulent intent existed. We have no hesitancy in holding that this find-

ing has ample support in the evidence. In fact, it is difficult to understand how reasonable, fair-minded men could have made any other.

Defendant contends, however, that the bill of sale was void as a matter of law, for the reason that it was accompanied by a secret verbal understanding. In support of this contention it is asserted that the undisputed evidence "shows that the said Richard Godman, by said bill of sale, transferred the property in question, together with all of his other personal property, to the plaintiff; and the said Godman received possession of it under a secret verbal understanding, wherein it was agreed between plaintiff and the said Richard Godman that plaintiff might satisfy the indebtedness of the said Richard Godman to the plaintiff out of the proceeds of said property, and pay over the balance to the other creditors of said Richard Godman;" and "that the plaintiff was holding the property from the judgment debtor Godman, under a bill of sale, absolute on its face, with a secret verbal understanding, making it fraudulent as to the creditors of Richard Godman." Defendant further asserts "that the giving of the bill of sale, with this secret oral reservation, would not make the bill of sale a chattel mortgage or a pledge, nor would the transaction constitute the plaintiff a trustee for the benefit of himself and all of the creditors, nor would it be a transaction preferring the plaintiff as a creditor, but the transaction constituted a transfer of the property of the said Richard Godman to the plaintiff in fraud of creditors."

It is difficult to understand how it can be seriously contended, under the facts in this case, that the bill of sale is void as a matter of law. That a bill of sale absolute on its face will be deemed a mortgage if intended as such by the parties, not only as between the parties, but also as to third persons affected with notice, is too firmly settled to require any extended discussion. See 6 Cyc. 922; 5 R. C. L. pp. 388, 399; Cobbey, Chat. Mortg. § 82. That the bill of sale involved in this case was not intended to operate as an absolute conveyance, so as to vest absolute title in the plaintiff, is undisputed. That the primary purpose of the bill of sale was to secure the payment of plaintiff's claim against Richard is so manifest that it is difficult to understand how this can be questioned. That any secret trust was reserved for the benefit of Richard Godman has not been shown. On the contrary, the testimony of all the witnesses—including defendant's own witnesses—was to the

effect that the surplus, if any, remaining after the payment of plaintiff's claim, should be divided proportionately among the remaining creditors. There is nothing in the transaction of which a creditor can justly complain. "It is sufficient to say," said Chief Justice Morgan (McCormick Harvester Co. v. Caldwell, 15 N. D. 132, 137, 106 N. W. 122), "that a bill of sale absolute in form, but in equity a mortgage, does not render it void as security for present indebtedness or indebtedness to accrue. The fact that a bill of sale or deed absolute in form is given does not of itself make it void as a matter of law. It may be a fact to be considered in connection with other facts, to determine whether the transaction was fraudulent in fact. But standing alone it is not given that effect when the debtor has no rights under it save that of paying his debts, and thereby releasing the property from the lien of the mortgage, and the creditor has no rights thereunder except to hold the property as security."

We have recently considered a case involving the sale of land wherein it was contended that an alleged secret reservation of a portion of the purchase price rendered the instrument void. See Merchants Nat. Bank v. Collard, 33 N. D. 556, 157 N. W. 488. The authorities principally relied upon by the appellant in this case were cited and relied upon in that case, and what we said with respect thereto in that case is directly applicable here. See Merchants Nat. Bank v. Collard, 33 N. D. 556, 562, 157 N. W. 488. And while the question is not involved here, it may also be mentioned that we recently considered the effect of a secret reservation for the benefit of the vendor. See Petrie v. Wyman, 35 N. D. 126, 147, 159 N. W. 616.

Appellant further contends that the fraudulent character of the transaction is established by the fact that Richard Godman was permitted to retain possession of the personal property covered by the bill of sale. If Richard Godman had executed and delivered a chattel mortgage instead of the bill of sale, it would unquestionably have been proper, and the customary thing, for him to retain possession of the property covered by the mortgage. Under the evidence in this case, the bill of sale was, as between the plaintiff and Richard Godman, intended to perform the same purposes as a chattel mortgage. The other portions of the verbal understanding with respect to the sale and distribution of the surplus among the creditors of Richard Godman were

not intended for the benefit of either plaintiff or Richard Godman, but rather for the benefit of the other creditors. The only benefit sought to be conferred upon or received by the plaintiff, under the bill of sale, was to secure the debt which Richard Godman owed him. Upon a sale of the property, that was all he was to receive. The surplus, if any, would go to the other creditors.

Appellant, however, contends that under the decision of this court in Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014, the bill of sale must be held fraudulent as a matter of law. That case is not in point. The facts in Newell v. Wagness were summarized by this court in the case of Merchants State Bank v. Tufts, 14 N. D. 238, 244, 116 Am. St. Rep. 682, 103 N. W. 760, as follows: "In that case a bill of sale of a large stock of goods was sold to the plaintiff by a bill of sale absolute on its face. The facts showed that the buyer and seller had secretly agreed that the buyer should dispose of the stock of goods, and turn over the proceeds, after repayment of the plaintiff's indebtedness, to the seller. The necessary and inevitable tendency of that transaction would be to delay the other creditors of the financially embarrassed seller. In the case at bar there was no secret reservation on behalf of the mortgagor, except as to reconveyance after the indebtedness was paid, and that will not avoid the conveyance as constructively fraudulent. As said in McClure v. Smith, 14 Colo. 297, 23 Pac. 786: 'But if there be a bona fide debt for which the security is given; if there be no understanding with the mortgagee to hold the overplus, or to hold the property after payment of his debt, secretly, for the benefit of the mortgagor; if there be no collusion on the part of the mortgagee with the mortgagor in keeping the defeasance unrecorded, or in keeping secret the exact nature of the transaction, for the purpose of deceiving creditors; in short, if the mortgagee is simply endeavoring in good faith to obtain that precedence in the security of his debt which the law permits,—the mere isolated fact that he takes an absolute deed instead of a mortgage will not, in and of itself alone, render his lien nugatory." The case of Newell v. Wagness is readily distinguishable for another reason. Under our statutes as they existed at the time Newell v. Wagness was decided, the retention by the vendor of the possession of personal property was made conclusive evidence of fraud in the transaction. Comp. Laws 1887, § 4656. This statute was subsequently amended by the legislature, so as to

render the retention of possession by the vendor merely presumptive evidence of fraud. Comp. Laws 1913, § 7221; Drinkwater v. Pake, 33 N. D. 190, 156 N. W. 930; Moores v. Tomlinson, 33 N. D. 638, 157 N. W. 685. In this case the question of fraud was submitted to the jury, and it found that the transaction was not fraudulent. This finding was approved by the trial court on the motion for a new trial. And, as we have already indicated, we are wholly agreed that this finding was correct, and that a finding to the contrary would not have been justified under the evidence.

Appellant also contends that the bill of sale, if intended as a mortgage, was not entitled to record, for the reason that a copy thereof had not been delivered to the mortgagor. It is unnecessary for us to determine whether the record of a chattel mortgage operates as constructive notice, where there is not attached to the original mortgage a receipt showing that the mortgagee has delivered a copy of the mortgage to the mortgagor. That question is not involved in this case. Emil Plath, the attaching creditor, testified that he had actual knowledge of the bill of sale before the attachment was levied. He admits that he was so informed by both the plaintiff and Richard Godman. His son John testified that the plaintiff also informed the attaching creditor of the oral defeasance. It is therefore an undisputed fact that the attaching creditor had full knowledge of all the facts which he could have received by an inspection of the records in the register of deeds' office. An unrecorded chattel mortgage is not involved as between the parties, or as to any person who has actual personal knowledge of its existence. Union Nat. Bank v. Oium, 3 N. D. 193, 44 Am. St. Rep. 533, 54 N. W. 1034; Aultman & T. Machinery Co. v. Kennedy, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; Loeser v. Jorgenson, 137 Mich. 220, 100 N. W. 450. See also Wm. Deering & Co. v. Hanson, 7 N. D. 288, 75 N. W. 249; Thompson v. Armstrong, 11 N. D. 198, 91 N. W. 39; Merchants State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Rock Island Plow Co. v. Western Implement Co. 21 N. D. 608, 132 N. W. 351.

Appellant further contends that plaintiff has sustained no injury by reason of the seizure and sale of the two horses, for the reason that the evidence shows that the property covered by the bill of sale, exclusive of the two horses involved in this litigation, exceeds in value the amount

of plaintiff's claim. In support of this contention appellant invokes the doctrine of marshaling of securities, and quotes the following portion of § 6716, Compiled Laws of 1913, *viz.*: "When one has a lien upon several things, and other persons have subordinate liens upon, or interests in, some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself or of injustice to other persons, must resort to the property in the following order, *on the demand* of any party interested: 1. To the things upon which he has an exclusive lien."

It is true as a general rule that the holder of a mortgage, or other lien upon or special interest in personal property, is, in an action for conversion of such property, entitled to recover damages only to the extent of the value of such special interest. But it is equally true that such special interest extends to every article of personal property in which such special interest has been granted. Of course, if the article converted exceeds in value the amount of the special interest, the owner of the special interest should be awarded only the amount of his interest; but, if the special interest exceeds the value of the property converted, the owner of the special interest should be awarded the full value of the property. Plath made no demand that plaintiff, if possible, satisfy his claim from the residue of the property. He did not even pretend to levy upon or sell the horses subject to plaintiff's interest therein. He ignored plaintiff's rights, and denied their very existence. The doctrine of marshaling of securities manifestly has no application.

In considering contentions similar to those advanced here, the supreme court of Michigan (Huellmantel v. Vinton, 112 Mich. 47, 88, 70 N. W. 412) said: "The logical result of the defendant's last contention is that, in all cases of levy on a portion of the property covered by a chattel mortgage, the defendant in a suit brought by the mortgagee for conversion by levy and sale upon execution running against the mortgagor would be at liberty to defend on the ground that, while he levied upon and sold a part of the mortgaged property wrongfully, yet, as he had left sufficient to pay the plaintiff's debt, the plaintiff had suffered no injury. In a case like the present he might defend upon the ground that the plaintiff had ample security under another instrument, *e. g.*, a real estate mortgage; although this defense, if allowed, might subject the plaintiff to the annoyance, expense, and delay of foreclosure of such

mortgage, to say nothing of its violation of the rule that the creditor may choose between securities, and avail himself first of one or the other, at his option. In Jones on Chattel Mortgages, 4th ed. § 448, it is said that 'he [the mortgagee] is not obliged to look to the personal responsibility of his debtor, or to show his insolvency before recovery of the wrongdoer. Neither is he required to first look to any other security he may hold.' "

Under our statute the interest of a debtor in property held as a pledge, or subject to a mortgage or other lien, may be levied upon and sold on execution without the officer taking possession of or removing the same. Comp. Laws 1913, § 7721. Plath did not see fit to proceed under this statute. He disregarded it, and proceeded contrary to its provisions. With full knowledge of plaintiff's rights in this property, he intentionally disregarded and challenged the existence of such rights, and sought to secure by a judicial proceeding a preference over all creditors of Richard Godman.

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

ROBINSON, J. I affirm original opinion.

THOMAS L. MARTIN v. COUNTY OF BURLEIGH, etc.

(165 N. W. 520.)

Assessment of property — city assessor — city board of equalization — schedules — changing of — reassessment by board — no notice given — assessment void.

1. Where a city assessor assessed certain property under its proper designation in the assessment schedule, and the city board of equalization, at a regular

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NOTE.—The general rule that the situs for taxation of a vessel engaged in foreign or interstate commerce and merely touching at local ports, regularly or otherwise, as an incident of such commerce, is at the home port of the vessel, or at the domicil of the owner, and the exception to that rule in case a vessel is so used within a particular state as to impress her with a local character, are both well sustained

meeting, canceled the assessment, entered the amount thereof in a column designated "all other property," then reassessed the property originally assessed at a certain valuation, but gave no notice of the increase in the assessment, resulting from the addition of two items, it is *held* that the failure to give notice required by §§ 1217 and 2187, N. D. Rev. Codes, 1899, is fatal to the legality of the assessment placed under the item "all other property."

Personal property taxes — collection of — officers — neglect of duty — for period of years — legality of assessment — no presumption in favor of — beyond that shown by face of records.

2. Where the officers charged with the duty of collecting personal taxes neglected to take legal steps to collect the same for a period of years, though there was real property within the jurisdiction which might have been subjected thereto; and where a part of the assessment records are lost,—no presumption favorable to the legality of the proceedings can be indulged beyond that warranted by the face of the records.

Property owner — original notice given to — showing amount of assessment — amount reduced by board — no notice given — owner cannot complain.

3. Where a property owner had original notice, presumptive or otherwise, that certain property was assessed by the assessor at $2,750, and later received notice from the board of equalization that this item of property was "equalized" at $2,000, he cannot complain of the assessment at the latter valuation.

Vessel property — situs of — for taxation purposes — owner within taxing jurisdiction — certain district — listed and assessed in — proper assessment district — not determined — owner cannot complain.

4. Sections 1179, 1183, 1184, and 1189, N. D. Rev. Codes, 1899, construed in conjunction with § 4141, U. S. Rev. Stat. 1878, Comp. Stat. 1916, § 7719, relating to the situs of vessel property for taxation, and *held* that the owner of personal property which is within the taxing jurisdiction of the state cannot complain of its assessment within a certain district, where no steps have been seasonably taken to determine the proper assessment district.

Interstate navigable stream — vessel plying upon — taxing district — other than where vessel is registered or licensed — may belong to.

5. Where a vessel plying upon an interstate navigable stream acquires a

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by authority, as will be seen by the cases cited in notes in 37 L.R.A. 518 and 29 L.R.A.(N.S.) 105, on where ships are taxable.

As to what is home port of vessel for purpose of taxation, see note in 2 L.R.A. (N.S.) 197 and 1196.

On the question of situs of vessel for purpose of taxation, see note in 62 Am. St. Rep. 471.

physical situs within the state, such property may, under § 179 of the Constitution, and §§ 1183 and 1184, N. D. Rev. Codes, 1899, "belong," for taxation purposes in a district other than that in which the same may be enrolled, registered, or licensed.

Interstate commerce vessel used in navigable stream — actual situs in state — subject to taxation within state — domicil of owner — regardless of.

6. Where a vessel used in interstate commerce upon a navigable stream has acquired an actual physical situs within the state, it is subject to taxation within the state as a part of the mass of property within the jurisdiction of the state, regardless of the domicil of the owner.

Opinion filed November 16, 1917.

Appeal from the District Court of Burleigh County, *W. L. Nuessle,* Judge.

Reversed.

Benton Baker, for appellant.

The situs of personal property for taxation purposes is determinable the first day of April,—not prior or subsequent thereto. Gaar, S. & Co. v. Sorum, 11 N. D. 164, 90 N. W. 799.

The expression in the statute, "all other property," merely means all other personal property not falling within the itemized lists or classes named for taxation purposes. Rev. Codes 1899, § 1191.

It is a well-recognized principle of equity jurisdiction that a court of equity will exercise jurisdiction to prevent the casting of a cloud upon the title to real estate at the instance of the owner of the legal title, when a proper showing is made. This principle extends to and embraces the case of the lien upon real estate for taxes ripening into a cloud upon title; and where the tax is invalid for illegality in its determination and levy, a court of equity will annul the lien and enjoin the assertion of rights under it. Frost v. Flick, 1 Dak. 132, 46 N. W. 508; Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Northern P. R. Co. v. Barnes, 2 N. D. 310, 51 N. W. 386; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919.

The rights of the taxing authorities are prescribed by the Constitution and statutes, and are conditional upon substantial compliance therewith. Reading v. Krause, 167 Pa. 23, 31 Atl. 366; Kupfer v. McConville, 35 N. D. 622, 161 N. W. 283; Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; People v. Pearis, 37 Cal. 259; L'Engle v. Florida C. & W. R. Co. 21 Fla. 353; Jackson v. Smith, 153 App. Div. 724, 138 N. Y. Supp. 654; 37 Cyc. 1139; 27 Am. & Eng. Enc. Law, 2d ed. 736, Taxation.

A subsequent purchaser of property may contest the validity of a tax. Vesta Mills v. Charleston, 60 S. C. 1, 38 S. E. 226; 2 Cooley, Taxn. 3d ed. 1428; Eaton v. Bennett, 10 N. D. 349, 87 N. W. 188.

In assessment of property for taxation purposes, the action of the local board of equalization of a city, over the property within its jurisdiction, is final. First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836; Minot v. Amundson, 22 N. D. 236, 133 N. W. 551; Rev. Codes 1905, § 1553; Comp. Laws 1913, § 2165.

"Where a tax purchaser is not in possession, the legislature cannot impose upon the owner the duty to bring suit to quiet title against such tax title. Martin v. White, 53 Or. 319, 100 Pac. 290.

There must be the statutory notice given, and an opportunity for a hearing, as a condition precedent to charging him with a tax. Power v. Larabee, 2 N. D. 141, 49 N. W. 724; Carney v. People, 210 Ill. 439, 71 N. E. 365; People v. International Salt Co. 233 Ill. 223, 84 N. E. 278; State Bank v. Seward County, 95 Neb. 665, 146 N. W. 1046; Bode v. New England Invest. Co. 1 N. D. 121, 45 N. W. 197; Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Griswold College v. Davenport, 65 Iowa, 633, 22 N. W. 904; Kelly v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658; Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; State R. Tax Cases, 92 U. S. 575, 23 L. ed. 663; Stuart v. Palmer, 74 N. Y. 192, 30 Am. Rep. 289; Thomas v. Gain, 35 Mich. 164, 24 Am. Rep. 535; San Mateo County v. Southern P. R. Co. 8 Sawy. 238, 13 Fed. 751; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385;

Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Mulligan v. Smith, 59 Cal. 206; Kuntz v. Sumption, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; Baltimore & O. & C. R. Co. v. Seneca County, — Ohio —, 1 West. Rep. 94; Boorman v. Santa Barbara, 65 Cal. 313, 4 Pac. 31; Cooley, Taxn. 265, 267; Dundee Mortg. Trust Invest. Co. v. Parrish, 11 Sawy. 92, 24 Fed. 197; Butler v. Saginaw County, 26 Mich. 22; Hutson v. Woodbridge Protection Dist. 79 Cal. 90, 16 Pac. 549, 21 Pac. 435.

The law, in prescribing the time when complaints before the taxing officers may be heard, gives all the notice required; and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquents' property, is due process of law. Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 409; Scott v. Toledo, 1 L.R.A. 688, 36 Fed. 385; McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

The residence of a corporation is that place where its principal place of business is as provided in its charter. It matters not where the residence of its stockholders may be; it cannot have any other residence than that fixed and given under its charter. Middletown Ferry Co. v. Middletown, 40 Conn. 65; Wheeling, P. & C. Transp. Co. v. Wheeling, 99 U. S. 273, 25 L. ed. 412; Com. v. Southern P. Co. 134 Ky. 417, 120 S. W. 311, 20 Ann. Cas. 965, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; Ayer & L. Tie Co. v. Keown, 122 Ky. 580, 93 S. W. 588; Boston Invest. Co. v. Boston, 158 Mass. 461, 33 N. E. 580.

The situs of a vessel for the purpose of taxation is the domicil of the owner, though the vessel in fact has never been there, or cannot go there. Hays v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; People v. Niles, 35 Cal. 282; State, New York & E. R. Co., Prosecutor, v. Haight, 30 N. J. L. 428; People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs. 58 N. Y. 242; Southern P. Co. v. Com. 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13; Old Dominion S. S. Co. v. Virginia, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 Ann. Cas. 1100; North American Dredging Co. v. Taylor, 56 Wash. 565, 29 L.R.A.(N.S.) 105, 106 Pac. 162.

F. E. McCurdy, William Langer, Attorney General, *D. V. Brennan* and *H. A. Bronson,* Assistant Attorneys General, and *H. F. O'Hare,* City Attorney, Bismarck, for respondent.

The plaintiff does not ask to have the assessment for taxes set aside, but merely seeks relief from the collection of the resultant taxes. Injunctional relief will not be given for such purpose. Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, L.R.A.1916A, 965, 153 N. W. 454; Comp. Laws 1913, §§ 2232, 2233; First Nat. Bank v. Lewis, 18 N. D. 390, 121 N. W. 836.

The situs of a vessel plying navigable streams in this state, for taxation purposes, is at the home port of the vessel, where such vessel is so used within the state as to impress her with local character. North American Dredging Co. v. Taylor, 56 Wash. 565, 106 Pac. 162, 29 L.R.A.(N.S.) 105, note; Olson v. San Francisco, 148 Cal. 80, 2 L.R.A. (N.S.) 197, 113 Am. St. Rep. 191, 82 Pac. 850, 7 Ann. Cas. 443, 2 L.R.A.(N.S.) 1196, Appx.

BIRDZELL, J. This is an appeal from a judgment of the district court of Burleigh county, vacating an injunctional order previously issued in an action restraining the sale of certain real estate owned by the plaintiff to satisfy the lien of personal property taxes assessed against a former owner of the realty, namely, the Benton Transportation Company, in the year 1903. Also dismissing the action and granting to the defendants their costs and disbursements. The facts are as follows: The Benton Transportation Company, an Iowa corporation, was for a period of years, until the expiration of its charter in April, 1905, engaged in the business of owning and operating boats and barges on the Missouri river and its tributaries. The company was licensed to do business in the state of North Dakota from 1889 to 1905, maintaining an office in the city of Bismarck, the county seat of Burleigh county. The company owned a number of boats and barges, which were registered and licensed in accordance with the laws of the United States, which boats were used in the carrying of interstate as well as intrastate commerce. During the years the company did business in the state of North Dakota, personal taxes were levied and paid for various years excepting, however, the years 1892, 1893 when no assessments were made, and 1903. The assessment upon which the tax in question was

levied was made in the year 1903. The assessments, exclusive of the 1903 assessment, range from $500 in 1889 to $3,300 in 1899. For each of the years, 1899, 1900, 1901, and 1902 the assessment was $2,750. For the year 1903 the purported assessment was $4,750. The circumstances under which it was made will later be referred to. The company also owned certain real estate, among which were lots 1, 2, 3, 4, and 5 and the west half of the northeast quarter and the northeast quarter of the southeast quarter of section 19, township 138, range 80, in Burleigh county. This real estate was owned by the company in 1903, when the personal property tax in question was assessed and levied, but was later, on December 2, 1915, transferred, under the authority of a resolution passed prior to the termination of the corporate charter, to Thomas L. Martin, the plaintiff and appellant in this action. The defendant Flaherty, acting under the authority of § 2189, Comp. Laws 1913, as amended by chapter 256, Session Laws of 1915, as county auditor, caused the personal tax of the Benton Transportation Company to be entered on the tax list against the foregoing real estate, and proceeded to advertise the same for sale. This action was for the purpose of restraining the sale and for the annulment of the taxes, in so far as the same might constitute a lien upon the real estate owned by the plaintiff. An injunctional order restraining the sale was issued, and a trial was had upon the merits, resulting in a judgment of dismissal. The crucial facts are those concerning the assessment of the personal property of the Benton Transportation Company for the year 1903. Thirteen years elapsed between the making of the assessment and the trial of this action, and it appears that some of the original assessment records cannot be obtained. It is stipulated, however, "that on June 26, 1903, the mayor and city council of the city of Bismarck, acting as a board of equalization, canceled an assessment of two thousand seven hundred and fifty ($2,750) dollars for 'steamboats, etc.,' of the Benton Transportation Company, assessed 'all other property' of the value of two thousand seven hundred and fifty ($2,750) dollars against said company, and reassessed 'steamboats, etc.,' as of the value of two thousand ($2,000) dollars against said company," and "that no notice of the action of the board of equalization of the city of Bismarck on June 26, 1903, was given to the Benton Transportation Company,

except that said company received a notice in words and figures as follows:

"Council Chamber, Bismarck, N. D., 6–26–03.

" 'I am directed by the city board of equalization, now in session, to notify you that the board has raised your assessment as noted below:

Items	As Assessed	As Equalized
Steamboats, etc.		$2,000.00

" 'The board will be in session at the council chamber 6–26–03 (now in session), at which time you may appear and be heard if not satisfied with the action above noted.' "

The net result of this action was to assess the personal property of the Benton Transportation Company, $4,750, which, in view of the assessments for the previous years, was probably not intended, and it remains to be seen how far this result may be legally substantiated. It does not appear that any steps were taken to collect the taxes upon this assessment from 1903 to 1915; and, in view of the long period of time that has elapsed since the tax was levied and the apparent inactivity of those whose duty it was to collect the taxes, we think no presumption should be indulged favorable to the regularity of the proceedings, beyond what appears upon the face of the record as stipulated. It being stipulated that the city council, acting as a board of equalization, canceled an assessment of $2,750 for steamboats and assessed "all other property" of the company at the valuation of $2,750, its action amounted to a determination that the property other than the steamboat property, and aside from whatever property might be owned by the company which did not fall within some specific designation in the assessment schedule, was of the value of $2,750; for, under § 2188 of the Revised Codes of 1899, it is made the duty of the city board of equalization to "place upon and add to the assessment roll any property, real or personal, subject to taxation, which has been omitted therefrom by the owner or by the assessor, and enter the same at a valuation so

that it will bear an equal and just proportion of taxation." It is thus apparent that the action of the city board of equalization was equivalent to a finding that the company owned $2,750 worth of property other than steamboat property. Section 2187, Revised Codes of 1899, requires "that the valuation of *any personal property* as returned by the assessor shall not be increased more than 25 per cent without first giving the owner or his agent notice of the intention of the board so to increase it." See also § 1217, Revised Codes of 1899. It appears that the action of the city board of equalization relative to the assessment of "all other property" was taken without complying with this requirement; for it is stated in the stipulated facts that the only notice that was given was a notice that the item of "steamboats" was equalized at $2,000. Clearly this notice was not sufficient to apprise the taxpayer that it had been assessed by the board of equalization $2,750 on property classified as "all other property." This mandatory requirement of § 2189 has not been complied with as to the $2,750 item. This item of the personal property assessment for the year in question therefore cannot stand. It is elementary that, where notice of an assessment proceeding is required by statute, the failure to give notice is fatal to the proceeding. McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

By reason of the necessary elimination of the $2,750 item from the assessment, the scope of our inquiry is now limited to the remaining item of the assessment; the $2,000 valuation under the item of "steamboats, etc." It is urged by the appellant that the steamboat property of the Benton Transportation Company was not taxable in the assessment district of the city of Bismarck, and, in support of this contention, he relies upon the facts that the corporation was a foreign corporation, with its main office situated outside the state; that such vessels as were used by the company were registered and licensed at ports distant from the city of Bismarck; and that the vessels themselves were used in conducting the interstate traffic carried on by the company. None of these facts, nor all combined, warrant the legal conclusion contended for. The company kept its principal office within the state at Bismarck, where one of its officers and managing agent resided. The boats plied upon the Missouri river, which touched at the city of Bismarck. The boats upon which the assessment was made, or could be held to apply, were during the year in question outside the state of

North Dakota but little if at all, and they never visited the port of registration. The permanency of their location within the state amply justifies their treatment for tax purposes as a part of the general mass of property within the jurisdiction of the state.

The appellant relies up §§ 1179, 1183, and 1184 of the Revised Codes of 1899 in conjunction with § 4141, U. S. Revised Statutes 1878, Comp. Stat. 1916, § 7719, to disprove the taxing jurisdiction of the city of Bismarck. The latter section merely provides that "every vessel, . . . shall be registered by the collector of the collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel, usually resides." Section 1179, N. D. Rev. Codes 1899, defines personal property for taxation purposes, and includes in the definition ". . . all ships, boats, and vessels, either at home or abroad, and all capital invested therein. . . ." Section 1183, N. D. Rev. Codes 1899, provides for the listing of personal property in the county, town, or district where the owner or agent resides "except as otherwise provided;" and the following section (1184, N. D. Rev. Codes 1899) provides that "all persons, companies and corporations in this state owning steamboats, sailing vessels, wharve boats, barges and other water crafts shall be required to list same for assessment and taxation in the county, town or district in which the same may belong, or be enrolled, registered or licensed or kept, not enrolled, registered or licensed." These statutory provisions, as applied to the situation presented on this record, raise a nice question as to the proper place for listing and taxing the property in question. If a controversy should arise as between different taxing districts within the state, each contending for the right to swell its assessment roll by the valuation of such personal property,—one on account of its being the location of the place of business within the state of a foreign corporation, owning vessels situated within the state, and the other on account of the situs of the property within the district—it would be necessary to determine the matter. But inasmuch as § 1189, N. D. Rev. Codes 1899, makes it the duty of the assessor to list and assess all personal property *wherever* and *whenever* found, and further provides that when questions arise as to the proper place for listing they

shall be determined by the county board or by the state auditor, depending upon whether the doubt involves two districts within the county or districts lying within different counties, it was clearly the duty of the assessor to assess boats where he should find them. If, in order to avoid double assessment, it should later become necessary to determine the true situs, the procedure provided by § 1189 would be applicable. In view of this section, it cannot be said that an assessment in the wrong county or district is a void assessment; it is rather a voidable assessment. The defendant having for so long a time refrained from questioning the situs of the vessel property for taxation, that is, as between different districts within the state, should not be held to be precluded, as far as that question is concerned.

As further supporting the views above expressed relating to the situs of the property for purposes of taxation, it might well be remarked that to interpret §§ 1183 and 1184, Rev. Codes 1899, in the manner contended for would give them a meaning that would render them unconstitutional; for § 179 of the Constitution provides that "all property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village or district in which it is *situated* in the manner prescribed by law." The excepted class does not embrace steamboats. Under this section of the Constitution, the only permissible meaning of the statutory requirement that vessel property shall be listed for assessment in the district in which the same may *"belong,"* or be enrolled, registered, or licensed, is that such property *belongs,* for tax purposes, where it is situated for a sufficient period of time to warrant its inclusion in the general mass of property within the assessment district. Where there is no such controlling physical situs, of course it may be assessed where enrolled, registered, or licensed.

But it is contended that the vessel property is not assessable within the state. The case of Hays v. Pacific Mail & S. S. Co. 17 How. 596, 15 L. ed. 254, is relied upon as supporting the appellant's proposition; but this case only goes to the extent of holding that where a vessel is only temporarily plying within the jurisdiction of a state and for a purpose wholly excluding the idea of permanently abiding in the state or changing the home port, it is not subject to the jurisdiction of the for tax purposes. The last expression of the Supreme Court of the United States upon this subject is contained in an exhaustive opinion

by Mr. Justice Lurton in the case of Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. ed. 96, 32 Sup. Ct. Rep. 13. The learned justice discusses the matter as follows (222 U. S. page 73): "The general rule has long been settled as to vessels plying between the ports of different states [and the language is applicable to all vessels engaged in interstate traffic] . . . that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrolment, subject, however, to the exception that, where a vessel engaged in interstate commerce *has acquired an actual situs in a state other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority.*" In the above case, the Supreme Court of the United States sustained the taxing jurisdiction of the state of Kentucky as to vessels belonging to a domestic corporation, which vessels plied only on the ocean, and could not have even reached the state of Kentucky by water. Jurisdiction for taxing purposes must be dependent either upon a physical location of the property of such a character as to give to it a degree of permanency warranting the same treatment of the property as that accorded to all other property within the state, or it must be justified by the legal domicil of the owner being within the state. Where the latter affords a ground for the exercise of the taxing power, it is upon the theory that the owner, being within the state, must contribute to the tax burden according to his or its ability, which is largely determined by the ownership of the property. That neither the domcil of the owner nor the port of registry can be considered as the sole test in determining the situs of vessel property for taxation, and that such situs may be determined by the physical location of the property, is abundantly supported by the authorities referred to in the case of Southern P. Co. v. Kentucky, supra. In the case of St. Louis v. Wiggins Ferry Co. 11 Wall. 423, at 430, 20 L. ed. 192, 194, the Supreme Court of the United States said: "In the eye of the law personal property, for most purposes, has no locality. . . . In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicil. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property *has its*

actual situs, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality." We are convinced that the record in this case supports the findings of the trial court, that the vessel property assessed had an actual situs within the state.

For the reasons heretofore assigned, the tax lien upon the property in question must be reduced to correspond proportionately with the reduction in the valuation from $4,750 to $2,000, and this amount must stand as a lien against the property of the plaintiff. By reason of the failure of the officers charged with the assessment and equalization of the taxes to make a proper assessment, no interest or penalty should be included. It is therefore ordered that the judgment of the trial court be reversed and this case remanded for further proceedings in accordance with this opinion.

ROBINSON, J. I concur in result.

JOHN E. STRONG v. JAMES NELSON and Minnie Nelson.

(165 N. W. 511.)

Contract — action on — defendant may counterclaim — other cause of action on contract — existing when action commenced.

1. In an action on contract defendant may counterclaim any other cause of action on contract existing at the commencement of the action.

Pleading — answer — construction — deceit — action for.

2. It is *held* that the answer in the case at bar does not state a cause of action for deceit, but that, when liberally construed, it states a cause of action arising out of contract.

Opinion filed November 16, 1917.

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

Defendants appeal.

Reversed.

M. J. Englert, for appellants.

In actions arising on contract, the defendant may set forth in answer by way of counterclaim any other cause of action on contract, existing at the time of the commencement of the action. Comp. Laws 1913, § 7449; St. Louis Public Schools v. Broadway Sav. Bank, 12 Mo. App. 104, 84 Mo. 56; Cal. Civ. Code, § 438; Wheelock v. Pacific Pneumatic Gas Co. 51 Cal. 223; American Ink Co. v. Riegel Sack Co. 141 N. Y. Supp. 549, 79 Misc. 421, 140 N. Y. Supp. 107; Williams v. Wieting, 3 Thomp. & C. 439; Curtis v. Barnes, 30 Barb. 225; Schubart v. Harteau, 34 Barb. 447; Parsons v. Sutton, 66 N. Y. 92; Jacobowitz v. Strasbourger, 108 N. Y. Supp. 698; Garnett & A. Paper Co. v. Midland Pub. Co. 156 Mo. App. 187, 136 S. W. 736; Empire Transp. Co. v. Boggiano, 52 Mo. 294; Halfpenny v. Bell, 82 Pa. 128; Stevens v. Able, 15 Kan. 584; Axford v. Hubbell, 24 Kan. 444; Morrison v. Lovejoy, 6 Minn. 319, Gil. 224.

This statute was designed to enlarge the doctrine of set-off so as to include all causes of action arising *ex contractu* whether the damages are liquidated or not. Brady v. Brennan, 25 Minn. 210; Minn. Gen. Laws 1878, chap. 66, § 97; Minn. Gen. Stat. 1913, § 7757; Midland Co. v. Broat, 50 Minn. 562, 17 L.R.A. 312, 52 N. W. 972; First Nat. Bank v. Silver, 45 Mont. 231, 122 Pac. 584; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782; Schick v. Suttle, 94 Minn. 135, 102 N. W. 217.

Knauf & Knauf, for respondent.

CHRISTIANSON, J. The plaintiff brought this action to recover upon a promissory note executed by the defendants, and payable to the plaintiff. The defendants in their answer admit the execution and delivery of the note and nonpayment thereof. By way of defense and counterclaim they aver that the plaintiff has been engaged in business at Jamestown, under the name of Strong Land Company, and that during July, 1914, the defendants purchased "from said plaintiff, and one R. B. Lowe, and the said Strong Land Company, some land located in the island of Cuba;" that in payment of said land the defendants traded and delivered to the plaintiff and his said company a stock of shoes; that in consideration of said stock of shoes the defendants were to have title and deed to said Cuban land; that plaintiff and his company were

not only to deed said land to defendants, but were to make a satisfactory showing that the party from whom the land was deeded had a good and merchantable title thereto; that defendants delivered the stock of shoes to plaintiff and his company, upon such promises and agreements; that the stock of shoes was of the agreed value of $920; that the defendant and his company failed to deliver the deed or other instrument of conveyance; that the plaintiff and his company had no title to the land and are unable to convey any good title thereto whatsoever; that by reason of such false and fraudulent representations on the part of the plaintiff and the land company, its agents, and representatives, the defendants were induced to part with their said shoe stock, and turned the same over to the plaintiff, his company, agents, and representatives. Wherefore defendants ask for recoupment against the amount of plaintiff's claim, to the amount of $920, the value of such stock of shoes. The plaintiff demurred to the answer on the grounds: (1) That the same does not state facts to constitute a defense or counterclaim to the cause of action set forth in the complaint; (2) that defendants have attempted to plead an alleged tort as a counterclaim to an action upon contract. These were the only grounds on which the demurrer was based, and hence are the only ones which we shall consider. 3 C. J. p. 791, § 714.

Under our statute a counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

"1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

"2. In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Comp. Laws 1913, § 7449.

The counterclaim sought to be set up by defendants in this case did not arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim, nor was it connected therewith. It arose out of a wholly independent transaction. The question is therefore whether the answer sets forth a cause of action arising on contract and existing at the commencement of the action. In our opinion it does. It does not state a cause of action for deceit. The only representations set

forth are promises or agreements to convey a good, merchantable title in certain land to the defendants. The answer is by no means a model pleading, but it does allege that plaintiff has been doing business under the name of Strong Land Company; that defendants turned over to plaintiff a stock of shoes of an agreed value of $920, in consideration of which it was agreed that defendants were to receive a deed conveying good and merchantable title to certain land, and that plaintiff has failed to comply with the agreement under which he received the stock of shoes. It is well settled that where the consideration for a contract for the purchase of land fails, the law implies an obligation on the part of one who has received the purchase price to make restitution to the party from whom he received it. Laflin v. Howe, 112 Ill. 253; Wright v. Dickinson, 67 Mich. 580, 11 Am. St. Rep. 602, 35 N. W. 164; Leach v. Tilton, 40 N. H. 473.

The answer alleges an agreement between the plaintiff and the defendants, the payment to plaintiff of the full consideration agreed upon, and that the reciprocal consideration moving to the defendants has wholly failed. The relief demanded is that defendants be awarded the value of the goods delivered by them to the plaintiff as the purchase price of land, which they did not receive, and to which plaintiff has no title. The allegations of a pleading must be liberally construed with a view of substantial justice between the parties. Comp. Laws 1913, § 7458. When so construed, the answer in this case is sufficient, and states "a cause of action arising on contract and existing at the commencement of the action." It was therefore error to sustain the demurrer upon either of the grounds urged by the plaintiff. The judgment appealed from must be reversed. Reversed and remanded for further proceedings according to law.

Robinson, J. (concurring). This is an appeal from an order sustaining a demurrer to the answer and counterclaim and from a judgment on such order. The complaint is that in December, 1911, the defendants for value promised to pay to the order of the plaintiff $550, on the 1st day of November, 1916, with interest. The answer admits the making of the note. Then it avers in effect that the plaintiff did business under the name of Strong Land Company, and that in July, 1914, defendants purchased from the plaintiff, R. B. Lewis and Strong

Land Company, some land in Cuba, and the defendant, in payment for the Cuban land, traded a shoe stock to the plaintiff at the agreed value of $920, and delivered the same to him; that the plaintiff and his company failed to deliver a deed to the land in Cuba, and the defendants have received nothing for said shoe stock, which was of the value of $920.

The brief of respondent has the merit of being short. It says: The defense failed to show the incorporation or copartnership of the Strong Land Company; failed to show the members thereof, and failed to show the insolvency of Lowe or Strong Land Company; but that avails nothing, as the answer avers that the plaintiff was doing business in the name of Strong Land Company, and he received the shoe stock and made no payment for it. It fairly indicates that the plaintiff received the shoe stock, which was of the value of $920, promising to make payment by a conveyance of certain land in Cuba, and that he wholly failed to make such payment, and did not own the land he contracted to convey. It is said the answer is not sufficiently definite and certain, but the remedy for such a defect is by motion to make the answer more definite and certain.

If the plaintiff received from the defendants a shoe stock at the alleged price and value of $920, and failed to make payment in any manner, of course the defendants have a cause of action to recover the $920, with interest. The plaintiff brings a cause of action on contract for the recovery of money only, and the defendants by answer state a cause of action on contract for the recovery of money only, and the cause of action is against the plaintiff, who received the shoe stock and made no payment for it.

C. C. ARENDTS v. CHARLES E. BEST, as County Auditor of Ransom County, North Dakota.

(165 N. W. 500.)

Personal property taxes — tax lists — entered upon — current — delinquent — payment of taxes — before recording deed of transfer.

Personal property taxes which have not been entered upon the tax list against

real property in accordance with § 2174, Comp. Laws 1913, do not constitute current or delinquent taxes within the purview of chapter 252, Laws 1915, which requires certain taxes to be paid before a deed may be transferred and recorded.

Opinion filed November 16, 1917.

From a judgment of the District Court of Ransom County, Honorable *Frank P. Allen,* Judge, defendant appeals.

Affirmed.

J. V. Backlund, for appellant.

Current or delinquent taxes upon real estate must be paid before the county auditor shall enter the transfer, or before deed conveying the property can be recorded. Comp. Laws 1913, §§ 2166, 2169, 2174, 2186, 2212; Danforth v. McCook County, 11 S. D. 258, 74 Am. St. Rep. 808, 76 N. W. 940.

The failure of the county auditor to bring forward personal taxes for preceding years, and extend them upon the real estate tax list, and to sell the land on which they were a lien, does not, as against a purchaser of the land, release the land from the lien. Iowa Land Co. v. Douglas County, 8 S. D. 491, 67 N. W. 52.

Courts of equity in general should interfere to restrain the collection of a tax or annul tax proceedings only where it appears either that the property sought to be taxed is not subject to taxation, or the tax itself is not wholly authorized by law, or the taxes are assessed or levied without authority, or the taxes have been unjustly levied, or the assessment made unjustly or without uniformity, and plaintiff must also bring himself within some recognized head of equity jurisprudence, and must tender or pay the taxes before a mandamus or injunction restraining collection will issue. Farrington v. New England Invest. Co. 1 N. D. 102, 45 N. W. 191; Douglas v. Fargo, 13 N. D. 467, 101 N. W. 919.

Curtis & Curtis, for respondent.

Before a deed can be placed on record it must have the indorsement of the county auditor as to the payment of taxes. Sess. Laws 1915, chap. 252.

The statute, however, refers only to real estate taxes, and not to personal property taxes. Ibid.

There is no lien for personal property taxes until there is distraint

made by the sheriff, or when the tax becomes past due and is extended on the books. Comp. Laws 1913, §§ 2160, 2174, 2186.

CHRISTIANSON, J. Plaintiff applied to the district court of Ransom county for a writ of mandamus to compel the defendant, as county auditor, to transfer a certain deed. The district court directed the writ to issue, and defendant appeals. The material undisputed facts are: On December 28th, 1916, the plaintiff purchased a lot in the city of Lisbon, in Ransom county, from one Phoebe A. Curtis, the then record owner thereof. On that same day plaintiff received from her a warranty deed for said premises. On February 3, 1917, the plaintiff presented the deed to the defendant county auditor, tendered him the statutory fee, and demanded that he make a transfer of the premises in the records of his office, and place upon the deed the following statement, "Taxes paid and transfer entered," so as to entitle the deed to record in the register of deed's office. The defendant refused to make the transfer. At the time the deed was tendered for transfer, there were no current taxes or special assessments due on the land. There were, however, certain outstanding and unpaid personal property taxes against Phœbe A. Curtis, for the years 1901, 1903, 1904, 1906, 1907, 1908, and 1916.

Our statute provides that "when any deed or patent is presented to the county auditor for transfer he shall ascertain from the books and records in the office of the county treasurer if there are any current taxes due on the land described therein, or any special assessment due thereon; he shall also ascertain from the books and records in the auditor's office if there be delinquent taxes on the said land described within, or special assessments due thereon, or if it has been sold for taxes; and if there are current taxes, delinquent taxes or special assessments due or instalments of special assessments due, he shall certify to the same, and when the receipt of the county treasurer shall be produced for the said current taxes, delinquent taxes or special assessments or instalments of special assessments and for any other current or delinquent taxes, or special assessments of [or] instalments of special assessments that may be in the hands of the county treasurer or county auditor for collection, the county auditor shall enter on every deed or patent so transferred, over his official signature, 'taxes and special

assessments or instalments of special assessments, paid and transfer entered,' or if the land described has been sold for taxes, 'paid by sale of the land described within,' or if it is an instrument entitled to record without regard to taxes, 'transfer entered,' and unless such entry is made upon any deed, or patent, the register of deeds shall refuse to receive or record the same." Laws 1915, chap. 252.

Our statutes provide for the collection of delinquent personal property taxes by distraint (Comp. Laws 1913, § 2166); or by action in the name of the county, whenever the board of county commissioners deem the latter method to be expedient. Comp. Laws 1913, § 2172.

The sheriff is required to make a return to the board of county commissioners, showing both the taxes collected and the taxes "uncollected." And the county commissioners are empowered to cancel "such taxes as they are satisfied cannot be collected." Comp. Laws 1913, § 2169.

The statute further provides that "after the county commissioners have canceled so much of the delinquent taxes as they deem uncollectable as provided in the preceding section, the county auditor shall extend to and enter upon the tax list in the hands of the treasurer for the same year in an appropriate column or columns for remarks, opposite each description of real property belonging to any person owing such uncollected personal property tax, words showing the year for which the same remains due, and the principal sum of such tax, as for example, 'personal tax, 1896, $12.78.' And when the delinquent afterwards acquires any real property in the county such delinquent taxes may be entered in like manner upon any subsequent tax list; *and from the time of such entry the delinquent taxes so entered shall become a lien on any real property of the delinquent against which they are so entered in the same manner and to the same extent as the taxes upon such real property,* and collection thereof shall be enforced accordingly by sale of the lands against which they are so entered, or so much thereof as may be necessary, at the time when the lands are sold for delinquent taxes, and in the same manner as if originally charged against such lands." Comp. Laws 1913, § 2174.

It is conceded that the personal property taxes involved in this action have not been extended against the real property as provided in the section last quoted. The plaintiff disclaims any intention of avoiding the personal property taxes, and concedes that these taxes constitute

an inchoate lien which eventually may be enforced against the land. Plaintiff's sole contention is that, inasmuch as these personal property taxes have not been entered upon the tax list against the land as provided by § 2174, Comp. Laws 1913, they do not constitute current or delinquent taxes on the land, within the purview of chapter 252, Laws 1915. Defendant, however, contends that the personal property taxes are "current taxes" within the purview of chapter 252, Laws 1915, and that they are a lien upon the premises under the provisions of § 2186, Comp. Laws 1913, which reads: "Taxes upon real property are hereby made a perpetual paramount lien thereupon against all persons and bodies corporate, except the United States and the state, and taxes due from any person upon personal property shall be a lien upon any and all real and personal property owned by him at the time the tax became due, or which may be subsequently acquired by him, and the title to any of which personal property so owned or subsequently acquired remains in him at the time of the distraint. All taxes shall, as between vendor and purchaser, become a lien upon real estate on and after the 1st day of December in each year."

Sections 2174 and 2186, Comp. Laws 1913, were both parts of the same legislative enactment. Laws 1897, chap. 126. They should be construed together; and, as far as possible, reconciled so as to make them consistent and harmonious, and so as to give sensible and intelligent effect to each.

The effect and purpose of § 2186, supra, with respect to, and the lien created thereby upon, personal property, was recently considered by this court in the case of First Nat. Bank v. Kelly, 36 N. D. 546, 162 N. W. 901. In that case we held that this section does not of itself impress a specific lien upon personal property for personal property taxes, but that "it is intended to create a tax lien upon personal property owned by the tax debtor for the sole purpose of enabling the collection of the tax by distraint, and not for the purpose of preventing a sale free from the taxes before the property is levied upon for their collection." A personal property tax is not a lien upon real property unless expressly made so by statute. And when so created it will not be enlarged by construction. 2 Cooley, Taxn. 3d ed. pp. 866, 867.

If § 2186 is given the construction contended for by appellant, it will be given one effect as to personal property and another as to real

property. There is nothing to justify such construction. The purpose of the section with respect to personal property taxes is: (1) To create a tax lien upon personal property owned by the tax debtor so as to enable the tax collector to collect the tax by distraint; (2) to render such tax a lien upon real property so as to enable the tax to be extended and in effect become a tax against real property and enforced as such in the manner provided by statute.

The tax would not be a lien unless the legislature made it so. Section 2186, supra, is merely the legislative declaration of its purpose to create the lien. It does not attempt to fix the time when the lien becomes operative, or the procedure with respect to its maintenance or enforcement.

Cooley (Cooley, Taxn. 3d ed. vol. 2, pp. 871, 872) says: "The time when the lien will attach to land must be determined by the terms of the statute. . . . Where no time is thus expressly named the lien should attach at the time when by an extension of the tax upon the roll a particular sum has become a charge upon a particular parcel of land." We are agreed that a personal property tax does not become a tax against real property within the purview of chapter 252, Laws 1915, until it is extended upon the tax list as a tax against such real property in accordance with § 2174, Comp. Laws 1913.

The judgment appealed from is correct and must be affirmed. It is so ordered.

ROBINSON, J. (dissenting). In this case the county auditor appeals from a judgment requiring him to certify to a matter which is not true. The plaintiff presented to the county auditor a deed of certain lots, requesting him to certify on the deed taxes paid and transfer entered, when in truth the records show delinquent personal taxes for several years against the maker of the deed. The contention is that a personal tax against the owner of land is not a tax against his land.

The statute reads:

Section 2186. Taxes against real property are hereby made a perpetual lien thereupon, and taxes due from any person upon personal property shall be a lien upon any real and personal property owned by him at the time the tax becomes due, or which may be subsequently acquired by him and remain in his name at the time of the distraint.

Section 2174 provides that a personal property tax may be entered on the tax list opposite each description of land, and from the time of such entry the delinquent tax so entered shall become a lien upon any real property of the delinquent against which they are so entered, in the same manner and to the same extent as taxes upon such real property, and collection thereof shall be indorsed accordingly by a sale of the lands against which they are so entered, or so much thereof as may be necessary at the time when the lands are sold for delinquent taxes.

There is some apparent conflict between those two sections, but they should be construed so as to give effect to each and to conform to the well-known general usage. The first section relates entirely to the lien of the tax, and the latter section to the collection of the tax. The personal tax is made a lien upon all real property owned by any person at the time the tax becomes due. A party may own one hundred or more lots or tracts of real property, which are all subject to the lien of his personal tax, without entering the same opposite the description of each lot or tract on the tax list.

No county auditor incurs the needless trouble of entering the personal tax against every tract or lot, unless when he comes to advertise and sell the same for the personal tax. All abstracts of title to real property give the delinquent personal taxes and judgments against the several owners of the property, and it is the proper custom of all county auditors to examine the records for delinquent personal taxes before certifying on a deed that the taxes are paid. Such a certificate on a deed means that the property is free and clear from all taxes.

As the appeal was taken by the county auditor in his official capacity, pursuant to a resolution of the county commissioners, his counsel did not deem it necessary to give an appeal bond, and now, for want of a bond, a motion is made to dismiss the appeal. The county auditor has submitted, and he offers to file, a proper undertaking. The offer and motion is allowed. It is made under this statute. Comp. Laws § 7840. When a party shall in good faith give notice of an appeal, and shall omit, through mistake or action, to do any other acts necessary to perfect the appeal, the supreme court or one of the justices thereof may permit the proper act to be done.

UNION STATE BANK OF MINNEAPOLIS, MINNESOTA, a Corporation, v. ALBERT BENSON.

(L.R.A.1918C, —, 165 N. W. 509.)

Promissory note — form of — marginal entries — partial payments — maturity — from what determined — dishonor.

1. The following note is held not to have been dishonored by nonpayment at the expiration of the time mentioned in the marginal memoranda for partial payments before maturity:

$100.00 Hampden, N. D., Sept. 2, 1909.

On or before Sept. 2, 1910, after date I promise to pay to the order of the Sageng Threshing Machine Company, of Minneapolis, Minn., one hundred ..... dollars.

Value received, with interest at 6 per cent.

[Signed] Albert Benson.

$25 will be pd. Nov. 1, 1909.
$25 " " " Jan. 1, 1910.

Purchaser — before maturity — holder in due course — may show such fact.

2. The purchaser of the above note before maturity is entitled to show that he is a holder in due course.

Opinion filed November 27, 1917.

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

Reversed.

Brennan & Brennan, for appellant.

It is not necessary for a bank in buying negotiable paper, that its

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NOTE.—As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry in order to secure rights of bona fide holder, see notes in 29 L.R.A.(N.S.) 351, and 44 L.R.A.(N.S.) 395.

On effect of exchange of commercial paper to constitute one a holder in due course for value, see note in 17 L.R.A.(N.S.) 747.

officers make a personal examination of the affairs of people with whom it deals, to ascertain possible defenses, when there is nothing in the transaction of a suspicious nature, or which would invite research. American Nat. Bank v. Lundy, 21 N. D. 167, 129 N. W. 99.

This was not an instalment note. Marginal entries forming no part of the written promise do not constitute any part of the note. Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616; Dan. Neg. Inst. § 86, and cases cited; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; Comp. Laws 1913, § 6902; Danforth v. Sterman, 165 Iowa, 323, 145 N. W. 485; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Chestnut v. Chestnut, 104 Va. 539, 2 L.R.A.(N.S.) 879, 52 S. E. 348, 7 Ann. Cas. 802; Heywood v. Perrin, 10 Pick. 222, 20 Am. Dec. 518; 7 Century Dig. § 330, Bills and Notes; Branning v. Markham, 12 Allen, 454, and cases cited; Way v. Batchelder, 129 Mass. 361; 7 Cyc. 631, note, Commercial Paper.

Such marginal entries are more in the nature of convenient memoranda. Payne v. Clark, 59 Am. Dec. 333, and note 338, 19 Mo. 152; Smith v. Smith, 1 R. I. 398, 53 Am. Dec. 652; Nugent v. Roland, 13 Am. Dec. 381, and note, 12 Mart. (La.) 659; National Bank v. Second Nat. Bank, 69 Ind. 485, 35 Am. Rep. 236; Krouskop v. Shontz, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241, Dan. Neg. Inst. § 154, note 41; 8 Wait, Act. & Def. p. 235; Siegel, C. & Co. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 7 L.R.A. 537, 19 Am. St. Rep. 51, 23 N. E. 417.

If the marginal figures do not correspond with the written body of the note, the latter controls. Prim v. Hammel, 134 Ala. 652, 92 Am. St. Rep. 52, 32 So. 1006.

The payment of a part before maturity by defendant, and before plaintiff became the owner, is immaterial. St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606, 15 Pac. 544; Button v. Russell, 55 Mich. 478, 21 N. W. 899; Smith v. O'Brien, 146 Mass. 294, 15 N. E. 645; Shoemaker v. Benedict, 11 N. Y. 176, 62 Am. Dec. 95.

The burden was upon defendant to prove that plaintiff was not a holder in due course. Comp. Laws 1913, § 6940; Commercial Secur. Co. v. Jack, 29 N. D. 67, 150 N. W. 460; Galbraith v. McDonald, 123 Minn. 208, L.R.A.1915A, 464, 143 N. W. 353, Ann. Cas. 1915A, 420; Keyes v. Blue Bell Medicine Co. 34 S. D. 297, 148 N. W. 505.

The stock was a good consideration. German Mercantile Co. v. Wanner, 25 N. D. 479, 52 L.R.A.(N.S.) 453, 142 N. W. 463; Farmers Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556.

Cowan & Adamson, H. S. Blood, and *T. W. Morrissey,* for respondent

Since there was evidence of fraud on the part of the payee in procuring the note, the burden was cast upon plaintiff to prove affirmatively that the note was purchased by and indorsed to plaintiff in due course for value and without notice. Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 550.

When a person purchases a note on which part has been paid and part is still past due, it is sufficient to put him upon inquiry, and precludes him from claiming as an innocent, bona fide purchaser, 7 Cyc. 952, and cases cited.

BIRDZELL, J. This is an action to recover $70 and interest on a promissory note made by the defendant to the Sageng Threshing Machine Company, and by it transferred to the plaintiff. The judgment was entered in favor of the defendant upon a verdict of the jury, and the plaintiff appeals. The defense is that the note was given for stock in a threshing machine company which turned out to be worthless, and that the plaintiff is not a holder in due course nor one who has derived title from a holder in due course. The note is as follows:

$100.00 Hampden, N. D., Sept. 2, 1909.

On or before Sept. 2, 1910, after date I promise to pay to the order of the Sageng Threshing Machine Company, of Minneapolis, Minn., one hundred ..... dollars.
Value received, with interest at 6 per cent.

[Signed] Albert Benson.

$25 will be pd. Nov. 1, 1909.
$25 " " " Jan. 1, 1910.

On the back of the note is the following indorsement of payment: "April 15, 1910, pd. $30." The plaintiff received the note in June, 1910.

The trial court excluded evidence offered to prove that the plaintiff was a holder in due course, and instructed the jury that, inasmuch as the payments referred to in the marginal notations had not been made in full, the plaintiff was the purchaser of overdue paper, and, as such, could not be a holder in due course.

The note in suit is what is frequently termed an "on or before note." On its face, in the body of the instrument, the promise is to pay $100 on or before September 2, 1910. There is no ambiguity as to the time of payment, except such as might be thought to arise from marginal notations in the lower left-hand corner of the note. Unless these marginal memoranda amount to unqualified promises to pay instalments at the times designated, they cannot be said to qualify the promise to pay $100, which matures on September 2, 1910. While the court is not free to disregard the plain meaning of a portion of the language appearing upon the face of the instrument in so far as it forms a part of the contract of the parties, it is nevertheless true that where, as here, the body of the instrument speaks in plain terms and sets forth a contract wholly different in its obligations and legal effect from that which would result were the marginal notations considered as binding, it should not be prone to alter a plain meaning in order to give effect to words and figures of doubtful legal import. There can be no doubt whatever that it was the intention of the parties to make the note in suit absolutely payable on September 2, 1910; neither can there be any doubt that under the terms of the note, separate and apart from the memoranda, the maker reserved the right to pay in advance of his legal liability to pay. The marginal notations are such as to convey neither a promise, an agreement, nor a condition in any way changing the legal effect of the words in the body of the instrument, and are in terms which merely express a likelihood that certain amounts will be paid before maturity, giving the dates of such prospective payments. The court is not warranted in giving to the words used a meaning and legal significance entirely contrary to that expressed in the body of the instrument. The language embraced in the marginal memoranda is not sufficiently strong to warrant the bringing of actions for the nonpayment of the sums named, and does not, in our judgment, accelerate the obligation to pay any portion of the note. In these notations, as we view them, it only appears what the expectations of the parties were with

reference to advance payments, rather than what the obligation of the maker was to be in that respect.

In determining whether or not an instrument is overdue for the purpose of fixing the status and rights of the parties thereto, it is proper to inquire whether, under its terms, a cause of action has accrued to the holder. The case of Fisk v. McNeal, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616, applies the controlling principle of this decision to notes somewhat similar to that in the instant case. The action in that case was upon two promissory notes, dated July 1, 1878, the bodies of which contained promises to pay ten days after date. Upon one there was a marginal notation as follows: "Due September 30, 1878," and upon the other "Due October 30th, 1878." The action was commenced on the 18th day of September, 1883, which was within the period of the Statute of Limitations if the accrual of the action was governed by the marginal notations, but which was barred by the statute if the accrual of the action was governed by the maturity as fixed by the language appearing in the bodies of the notes. The court held that the marginal notes or memoranda could not control the body of the notes, and that consequently the action was barred by the Statute of Limitations. The case would clearly be different here if the marginal notations contained words strong enough to obligate the debtor to pay before September 2, 1910.

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

ROBINSON, J. (dissenting.) In this case our judges seem to break even. In the first decision three judges were against the bank and two in its favor. Now, on rehearing, one judge has changed his mind, three judges voting in favor of the bank and two against it. So, that makes an even break. However, the result is to reverse the judgment of the district court and the verdict of twelve jurors in favor of the defendant.

As stated in the original opinion, the promissory note in question was given without any consideration only a promise of some worthless stock, and the plaintiff is not a purchaser in good faith and for value. It took the note after it was dishonored by the nonpayment of $20 which was past due, and it took the note with a good bunch of similar

notes and with knowledge of facts and circumstances sufficient to put it upon inquiry. Bankers are not justified in shutting their eyes and remaining wilfully ignorant when purchasing a note or taking it as collateral security. It is time to put a stop to the gross and prevalent abuse of the rules which gives protection to a real, honest, and prudent purchaser of negotiable paper. The rules should never protect a person taking paper without making any inquiry concerning the consideration, and with perfect indifference as to whether or not it was given for any consideration. The rules should no longer be extended to give encouragement to fraud and sharp practice. The judgment should be affirmed.

GRACE, J. I concur in the dissent, but not in all the reasoning thereof.

JOHN BENTLER and Martha E. Bentler, by H. B. Gunderson, Their Attorney in Fact, v. B. S. BRYNJOLFSON and First National Bank of Grand Forks, a Corporation.

(165 N. W. 553.)

Contracts — sale of land — yearly payments — default — provisions as to — whole sum to become due on — effect of such provision in contract.

1. Where one sold to another a certain tract of land for a specified price payable in yearly instalments, the first of such instalments being due December 1, 1910, and the last being due December 1, 1913, and such contract contained a condition that, if default be made in any of the payments, then the whole of such purchase price and interest should become immediately due and payable; and default was made in the first payment,—the whole sum of such contract became immediately due and payable, and remained due and payable during the continuance of such default. Where such default continues, the payment due each year is not the amount specified in the contract to be payable at a certain time each year, but the whole amount of the contract is due and payable each year.

Contract — for sale of land — grains grown thereon — title to be in vendor or owner of land — till purchase price is paid — lien in nature of chattel mortgage — security — default — amount due each year is whole sum.

2. Where such contract contains a provision that, until the payment each year

of the payment due each year thereunder, the legal title to and possession of all the grains grown on said land shall be in the name of the first parties as owners thereof, such provision is a lien in the nature of a chattel mortgage, and is security for all that is due in a given year. If default is made and continues, the amount due each year is the whole of the purchase price, and such clause in such case secures the whole amount due.

Contracts — payments under — default crops — lien upon — security — claim and delivery — special property — proof of — judgment for possession — or value.

3. Where the last specified payment in the contract was due in December, 1913, and such default continued to exist so that the whole amount remaining unpaid upon the contract was due that year, and such contract was continued in force for the year 1914, when there was no specified payment due, the default having continued to exist, the payment due for the year 1914 was the whole amount remaining unpaid upon such contract, and under such security clause the seller had a lien upon the crops of that year for the security thereof, and, in an action of claim and delivery, is entitled to prove his special interest in such crops and his right to possession thereof, and is entitled to judgment for the possession of such crops or the value thereof, where by competent proof he has shown himself to be entitled thereto.

Claim and delivery — possession of property — taken under — identity of property — general denial — proof under.

4. Where the seller in an action of claim and delivery causes a writ of claim and delivery to be issued, and the sheriff by virtue of such writ takes possession of certain grain, and the seller, the plaintiff in the case, introduces testimony to show that the grain taken is the identical grain grown upon the premises described in his complaint, being the same premises which he sold to the defendant, the introduction of such testimony broadened the issues of the complaint in this action and gave the defendant the legal right to introduce testimony tending to prove the grain taken under the writ was not grain grown upon the premises in question, and this even though the defendant's answer was only a general denial; and it was reversible error for the court to exclude such testimony and defendant's offer to show by competent testimony that the grain taken by the sheriff was not the grain grown upon the premises described in the complaint.

Opinion filed November 27, 1917.

Appeal from the judment of the District Court of Pierce County, Honorable *A. G. Burr,* Judge.

Reversed.

Harold B. Nelson, for appellants.

In construing contracts the first and main rule is that the intent of the parties, as expressed in the words they have used, must govern. 9 Cyc. 577; Travelers Ins. Co. v. California Ins. Co. 1 N. D. 151, 8 L.R.A. 769, 45 N. W. 703.

It can never be assumed that the parties were making a contract they both knew would not be performed. Gorder v. Hilliboe, 17 N. D. 281, 115 N. W. 843.

Such assumption is necessary in order to sustain plaintiff's theory of the contract involved. Morrison Mfg. Co. v. Fargo Storage & Transfer Co. 16 N. D. 256, 113 N. W. 605; Young v. Metcalf Land Co. 18 N. D. 441, 122 N. W. 1101;; Stewart v. Marvel, 101 N. Y. 357, 4 N. E. 743.

All rules are subordinated to the real intention of the parties, and this is to be gathered from the contract itself, lawful in form and substance. Taylor v. Enoch Morgan's Sons Co. 124 N. Y. 184, 26 N. E. 314; Mauran v. Bullus, 16 Pet. 528, 20 L. ed. 1056; Chesapeake & O. Canal Co. v. Hill, 15 Wall. 94, 21 L. ed. 64; Wilson v. Marlow, 66 Ill. 385.

Where ambiguity is claimed the court should endeavor to ascertain the real intent of the parties. Walker v. Tucker, 70 Ill. 527, 8 Mor. Min. Rep. 672; Ross v. Garlick, 10 Rob. (La.) 365; Salmon Falls Mfg. Co. v. Portsmouth Co. 46 N. H. 249; Comp. Laws 1913, § 5908; Crimp v. McCormick Constr. Co. 18 C. C. A. 595, 34 U. S. App. 598, 72 Fed. 366; Hall v. Farmers' Nat. Bank, 53 Md. 120.

If a contract is susceptible of more than one interpretation, it is to be interpreted in the sense in which the promisor has reason to suppose it was understood by the promisee. Comp. Laws 1913, § 5909; Potter v. Berthelet, 26 Fed. 240; Metropolitan Bank v. Northern Fuel Co. 73 Ill. App. 164, 173 Ill. 345, 50 N. E. 1062; McClendon v. Moore, 68 Ark. 621, 58 S. W. 347; Bickle v. Beseke, 23 Ind. 18; Losecco v. Gregory, 108 La. 648, 32 So. 985; Wisner v. Field, 15 N. D. 43, 106 N. W. 38.

In case of doubt as to the construction of a contract, the conclusion must be in the sense the least onerous to the obligor. Wagner v. Kenner, 2 Rob. (La.) 120; Erwin v. Greene, 5 Rob. (La.) 70.

Greater weight is given to the written, rather than to the printed,

portions of the contract. Comp. Laws, 1913, § 5911; Farmers Nat. Bank v. Delaware Ins. Co. 83 Ohio St. 309, 94 N. E. 834; Union P. R. Co. v. Graddy, 25 Neb. 849, 41 N. W. 809; John Deere Plow Co. v. City Hardware Co. 175 Ala. 512, 57 So. 821; Low v. Young, 158 Iowa, 15, 138 N. W. 828; Eighme v. Holcomb, 84 Wash. 145, 146 Pac. 391; Harney v. Wirtz, 30 N. D. 292, 152 N. W. 803; Bolman v. Lohman, 79 Ala. 67; Regent State Bank v. Grimm, 35 N. D. 290, 159 N. W. 842.

Where there is a conflict, the written portions will control. Loveless v. Thomas, 152 Ill. 479, 38 N. E. 907; Murray v. Pillsbury, 59 Minn. 85, 60 N. W. 844; Clark v. Woodruff, 83 N. Y. 518.

Where parties do not agree upon the same terms, there is no completed contract. 1 Elliott, Contr. § 36; Phenix Ins. Co. v. Schultz, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 337.

An agreement is reached when without fraud, duress, or mistake on the part of either, one submits, and the other accepts, a given proposition. 1 Elliott, Contr. § 36; Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087; American Can Co. v. Agricultural Ins. Co. 12 Cal. App. 133, 106 Pac. 720.

The acceptance must be unconditional. One who makes an offer cannot be bound by a conditional acceptance. Comp. Laws 1913, §§ 5859, 5862; Martin v. Northwestern Fuel Co. 22 Fed. 596; Bowen v. Hart, 41 C. C. A. 390, 101 Fed. 376; Breen v. Mayne, 141 Iowa, 399, 118 N. W. 441; Melick v. Kelley, 53 Neb. 509, 73 N. W. 945; Strong & T. Co. v. H. Baars & Co. 60 Fla. 253, 54 So. 92; Monk v. McDaniel, 116 Ga. 108, 42 S. E. 360; Baxter v. Bishop, 65 Iowa, 582, 22 N. W. 685; Flynn v. Dougherty, 3 Cal. Unrep. 412, 26 Pac. 831; Corcoran v. White, 117 Ill. 118, 57 Am. Rep. 858, 7 N. E. 525; Sawyer v. Brossart, 67 Iowa, 678, 56 Am. Rep. 371, 25 N. W. 876; Esmay v. Gorton, 18 Ill. 483; Payne v. Newby, 49 Ill. App. 141; Scribner v. Rutherford, 65 Iowa, 551, 22 N. W. 670; Green v. Cole, 103 Mo. 70, 15 S. W. 317; Krum v. Chamberlain, 57 Neb. 220, 77 N. W. 665; Beiseker v. Amberson, 17 N. D. 215, 116 N. W. 94; Patterson v. Farmington Street R. Co. 76 Conn. 628, 57 Atl. 853; Harding v. Gibbs, 125 Ill. 85, 8 Am. St. Rep. 345, 17 N. E. 60; McCormick v. Bonfils, 9 Okla. 605, 60 Pac. 296; Parlin v. Hall, 2 N. D. 473, 52 N. W. 405; Cedar

Rapids Lumber Co. v. Fisher, 129 Iowa, 332, 4 L.R.A.(N.S.) 177, 105 N. W. 595.

Under a general denial by way of answer, defendant may show anything that will defeat plaintiff's right to recover, or, in this case, plaintiff's right to possession of the property. Aultman & T. Co. v. O'Dowd, 73 Minn. 58, 72 Am. St. Rep. 603, 75 N. W. 756; Gunderson v. Holland, 22 N. D. 258, 133 N. W. 546; Advance Thresher Co. v. Pierce, 74 Mo. App. 676; Oester v. Sitlington, 115 Mo. 247, 21 S. W. 820; Cunningham v. Skinner, 65 Cal. 385, 4 Pac. 373; 34 Cyc. 1501; Hillman v. Brigham, 110 Iowa, 220, 81 N. W. 451; Pulliam v. Burlingame, 81 Mo. 111, 51 Am. Rep. 229.

And where a general denial has been interposed, plaintiff must prove every collateral fact necessary to establish the cause of action. Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Aultman, M. & Co. v. Stichler, 21 Neb. 72, 31 N. W. 241; Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633; Kaufman v. Cooper, 38 Mont. 6, 98 Pac. 504, 1135.

The burden of proof is upon the plaintiff to show that he is entitled to the property taken. Chaffee v. Blaisdell, 142 Mass. 538, 8 N. E. 435; Russell v. Amundson, 4 N. D. 112, 59 N. W. 477; Stephens v. Williams, 46 Iowa, 540; Vennum v. Thompson, 38 Ill. 143; Plano Mfg. Co. v. Daley, 6 N. D. 330, 70 N. W. 277; Haveron v. Anderson, 3 N. D. 540, 58 N. W. 340; 34 Cyc. 1503.

The property described in the complaint is the property in question in claim and delivery. Shinn, Replevin, § 457; Talcott v. Belding, 4 Jones & S. 84; Nicholson v. Dyer, 45 Mich. 610, 8 N. W. 515.

The rule as to the identification of the property is very strict. Ames v. Mississippi Boom Co. 8 Minn. 467, Gil. 417; Stanchfield v. Palmer, 4 G. Greene, 23; Russell v. Amundson, 4 N. D. 112, 59 N. W. 477; Berthold v. Holman, 12 Minn. 347, Gil. 221, 93 Am. Dec. 233; Hardin v. Palmerlee, 28 Minn. 453, 10 N. W. 773; Cobbey, Replevin, § 27; Shackelford v. Hargreaves, 42 Neb. 680, 60 N. W. 951; Nichols & S. Co. v. Paulson, 10 N. D. 440, 87 N. W. 977.

The judgment is not supported by the evidence, but is contrary thereto. John Deere Plow Co. v. City Hardware Co. 175 Ala. 512, 57 So. 821; Martin v. Northwestern Fuel Co. 22 Fed. 596; Bowen v. Hart, 41 C. C. A. 390, 101 Fed. 376; Ames v. Mississippi Boom Co. 8 Minn. 467, Gil. 417.

Richard E. Wenzel, for respondents.

When parties enter into a contract they do so with the law in reference to the same as it then existed, ever in mind, and the construction of a contract is always with this consideration. 2 Elliott, Contr. § 1507.

"A contract should be construed so as to carry out the real intention of the parties, even though it is necessary to depart from the strict letter." Ross v. Garlick, 10 Rob. (La.) 365.

The issue here was whether or not plaintiff was entitled to the possession of the property described in the complaint. The evidence showed he was so entitled. 11 Enc. Ev. 224.

GRACE, J. This action is one of claim and delivery for the recovery of possession of certain personal property, or, in the event possession thereof cannot be had, for judgment for the value thereof.

The complaint is in the ordinary form, and among other things alleges the right to possession of 936 bushels of oats and 663 bushels of barley, grown and raised upon the west half of section 21, township 158, range 73, Pierce county, North Dakota, for the season of 1914.

The answer is a general denial, and the further allegation that the value of the property described in the complaint is $1,430.

The facts in the case are substantially as follows: On the 23d day of September, 1909, the plaintiffs were the owners of the west half of section 21, township 158, range 73, Pierce county, North Dakota. On the 23d day of September, 1909, the plaintiffs agreed to sell said premises to the defendant for the sum of $12,800, and, in pursuance of such agreement, executed and delivered to the defendant a contract for deed of said premises. The defendant agreed to pay the purchase price of such premises at the times and in the manner as follows: $3,800 on or before December 1, 1910; $3,000 on or before December 1, 1911; $3,000 on or before December 1, 1912; and $3,000 on or before December 1, 1913,—with interest at the rate of 7 per cent per annum, payable annually, on the whole sum remaining from time to time unpaid. He made the following payments upon such contract: Paid on principal December 1, 1910, $1,800; paid interest until December 1, 1910, $1,060.26; January, 1912, defendant paid $1,000; December,

1912, defendant paid $2,000. These payments were the only payments made upon such contract.

The contract for deed is in the ordinary and customary form of such contracts, with the exception that it contains the following provision: "It is mutually agreed that, until the payment each year of the payment due each year hereunder to the said first parties, the legal title to, and the possession of, all grains grown upon said land during that year shall be and remain in the first parties as owners thereof."

The main question presented is the interpretation of the contract and the intention and effect of the clause therein contained and above quoted, and the further question of the correctness of the court's ruling on defendant's offer of proof as to the identity of the property; to the solution of which questions we will direct our attention.

Appellant claims that the crops were to be security for the payment due the year the crop was grown, and nothing more, and that therefore this contract made no provision for the 1914 crop.

Plaintiff claims that, under the stipulation above quoted, the crop during each year was held as security for the entire sum due on the contract.

The contract in question remained in full force and effect up to December, 1914. It was not canceled, and remained effective as a contract for deed until the time stated. To us there appears no ambiguity in the contract. From the contract it is easy to ascertain the intentions of the parties. It is clear that the clause in the contract, above quoted, concerning the title and possession of the grain grown upon said land, was intended as security for the payments to be made upon such contract and was in the nature of a chattel-mortgage lien upon defendant's interest in the crops to be raised upon said land to secure the payments to be made, as specified by the contract itself, and in accordance with all the terms and conditions of such contract. A further provision in such contract is as follows: "And in case of the failure of the said party of the second part (defendant) to make either of the payments, or interest thereon, or any part thereof, or perform any of the covenants on his part hereby made and entered into, then the whole of said payments and interest shall become immediately due and payable."

An inspection of the testimony discloses that the defendant failed to make all the payment due December 1, 1910. He paid only $1,800 on the principal and $1,060.26, which paid interest up to December 1, 1910. He was thus short in his payment due December 1, 1910, the sum of $2,000. Under the terms of the contract the balance of the purchase price and interest, if any, became immediately due and payable by reason of such default, and would all remain due and payable until such time as such default was removed by sufficient payments. Defendant was in default in his payments each year to the extent that he had failed to pay all the payments due in each year, together with all interest remaining due from time to time on the whole sum. By reason of such default the whole sum was due and payable. If the defendant had at any time paid any amounts sufficient to equal the amount which he was in default, then the default would be cured and the whole sum would not be due each year, but such sums only as were specified in the contract, together with the interest. The default in the payments continued during all the time of the contract from December 1, 1910, up to the fall of 1914, and therefore, each year, from 1910, the whole purchase price of such land remained due and payable by reason of such default, and the balance of the purchase price which remained unpaid, with interest thereon, continued to be due in 1914, which balance of the purchase price and interest was in fact the payment which was due or remained due in 1914, and the defendant's share of the crop on said land for 1914 must be held to be, and was, security for the payment of such balance of purchase price and interest so remaining unpaid.

The plain intention of the security clause on the crop was to secure all that was due upon the contract in any year. We are quite clear that the plaintiffs in this case are entitled to be adjudged to have security on such half of the crop for the year 1914, not only by the plain intention of the terms of the contract, but also by reason of the special agreement or contract brought about by the correspondence between plaintiffs and defendant, and especially by reason of the contents of "exhibit 8."

It is clear from what we have said that the plaintiffs have a lien on, and are entitled to the possession of, one half of the grain raised upon the east half of section 21, township 158, range 73, Pierce county,

North Dakota, for the year 1914, or, in the event they cannot get possession of such grain, or possession could not be delivered to them, the plaintiffs would then be entitled to judgment for the market value thereof. In this proceeding the sheriff did take possession of certain grain, the same being in kind and quantity as follows: 936 bushels of oats, and 487 bushels of barley. Defendant maintains that such oats and barley were not raised upon the east half of section 21, above described, but upon other land belonging to the defendant, in the crops upon which plaintiffs had no claim, interest, or lien.

The defendant, for his answer in this case, interposed a general denial to plaintiffs' complaint, and thus put in issue every material allegation in the complaint, which includes the title and right of possession, which must also include unlawful detention; the sheriff in this case having in connection with the proceedings served the writ of claim and delivery and taken certain grain into his possession by virtue thereof, which grain so taken by the sheriff we shall subsequently fully show was claimed to be the same grain which was grown upon the land described in the complaint for the year 1914.

There is, however, a further question in this case. This question has reference to the exclusion of testimony tending to show the grain taken by the sheriff was not the grain grown upon the premises described in the complaint. It is held, the exclusion of such testimony, and offer of such testimony, is reversible error, for which a new trial ought to be granted. The allegations of the complaint as originally drawn only went to the question of ownership and right of possession of the grain grown upon the premises in question. If the writ of claim and delivery had not been procured, there would have been no other issues; but when the plaintiffs procured the writ and took possession of the property, and at the trial introduced testimony tending to show that the grain so taken was the grain grown upon the premises in question, the issues of the case became materially broadened; and while the answer in its original state may not have been sufficient under which the defendant could show what he attempted and offered to show, nevertheless, when the issues had been broadened by the plaintiff and testimony introduced on such issues as broadened, the defendant could not be precluded from introducing testimony which tended to disprove evidence relating to the issues as broadened. For instance, the plain-

tiffs introduced "exhibit 14," which was the sheriff's return on the writ of claim and delivery. Such return shows that the sheriff took into his possession certain grain, which was the same grain described in the affidavit, and the affidavit necessarily described the same grain which is in controversy in the complaint. The plaintiff thus introduced evidence tending to show that the grain taken by the sheriff was the same grain as grown upon the premises in question for the year 1914. If the defendant could show by competent testimony that the grain taken by the sheriff for the plaintiffs and afterwards delivered to the plaintiffs was not the grain grown upon the premises described in the complaint, he should have been allowed to do so.

The judgment of the trial court is reversed, and the case is remanded to the District Court for a new trial.

CHRISTIANSON, J. (concurring in part and dissenting in part). I concur in the construction placed upon the contract between the parties to this litigation in the opinion prepared by Mr. Justice Grace. But I am unable to concur in that part of his opinion wherein the rejection by the court of certain evidence, offered by the defendant with respect to the identity of the grain seized by the sheriff in the claim and delivery proceedings, is held to be reversible error. In the complaint the plaintiffs claim the ownership of certain grains grown during the year 1914 on lands described in the contract involved in this case. The defendant's answer consists of a qualified general denial and an allegation that the property taken from the defendant is of the value of $1,430. The case was tried to a jury, but, as both parties moved for a directed verdict at the close of all the testimony, the jury was discharged, and the trial court made findings of fact and conclusions of law in favor of the plaintiffs.

It is well to remember that a claim and delivery proceeding is not an action, but merely an ancillary proceeding, and does not necessarily affect the issues in the main action. The statutory claim and delivery proceeding differs to some extent from the common-law action of replevin. The only issue framed by the pleadings in this case was whether the plaintiff was the owner, and entitled to the possession, of the property described in the complaint, or the value thereof in case a return could not be had. The determination of this question depended

principally upon the construction of a certain contract. There was no dispute in the evidence as to the amount or value of such grain. In fact the amount and value found in the judgment in this case is based upon the testimony of the defendant himself. The members of this court are all agreed that the plaintiffs are entitled to judgment awarding them the possession of the grain grown during 1914 upon the lands described in the contract, or the value of such grain, in event a possession thereof cannot be had.

The findings of fact do not purport to pass upon the identity of the grain. They merely find that plaintiffs are entitled to the possession of the grain, and fix the amount and value thereof. There is no finding to the effect that the grain seized by the sheriff in the claim and delivery proceeding is the grain described in the complaint. Consequently there is no contention that the facts found by the trial court are erroneous. On the contrary the majority opinion fully confirms the correctness of the findings of fact in every particular.

It is true the court received in evidence the sheriff's return in the claim and delivery proceeding, and rejected certain evidence offered by the defendant tending to show that the sheriff had seized some grain not involved in the action. It is also true that, in its conclusions of law and in the judgment entered, the court provided that plaintiff retain possession of the grain seized by the sheriff. While the rulings on the reception and exclusion of evidence were inconsistent, it is only fair to the trial court to say that only a general objection was made to the sheriff's return when it was offered in evidence. But manifestly the reception of this evidence and the exclusion of the evidence offered by the defendant in no manner affected the right of the plaintiffs to the relief demanded in their complaint. The members of this court are all agreed that the plaintiffs are entitled to the relief sought. In so far as the conclusions of law and the judgment entered sought to award to plaintiffs the grain seized by the sheriff in the claim and delivery proceedings, they are erroneous. But in my opinion it is not necessary or proper to order a new trial, but the judgment should be modified by striking therefrom the provisions awarding to the plaintiffs the right of possession of the grain seized by the sheriff. The judgment as thus modified would award to the plaintiffs a judgment in the alternative for the possession of the grain described in the complaint, or the value thereof in case

possession cannot be had. And every member of this court is agreed that plaintiffs are entitled to such judgment.

ROBINSON, J. (dissenting). In this case plaintiff sues to recover oats, 936 bushels, and barley, 633 bushels, or the value of the same. The case was tried to a jury. Both parties moved for a directed verdict; the court made findings of fact and conclusions of law and gave judgment for the plaintiff, and defendant appeals.

As the complaint and evidence show, in September, 1909, the plaintiff contracted to sell defendant a half section of land in Pierce county, for yearly payments, thus: $3,800, $3,000, $3,000, $3,000, with annual interest to be paid on the 1st of December of each year, commencing in 1910. The written contract contained a clause as follows: That until the payment each year of the payment due each year hereunder to the said first parties, the legal title to and the possession of all grain grown upon said land during that year shall be and remain in the second parties as owners thereof. In each of the four years the payments were about equal the interest. In 1914 the defendant concluded to abandon the land, and to take all the crops of that year without making any payment on the sum of about $12,000. His claim is that, under the literal terms of the contract which he himself had drafted, the plaintiffs had no title to or interest in crops produced in the year 1914. That is clearly contrary to the plain words of the contract, which gives plaintiffs the yearly crops to secure the amount due in each year. In the year 1914 the amount due was about $12,000.

The only real question is in regard to the identity of the grain, which the plaintiffs were forced to replevin and take under claim and delivery proceedings. The plain duty of the defendant was to keep separate the plaintiffs' share of the grain, and deliver the same on demand, and not to try to defeat a just claim by any play of tweedle dum or tweedle di dum or hide-and-seek. The complaint and replevin papers were for 936 bushels of oats and 633 bushels of barley grown during the season of 1914 on the land in question. (W½—21—158—73.) The return of the sheriff is that in January, 1915, he served the summons and replevin papers personally on defendant, and took from a granary on the place 936 bushels oats and 487 bushels barley. The answer contains merely a general denial and an averment that the property taken was worth

$1,430, and demands judgment for the same. It does not aver that the grain taken is not the identical grain grown on the place, nor is there any showing or attempt to show that such a claim was made to the sheriff when he took the grain,—and that was the time for the defendant to speak and to show the sheriff the grain grown on the land. The land was rented by the defendant and he was to have half the crops. The grain was taken from the granary on the land, and the tenant did not claim that the sheriff took his share of the crops. As appears from the testimony, there was grown and threshed 1,872 bushels of oats, and the sheriff took 936 bushels and no more. There was grown 1,200 or more bushels of barley. Defendant took two or three hundred bushels, and the sheriff took half the remainder, or 487 bushels, 12 pounds. Defendant testifies that the division of the crops was made by the tenant that farmed the land, and that the sheriff took all grain produced on the land that he, the defendant, did not take.

At the close of all the testimony Mr. Nelson, counsel of defendant, moved for a dismissal of the case and a directed verdict. Then a recess was taken for a few minutes, on motion of counsel for the defendant.

After the recess an offer was made to prove by defendant that the grain taken by the sheriff was not grown on the place. The offer was properly denied. It was contrary to the pleadings and the prior testimony of the defendant. It was offering a new issue after the close of the case. It was an offer to impeach the conduct of both the defendant and his counsel. It was the duty of the defendant to point out and deliver to the sheriff the grain grown on the place. In the conduct of a lawsuit there is a time for candor and fairness. There is no time for deception, duplicity, or boy play.

GEORGE SUNBERG v. MARY SEBELIUS, as Executrix of the Last Will of August Sebelius, Deceased, and G. A. Sebelius.

(165 N. W. 564.)

Estates of decedent — claims against — presentation of — to executor or administrator — indorsement on — county judge — approval of action taken — evidence.

Section 8740, Compiled Laws of 1913, provides: "When a claim accompanied by

the affidavit required in this chapter is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim it must be presented to the county judge for his approval, who must, in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day," etc. Evidence of the presentment of the claim in question to the administrator, and his rejection thereof, examined and *held* to be sufficient to show a due presentment in pursuance of such section, and to further show that such claim was rejected.

Opinion filed November 27, 1917.

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

Affirmed.

L. D. Gooler, for appellants.

From the first presentation of a claim against an estate, the limitation statute as to barred claims begins to run, and a subsequent presentation cannot revive the claim or toll the statute. Comp. Laws 1913, § 8742; Mann v. Redmon, 23 N. D. 508, 137 N. W. 478; Singer v. Austin, 19 N. D. 546, 125 N. W. 560.

No action on a claim may be commenced until rejection of the claim by the executor or administrator, either by operation of law or by written rejection indorsed thereon. Murray v. Johnson, 28 S. D. 571, 134 N. W. 206.

An executor or administrator cannot refuse to allow a claim merely by oral rejection. The action of such officer on a claim presented must be in writing, unless held by him for the length of time named by law without acting. F. A. Patrick & Co. v. Austin, 20 N. D. 261, 127 N. W. 109.

The claim must be given into the hands of the executor or administrator, who shall have opportunity to investigate same, before allowance or rejection. Comp. Laws 1913, §§ 8737, 8740, 8742.

A judgment by default on such a claim is not like other default judgments. There are jurisdictional facts which must be established even in the absence of an answer, such as proof of the proper presentation of the claim, the action taken thereon, or the fact that no action

was taken. Mann v. Redmon, 27 N. D. 346, 145 N. W. 1031; Farwell v. Richardson, 10 N. D. 35, 84 N. W. 558.

Bowen & Adams, for respondent.

In a case which was properly a jury case, but by agreement was tried by the court on appeal, the appellant is not entitled to a new trial where no motion therefor was made in the lower court and where no specifications as to the insufficiency of the evidence were served with notice of appeal, and such questions cannot be here considered. Novak v. Lovin, 33 N. D. 424, 157 N. W. 297; Laffy v. Gordon, 15 N. D. 282, 107 N. W. 969; Comp. Laws 1913, § 7656; Morris v. Minneapolis, St. P. & S. Ste. M. R. Co. 32 N. D. 366, 155 N. W. 861.

Both presentations of the claim here involved were made within the statutory time, and therefore the question of the application of the special limitation statute is not before the court. Comp. Laws 1913, § 8742.

GRACE, J. This action is one involving recovery on a certain promissory note dated January 19, 1915, and due October 1, 1915, with interest thereon at 10 per cent from date until paid.

The complaint alleges the note to have been executed and delivered by August Sebelius and G. A. Sebelius to the Farmers & Merchants Bank of Overly, and by them, for value received, indorsed and transferred to the plaintiff prior to October 1, 1915. Plaintiff further shows that August Sebelius died testate prior to December 18, 1915; and further alleges the appointment of Mary Sebelius, surviving widow of August Sebelius, as the executrix of the last will of the deceased, which appointment was alleged to have been on December 18, 1915.

The answer denies the execution of the note and the transfer thereof by the bank to the plaintiff. The remainder of the answer makes a further denial of the allegations of the complaint, which we will notice more specifically in a subsequent portion of this opinion, where the pleadings will be more fully analyzed.

The facts are substantially as follows: The action was commenced in Bottineau county on the 22d day of July, 1916, by the service of the summons upon Mary Sebelius as executrix. Mary Sebelius published notice to creditors, the first publication of which was on March 23, 1916. The plaintiff claims a presentment of the claim for the

amount of the note in question to the executrix on the 23d day of May, 1916, and a second and subsequent presentment of such claim to the executrix just prior to the commencement of this action. The defendant claims that no due presentment of such claim was ever made to her, as required by law, and this is one of the disputed questions in the case. Tho appellant further claims that the plaintiff holds a renewal note of the note in question, and therefore is not entitled to present the old note without a surrender of the renewal note.

The first matter for our consideration is an analysis of the pleadings for the purpose of determining what issues were really formed by such pleadings. As pleadings, neither the complaint nor the answer are in the form which they should be. In the complaint there is a want of certainty and clearness of allegation. There is nothing therein to show that the presentment of the claim alleged to have been made on May 23, 1916, was presented and rejected in the manner provided by law, and the same is true of the second alleged presentment, and nothing to show the necessity of the second presentment of such claim.

The theory of the plaintiff, as well as the court below in its decision, was that the allegation in the complaint relating to the second presentment of the claim was not denied by the answer, and was therefore admitted by such answer to have been presented as required by law. We think this theory is not sound, and not justified upon a close inspection of the pleadings, when considered in the light of the rule that pleadings are to be always liberally construed. When the denials in the answer are considered with the allegations in the complaint relating to the presentment of the claim, such denial in the answer will be found sufficient to be a denial of both the first and second presentments of the claim. The complaint contains this allegation relating to the first presentment of the claim: "That on or about May 23, 1916, and prior to the expiration of six months after publication of notice to creditors by defendant, a duly verified proof of claim of the said promissory note, executed by the said plaintiff and supported by his affidavit, made in accordance with the law, was presented to the said executrix, who then and there rejected and disallowed said claim." It is conceded by the plaintiff that the denial in the answer denies this particular allegation. It is, however, claimed that such denial does not reach the allegation relating to the second presentment, which is as

follows: "That thereafter, and prior to the commencement of this action, the said claim was again presented to the said executrix, and that she again disallowed and rejected the same, and so notified the plaintiff."

It is true the defendant did not, by a separate reference or denial specifically directed towards the allegation concerning the second presentment of the claim, deny the same; but when we consider the language of the plaintiff relating to the first presentment of the claim, which does not allege with certainty when the claim was presented, but says, on or about the 23d day of May, 1916, and immediately followed by the following clause, "and prior to the expiration of six months after publication of notice to creditors," it really means that the claim was presented within six months after the notice to creditors was given. The denial to this part of the complaint really in effect denies that any claim was presented to the executrix within six months after the publication of the notice to creditors. The denial that any claim was presented within six months would be broad enough to include also the second presentment of the claim, which was prior to the time of the commencement of this action and less than six months after the notice to creditors. In fact, each presentment of the claim was made, if at all, within less than four months after the notice to creditors. If this were the only point involved, we would have no trouble in holding that the denial in this case is broad enough to deny each alleged presentment of the claim; and as far as that point is material in this case, we hold that the answer is a sufficient denial of each presentment of the claim. The method of pleading specific denial as used in the answer is not to be commended, and certainly is not in accord with any well-recognized rule of pleading.

The principal question in this case is, Was either of the presentments of the claim alleged in the complaint sufficient compliance with the requirements of law relative to the presentment of such claims? Section 8740, Compiled Laws of 1913, prescribes the manner in which a claim shall be presented to the executor of the will of a deceased person or the administrator of a deceased person's estate. Such section is as follows:

"Indorsement of allowance or rejection. How made. When a claim accompanied by the affidavit required in this chapter is presented to

the executor or administrator, he must indorse thereon his allowance or rejection with the day and date thereof. If he allows the claim it must be presented to the county judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuses or neglects to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day; and if the presentation be made by a notary, the certificate of such notary, under seal, is prima facie evidence of such presentation and rejection. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. When a claim stating the postoffice address of the claimant has been rejected, either by executor or administrator, or county judge, whether by indorsement or by nonaction, the person to whom the claim was presented must serve notice of such rejection, said notice to be by personal service or registered mail upon the claimant."

This section means that there are two ways in which an executor or administrator may accept or reject a claim. First, by the written indorsement of their acceptance or rejection, upon such claim. Second, by neglect or refusal of the executor or administrator for a period of ten days to indorse allowance or rejection upon such claim. It is clear, therefore, that the executor or administrator has all of the ten days in which to act, either to accept or reject the claim in the manner prescribed by law. No action would be maintainable or could be commenced within such ten-day period against the executor or administrator to recover upon such claim. A claim, when in due form according to law, is not presented to the executor or administrator by simply exhibiting it or describing it to the executor or administrator. The claim not only must be in due form as required by law, but to be presented it must be handed to or left with the executor or administrator, and from the time of the handing to or leaving with the executor or administrator of such claim, such executor or administrator would have ten days in which to allow or reject such claim in the manner provided by § 8740, Compiled Laws of 1913. The ten-day period

allowed by law for the claim to remain with the executor or administrator before any action may be maintained thereon is for the purpose of giving such executor or administrator an opportunity and time to examine into the merits of the claim, to investigate it, inquire about it, and determine in their mind whether or not the claim is of such a character that it ought to be allowed or rejected as the case may be.

Adverting at this time to the alleged second presentment of the claim in question in the month of July, 1916, we are clear that such claim as a matter of law was never at such time legally presented. It was not at such time handed to or left with the executrix. The testimony of Mr. Sunberg with reference to the second presentment of the claim in question in July shows conclusively that he did not leave a copy of the claim in question with the executrix. The second alleged presentment of this claim, therefore, need not be further considered, as the same was not presented in accordance with the law relative thereto, and was entirely illegal and void.

There remains to be considered only the first presentment of the claim.

An examination of the testimony relating to the first presentment of this claim convinces us that such claim was duly presented to the executrix by handing to and leaving with her a copy of such claim with the proper affidavit attached thereto; that she failed and neglected to indorse such allowance or rejection within ten days after the claim had been presented to her, which refusal and neglect was equivalent to a rejection. The action to recover upon the claim was not commenced until long after the ten-day period had expired after the first presentment of the claim. Mary Sebelius, the executrix, was called by the opposite party; and, we think from an examination of her testimony, the effect thereof is to admit that one A. R. Thompson sometime during the month of May delivered to her a duplicate of "exhibit 2," which is the proof of claim by affidavit, to which is attached a copy of "exhibit 1," the note or claim in question. Whether the duplicate of "exhibit 2" was handed to her by Thompson the day he was at the house in May, or sometime in May at the bank, is not material. The main question is, Did Thompson hand to and leave with her a duplicate of "exhibit 2?" We think her own testimony so shows.

Some of the testimony given by Mary Sebelius, which almost conclusively proves that she received a copy or duplicate of "exhibit 2," is shown by her testimony, which is as follows:

Q. Did you look at the paper Mr. Thompson gave you?

A. No, I don't look at it. He say that is a copy of the note and you must understand that is a copy of the note.

Q. Copy of the note attached like that is here to this "exhibit 2?"

A. Yes.

Q. Did you look at the copy of the note that was on the paper?

A. He just showed it to me.

Q. He gave you the paper?

A. Yes.

Q. And you took it home with you?

A. Yes.

She further testified that she took this paper up to show it to Mr. Gooler, but he was not at home, and she took the paper home again. Afterwards she could not find the paper.

We think this testimony is quite conclusive that the claim was properly presented to and left with Mary Sebelius, the executrix, sometime during the month of May, 1916. "Exhibit 2" is in evidence. On the margin thereof is written the following language, with what appears from the writing to be an indelible pencil: "Copy of this presented and delivered to Mrs. Sebelius May 23, 1916. A. R. Thompson." A. R. Thompson is the one who Mary Sebelius testified was out to her place in May. There is no proof in the record that the marginal notation was written thereon by A. R. Thompson, or that he signed his name thereto, and it may not have much weight when examined in the light of the rules of evidence, but it may be considered, however, a circumstance, when considered in the light of the testimony given by Mary Sebelius, the executrix, tending to show a delivery of a copy of the claim to Mary Sebelius in May, 1916.

We are convinced that the testimony shows a proper presentment of this claim as required by law to Mary Sebelius as such executrix sometime in May, 1916, and that no action was commenced against her until after the expiration of ten days after the presentment of such claim, but was commenced within four months after such presentment.

There has been some question raised in this case concerning the four

months,' and six months,' period allowed by law in which creditors may present claims, there being no testimony to show what the value of the estate was. The law is, under § 8734, Compiled Laws of 1913, that if the estate exceeds in value $5,000 the time expressed in the notice to creditors must allow six months for presentation of claims against the estate; if $5,000 or less, the time allowed would be four months. In any event, in this case the claim was presented within four months, and the suit was properly and timely brought upon the rejection of such claim.

The appellant also invokes § 7871, Compiled Laws of 1913, claiming that Mary Sebelius, the executrix, was incompetent to testify, and therefore her testimony was of no force and effect, and has no probative value. Subdivision 2 of such section is relied upon by the appellant, which is in part as follows: "In civil action or proceeding by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party. It will be noticed in this case that the executrix was called by the opposite party. She thus came within the exception, and her testimony was competent. In any event, the plaintiff in this case had no transaction with the decedent. Whatever transaction he had was with the bank from whom he purchased the note in question, and the cashier of the bank from whom he purchased the note was a proper witness and was not disqualified under § 7871, and was under no disability to testify to the execution and delivery of such note. Sunberg testified as to the purchase of the note, and the amount of money which he paid for the note, which was $1,700. There is no showing but that he purchased the note in good faith and is a holder for value. The testimony shows that he is a holder for value.

Considering appellant's claim that there is a new note outstanding of "exhibit 1," the note or claim under consideration, we conclude, that is not a matter which is involved in this action. If there is a renewal note outstanding of the note in question, or if it should ever appear that the bank indorsed and transferred such original note for the purpose of avoiding any defenses, which matter is referred to in the opinion of the trial court, which is a part of the record, the appellant proba-

bly has her remedy at law or otherwise to reach any such conditions, if they exist, but so far as the record in this case is concerned, we have only to consider the proper and legal presentment of the claim in question to the executrix, and other questions germane thereto. The motive, if any, of the bank in making such transfer of the note to Sunberg, its desire to cast off defenses, if any, to such note, its fraud, if any, is not presented to us in this case; the bank is not a party to this action. So far as this record shows, Sunberg purchased said note in good faith before maturity thereof for value, from such bank.

The judgment is affirmed, with costs.

BIRDZELL, J. (concurring specially). I concur in an affirmance of the judgment and in the opinion of Mr. Justice Grace, assigning the reasons why the judgment must be affirmed. However, I am so firmly of the opinion that the first presentation to the executrix in May, 1916, was sufficient for the reasons assigned by Justice Grace, that I do not deem it necessary to express any opinion as to the sufficiency of the second presentment in July, 1916. I therefore refrain from expressing any opinion upon the interpretation of § 8740, Comp. Laws 1913, in so far as the sufficiency of the second presentment is affected thereby.

CHRISTIANSON, J. (concurring specially). I concur in the result reached in the opinion prepared by Mr. Justice Grace, but am not prepared to concur in the construction placed upon the statutes relating to presentation of claims to an administrator or executor.

These statutory provisions were intended solely for the benefit of the administrator or executor. He may take ten days in which to consider or investigate a claim, or may require additional proofs as to its validity in case of doubt, but he is not required to do either. If he has sufficient knowledge to enable him to pass upon the merits of the claim, he may, if he desires, approve it or reject it immediately upon its presentation. If he approves it, the claim goes to the county judge for consideration. If he doubts its correctness, he may enter into an agreement in writing with the claimant for a reference of the claim. Comp. Laws 1913, § 8747. If he rejects the claim the claimant must bring suit thereon in the proper county within the time prescribed by law. Comp. Laws 1913, § 8742.

It is true the statute provides two different modes in which an executor or administrator may reject claims. "One is by actually indorsing a rejection on the claim, with the day and date of such rejection; the other is by nonaction on the part of the administrator, executor or probate judge, as the case may be, for a period of ten days after such claim is presented. *Such nonaction may consist of either a neglect to act or a refusal to act upon the claim,* but in either case it is just as much of a rejection of the claim as an affirmative rejection by written indorsement." Boyd v. Von Neida, 9 N. D. 337, 338, 83 N. W. 329.

But the statute, also, recognizes the propriety of presentation of claims by a notary public, and provides that, "if the presentation be made by a notary, the certificate of such notary, under seal, is prima facie evidence of such presentation and rejection." Comp. Laws 1913, § 8740.

"It [the rejection] is important only," said Young, Ch. J., Re Smith, 13 N. D. 513, 515, 101 N. W. 890, "in setting the special Statute of Limitations in motion."

A claim is presented when it is exhibited to the executor or administrator. Comp. Laws 1913, § 8734.

In this case it clearly appears that the claim was exhibited to the executrix upon two different occasions, both within the time limited for presentation of claims; and that this action was timely brought upon either presentation. In fact this action was brought within four months after the first publication of notice to creditors. The executrix never expressed a desire to have the claim left with her, or to have further proof as to its validity. It is unquestioned that she had no intention or desire to allow the claim. On the contrary she consistently and persistently denied its validity.

It is a maxim of our jurisprudence that the law neither does nor requires idle acts. Comp. Laws 1913, § 7266. It is also a maxim that the law respects form less than substance. Comp. Laws, § 7262. And the courts have generally held that a substantial compliance with the statutes relating to presentation of claims is sufficient. 18 Cyc. 479; Woerner, Administration, § 386. In applying these statutes their purpose should be kept in mind. They were intended to provide for orderly procedure in presentation of claims against a decedent. They were doubtless intended to throw proper safeguards around the estate

so as to prevent the presentation or allowance of fraudulent claims, but that they were not intended to cause undue annoyance or expense to honest claimants or to defeat legitimate claims against the estate.

If it is true that a claim must not only be exhibited to but actually left with the administrator or executor regardless of his refusal to consider it, then a claimant would be required by judicial proceeding to compel the executor or administrator to reject the claim by written indorsement, or receive and retain the claim for ten days or more and reject it by nonaction. I cannot believe that the legislature intended to provide such cumbersome methods or require such needless acts. It seems to me that when an executor or administrator who has had an opportunity to make all the investigation he desires, disclaims liability and refuses to recognize, receive, or file the claim at all, that this constitutes a sufficient rejection upon which to base an action on the claim.

BRUCE, Ch. J. I concur in the views expressed in the opinion of Mr. Justice Christianson and as thus qualified in the opinion of Mr. Justice Grace.

ROBINSON, J. (concurring). The plaintiff sues to establish against the estate a claim based on a promissory note for $1,700 and interest at 10 per cent. The note was due October 1, 1915. The district court gave judgment for plaintiff, and the executrix appeals. By answer she denies any knowledge or information sufficient to form a belief concerning the making, delivery, and nonpayment of the note, and yet the fair presumption is that she knew all about it. She was the wife of the deceased, and she must have known of his making that note. The note was put in evidence with proof that the claim had been duly presented to the executrix for allowance, and she refused to allow it, and said she would not pay it until she had to. She denies the concluding part of the complaint, which avers that the claim was duly presented to her and that she refused to allow it. That part of the answer becomes wholly immaterial in view of the fact that the answer does in effect deny the claim. It in effect avers that the presentment of the claim would have been of no avail, and the law neither does nor requires idle acts. On the trial of this case the claim was presented and proved to the satisfaction of the district court, and it was duly

adjudged that there was due $2,180.95 and that the same be paid by the executrix in due course of administration.

The burden of appellant's brief is on the presentation of the claim. There is no attempt to show that it is unjust. There is no specification showing that the evidence is insufficient to support the findings. The promissory note and the proof of claim is in evidence. The note was made to the Merchant's Bank of Overly to secure $1,700 and interest at 10 per cent. It became due October 1, 1915. It was duly indorsed to the plaintiff for $1,700 in cash money.

By a little honest inquiry the executrix and her attorney could have learned, if they did not know, all the facts concerning the note. It was her duty to know and to ascertain the facts. It was not for her to shut her eyes and to say that she did not see. The record shows no excuse or reason for the defense or the appeal to this court.

THE HOPE NATIONAL BANK, a Corporation, v. C. O. SMITH.

(165 N. W. 550.)

Justice court — judgment — appeal to district court — appeal papers filed — jurisdiction — notice of trial — not necessary — record on appeal — transmission of — before trial — right to have.

Where an action is commenced in the justice court, and judgment was rendered therein in favor of the plaintiff and against the defendant for the relief prayed for in the complaint, and after entry of such judgment, within thirty days, an appeal is taken to the district court, and notice of appeal is duly served, together with the proper undertaking, and afterwards duly filed in the district court, the district court acquires jurisdiction of such case, and such case is on the calendar of the district court for trial without any necessity of serving notice of trial; such case cannot ordinarily be tried in the district court, however, until the justice of the peace before whom such trial was had, transmits his record, which shall contain a certified copy of the justice's docket, the pleadings, and all notices, motions, and other papers filed in the cause. If the justice, or his successor in office, neglect or refuse to so transmit his record, he may be compelled to do so by the district court. Under § 9170, Compiled Laws of 1913, the plaintiff had a statutory right to have the certified record of the justice of the peace in the district court before he could be required to proceed to trial.

Opinion filed November 27, 1917.

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

Reversed.

Statement of facts by GRACE, J.:

This action was originally commenced in the justice court of Barnes county, before A. H. Beckley, a justice of the peace. The action is one of replevin to recover from the defendant the possession of a team of horses upon which the plaintiff had two valid and subsisting liens by virtue of two chattel mortgages.

In the justice court the plaintiff duly filed a verified complaint in writing and the usual affidavit, notice, and demand, together with a proper undertaking. The summons and complaint were duly served upon the defendant, and all of the papers filed with the justice of the peace. Both parties appeared by counsel; plaintiff by C. H. Shipley, and the defendant by Judge Courtney. The defendant pleaded orally, and the issues were duly joined. Trial was had without a jury. The promissory notes which such chattel mortgages secured, and certified copies of the chattel mortgages, were offered and received in evidence by the court. Witnesses for both parties were sworn and examined, and at the conclusion of the trial the court announced its decision granting judgment in favor of the plaintiff and against the defendant for the return and delivery of the team of horses, and for plaintiff's costs.

Within thirty days after the trial in the justice court the defendant served notice of appeal to the district court of Barnes county, furnishing a sufficient undertaking on appeal, and served a verified answer. The case was placed on the calendar of the district court of Barnes county. The case was continued over two successive terms by the consent of the counsel for both parties. On the 16th day of January, 1917, at the regular term of the district court of Barnes county, counsel for each of the parties being present, plaintiff appeared specially and moved the court to dismiss the defendant's appeal on the grounds that no certified copy of the record, docket entries, or exhibits had been certified to the district court by the justice of the peace. The defendant made a motion asking the court to make an order directing the said justice of the peace, A. H. Beckley, or his successor, to transmit forthwith a certified copy of the docket or record in the case. The court granted defendant's

motion on the condition that the defendant would pay the costs, if any, for the continuance of the case until the obtaining of the record, and, in the event that immediate steps were not taken to procure such record, that the appeal would be dismissed. The order of the court was never served upon the justice, and the record was never procured from the justice court or transmitted to the district court by the said justice or his successor in office.

C. S. Shippey, for appellant.

On appeal from justice court to the district court, the appellate court is without jurisdiction to proceed with the trial in the absence of a certified transcript of the justice court proceedings. That is, such proceedings and the record of the lower court shall be certified up to the district court before the respondent there can be forced to trial. Comp. Laws 1913, § 8170; Will J. Block Amusement Co. v. Case, 139 Ill. App. 73; Missouri, K. & T. R. Co. v. Hamilton, — Tex. Civ. App. —, 108 S. W. 1002; American Soda Fountain Co. v. Mason, 55 Tex. Civ. App. 532, 119 S. W. 714; 24 Cyc. 704, 709, and cases cited; Fargo v. Graves, 12 S. D. 293, 81 N. W. 291; Edminster v. Rathbun, 3 S. D. 129, 52 N. W. 263; Allard v. Smith, 120 Wis. 22, 97 N. W. 510.

The absence of a jurisdictional record cannot be supplied by presumption or parol. 2 Current Law, 663; 8 Current Law, 651; Kloss v. Sanford, 77 Minn. 510, 80 N. W. 628; Continental Ins. Co. v. Richardson, 69 Minn. 433, 72 N. W. 458; Barker v. David, 4 Penn. (Del.) 395, 55 Atl. 334; 24 Cyc. 703, and cases cited; Caster v. Scheuneman, 74 Neb. 243, 104 N. W. 152.

A trial means the judicial examination of the issues presented. Without the certified copy of the proceedings and all pleadings filed in the court below being sent up and filed, there was no record before the district court, and consequently no issue before such court, and hence there could be no trial. Comp. Laws 1913, § 7607.

W. J. Courtney, for respondent.

Where a client and his counsel join in a request for a continuance, and same is acted upon and granted by the court, they waive the right to insist upon a dismissal of the appeal. Toler v. Ayres, 1 Tex. 398;

Coby v. Halthusen, 16 Colo. 11, 26 Pac. 148; Robertson v. O'Reilly, 14 Colo. 441, 24 Pac. 560.

A motion to dismiss an appeal must be made at the earliest possible opportunity. McDonald v. Thompson, 16 Colo. 13, 26 Pac. 146; Ricker v. Collins, 81 Tex. 662, 17 S. W. 378; Hall v. Claiborne, 27 Tex. 217; Anderson v. Webster, 30 Fla. 220, 11 So. 546; Ex parte Ostrander, 1 Denio, 679; Robinson v. Bryan, 34 N. C. (12 Ired. L.) 183.

The failure of the justice of the peace to send up the transcript on appeal does not furnish grounds for a dismissal of the appeal. Clyde v. Parker, 22 Barb. 323.

GRACE, J. (after stating the facts as above). In an appeal from the justice court to the district court the district court acquires jurisdiction when the party appealing serves a notice of appeal, together with the undertaking required by law, and by filing the same with the clerk of the district court, or in lieu of such undertaking, the deposit required by law, as prescribed in § 9170, Compiled Laws of 1913. If at the time the notice of appeal and undertaking are to be served, the party on whom they are to be served is not within the state or cannot be conveniently found, which facts appear by the return of the sheriff filed with the justice of the peace, and has not appeared by attorney, a service of such notice of appeal and undertaking may be made upon the justice rendering the judgment.

In appeals from the justice court to the district court, where the appeal is taken by the defendant, it is not necessary to serve an answer unless the judgment was taken by default. In this case the plaintiff filed his complaint in the justice court and the defendant answered orally. Therefore the district court would acquire jurisdiction upon the proper service of the notice of appeal and undertaking as required by § 9163, Compiled Laws of 1913.

Section 9170, Compiled Laws of 1913, provides in substance, that upon the filing of a notice of appeal and undertaking, or the making of the deposit prescribed in § 9168, in the office of the clerk of the district court, the clerk shall immediately mail to the justice of the court in which the judgment appealed from was rendered, a written notice thereof, specifying the court in which the judgment was rendered, the names

of the parties, the date and amount of the judgment appealed from, and stating whether the undertaking filed or the deposit made entitles the appellant to a stay of execution, and requiring such justice to transmit to such clerk the record required by law. Such justice must, within ten days after the receipt of such notice, transmit to the clerk of the district court a record which shall contain a certified copy of the justice's docket, the pleadings, and all notices, motions, and other papers filed in the cause. The justice may be compelled, by the district court by order entered upon motion, to transmit such record, and may be fined for neglect or refusal so to do. A certified copy of such order may be served on the justice by the party or his attorney.

The district court made an order requiring the justice of the peace to comply with the provisions of this section. The order was made upon the motion of the defendant. There is nothing in the record to show that the same was served or ever attempted to be served, or that any proceedings were had to compel the justice of the peace to comply with the terms of such section by certifying to the record and transmitting the same to the clerk.

There is some intimation in the record that the justice's records were either lost or destroyed, but there is no proof thereof. The service of the notice of appeal and undertaking and the filing thereof, as we have said, gives the court jurisdiction of the case, but the same cannot ordinarily be tried until the justice certifies up his record. That has not been done in this case, nor was such justice served with the order requiring him to do so. The record of the justice would contain the pleadings of the parties, the different exhibits offered at the trial, and other matters. The offer of the defendant and appellant to stipulate as to certain of these matters amounted to nothing, the plaintiff refusing to stipulate. The plaintiff had the statutory right to have a certified record of the justice of the peace in the district court before proceeding to trial. If the justice failed or refused to certify such record to the district court, and the defendant failed and neglected to take steps to compel him to certify the records to the district court, or the defendant fails to show cause why he could not have the records certified to the district court, the appeal should be dismissed on notice and motion of the plaintiff, or upon motion made in open court when the parties are present by their attorneys. Plaintiff did make such a mo-

tion, and it should have been granted, unless the court was disposed to grant further time to have such justice's records certified to the district court. Any attempted trial of these issues in the district court in the manner disclosed by the record was entirely ineffective, and was in no way binding upon the plaintiff, he not having participated therein.

The discussion of the claims of the defendant, as shown by his testimony at the attempted trial in the district court, would be mere *obiter;* but we might refer to it even if it be considered *obiter,* for the purpose of disposing of this litigation. Defendant does not claim to be the owner of the property, but claims only a lien for pasturage. If the action was between the plaintiff and the owner of the property, the defendant's position might have some force, but as against the holder of a prior chattel mortgage lien, the defendant's lien for pasturage has no priority excepting for a period of ten days after the receipt of the property, unless the defendant had within ten days served upon the holder of such chattel mortgage lien, if known, or if a resident of the state, the notice required by § 6846, Compiled Laws of 1913. The defendant does not by his testimony disclose the giving of any such notice, and could claim no lien beyond the ten days, unless he had given such notice.

Plaintiff has presented on this appeal a statement of the case, duly settled. This statement shows the proceedings had below, and contains a transcript of all the evidence offered upon the trial.

We are aware that ordinarily the questions presented on this appeal could not be raised unless a motion was made in the trial court to vacate the judgment. And we believe it would have been better practice to have done so in this case. We do not believe, however, that such motion is absolutely essential. For in this state an appeal may be taken from a default judgment. Comp. Laws 1913, § 7820. And the statute provides that "all remarks of the court made during the trial and all orders or decisions made in the absence of a party" are deemed excepted to, "and they may be reviewed . . . upon motion for a new trial or upon appeal, as fully as if exception thereto had been expressly taken." Comp. Laws 1913, § 7653.

The judgment appealed from is in all things reversed, and the case is remanded to the District Court for further proceedings in accordance with law.

ROBINSON, J. (dissenting). This action was commenced before a justice of the peace of Barnes county to recover two horses claimed under a chattel mortgage lien. The defendant claims a prior lien for the keeping of the horses at the request of the mortgagor and the owner of the property. If he had not kept and cared for the horses, they might have perished. Hence, he claims a lien for the care of them.

On January 20, 1915, it seems judgment was given for plaintiff, and defendant duly appealed; but the justice went out of office, left the state, made no return to the appeal, and we have no proof that he left a successor or a docket. There is nothing to show that he ever made any docket entries or kept a docket, and the chances are that he did not. There is on file a paper in the form of a judgment in favor of the plaintiff dated January 20, 1915, signed: "A. J. Beckley, Justice of the Peace."

In the trial court there was made an order that the justice or his successor in office make a return to the appeal, but no return was made. The justice was not in the state. The case was on the court calendar three terms, and adjourned from time to time by consent of the parties, and on the fourth term it seems the judge gave notice to the attorneys that it must be tried and disposed of, and he termed it a "pestiferous" case. So, it was called for trial on motion of defendant, evidence was submitted and judgment entered in favor of the defendant for $62 and costs. The trial was in absence of the plaintiff and his counsel. The plaintiff appeals without making any motion to vacate the default or to amend or correct any error in the judgment. He assigns error in the failure of the court to dismiss the appeal, in the making and disregarding an order on the justice to return the record, and on calling the case for trial and taking the judgment by default.

The proceedings were grossly irregular, and it seems the attorneys showed a disposition to play horse with the case. It had been on the court calendar for three terms, and at the fourth term it seems that the judge was determined to dispose of it, and so he gave notice that they must be prepared to try the case. Clearly the court had jurisdiction of the case and a right to rescind or disregard his own orders.

The plaintiff appeals and assigns error in the failure of the court to dismiss the appeal, the making and then disregarding an order for a return of the record, and the entry of judgment. There was no motion

to open the judgment or to correct it in any manner; no attempt to excuse the default and no affidavit of merits; no showing that the plaintiff had a cause of action.

Certain it is the court had jurisdiction of the action and a right to rescind and disregard its own orders, and to insist that action be tried or dismissed. That was all a matter of pure discretion with the trial court. It seems the judment is irregular; it is against the defendant personally when it should deal with the horses only, unless the plaintiffs had possession of the horses; but the specifications of error do not point to such irregularity, and the chances are that neither the court nor the counsel ever thought of it. The judgment may be for too much, but the case is not here for trial or a review on the merits. There is nothing in the record which appeals to the favor of this court. The appeal should be dismissed and plaintiff left to his proper remedy, if any, by motion on a proper showing of merits and an excuse for his default.

MARY MONTAIN v. CITY OF FARGO, a Corporation.

(L.R.A.1918C, 600, 166 N. W. 416.)

City — servant of — independent contractor — written contract — to perform services.

1. One who performs services for a city in the matter of removing garbage under a written contract which contains a provision that he is to furnish teams and men or such number thereof as in the judgment of said city may be necessary, and that the entire work is to be done in a good and substantial manner with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health, and that his teams and equipment shall be acceptable and satisfactory to said health commissioner, is *held* to be an independent contractor, and not a servant of said city.

City health commissioner — city commission — removal of garbage — supervising the work — public and governmental capacity — not private — or corporate capacity.

2. A city health commissioner while supervising the removal of garbage, and a city commission while authorizing and providing for its removal, are *held* to have been acting in a public governmental, and not in a private or corporate, capacity.

Opinion filed November 1, 1917. Rehearing denied November 27, 1917.

Appeal from the District Court of Cass County, *A. T. Cole,* J.
Action to recover for personal injuries.
Order sustaining demurrer to complaint.
Plaintiff appeals.
Affirmed.

Statement of facts by BRUCE, Ch. J.:

This is an appeal from an order sustaining a demurrer to a complaint which in substance alleged that the plaintiff's intestate, one Mons Montain, met his death by being struck by a runaway team drawing a garbage sled, which sled was being used for the purposes and under the conditions intended and detailed in a certain written agreement between the city of Fargo and one Nels Johnson for the collection and disposal of kitchen garbage, and which contained the following provisions:

"Whereas, said Nels Johnson did agree in writing to furnish four teams and eight men or any number of said teams, at the rate of $147 per month for each team, and two men to haul said garbage, during the said year 1915, at the said prices set out in said bid,

"Now, therefore, the said party of the second part covenants and agrees to furnish to said city, at his own cost and expense, not to exceed four teams fully equipped and eight men or any number of said teams and men, at the rate of $147 per month for each team, and two men to perform the work necessary under the provisions of the ordinance commonly known as the 'garbage ordinance,' to the full satisfaction and acceptance of the said city, and to perform not less than ten hours' work each day.

"The entire work to be done in a good and substantial manner, with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health, of such agent or agents as he may appoint for that purpose. Such teams and equipment and men to be acceptable and satisfactory to said health commissioner. The said city reserving the right to cancel this agreement upon ten days' notice if the said second party fails to comply in all respects with the terms and conditions of this contract and the provisions of the ordinance heretofore referred to."

Pfeffer & Pfeffer, for appellant.

The written agreement between the parties created the relationship of master and servant. Comp. Laws 1913, § 6134; Hedge v. Williams, 131 Cal. 455, 82 Am. St. Rep. 366, 63 Pac. 721, 64 Pac. 106.

The test is that, if the performance of the work is controlled by the employer, the employee is a servant; but if it is controlled by the employee he is an independent contractor. Messmer v. Bell & C. Co. 133 Ky. 19, 117 S. W. 346, 19 Ann. Cas. 1; Madisonville, H. & E. R. Co. v. Owen, 147 Ky. 1, 143 S. W. 421; Mason & H. Co. v. Highland, — Ky. —, 116 S. W. 320.

Where the owner retains the right to direct the manner of carrying out the details of the work, the contractor is not independent. Majors v. Connor, 162 Cal. 131, 121 Pac. 371; Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Madisonville, H. & E. R. Co. v. Owen, 147 Ky. 1, 143 S. W. 421; Quayle v. Sewerage & Water Board, 131 La. 26, 58 So. 1021; Cunningham v. Penn Bridge Co. 131 La. 196, 59 So. 119; McCarthy v. Clark, 115 Md. 454, 81 Atl. 12; Beal v. Champion Fiber Co. 154 N. C. 147, 69 S. E. 834; Harmon v. Ferguson Contracting Co. 159 N. C. 22, 74 S. E. 632; Chas. T. Derr Constr. Co. v. Gelruth, 29 Okla. 538, 120 Pac. 253; Moore v. Koplin, — Tex. Civ. App. —, 135 S. W. 1033; James v. Pearson, 64 Wash. 263, 116 Pac. 852; Nelson v. American Cement Plaster Co. 84 Kan. 797, 115 Pac. 578; Johnson v. Carolina, C. & O. R. Co. 157 N. C. 382, 72 S. E. 1057; Swanson v. Schmidt-Gulack Elevator Co. 22 N. D. 563, 135 N. W. 207; Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91.

The right to control the work to be done under the contract is the most important test in determining whether the employee is a servant or an independent contractor. Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Sacchi v. Bayside Lumber Co. 13 Cal. App. 72, 108 Pac. 885; Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; Giacomini v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; DePalma v. Weinman, 15 N. M. 68, 24 L.R.A. (N.S.) 423, 103 Pac. 782; Potter v. Seymour, 4 Bosw. 140; Goldman v. Mason, 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Hawke v. Brown, 28 App. Div. 37, 50 N. Y. Supp. 1032; Baldwin v. Abraham, 171

N. Y. 677, 64 N. E. 1118; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Kniceley v. West Virginia Midland R. Co. 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811; Lacour v. New York, 3 Duer, 406; New Orleans M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906.

Where the work is to be done "under the direction of a street commissioner," the employer retains control and the employee is a mere servant. St. Paul v. Seitz, 3 Minn. 297, Gil. 205, 74 Am. Dec. 753.

Also where the work is directed by a "superintendent" of employees. De Palma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Cincinnati v. Stone, 5 Ohio St. 38.

A master is liable for the negligent act of his servant when the negligent act occurred while the servant was performing services within the scope of his employment and in the line of his duties while engaged in such employment. Scott v. Springfield, 81 Mo. App. 312.

The removal of garbage by a city in this state is a private or corporate function, and not a public or governmental duty. Denver v. Porter, 61 C. C. A. 168, 126 Fed. 288; Barney Dumping-boat Co. v. New York, 40 Fed. 50; Denver v. Davis, 37 Colo. 370, 6 L.R.A.(N.S.) 1013, 119 Am. St. Rep. 293, 86 Pac. 1027, 11 Ann. Cas. 1013, 20 Am. Neg. Rep. 498; Quill v. New York, 36 App. Div. 476, 55 N. Y. Supp. 889, 5 Am. Neg. Rep. 423; Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652.

Negligence may be inferred from the mere fact that a team of horses runs away; or, in other words, the mere running away of a team of horses implies negligence on the part of the owner, and the doctrine of *res ipsa loquitur* applies. Peck v. St. Louis Transit Co. 178 Mo. 617, 77 S. W. 736; Orcutt v. Century Bldg. Co. 201 Mo. 424, 8 L.R.A. (N.S.) 929, 99 S. W. 1062; Denver v. Davis, 6 L.R.A.(N.S.) 1013, note; 34 Cyc. 1665; 29 Cyc. 591, 595; Kahn v. Burette, 42 Misc. 541, 85 N. Y. Supp. 1047; Griffen v. Manice, 166 N. Y. 188, 52 L.R.A. 922, 82 Am. St. Rep. 630, 59 N. E. 925, 9 Am. Neg. Rep. 336; Maus v. Broderick, 51 La. Ann. 1153, 25 So. 977; Gorsuch v. Swan, 109 Tenn. 36, 97 Am. St. Rep. 836, 69 S. W. 1113, 12 Am. Neg. Rep. 632; Strup v. Edens, 22 Wis. 432; Gannon v. Wilson, 1 Sadler (Pa.) 422, 18 W. N. C. 7, 5 Atl. 381; Kokoll v. Brohm & B. Lumber Co. 77 N.

J. L. 169, 71 Atl. 120; Francois v. Hanff, 77 N. J. L. 364, 71 Atl. 1128; Crawford v. Upper, 16 Ont. App. Rep. 440; Unger v. Forty-second Street & G. Street Ferry R. Co. 51 N. Y. 497; Hummell v. Wester, Brightly (Pa.) 133; Tolhausen v. Davies, 59 L. T. N. S. 436, 57 L. J. Q. B. N. S. 392, 52 J. P. 804; Snee v. Durkie (1904) 6 F. 42, 1 Butterworths' Dig. 67; Thane v. Douglass, 102 Tenn. 307, 52 S. W. 155; 1 Thomp. Neg. p. 389.

Spalding & Shure, for respondent.

The contract here was to do an act in itself lawful, and, it is to be presumed, in a lawful manner. It did not involve injury to anyone. It was not inherently dangerous. Emmerson v. Fay, 94 Va. 65, 26 S. E. 386; Hilliard v. Richardson, 3 Gray, 349, 63 Am. Dec. 743.

A servant is one who is employed to render personal service to his employer otherwise than in pursuit of an independent calling, and who in such service remains entirely under the control and direction of the employer, who is called his master. Comp. Laws 1913, § 6134; Cal. Civ. Code, § 2009.

An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control, as to the means by which the result is to be accomplished, of anyone, but only as to the results of the work. 26 Cyc. 1546; Taute v. J. I. Case Threshing Mach. Co. 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365; Harrison v. Collins, 86 Pa. 153, 27 Am. Rep. 699; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Richmond v. Sitterding, 65 L.R.A. 455, note; Bailey v. Troy & B. R. Co. 57 Vt. 252, 52 Am. Rep. 129; Butler v. Townsend, 126 N. Y. 105, 26 N. E. 1017; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595.

If the contract of employment has been reduced to writing, the question whether the person employed was an independent contractor or merely a servant is determined by the court as a matter of law. Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Pioneer Fireproof Constr. Co. v. Hansen, 176 Ill. 100, 52 N. E. 17; Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Rogers v. Florence R. Co. 31 S. C. 378, 9 S. E. 1059; Emmerson v. Fay, 94 Va. 60, 26 S. E. 386; Central Coal & I. Co. v. Grider, 65 L.R.A. 508, note.

The character of the contract is tested by the existence or absence

of a right of control on the employer's part. Carrico v. West Virginia, C. & P. R. Co. 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571; Pioneer Fireproof Constr. Co. v. Hansen, 176 Ill. 100, 52 N. E. 17; Thomp. Neg. p. 909; Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Carlson v. Stocking, 91 Wis. 432, 65 N. W. 58; Blake v. Ferris, 5 N. Y. 48, 55 Am. Dec. 304; Smith v. Simmons, 103 Pa. 32, 49 Am. Rep. 113; Foster v. Wadsworth-Howland Co. 168 Ill. 514, 48 N. E. 163; Barg v. Bousfield, 65 Minn. 355, 68 N. W. 45, 16 Am. Neg. Cas. 188; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334; Hexamer v. Webb, 101 N. Y. 377, 54 Am. Rep. 703, 4 N. E. 755; Hughbanks v. Boston Invest. Co. 92 Iowa, 267, 60 N. W. 640; Hardy v. Shedden Co. 37 L.R.A. 33, note; Central Coal & I. Co. v. Grider, 65 L.R.A. 475, note; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Hardaker v. Idle Dist. Council [1896] 1 Q. B. 335, 67 L. J. Q. B. N. S. 335, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196.

A person who hires a contractor to do certain work, and has no immediate control over the servants of the contractor, is not liable to persons injured through the negligence of one of such servants. De Forrest v. Wright, 2 Mich. 368; Riedel v. Moran Fitzsimons Co. 103 Mich. 262, 61 N. W. 509.

Clauses providing that the work shall be done under the direction of the engineer or superintendent, relating to the supervision of the work and other conditions with reference to by-laws and ordinances, do not have the effect of rendering the contractor a servant, nor do they interfere as to any particular method the contractor may employ to do the work, so long as it is done according to the contract. Central Coal & I. Co. v. Grider, 65 L.R.A. 478, note; Larson v. Metropolitan Street R. Co. 110 Mo. 234, 16 L.R.A. 330, 33 Am. St. Rep. 439, 19 S. W. 416; Harrison v. Kiser, 79 Ga. 588, 4 S. E. 320; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957, 7 Am. Neg. Rep. 86; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017.

"A provision in the contract, that the work is to be done to the satisfaction of the employer's representative," is not such a supervision over the work that it destroys its independent nature. Harding v. Boston, 163 Mass. 14, 39 N. E. 411; Foster v. Chicago, 197 Ill. 264, 64 N. E.

322; Kelly v. New York, 11 N. Y. 432; Frassi v. McDonald, 122 Cal. 400, 55 Pac. 139; Indian Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Humpton v. Unterkircher, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; Foster v. Chicago, 197 Ill. 264, 64 N. E. 322; Harding v. Boston, 163 Mass. 14, 39 N. E. 411; Saunders v. Toronto, 26 Ont. App. Rep. 265, reversing 29 Ont. Rep. 273; Uppington v. New York, 165 N. Y. 222, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115; Hardaker v. Idle Dist. Council [1896] 1 Q. B. 335, 65 L. J. Q. B. N. S. 363, 74 L. T. N. S. 69, 44 Week. Rep. 323, 60 J. P. 196; Blumb v. Kansas City, 84 Mo. 112, 54 Am. Rep. 87; Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205.

"A city is not liable for injuries caused by the board of public works in disposing of the garbage from the city." Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Ash v. Century Lumber Co. 153 Iowa, 523, 38 L.R.A.(N.S.) 973, 133 N. W. 888, 2 N. C. C. A. 494; Driscoll v. Towle, 181 Mass. 416, 63 N. E. 922; Stewart v. California Improv. Co. 131 Cal. 125, 52 L.R.A. 205, 63 Pac. 177, 724; Frerker v. Nicholson, 41 Colo. 12, 13 L.R.A.(N.S.) 1122, 92 Pac. 224, 14 Ann. Cas. 730; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Fenner v. Crips Bros. 109 Iowa, 455, 80 N. W. 526, 6 Am. Neg. Rep. 504; Bellatty v. Barrett Mfg. Co. 192 Fed. 229.

It is the duty of cities to keep the streets clean and free of all putrid and other substances which are offensive to the tastes and endanger or imperil the health of the people, and this duty directly devolves upon the health department; and the functions of this department of the city being governmental, and not purely administrative in their nature, it follows that if, in the exercise of such functions, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city. Savannah v. Jordon, 142 Ga. 409, L.R.A.1915C, 741, 83 S. E. 109, Ann. Cas. 1916C, 240; Love v. Atlanta, 95 Ga. 129, 21 Am. St. Rep. 64, 22 S. E. 29.

Cleaning the streets and removing ashes and garbage therefrom is a public duty of a city, performed for the protection of the general health, and it is purely a governmental function. Savannah v. Jordon, Ann. Cas. 1916C, 243, note; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; State v. Howard, 72 Me. 459; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351.

While engaged in such public, governmental work, a city cannot be held in damages for injuries to third persons resulting from the negligence of a person who is performing the actual labor under a contract and according to his own method and manner of doing the work, and who is responsible to the city or to its proper representative only to the extent of doing the work as provided by his contract. Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; Condict v. Jersey City, 46 N. J. L. 157; Comp. Laws 1913, § 3818, ¶ 9; Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 352, 52 N. W. 811; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302; Russell v. Tacoma, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; Kies v. Erie, 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942; Evans v. Sheboygan, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; Kempster v. Milwaukee, 103 Wis. 421, 79 N. W. 411; Bruhnke v. LaCrosse, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100; Gregg v. Hatcher, 94 Ark. 54, 27 L.R.A.(N.S.) 138, 125 S. W. 1007, 21 Ann. Cas. 982; Bolster v. Lawrence, 225 Mass. 387, L.R.A.1917B, 1285, 114 N. E. 722; Tindley v. Salem, 137 Mass. 171, 50 Am. Rep. 289.

The mere fact that a team of horses runs away and injury results, does not raise the presumption of negligence, either as against the owner or the driver. Metropolitan Casualty Ins. Co. v. Clark, 145 Wis. 181, 37 L.R.A.(N.S.) 717, 129 N. W. 1065, 3 N. C. C. A. 532; Rowe v. Such, 143 Cal. 573, 66 Pac. 862, 67 Pac. 760; Creamer v. McIlvain, 89 Md. 343, 45 L.R.A. 531, 73 Am. St. Rep. 186, 43 Atl. 935, 6 Am. Neg. Rep. 547; McGahie v. McClennen, 86 App. Div. 263, 83 N. Y. Supp. 692; Gray v. Tompkins, 40 N. Y. S. R. 546, 15 N. Y. Supp. 953; Coller v. Knox, 222 Pa. 362, 23 L.R.A.(N.S.) 171, 71 Atl. 539; O'Brien v. Miller, 60 Conn. 214, 25 Am. St. Rep. 320, 22 Atl. 544; Button v. Frink, 51 Conn. 342, 50 Am. Rep. 24; Patton-Worsham Drug Co. v. Drennon, 104 Tex. 62, 133 S. W. 871, 3 N. C. C. A. 859.

BRUCE, Ch. J. (after stating the facts as above). Two propositions are advanced in support of the demurrer to the complaint:

(1) That the garbage collector was an independent contractor, and, being such, the city was not liable for his negligence.

(2) That even if the said collector was not an independent contractor, the city was acting in a public and governmental capacity and was therefore not liable.

And, first, Was the said Nels Johnson an independent contractor? Is or is not the appellant correct in his contention that "one who performs services for a city in the matter of removing garbage under a written contract which contains a provision that he is 'to furnish said teams and men or such number thereof as in the judgment of said city may be necessary for the delivery and disposal of said garbage,' and which contains this further provision, *viz.:* 'The entire work to be done in a good and substantial manner with the approval and acceptance of the city, and under the supervision and direction of the commissioner of health, or such agent or agents as he may appoint for that purpose; such teams and equipment to be acceptable and satisfactory to said health commissioner,' is a servant of the city, and not an independent contractor."

We are satisfied that the said Nels Johnson was an independent contractor, and not a servant of the defendant city.

According to § 6134 of the Compiled Laws of 1913, "a servant is one who is employed to render personal service to his employer, otherwise than in pursuit of an independent calling, and who in such service remains *entirely* under the control and direction of the latter, who is called his master."

This definition of a servant, where it is sought to distinguish between a servant and an independent contractor, affords by inference a definition of an independent contractor, an independent contractor being considered a person employed to execute work, who is not within the definition of a servant.

The question whether the employee is an independent contractor, says the supreme court of Kentucky, may be determined by answering the following questions: Who has the general control of the work? Who has the right to direct what shall be done, who shall do it, and how it shall be done? See Mason & H. Co. v. Highland, — Ky. —, 116 S. W. 322; Madisonville, H. & E. R. Co. v. Owen, 147 Ky. 1, 5, 143 S. W. 421.

"An 'independent contractor' is one who is independent of his employer in the doing of his work, and may work when and how he

prefers. A 'servant' is one who is employed by another and is subject to the control of his employer." Messmer v. Bell & C. Co. 133 Ky. 19, 25, 117 S. W. 346, 19 Ann. Cas. 1.

"The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists." 1 Thomp. Neg. §§ 579, 629.

"The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished; or, in other words, 'not only what shall be done, but how it shall be done.'" Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Huffcut, Agency 9; Taute v. J. I. Case Threshing Mach. Co. 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365; notes in 65 L.R.A. 445 and 17 L.R.A. (N.S.) 371.

"The test is very much this; *viz.*, whether the person charged is under the control and bound to obey the orders of another." Reg. v. Negus, L. R. 2 C. C. 37, 42 L. J. Mag. Cas. N. S. 62, 28 L. T. N. S. 646, 21 Week. Rep. 687, 12 Cox, C. C. 492, 1 Am. Crim. Rep. 150.

There can be no doubt that under these general tests the relation of master and servant did not exist; and the mere fact that the contract states that the collector was "to furnish said teams and men or such number thereof as in the judgment of the health commissioner of said city may be necessary for the delivery and disposal of garbage;" and that the contract further provides that the work shall be done "under the provision of the ordinance known as the 'garbage ordinance' to the full satisfaction and acceptance of the city,—and under the supervision and direction of the commissioner of health,—and that such teams and equipment and men shall be acceptable and satisfactory to said health commissioner," does not change the situation.

It is true that the men and the teams and the work were required to be satisfactory to the health commissioner, but this was for the purpose of the public health, and the health commissioner would have had a voice in the matter even though the contract and ordinance under which it was let had not so provided.

The health commissioner had no power to discharge men; he had no

power to say how hard they should work; he had no power to say what their wages should be; nor did the contract itself dictate in these matters.

His supervision was for the protection of the public health and for that purpose alone.

The city health officer or commissioner, indeed, exercises a public, and not a private or municipal, function. His office is provided for by the statutes, and in cities which, like Fargo, are under the commission form of government, he has all the power and authority which are conferred by the general statutes upon city boards of health. He represents the state and the city in their governmental, and not in their corporate or property owning, capacities. He would have possessed the powers given to him by the contract even if the instrument had been silent upon the subject. See §§ 3820 and 411 to 433, Compiled Laws of 1913.

We are also satisfied that, in disposing of its garbage and in letting the contract in question, the city of Fargo was acting in its governmental, and not in its private or corporate, capacity.

There is only one purpose for our municipalities entering so largely into this work as they do to-day, and that is the preservation of the public health; and in every enlightened land this aid and protection always has been and always will be considered a primary duty which devolves upon the state in its sovereign power. Savannah v. Jordon, 142 Ga. 409, L.R.A.1915C, 741, 83 S. E. 109, Ann. Cas. 1916C, 240 and note 243; Love v. Atlanta, 95 Ga. 129, 21 Am. St. Rep. 64, 22 S. E. 29; Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664; Haley v. Boston, 191 Mass. 291, 5 L.R.A.(N.S.) 1005, 77 N. E. 888; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030; see also Nicholson v. Detroit, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695; Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Bolster v. Lawrence, 225 Mass. 387, L.R.A.1917B, 1285, 114 N. E. 722.

If, indeed, as has generally been held, the protection of the lives and property of its citizens from loss by fire is a governmental function, and to such an extent that the city is not liable for the negligence of its firemen either in putting out or failing to put out a fire, or for accidents while the engines and carts are going to and from fires, or

of its servants in removing ashes and inflammable material, how much less should the city be held liable for acts done in seeking to protect its citizens from dangers which are much more insidious and extensive? See 28 Cyc. 1303; State v. Howard, 72 Me. 459; Re Vandine, 6 Pick. 187, 17 Am. Dec. 351; Condict v. Jersey City, 46 N. J. L. 157; Gillespie v. Lincoln, 35 Neb. 34, 16 L.R.A. 352, 52 N. W. 811; Kies v. Erie, 135 Pa. 144, 20 Am. St. Rep. 867, 19 Atl. 942.

We realize that there are some decisions of the courts of New York and Colorado which seem to hold to a contrary view than that expressed by us, but we are not persuaded thereby.

The judgment of the District Court is affirmed.

GRACE, J. (dissenting). The appeal in this case is from an order sustaining a demurrer to the complaint.

The complaint alleges in substance that Mons Montain came to his death by being struck by a garbage sled which at the time was drawn by a runaway team. Mons Montain, at the time he met his death, was in the employ of the city of Fargo, he being superintendent of the garbage or dumping ground.

It appears that the city of Fargo had entered into an agreement with one Nels Johnson, in writing, whereby the said Johnson was to furnish four teams and eight men, or any number of teams at the rate of $147 a month for each team and two men, to haul said garbage from the city of Fargo during the year 1915. According to the agreement the work was to be done under the provisions of the ordinance of such city, known as the "garbage ordinance," and was to be performed to the full satisfaction and acceptance of said city, and to be done in a good and substantial manner, and in such manner as to meet the approval and acceptance of the city, and all such work to be done under the supervision and direction of the commissioner of health, or such agent or agents as he might appoint for that purpose. Such agreement also provided that the teams, equipment, and men should be acceptable and satisfactory to the health commissioner. The city reserved the right to cancel the agreement upon ten days' notice, upon Johnson's failure to comply in all respects with the terms and conditions of the contract and the provisions of the ordinance.

The city of Fargo, the defendant, seeks to escape liability for its

negligence upon two theories: First, that Johnson was an independent contractor, and, being such, the city was not liable for his negligence. Second, that even if Johnson was not an independent contractor, and even if he was the agent of the city, so that the city would be liable for his negligent acts in and about performing the work for the city for which he was employed, the city would not be liable, notwithstanding such facts, for the reason that in disposing of such garbage it claimed to be acting in a governmental capacity, and claimed for this reason to be immune from liability.

Upon investigation and analysis of the first legal proposition, it is perfectly clear that Johnson was not an independent contractor, but merely a servant of the city of Fargo. The relation between the city of Fargo and Johnson was one of master and servant, and not the relation of independent contractor. Under the very terms of the written agreement which Johnson had with the city of Fargo, when such contract is examined in the light of the law of master and servant, there remains no doubt of the fact that Johnson was a servant of the city. The term, "independent contractor," is one difficult of definition. It is difficult to distinguish the line of demarcation by which independent contractors may be separated from servants. It appears to us, there may be such a person as an independent contractor. A contract may be made in which one of the contracting parties would and could be an independent contractor. The great difficulty appears to be in the efforts so often resorted to by endeavoring to make a relationship which is purely one of master and servant fit into the relationship of that of independent contractor for the purpose of avoiding liability which in case of injury or damage would naturally flow from the relationship of master and servant, thus seeking security under the protecting principle upon which the relationship of independent contractor is founded. Where the law of master and servant is for our consideration there is no difficulty in applying the law. The relationship of the master to his servant is well understood, and his duties and liabilities are easily discernible. If the master is negligent in the execution of his duties, and his servant is injured through the negligence of such master in the performance of his plain duties towards the servant, liability of the master towards the servant naturally follows. It is different with the law of independent contractor. It seems that the relationship or principle of

independent contractor, and the law relating thereto, are somewhat shadowy and uncertain. The relationship is not a common one, except that it has been made more common in recent years in an effort to shift or avoid liability. When an independent contract is made, it is made by a person who contracts to have a certain job of work done, who is called a contractor, with a person who contracts to do the job of work, who is called an independent contractor. Why the invention of this comparatively new term, "independent contractor?" The answer is, it is a means by which in a proper case a person for whom the work is to be done, or in other words, the contractor, may avoid his liability for any damages to any person who may be engaged in assisting in the performance of the work to be done. As before indicated, there are conditions, and certain quantities of work to be done, to which the principle is applicable. To the application of the principle in a proper case there can be no objection. The abuse of the principle is, in seeking to apply it in cases and to conditions to which it is not germane.

Without following any particular set definition which we have found and examined in different authorities concerning the relationship of independent contractor, but taking such definitions into consideration and applying also other language which we think may throw some light upon the relationship of independent contractor, we find the meaning of "independent contractor" to be as follows: An independent contractor may be defined as one exercising an independent employment *in which he is skilled,* who, having entered into a contract to do certain work, does his work according to his own way and method, independent of any methods submitted by another, and who is not subject to the control of any person in the execution of his work; being responsible only for the result of his work; doing all the work at his own risk and cost in the first instance, and furnishing all means and power by which such work is done; and who contracts to do a complete quantity or job of work at a stated price for the whole of such work, which is to be considered as the price for which the whole work is to be done, and not as wages; and who cannot be discharged at the will of the person with whom the contract is made, or because the person with whom the independent contractor has made the agreement is dissatisfied with the work. Measured by this definition and by the terms of the written contract between Johnson and the city of Fargo, Johnson was merely

a servant of such city. It will be noticed, from a consideration of such written contract, that all work performed by Johnson for the city was to be supervised and controlled by the city. The city reserved certain power in such contract whereby it could supervise and direct the means and the method of doing such work; for the contract specifically says, "Such teams, equipment, and men to be acceptable and satisfactory to the health commissioner." And again, the entire work was to be done in a good and substantial manner, and this means, they could determine the quality of the work and the manner in which it was performed. The contract further says that the work shall be done in such a manner as to meet the "approval and acceptance of the city." We can easily understand that, if the city did not approve of any work done, the so-called independent contractor would have to do the work in a different manner so as to merit the approval of the city; and thus we see the city really directed the doing of the work. The city could enforce all these demands, directions, and requirements in what way? The answer is in the contract itself,—by discharging the independent contractor upon ten days' notice. Or, in other words, by canceling the contract upon ten days' notice, which is in fact a discharge of the independent contractor. These are not the rights and remedies of one who contracts with an independent contractor. Where one contracts with an independent contractor for a complete job of work at a certain price, he permits such independent contractor to do such work according to his own manner and method of performing such work; but if the work is not satisfactory to the person with whom the independent contractor has made the agreement, such person cannot discharge the independent contractor; but if the work which the independent contractor agreed to do is not done in such a manner as to bring about the result which was contracted to be brought about, the one who made the contract with the independent contractor has a complete remedy in refusing to pay the price stated in the contract, by reason of the failure of the independent contractor to bring about the result he contracted to bring about. In the case of Schular v. Hudson River R. Co. 38 Barb. 653, the court said: "Perhaps the most usual test by which to determine whether the person doing the injury was *a servant or an independent contractor is to consider whether he was working by the job or at stated wages,*— so much per day, week, or month. A person who works for wages,

whose labor is directed and controlled by the employer either in person or by an intermediate agent, is a servant, and the master must answer for a wrong done by him in the course of his employment. A person who for a stated sum engages to perform a stated piece of labor in which he is skilled, the proprietor of the work leaving him to his own methods, is an independent contractor. The proprietor does not stand in the relation of superior to him, and is not answerable for the wrongs done by him or his servants in the prosecution of his work, unless special circumstances exist making him so. The fact that the employee was hired, not for a definite time, but to perform a particular job, does not, however, of itself negative the relation of master and servant, for under such a contract the employer may well retain full control over him; and it must constantly be borne in mind that the power to control on the part of the employer is the essential fact establishing the relation."

Jensen v. Barbour, 15 Mont. 582, 39 Pac. 906; Bibb v. Norfolk & W. R. Co. 87 Va. 711, 14 S. E. 163; Fink v. Missouri Furnace Co. 82 Mo. 276, 52 Am. Rep. 376; Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 46 L.R.A. 367, 34 S. E. 525; Waters v. Pioneer Fuel Co. 52 Minn. 474, 38 Am. St. Rep. 564, 55 N. W. 52; Indiana Iron Co. v. Gray, 19 Ind. App. 565, 48 N. E. 803; Majors v. Connor, 162 Cal. 131, 121 Pac. 371; Perkins v. Blauth, 163 Cal. 782, 127 Pac. 50; Nelson v. American Cement Plaster Co. 84 Kan. 797, 115 Pac. 578; Johnson v. Carolina, C. & O. R. Co. 157 N. C. 382, 72 S. E. 1057; Swanson v. Schmidt-Gulack Elevator Co. 22 N. D. 563, 135 N. W. 207; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175; Sacchi v. Bayside Lumber Co. 13 Cal. App. 72, 108 Pac. 885; Atlantic Transport Co. v. Coneys, 28 C. C. A. 388, 51 U. S. App. 570, 82 Fed. 177; Campbell v. Lunsford, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; Giacomin v. Pacific Lumber Co. 5 Cal. App. 218, 89 Pac. 1059; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; DePalma v. Weinman, 15 N. M. 68, 24 L.R.A.(N.S.) 423, 103 Pac. 782; Potter v. Seymour, 4 Bosw. 140; Goldman v. Mason, 18 N. Y. S. R. 376, 2 N. Y. Supp. 337; Hawke v. Brown, 28 App. Div. 37, 50 N. Y. Supp. 1032; Baldwin v. Abraham, 171 N. Y. 677, 64 N. E. 1118; Pickens v. Diecker, 21 Ohio St. 212, 8 Am. Rep. 55; Smith v. Humphreyville, 47 Tex. Civ. App. 140, 104 S. W. 495; Kniceley v. West Virginia Midland Co. 64 W. Va. 278, 17 L.R.A.(N.S.) 370, 61 S. E. 811; Lacour

v. New York, 3 Duer, 406; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220.

In the light of the language of the written contract, the authorities cited by the majority opinion sustain our contention that in this case Johnson was a servant of the city of Fargo, and not an independent contractor. The majority opinion contains the following, citing 1 Thomp. Neg. §§ 579, 629: "The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists."

Keeping in mind that the written contract in question between Johnson and the city of Fargo provides that the city may, upon ten days' notice, cancel the contract if the second party fails to comply with the terms and provisions thereof, and the provisions of the ordinance, it simply means that the city can for such causes discharge Johnson upon ten days' notice by cancelation of his contract; his relation to the city of Fargo is that of servant, and not an independent contractor, when measured even by the authorities relied upon by the majority. The majority opinion further says: "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished." Then follows in the majority opinion numerous authorities in support of this point. We accept the law contained in the quotation, and believe, when the language of the contract is carefully examined, our interpretation thereof is sustained by all of the law cited by the majority in relation to defining master and servant. The city in this case had the right to decide the manner in which the work was done; for it had to be done in a manner which suited them and which met with their approval. And the city, also, not only had the authority by the contract to decide the manner in which the work was to be done by refusing to accept it until it was done to suit them, and thus they determined the result to be accomplished. When we add to this the right to discharge Johnson by giving him ten days' notice and canceling his contract, all the elements by which we determine when one is a master are supplied.

The second question to be considered in this case is, Was the city

acting in a governmental capacity in causing the removal and disposition of the garbage? We are clear, so far as the facts of this case are ascertained from the pleadings, that the city, when removing and disposing of such garbage, was not acting in a governmental capacity, but was merely engaged in the performance of a ministerial duty. It is a well-settled rule that where it is the duty of a municipal corporation, by statute or implication of law, to keep its streets in a reasonably safe condition for public travel, such duty cannot be delegated to another so as to relieve the municipal corporation from liability for injury sustained by another on account of the neglect or failure of the municipal corporation to observe its duty. This principle is established in a long line of authorities.

Sterling v. Schiffmacher, 47 Ill. App. 141; Springfield v. Scheevers, 21 Ill. App. 203; Anna v. Boren, 77 Ill. App. 408; Louisville City R. Co. v. Louisville, 8 Bush, 415; Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Jacksonville v. Drew, 19 Fla. 106, 45 Am. Rep. 5; Betz v. Limingi, 46 La. Ann. 1113, 49 Am. St. Rep. 344; 15 So. 385; Baker v. Grand Rapids, 111 Mich. 447, 69 N. W. 740, 1 Am. Neg. Rep. 90; Blake v. St. Louis, 40 Mo. 569; Welsh v. St. Louis, 73 Mo. 71; Russell v. Columbia, 74 Mo. 480, 41 Am. Rep. 325; Davis v. Omaha, 47 Neb. 836, 66 N. W. 859; Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Omaha v. Jensen, 35 Neb. 68, 37 Am. St. Rep. 432, 52 N. W. 833; Scanlon v. Watertown, 14 App. Div. 1, 43 N. Y. Supp. 618; Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; McAllister v. Albany, 18 Or. 426, 23 Pac. 845; Williams v. Tripp, 11 R. I. 447; Watson v. Tripp, 11 R. I. 98, 23 Am. Rep. 420; Nashville v. Brown, 9 Heisk. 1, 24 Am. Rep. 289; Patterson v. Austin, — Tex. Civ. App. —, 29 S. W. 1139; Morris v. Salt Lake City, 35 Utah, 474, 101 Pac. 373; McCoull v. Manchester, 85 Va. 579, 2 L.R.A. 691, 8 S. E. 379; Drake v. Seattle, 30 Wash. 81, 94 Am. St. Rep. 844, 70 Pac. 231.

The duty of a city to keep its streets in a reasonably safe condition for public travel, and to keep them in repair and in proper condition, is mostly for the benefit of the city itself; and such duty extends to, and includes, keeping the streets cleaned and the removal of garbage. The removal of garbage, ashes, rags, and papers, and other *débris* which may accumulate upon the streets, is to be classified and comes under the duties incumbent upon the city to keep its streets and alleys in a safe

and good condition of repair, and the removal of the garbage and *débris* from the streets is part of the duty of repair and care of streets and alleys. Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652.

Dillon on Municipal Corporation says that such corporations are possessed of dual power,—the one governmental, legislative, or public, and the other proprietary or private; that the care of the streets is within the latter classification. See Dill. Mun. Corp. 4th ed. § 980 and § 66. This principle is also sustained in Conrad v. Ithaca, 16 N. Y. 158.

The liability of municipalities as to the care of streets has been recognized in a great number of cases, among which is found Barnes v. District of Columbia, 91 U. S. 540, 23 L. ed. 440, and Barney Dumping-boat Co. v. New York, 40 Fed. 50. In the latter case Judge Wallace, referring to the commissioner of street cleaning, says: "His duties, unlike those of the officers of the departments of health, charities, fire and police, although performed incidentally in the interest of public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them."

So, in the case at bar, Johnson, even though under the contract he was to work under the direction of the health commissioner, nevertheless the work he did do was performed more particularly in the interest of the city itself than that of the public. While the removal of the garbage and *débris* of all kinds from the streets may incidentally be for the public health, the greater benefit is to the city, and the removal thereof is a part of the duty of such city of keeping the streets in repair, and the duty is purely ministerial and principally for the benefit of the city. There is a distinction between the liability of municipal corporations who have accepted a city charter, and such corporations as counties and townships. The former, the municipal corporations, are always under greater liability.

In the case of Circleville v. Sohn, 59 Ohio St. 285, 69 Am. St. Rep. 777, 52 N. E. 788, 5 Am. Neg. Rep. 704, we find the following in the syllabus: "The duty enjoined by statute on municipal corporations to keep their public ways open in repair and free from nuisance is min-

isterial and mandatory, and requires the removal from such ways of all dangerous defects, and obstructions, from whatever cause arising."

We are of the opinion that it is the ministerial duty also of the city to keep its streets clean, to remove garbage therefrom, and to keep them in a sanitary condition; and the removal of such garbage is a ministerial duty principally in the interest of the city itself; and the duty to so keep its streets clean is a ministerial, and not a governmental, function. The test which has generally been applied is, "If the duty in respect to which there has been a wrongful act or omission *is one resting primarily upon municipalities, and is not a mere governmental duty, the performance of which has been delegated to the municipality by competent legislative authority, then the liability of the municipality is substantially that of a private corporation.* We are convinced that the duty of cleaning the streets, removing garbage and *débris* therefrom in the city, is a duty connected with the care and repair of such streets, and is a duty resting primarily upon the municipality for its own convenience and benefit principally, although the general public may be benefited to some extent incidentally."

Up to this point we have been discussing more particularly the duties of a municipality with reference to the care and repair of its streets and alleys, and also its liability when negligent in performing such duties. The removal of garbage and other accumulations, such as ashes, etc., from its streets and alleys so as to keep them in a safe and clean condition, is without question a municipal ministerial duty. The garbage contract in question relates more particularly to the removal of garbage from private property, such as the removal of scraps of meat, and other refuse which is thrown away after meals, also papers, rags, and other waste material which a private owner discards. It is plain to us that the disposition of all of such material and refuse in a proper manner is a duty which primarily belongs to the owner of the private property. It is the duty of every owner of private property, whether the same is in use or not, to keep it in a clean, sanitary condition, and in such a condition that no nuisance will be maintained thereon which would be offensive to other persons within said municipality, or which would endanger the comfort and health of the community, or result in the interference to others with the full enjoyment and pleasure of their rights and property. The municipality, therefore, could require every

owner of private property to so maintain his premises and keep it in a clean and sanitary condition.

The defendant in this case is under the commission form of government, and has the right, power, and authority by the law under which it is organized, which fully sets forth all its powers and duties, to inspect all private premises, and cause to be removed therefrom and abated any condition thereon maintained in the nature of a nuisance, and which would tend to interfere with the comfort of the inhabitants of the municipality, or which could in any manner be offensive to the inhabitants of such municipality. This would include the power, therefore, to cause to be removed all refuse of every kind and description found upon said private premises by the inspector or overseer, who may be appointed by the municipality. Such refuse accumulated upon private property is usually, but not always, placed in receptacles with proper covers thereto, which receptacles are placed in a convenient manner near the alley or other convenient place for removal.

We have seen that it is the primary duty of the private owner of such property to remove all such refuse. If the municipality therefore undertakes to perform this private duty for the convenience, comfort, protection, and health of the municipality, and considers it can do it in a better way and manner than the private property owner could do, in the removal of such refuse the municipality is acting and doing such work mostly in behalf and for the convenience and comfort of the inhabitants of such city, and the public at large can receive only very slight individual benefit, and hence the performance of such service by the city is not a governmental, but a ministerial, duty. If the city in the performance of such ministerial duty does the same in a negligent manner so as to cause an injury to some person, it cannot escape liability any more than the private owner of the property from which such refuse is removed could escape liability if he had removed the refuse, and in the course of such removal acted so negligently as to cause injury to another.

Our court in the case of Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506, said in the syllabus of such case: "Cities which have been organized or reorganized under the general law of this state . . . are charged with full power and responsibility in the matter of the streets, sidewalks, and crossings within their limits; and the duty of estab-

lishing streets and removing obstructions therefrom is a duty expressly enjoined by the statute. In performing such duties, cities are liable in a civil action to persons who in the exercise of due care receive injuries caused by negligent acts done *either by the city officials, or others who are acting for the city and under its authority. The cities so organized and governed are impliedly liable for damages caused by their wrongful or negligent acts, and no express statute making them liable is necessary.* Accordingly, held that the following instruction given by the trial court to the jury is not error: 'The general rule is that, in the case of a highway, a municipal corporation is answerable in damages for the lack of ordinary and reasonable care, *and is held to the same rule of negligence which is expected of private persons in the conduct of their business, involving a like danger to others.*'"

We see, therefore, in this case the city assumed the duty of removing the garbage for private persons, and even in the absence of a statute they are impliedly liable for their negligent acts just the same as the private owner would have been.

Another case of importance is Grand Forks v. Paulsness, 19 N. D. 293, 40 L.R.A.(N.S.) 1158, 123 N. W. 878. This was a case in which the city was held liable in the United States district court for the district of North Dakota. The waterworks of said city were owned by it. They became out of repair. They were repaired by a licensed plumber in the employ of the city of Grand Forks under the direction of the superintendent of the waterworks. In making such repairs an obstruction was placed upon the street by reason of which Paulsness was injured, and the city was held liable for its negligence, and plaintiff recovered a verdict against it. While in this case the recovery was had by reason of the negligence of the city in keeping its streets in an unsafe condition, nevertheless, if water had escaped through the negligence of the city in the management of its waterworks, and overflowed and destroyed property, there is no doubt in our mind but what it can be held liable for such damage.

Where a municipality undertakes to maintain a waterworks system and to supply its citizens with water for pay, it is liable to individuals whose property is injured by the negligence of its employees, placed in charge of the plant, failing to maintain it in a safe condition. Piper v. Madison, 140 Wis. 311, 25 L.R.A.(N.S.) 239, 133 Am. St. Rep.

1078, 122 N. W. 730. And where the municipal corporation uses its waterworks system for protection against fire, it is not relieved from liability to private property through the negligence of its employees in maintaining the plant in an unsafe condition, except for such acts as are performed in the actual work incident to extinguishing fires. In such case the city is performing an act for a private party for which it gets pay. However, in the case in question, in the removal of the garbage the act of the city is also the performance of an act for a private party, and the city reimburses itself through taxation. The fact that the city receives no pay, and that such work is paid for through the channel of taxation, does not detract from the fact that the disposal of the garbage is a duty incumbent upon the private owner of the premises; and where the municipality undertakes to perform such a duty in place of the owner of the premises, such work is to be considered rather in the nature of a private act on the part of the city, than a public duty, for the reason that the benefits derived from such performance accrue to the owners of private property and the inhabitants of the city. Where the city is organized and receives its charter from the state, either under a special grant or under the general law, it is as a general rule its ministerial duty under either of such grants to keep its streets in a safe condition, and to keep the city as a whole in a clean, healthful, and sanitary condition. We believe this is a part of the ministerial duty which the city obligates itself to perform; and if in the execution of such duty it acts negligently, like other corporations, it is liable for such negligence.

In Denver v. Davis, 37 Colo. 370, 6 L.R.A.(N.S.) 1013, 119 Am. St. Rep. 293, 86 Pac. 1027, 11 Ann. Cas. 187, 20 Am. Neg. Rep. 498, we find the following in the syllabus: "The maintenance of a dump for the reception of waste materials gathered from the streets, alleys, and private premises of a city, is for its private and corporate convenience, so that the city will be liable in case it is so negligently managed that fire spreads from it and destroys property in the vicinity, *although the supervision of the dump is in the health department.*"

The principle in question in Denver Case is, we believe, applicable to the case at bar. After a sewage system has once been completed and placed in operation, the maintenance, conduct, and operation thereof becomes merely a ministerial duty. If the municipality should be neg-

ligent in the performance of such ministerial duty, and should leave the manholes uncovered so that a person should fall therein and be injured, or if the pipe should break and private property should be injured thereby,—should become flooded and not usable,—it can hardly be said that the city would not be liable for its negligence on the ground that they were engaged in the execution of a governmental power. Garbage in a large sense is sewage. It is the coarser material that cannot be safely put through the sewer for fear of blocking the sewer pipe, and hence must be hauled rather than put through the sewer pipe. But properly speaking it may be classed under the head of sewage; and if the municipality is negligent in its removal, having undertaken to remove the same, and having undertaken to perform the duties which really belong to the owner of the premises from which such garbage is taken, it must use ordinary care in performing its duty; and if it fails to do so, and is negligent, it is liable for damages by reason of such negligence.

The question, whether or not Johnson was an independent contractor was not exclusively a question of law for the court. It was a mixed question of law and fact, and thus became exclusively a question for the jury. The plaintiff was not a party to the written contract, and contended that the contract did not express the true relations of the parties thereto. 14 R. C. L. 78. For this reason Johnson's relations to the city of Fargo, whether he was an independent contractor or a mere servant, was a mixed question of law and fact. The demurrer should have been overruled, and such question submitted to the jury.

We are clear that the city of Fargo, in removing or causing to be removed the garbage from private premises or from its streets and alleys, and keeping them in a clean condition, was acting in a purely ministerial, and not a governmental capacity, for the benefit of itself and its citizens principally; and that, in employing Johnson to remove such garbage, the relation was established between the city and Johnson of master and servant. We are clear the demurrer should be overruled.

STATE OF NORTH DAKOTA v. C. B. WHEELER.

(165 N. W. 574.)

Common nuisance — keeping and maintaining — information — sufficiency of — place of crime — identified as in county — capable of — lien on specific property — rule different — definite description required.

1. In a prosecution against a person for keeping and maintaining a common nuisance, the information contains sufficient allegation as to the place of the commission of the crime if it describes the place where such common nuisance was maintained with such certainty that it can be identified, and alleges the commission of such crime to be within the county. The rule would be different if there be a search or seizure of certain property, or if the prosecution were one for the abatement or restraining of the commission or continuance of a nuisance carried on at a certain location, or where it is the purpose of the action to acquire a lien against specific property. In all such cases there must be a definite description of the property.

Common nuisance — competent evidence of keeping — sales of intoxicating liquors in place — by defendant — by his employees — knowledge of defendant — jury — question for.

2. Where one is charged in an information with the keeping and maintaining of a common nuisance at a certain building or place, and the prosecution is against the person only, and is intended to secure the conviction and punishment of such person only, evidence of sales of intoxicating liquors by the defendant, and evidence of sales of intoxicating liquors by defendant's employees, even though the sale of the intoxicating liquors by the employees was not shown to have been made with the knowledge of the defendant, is all competent evidence tending to show that such place or building is one where intoxicating liquors are kept for sale, barter, or gift in violation of law. Whether the defendant had knowledge of the sales of intoxicating liquors at such building or place by his employees is a question of fact for the jury.

Opinion filed November 27, 1917.

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

Affirmed.

NOTE.—Criminal responsibility for sale of intoxicating liquor by partner, servant, or agent is the subject of a comprehensive series of notes in 41 L.R.A. 660; 16 L.R.A.(N.S.) 786; 20 L.R.A.(N.S.) 321; and 33 L.R.A.(N.S.) 419, in which cases will be found collated on the question of the necessity of authority, when the same can be implied, and the liability for selling without authority.

Barnett & Richardson and *Murphy & Metzger,* for appellant.

In a prosecution for keeping and maintaining a common nuisance, where the state unnecessarily charges a more particular description than an allegation of its commission within the county, the particular description given must be proved. Such specific description narrows the scope of the proof. State v. O'Neal, 19 N. D. 426, 124 N. W. 68; State v. Kelly, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974; State v. Rozum, 8 N. D. 548, 80 N. W. 477.

The state must also prove that defendant had knowledge of the unlawful sales of liquors by his employees, before he can be convicted. The use of the word "permit" in the statute implies that defendant must have had knowledge. Larson v. Christianson, 14 N. D. 476, 106 N. W. 51; State v. McGillic, 25 N. D. 27, 141 N. W. 82.

"If possession of a building is obtained for a lawful purpose, and then without the knowledge or consent (permission) of the owner, the place is used for illegal purposes, such premises will not be adjudged a nuisance against the owner, unless after knowledge or notice of its unlawful use, he still permits the same." State ex rel. Kelly v. Nelson, 13 N. D. 122, 99 N. W. 1077; State v. Rozum, 8 N. D. 548, 80 N. W. 477; Partridge v. State, 88 Ark. 267, 20 L.R.A.(N.S.) 321, 129 Am. St. Rep. 100, 114 S. W. 215; 28 Cyc. 207 (b); State v. Lesh, 27 N. D. 165, 145 N. W. 829.

Where a judge in his charge to the jury makes a serious and prejudicial mistake, the fact that he correctly states the law in another part of his charge is not sufficient to remove the ambiguity and prejudice resulting from the other erroneous instructions. State v. Kruse, 19 N. D. 203, 124 N. W. 385.

The motion for a new trial was made and decided before judgment was entered, and is a part of the record, and therefore properly before the court. Rev. Codes, § 7842.

Wm. Langer, Attorney General, and *William G. Owens,* State's Attorney, for respondent.

An information charging an offense may be amended at any time after plea, or during the trial, as to any matter of mere form, in the discretion of the court, when the same can be done without prejudice to the rights of the defendant. Comp. Laws 1913, § 10,633.

By the amendment here made, the state placed a limit upon its proof,

which, instead of being prejudicial to defendant, created a greater burden upon the state. State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. O'Neal, 19 N. D. 426, 124 N. W. 68; State v. Kelly, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974.

The owner of property is personally responsible and answerable for all the acts of his employees, and "he is liable for particular sales although made by his servants in his absence." People v. Sharrar, 164 Mich. 267, 127 N. W. 801, 130 N. W. 693; People v. Damm, 183 Mich. 554, 149 N. W. 1002; Black, Intoxicating Liquors, § 510.

"A person is sufficiently proved to be such a nuisance keeper when once control, even though temporary, of the place and unlawful business, is shown."

And it is no defense that the saloon was opened by the keeper's bartender without authority. State v. Grant, 20 S. D. 164, 105 N. W. 97, 11 Ann. Cas. 1017; Rev. Codes 1905, § 9373, Comp. Laws 1913, § 10,117; State v. McGillic, 25 N. D. 34, 141 N. W. 82.

There was no error committed by the court in its instructions to the jury, and if any misleading statement was made it was completely corrected by further instructions.

The charge should be read and considered as a whole. State v. Kruse, 19 N. D. 203, 124 N. W. 385; State v. Lesh, 27 N. D. 165, 145 N. W. 829.

GRACE, J. This action is one prosecuted by the state of North Dakota against C. B. Wheeler on information filed in the district court of Williams county, North Dakota, which information charged the defendant with keeping and maintaining a common nuisance on the 7th day of January, 1917, and during the regular December, 1916, term of the district court in and for said Williams county, in that the defendant kept and maintained that place known as "Wheeler's Feed Barn," located on lots 7 and 8, Le Dosquet's addition to the city of Williston. The information was filed by the order of the court of said county on the 15th day of January, 1917. The case was tried to the court and a jury on the 18th day of January, 1917, which term was the regular December, 1916, term of such court. The jury by their verdict found the defendant guilty as charged in the information, and recommended to the court that the jail sentence be suspended.

Defendant in his appeal to this court has assigned eighteen errors.

Regarding the first assignment of error, the court did not err in overruling the objection to the question as to the location of the barn. It was perfectly proper to prove the location of the barn in question.

The testimony sought to be excluded in the second assignment of error was proper testimony to admit. The prosecution was for keeping and maintaining a common nuisance. Evidence of purchases of intoxicating liquors upon the premises, whether made from the defendant in person or from the servants or employees of such defendant, was competent testimony.

The third error assigned relates to the amendment of the information by adding thereto the number of the block in which such lots were located upon which such barn was situated. Such an amendment was a matter of form only. The information would have been perfectly good as to substance without any reference to either the lots or blocks, so long as the location of the place of the nuisance was within the county, and the place of maintaining the nuisance would be identified and proved by competent testimony. The rights of the defendant would not be prejudiced by such amendment; and the amendment, being one of form, was permitted under § 10,663, Compiled Laws of 1913. The prosecution in this case is against the person only. The state does not attempt by this proceeding to obtain an order of abatement of the nuisance, or establish a lien against the premises in which the nuisance existed and was maintained; hence, the information would have been good had there been no description of the lots or block, but merely a description of the building by which it could be recognized or identified by competent testimony. State v. Kruse, 19 N. D. 203, 124 N. W. 385. In this case the information was amended so as to disclose a fuller description of the premises, and there was competent testimony offered tending to show the maintaining of a nuisance at the building on lots 7 and 8, block 8.

The testimony of the defendant establishes the location of the feed barn in accordance with the more particular description set forth in the information. We are of the opinion, however, that the particular description of the premises in a case such as the one at bar may be considered as mere surplusage, in view of the law that, in prosecutions against the person only, it is a sufficient allegation as to the place of the commission of the crime where the information alleges its commission

within the county. The rule would be different if there be a search or seizure of certain property, or the abatement or restraining of a commission for the continuance of a nuisance carried on at a certain location, or where it is the purpose of the action to acquire a lien against specific property. In all such cases there must be a definite description of the property. In all other cases where the prosecution is against the person only, and where the only question presented is the personal guilt of the defendant, the more particular description of the place of the commission of the offense is unnecessary, except the information must show it is within the county.

The legal requirements of an information or indictment of a person accused of the commission of a crime are contained in § 10,693, Compiled Laws of 1913. The only portion of such section necessary for us to consider is subdivisions 4 and 5 thereof, which are as follows:

"That the offense was committed at some place within the jurisdiction of the court, except when the act, though done without the local jurisdiction of the county or judicial subdivision, is triable therein."

"That the offense was committed at some time prior to the time of the presenting of the information or of the finding of the indictment."

Clearly, then, it must appear that an information is sufficient as to place when the prosecution is against the person, if it contains an allegation that the crime charged to have been committed, was committed within the county. If the information contains a more specific description of the place of the commission of the crime, and it is made to appear by the defendant that he had been misled or deceived by the more particular description, or his rights had in any manner been prejudiced, he may be entitled to a continuance of the trial, or, in the event of conviction, he might be entitled to a new trial. However this may be, we are clear that any testimony which shows or tends to show the commission of a crime by the accused within the county in which the crime was committed, is competent and admissible testimony in all cases where the prosecution is only against the person.

The defendant in the case at bar predicates error upon the admission of the testimony of those witnesses who testified they purchased intoxicating liquors from Frank Brown and Harry Wheeler, who were employees of the defendant, on the ground that it is not shown that the

defendant had any knowledge of such sales, if any, by Brown and Harry Wheeler. We are of the opinion that the testimony of such witnesses as to purchases from Brown and Harry Wheeler was competent and admissible testimony, even though the sales by Brown and Harry Wheeler were without the knowledge of the defendant.

It is shown by the testimony of the witness Joyce that he purchased whisky at the barn in question from the defendant. His testimony shows that he got one bottle of whisky from the defendant and paid him $1 therefor; that he had since that time got whisky at the barn in question.

The witness Joyce further testified as follows:

Q. Had you got whisky from the defendant himself before Christmas and after the 11th day of December, 1916?

A. Yes.

Q. On how many different occasions?

A. Oh, I don't know.

Q. More than once?

A. Yes.

Q. Did you pay him for it?

A. Yes, sir.

Q. How much did you pay him?

A. A dollar a pint.

Q. Now, since Christmas, have you got whisky in the barn?

A. Yes.

Q. On how many different occasions?

A. Three or four times.

Q. Who did you get the whisky from on those different occasions?

A. Frank Brown and Harry Wheeler.

Q. Who is Frank Brown, do you know?

A. He is working there in the barn.

Q. Is he the barn man?

A. Yes, sir.

Q. Who is Harry Wheeler?

A. Mr. Wheeler's son.

Q. And each of these occasions was in the barn?

A. Yes, sir.

It also appears from the testimony of Reynolds, that about the first of the month, meaning January, he purchased whisky at this barn three different times. That such purchases were made from Brown and Harry Wheeler.

The information charges the keeping and maintaining of a common nuisance, and the words of the information in this regard are as follows: "That C. B. Wheeler, late of said county of Williams and state aforesaid, did commit the crime of keeping and maintaining a common nuisance committed as follows, to wit: That at said time and place the said C. B. Wheeler did then and there wilfully, wrongfully, and unlawfully *keep and maintain* that certain place known as the Wheeler's Feed Barn, which is located on lots 7 and 8, block 8, Le Dosquet's addition to the city of Williston, where intoxicating liquors were bartered and sold to James Reynolds and divers and various other persons as a beverage." It will be seen that it is the keeping and maintaining of the common nuisance which is the gist of the prosecution. It was shown by competent testimony that the defendant, while at such barn, sold whisky. It is shown that the defendant was in charge of such premises as a feed barn; and so far as this prosecution is concerned, for all intents and purposes, he was the owner thereof. It is also shown that sales were made by Brown and Harry Wheeler. It having been shown that the defendant made a sale of intoxicating liquors at such barn to Joyce, and other testimony showing that the defendant's employees sold liquors to other parties, such testimony was all competent for the purpose of showing that such feed barn was a place where a common nuisance was maintained or kept.

Section 10,117, Compiled Laws of 1913, provides as follows: "All places where intoxicating liquors are sold, bartered, or given away in violation of any of the provisions of this chapter, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this chapter, are hereby declared to be common nuisances.

It will be noticed by an examination of the provisions of such statute there are three ways in which such place may be determined to be a common nuisance. First, when such place is one where intoxicating

liquors are sold, bartered, or given away in violation of the law in question. Second, when such place is one to which persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage. Third, when the place is one where intoxicating liquors are kept for sale, barter, or delivery. It will be noticed that the language in each of the provisions refers to the place where such intoxicating liquors are sold or kept for sale, or to which persons may resort for the purpose of drinking intoxicating liquors. Neither of such provisions refers to the person who is keeping and maintaining such place. Under the first provision, to show that it is a common nuisance, all that is required to be shown is that it is a place where intoxicating liquors are sold, bartered, or given away in violation of the law in question. Under the third provision, all that is necessary to show is that such place is one where intoxicating liquors are kept for sale, barter, or delivery in violation of the law. If there is competent testimony proving the selling, bartering, or giving away of intoxicating liquors at such place in violation of the law, or that such place is one where intoxicating liquors are kept for sale, barter, or delivery in violation of law, and the jury returned a verdict of guilty, the owner or person in control and possession of such place is guilty of keeping and maintaining a common nuisance. The question whether the defendant had knowledge that the place was kept and maintained for the sale of intoxicating liquors, and the further question that the place was one where intoxicating liquors were kept for sale, barter, or delivery, are questions of fact for the jury, to be determined as all other questions of fact in the case by all the testimony, facts, and circumstances. A distinction arises as to the second provision, where the place is charged to be one to which persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage. In such case the word "permit" means the same as consent, and consent implies knowledge. In such case it would require proof of knowledge of the keeper of such place of such illegal act, before such place could be held to be a common nuisance.

It was shown by the testimony that the defendant at his feed barn sold whisky and received pay therefor. Other testimony showed that witnesses had also bought whisky from defendant's employees, Brown and Harry Wheeler. All of such testimony was competent to show

that the place, that is, the feed barn, was a common nuisance within the meaning of said statute.

Said section further provides that where the owner or keeper thereof, upon conviction, be adjudged guilty of maintaining a common nuisance, he shall for the first offense be punished by a fine of not less than $200, nor more than $1,000, or by imprisonment in the county jail not less than ninety days nor more than one year. The statute provides a heavier penalty for the second offense. The statute also provides that where the existence of such nuisance is established, either in a criminal or equitable action, upon judgment of the court or judge having jurisdiction finding such place to be a nuisance, the sheriff, his deputy, or undersheriff, or any constable of any county, or marshal of any city, where the same is located, shall abate such place, etc.

This prosecution is against the person only.

We have carefully examined all instructions given by the court to the jury, and find no prejudicial reversible error therein. The court was not in error in refusing defendant's motion for a new trial. The alleged newly discovered evidence was of no effect excepting for the purpose of impeachment. Evidence of such character is not necessarily sufficient to require the granting of a new trial. There was no error in admitting testimony of sales of liquor between the 11th day of December and the date of the filing of the information.

All the testimony on cross-examination sought to be brought out by defendant's counsel from the witness Joyce, in regard to the trouble with his wife and the threatened divorce proceeding, might just as well have been admitted, but we do not think it was prejudicial reversible error to exclude it.

The jury being the exclusive judges of fact, and having seen all the witnesses on the stand, and having had an opportunity to observe their appearance, the willingness or unwillingness with which they testified, and having returned a verdict of guilty, the same is conclusive upon us, there appearing to be no prejudicial reversible error.

The cases cited by the defendant of State v. O'Neal, 19 N. D. 426, 124 N. W. 68, and State v. Kelly, 22 N. D. 5, 132 N. W. 223, Ann. Cas. 1913E, 974, are considered, and by a majority of the court held not in point. There is therefore no need to examine the rule of law con-

tained in such cases. The order of the district court in overruling defendant's application for a new trial is affirmed.

CHRISTIANSON, J. I concur in result.

ROBINSON, J. I dissent on the ground that the evidence fails to show that the livery barn is a common nuisance.

JOHN McDONOUGH v. RUSSELL-MILLER MILLING COMPANY, a Corporation.

(165 N. W. 504.)

Land — traversed by natural stream — owner of land — must not prevent natural flow — nor pollute water — reasonable use by.

1. The owner of land traversed by a natural stream may not prevent the natural flow of or pollute the stream, but he may rightfully use the water therein for any reasonable purpose as long as it remains on his land.

Riparian owner — natural stream — may make reasonable use of.

2. The right of a riparian owner to have a natural stream continue to flow through or by his premises in its natural quantity and quality is subject to the right of each riparian owner to make a reasonable use of the waters in the stream as long as it remains on his land.

Use of by owner — domestic purposes — manufacturing — agricultural — circumstances.

3. The right to make reasonable use of a stream extends not only to the use thereof for domestic purposes, but where the circumstances of the case make the use a reasonable one, it extends also to the use thereof for manufacturing, agricultural, and similar purposes.

Use of stream — reasonableness of — test of.

4. The test of the rightfulness of the use which an owner is attempting to make of a stream is whether such use is reasonable.

NOTE.—The correlative rights of upper and lower proprietors as to use and flow of water in a stream are discussed in a note in 41 L.R.A. 737, which, after giving a general statement of the right and its application to different states of facts as arising in specific cases, discusses the right to use, flow, use for sewer purposes, and the right to relief, and the forms thereof, for violation.

Riparian owner — reasonable use of water — question of fact — circumstances.

5. What is a reasonable use by a riparian owner of the waters in a natural stream is primarily a question of fact to be determined in view of all the circumstances of the case.

Damages for pollution — action by riparian owner — unreasonable use — detriment the result of.

6. To enable a riparian owner to maintain an action for damages for the pollution of a stream, he must show not only that defendant has made an unreasonable use of the stream, but that the detriment of which he complains was the result of such unreasonable use.

Riparian owner — injunctive relief — against use of stream — right to — unreasonable use — must show.

7. To entitle a riparian owner to injunctive relief, he must show not only that the defendant makes or threatens to make unreasonable use of the waters in the stream, but must further establish facts which entitle him to such relief under the general equitable principles applicable to injunctions.

Unreasonable use — damages — action for — injunctive relief — evidence — failure of proof.

8. Evidence examined, and, under the above-stated principles of law, it is *held* that plaintiff has failed to establish a cause of action either for damages or for injunctive relief against the defendant, and that judgment was properly rendered for defendant.

Opinion filed October 2, 1917. Rehearing denied December 14, 1917.

From a judgment of the District Court of Stark County, *Crawford*, J., plaintiff appeals.

Affirmed.

F. C. Heffron and *Murtha & Sturgeon*, for appellant.

Where one uses a natural running stream of water as a dumping place for all offal matter from his mill, and for all the excrement of his many employees, this is not a reasonable use, by a riparian owner, so as to exempt him from damages, and furthermore, such acts are criminal under our statutes. Comp. Laws 1913, §§ 10,225 and 10,226; Satterfield v. Rowan, 83 Ga. 187, 9 S. E. 677; Red River Roller Mills v. Wright, 30 Minn. 249, 44 Am. Rep. 194, 15 N. W. 167; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719; 2 Farnham, Waters, pp. 1705 and 1709.

The pollution of a stream being a wrongful act, no permanent right

to continue it can be acquired. The foundation for damages is the diminished rental value of the property because of the pollution of the stream. A recovery may also be had for any special injury caused by the wrongful act of unreasonable use. 2 Farnham, Waters, p. 1718, § 527; 40 Cyc. 601 (g); Handforth v. Maynard, 154 Mass. 414, 28 N. E. 348; Ferguson v. Firmenich Mfg. Co. 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; Hollenbeck v. Marion, 116 Iowa, 69, 89 N. W. 210; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719; Weston Paper Co. v. Comstock, — Ind. —, 58 N. E. 79; North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. 23 Utah, 199, 63 Pac. 812; Farr v. Griffith, 9 Utah, 416, 35 Pac. 506; Muncie Pulp Co. v. Martin, 164 Ind. 30, 72 N. E. 882; Muncie Pulp Co. v. Keesling, 166 Ind. 479, 76 N. E. 1002, 9 Ann. Cas. 530; Straight v. Hover, 79 Ohio St. 263, 22 L.R.A.(N.S.) 276, 87 N. E. 174.

"If one up the stream, in his works, be they ever so lawful, honorable or necessary for public or private weal, do thereby injure the land of that owner further down the stream, by unlawful invasion of it, by casting upon it things damaging it, or by polluting the purity of the water, rendering it unfit for the owner's consumption as it passes through his land, the man up the stream must answer in damages." Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776.

The plaintiff is entitled to his injunctional remedy. The showing is that defendant, by its unreasonable and unlawful use of the stream, has so polluted its waters as to render them unfit and unsafe for those farther down the stream to use. Barrett v. Mt. Greenwood Cemetery Asso. 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L.R.A. 899, 57 N. E. 719; Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; Pittsburgh, C. C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914; Strobel v. Kerr Salt Co. 164 N. Y. 303, 51 L.R.A. 687, 79 Am. St. Rep. 643, 58 N. E. 142, 21 Mor. Min. Rep. 38; Ferguson v. Firmenich Mfg. Co. 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; Bradley v. Warner, 21 R. I. 36, 41 Atl. 564; Farnham, Waters, pp. 1689, 7108, §§ 522 et seq.; Chapman v. Rochester, 110 N. Y. 273, 1 L.R.A. 297, 6 Am. St. Rep. 366, 18 N. E. 88; Barton v. Union Cattle Co. 28

Neb. 350, 7 L.R.A. 457, 26 Am. St. Rep. 340, 44 N. W. 454; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Hodges v. Pine Products Co. 135 Ga. 134, 33 L.R.A.(N.S.) 74, 68 S. E. 1107, 21 Ann. Cas. 1052; Trevett v. Prison Asso. 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373.

Statutes like our own are to be liberally construed with a view to enforcing the object for which they were intended. 2 Farnham, Waters, pp. 1533 and 1534; People v. Truckee Lumber Co. 116 Cal. 397, 39 L.R.A. 581, 58 Am. St. Rep. 183, 48 Pac. 374; State v. Taylor, 29 Ind. 517; Com. v. Yost, 11 Pa. Super. Ct. 323; Catlin v. Valentine, 9 Paige, 575, 38 Am. Dec. 567.

Watson, Young, & Conmy, for respondent.

"A trial *de novo* cannot be had in the supreme court in an action properly triable to a jury, even though a jury was waived and the cause tried to the court." Novak v. Lovin, 33 N. D. 424, 157 N. W. 297.

Appellant's so-called "citation of errors" is insufficient, and is not in compliance with the statute, even in a case where a trial *de novo* might properly be asked. Comp. Laws 1913, § 7656.

The evidence in this case cannot be reviewed in its entirety to determine whether or not the findings are sustained, since the case was not proprly tried under the statute authorizing such procedure. More v. Burger, 15 N. D. 345, 107 N. W. 200; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366.

The findings of the trial court are at least presumed to be correct. State Bank v. Maier, 34 N. D. 259, 158 N. W. 346.

It is well settled in this state, where it appears that the loss or injury might have been caused in several different ways and because of several different reasons, then the burden is on the plaintiff to show that the injury or loss was occasioned because of the fault of the defendant. Meehan v. Great Northern, 13 N. D. 443, 101 N. W. 183; Balding v. Andrews, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390; Koslowski v. Thayer, 66 Minn. 150, 68 N. W. 973; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537.

The appropriate functions of the legislature are to make laws to operate on future incidents, and not to make decisions or forestall rights accrued or vested under previous laws. Duncombe v. Prindle, 12 Iowa, 12; Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

A plaintiff alleging negligence must prove it. This proof must not be by mere speculation or possibility.

"The plaintiff must show that the act or omission of which he complains was the act or omission of the defendant, and also that such act or omission was a negligent one." Sheldon v. Hudson River R. Co. 29 Barb. 228; Longabaugh v. Virginia City & Truckee R. Co. 9 Nev. 296; Smith v. Hannibal & St. J. R. Co. 37 Mo. 295; Omaha & R. Valley R. Co. v. Clark, 35 Neb. 867, 23 L.R.A. 504, 53 N. W. 970; 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, 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; Garraghty v. Hartstein, 26 N. D. 148, 143 N. W. 390.

"Where different parties pollute a stream by discharge of sewerage therein, each from his own premises, and each acting separately and independently of the others, one of the number is not liable for all the injury suffered by another, because of the nuisance thus created; each is liable to the extent only of the wrong committed by him." Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566.

The fact that it is difficult to separate the injury done by each one from that of others should furnish no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert. Barrett v. Third Ave. R. Co. 45 N. Y. 628; Webster v. Hudson River R. Co. 38 N. Y. 260; Sheridan v. Brooklyn City & N. R. Co. 36 N. Y. 39, 93 Am. Dec. 490, 9 Am. Neg. Cas. 619; Chapman v. New Haven R. Co. 19 N. Y. 341, 75 Am. Dec. 344; Colegrove v. New York & N. H. R. Co. 20 N. Y. 492, 75 Am. Dec. 418; Creed v. Hartmann, 29 N. Y. 591, 86 Am. Dec. 341; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566; Harley v. Merrill Brick Co. 83 Iowa, 73, 48 N. W. 1000; Sellick v. Hall, 47 Conn. 260; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Martinowsky v. Hannibal, 35 Mo. App. 70; Little Schuylkill Nav. R. & Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209, 10 Mor. Min. Rep. 209; Miller v. Highland

Ditch Co. 87 Cal. 430, 22 Am. St. Rep. 254, 25 Pac. 550; Brown v. McAllister, 39 Cal. 573; Westgate v. Carr, 43 Ill. 450; Partenheimer v. Van Order, 20 Barb. 479; Lull v. Fox & W. Improv. Co. 19 Wis. 100; Brennan v. Corsicana Cotton Oil Co. — Tex. Civ. App. —, 44 S. W. 588; Vansteenburgh v. Tobias, 17 Wend. 562, 31 Am. Dec. 310; Auchmuty v. Ham, 1 Denio, 495; Keyes v. Little York Gold Washing & Water Co. 53 Cal. 724, 14 Mor. Min. Rep. 95; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Harley v. Merrill Brick Co. 83 Iowa, 73, 48 N. W. 1000; Sellick v. Hall, 47 Conn. 260; Watson v. Colusa-Parrot Min. & Smelting Co. 31 Mont. 513, 79 Pac. 15; Mansfield v. Bristor, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 430; Newark v. Chestnut Hill Land Co. 77 N. J. Eq. 23, 75 Atl. 645.

Proof of special damages is not permissible unless the specific facts are clearly pleaded. Potter v. Froment, 47 Cal. 166; Glass v. Gelvin, 80 Mo. 297; Benson v. Chicago & A. R. Co. 78 Mo. 504; Capital Bank v. Armstrong, 62 Mo. 59; Moffatt v. Conklin, 35 Mo. 453; Iron Mountain Bank v. Murdock, 62 Mo. 70; Brown v. Chicago & A. R. Co. 80 Mo. 459; Solms v. Lias, 16 Abb. Pr. 311; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 49; Cushing v. Seymour, S. & Co. 30 Minn. 301, 15 N. W. 249; Wood's Mayne, Damages, 1st ed. 707–714; 1 Sutherland, Damages, pp. 673–766; 2 Sutherland, Damages, pp. 383–392; Thompson v. Webber, 4 Dak. 245, 29 N. W. 671; Bissell v. Olson, 26 N. D. 60, 143 N. W. 340.

"In an action for the loss of ice destroyed by defendants by draining the waters of a pond, the measure of damages is the value of the plaintiff's right to harvest the ice upon the pond and so to make it his property at the time it was destroyed." Handforth v. Maynard, 154 Mass. 414, 28 N. E. 348.

"In an action for tort, damages for loss of profits in business may be recovered if they can be definitely ascertained and are the direct result of the injury." Paul E. Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307, 70 S. W. 378; Coyle v. Pittsburg, B. & L. E. R. Co. 18 Pa. Super. Ct. 235; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; Spicer v. Northern P. R. Co. 21 N. D. 61, 128 N. W. 302.

CHRISTIANSON, J. This action was commenced by the plaintiff in June, 1914, to recover damages for the alleged pollution of the waters in the Heart river, and to enjoin further pollution thereof. The case was tried to the court without a jury, and resulted in findings and conclusions favorable to the defendant, with an allowance of nominal damages to plaintiff assessed at $100. The plaintiff appeals from the judgment, and demands a trial *de novo* in this court.

Both parties are riparian owners upon the Heart river within the limits of the city of Dickinson. The plaintiff owns a tract of land traversed by the Heart river. He has utilized this tract in part for raising vegetables, but principally as a pasture for horses and cattle. He also maintains an ice house, which is situated on the bank of the river on this land. Immediately below plaintiff's land is a concrete dam constructed by the Northern Pacific Railroad Company some five or six years prior to the commencement of this action. This dam is situated about 2,060 feet below plaintiff's ice house, and he cut ice from the pond formed above the dam.

Up stream from the plaintiff's premises is located a tract of land owned by the defendant. Some four years prior to the commencement of this action the defendant constructed a large flouring mill upon its land. It used the water of the Heart river in the mill to wash the wheat, taking the water for such purpose from a small dam that extended across the stream above the mill. The drainage from the mill led into the river at a point 6,350 feet above plaintiff's ice house. The plaintiff claims that this drainage, consisting of the water so utilized in washing wheat and the discharge of a certain water-closet used by the employees of the mill, polluted the waters of the Heart river, and caused them to become "absolutely unfit for any use in connection with any human or animal food or drink, and rendered all ice cut on said pond unfit and dangerous for use to which ice is commonly used, and valueless and unsalable, thereby destroying utterly the value and profitableness of said ice business."

Before discussing the questions of fact presented in this case, we deem it desirable to consider the rules of law which must be applied in determining those questions and in fixing the rights and liabilities of the parties to this litigation.

The owner of land traversed by a natural stream may use the water

therein so long as it remains on his land, but he may not prevent the natural flow of the stream nor pollute it. Comp. Laws 1913, § 5341. The right to the use of the water in its natural flow is not a mere easement or appurtenance, but is a natural right inseparably annexed to the soil itself, which arises immediately with every new division or severance of ownership. (Gould, Waters, § 204.) The right of a riparian owner to have a natural stream continue to flow through or by his premises in its natural quantity and purity is necessarily subject to the right of each riparian proprietor to make a reasonable use thereof. (40 Cyc. 592, 594; 30 Am. & Eng. Enc. Law, 358; Gould, Waters, § 208.) In every case the test "of the rightfulness of the use which one owner is attempting to make of the stream is whether or not such use is reasonable under all the circumstances of the case." 30 Am. & Eng. Enc. Law, 358; Farnham, Waters, § 516.

It cannot be contended that every use of a stream which either decreases the amount or purity of its waters is unreasonable. If this was true, the right of riparian owners to use the waters of the stream would largely be a right without value or benefit. For clearly many, if not most, of the uses to which streams are ordinarily put tend to decrease in some degree at least either the quality or quantity of the flow.

The question whether a reasonable or unreasonable use of the water is being made, having regard to the common rights of others, is to be determined by the circumstances of each particular case, due consideration being given to the character and size of the watercourse, its location, and the uses to which it may be applied, as well as the general usage of the country in similar cases. (30 Am. & Eng. Enc. Law, 357.) Upon the question of the reasonableness of the use by the upper proprietor, the character and extent of his business, as well as the use to which the lower proprietor is putting the water, may be taken into consideration. Farnham, Waters, § 516.

A riparian owner has right to make a reasonable use of a stream for the operation of a mill or factory, and may even cast sewage or waste material therein, if he does not thereby cause material injury to public or private rights. 40 Cyc. 597; Gould, Waters, § 220.

As already stated, the question in such case is whether the use is, under all the circumstances, a reasonable one. If it is reasonable, then the lower owner cannot complain, even though the quality or quantity

of the flow of water may be impaired by the use of the upper owner. What is a reasonable use is, under all the authorities, primarily a question of fact, to be determined in view of all the circumstances of the case. Farnham, Waters, § 466; 30 Am. & Eng. Enc. Law, 357.

Manifestly, running streams cannot be used for commercial, manufacturing, or agricultural purposes, and retain their pristine clearness and purity. And as every riparian owner has the right to use the waters while on his land, it necessarily follows that the right of a riparian owner to have the water unimpaired as to quantity and quality is subject to the rights of other and upper riparian owners to make a reasonable use of the stream; and, if such use is reasonable, the fact that it incidentally impairs the purity of the water gives no cause of action. 30 Am. & Eng. Enc. Law, 382.

A riparian owner whose rights have been invaded is entitled to apply to and receive from the courts such relief as the facts in the particular case show him to be entitled to. He may maintain an action for damages against the wrongdoer for the detriment sustained. And in certain cases, where the legal remedies are inadequate, he may also be awarded injunctive relief.

The plaintiff of course has the burden of proof, regardless of the form of the action, and must establish the facts entitling him to relief by a preponderance of the evidence.

The liability of one charged with pollution of a stream is coextensive with the injury directly resulting from the acts causing such pollution. Hence, the wrongdoer cannot escape liability by showing that others have contributed to the pollution. Neither is he liable for any injury sustained by reason of pollution by others, unless he was acting in concert with them. Where the individual and separate acts of several riparian owners result in pollution of a stream, one of the number is not liable for all the injury suffered by another because of such pollution; each is liable to the extent only of the wrong committed by him. Chipman v. Palmer, 77 N. Y. 51, 33 Am. Dec. 566; Watson v. Colusa-Parrot Min. & Smelting Co. 31 Mont. 513, 79 Pac. 15; Mansfield v. Bristor, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631; Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 430; Newark v. Chestnut Hill Land Co. 77 N. J. Eq. 23, 75 Atl. 645.

"To enable a riparian owner to maintain an action for damages for

the pollution of the stream, he must show not only that defendant has done some act which tends to injure the stream, and which he has no legal right to do, or which is in excess of his legal right so as to be an unreasonable use thereof, but also that the detriment of which he complains was the result of that cause. As stated in Columbus Gaslight & Coke Co. v. Freeland, 12 Ohio St. 392, to enable a landowner to recover for the pollution of water as for a nuisance he must have suffered a real, material, and substantial injury,—what amounts to such an injury being a question for the jury." Farnham, Waters, § 517. See also Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826.

A party who seeks injunctive relief against the pollution of a stream must not only show such pollution, but must further establish facts entitling him to such relief under the equitable principles generally applicable to injunctions. 30 Am. & Eng. Enc. Law, 369 et seq.

Bearing these principles in mind, we approach the issues presented for determination under the pleadings and the evidence in this case.

Plaintiff claims that he is entitled to recover damages for (1) the loss of profits, or value of the ice-cutting privilege; (2) the expense incurred one winter in cutting off about 5 inches from the bottom of the cakes of ice when such bottom part was filled with black specks; (3) the loss of the use of the land for pasturage purposes; and (4) the additional expense for cutting and hauling ice a distance of about 2 miles during the winter of 1913–14.

Plaintiff further claims that he is entitled to an injunction against the defendant, restraining it from continuing the acts which it is asserted caused the pollution of the stream.

While there are certain general statements and conclusions in plaintiff's testimony tending to show that defendant has polluted the water to some extent, as well as resulting injury to the plaintiff by reason of such pollution, we do not believe that even plaintiff's testimony when considered as a whole tends to establish all of plaintiff's contentions. And when all the evidence in the case is considered, we are satisfied that plaintiff has failed to sustain his burden of proof.

Plaintiff claims that his ice business was ruined, that he lost his customers, and that they purchased ice from his competitors. Yet, according to his own testimony, he continued to cut ice from the river upon his own premises until the city council in the winter of 1914

adopted an ordinance regulating ice cutting, which ordinance prohibited the cutting of ice from that portion of the Heart river within the city limits, east of the milldam, and required all persons desirous of cutting and packing ice for sale or distribution within the city of Dickinson to apply to the local board of health, and receive its approval as to the sanitary condition of such ice.

During the preceding winters he filled his ice house as usual with ice cut upon his own premises, and sold all the ice which he thus put up, with the exception that the bottom tier of the ice put up in the winter of 1912–13 was left at the end of the selling season of 1913.

So far as the evidence shows, plaintiff sold this ice at the usual prices. In fact, there is no contention that he was required to dispose of any of it at less than the customary price. Plaintiff did not personally conduct his ice business during the summer of 1914. In his testimony given upon the trial in November, 1914, he said: "I haven't been attending to the ice house this summer. I turned it over to another party and I haven't paid no attention to how much business he has been doing."

Plaintiff testified that he lost the business of the St. Charles Hotel because of the aversion of its owners to ice cut below the milldam. And he called Mr. Reichert, one of the proprietors, to substantiate this contention, but Reichert's testimony contradicts rather than corroborates plaintiff's testimony on this point.

Reichert testified in part:

Q. Before the mill company went in, where was the ice cut that you used in the hotel?

A. I wouldn't be able to say. I bought ice from McDonough and I bought ice from Carroll. I don't know. . . .

Q. As a matter of common knowledge in the town, you have known that a sewer at the mill discharged at the Heart river?

A. No, I didn't know that there was a sewer at the mill discharging into the Heart river.

Q. You know that the board of health had condemned the ice?

A. Yes.

Q. It was just a year ago, was it, Mr. Reichert, that you made a change in the ice? It was just this past summer, was it?

A. No, I haven't bought ice from McDonough for three or four years.

Q. Where do you get your ice?

A. Why, I buy it from Mr. Carroll.

While Reichert in answer to a leading question stated that he knew the board of health had condemned the ice, the testimony of one Rabe, a member of the local board of health, called as a witness in behalf of plaintiff, shows that while the board of health investigated the ice conditions in the spring of 1913, it did not attempt to stop the ice dealers from selling the ice put up that winter. He says: "By the time we got this analysis, it was too late, and the parties had put up their ice, and so we left them go for that year."

So far as the evidence shows, plaintiff's only competitor was Carroll, or rather Carroll Brothers, referred to in Reichert's testimony. Carroll Brothers maintained an ice house at a point between the defendant's mill and plaintiff's premises.

According to Rabe's testimony, Carroll Brothers put up their ice even in the winter of 1912–13 in front of their ice house, which, as already stated, was above plaintiff's premises, and below the milldam, and hence far more likely to be contaminated by the drainage from the mill than the ice put up on plaintiff's premises, and yet, according to Reichert's testimony, his firm bought Carroll Brothers' ice.

The defendant called as witnesses Professors Snyder and Hulbert. Professor Snyder for eighteen years occupied the chair of agricultural chemistry in the University of Minnesota. Professor Hulbert formerly occupied the position of chemist and bacteriologist of the Public Health Laboratory at the North Dakota University, and was, at the time of the trial of this action, and for some time prior thereto had been, engaged in similar work as an assistant to Professor Ladd at the North Dakota Agricultural College. Both chemists had made analyses of samples of ice cut by the plaintiff in the winter of 1912–13 in front of his ice house; and they both pronounced such ice to be good, wholesome ice, free from colon bacilli, and entirely fit for use by human beings. Both chemists had also made analyses of several samples of water obtained at various times during the spring, summer, and fall, both from above the milldam and in front of plaintiff's ice house; and they both testi-

fied that there was no appreciable difference in purity between the water taken above the milldam and the water taken at a point opposite plaintiff's ice house. Professor Hulbert personally obtained the samples of ice and water which he analyzed.

The undisputed evidence shows that no chemicals were used in washing the wheat, but that the process consisted in cleansing or washing the wheat with water. This washing process was not used as a substitute for other cleansing processes usually employed, but was used in addition thereto. All wheat was run over cleaners to take out the loose refuse, such as dirt and foul seed, before it went into the washer. The washing process was merely used for the purpose of loosening and removing whatever particles of dirt might be adhering to the kernels of the wheat.

The plaintiff testified that one winter the bottom of the ice became filled with black specks which looked like cockle seed, and that he was required to cut off about 5 inches of the bottom of each cake of ice.

Plaintiff further testified that this never occurred before the mill was built, and apparently it occurred only during one winter afterwards,—at least there is only one winter that he was required to cut off a portion of the bottom of the cakes of ice. There is no evidence as to the nature of the black specks, except plaintiff's statement that the ice was spotted "with what we thought was cockle, looked something like cockle."

The undisputed testimony of the manager of the mill, however, shows that cockle seed was never discharged into the water, but was cleaned out by other processes before the wheat was washed, and that the washing process merely removed particles of dirt adhering to the kernels which had not been removed by the cleaners. And both chemists contradicted the conclusions drawn by the plaintiff.

In this connection it should be noted that, according to plaintiff's own testimony, the railroad dam which forms the pond where plaintiff has been getting his ice supply is about 7 feet high. There are no gates in the dam, but it is built so that there is no overflow until the water flows over the top of the dam. The dam was constructed five or six years prior to the commencement of this action, and was abandoned about two or three years after its construction. It has not been kept in repair since it was abandoned. Hence, the dam was constructed only

about one or two years before the mill was constructed, and abandoned about the time the mill was constructed, or within a year thereafter. Plaintiff testified that the railroad company put an addition or cap on the dam after it was built; that this cap or addition was "knocked off" by the ice pressure, and has not been replaced; and that its removal resulted in lowering the water in front of plaintiff's ice house. But the evidence does not show the height of the "cap," when it was removed, or the extent to which the water was lowered by reason of its removal.

Dr. Davis, the local health officer, also testified that the cinders and small particles of unconsumed coal emitted by the various plants in Dickinson could and would be carried into the river on plaintiff's premises by the prevailing winds. And the sediment in a large Mason jar marked exhibit "E" offered by the plaintiff, and part of the record on this appeal, has every indication of being particles of coal, rather than anything which would ordinarily be found adhering to kernels of wheat.

Plaintiff offered in evidence the ordinance regulating the cutting of ice, and contends that this ordinance was adopted because the city authorities had determined that the drainage from the mill polluted the waters in the Heart river and rendered the ice therein unfit for human use. In support of this contention plaintiff called Dr. Davis and one Rabe, two members of the local board of health, who testified in regard to the reasons for the action of the city officials.

It is a rule of construction universally adopted, that courts are not concerned with the wisdom of legislative policy or the motive or necessity for legislative acts, except in so far as these may furnish some aid in ascertaining the intent of the legislative body in case the language of an enactment is ambiguous or doubtful. It surely cannot be contended that a party who is injured by the enactment of a prohibitory or regulatory measure by a legislative body is entitled to recover damages against the person or persons whose conduct was responsible for or created the public sentiment or necessity which led to the enactment of the measures. Nor does it seem that the reasons which actuate a legislative body in enacting a measure can be deemed to have any particular probative force in a controversy between private parties and involving private rights, even though the reasons for the enactment are recited in the measure itself. It is for the legislative body to de-

termine what the law shall be, and for the courts to determine what it is. It is solely for the legislative body to determine whether the facts, existing or prospective, require certain legislation to be enacted. The courts are not concerned with whether the reasons which actuated the legislative body to adopt a law were wise or unwise, or whether the premises on which legislative judgment was exercised were correct or incorrect. These are matters to be determined solely by the legislative body itself, and may be considered by the court only to ascertain the legislative intent in case the enactment is couched in language of ambiguous or doubtful meaning. Sedgwick (Sedgw. Stat. & Const. Law, pp. 56, 57), in discussing what weight and effect should be given to facts recited by a lawmaking body in the preamble of an enactment, says: "As between individuals whose rights are affected, the facts recited ought not to be evidence. We well know that such applications are made frequently *ex parte*. Once adopt the principle that such facts are conclusive, or even prima facie evidence against private rights, and many individual controversies may be prejudged and drawn from the sanctions of the judiciary into the vortex of legislative usurpation. The appropriate functions of the legislature are to make laws to operate on future incidents, and not a decision or forestalling of rights accrued or vested under previous laws. Such a preamble is evidence that the facts were so represented to the legislature, and not that they are really true."

Even if the enactment of the ordinance could be considered, however, it is difficult to see wherein it would strengthen plaintiff's cause. It seems rather far-fetched to say that the ordinance was passed because defendant polluted the water in the stream. If the city authorities deemed that the discharge of drainage from defendant's mill tended to pollute waters in the stream so as to render them dangerous to public health, it seems as though the logical thing for them to have done under the circumstances would have been to prevent such pollution, rather than to permit the pollution to continue and prohibit the cutting of ice.

The evidence in this case, however, shows that there were other sources of possible pollution below the milldam which of themselves furnished adequate reason for the adoption of the ordinance in question. For instance it is shown that South Dickinson lies between the milldam and plaintiff's premises. That there are in all three or four hundred

German, Russian, Bohemian, and Polish families living here. There are no sewers, and the houses have privies, and there are also barns situated on the bank of the river. The land slopes toward the river. The surface drainage from this town, as well as the seepage from the privies, discharge into the river. Cattle and horses pastured on plaintiff's premises, and the town herd containing some 80 to 100 head of cows, are permitted to wade into the river. There are piles of manure along its banks. There is a brickyard which drains into the river.

Professor Snyder in his testimony gave a graphic description of these sources of pollution.

He testified in part as follows:

Q. Now, what was the first source of contamination which you discovered below the mill?

A. At the brickyard there is a cut through which the clay material is brought to the brickyard, affording a natural drainage for a large portion of the brickyard area, and there is also situated on this gully an open privy the drainage of which leads down a channel into the river. That was the first one.

Q. You don't know how many men are employed in that brickyard?

A. I don't . . . but I would judge from the size of the works there would be a large number.

Q. Going on down the stream, what else did you discover?

A. Buildings located near the bank, barns, the natural drainage directly into the river, also privies of buildings further down; also located a small flour mill a little off, but where the drainage would find its way into the river. Also general conditions such as was described by the doctor (Dr. Davis) this morning.

This testimony was corroborated by Professor Hulbert, who testified to other sources of pollution observed by him, including piles of manure and the carcass of a horse.

Dr. Davis, the local health officer who apparently was largely responsible for the enactment of the ordinance, admits that these other possible sources of pollution would have justified the enactment of the ordinance.

On his cross-examination Dr. Davis testified in part:

Q. Assuming that his (plaintiff's) ice house is below the pond where

the surface drainage from all of South Dickinson enters the Heart river, would'nt you say that that situation alone would be sufficient grounds to pass the ordinance there?

A. I certainly would. . . .

Q. So that, entirely independent of the Russell Mill Company's sewerage, there was another distinct ground upon which you would have been justified in passing that regulation?

A. I think so.

The plaintiff testified that the live stock was unwilling to drink the water and would come to the well near the house, that he ceased to take stock for pasture, and pastured only his own stock, which he watered at the well, and cut the grass, not eaten, for hay. He also testified that the land was more valuable, and capable of earning larger profits when used for pasture purposes. And it is therefore contended that this loss of profit was due to defendant's acts. The plaintiff's own testimony shows that he had other water available for watering the stock; the uncontradicted testimony of the chemists is to the effect that the water was not necessarily unfit even for human use. So far as any pollution of the water which rendered it distasteful to the cattle is concerned, it is at least as, if not more, probable, that it resulted from the stagnancy caused by the dam constructed below plaintiff's property, and the surface drainage from South Dickinson, and the piles of manure on the banks of the river, some of which were located on plaintiff's own land, as by any acts of the defendant.

Plaintiff claims that he is in any event entitled to an injunction restraining defendant from depositing sewage in the river, and calls our attention to certain sections of the Penal Code relating to the fouling of public waters. We are at a loss to understand how the penal statutes are involved. If defendant has violated any provisions of the Penal Code it is subject to the penalties provided by law. But such penalties do not inure to the benefit of the plaintiff. He must recover, if at all, by proof of invasion of his own rights.

The remedy by injunction, being preventive, is intended to prevent a continuance of an existing and continuing pollution, or a threatened pollution; and past acts or resulting injuries are not in themselves grounds for injunctive relief, unless it appears that the acts or injuries shown will probably continue or recur. Gould, Waters, §§ 512 et seq.

The trial of this action was commenced on November 27, 1914, and concluded on the day following. Upon the trial defendant's attorney stated, and its manager testified, that the defendant was then engaged in constructing a septic tank; that the latest and most approved scientific apparatus and appliances for purification were utilized in such construction; that the same would completely deodorize and destroy all bacteria and germs; that a large force of men was then at work on such construction; and that the tank would be fully completed and in use within ten days or two weeks from that time. The findings of fact were not signed by the trial court until August 31, 1915, and in these findings the court found that "defendant installed a septic tank at its said mill and elevator; and that since that time it has not discharged, and is not now discharging into the Heart river, any sewage from its said mill or elevator, and by reason of said instalment of said septic tank by said defendant it has ceased to discharge into the Heart river any sewage matter such as it was discharging there into at and prior to the time of the commencement of said suit."

It is asserted that this finding is not supported by the evidence. There is, it is true, no evidence in the record showing the installation of a septic tank prior to the commencement of the trial. But the evidence does show that at the time of the trial a large force of men was at work constructing said tank, and that the same would be fully completed within the next ten days or two weeks. This was not only established by the testimony of the defendant's manager, but was also contained in a statement of the defendant's attorney, assuring the court that such tank would be fully constructed and in use within such time. It must be presumed "that the ordinary course of business has been followed." Comp. Laws 1913, subd. 20, § 7936.

There is no contention in the record that the tank has not as a matter of fact been fully constructed and put into use as found by the trial court. No request was made by the plaintiff for leave to show that the proposed construction had not been completed, although, as already stated, findings were not made or judgment entered until almost a year after the trial.

We concur fully in the findings of the trial court. In our opinion plaintiff has wholly failed to establish his alleged cause of action

against the defendant. If any error was made it was in allowing plaintiff $100 as nominal damages.

In this opinion we have adopted the theory on which the case has been argued, but we deem it proper to say that we are by no means satisfied that a riparian owner of land situated within the limits of a city at a point with respect to residences and manufacturing establishments therein, such as the evidence shows plaintiff's premises to be situated, can legally claim that the cutting of ice thereupon is a reasonable use of the waters in the stream.

Certain questions of practice with respect to the extent of review on this appeal have been raised. As the result in this case must be the same regardless of the ruling on such questions, it becomes unnecessary to consider them.

The judgment appealed from must be affirmed.

It is so ordered.

J. B. BEAUCHAMP v. RETAIL MERCHANTS ASSOCIATION, Mutual Fire Insurance Company.

(165 N. W. 545.)

Fire insurance contract — object of — indemnity — forfeiture stipulations in — constructions of — policy followed — forfeiture not favored.

1. The object of a fire insurance contract is to afford indemnity; and for-

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NOTE.—In deciding just what books and inventories must be kept in a safe to constitute substantial compliance with the provisions of the iron safe clause in a policy of insurance, the courts are not inclined to favor forfeitures of policies because of technical violations, as will be seen by an examination of the cases collated in a note on the subject in 15 L.R.A.(N.S.) 471, from which it appears that although no statement of the general rule has been found, there is a noticeable uniformity in the decisions, allowing the insured to recover, where the information as to the condition of the business, contained in the destroyed books or inventories, can be obtained from order sources.

On waiver of provisions as to keeping of books and vouchers in safe or safe place, see notes in 51 L.R.A. 698; 28 L.R.A.(N.S.) 337, and L.R.A.1915F, 759.

On the force and effect of iron safe clauses in policies of insurance, see note in 78 Am. St. Rep. 227.

feiture stipulations and conditions in the policy will be construed, if possible, so as to avoid forfeiture and afford indemnity.

Insurance contract — breach of conditions — present or subsequent — violation by the insured — only terminates liability of insurer.

2. When an insurance contract is conditioned to become void in case there be a breach of condition present or subsequent, the true meaning is, not that the instrument is upon a breach thenceforth a nullity and has no legal existence, but only that, upon a violation of the covenants by the insured, the insurer shall cease to be bound by his covenants.

Conditions in policy — insurer may waive — insured may not lose insurable interest.

3. The insurer may waive the conditions in the policy relating to forfeiture and nonwaiver, except when the insured, by the act, loses his insurable interest.

Intent only manifested — by insurer — cannot withdraw — except when induced by fraud of insured.

4. When the insurer has once manifested an intent to waive a forfeiture, it cannot subsequently withdraw the waiver, unless the acts constituting waiver were induced and occasioned by fraud on the part of the insured.

Forfeiture — waiver — general rule — insurer — acts of — belief of insured — induced by acts of insurer.

5. As a general rule a forfeiture is waived when an insurer, with knowledge of the act on the part of the insured which works a forfeiture, enters into negotiations with him, and induces him to incur trouble or expense under the belief that his loss will be paid.

Non-waiver — stipulation in policy — agreement executed by insured after loss — before or during work of adjustment — strictly construed against insurer.

6. A nonwaiver stipulation in the policy, and a nonwaiver agreement executed by the insured after the loss and before or during the investigation by the adjuster, will be construed strictly against the insurer.

Stipulation not extended by implication — cause of fire — ascertained by insurer — insurance company bound — acts — conduct — statements — reliance upon.

7. Such stipulation and agreement will not be extended by implication beyond their exact terms, and do not prevent the insurance company from being bound by statements made and acts performed after it had fully investigated, and to its satisfaction ascertained the cause of the fire and the amount of the loss.

Waiver — question for jury usually — facts admitted — question of law.

8. Waiver is ordinarily a question for the jury; but where the facts and circumstances relating to the subject are admitted, or clearly established, and

only one inference can reasonably be drawn therefrom, waiver becomes a question of law.

Opinion filed October 20, 1917. Rehearing denied December 14, 1917.

From a judgment of the District Court of Cavalier County, Honorable *W. J. Kneeshaw,* Judge, defendant appeals.

Affirmed.

Pierce, Tenneson, & Cupler, for appellant.

All of the defenses alleged in the answer are based upon facts within the knowledge of plaintiff, and he therefore cannot claim to be surprised.

When one has full knowledge of all the facts set out in the amendments, he is in no position to claim surprise. Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 156 N. W. 234; Southern Ins. Co. v. Hastings, 64 Ark. 253, 41 S. W. 1093.

But if one can honestly claim surprise he should at once ask for continuance for a reasonable time to prepare. Helbig v. Grays Harbor Electric Co. 37 Wash. 130, 79 Pac. 612; Straus v. Buchman, 96 App. Div. 270, 89 N. Y. Supp. 226, 184 N. Y. 545, 76 N. E. 1109; 31 Cyc. 751, note 45; 1 Hayne, New Tr. & App. § 54, p. 272.

"The mere fact that the amendment constitutes a departure in pleading, or adds or substitutes a new or different cause of action in the strict sense of those terms, is no good reason for disallowing the amendment." Cooke v. Northern P. R. Co. 22 N. D. 266, 133 N. W. 306; 2 Elliott, Ev. 920; Rae v. Chicago, M. & St. P. R. Co. 14 N. D. 507, 105 N. W. 721; Kerr v. Grand Forks, 15 N. D. 294, 107 N. W. 197; Martin v. Luger Furniture Co. 8 N. D. 220, 77 N. W. 1003; Anderson v. First Nat. Bank, 5 N. D. 80, 64 N. W. 114; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562; Southern Ins. Co. v. Hastings, 64 Ark. 253, 41 S. W. 1093; 19 Cyc. 931.

They may be allowed after the evidence is in. 31 Cyc. 398 to 406; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387; Comp. Laws 1913, §§ 7181, 7482, 7483.

"A provision in a surety bond, requiring notice of default to the surety, is one to be performed after the occurrence of the loss or damage for which recovery is sought; and, while a condition precedent to the maintenance of an action, pertains to the remedy, and is not essential

to the binding force of the contract prior to default, and is not as strictly construed as the conditions involving the essence of the agreement." Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24; 1 Clement, Fire Ins. p. 410; Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 31, 156 N. W. 234; 14 Mod. Am. Law, 46, Waiver & Estoppel.

"An invoice of goods purchased is not an inventory of stock to be produced under the 'iron-safe clause' in an insurance policy." Southern F. Ins. Co. v. Knight, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821; Scottish Union & Nat. Ins. Co. v. Weeks, 55 Tex. Civ. App. 263, 118 S. W. 1086; Phœnix Ins. Co. v. Sherman, 110 Va. 435, 66 S. E. 81; German American Ins. Co. v. Fuller, 26 Okla. 722, 110 Pac. 763; Houff v. German American Ins. Co. 110 Va. 585, 66 S. E. 831; Teutonia Ins. Co. v. Tobias, — Tex. Civ. App. —, 145 S. W. 251.

If the destruction of the inventory and books was due to the negligent failure of the insured to preserve them as required by the "iron-safe clause," his failure to produce them in accordance with the provisions of the policies will preclude any recovery thereon. Southern F. Ins. Co. v. Knight, 111 Ga. 622, 52 L.R.A. 73, 78 Am. St. Rep. 216, 36 S. E. 821; Arkansas Ins. Co. v. Luther, 85 Ark. 579, 109 S. W. 1022; Shawnee F. Ins. Co. v. Kneer, 72 Kan. 385, 83 Pac. 611, 613; Goldman v. North British Mercantile Ins. Co. 48 La. Ann. 223, 19 So. 132; King v. Concordia F. Ins. Co. 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; Ætna Ins. Co. v. Mount, 90 Miss. 642, 15 L.R.A. (N.S.) 471, 44 So. 162, 45 So. 835; Cobb & S. Shoe Store v. Ætna Ins. Co. 78 S. C. 388, 58 S. E. 1099; Western Assur. Co. v. Kemendo, 94 Tex. 367, 60 S. W. 661, reversing — Tex. Civ. App. —, 57 S. W. 293; Continental Ins. Co. v. Cummings, 98 Tex. 115, 81 S. W. 705, reversing — Tex. Civ. App. —, 78 S. W. 378; Rives v. Fire Asso. of Philadelphia, — Tex. Civ. App. —, 77 S. W. 424; Allred v. Hartford F. Ins. Co. — Tex. Civ. App. —, 37 S. W. 95; Fire Asso. of Philadelphia v. Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153; Yates v. Thomason, 83 Ark. 126, 102 S. W. 1112; St. Landry Wholesale Mercantile Co. v. New Hampshire F. Ins. Co. 114 La. 146, 38 So. 87, 3 Ann. Cas. 821.

"A mere offer to compromise is not a waiver of breaches of the con-

ditions of the policy." 19 Cyc. 804, 805; McCormick v. Orient Ins. Co. 86 Cal. 260, 24 Pac. 1003.

Neither can the conduct of the company's agent or adjuster, in trying to effect a compromise settlement, be regarded as a waiver. City Drug Store v. Scottish Union & Nat. Ins. Co. — Tex. Civ. App. —, 44 S. W. 21; Holbrook v. Baloise F. Ins. Co. 117 Cal. 561, 49 Pac. 555.

Grimson & Johnson, and *Linde & Murphy,* for respondent.

Special defenses must be specifically set forth in the answer in order to be available in an action on the policy. Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 156 N. W. 234.

A defense based upon a failure to comply with the so-called "iron-safe clause" in the policy is merely technical. 1 Hayne, New Tr. & App. § 54, p. 272; Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. supra; Comp. Laws 1913, § 7482.

No representations or warranties in the application or policy can be deemed material so as to defeat or avoid such policy, where, as in this case, no contention is or can be made that the insured made the same with intent to deceive, or that matters claimed to have been misrepresented or warranted against increased the risk of loss. Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151, 64 L.R.A. 451, 105 Am. St. Rep. 916, 79 S. W. 119, and cases cited; Comp. Laws 1913, § 6501; Soules v. Brotherhood of American Yeoman, 19 N. D. 23, 120 N. W. 760.

It has also been held that, in order to work a forfeiture of the policy, there must be a failure of not only one, but of all, the conditions of the clause. Connecticut F. Ins. Co. v. Jeary, 60 Neb. 338, 51 L.R.A. 698, 83 N. W. 78.

CHRISTIANSON, J. On July 29, 1914, the defendant issued to the plaintiff an insurance policy of the usual standard form adopted in this state, whereby it insured the plaintiff against loss or damage by fire in the sum of $3,000, upon a certain stock of merchandise in plaintiff's store at Olga, in Cavalier county, in this state. The stock was also insured in the sum of $2,500 by another insurance policy issued by the Northwestern Mutual Fire Insurance Company. This latter policy also insured household goods belonging to plaintiff in the sum of $500. On January 22, 1915, the stock of merchandise was, together with

the building wherein it was contained, accidentally, totally destroyed by fire. The plaintiff immediately notified the defendant, and the Northwestern Mutual Fire Insurance Company of the loss, and these two companies sent their adjuster, one Larkin, to adjust the losses. Larkin arrived about three weeks after the fire. Upon his arrival at Olga he asked for the books of account, and was informed by the plaintiff that they were in the safe, which was still lying on the ground, close to the place where the fire had occurred. A blacksmith was sent for, who broke open the safe, and Larkin and the plaintiff took the books and papers to plaintiff's house and looked them over. In examining the books it was discovered that a book in which plaintiff kept the record of his purchases had been destroyed by the fire. Plaintiff informed Larkin that this book had been left on the plaintiff's desk, the night the fire occurred. The safe, however, contained a ledger in which accounts were kept of all the goods sold on time, and the plaintiff informed Larkin that the cash received from cash sales had been deposited in the Bank. Larkin, upon receiving this information, went to the bank and examined the bank books to ascertain the amount of such sales. Larkin arrived at Olga in the forenoon, and left on the morning of the day following. Before leaving he requested plaintiff to accompany him to Grand Forks. Two versions are given of the reasons for such request. Plaintiff says: "He asked me if I would go with him to Grand Forks or Fargo, and look over the ledger, and he said we had some work to do, and that we could do it better there, and I went with him." Larkin says that some discussion arose with respect to the last inventory taken in March, 1914; that plaintiff stated he believed that this inventory had been sent to the Grand Forks Mercantile Company, and that it was principally for this reason that he suggested that plaintiff accompany him to Grand Forks. The Grand Forks Mercantile Company, however, did not have such inventory. Mr. Larkin thereupon requested that he (plaintiff) write the various wholesale houses and obtain from them statements or inventories of the goods which they had sold to the plaintiff since the last inventory was taken on March 1, 1914, and Larkin prepared a form of the letter to be so sent. Plaintiff acted in accordance with this request, and prepared and sent letters to the various wholesale houses, and obtained statements or inventories from them. He also obtained statements from the bank.

These statements and inventories he submitted to Larkin. At Larkin's request plaintiff came to Fargo, where they went over the whole matter. Larkin testified that, from the information furnished him by the plaintiff, he determined that the goods destroyed were worth $4,204.62. The policies limited the liability of the insurers to three fourths of the actual value of the goods insured, and, hence, Larkin fixed the amount of liability of the companies under the two policies at $3,153.47; defendant's proportion of such liability being approximately $1,720.

On his direct examination Larkin testified:

Q. *Did you as adjuster have these two companies agree to settle for this amount ($3,153.47)?*

A. *I did.*

It appears from Larkin's testimony that, in fixing the value of the goods, he deducted 20 per cent from the wholesale prices for depreciation. Larkin claims that there was little or no dispute between him and the plaintiff with respect to the basis on which he computed the amount of loss. This, however, is denied by the plaintiff, who claims that there was a difference of opinion between them as to the amount to be allowed for depreciation, cost of handling, and matters of that kind. Plaintiff further claims that Larkin refused to take into consideration statements furnished by some of the wholesale houses; that the bank account represented, in addition to the moneys received from cash sales made at the store, the proceeds of certain grain raised by plaintiff upon farms owned by him, and that Larkin refused to deduct these items. Larkin, on the other hand, claims that the statements were all considered, and that he deducted the amount of the deposits represented by the sale of grain. It is undisputed, however, that they were unable to agree upon the amount of the loss, and that plaintiff refused to accept the amount offered, claiming that the stock at the time of the fire had an actual value of approximately $12,000.

The present action was brought, and the summons and complaint therein served on the defendant on April 18, 1916. The defendant appeared and answered on May 15, 1916. Notice of trial was served on June 2, 1916, noticing the case for trial at the term appointed to commence on June 13, 1916. The June term was adjourned until July 3, 1916. On July 3, 1916, defendant's attorneys mailed an

amended answer to plaintiffs' attorneys with request that they consent to the proposed amendments. The amendments averred that plaintiff had failed to comply with the provisions of the policy with respect to taking inventories, and keeping such inventories and books of account correctly detailing purchases and sales of stock securely locked in an iron safe during the hours the store was closed for business. Plaintiff's attorneys refused to consent to the amendments. Defendant's attorneys thereupon, on July 12, 1916, served upon plaintiff's attorneys an application for leave to serve and file a proposed amended answer, accompanied by an order to show cause, returnable on July 17, 1916. The application was presented to the court immediately before the cause was called for trial, and a jury therein selected, but, owing to the absence of one of plaintiff's counsel, it was not argued until the day following, and during the interim the trial jury had been selected. The only showing made in support of the application to amend consisted of an affidavit by one of defendant's attorneys, setting up the facts with respect to the preparation of the proposed amended answer, the mailing thereof to plaintiff's attorneys with the request that they consent to the proposed amendments, and their refusal to do so. No showing whatever was made for the failure on the part of defendant's counsel to fully assert the proposed defense in the original answer. Plaintiff's attorneys objected to the allowance of the proposed amendments on various grounds. The trial judge sustained the objection, stating that he did not believe the allowance of the amendments would be in the furtherance of justice. The motion to amend was renewed at the close of plaintiff's case, and was again denied by the court. The jury returned a verdict in plaintiff's favor for the full amount of the policy, and defendant has appealed from the judgment.

The errors assigned are all predicated upon a so-called "iron-safe clause" in the policy, which reads as follows: "It is expressly stipulated that the assured shall take an inventory of the stock hereby covered at least once a year during the life of this policy, and shall keep books of account correctly detailing purchases and sale of said stock, and shall keep said inventory and books securely locked in an iron safe during the hours that said store is closed for business. Failure to observe these conditions shall work a forfeiture of all claims under this policy."

Appellant contends: (1) That the court erred in denying plaintiff's application for leave to amend the answer: (2) that the evidence shows that plaintiff had failed to comply with the iron-safe clause in the policy; that such failure rendered the policy void, and that the court should have directed a verdict in defendant's favor.

Appellant has anticipated that it might be claimed that it has waived plaintiff's noncompliance with this clause. Appellant has therefore pointed out in its brief that the policy contained the following provision: "This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part, relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

It is also pointed out that the plaintiff, during the negotiations with Larkin, on March 15, 1915, signed an agreement to the effect that "it is hereby mutually understood and agreed by and between J. B. Beauchamp, of Olga, North Dakota, of the first part, and the Retail Merchants Association Mutual Fire Insurance Company, of Fargo, North Dakota, and other companies signing this agreement parties of the second part, that any action taken by said parties of the second part in investigating the cause of the fire, or investigating and ascertaining the amount of the loss and damage to the property of the party of the first part caused by fire alleged to have occurred on January 29, 1915, shall not waive or invalidate any of the conditions of the policies of the parties of the second part, held by the party of the first part, and shall not waive or invalidate any rights whatever of either of the parties to this agreement.

"The intent of this agreement is to preserve the rights of all parties hereto, and provide for an investigation of the fire and the determination of the amount of the loss or damage, without regard to the liability of the parties of the second part."

Appellant contends that, in view of the above-quoted policy provision and nonwaiver agreement, it cannot be held to have waived the forfeiture provisions of the policy.

A fire insurance policy is a contract of indemnity. The sole purpose on the part of the insured in contracting is to obtain such indemnity. The prime obligation on the part of the company is to pay the loss (not exceeding the amount stipulated) in event the property is destroyed by fire. "The object of the contract being to afford indemnity, it will be so construed, in case of doubt, as to support rather than defeat the indemnity provided for." 19 Cyc. 657.

While the parties to an insurance contract may stipulate that the validity of the contract from its inception shall depend upon the existence of certain stated material facts, or that the life and continuation of the policy shall depend upon the continuation or fulfilment of certain material conditions subsequent to the issuance of the policy, such "conditions and exceptions are to be strictly construed against the company and liberally construed in favor of the insured. Stipulations and conditions in the policy are to be so construed, if possible, as to avoid forfeiture and afford indemnity." Ibid. And "when an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is, not that the instrument is, upon a breach, thenceforth a nullity and has no legal existence, but only that, upon the violation of the covenants by the insured, the insurer shall cease to be bound by his covenants. Inasmuch, therefore, as such conditions are inserted for the benefit of the insurer, they may all be waived by him, except when the insured by the act loses his insurable interest. Even a stipulation that the conditions of a policy cannot be waived, or if waived at all only in a certain manner, may itself be waived." 19 Cyc. 777.

It must be assumed that an insurance company intends to carry out the primary purpose of its contract; and if it sees fit to waive any of the technical conditions of the policy, inserted therein for its own benefit, it is readily permitted to do so. In discussing the subject of waiver and estoppel as applied to such conditions, the American & English Encyclopædia of Law (vol. 16, 2d ed. p. 934) says: "Since the conditions of a policy a breach of which by the assured will give rise to a forfeiture are inserted for the benefit of the insurance company, they may be waived either pending the negotiation for the insurance, or after such negotiation has been completed and during the currency of the policy, and this either before or after the forfeiture is incurred;

and since forfeitures are not favored in the law, the courts are always prompt to seize hold of any circumstances that indicate an election to waive."

While it has been said to be "impossible to assert with any confidence a consistent theory upon which all the adjudications in insurance cases, commonly collected under the topics of waiver or estoppel, may rest," it will be found that the "harmonious principle that pervades the subject seems to be a desire on the part of the courts to hold the company as strictly as possible to the performance of its contract, and to prevent an unfair reliance, on its part, upon technical conditions of the policy." 19 Cyc. 777, 778.

And where an insurance company has once manifested its intent to waive the right to declare a forfeiture, it cannot subsequently withdraw the waiver, unless the waiver was occasioned by fraud on the part of the insured. 19 Cyc. 779, 871, 872.

It is a general rule "that when an insurer, with knowledge of any act on the part of the insured which works a forfeiture, enters into negotiations with him which recognize the continued validity of the policy, and thus induces him to incur expense or trouble under the belief that his loss will be paid, the forfeiture is waived." 14 R. C. L. § 376, p. 1197; see also Beach, Ins. § 753. And while it is generally held that the insurer and insured may agree, either by a policy provision or by an agreement after loss and before appraisal, that no waiver shall be implied from an investigation of the cause of the fire and the amount of the loss and damage caused to the property insured, such stipulations and agreements, like the forfeiture provisions of the policy, should be construed strictly against the insurer and liberally in favor of the insured. Pennsylvania Ins. Co. v. Hughes, 47 C. C. A. 459, 108 Fed. 497. See also 19 Cyc. 656.

Such stipulations and agreements should not be extended by implication beyond their exact terms, and the conduct of the insurer after it passes the stage of investigation and ascertainment will be subject to the same rules as though such stipulation or agreement did not exist. Pennsylvania F. Ins. Co. v. Draper, 187 Ala. 103, 65 So. 923; Rudd v. American Guarantee Fund Mut. F. Ins. Co. 120 Mo. App. 1, 96 S. W. 237; Indiana Ins. Co. v. Pringle, 21 Ind. App. 559, 52 N. E. 821; Pennsylvania F. Ins. Co. v. Hughes, supra; Queen of Arkansas Ins. Co.

v. Malone, 111 Ark. 229, 163 S. W. 771; Arkansas Mut. F. Ins. Co. v. Witham, 82 Ark. 226, 101 S. W. 721; McCollough v. Home Ins. Co. 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862. See also Corson v. Anchor Mut. F. Ins. Co. 113 Iowa, 641, 85 N. W. 806. In most of the above cited cases the nonwaiver agreement was identical with the one involved in this case.

It will be noticed that the nonwaiver stipulation in the policy is limited to an appraisal and examination as provided for in the policy. The nonwaiver agreement is limited to "investigating the cause of the fire, or investigating or ascertaining the amount of the loss and damage to the property caused by (the) fire." The defendant did not attempt to avail itself of the provision in the policy relative to an appraisal.

We have already referred to the negotiations between the plaintiff and the adjuster Larkin. At no time during these negotiations did Larkin, or any other representative of either of the insurance companies, even suggest that the companies were not liable under the policies; or that the policies had been forfeited by reason of failure on the part of the plaintiff to comply with the so-called "iron-safe clause." It is undisputed that Larkin, an insurance adjuster of long experience, had full notice and knowledge of such noncompliance immediately after his arrival in Olga about three weeks after the fire. Possessed of such knowledge he proceeded not only to investigate the fire and determine the loss, but he also put plaintiff to the trouble and expense of obtaining and furnishing other proof of the facts which would have been disclosed by the books destroyed by the fire. He further put plaintiff to the expense of two trips—one to Grand Forks and one to Fargo—for the sole and only purpose of furnishing proof as to the amount and value of the goods destroyed. This information was necessary only for the purpose of computing the amount to be paid by the defendants under the terms of the policies. Manifestly Larkin did not limit his acts to an inquiry into the cause of the fire and the amount of the loss, and to an ascertainment thereof; but, after these acts were fully completed to his own satisfaction, he, according to his own testimony, offered and "had the insurance companies agree to pay" the full amount of the loss as determined by Larkin.

The attitude of the insurance companies from the moment they acquired knowledge of plaintiff's failure to comply with the "iron-safe clause," and during all the negotiations with the plaintiff, was not that of one disclaiming liability, but rather that of one admitting liability. They, in effect, said to the plaintiff, "We will pay you the amount of your loss, according to the terms of the policy, as soon as we ascertain the cause of the fire and the amount of the loss." After the investigation was fully completed, they said, in effect: "We have now satisfied ourselves as to the cause of the fire and the amount of your loss; we find your loss to be $4,204.62, and under the policies, we are liable for $3,153.47, which we offer to pay you." The testimony of Larkin clearly and unquestionably leads to the conclusion that there never was any intent on his part, or on the part of either of the insurance companies, to assert that the policies were void for failure on the part of plaintiff to comply with the "iron-safe clause." The attitude of Larkin and both the insurance companies was that the companies were liable, and would pay the full amount which plaintiff was entitled to receive under the policies. Larkin's testimony discloses that the only point in dispute was the amount of the loss. The question of want of liability was never suggested. No suggestion was made that the policies were forfeited. The amount offered was not offered as a compromise. It was offered as payment for an obligation existing under the insurance contract. The defendant recognized the policy as being in full force and effect. It was willing to perform its primary obligation under the policy and pay the amount of the loss. Under these circumstances, the nonwaiver stipulation in its policy and the nonwaiver agreement will not avail or prevent the act of waiver from taking place.

As waiver is mainly a question of intention, it is ordinarily a question of fact, or a mixed question of law and fact, and is rarely to be inferred as a matter of law. But when the facts and circumstances relating to the subject are admitted or clearly established, and reasonable men, in the exercise of their reason and judgment, can draw but one inference therefrom, waiver becomes a question of law. 40 Cyc. 270, 271. See also Pennsylvania F. Ins. Co. v. Hughes, 47 C. C. A. 459, 108 Fed. 497; Hollings v. Banker's Union, 63 S. C. 192, 41 S. E. 90.

In the case at bar the facts relating to waiver were not in dispute. They were established, principally, by the testimony of defendant's representative Larkin. We believe that only one inference can be drawn from the undisputed facts, and that is that defendant, with full knowledge of plaintiff's noncompliance with the iron-safe clause, determined to waive such noncompliance and pay the amount of indemnity which plaintiff was entitled to receive under the policy. The amount of plaintiff's loss has been determined by a jury whose verdict is amply sustained by the evidence.

The defense of forfeiture for failure to comply with the provisions of the iron-safe clause must be specially pleaded. Ennis v. Retail Merchants Asso. Mut. F. Ins. Co. 33 N. D. 20, 156 N. W. 234. This defense was not pleaded in the original answer herein. And although, under the views expressed above, it is unnecessary to determine whether the proposed amendment to the answer should have been allowed, it may properly be observed that under our system of procedure, trial courts are vested with a broad judicial discretion with respect to the allowance of amendments. And it is firmly established that an appellate court will not interfere with the trial court's action except in case of a clear abuse of such discretion. Webb v. Wegley, 19 N. D. 606, 610, 125 N. W. 562. The authority vested in courts under the law to allow amendments to pleadings is conferred to promote the ends of justice, and should be liberally exercised by the courts to that end. The controlling principle in determining an application to amend is, or should be, whether the proposed amendment, if allowed, would further the ends of justice. Martin v. Luger Furniture Co. 7 N. D. 220, 77 N. W. 1003. In the case at bar the affidavit submitted in support of the application to amend presented no excuse whatever for the failure to assert the defense in the original answer. As we have already stated, the defendant was informed of the plaintiff's noncompliance with the iron-safe clause immediately after its adjuster arrived in Olga. The action was not commenced until more than one year after the adjuster had obtained this information. Under these circumstances, we would by no means feel justified in saying that the trial court erred in holding that an allowance of the proposed amendment would not be in furtherance of justice. But if the amendment had been allowed, we are wholly satisfied that, under the undisputed facts in this case, it must be held

that defendant has waived the right to assert the defense sought to be interposed thereby.

The judgment must be affirmed. It is so ordered.

BRUCE, Ch. J. I dissent.

On Rehearing.

CHRISTIANSON, J. Defendant has filed a petition for rehearing wherein it asserts: (1) That the construction placed upon the iron-safe clause is too narrow; (2) that the acts of Larkin and the offer of payment made by him did not operate as a waiver; (3) that it was incumbent upon plaintiff to raise the question of waiver by way of reply; that the question was not so raised, or at all; (4) that we overlooked certain showing made by defendant's counsel in support of the motion to amend the answer; (5) that the evidence was insufficient to show that the plaintiff had sustained a loss, under the policies, for the amount of the verdict.

With respect to the first two propositions, it is sufficient to say that we have again considered the former opinion, and are wholly satisfied with what we there said with respect to the purpose of insurance contracts; the construction to be placed upon forfeiture provisions in such contracts, and waiver of such provisions.

Defendant is in error when it asserts that it was incumbent upon the plaintiff to raise the question of waiver by way of reply. In this state "a plaintiff is not required to reply to new matter in an answer not constituting a counterclaim, except by order of the court; but every allegation of new matter in the answer, not constituting a counterclaim, is deemed controverted by the plaintiff as upon a direct denial or avoidance by operation of law." Moores v. Tomlinson, 33 N. D. 638, 157 N. W. 685, Comp. Laws 1913, §§ 7467–7477 and 7452; Kingman v. Lancashire Ins. Co. 54 S. C. 599, 32 S. E. 762; Crittenden v. Springfield, F. & M. Ins. Co. 85 Iowa, 652, 39 Am. St. Rep. 321, 52 N. W. 548. See also Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011; 19 Cyc. 922, and authorities cited in notes 38, 39, 40, and 41.

As noncompliance with the iron-safe clause was not pleaded in the

answer, the question of waiver was not strictly an issue in this case. But, as stated in our former opinion, appellant anticipated this question, and devoted a considerable portion of its brief to argument and citation of authorities in support of the proposition that defendant had not waived the right to avail itself of the defense of noncompliance with the iron-safe clause. Appellant raised the question of waiver, and we are wholly satisfied with what we said with respect thereto in our former opinion.

It is asserted that in our former opinion we overlooked the oral statement made by defendant's counsel upon the hearing of the motion for leave to file an amended answer to the effect "that the answer in this case was prepared rather hurriedly, and that in preparing for trial, after talking to my client, I discovered that the answer as originally prepared did not set out all of the defenses to which the defendant was entitled and which was necessary to be pleaded as a defense so as to properly protect the rights of the defendant, and, accordingly, I prepared an amended answer." Whatever value was to be attributed to a statement of this kind was primarily for the trial court. A party who desires to apply to a trial court for leave to amend a pleading has the burden of sustaining his application, and should show some reason justifying or requiring the court to grant the amendment. The application is addressed to the court's discretion. The discretion should be exercised to promote the ends of justice. The presumption is that it was so exercised. On appeal it must be shown that the discretion has been abused. In this case we are agreed that an abuse of such discretion has not been shown.

It is true that appellant, in its specifications, assails the sufficiency of of the evidence as to the value of the stock of merchandise destroyed. But no further reference is made thereto, and no argument is presented in support thereof in the brief. Nor is it mentioned by appellant, as one of the issues presented for determination on this appeal. Hence under the well-settled rule that assignments not argued will be deemed abandoned, the specification of insufficiency of evidence as to the value of the stock of merchandise should be deemed abandoned. In this case, however, the point is without merit, as plaintiff's testimony is to the effect that the stock was worth to exceed $12,000 at the time of the fire.

A rehearing is denied.

J. B. BEAUCHAMP v. NORTHWESTERN MUTUAL FIRE INSURANCE COMPANY.

(165 N. W. 550.)

This case is governed by the decision rendered in Beauchamp v. Retail Merchants Asso. ante, 483.

Opinion filed October 20, 1917. Rehearing denied December 14, 1917.

From a judgment of the District Court of Cavalier County, Honorable *W. J. Kneeshaw,* Judge, defendant appeals.

Affirmed.

Pierce, Tenneson & Cupler, for appellant.

Grimson & Johnson, and *Linde & Murphy,* for respondent.

CHRISTIANSON, J. This case was consolidated with Beauchamp v. Retail Merchants Asso. ante, 483, 165 N. W. 545, and was tried in the court below, and argued in this court jointly with that case, and involves the other insurance policy referred to in the opinion in that case. The controlling facts and legal principles involved are identical with those involved in Beauchamp v. Retail Merchants Asso. and, on the authority of that case, the judgment of the District Court is affirmed.

BRUCE, Ch. J. I dissent.

MAGDALENA KRUMENACKER v. ANTON ANDIS, Executor of the Last Will of Decedent; Magdalena Krumenacker; Katie Stecher; her Children, Peter, Ludvig, Katie, and Thomas Krumenacker Stecher.

(165 N. W. 524.)

Action — commencement of — summons — service of — by publication — affidavit for — sufficiency of — defendant — residence of — "whereabouts" — not synonymous terms — court — jurisdiction — filing of affidavit — precedes first publication.

1. Under § 7428, Compiled Laws of 1913, relating to the service of the summons by publication, and stating what is required to be done in order to secure service of the summons by publication, requiring among other things that an affidavit stating the place of defendant's *residence*, if known to the affiant, and if not known, stating that fact. *Held*, that an affidavit which states that the "whereabouts" of the defendant are unknown is not a compliance with the requirements of such section in that the word "whereabouts" in its signification as used in such affidavit is not synonymous with the word "residence" in said section, and an affidavit for publication which contains the word "whereabouts," instead of the word "residence," is wholly defective; and the court acquires no jurisdiction by reason of such defective affidavit. Where such affidavit is in proper form, it must also be filed before the first publication of the summons. If otherwise, the court acquires no jurisdiction.

Exemptions — statutes — construction of — husband or wife — minor children — persons entitled to claim — residence.

2. Section 8725, Compiled Laws of 1913, which relates to the setting aside for the surviving wife or husband, or minor children, all property of the testator or intestate which would be exempt from execution if he were living, including all property absolutely exempt, and other property selected by the person or persons entitled thereto to the value of $1,500. *Held*, that such statute is one of exemption, and not of inheritance; and that to entitle one to the benefits of such section such person must bring himself within the letter or spirit of the exemption laws of this state as to residence therein, or at least circumstances must show an intent and desire to establish and have such residence within the state.

Opinion filed October 9, 1917. Rehearing denied December 14, 1917.

Appeal from the District Court of Stark County, Honorable *W. C. Crawford,* Judge.

Reversed.

W. F. Blume and *H. C. Berry,* for appellants.

In an affidavit for service of summons by publication, in an action against one whose residence is unknown, the statement that his "whereabouts" are unknown to affiant is equivalent to a statement that his "residence" is unknown, and is a full compliance with the statute. Comp. Laws 1913, § 7428; Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274; Dallas v. Luster, 27 N. D. 450, 147 N. W. 95; Horton v. Monroe, 98 Mich. 195, 57 N. W. 109; Leigh v. Green, 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093.

For the purpose of sustaining an affidavit for attachment, the complaint should be read and construed with the affidavit. Woods v. Pollard, 14 S. D. 44, 84 N. W. 214; Carr v. Carr, 92 Ky. 552, 36 Am. St. Rep. 614, 18 S. W. 453.

When it is stated that defendant resides in another state, it is sufficient to show that service cannot be made within the state, and is sufficient as basis for service by publication. Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

When it is stated that defendant resides in another state, it is sufficient to show that service cannot be made within the state, and is sufficient as basis for service by publication. Hilbish v. Hattle, 145 Ind. 59, 33 L.R.A. 783, 44 N. E. 20; Morrow v. Weed, 4 Iowa, 77, 66 Am. Dec. 122; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Brown v. Globle, 97 Ind. 86; Barnes v. Shoemaker, 112 Ind. 512, 14 N. E. 367.

Where the jurisdiction of the court depends upon the facts which it is required to ascertain and determine by its decision, its findings of facts showing its jurisdiction is conclusive in collateral attack. Dowell v. Lahr, 97 Ind. 146; Otis v. DeBoer, 116 Ind. 531, 19 N. E. 317; People ex rel. Porter v. Rochester, 21 Barb. 656.

Jurisdiction in such cases is presumed. Withers v. Patterson, 27 Tex. 491, 86 Am. Dec. 643; Holmes v. Campbell, 12 Minn. 221, Gil. 141; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459; Bush v.

Lindsey, 24 Ga. 245, 71 Am. Dec. 117; Ely v. Tallman, 14 Wis. 29; Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Arnold v. Nye, 23 Mich. 286; Foot v. Stevens, 17 Wend. 483.

A nonresident alien cannot successfully claim exemptions unless so authorized by statute. The statutes of North Dakota do not give such right. 12 Am. & Eng. Enc. Law, 67; Johnson v. Olson, 92 Kan. 819, L.R.A.1915E, 327, 142 Pac. 256; Schouler, Exrs. & Admrs. § 448; 2 Am. & Eng. Enc. Law, 156; Tromsdahl v. Beaton, 27 N. D. 441, 52 L.R.A.(N.S.) 746, 146 N. W. 719; Comp. Laws 1913, §§ 5759, 8725 and 8727.

The exemption of personal property to the widow and children of decedent, like the exemption of the homestead, is intended for the benefit of residents, and contemplates the existence of the family relation in the estate. Ex parte Pearson, 76 Ala. 521; Allen v. Manasse, 4 Ala. 554; Coates's Estate, 12 Phila. 171; Spier's Appeal, 26 Pa. 233; Platt's Appeal, 80 Pa. 501; Monk's Estate, 8 Montg. Co. L. Rep. 113; Auerbach v. Pritchett, 58 Ala. 451; Talmadge v. Talmadge, 66 Ala. 199; Shannon v. White, 109 Mass. 146; Barber v. Ellis, 68 Miss. 172, 8 So. 390; Richardson v. Lewis, 21 Mo. App. 531; Re Bose, 158 Cal. 428, 111 Pac. 258; Austin's Estate, 73 Mo. App. 61; Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423; Daniels v. Taylor, 76 C. C. A. 139, 145 Fed. 169, 7 Ann. Cas. 352; Alston v. Ulman, 39 Tex. 158; Smith v. Howard, 86 Me. 203, 4 Am. St. Rep. 537, 29 Atl. 1008; Medley v. Dunlap, 90 N. C. 527; Graham v. Stull, 92 Tenn. 673, 22 S. W. 738, and note in 21 L.R.A. 241.

The homestead right is denied to a nonresident. Tromsdahl v. Beaton, 27 N. D. 441, 52 L.R.A.(N.S.) 746, 146 N. W. 719; Blatchley v. Dakota Land & Cattle Co. 26 N. D. 539, 145 N. W. 95.

Property left by will is not subject to the claim to exemptions by a nonresident alien. Comp. Laws 1913, §§ 7730, 8725; Fore v. Fore, 2 N. D. 261, 50 N. W. 712; Kapp v. Public Administrator, 2 Bradf. 258.

The right to exemptions is not personal to anyone; it is a family right. There is no family relationship shown in this case. First International Bank v. Lee, 25 N. D. 197, 141 N. W. 716; Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Farlin v. Sook, 26 Kan. 397; Stanton v. Hitchcock, 64 Mich. 316, 8 Am. St. Rep. 821, 31 N. W.

395; Black v. Singley, 91 Mich. 50, 51 N. W. 704; Emmett v. Emmett, 14 Lea, 369; Prater v. Prater, 87 Tenn. 78, 10 Am. St. Rep. 623, 9 S. W. 361; many citations in note to Sheehy v. Scott, 4 L.R.A.(N.S.) 365; Spier's Appeal, 26 Pa. 233; Ex parte Pearson, 76 Ala. 521.

Murtha & Sturgeon, and *C. B. Schmidt,* for respondent.

This is not an equity case, and therefore a trial *de novo* in this court cannot be had. The mere fact that a case is tried to the court without a jury does not make it strictly a court case. Novak v. Lovin, 33 N. D. 424, 157 N. W. 297; More v. Burger, 15 N. D. 345, 107 N. W. 200; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 257, 100 N. W. 717; Gagnier v. Fargo, 12 N. D. 219, 96 N. W. 841; Flora v. Mathwig, 19 N. D. 4, 121 N. W. 63; Updegraff v. Tucker, 24 N. D. 171, 139 N. W. 366.

If the findings, in such a case, have substantial support in the evidence, they are not disturbed. State v. Banks, 24 N. D. 21, 138 N. W. 973; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; State Bank v. Maier, 34 N. D. 259, 158 N. W. 346; Taute v. J. I. Case Threshing Mach. Co. 25 N. D. 102, 141 N. W. 134, 4 N. C. C. A. 365.

Where the affidavit for publication of the summons makes use of the word "whereabouts" in their attempt to show that defendant's "residence" is not known, it is fatally defective. Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587; Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274.

Such expressions or terms are not synonymous, and the use of the word "whereabouts" is not a compliance with the statute. Further than this, no affidavit was on file before the first publication of the summons. Jurisdiction in such cases can only be acquired by a strict compliance with the statute. Jablonski v. Piesik, supra; Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145; Black, Judg. 2d ed. § 232, p. 348; Boswell v. Otis, 9 How. 336, 350, 13 L. ed. 164, 170; Braly v. Seaman, 30 Cal. 611; Comp. Laws 1913, § 7428.

In this state the affidavit for publication and the proof of such service are a part of the judgment roll. It is the established rule that, where the judgment roll discloses the fact that no service was had, then the judgment is absolutely void and may be impeached collaterally. Black, Judgm. 2d ed. §§ 246, 263, pp. 366, 396; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436; Carter v. Frahm, 31 S. D. 379.

141 N. W. 370; Boyle v. Ora Plata Min. & Mill. Co. 14 Ariz. 484, 131 Pac. 155; Empire Ranch & Cattle Co. v. Coleman, 23 Colo. App. 351, 129 Pac. 522; Empire Ranch & Cattle Co. v. Gibson, 23 Colo. App. 344, 129 Pac. 520; Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 Pac. 1005; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Vandervort v. Finnell, 96 Neb. 515, 148 N. W. 332; Oziah v. Howard, 149 Iowa, 199, 128 N. W. 364; Lougee v. Beeney, 22 Colo. App. 603, 126 Pac. 1102; Munson v. Pawnee Cattle Co. 53 Colo. 337, 126 Pac. 275; Empire Ranch & Cattle Co. v. Irwin, 23 Colo. App. 206, 128 Pac. 867; Hembree v. McFarland, 55 Wash. 605, 104 Pac. 837; Fogg v. Ellis, 61 Neb. 829, 86 N. W. 494; Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; Brown v. St. Paul & N. P. R. Co. 38 Minn. 506, 38 N. W. 698; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92.

The statute limiting exemptions to $500 does not apply in probate proceedings, and that the surviving husband, wife, or minor child is entitled to $1,500 in exemptions. Woods v. Teeson, 31 N. D. 610, 154 N. W. 797; Comp. Laws 1913, § 8725.

Under such statutes a nonresident widow is entitled to the exemption. Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; Grieve's Estate, 165 Pa. 126, 30 Atl. 727; Comerford v. Coulter, 82 Mo. App. 362; Re Hager, 150 Ill. App. 347; Re McMillan, 28 Ohio C. C. 645; Farris v. Battle, 80 Ga. 187, 7 S. E. 262; Maddox v. Patterson, 80 Ga. 719, 6 S. E. 581; Campbell v. Whitsett, 66 Mo. App. 444; Kapp v. Public Administrator, 2 Bradf. 258; Duplain's Succession, 113 La. 786, 37 So. 755; Banse v. Muhme, 13 Ohio C. C. 501, 7 Ohio C. D. 224; Balmforth's Estate, 26 Pa. Super. Ct. 491; Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17; Christie's Succession, 20 La. Ann. 383, 96 Am. Dec. 411; Johnson v. Johnson, 41 Vt. 467; Nye's Appeal, 126 Pa. 341, 12 Am. St. Rep. 873, 17 Atl. 618; Mowser v. Mowser, 87 Mo. 437; Comerford v. Coulter, 82 Mo. App. 362; Hastings v. Myers, 21 Mo. 519; King v. King, 64 Mo. App. 301; Allen v. Allen, 117 Mass. 27; Lisk v. Lisk,

155 Mass. 153, 29 N. E. 375; Welch v. Welch, 181 Mass. 37, 62 N. E. 982.

The clear intent of the law is to vest an absolute property right in the widow, and her abandonment of her husband does not affect such right, and such right is not restricted to resident widows. Kellogg v. Graves, 5 Ind. 509; Singleton v. McQuerry, 8 Ky. L. Rep. 782; Mitcham v. Moore, 73 Ala. 542; Jones v. Layne, 144 N. C. 600, 11 L.R.A.(N.S.) 361, 57 S. E. 372; Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595; Welch v. Welch, 181 Mass. 37, 62 N. E. 982; Re Taylor, 5 Ind. Terr. 219, 82 S. W. 727; Field v. Field, 215 Ill. 496, 74 N. E. 443; Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265; Murphy v. Renner, 99 Minn. 348, 8 L.R.A.(N.S.) 565, 116 Am. St. Rep. 418, 109 N. W. 593; Eversole v. Eversole, 169 Ky. 793, L.R.A.1916E, 593, 185 S. W. 487.

The husband by will cannot cut off the wife's exemptions, nor can he by making a will affect such right in any manner. It stands absolute in the widow. Meyer v. Meyer, 25 S. D. 596, 127 N. W. 595; Re Whitney, 171 Cal. 750, 154 Pac. 855; Rountree v. Montague, 30 Cal. App. 170, 157 Pac. 623.

Appellants motion for a new trial was properly denied by the lower court. There was no showing of diligence in any degree. 29 Cyc. 886 (4) 892, note 10, 894, 898; Goose River Bank v. Gilmore, 3 N. D. 188, 54 N. W. 1032; Sebold v. Rieger, 26 Colo. App. 209, 142 Pac. 201; Gaines v. White, 1 S. D. 434, 47 N. W. 524; Axiom Min. Co. v. White, 10 S. D. 198, 72 N. W. 462; Libby v. Barry, 15 N. D. 286; Smith v. Mutual Cash Guaranty F. Ins. Co. 21 S. D. 433, 113 N. W. 94; Heyrock v. McKenzie, 8 N. D. 601, 80 N. W. 762; Braithwaite v. Aiken, 2 N. D. 57, 49 N. W. 419; Gaines v. White, 2 S. D. 410, 50 N. W. 901; Wagner v. Geiselman, — Tex. Civ. App. —, 156 S. W. 524.

GRACE, J. This appeal involves the interpretation of § 8725 of the Compiled Laws of 1913, and the sufficiency of an affidavit necessary for service by publication in the divorce proceedings referred to in this action. A complete statement of facts is necessary for a full understanding of the issues involved. For the sake of clearness it may be well to note at the inception that there are two Magdalena Krumen-

ackers who are interested in this action;—the plaintiff, who was the wife during his lifetime of Ludvig Krumenacker and who is the plaintiff in this case; the other Magdalena Krumenacker is the surviving widow of Ludvig Krumenacker's brother.

The respondent, Magdalena Krumenacker, and Ludvig Krumenacker, were intermarried in Austria-Hungary in the year 1887. They lived in said country for some years as husband and wife, and to that union one child was born, which died in infancy. The deceased while living in said country abused the respondent and beat her, and for such was sentenced to and did serve seven months in prison in Austria-Hungary. After being released from such prison he never returned to live with the respondent, and in the year 1900 came to the United States of America, established his residence in Stark county, North Dakota, about the year 1900, and continued to reside there until April 5, 1914, at which time his death occurred in Stark county, and while a resident thereof. The respondent has always resided in Austria-Hungary, and has never been a resident of Stark county, North Dakota, nor of the state of North Dakota.

The deceased left no property except that which was in Stark county, North Dakota, the amount of which is disclosed by the inventory. After the payment of all funeral expenses and the expenses of the last illness, there remained in the hands of the executor unexpended property of the value of $2,000.

In 1910 Ludvig Krumenacker brought an action in the district court of Stark county for a divorce from his wife, Magdalena Krumenacker, on the ground of desertion, and the decree of divorce was granted. In 1911, at Dickinson, North Dakota, he married his then housekeeper, Margaret Schummer, and they lived together as husband and wife until she died in 1913. To the marriage of Ludvig Krumenacker and Magdalena Krumenacker there was never any other issue except the child to which we have before referred, which died in infancy.

Ludvig Krumenacker died testate, and by the terms of his will all of his property is given to other persons than the respondent. The beneficiaries under the will are his brother's widow, whose name is also Magdalena Krumenacker, and her grand-children, who are residuary legatees, the Stecher children, all of whom are minors and orphans and residents of Stark county, North Dakota.

While the will was in process of being probated and the estate was in the course of administration, the respondent, by attorney, filed a petition in the county court of Stark county, claiming that she was the widow of the decedent, and setting forth that no provision had been made for her by the will, demanding a certain house and lot for a homestead, and $1,500 in personal property exemptions under § 8725 of the Compiled Laws of 1913, and a family allowance. The executor and two of the defendants answered, denying her right to the homestead and other exemptions, and set up a certain decree of divorce, and the further fact that the plaintiff was a nonresident, who had not maintained any family relation with the decedent for twenty years or more. The matter came on for hearing in the county court of Stark county, the county court denying the plaintiff and respondent any right to exemptions. Plaintiff appealed to the district court of Stark county, and trial was had therein December 30, 1915. The district court found the decree of divorce to be null and void and open to collateral attack, denied the plaintiff and respondent's right to the homestead, but held that she was entitled to the exemption of $1,500 in personal property. A motion was made by the defendants for a new trial, which was denied.

The first legal question presented to us is, Was there a valid decree of divorce granted Ludvig Krumenacker from Magdalena Krumenacker? The divorce action was commenced in the year 1910. The only service of the summons in the divorce proceedings was by publication. No claim is made of any personal service, and the validity of the divorce decree depends upon the validity of the constructive service of the summons.

Section 7428 of the Compiled Laws of 1913 and its subdivisions provides the things necessary to be done to procure the service of a summons by publication. It reads as follows: "Service of the summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and further stating:

"That the defendant is not a resident of this state; or . . . that personal service cannot be made on such defendant within this state to

the best knowledge, information and belief of the person making such affidavit, and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant. The affidavit shall also state . . . that the action is for divorce or for a decree annulling a marriage."

The following is the affidavit made as a basis for the publication of such summons:

"Ludvig Krumenacker, Sr., on being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that the defendant, Magdalena Krumenacker, is not a resident of the state of North Dakota, and for that reason it will be impossible to get personal service on the defendant in the above-entitled action; *that the present whereabouts of this defendant are unknown to your affiant.* Affiant further states that this action is one for divorce."

The main question presented concerning this affidavit is whether or not it is sufficient compliance with § 7428 of the Compiled Laws of 1913, which provides that the affidavit for publication shall state the place of defendant's residence, if known to the affiant, and, if not known, stating that fact.

We are quite clear that the term "whereabouts" is in no manner synonymous with the place of defendant's residence. These expressions have not the same meaning. The term "whereabouts" as defined by Webster means the place where a person or thing is. It is clear that a person might be in a place or in many different places at different times without that place being his residence. Residence means the place where a person resides or stays with some degree of permanency. As defined by Webster, "the act or fact of residing, abiding, or dwelling in a place for some continuance of time;" "the place where one resides;" "an abode;" "a dwelling or habitation, especially a settled or permanent home or domicil;" "the place where anything rests permanently."

It is clear from these definitions that there is really nothing synonymous between the terms "resident" and "whereabouts." A person may be in a place or different places, any or all of which may be referred to as his "whereabouts," but none of which is his "residence." His

residence may be a great distance from the places we have referred to. It might be in a different city or a different state, and a long distance removed from the places which may be referred to as his "whereabouts." The term "whereabouts" implies a kind of nomadic quality. It to some extent implies a wanderer from place to place, while, on the other hand, residence implies permanency, and brings to our mind the abiding place for a continuance of time. The word "whereabouts" having a clearly different significance to the word "residence," it is not synonymous with it, and is not interchangeable therewith in use or meaning. As used in the affidavit under consideration in this case in place of the word "residence" it is wholly inadequate. This is especially true in view of the provisions of law which require the residence to be stated, if known, and, if not known, that fact also to be stated. The word "whereabouts" in no manner complies with the requirements of such law, and the affidavit is for that reason fatally defective. The law also requires the affidavit to be filed before the first publication of the summons. The affidavit in question was not filed until some time after the first publication of the summons. This omission is also fatally defective. These two matters are the basis of the jurisdiction to be required. Where the affidavit and the filing thereof are not in accordance with the law, and are fatally defective, the court acquires no jurisdiction, and for these reasons the court acquired no jurisdiction, and therefore the decree of the court is invalid, void, and of no force and effect.

The following cases are largely in point: Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274; Roberts v. Enderlin Invest. Co. 21 N. D. 594, 132 N. W. 145; Black, Judgm. 2d ed. § 232; Boswell v. Otis, 9 How. 336, 350, 13 L. ed. 164, 170; Braley v. Seaman, 30 Cal. 611; Barber v. Morris, 37 Minn. 194, 5 Am. St. Rep. 836, 33 N. W. 559.

The affidavit for publication and the proof of service and filing thereof are part of the judgment roll under § 7688, Compiled Laws of 1913. It is a rule well settled that, where the judgment roll discloses that no service was had, the judgment is void, and may be impeached directly or collaterally. Black, Judgm. 2d ed. §§ 246, 263, pp. 366, 396; O'Malley v. Fricke, 104 Wis. 280, 80 N. W. 436; Carter v. Frahm, 31 S. D. 379, 141 N. W. 370; Boyle v. Ora Plata Min. & Mill. Co. 14 Ariz. 484, 131 Pac. 155; Empire Ranch & Cattle Co. v. Coleman, 23 Colo. App. 351, 129 Pac. 522; Empire Ranch & Cattle Co. v. Gibson,

23 Colo. App. 344, 129 Pac. 520; Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 Pac. 1005; Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Chicago, B. & Q. R. Co. v. Hitchcock County, 60 Neb. 722, 84 N. W. 97; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Galpin v. Page, 18 Wall. 360, 21 L. ed. 959; Vandervort v. Finnell, 96 Neb. 515, 148 N. W. 332; Lougee v. Beeney, 22 Colo. App. 603, 126 Pac. 1102; Munson v. Pawnee Cattle Co. 53 Colo. 337, 126 Pac. 275; Empire Ranch & Cattle Co. v. Irwin, 23 Colo. App. 206, 128 Pac. 867; Hembree v. McFarland, 55 Wash. 605, 104 Pac. 837; Fogg v. Ellis, 61 Neb. 829, 86 N. W. 494; Hanover v. Turner, 14 Mass. 227, 7 Am. Dec. 203; Brown v. St. Paul & N. P. R. Co. 38 Minn. 506, 38 N. W. 698; Grover & B. Sewing Mach. Co. v. Radcliffe, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92.

The next question to be considered in this case is the construction to be accorded to § 8725, Compiled Laws of 1913. § 8725 is as follows: "Exempt Personal Property, disposition of. There shall also be set apart absolutely to the surviving wife or husband, or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt, and other property selected by the person or persons entitled thereto to the amount in value of $1,500 according to the appraisement, and such property shall not be liable for any prior debt of the decedent except the necessary charges of his last sickness and funeral—and expenses of the administration, when there are no other assets available for the payment of such charges."

Section 8727 is as follows: "Allowance for the family. If the amount so set apart is insufficient for the support of the widow and children or either—and there is other estate of the decedent, the court may in its discretion order such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which, in case of an insolvent estate must not be longer than one year after granting letters testamentary or of administration."

We have no hesitancy in interpreting the sections just referred to as part of the exemption law. The exemption laws are of local application and apply to the residents of this state.

They are primarily intended for the protection of the home, as well as for the protection of the state itself. The state is interested in protecting the home, and in throwing safeguards about it. In setting aside part of the property of which the decedent died possessed, for the use and benefit of his widow and minor children, exclusive of any claim of creditors and others, in order that such widow and children may be protected and provided for, and may not become public charges to the state. Death is a tragedy. The death of the head of the family, or the father, tends to throw the family into commotion and bewilderment. The father, the head of the family, has been the bread winner and financier, and quite frequently the widow has never had any experience in looking after the business affairs, and the minor children of course have no capacity to do so. Quite frequently the father may be indebted and have numerous creditors. Creditors, or some of them, are ofttimes inconsiderate. They have no thought of the future welfare of the family, thus ofttimes without warning thrown on their own resources. In such case it is easy to see that, if no protection was afforded and thrown about the surviving members of the family, and possibly the pressing and insistence of the creditors for the payment of the debts due them coming at a time when the surviving members of the family are most greatly depressed, and the condition of the business of the deceased may be in a chaotic state, many such families would be wrecked, and the surviving members of such family or home be caused much suffering, anguish, and uncertainty of mind, or much inconvenience in procuring the necessities of life, and possibly be thrown on the state for actual support. The state, therefore, in order to protect such family and itself against such conditions, and being also deeply interested in the development of the surviving members of the family, for the family, the home, is the source from which its future citizens are recruited, it throws about such family at such time the arm of its protection, and says to all creditors or those having claims against the estate,—this much of all the property that was left shall be set aside for the protection of the surviving widow and minor children. This much shall be exempt. There is exempt to the surviving widow and minor children under our law out of all the property left, and which was not encumbered by the deceased wife or husband, first, the same amount as could have been claimed by the hus-

band during his lifetime as exempt from execution; to wit, the sum of $500. In addition thereto, the absolute exemption provided by law; and, further, additional property to the extent and of the value of $1,500,—all of which shall be exempt from any debt owing by the deceased. In addition to this, if these are insufficient for the support of the widow and children, and there is other estate, the court in its discretion may make additional allowances, provided that in an insolvent estate such additional allowances shall not be for more than one year.

In these exemption statutes, aliens are not mentioned and are not recognized; and such exemption statutes were never intended to apply to nonresident aliens who never have, and never do, intend to become residents of our state, and who never have, and never intend to have, and maintain their home in our state, and who owe no duty to the state, and to whom the state owes no duty.

It is true that aliens can purchase and sell, and take by will, donation, succession, or distribution, which rights are protected under treaty arrangements between the various nations, but exemptions are matters which are entirely foreign to the intent and purpose for which treaties are executed.

The plain intent of the exemption laws is for the protection of the home and the family, of residents within the state, and the surviving widow and minor children thereof. There is no home or family within the meaning of the exemption laws, if the father or head of the family lives permanently in North Dakota, and the wife or mother lives permanently in Austria-Hungary, or other foreign nation, or in another of our states, with no intention, or circumstances indicating an intention, to ever become a resident of our state, or become a member of the home of one who is a resident of our state. The law contemplates a family living together and existing as a family.

The exemption laws are always liberally construed, and there might exist circumstances where the husband lived within our state and the wife for the time being was a resident of a foreign nation or a resident of a sister state, where, notwithstanding that fact, they could, with propriety and with some degree of legality, lay claim to such exemptions. For instance, had the husband left Austria-Hungary for the United States, and come to North Dakota with the purpose of establishing a permanent residence and home, and with the understanding

with his wife before he left—it being assumed for the purpose of this illustration that the husband is poor,—that as soon as he was able to earn enough money to send for his wife he would do so, and that intention was present with both the parties in good faith at all times; and if there were correspondence between them which showed that it was the intention of both that the wife should follow the husband as soon as the husband could send for her, or as soon as she could by any means reasonable make the trip to join her husband; or it was shown that she had fallen sick and was unable physically to make the trip, yet always had the desire and intention of doing so as soon as she became physically able,—in such case, with the liberal construction given to the exemption laws, such person might be granted exemptions. It is no fault of hers in such case that she cannot be with her husband. She desires to be, she always intends to be, and the domicil of her husband as a general rule of law being that of the wife, and intent being at the very foundation of residence, such good intention, with the good faith otherwise shown, may be sufficient for the law to say that her real residence is in fact with her husband, though she be physically absent therefrom. This same reasoning would apply to the husband coming from a sister state under similar circumstances and conditions. If there is a good and sufficient reason why the wife is not with her husband which is based upon good faith, and is coupled with an intent and desire on the part of the wife to join her husband at the first opportunity, or as soon as it is possible, whatever the cause may be which prevents her joining him, then in such case by reason of the liberality of the construction of the exemption laws, the construction thereof may be extended to include cases of this kind. On the other hand, where testimony shows that an alien wife whose husband has come to this country and established a home in one of the states has always maintained her residence in the foreign land or nation, has always maintained her allegiance to the authority of such foreign state, who never has intended or expressed any intention, or given any evidence of an intention, to become a resident of the state in which her husband has established his home, has never expressed any desire to renew the family relations or again make the home complete by joining her husband in his home, or expressing any desire or intention to do so, she can have no benefit of the exemption laws of this state, and the exemption laws were not meant to include

such persons. The most liberal construction that can be placed upon the exemption laws is, they are for the benefit and protection of the residents, the family, and home of residents within this state, or at the very farthest, those who have a present intention in good faith to become residents of the state and members of the family or home of some person who is a resident of, and who has his home within our state.

It is conceded in respondent's statement of facts that she is not now, and never was, a resident of said county (Stark county) or of this state, but since birth has been, and now is, a resident of Austria-Hungary, Europe. And it must therefore be conceded, from these facts and from the whole record, that she never had any intention of becoming a resident of Stark county, North Dakota. This being true, she is not entitled to personal property to the value of $1,500, nor any other amount, as an exemption.

The question now under consideration turns largely upon whether we consider the statute under consideration one of exemption or of inheritance. Respondent's theory really is that the statute in question is a statute of inheritance, and cites some authorities which tend to sustain this position. Others are not in point. One of the cases cited by respondent is the Grieve's Estate, 165 Pa. 126, 30 Atl. 727. This decision is quite an important one, but we believe is rather against the position taken by the respondent, and is in harmony with the position which we have taken; that is, that the statute is one of exemption, and not of inheritance. The syllabus in the Grieve's Case is as follows: "Where a husband leaves his wife in a foreign country with the understanding that she is to follow him when he shall have made a home for her in this country, and he subsequently settles in Pennsylvania but does not inform his wife of his whereabouts, and afterwards bigamously marries another woman, and then dies, the first wife is entitled to the widow's exemption out of his estate, if it appears that she was always willing to join her husband and would have done so if she had not been kept in ignorance of his whereabouts."

In this case there was, not only an agreement that the wife would follow and live with her husband in his new home, but a reading of the case discloses that she always had a desire and intention to do so, and was only prevented from doing so by reason of ignorance of his whereabouts. When we take into consideration that a person's residence

depends, to a considerable extent at least upon the intention, we have no hesitancy in agreeing with the reasoning in the Grieve's Case, when all the facts in the case are fully considered. The Grieve's Case is really an authority in point to prove the principle which we believe is the proper one; that is, that the statute is one of exemption. The Grieve's Case in fact holds that the statute is one of exemption and the widow had brought herself within its terms. There is much authority also for the position which we have taken. The following authorities cited by the appellant in his brief sustains the proposition that the statute is one of exemption: Ex parte Pearson, 76 Ala. 521; Allen v. Manasse, 4 Ala. 554; Coates's Estate, 12 Phila. 171; Spier's Appeal, 26 Pa. 233; Platt's Appeal, 80 Pa. 501; Monk's Estate, 9 Montg. Co. L. Rep. 113; Auerbach v. Pritchett, 58 Ala. 451; Talmadge v. Talmadge, 66 Ala. 199; Shannon v. White, 109 Mass. 146; Barber v. Ellis, 68 Miss. 172, 8 So. 390; Richardson v. Lewis, 21 Mo. App. 531; Re Rose, 158 Cal. 428, 111 Pac. 258; Austin's Estate, 73 Mo. App. 61; Hascall v. Haffard, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423; Daniels v. Taylor, 76 C. C. A. 139, 145 Fed. 169, 7 Ann. Cas. 352; Alston v. Ulman, 39 Tex. 158; Smith v. Howard, 86 Me. 203, 41 Am. St. Rep. 537, 29 Atl. 1008; Medley v. Dunlap, 90 N. C. 527; Graham v. Stull, 92 Tenn. 673, 22 S. W. 738, and note in 21 L.R.A. 241.

We are clear that the statute under consideration, § 8725, Compiled Laws of 1913, is an exemption statute, and not a statute of inheritance. There being, therefore, no exemptions of which the respondent could claim the benefit, the disposition of the property in question by will cannot be questioned; the will never having been set aside, and is in full force and effect.

The judgment of the lower court is reversed, and the case is remanded for a new trial, each party to pay their own costs in the lower court and in this court.

CHRISTIANSON, J. (concurring specially). I concur fully in the conclusions reached in the opinion prepared by Mr. Justice Grace, for the reasons stated in that part of his opinion covered by paragraph 2. of the syllabus. I am not prepared, however, to say that the use of the word "whereabouts," instead of the word "residence," in an affidavit

for publication of a summons, renders void such affidavit and a judgment based upon service made thereunder, and I express no opinion upon that question.

In connection with what is said by Mr. Justice Grace with respect to § 8725, Comp. Laws 1913, it may be observed that the policy of allowing exemptions to heads of families while living, and to a surviving wife, husband, or minor children was in force even before statehood. See §§ 322–334, Code Civ. Proc. 1877; § 135, Probate Code 1877. The desirability of enacting "wholesome laws exempting from forced sale to all heads of families a homestead, . . . and a reasonable amount of personal property," was recognized and declared by the framers of our state Constitution. N. D. Const. § 208. The constitutional policy thus declared was carried out by appropriate enactments by the legislature. Comp. Laws 1913, §§ 5605, 5623, 7729–7742. It will be noted that both the homestead and personal property exemptions thus allowed to heads of families are distinctly limited to residents of the state. These exemptions, while allowed to and claimed by the heads of families, are intended primarily for the benefit of the families. Calmer v. Calmer, 15 N. D. 120, 127, 106 N. W. 684. And in event the head of the family fails to claim the exemption it may be claimed by his wife or by a child over the age of sixteen years. Comp. Laws 1913, § 7736. At the time § 8725, Comp. Laws 1913, was enacted, it allowed to the surviving husband, wife, or minor children the same additional exemptions as those then allowed to the head of the family during his lifetime. This section in its original form came before this court for construction in the early history of the state in the case of Fore v. Fore, 2 N. D. 260, 50 N. W. 712. And while the specific question here presented was not there involved, the entire opinion and reasoning adopted by the court therein is clearly to the effect that this is an exemption statute. This is, also, true of the decision in Woods v. Teeson, 31 N. D. 610, 154 N. W. 797. And statutes of this character have generally been classed as exemption laws by courts and legal writers. 18 Cyc. 1401. In construing a somewhat similar statute, the supreme court of Mississippi said that it "must be held to be a part of our exemption laws, and applicable only to persons residing within our borders." Barber v. Ellis, 68 Miss. 172, 8 So. 390. The supreme court of Pennsylvania held that a statute allowing widow's exemptions

does not apply to a widow who, upon the emigration of her husband to this country, five years before his death, had remained behind, and had never joined him in this country although she had promised to do so. Spier's Appeal, 26 Pa. 233. See also Medley v. Dunlap, 90 N. C. 527.

In the case at bar plaintiff, in her petition to the county court, claimed both a homestead exemption and the exemption allowed by § 8725, supra. The county court disallowed both claims, and an appeal was taken to the district court, which affirmed the order appealed from. Plaintiff did not appeal from the disallowance of the homestead exemption, and has apparently abandoned all claim thereto.

Section 8725 is part of article 3 of chapter 6 of the 1913 Probate Code. The first two sections of the article relate to the homestead exemption. Section 8723 provides that "upon the death of either husband or wife the survivor . . . may continue to possess and occupy the whole homestead, and upon the death of both husband and wife the children may continue to possess and occupy the same until otherwise disposed of according to law." Section 8724 provides for setting apart of the homestead. The first words of § 8725 (the one involved in this proceeding) are as follows: "There shall *also* be set apart absolutely to the surviving widow," etc. The word "also" in this section clearly refers to the preceding sections, and means that the personal property exemption therein mentioned shall be "in addition to" the homestead exemption provided for in the preceding sections. Hill v. Terrell, 123 Ga. 49, 51 S. E. 86; Loring v. Hayes, 86 Me. 351, 29 Atl. 1098; Mace v. Mace, 95 Me. 283, 49 Atl. 1038.

It seems to me that the legislature intended that the personal property exemption provided for in the last section should be allowed only to such person or persons as might, under the preceding sections, claim and receive the homestead exemption.

The exemption allowed to heads of families is distinctly limited to residents of this state. Comp. Laws 1913, §§ 5623, 7742. The homestead exemption can attach only to such property as constituted decedent's homestead at the time of his death. Calmer v. Calmer, 15 N. D. 120, 125, 106 N. W. 684. If the decedent is not entitled to claim a homestead exemption at the time of his death, no homestead estate survives or descends. Holcomb v. Holcomb, 18 N. D. 561, 120 N. W. 547, 21 Ann. Cas. 1145. The immunity given to heads of

families is founded upon the idea that the exempt property is necessary to support the debtor and his family. It is not intended exclusively for the benefit of the owner of the property, but mainly for the benefit of the family for which he provides. 18 Cyc. 1374; Calmer v. Calmer, 15 N. D. 120, 122, 106 N. W. 684.

The purpose of the legislature in the enactment of the section here under consideration and the preceding sections was to continue the exemption for the benefit of the family after the death of the owner. Fore v. Fore, 2 N. D. 260, 263, 267, 50 N. W. 712; Calmer v. Calmer, 15 N. D. 120, 127, 106 N. W. 684. And in order to provide for all cases the language was made broad enough to include not only the usual cases in which the property belongs to the husband, but also the more or less unusual cases where the property belongs to the wife.

If it is true, as contended by respondent's counsel and by the minority members of this court, that § 8725 is not an exemption statute, but a statute of distribution, then manifestly its provisions would apply to all estates, those of nonresidents as well as of residents. If the contention of the respondent and the minority members is correct, then the plaintiff would have been entitled to claim and receive the exemption now claimed, even though she and the deceased had both been residents of Austria, and even though neither of them had ever been within the United States of America. Such construction, it seems to me, is not in accord with the legislative intent, and applies the statute for a purpose never intended.

While it has been said to be "apparent that the legislature, in making the provision, were contemplating the ordinary case where the parties to the marriage relation have lived together till death severed the tie, and where the widow remains in charge of the family of the deceased" (Kersey v. Bailey, 52 Me. 200), the courts have generally held that a deserted wife is entitled to claim the exemption in the state where her husband has maintained his residence, even though she has not been an actual resident of the state. These cases are based upon and give effect to the presumption that the marriage relation continued, and that the domicil of the husband is, also, the domicil of the wife. The presumption of continuance of marriage relation and identity of domicil of husband and wife cannot prevail, however, when the facts are shown to be to the contrary. Comp. Laws 1913, § 14; McGrew v. Mutual

L. Ins. Co. 132 Cal. 85, 84 Am. St. Rep. 27, 64 Pac. 103. This is not a case where the husband surreptitiously deserted and abandoned his family which the wife has continued to maintain and support; in effect maintaining the family relation and bearing the burdens incident thereto. Nor is it shown that she has been prevented from residing with her husband by reason of his wrongful or illegal acts. The evidence here shows that the plaintiff owned some land in Austria-Hungary; that she and her husband separated and lived apart for some time before he emigrated to this country; that a divorce could not be had under the laws of Austria-Hungary under the existing circumstances; that when the deceased left Austria-Hungary and came to this country the plaintiff had no desire or intent to accompany him or to follow him at any time afterwards. So far as the family relation was concerned it was for all intents and purposes actually and finally terminated, and neither party apparently had the slightest intent of ever resuming it.

Under these circumstances I do not believe that the plaintiff is entitled to claim or receive the benefits conferred by § 8725, supra. In my opinion the legislature intended that this section should apply only to the estates of decedents who were residents of this state, and that its benefits should accrue only to those who were either actual residents, or those who within the contemplation of the law may be deemed to be such.

BRUCE, Ch. J. (dissenting). I agree with the majority that the divorce proceedings were a nullity. Jablonski v. Piesik, 30 N. D. 543, 153 N. W. 274; Atwood v. Tucker (Atwood v. Roan) 26 N. D. 622, 51 L.R.A.(N.S.) 597, 145 N. W. 587; Dallas v. Luster, 27 N. D. 450, 147 N. W. 95.

I do not, however, agree with the majority that §§ 8725 and 8727 of the Compiled Laws of 1913 are exemption statutes.

Section 8725 provides that: "There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living."

Section 8727 provides: "If the amount so set apart is insufficient for the support of the widow and children or either and there is other estate of the decedent, the court may in its discretion order such rea-

sonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate," etc.

It is unquestionably true that at the common law no exemptions existed. 12 Am. & Eng. Enc. Law, 67. This is also generally true of the right to inherit. See Strauss v. State, 36 N. D. 594, L.R.A. 1917E, 909, 162 N. W. 908; Moody v. Hagen, 36 N. D. 471, L.R.A. —, —, 162 N. W. 704; Johnson v. Olson, 92 Kan. 819, L.R.A.1915E, 327, 142 Pac. 256. It is also true that the allowance paid to the wife and family of a deceased person are purely of statutory origin. 2 Am. & Eng. Enc. Law, 156. Do, then, §§ 8725 and 8727 of the Compiled Laws of 1913 include and contemplate nonresident aliens whose husbands have lived within the United States for fifteen years, but who themselves, during all of that time, have lived separate and apart from their husbands and in a foreign country, and who have no children? I think they do.

The statute says nothing about residents or nonresidents, alienage or nonalienage, abandonment or nonabandonment. Section 8725 simply provides that "there shall be set apart absolutely to the surviving wife or husband, etc."

It is in my opinion, and strictly speaking, a statute of succession or inheritance and distribution, rather than a statute of exemptions. See Farmers State Bank v. Smith, 36 N. D. 225, 162 N. W. 302; Farris v. Battle, 80 Ga. 187, 7 S. E. 262. It must be construed in connection with § 5729, Comp. Laws 1913, which provides that "aliens may take in all cases by succession as well as citizens." It should also be considered in connection with the treaty of 1848 between the United States and Austria-Hungary, which provides that:

"Article 1: The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the states of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country, where the said property lies, shall be liable to pay in like cases." See [9 Stat. at L. 944] 7 Fed. Stat. Anno. 417.

War not having yet been declared with Austria-Hungary, this treaty is still operative.

The language of the act is clear, and there can be no doubt of its meaning. Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265; Mowser v. Mowser, 87 Mo. 437; Slack v. Slack, 123 Mass. 443; Welch v. Welch, 181 Mass. 37, 62 N. E. 982; Kellogg v. Graves, 5 Ind. 509; Singleton v. McQuerry, 8 Ky. L. Rep. 782; Mitcham v. Moore, 73 Ala. 542; Stromberg v. Stromberg, 119 Minn. 325, 138 N. W. 428; Grieve's Estate, 165 Pa. 126, 30 Atl. 727; Comerford v. Coulter, 82 Mo. App. 362. See also as to right generally Woods v. Teeson, 31 N. D. 610, 154 N. W. 797.

Nor is there, in my opinion, any merit in the contention that nonresidence or alienage precludes the plaintiff and respondent from taking, under § 8727, Compiled Laws of 1913, which provides that "if the amount so set apart is insufficient for the support of the widow and children or either, and there is other estate of the decedent, the court may in its discretion order such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, which in case of an insolvent estate must not be longer than one year after the granting letters testamentary or of administration."

As was said by the supreme court of Georgia in Farris v. Battle, supra: "In the view we take of the law, the provision for year's support is *a branch of the Statute of Distributions,* and the persons entitled to it are just as much and as absolutely entitled as they are in case of intestacy to a distributive share of the residue after the year's support is deducted and all debts are paid. It is a branch of the Statute of Distributions, and prescribes how the estate of a deceased person to this extent is to be disposed of. Creditors are left out, and adult children are left out, until this much of the estate is withdrawn from it. Then they are admitted for participation in the balance. *They have no right to anything except by the Statute of Distributions. To take at all, they must look to the law, and must take according to law.* This being so, we consider that the special provision applicable to the widow and minor children gives them this much advantage over other distributees. It makes their part of the estate that much more, and they take it as absolutely and unconditionally, and for as long a time, as distributees

take under the general provisions of the statute. It requires nothing to give a right to this benefit, except the relation of wife or minor child. When that relation exists at the time of the death, the person or persons sustaining it are entitled to make their claim under the terms of the statute." See also Farmers State Bank v. Smith, 36 N. D. 225, 162 N. W. 302; Banse v. Muhme, 13 Ohio C. C. 501, 7 Ohio C. D. 224.

I have carefully examined the cases cited by counsel for appellant. In nearly all of them, however, the court was either dealing with the discretion of the trial judge in refusing to award an extra allowance, or the court erroneously treated the right as a right of exemptions rather than of inheritance (see Ex parte Pearson, 76 Ala. 521; Allen v. Manasse, 4 Ala. 555; Barber v. Ellis, 68 Miss. 172, 8 So. 390; Emmett v. Emmett, 14 Lea, 370); or there was no constitutional or statutory provision such as ours entitling the alien to inherit, or the right involved was a homestead right, where a home and a residence was essential to the claim (see Alston v. Ulman, 39 Tex. 158; Stanton v. Hitchcock, 64 Mich. 326, 8 Am. St. Rep. 821, 31 N. W. 395); or the estate of a nonresident, as well as the claim of a nonresident, was involved and the statute therefore held not applicable. See Smith v. Howard, 86 Me. 205, 41 Am. St. Rep. 537, 29 Atl. 1008; Hascall v. Hafford, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423; Graham v. Stull, 92 Tenn. 673, 21 L.R.A. 241, 22 S. W. 738; Farris v. Sipes, 99 Tenn. 298, 41 S. W. 443; Shannon v. White, 109 Mass. 146; Richardson v. Lewis, 21 Mo. App. 531.

I cannot, it is true, so distinguish the Pennsylvania cases of Spier's Appeal, 26 Pa. 233; Hettrick v. Hettrick, 55 Pa. 290; Odiorne's Appeal, 54 Pa. 175, 93 Am. Dec. 683. These cases, however, I believe are hardly in the line of authority, and seem to consider the matter in the light of a claim to an allowance to the poor rather than a right of succession or inheritance, and no reference is made therein to any statutory enactment which allowed the alien to inherit.

I am also not unaware of the case of Tromsdahl v. Beaton, 27 N. D. 441, 52 L.R.A.(N.S.) 746, 146 N. W. 878. In this case, however, there was involved the right merely of a nonresident wife on an alleged homestead as against a mortgagee; the wife not having joined in the execution of the mortgage. The wife had never at any time made her home upon the land, nor did it appear that she was in the country at the time

of the execution of the mortgage. The husband also had left the land soon after the mortgage was executed.

There is also, in my opinion, no merit in the contention that appellant's motion for a new trial was wrongly denied. No diligence was shown to produce the newly discovered evidence, and, above all, there is no reason to believe that a new trial would change the result in any way. All that it would tend to show, at the most, would be that the appellant was not without fault, and that her husband had not illtreated her while in Hungary. This would not negative the fact that she was still his wife, and, if she was his wife at the time of his decease, she was entitled to recover.

Nor is there any merit in the contention that improper evidence was admitted in regard to the character of the deceased. The question at issue is really a question of law. It was whether a divorce had been had or not been had, or whether the petitioner was the wife of the deceased at the time of his death. The evidence on the other matters could have had no effect upon the judgment.

For these reasons I am of the opinion that the judgment of the district court should be affirmed.

ROBINSON, J. (dissenting). The plaintiff is the surviving widow of Ludvig Krumenacker, who died leaving personal property amounting to $2,500. The defendants appeal from a judgment pursuant to the statute giving the widow of a deceased husband an allowance of $1,500 from his personal property. It is contended that the widow should not have any allowance because she was not a resident of the state.

In Austria-Hungary, the deceased cruelly beat, deserted, and abandoned the plaintiff. She did not follow him up and insist on living with him. Hence, it is claimed that the wrongs which he did to her in his lifetime should be rounded out by denying to her any share in his estate. Her claim is based on this statute,—Compiled Laws, § 8725: There shall also be set apart absolutely to the surviving wife or husband or minor children all the personal property of the testator or intestate which would be exempt from execution, if he were living, including all property absolutely exempt and other property selected by the person or persons entitled thereto to the amount in value of $1,500. The statute does not provide that the surviving widow must be a

resident of the state or the head of a family, or that it must be her intention to become a resident of the state. It is quite immaterial as to whether the statute be classified as one of exemption or of inheritance. In either case a person who comes within the letter of the statute is entitled to its benefits. The husband died leaving personal property in excess of $1,500. The plaintiff is his surviving wife. Hence, she is entitled to the $1,500. It is her inheritance.

An exemption statute applies to property which belongs to a party and exempts it from legal process. An inheritance statute gives to a party property not belonging to him. It gives him title by descent. It may be the legislature was wrong in not limiting the inheritance of surviving widows to residents of the state, or to persons having a mind to become a resident, but it is not for the courts to make any such limitations. It cannot be done without judicial legislation.

ARTHUR B. STEARNS v. MERCHANTS' LIFE & CASUALTY COMPANY.

(165 N. W. 568.)

Accident insurance — application for — policy — advance payment of premium — receipt for — to cover option of twenty days — money not remitted by agent — insured injured within the twenty days — policy issued by company without knowledge of injury — policy effective — — recovery may be had.

1. Where, in an application for an accident insurance policy which was applied for on the 2d day of October, 1911, the receipt acknowledged the payment of $5

NOTE.—Although mere delay in passing upon application for insurance cannot be construed into acceptance thereof by the insurer, as will be found by an examination of the cases cited in notes on the subject in 36 L.R.A.(N.S.) 1211 and 51 L.R.A. (N.S.) 873, the retention of the premium seems to raise a different question, making the company liable as on an insurance contract. The proposition that an insurer should be held liable for a loss on an application for insurance because of the negligence of the insurance agent in failing to forward the application within a reasonable time is undoubtedly sound, and is discussed in a note and case in 40 L.R.A. (N.S.) 164, on the liability of an insurance company for negligent delay in passing upon or issuing policy until after loss.

"being payment in advance to carry policy so applied for to December 1, 1911," and also an agreement that, "should said company decline to issue a policy therein in twenty days from the date thereof, the amount of payment actually made should be returned to said applicant by the person signing this receipt;" and the money was not returned or offered to be returned to the insured, nor was it transmitted by such agent to the company within the twenty days, and after the lapse of said twenty days the insured was injured, but later, without knowledge of such accident and immediately upon the receipt of the application, the company approved of the risk and issued a policy thereon.—*Held*, that the insured might recover on the policy; that the receipt merely gave to the insurance company an option of twenty days in which to decline to accept said policy, and that the company not having declined the risk within the prescribed time and having approved of it for all other reasons, the policy was effective.

Insurance company — agent of — authorized to accept applications — to receive payment of premium — acts as agent of company.

2. "An agent of an insurance company who is authorized to accept applications and to receive advance premiums thereon is, in the transmission of such applications and premiums, the agent of the insurance company, and not of the insured."

Opinion filed October 13, 1917. Rehearing denied December 14, 1917.

Action on an accident insurance policy.

Appeal from the county court of Ward county, Honorable *William Murray*, Judge.

Judgment for defendant.

Plaintiff appeals.

Reversed.

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

An agent of an accident insurance company who is authorized to accept applications for such insurance and to receive payment of premiums acts as the agent of the company in so doing, and not as agent of the insured.

If he fails to remit in accordance with the application, but does so later, and a policy is issued to the insured, but insured is injured before the issuance of policy, and policy is issued by company without knowledge of such injury, and such injury occurs within the time mentioned in receipt for advance premium paid, the company is liable, and a recovery may be had. Preferred Acci. Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986.

The insurance contract, under the application and the receipt for the advance premium, was a valid, enforceable contract, and if insured was injured during the time therein specified, he can recover, regardless of the provisions of the policy thereafter issued. Leisen v. St. Paul F. & M. Ins. Co. 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837; Waterbury v. Dakota F. & M. Ins. Co. 6 Dak. 468, 43 N. W. 697; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 167, 45 N. W. 799; Stotlar v. German Alliance Ins. Co. 23 N. D. 346, 136 N. W. 792.

The whole trend of modern authority is to the effect that courts will look with leniency upon those who have, in good faith, made and kept their contract; and that where an insurance company accepts the benefits of a contract made by its authorized agent, it is estopped to defend against loss. Boyer v. State Farmers' Mut. Hail Ins. Co. 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671; Pfiester v. Missouri State L. Ins. Co. 85 Kan. 97, 116 Pac. 245.

It cannot be doubted that the insurer should be held liable for a loss sustained by an applicant for insurance, because of the negligence of the insurer's agent in failing to forward the application within a reasonable time. Duffie v. Banker's Life Asso. 160 Iowa, 19, 46 L.R.A. (N.S.) 25, 139 N. W. 1087.

The policy agreed to be issued and delivered is not the basis of this action. The agent took appellant's application for insurance, accepted his money for the premium then to be paid, and issued to appellant a proper receipt therefor. This transaction constitutes the contract. Western Assur. Co. v. McAlpin, 23 Ind. App. 230, 77 Am. St. Rep. 423, 55 N. E. 119; Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 13 L. ed. 187; Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co. 19 How. 318, 15 L. ed. 636; Baile v. St. Joseph F. & M. Ins. Co. 73 Mo. 371; Wood, Fire Ins. §§ 11, 20; Kelly v. Commonwealth Ins. Co. 10 Bosw. 82; Security F. Ins. Co. v. Kentucky, M. & F. Ins. Co. 7 Bush, 81, 3 Am. Rep. 301; May, Ins. § 22a; Union Cent. L. Ins. Co. v. Pauly, 8 Ind. App. 85, 35 N. E. 190; Bragdon v. Appleton Mut. F. Ins. Co. 42 Me. 259; Kohne v. Insurance Co. of N. A. 1 Wash. C. C. 93, Fed. Cas. No. 7,920.

That even a parol agreement to insure has been held valid by the courts. Security F. Ins. Co. v. Kentucky, M. & F. Ins. Co. 7 Bush, 81, 3 Am. Rep. 301; First Baptist Church v. Brooklyn F. Ins. Co. 19

N. Y. 305; Audubon v. Excelsior Ins. Co. 27 N. Y. 216; Hamilton v. Lycoming Mut. Ins. Co. 5 Pa. 339; Davenport v. Peoria M. & F. Ins. Co. 17 Iowa, 276; Bragdon v. Appleton Mut. F. Ins. Co. 42 Me. 259; Andrews v. Essex F. & M. Ins. Co. 3 Mason, 6, Fed. Cas. No. 374; Palm v. Medina County Mut. F. Ins. Co. 20 Ohio, 529; Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298.

There is here no difficulty in determining when the risk was to commence. The contract is certain. Eames v. Home Ins. Co. supra; Hartford F. Ins. Co. v. King, 106 Ala. 522, 17 So. 707; Schultz v. Phenix Ins. Co. 77 Fed. 389; Stockton v. Firemen's Ins. Co. 33 La. Ann. 580, 39 Am. Rep. 277; Emery v. Boston M. Ins. Co. 138 Mass. 412; Home Ins. Co. v. Adler, 71 Ala. 524; Newark Mach. Co. v. Kenton Ins. Co. 50 Ohio St. 556, 22 L.R.A. 772, 35 N. E. 1060; Sproul v. Western Assur. Co. 33 Or. 105, 54 Pac. 180.

The remedy sought, or the form of procedure here adopted, is proper. Comp. Laws, §§ 7439, 7440, ¶ 2.

Bosard & Twiford and *P. W. Guilford,* for respondent.

In the absence of a stipulation to the contrary, an accident insurance policy takes effect from its date, and a policy bearing a given date and insuring for the future only will not permit a recovery for a loss occurring prior to such date. 1 C. J. 408; Fowler v. Preferred Acci. Ins. Co. 100 Ga. 330, 28 S. E. 398; Rogers v. Equitable Mut. Life & Endowment Asso. 103 Iowa, 337, 72 N. W. 538; Rayburn v. Pennsylvania Casualty Co. 138 N. C. 379, 107 Am. St. Rep. 548, 50 S. E. 762.

This is purely an action to recover for loss, under the policy. Walker v. Farmers' Ins. Co. 51 Iowa, 679, 2 N. W. 583.

There is no showing here that the application for insurance was ever accepted by the company, prior to the date of the injury. Hartford F. Ins. Co. v. King, 106 Ala. 519, 17 So. 707.

The application made and the money paid was for a policy of insurance to be later on issued. It in no manner constituted a contract, or the contract contemplated. Wacker v. Globe F. Ins. Co. 37 N. D. 13, 163 N. W. 263.

BRUCE, Ch. J. This is an action to recover on an accident insurance policy, and the appeal is by the plaintiff from a judgment entered against him upon a directed verdict.

On October 2, 1911, the plaintiff paid a policy fee and premium to a duly authorized agent of the company, and obtained the following receipt:

Received of Arthur Stearns an application for a policy in the Merchant's Life & Casualty Company, and the sum of $5 being payment in advance to carry policy so applied for to December 1, 1911.

Signed, F. P. Francis.

It is expressly agreed, that should said company decline to issue a policy herein in twenty days from date hereof, the amount of payment actually made shall be returned to said applicant by the person signing this receipt. Applicants will please notify the company at Minneapolis, Minnesota, should the policy not be received in ten days from the date hereof.

At the same time that the money was paid to the agent and the receipt obtained, an application was signed by the insured and delivered to the agent, which contained the following language:

"This application shall not be binding upon the company until accepted at the home office, and the policy shall not be in force until actually issued and the policy fee and premium paid."

According to the rules of the company this first premium was to be paid to the agent and retained by him as a commission. It at no time was repaid or offered to be repaid to the plaintiff.

The application, for some reason or other, was not received at the home office of the company until October 31, 1911.

The accident to the plaintiff took place on October 28, 1911.

On October 31st the policy was issued and mailed directly to the plaintiff, the general office not at that time having any knowledge of the prior accident.

It also appears that on January 12, 1912, the company received $3 additional premium from the plaintiff, Stearns, being the premium to March 1, 1912, and receipted therefor, and as far as the record shows has not returned or offered to return the same.

The preliminary notice of disability was recovered on November 7, 1911.

The verdict for the defendant was directed on the theory that the accident occurred before the policy was issued.

The receipt acknowledged that the sum of $5 was a "payment in advance to carry the policy so applied for to December 1, 1911. It "expressly agreed that, should said company decline to issue a policy herein in twenty days from date hereof, the amount of payment actually made shall be returned to said applicant by the person signing this receipt." It is true that it also contained a request in the form that "applicants will please notify the company at Minneapolis, Minnesota, should the policy not be received in ten days from date hereof;" but this was a request, and not a condition. It is also true that it contained a provision that "this application shall not be binding upon the company until accepted at the home office, and that the policy shall not be in force until actually issued and the policy fee and premium paid;" but the money was retained, the application was approved, the policy was mailed to and received by the plaintiff, and the refusal to pay was not based on any defect in the application or any fault of the insurer. The contract in short to any fair-minded man must have been, and was, that the company had twenty days in which to pass upon the application and in which to return the money if it declined to accept the risk; and that, if it did not act upon this option, the insurance would be binding. In the eyes of the law, therefore, a contract of insurance existed on the terms of the application, and the policy contracted for, whether the policy was actually and physically issued or not. The receipt was positive, to the effect that the $5 premium was received as "payment in advance to carry policy so applied for to December 1, 1911; and the options were options for the benefit of the company, and not of the insured. It could not delay the matter for twenty days and keep the money, and then repudiate the contract.

This being the case, there was, as we have before said, an implied contract of insurance upon the terms and conditions of the application and the policy; and it is immaterial whether the complaint was based upon a contract for insurance or an actual insurance contract. The policy in short was, to all intents and purposes, issued. The clause of the complaint, therefore, is sufficiently sustained by the proof, which alleges: "That on the 2d day of October, 1911, for an agreed payment

which was then and there made to the defendant by the plaintiff, the said defendant did thereafter issue to the plaintiff a policy on the life and health of the plaintiff, and did deliver the same to him, etc." Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

It is true that some authorities seem to hold that the action in a case such as that which is before us should be based on the theory of the negligence of the agent in not transmitting the application to the head office of the company within the twenty days' period, but we can see no real distinctions. All of these cases hold the company, as well as the agents, liable, and base the liability of the company on the terms and conditions of the policy which should have been issued. The plaintiff in short is allowed to recover for his losses sustained under the proposed policy, and not merely for his premium or his loss of time. As the supreme court of Kansas has so aptly said, the agent "was merely the arm of the defendant; the obligation resting on him was the obligation of the defendant." Boyer v. State Farmers' Mut. Hail Ins. Co. 86 Kan. 442, 40 L.R.A.(N.S.) 164, 121 Pac. 329, Ann. Cas. 1915A, 671; Pfiester v. Missionary State L. Ins. Co. 85 Kan. 97, 116 Pac. 245.

It is to be remembered in the case at bar that the company actually accepted the risk and issued the policy, so there can be no claim that the risk was in any measure undesirable or the applications inadequate.

It is also to be remembered that in such cases the agent is the agent of the company, and not of the insurer; and that the company, therefore, is chargeable with his negligence in failing to forward the application and to report the payment of the premium within the twenty days. Duffie v. Bankers' Life Asso. 160 Iowa, 19, 46 L.R.A.(N.S.) 25, 139 N. W. 1087; Boyer v. State Farmers' Mut. Hail Ins. Co. supra.

It is also to be remembered that, even after the twenty days had passed, and after the notice of the accident, the company accepted another premium of $3 thereon.

It in short accepted the risk, and that acceptance at least dated back to the last day of the twenty days' period.

The judgment of the County Court is reversed and a new trial is ordered.

THE JOHN MILLER COMPANY, a Corporation, v. THE HARVEY MERCANTILE COMPANY, Ltd., a Corporation; Sayre, Strong Grain & Merchandise Company, a Corporation; Calgary Colonization Company, a Corporation; H. H. Phillips, A. J. Sayre, L. P. Strong, T. L. Beiseker, James T. Morris, Individually and as Trustees for the Corporations hereinafter Named, Creditors of the Harvey Mercantile Company, Ltd., a Corporation; Tibbs, Hutchings, & Company, a Corporation; Empire Cream Separator Company, a Corporation; Marshall Wells Hardware Company, a Corporation; Great Northern Implement Company, a Corporation; Northern Shoe Company, a Corporation; Pure Oil Company, a Corporation; Standard Oil Company, a Corporation; Singer Sewing Machine Company, a Corporation; International Harvester Company, a Corporation; Winston, Harper, Fisher Company, a Corporation; Patterson & Stevenson Company, a Corporation, also Known as T. W. Stevenson Company, a Corporation; Stacy Mercantile Company, a Corporation; F. Mayer Boot & Shoe Company, a Corporation; Twin City Separator Company, a Corporation; Northwestern Bedding Company, a Corporation; Miller, Watt, & Company, a Corporation, Defendants,

and

GREAT NORTHERN IMPLEMENT COMPANY, a Corporation; Empire Cream Separator Company, a Corporation; Patterson & Stevenson Company, a Corporation; Winston, Harper, Fisher Company, a Corporation; Marshall Wells Hardware Company, a Corporation; F. Mayor Boot & Shoe Company, a Corporation; Northern Shoe Company, a Corporation; Pure Oil Company, a Corporation; Singer Sewing Machine Company, a Corporation; Twin City Separator Company, a Corporation; Stacy Mercantile Company, a Corporation, and James T. Morris, Appellants.

(165 N. W. 558.)

Sequestration — proceedings — defendants in — who may be joined as — purpose of statute — insolvent corporation — assets of — general fund — collecting into — payment of debts.

1. Under the sequestration proceedings which are authorized by § 7989 of the

Compiled Laws of 1913, not only may numerous fraudulent grantees be joined as defendants with the corporation itself, but all officers and stockholders and other persons who have incurred a liability to the corporation. The purpose of the statute is to provide a means for collecting into a general fund all of the assets of an insolvent corporation, so that not only the debt due to the petitioner may be paid, but that, if desired, all other debts of the concern, and that its affairs may be wound up.

Debtor — preference right to pay — includes a corporation — statute.

2. The word "debtor" in § 7218 of the Compiled Laws of 1913, which provides that "a debtor may pay one creditor in preference to another or may give to one creditor security for the payment of his demand in preference to another," includes corporations as well as general partnerships and individuals, and gives to corporations equally with individuals and general partnerships the general right to prefer one creditor above another.

Complaint — allegations of — assets — assignment of — trustee — purpose of — transfer — illegal when.

3. An allegation in the complaint that an assignment of certain of the assets of an insolvent corporation was made to a trustee "in trust to convert into cash and distribute the proceeds, less collection charges, among the certain defendant creditors, to apply on their claims against said corporation," does not show an illegal transfer; there being no allegation either that the payment was in full and would exclude such creditors from recovering any balance that might be due, or that there was or was expected to be any surplus which was to be repaid to the debtor corporation, or that a general assignment was made or attempted.

Insolvent corporation — preference of creditors — assets — trust fund — for payment of debts — lien upon — assets — priority.

4. Although an insolvent corporation may, as a general rule, prefer certain of its creditors, the assets of a corporation are nevertheless a trust fund for the payment of its debts to the extent that the creditors have a lien upon them which is prior in point of right to any claim which the stockholders or directors as such can have, and the courts should be astute to defeat any scheme or device which is calculated to withdraw this fund or in any way to place it beyond the reach of creditors.

Complaint — cause of action — against directors and favored creditors — assets and property — beyond reach of plaintiff — scheme to place.

5. A complaint states a cause of action against both the directors of an insolvent corporation and its favored creditors, which charges that a scheme was planned and participated in by all of the defendants to place all of the property and assets beyond the reach of the plaintiff creditor and other creditors similarly situated, to convey to the directors certain of the assets, and to make

unlawful payments thereto, and generally to divide all of its assets between the said directors and the said favored creditors.

Opinion filed November 14, 1917. Rehearing denied December 14, 1917.

Action to sequestrate the assets of an insolvent corporation.

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

Order for plaintiff overruling demurrers to complaint.

Order affirmed.

Frank B. Dodge and *Frank R. Hubacheck* and *Edward P. Kelly,* for appellants.

If the directors of a corporation have a right to give a preference, then their intent is wholly immaterial and no fraud can be predicated thereon. If they acted with fraudulent intent and such was known to the defendants, such knowledge would not be material. Knowledge of the intent of a seller by a purchaser may affect the sale, but not knowledge acquired by a creditor. Lockren v. Rustan, 9 N. D. 43, 81 N. W. 63.

In order that a payment be or constitute a preference, the debtor must be insolvent or must, by the preferential payment, make himself insolvent. Neither of these was effected here. There is no averment of facts sufficient to show the essentials of a preference. 3 Clark & M. Priv. Corp. p. 2365; 1 Cook, Corp. 7th ed. § 9; Corey v. Wadsworth, 118 Ala. 488, 44 L.R.A. 766, 25 So. 503; Worthen v. Griffith, 59 Ark. 565, 43 Am. St. Rep. 50, 28 S. W. 286; Merced Bank v. Ivett, 127 Cal. 134, 59 Pac. 393.

"The assets of an insolvent corporation constitute a trust fund for the benefit of creditors only as between creditors and stockholders, and do not constitute a trust fund for ratable distribution among all its creditors, hence such a corporation may prefer a creditor." John V. Farwell Co. v. Sweetzer, 10 Colo. App. 421, 51 Pac. 1012; Catlin v. Eagle Bank, 6 Conn. 233.

"A corporation may make a general assignment with or without preference." Albany & R. Iron & Steel Co. v. Southern Agri. Works, 76 Ga. 135, 2 Am. St. Rep. 26; State Nat. Bank v. Union Nat. Bank, 168 Ill. 519, 48 N. E. 82.

"An insolvent corporation does not hold its property in trust or subject to a lien in favor of creditors in any other sense than does an individual debtor." Levering v. Bimel, 146 Ind. 545, 45 N. E. 775; Manton v. Seiberling, 107 Iowa, 534, 78 N. W. 194; Grand De Tour Plow Co. v. Rude Bros. Mfg. Co. 60 Kan. 145, 55 Pac. 848; Sargent v. Webster, 13 Met. 497, 46 Am. Dec. 743; Bank of Montreal v. J. E. Potts Salt & Lumber Co. 90 Mich. 345, 51 N. W. 512.

Corporate property is not held in trust in any proper sense of the term. Absolute control and power of disposition are inconsistent with the idea of a trust. Hospes v. Northwestern Mfg. & Car Co. 48 Minn. 174, 15 L.R.A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; Sells v. Rosedale Grocery & Commission Co. 72 Miss. 590, 17 So. 236; Pullis v. Pullis Bros. Iron Co. 157 Mo. 565, 57 S. W. 1095.

To the same effect are the following authorities: Teitig v. Boesman Bros. & Co. 12 Mont. 404, 31 Pac. 371; M. A. Seeds Dry-Plate Co. v. Heyn Photo-Supply Co. 57 Neb. 214, 77 N. W. 660; Thomson-Houston Electric Light Co. v. Henderson Electric Light Co. 116 N. C. 112, 21 S. E. 951; Moller v. Keystone Fibre Co. 187 Pa. 553, 41 Atl. 478; Weyeth Hardware & Mfg. Co. v. Jones-Spencer-Bateman Co. 15 Utah, 110, 47 Pac. 604; Pyles v. Riverside Furniture Co. 30 W. Va. 123, 2 S. E. 909; Hinz v. Van Dusen, 95 Wis. 503, 70 N. W. 657; Conway v. Smith Mercantile Co. 6 Wyo. 468, 46 Pac. 1084; Hollins v. Brierfield Coal & I. Co. 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; American Exch. Nat. Bank v. Ward, 55 L.R.A. 356, 49 C. C. A. 611, 111 Fed. 782; 5 Thomp. Corp. § 6492.

Pierce, Tenneson, & Cupler, for respondent.

There was a preference here, and it was an unlawful one—a scheme designed by the stockholders, directors, and certain creditors, to wholly defeat the plaintiff's claim.

The scheme was to wind up the business of the corporation, and if it was then insolvent such scheme rendered it so. Comp. Laws 1913, §§ 4541–4544, 4557, 4560, 4565, 4567, 4568, 7968, subds. 2, 5, 7989–8013; N. Y. Consol. Laws, chap. 23, §§ 100–115, 130–136.

The assets of a corporation are a "trust fund" for the benefit of the creditors and the stockholders in the order named, the moment the corporation becomes insolvent. 10 Cyc. 1246, 1249; 2 Morawetz, Corp. §§ 780 et seq.; 5 Thomp. Corp. §§ 6492, and 6496; 3 Clark

& M. Priv. Corp. § 780; Ford v. Plankinton Bank, 87 Wis. 370, 58 N. W. 766; Adams & W. Co. v. Deyette, 8 S. D. 119, 31 L.R.A. 497, 59 Am. St. Rep. 751, 65 N. W. 471; Furber v. Williams-Flower Co. 21 S. D. 228, 8 L.R.A.(N.S.) 1259, 111 N. W. 548, 15 Ann. Cas. 1216; 3 L.R.A. Ex. Anno. (vols. 1–70), p. 1045; Buck v. Ross, 68 Conn. 29, 57 Am. St. Rep. 61, 35 Atl. 763; Sabin v. Columbia River Lumber & Fuel Co. 25 Or. 15, 42 Am. St. Rep. 756, 34 Pac. 692, 35 Pac. 854; Larrabee v. Franklin Bank, 35 Am. St. Rep. 774 and note, 114 Mo. 592, 21 S. W. 747; 8 Thomp. Corp. p. 679; Adam Roth Grocery Co. v. Hotel Monticello Co. 148 Mo. App. 513, 128 S. W. 542; Brown v. Wilmington & B. Leather Co. 9 Del. Ch. 39, 74 Atl. 1105.

"The corporate assets are converted into a 'trust fund' for the benefit of creditors, where the corporation has ceased to do business or to exericise its franchises." 8 Thomp. Corp. p. 681; Voightman & Co. v. Southern R. Co. 123 Tenn. 452, 131 S. W. 982, Ann. Cas. 1912C, 211.

The "trust fund" doctrine applies in some jurisdictions to a corporation which has ceased doing business. Harle-Hass Drug Co. v. Rogers Drug Co. 19 Wyo. 35, 113 Pac. 791, Ann. Cas. 1913E, 181.

"A preferential deed of trust executed by a private trading corporation after its insolvency, ceasing to carry on its business without any intention of resuming business, is void as against unsecured creditors." Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. 22 L.R.A. 802, and note, 86 Tex. 143, 24 S. W. 16.

A corporation may be deemed insolvent when it is unable to meet its pecuniary obligations as they mature. Benner v. Scandinavian American Bank, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702, 706; 4 Clark & M. Priv. Corp. § 780C; Miller v. Gourley, 65 N. J. Eq. 237, 55 Atl. 1083; Empire State Trust Co. v. William F. Fisher & Co. 67 N. J. Eq. 602, 60 Atl. 940, 3 Ann. Cas. 393; American Handle Co. v. Standard Handle Co. — Tenn. —, 59 S. W. 709, and other cases; Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216.

There can be no valid preference of a corporate debt due a director or guaranteed by him. 5 Thomp. Corp. §§ 6504, 6520, pp. 5129, 5130; 3 Clark & M. Priv. Corp. §§ 786, 787b, pp. 2411, 2414, 2419;

8 Thomp. Corp. § 6207, p. 683; Buck v. Ross, 57 Am. St. Rep. 60, and note 67, 68 Conn. 29, 35 Atl. 763; 3 Thomp. Corp. §§ 2951, 2958, 2963, pp. 2109, 2117, 2121, 2122; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163.

"The directors of a corporation who distribute all or substantially all of its assets among themselves, the stockholders and favored creditors, to the detriment of its general creditors, are personally liable to refund the amount so distributed, up to the amount of the unpaid debts." Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 761, 85 Am. St. Rep. 667, 61 N. E. 163; Darcy v. Brooklyn & N. Y. Ferry Co. 26 L.R.A.(N.S.) 267, and note, 196 N. Y. 99, 134 Am. St. Rep. 827, 89 N. E. 461; White, P. & P. Mfg. Co. v. Henry B. Pettes Importing Co. 30 Fed. 864; Mills v. Hendershot, 70 N. J. Eq. 258, 62 Atl. 542; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; McIver v. Young, 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Re National Funds Assur. Co. L. R. 10 Ch. Div. 118, 48 L. J. Ch. N. S. 163; Moxham v. Grant [1900] 1 Q. B. 88, 69 L. J. Q. B. N. S. 97, 48 Week. Rep. 130, 81 L. T. N. S. 431, 16 Times L. R. 34; Hurd v. New York & C. Steam Laundry Co. 167 N. Y. 89, 60 N. E. 327.

"One who receives assets of a corporation upon its dissolution is bound to respond to its creditors to the extent of the assets so received in a suit by them to reach the assets or their value." Williams v. Commercial Nat. Bank, 49 Or. 492, 11 L.R.A.(N.S.) 857, 90 Pac. 1012, 91 Pac. 443; Sharples Co. v. Harding Creamery Co. 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; Atlantic & B. R. Co. v. Johnson, 11 L.R.A.(N.S.) 1119, 1131, and note, 127 Ga. 392, 56 S. E. 482; Tiger v. Rogers Cotton Cleaner & Gin Co. 96 Ark. 1, 30 L.R.A.(N.S.) 694, 130 S. W. 585, Ann. Cas. 1912B, 488; Darcy v. Brooklyn & N. Y. Ferry Co. 196 N. Y. 99, 26 L.R.A.(N.S.) 267, 134 Am. St. Rep. 827, 89 N. E. 461; Irvine v. New York Edison Co. 207 N. Y. 425, 101 N. E. 358, Ann. Cas. 1914C, 441; Re Hicks, 170 N. Y. 195, 63 N. E. 276; Gilbert v. Finch, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Re National Funds Assur. Co. L. R. 10 Ch. Div. 118, 48 L. J. Ch. N. S. 163; Mox-

ham v. Grant, [1900] 1 Q. B. 88, 69 L. J. Q. B. N. S. 97, 48 Week. Rep. 130, 81 L. T. N. S. 431, 16 Times L. R. 34.

The transfer is objectionable for the further reason that it provides for the payment of any surplus to the debtor, thus operating to place such surplus beyond the reach of nonassenting creditors and to hinder and delay them in the collection of their claims. Maclaren v. Kramar, 26 N. D. 256, 50 L.R.A.(N.S.) 714, 144 N. W. 85.

"The trustees of all deeds of trust on property sought to be sold and all creditors named therein are necessary parties." 6 Pom. Eq. Jur. § 891, p. 1443; 20 Cyc. 708, 716; Bagley & S. Co. v. Lennig, 61 App. Div. 26, 70 N. Y. Supp. 242; Beals v. Buffalo Expended Metal Constr. Co. 49 App. Div. 589, 63 N. Y. Supp. 635; Cummings v. American Gear & Spring Co. 87 Hun, 598, 34 N. Y. Supp. 541; Proctor v. Sidney Sash, Blind & Furniture Co. 8 App. Div. 42, 40 N. Y. Supp. 454.

Bruce, Ch. J. This is an appeal from an order overruling a demurrer to a complaint.

The action is brought under articles 2 and 4 of the Code of Civil Procedure, and particularly §§ 7989 et seq. of the Compiled Laws of 1913, and is known as a sequestration proceeding, its purpose being to obtain an equal distribution of the property of an insolvent corporation among its various creditors.

The complaint alleges the incorporation of the defendant, the Harvey Mercantile Company, the ownership of its capital stock by the defendants Sayre, Strong, Beiseker and Sayre, Strong Grain & Merchandise Company; that on or about the 21st day of January, 1913, and the 3d day of February, 1913, the plaintiff, the John Miller Company, obtained judgments against the defendant Harvey Mercantile Company in the sum of about $5,222.87, and on which unsatisfied executions leave a balance of $4,665.38, with interest.

It further alleges that on the 3d day of November, 1910, the defendants Phillips, Sayre, Strong, and Beiseker were stockholders, directors, and managing officers of the said Harvey Mercantile Company, and did then and there, without dissolving and winding up said corporations and without paying or providing in any manner for the payment of it, the said John Miller Company, and with the intent

of defrauding it and such other creditors as were similarly situated, and hindering and delaying them in the execution of their judgments and claims, wrongfully and unlawfully assigned and delivered to the defendants James T. Morris, as agent of the defendant creditors, or to themselves the said Phillips, Sayre, Strong, & Beiseker, or all of them, in trust to convert into cash and to distribute the proceeds among the said defendant creditors, all of the notes, bills receivable, and accounts of the defendant corporation of the face value of $26,000 and $11,000 in money, and also traded the stock of merchandise of said corporation of the alleged value of $32,800 for an equity in real estate in Canada, which it caused to be conveyed, and to be held in the name of the Calgary Colonization Company, all of the stock of which was and is owned by the said Phillips, Sayre, Strong, and Beiseker, and of which the said defendants were and are officers and directors, and unlawfully transferred and conveyed to the defendant H. H. Phillips the balance of the corporate assets of said Harvey Mercantile Company, which remained in the state of North Dakota, all of such transfers being made without any consideration passing to the said corporation; that all of such transfers were made in furtherance of the same fraudulent and unlawful scheme, and were intended to and did effectually place all of the property and assets of said corporation beyond the reach of the said John Miller Company and other creditors similarly situated by the ordinary process of law; that each of the persons and corporations who took said property and money had knowledge, prior to the transfer, of the fraudulent and unlawful scheme, and participated therein; that by the acts of the defendants, all of the property belonging to the said Harvey Mercantile Company was divided and transferred, and no property was left for the payment of the claims and judgments of the said plaintiff John Miller Company and others; and that said Harvey Mercantile Company was at the times thereof, and ever since has been and now is, insolvent, and has never since said time conducted any business, and that the said John Miller Company has no adequate remedy at law in the premises.

It further alleges that the defendant James T. Morris received said cash payment of $11,000, and about $25,000 from the proceeds of the notes, bills, and accounts, and has paid over and distributed about $21,000 to a number of the defendants named, and that the defendants

James T. Morris, H. H. Phillips, A. J. Sayre, L. P. Strong, and T. L. Beiseker, have in their possession or control notes, bills, and accounts of the value of about $8,889, and the German State Bank of Harvey has of these notes the sum of the face value of $7,102 for collection.

The complaint further alleges that the said stock of merchandise represents only a part of the purchase price of the Canadian land and that the balance thereof was paid by the defendants Phillips, Sayre Strong, and Beiseker or the said Calgary Colonization Company, and that the management and disposition of said real estate has been in the defendants' name, and that the defendants by such act intended to place the property beyond the control of the court.

It further alleges that all of the capital stock of the said Harvey Mercantile Company was not fully paid for, and that the stock was issued to the defendants Phillips, Sayre, Strong and the Strong Grain & Merchandise Company, with the knowledge and without the dissent of the said defendants Phillips, Sayre, Strong, and Beiseker.

It further alleges that the defendants Phillips, Sayre, Strong, and Beiseker, when acting as officers and directors of the defendant the Harvey Mercantile Company misused the assets of said company and distributed the same unlawfully, and between the years 1906 and 1910 paid to the defendant H. H. Phillips large sums of money of the alleged sum of $5,000 in excess of the compensation provided for by the by-laws and resolutions, and the indebtedness of said corporation, to the said Phillips for his salary and commission when acting for said company.

The complaint further alleges that the defendants Phillips, Sayre, Strong, and Beiseker, while directors of said Harvey Mercantile Company, during the years 1906 to 1910 inclusive, unlawfully paid to themselves and to other stockholders large sums of money, the exact amount being unknown.

It further alleges that in November, 1910, said defendants H. H. Phillips, A. J. Sayre, L. P. Strong, and T. L. Beiseker decided to wind up the affairs of the corporation, and then and there, without dissolving and winding up the affairs of said corporation in the manner provided by law and without paying or providing for the payment of the claims of the plaintiff, divided and distributed all of the capital stock, property, and assets of said corporation among themselves and

certain other creditors of said corporation whom they thereby sought to favor and prefer; and that ever since said time said corporation has owned no property, has done no business, and the plaintiff has been unable to enforce the collection of its said judgments.

The complaint further alleges that between the years 1906 and 1910 the four defendants named created debts on behalf of and against said corporation beyond the amount of the subscribed capital stock.

It then prays that the transfers mentioned be adjudged fraudulent, null, and void, and that the defendants and each of them be held to hold such property and money as trustees for the plaintiff and other creditors similarly situated; that said defendants be required to reassign and repay said money and property to a receiver to be appointed, and that in the event of their refusal so to do that the plaintiff have judgment against the defendants and each of them for the value of said property; that the defendants and each of them be required to account for the money and property of the defendant received by them; that the defendants Phillips, Sayre, Strong, and Beiseker be required to account for their acts as directors in relation to their creation of debts, payments of money, and payment of dividends, and the issuance of the capital stock; that a receiver be appointed if necessary; and that during the pendency of the action the defendants be enjoined from further transferring, assigning, and disposing of any of the assets of said corporation.

To this complaint demurrers are interposed by the Great Northern Implement Company and the other creditors to whom property had been transferred, and whose debts had been paid, and for whose benefit the alleged transfers of land had been made.

In support of these demurrers the defendants urge that the first cause of action is double and multifarious; that it contains matters for and on account of which relief is first asked against James T. Morris as agent and trustee of certain creditors, together with the creditors whom he represented because of an alleged preference given them as creditors of the Harvey Mercantile Company by Phillips, Sayre, Strong, and Beiseker, while acting as directors of the said Harvey Mercantile Company, to accomplish which preference they transferred certain property of said company to said James T. Morris, as trustee; and, second, against Phillips, Sayre, Strong, and Beiseker for diverting

certain other property of the Harvey Mercantile Company to their own use through or by an exchange for land in Canada, of which they, said directors, were stockholders.

They claim that the second cause of action is to recover from Phillips, Sayre, Strong Grain & Merchandise Company the difference between the par value of the stock of the Harvey Mercantile Company subscribed for by them, and the amount paid therefor.

They claim that the 4th cause of action is to recover from Phillips, Sayre, Strong, and Beiseker for failure and neglect to perform their duties as officers and directors, and for their negligent mismanagement of the business of the company, and for suffering and allowing its money to be diverted, and especially in the payment to Phillips of money not due him.

They claim that the 6th cause of action is for relief against Phillips, Sayre, Strong, and Beiseker for moneys divided and paid to themselves, or to some of them, in the form of dividends which did not arise from the surplus profits of the business. They claim that the 6th cause of action is for relief against Phillips, Sayre, Strong and Beiseker for having, while acting as directors, created debts against said corporation beyond the amount of the subscribed capital stock.

They claim that various claims for relief as against the defendants referred to in the third, fourth, fifth, and sixth causes of action, are all to the end of paying the claim of the John Miller Company.

They claim that the appellants Morris and the creditor defendants are brought into the case and affected by averments contained in the first cause of action only, and by a part only of this; that the creditor defendants are therein charged with having received a preference out of certain property of the Harvey Mercantile Company, and other defendants, directors, with having diverted and appropriated certain other property to their own individual use.

They in short contend: (1) That the complaint does not state facts sufficient to constitute a cause of action; and (2) that several causes of action have been improperly united.

If it were not for the peculiar nature of the proceedings before us and for the peculiar nature of the statutes under which they are brought, we would have no doubt that several causes of action have been improp-

erly united. Comp. Laws 1913, § 7466; Pom. Rem. & Rem. Rights, 2d ed. 473; Nevin v. Peoples, 23 N. D. 202, 136 N. W. 73.

The proceeding, however, is what is known as a sequestration proceeding, and is brought under special provisions of the Compiled Laws of 1913, which provide that:

Section 7989. "Whenever a judgment shall be obtained against any corporation incorporated under the laws of this state and an execution issued thereon shall have been returned unsatisfied in whole or in part, the judgment creditor or his legal representative may maintain an action to procure a judgment sequestrating the property of a corporation and providing for a distribution thereof."

Section 7995. "In an action against a corporation upon a claim for which its stockholders, directors, trustees or other officers, or any of them, are liable by law in any event or contingency, one or more or all of the persons so liable may be made parties defendant by the original or by an amended or supplemental complaint; and their liability may be declared and enforced by the judgment in such action."

Section 7999. "Upon a final judgment being rendered in any action under this article, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made in the order prescribed in § 7387."

Section 8000. "In all cases in which the directors or other officers of a corporation, or the stockholders thereof shall have been made parties to an action in which judgment shall be rendered, if the property of such corporation shall be insufficient to discharge its debts, the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as shall be necessary to satisfy the debts of the corporation. If the debts of the corporation, or any part thereof, shall still remain unsatisfied, the courts shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders and adjudge the amount payable by each and enforce the judgment as in other cases."

These sections, and in fact §§ 7986–8013 of the North Dakota Compiled Laws of 1913, seem to have first appeared in the statutes of New York and (as they were not a part of the original Field Code) to have been adopted by us from that state. See N. Y. Consol. Laws,

§§ 90–92, 100–115 and 130–136, chap. 23; N. Y. Code Civ. Proc. §§ 1781–1783. Almost contemporaneously with their adoption by us, and in an unbroken line of decisions since that time, they were there examined and construed, and in such a manner as to allow a joinder such as that which is before us. See Cummings v. American Gear & Spring Co. 87 Hun, 598, 34 N. Y. Supp. 541; Beals v. Buffalo Expended Metal Constr. Co. 49 App. Div. 589, 63 N. Y. Supp. 635; Bagley & S. Co. v. Lennig, 61 App. Div. 26, 70 N. Y. Supp. 242; Proctor v. Sidney Sash, Blind & Furniture Co. 8 App. Div. 42, 40 N. Y. Supp. 454.

These authorities, though not necessarily conclusive upon us, are highly persuasive, and, in our opinion, express both a logical and practical rule, and one which we elect to follow. The statutes in short are sequestration statutes. Their purpose is to provide a means for collecting into a general fund all of the assets of the insolvent corporation, so that not only the debt due to the petitioner, but, if desired, its other debts, may be paid, and also, if desired, its affairs may be wound up. Sections 7995 provides that stockholders and officers who are liable by law in any event or contingency may be made parties defendant, and the term "sequestrating," which is used in § 7989, must, if its derivation be considered, be held to involve a seeking out as well as a setting apart. The action or proceeding which is authorized by our Code is similar to a creditor's bill. Its object and purpose is single, and that is to collect into a common fund the assets of the corporation. Such being the case, not only may numerous fraudulent grantees be joined as defendants with the corporation itself, but all those officers and stockholders and others who have incurred a liability to the corporation. Different personal issues may, it is true, be separated in the discretion of the court, and some, perhaps, if desired, submitted to the judgment of juries, but the proceeding is an entirety. Proctor v. Sidney Sash, Blind & Furniture Co. 8 App. Div. 42, 40 N. Y. Supp. 454; 7 Words & Phrases, 6419; Bagley & S. Co. v. Lennig, 61 App. Div. 26, 70 N. Y. Supp. 242; Cummings v. American Gear & Spring Co. 87 Hun, 598, 34 N. Y. Supp. 54; Beals v. Buffalo Expanded Metal Constr. Co. 49 App. Div. 589, 63 N. Y. Supp. 635; 6 Pom. Eq. Jur. 89, 1443; 20 Cyc. 708, 716.

This brings us to a consideration of the real merits of the case and

of the complaint, and this is somewhat simplified by the fact that the defendant James T. Morris and the creditor defendants for whose benefit the alleged fraudulent and preferential conveyance to the said Morris was made alone appeal.

The complaint alleges that the defendants Sayre, Strong, Phillips, Beiseker and the Strong Grain & Merchandise Company were the owners of the capital stock of the defendant corporation, the Harvey Mercantile Company, and the said Phillips, Strong, Sayre, and Beiseker directors thereof; and that while acting as such directors the persons last mentioned transferred certain of the property of the said corporation to the defendant James T. Morris, as trustee for the creditor defendants and appellants, and certain other property to their own use by way of an exchange for land in Canada, the title to which was taken in the name of the Calgary Colonization Company of which they, the said directors, were stockholders. These conveyances, it is claimed, completely exhausted the assets of the Harvey Mercantile Company, and made it impossible for the plaintiff to collect its judgment, and were made for the purpose of cheating and defrauding the plaintiff and the other creditors of the Harvey Mercantile Company and without dissolving and winding up the affairs of said corporation in the manner provided by law, and for the purpose of dividing the assets of said corporation among the said directors and the said preferred creditors who were of the same class as the said plaintiff, the said John Miller Company.

The relief prayed for is that the said transfers and payments be adjudged fraudulent, and the money and property be held in trust for the plaintiff and the other creditors of the company, and that the property and money be reassigned, repaid, and retransferred to a receiver, and in default thereof personal judgments might be obtained. It is not claimed, however, that the debts of the creditors defendants were not bona fide.

Though, in addition to the foregoing, there are claims against Sayre, Strong, and Beiseker and Phillips and the Sayre, Strong Grain & Merchandise Company for unpaid balances on stock, and against the said Phillips, Sayre, Strong, and Beiseker for malfeasance in office in allowing the property of the company to be unlawfully diverted, in creating debts beyond the amount of the subscribed capital stock, and

in allowing money to be unlawfully paid to themselves in the form of dividends, these parties have not appealed; and providing the joinder was properly made, and which we have before held to be the fact, these claims and interests need not here be considered.

The question then is, What are the rights and liabilities of the defendant James T. Morris and the creditor defendants whom he represents and for whose use he holds in trust the property in controversy?

It is first urged by the appellants that, although it is charged in the complaint that each of these persons "had knowledge prior to the transfers aforesaid of the fraudulent and unlawful scheme, purpose, and intent" of the said directors, and "participated therein," no conspiracy is alleged; and that, although knowledge of a fraudulent intent of a seller by a purchaser may of and by itself avoid a sale, this is not the case or result of knowledge acquired by a creditor. This is undoubtedly the law. See Lockren v. Rustan, 9 N. D. 43, 81 N. W. 63.

The real questions then to be determined are:

(1) Does the complaint allege that a preference was given?

(2) If so, can a corporation in contemplation of dissolution divide its assets in such a manner as to pay the claims of some creditors, leaving others unpaid and unprovided for?

And, first, does the complaint allege that a preference was given? We think it does.

Counsel for the respondents, it is true, argue that there is no allegation in the complaint connecting Morris and the creditor defendants with the scheme devised by the directors to transfer all the assets and cease business without paying the claim of the John Miller Company; and they further argue that the transfer to Morris and his clients should not be considered a preference, because there was enough property transferred to the directors to pay the claims of the John Miller Company. But in this we believe they are in error. The complaint alleges one scheme devised by the directors, and participated in by Morris and his clients to wind up the corporation by transferring all the assets to the defendants (stockholders, directors, and favored creditors), and thus avoid the payment of the claims of the John Miller Company. It alleges that "all of said transfers were made in furtherance of the

same fraudulent and unlawful scheme, and were intended to and did effectually place all the property and assets of said corporation beyond the reach of the said John Miller Company and other creditors similarly situated by the ordinary process at law."

It alleges that: "Each of the persons and corporations who took said property and money, or received the proceeds of the collection of said notes, bills, and accounts, *had knowledge, prior to the transfers and conveyances* aforesaid, of the *fraudulent* and unlawful *schemes, purpose, and intent* aforesaid, and participated *therein*."

The unlawful scheme charged in the complaint is that the said directors, "without dissolving and winding up said corporation in the manner provided by law, and without paying, or providing in any manner for the payment of the claims of said John Miller Company, decided to wind up the affairs of said corporation and cease conducting said business, and to divide the assets of said corporation among themselves and the other defendants herein who were creditors of the same class as the said John Miller Company," and then and there, to accomplish said purposes, and with the intent of cheating and defrauding the John Miller Company in the collection of its judgments, and "with the intent of preferring the defendant creditors, and of giving and permitting them to receive payment of their claims against said corporation, to the exclusion of said John Miller Company and other creditors of the same class who might be similarly situated," made the transfers to Morris or to the directors (the facts being unknown to plaintiff) in trust, to distribute the proceeds among the creditor defendants. The paragraph then proceeds to charge that the transfers *to the directors* of the balance of the property were made at the same time and in connection with the same scheme; the allegation being, "And also with the same purposes and with the same intent then and there wrongfully and unlawfully" disposed of the stock of merchandise for the benefit of the directors, and "also then and there for the same purposes and with the same intent wrongfully and unlawfully" transferred to the defendant Phillips the balance of the corporate assets,"—all of said transfers being made without any consideration passing to said corporation."

The transfers being made at the same time and as a part of the same scheme or transaction, and there being no property left belonging

to the corporation, it would seem that the result was a preference to the Morris creditors.

But was the preference unlawful? This is the main point to be considered.

There can be no doubt that, after a corporation has actually been dissolved and has gone into liquidation, its assets become a trust fund both for its creditors and stockholders. 3 Thomp. Corp. pp. 2410, 2411, § 3345.

The first question is whether the directors, who have decided to wind up the affairs of a corporation which is insolvent, can prefer creditors, and, by failing to take the statutory proceedings for the dissolution and winding up of such corporation, do that which, if such proceedings had been taken, they could not do.

In discussing this subject Clark and Marshall on page 2365 of vol. 3 of their work on Private Corporations say:

"In some jurisdictions it has been held that when a corporation becomes insolvent, and determines to make an assignment for the benefit of creditors, or ceases business, or determines to cease business, although no proceedings may have been instituted against it for winding up its affairs, its assets are so far a trust fund for the benefit of *all* its creditors ratably that it cannot, as a natural person may, prefer one or more of its creditors, to the exclusion of others by a voluntary conveyance, mortgage, pledge, assignment, confession of judgment, or otherwise; and that, if it attempts to do so, a court of equity will set the preference aside, and distribute the assets *pro rata* among all the creditors.

"This view, however, is contrary to the overwhelming weight of authority. The late cases show that the assets of a corporation are not in any proper sense a trust fund for creditors, so long as no proceedings for a winding up have been instituted, even though it may be hopelessly insolvent, except to such an extent that they cannot be distributed among or withdrawn by stockholders to the prejudice of creditors; but, on the contrary, a corporation, although insolvent, holds its assets just as a natural person holds his property, with the same power to dispose of it to secure or pay debts." See also 7 R. C. L. 755–758; Adams & W. Co. v. Deyette, 8 S. D. 119, 129, 31 L.R.A. 497, 59 Am. St. Rep. 751, 65 N. W. 471.

This quotation correctly states the general condition of the law upon the subject, and nothing can be gained by reviewing the particular cases. There can, indeed, be no doubt that, although the legislatures have in a few instances changed the rule, and eminent text-writers have from time to time protested, the great weight of judicial opinion is opposed to the so-called trust fund theory.

It also appears to us that this majority rule has been adopted by the legislature of North Dakota, and that no matter what may be our individual opinion as to the wisdom of the legislative enactment we are none the less bound thereby.

Section 7218 of the Compiled Laws of 1913 provides that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

This statute, or rather one in every respect identical therewith, was construed by the supreme court of California in the case of Merced Bank v. Ivett, 127 Cal. 134, 59 Pac. 393, and the word "debtor" therein contained was held to include corporations as well as partnerships and individuals. We can see no escape from this conclusion. It is also apparent to us that the word "debtor" can hardly be construed to embrace merely solvent debtors, for it can scarcely be conceived that a solvent debtor can be thought to prefer creditors.

It is also apparent to us that the statutes of North Dakota, which relate to the dissolution of insolvent corporations and which provide for a ratable distribution of their assets, do not prescribe or purport to prescribe a mandatory procedure which must be followed in all instances. They apply, in short, only after the aid of the courts has been sought to effect the dissolution; and they do not, prior to such time, "either in express terms or by implication, place any restraint upon the right of creditors to pursue any other remedies afforded them by the law, nor [do they] undertake to prevent them from acquiring preferences in any manner or to any extent allowed by the law in the case of natural persons." Billmyer Lumber Co. v. Merchants Coal Co. 66 W. Va. 696, 26 L.R.A.(N.S.) 1101, 1107, 66 S. E. 1073.

We are therefore of the opinion that in North Dakota we are committed to the so-called majority rule, and must adhere thereto until the legislature, as it has already done by § 6450 of the Compiled Laws of

1913, in the case of limited partnerships, chooses to change or to relax the same.

But is the transfer invalid because given to hinder and delay creditors in the collection of their claims until such times as the creditors represented by Morris were paid the amounts of their claims, and because the directors are saved harmless from loss by reason of their guaranty? Is it invalid under the ruling of the case of Maclaren v. Kramar, 26 N. D. 244, 256, 50 L.R.A.(N.S.) 714, 144 N. W. 85. In this case we held that a purported general assignment for the benefit of creditors, which contains a provision directing the assignee or trustee, after converting the property into cash, "to distribute the proceeds of said property ratably among the creditors of the party of the first part as shall consent to this trust agreement, and shall agree in consideration of the benefits accruing to them thereunder, to absolve and discharge the party of the first part from any and all liability," was void upon its face as an unlawful attempt by the debtor to coerce his creditors to surrender a portion of their just share of the estate, and tending directly to delay and hinder them in the collection of their claims.

Such purported assignment was also held to be void for the reason that "it does not purport on its face to transfer all of the debtor's unexempt property, and provides for the payment to the debtor of any surplus which may remain in the trustee's hands after satisfying the claims of the assenting creditors, thus operating to put such surplus beyond the reach of nonassenting creditors, and to hinder and delay them in the collection of their demands."

There can be no doubt of the correctness of these holdings. In the case at bar, however, there is no allegation of any agreement on the part of the creditors or trustees that any surplus was to be repaid to the debtor, and therefore no claim that any property was by that means concealed from the other creditors, or that they were hindered or delayed from levying upon such surplus; nor is there any allegation of any general assignment. If, therefore, it is competent for a debtor to prefer certain creditors, there seems to be no illegality in the transaction.

All that the complaint alleges, indeed, is that a certain portion of the assets of the corporation "were conveyed to the said Morris, who

was acting as the agent of the defendant creditors, in trust to convert into cash and distribute the proceeds, less collection charges, among such defendant creditors, to apply on their claims against said corporation." There is no allegation either that the payment was in full and would exclude such creditors from recovering any balance that might be due, or that there was or was expected to be any surplus which was to be repaid to the debtor corporation. Such being the case and the condition of the pleadings, the decision and the reasoning of the case of Maclaren v. Kramar, supra, do not apply.

But does the complaint state a cause of action against the respondents, for the reason that it not only charges a preferential conveyance to them, but a joint scheme and conspiracy entered into by them, together with the other defendants, "to place all of the property and assets of said corporation beyond the reach of the said John Miller Company and other creditors similarly situated," and "to divide the assets of the said corporation among the clients of the said Morris?" We think it does.

We have of course no doubt that an insolvent corporation may not pay illegal dividends. We are also of the opinion that, although an insolvent corporation may as a general rule prefer certain of its creditors, and its assets are not to that extent a trust fund in the hands of its directors, such assets are a trust fund as against the individual claims of the directors themselves. We are of the opinion, indeed, that to this extent the assets of a corporation are a trust fund for the payment of its debts, and that creditors have a lien upon them which is prior in point of right to any claim which the stockholders as such can have, and that courts should be astute to detect and defeat any scheme or device which is calculated to withdraw this fund or in any way to place it beyond the reach of creditors. Buck v. Ross, 57 Am. St. Rep. 60 and note pp. 66, 77, 78, 68 Conn. 29, 35 Atl. 763; 3 Clark & M. Priv. Corp. § 786, pp. 2411, 2419; 8 Thomp. Corp. § 6207, p. 683; Bosworth v. Allen, 168 N. Y. 157, 55 L.R.A. 761, 85 Am. St. Rep. 667, 61 N. E. 163.

If then, as we believe is charged in the complaint, a scheme was planned and participated in by all of the defendants, under which the directors should enrich themselves at the expense of the plaintiff and other unpreferred creditors, and the property transferred to Mor-

ris was transferred in furtherance of and as a part of this general scheme and transaction, the transfer was fraudulent and should be set aside. Whether these facts can be proved or not is of course a matter to be determined on the trial, and not by us here.

The order overruling the demurrer is for these reasons affirmed.

ROBINSON and GRACE, JJ. We concur in the result only.

C. A. McCARTY v. WILLIAM THORNTON and E. F. Maxey, Copartners, Doing Business under the Firm Name and Style of Thornton & Maxey.

(165 N. W. 499.)

Place of trial — complaint — county designated in — not proper county — change may be had — by defendant — must demand same — before time for answer expires — before actually making answer.

1. In construing § 7418 of the Compiled Laws of 1913, which provides that, "if the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, etc.," it is *held*, that a change of venue may not be demanded after an answer has actually been served, even though the time for answering which is provided for by the statute has not expired.

Residence — habitation — fixed place of abode.

2. A residence is a place where a man's habitation is fixed without a present purpose of removing therefrom.

County of residence — action removed to — change of venue.

3. Evidence examined and *held* not to support the claim of a residence in the county to which a change of venue is sought to be obtained.

Demand for change — motion for — affidavits for — letters incorporated into — hearsay — objection to — none made in lower court — none can be heard in supreme court.

4. When letters are incorporated in an affidavit which are hearsay in their nature, but no objection to the affidavit is made in the trial court on this ground, no such objection can be raised in the supreme court upon appeal.

Opinion filed November 8, 1917. Rehearing denied December 14, 1917.

Action on the contract for the recovery of a commission.

Appeal from the District Court of Stark County, Honorable *W. C. Crawford,* Judge.

Judgment for plaintiff.

Defendant appeals.

Affirmed.

Burdick & Converse, for appellants.

Where the county designated in the complaint is not the county of the defendant's residence, and he desires a change of the place of trial to his own county, he must demand same before the time for answering expires. Comp. Laws 1918, § 7418.

Such demand may be made even after answer is served, if it is made within the statutory time allowed in which to answer. Penniman v. Fuller & W. Co. 133 N. Y. 443, 31 N. E. 318; Irwin v. Taubman, 26 S. D. 450, 128 N. W. 617; Veeder v. Baker, 83 N. Y. 156; Smail v. Gilruth, 8 S. D. 287, 66 N. W. 452.

Upon such application the mere statement of some person, other than defendant, that defendant is not a resident of the county in which he claims a residence, is but a conclusion, of no probative value. It is hearsay. Bernou v. Bernou, 15 Cal. App. 341, 114 Pac. 1000; O'Brien v. O'Brien, 16 Cal. App. 103, 116 Pac. 692.

Murtha & Sturgeon, for respondent.

The demand for change of the place of trial from the county designated in the complaint, to the county of defendant's residence, must be made before the answer is served. This is true even though the time for answering has not expired. Comp. Laws 1913, § 7418; Irwin v. Taubman, 26 S. D. 450, 128 N. W. 617; Peterson v. Carlson, 127 Minn. 324, 149 N. W. 536; Potter v. Holmes, 72 Minn. 153, 75 N. W. 591; State ex rel. Hersey v. District Ct. 90 Minn. 427, 97 N. W. 112.

All of the defendants named must join in a demand for change of place of trial. 40 Cyc. 11, notes 46, 47 and 56; McKenzie v. Barling, 101 Cal. 459, 36 Pac. 8; Zeller v. Martin, 84 Wis. 4, 54 N. W. 330.

Bruce, Ch. J. In this case we are called upon to review the action of the district court in denying a change of venue. The statute involved provides that:

Sec. 7418. "If the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, etc."

Two questions are presented for determination:

(1) Whether under the provisions of § 7418 of the Compiled Laws of 1913, a demand for a change of venue can be made after the answer has been served but before the time for answering prescribed by the statute has expired.

(2) Whether the defendant, who was served by publication as a nonresident, was actually a resident of the county of Williams to which he desired the case removed.

On the first question but little, if any, direct authority can be found; most, if not all, of the cases cited by counsel being cases where the time for service prescribed by the statutes had actually expired and an extension of time had been agreed upon, or an amended answer had been sought to be interposed.

The judgment of the writer of this opinion is that the reasoning of the supreme court of South Dakota in the case of Irwin v. Taubman, 26 S. D. 450, 128 N. W. 617, is applicable and should be followed by us; that the statute should be liberally construed in favor of the generally recognized rights of a defendant to be tried in the county of his own residence; recognition should be given to the fact that the legislature used the comprehensive words, "before the time for answering," rather than the limited words, "before answer;" and the statue therefore should be so construed as to allow the motion to be made within the time which is allowed for answering even though an answer has been actually served prior to such time.

This, however, is the opinion of the writer alone, and is not concurred in by the other members of the court. These members all believe and hold that the construction just contended for would be both contrary to the practice established in the state, and to the intention of the legislature. They believe that it was the intention of the framers of the statute to merely allow a defendant an opportunity to demand a change of venue up to the time when the issues are framed. They hold, therefore, that while the law allows a certain time in which to answer,

that time expires when an answer is actually interposed. They argue that, if an action is commenced more than ten days before the term in which a district court is appointed to be held, and the defendant answers forthwith, the action may be placed upon the calendar for trial at that time; and they claim that it certainly would not avail the defendant in a motion to strike the action from the calendar, that under the law the thirty-day period allowed in which to answer had not expired. So, they claim that when a defendant interposes an answer, he cannot afterwards, on a demand for a change of venue, assert that the time for answering has not expired. This, being the opinion of the majority, is the holding of this court.

This brings us to the determination of the question whether the defendant on the merits showed himself entitled to the change of venue. Did he show that he was a resident of the city of Williston and the county of Williams? We think not. The only affidavit filed by the defendant is as follows:

"E. F. Maxey, being duly sworn, says that he is one of the defendants in the above-entitled action, that at the time of the beginning of said action he was a resident of Williston, North Dakota, and still is a resident of Williston, North Dakota."

In reply to this affidavit the plaintiff filed the following:

"C. A. McCarty, being first duly sworn, says that he is the plaintiff in the above-entitled action; that he is a resident of the above county and has been for ten years last past; that he is acquainted with defendant E. F. Maxey and has been acquainted with him for one year last past; that said E. F. Maxey resides and has a home in Hillsboro, Iowa, and that he does not and has not resided at Williston, or any other place in North Dakota, during the past year; that said E. F. Maxey travels around the county a great deal selling horses, but that his place of residence is at Hillsboro, Iowa."

Plaintiff also filed an affidavit made by his attorney T. F. Murtha, which contained two letters from the Williston State Bank and First National Bank of Williston, and which were written in reply to two inquiries which were made on March 6, 1917, as to "where does this party live—in Williston or Hillsboro, Iowa?"

These letters were as follows:

Williston, N. Dak.
March 10, 1917.

Murtha & Sturgeon,
Dickinson, N. Dak.

Gentlemen:—

We have your favor of the 6th relative to the responsibility of E. F. Maxey, and advise you that he is almost unknown to us. He does not live in Williston, but came here sometime last month with a number of horses which he is selling or endeavoring to sell here. We do not even know the name of the town in Iowa from which he came.

Yours very truly,
O. W. Bell,
Ass't Cashier.

Williston, North Dakota,
March 8, 1917.

Murtha & Sturgeon,
Dickinson, N. Dak.

Gentlemen:—

Your letter of March 6th, inquiring if judgment against one E. F. Maxey would be good and could be collected, received, and in reply to same wish to state that we do not know this man and don't know where he lives in Williston, or anywhere else, and for that reason we could not give you any definite answer.

Very truly yours,
Simon Westby,
Cashier.

We are satisfied that these affidavits do not conclusively prove the residence of the defendant E. F. Maxey in Williams county, and that the trial judge was justified in holding that such residence was not proved.

Nor do we believe that there is any merit in the contention of counsel for defendant and appellant that the letters mentioned contained merely conclusions and expressions of opinion. Mr. Bell wrote positively that

Maxey did not live in Williston, but came there merely to sell horses. He also states that the said Maxey was almost unknown to him, which in itself is evidence of a lack of residence. The affidavit of McCarty also positively states that the defendant has a home in Hillsboro, Iowa.

If conclusion there is, it is to be found in defendant's and appellant's own affidavit, as he gives no facts, but merely states that "he was a resident of Williston." It was he who was the moving party, and the burden of proof was upon him.

A resident is " 'one who has a residence; in the legal sense a residence is defined as a place where a man's habitation is fixed without a present purpose of removing therefrom.' . . . 'The word, "resident" is the opposite of the word "transient." The former describes the person at rest in a town, while the latter describes him in his passage through or across it.' " Reckling v. McKinstry, 185 Fed. 842, 843; New Haven v. Middlebury, 63 Vt. 399, 21 Atl. 608; 4 Words and Phrases, 2d Series, 349, 350.

It is true that the letters from the bankers mentioned were incorporated in the affidavit of the attorney, Murtha, and to a certain extent were hearsay. No objection, however, seems to have been made on this ground in the court below, and none therefore can be made here. They were certainly competent to show an inquiry on the part of the attorney Murtha, and the result thereof.

The order of the District Court is affirmed.

ROSE E. LIVINGSTON v. DANIEL B. HOLT, as Administrator of the Estate of James H. Grady, Deceased.

(165 N. W. 975.)

Estate of deceased person — claims against — administrator — presented to — payment refused — action to recover — defense by administrator — payment not pleaded — claim paid or reduced from other sources — may be shown — evidence — competency.

Where one presented a claim against the estate of a deceased person through the administrator of such estate, and the administrator refused payment thereof, and suit was brought by the claimant against the administrator, and the

administrator answered but did not plead payment; notwithstanding such failure to plead payment, it is proper to show by competent testimony that the plaintiff has received money from other sources which reduced, or showed payment of, the claim filed with the administrator, and upon which suit was brought. All such evidence was competent to show that the plaintiff had no claim against the estate.

Opinion filed November 27, 1917.

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

Affirmed.

M. A. Hildreth, for appellant.

"Where incompetent evidence is admitted over objection, before such error can be disregarded as nonprejudicial, it must appear that the error did not and could not have prejudiced the rights of the complaining parties. And the case must be such that the appellate court is not called upon to decide, from a preponderance of the evidence, that the verdict was right, notwithstanding the error complained of." Huston v. Johnson, 29 N. D. 546, 151 N. W. 774.

The court's charge upon the question of voluntary payments upon the insurance policy was clearly erroneous. Remington v. Geiszler, 30 N. D. 347, 152 N. W. 661; Linton v. Minneapolis & N. Elev. Co. 2 N. D. 232, 50 N. W. 357; McKyring v. Bull, 16 N. Y. 305, 69 Am. Dec. 696; Barron v. Northern P. R. Co. 16 N. D. 277, 113 N. W. 102; Petitt v. Belle Plain, 162 Iowa, 726, 144 N. W. 1015; Peloni v. Smith-Lowe Coal Co. 151 Iowa, 462, 131 N. W. 685; D. A. Enslow & Son v. Ennis, 155 Iowa, 266, 135 N. W. 1105; Nicklaus v. Burns, 75 Ind. 93; Smith v. Evans, 13 Neb. 314, 14 N. W. 406; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110, 51 N. W. 594; Swords v. McDonell, 31 N. D. 494, 154 N. W. 258.

The doctrine that a jury has the right to reject the testimony of a witness rests upon the common-law principle that what the witness has testified to he wilfully knew to be false. The court fails to distinguish between perjury and mistake, and in such respect its charge was erroneous. Remington v. Geiszler, 30 N. D. 357, 152 N. W. 661, and cases cited; State v. Johnson, 14 N. D. 290, 103 N. W. 565; McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58, 72 N. W. 935.

Lawrence & Murphy, for respondent.

To make a contract there must be an offer and an acceptance.

"There must be a meeting of the minds of the parties as to all essential elements. Both parties must understand the same thing in the same sense, and both parties must be bound, or neither is bound. There must be a meeting of minds on the subject-matter, relative to which the proposal and acceptance were in fact made and entered into." 1 Elliott, Contr. p. 24.

It is only in cases where it is probable that the witness has knowingly and intentionally testified falsely, that the jury is warranted in disregarding his entire testimony. McPherrin v. Jones, 5 N. D. 261, 65 N. W. 685; State v. Campbell, 7 N. D. 58, 72 N. W. 935.

GRACE, J. This is an appeal from the judgment of the district court of Cass county.

The issues of such case were tried to a jury, and a verdict was returned by them in favor of the defendant.

The facts in the case are substantially as follows: James H. Grady, deceased, Rose E. Livingston, and Mary Cary were brother and sisters. It is claimed by the plaintiff that, during the lifetime of Grady, she and Grady entered into an agreement whereby each was to contribute ratably to the support of Mary Cary. Plaintiff claimed that Mary Cary was an invalid and unable to care for or support herself. It appears that Grady had taken out a life insurance policy on his life for the sum of $3,000, which was payable to Mary Cary after the time of the insured's death. Such insurance upon the life of Grady was collected after his death and paid to Mary Cary. Rose E. Livingston filed a claim against the estate of Grady for $1,921.38, claiming that Grady made an express contract with her during his lifetime to contribute ratably to the support of Mary Cary, and that the amount of said claim was the amount due from Grady, none of which had been paid except $405. The defendant, to the complaint of the plaintiff, entered a general or specific denial to all of the allegations thereof, except that he admitted the filing of such purported claim.

There are presented in this case but two questions for our consideration. First, the insufficiency of the evidence to justify the verdict of the jury; second, errors of law occurring at the trial from the exclusion

of certain testimony offered by the plaintiff, and alleged erroneous instructions of law by the court. In order to determine whether or not the evidence is sufficient to sustain a verdict, it is well to refer to the pleadings in the case to determine what matters were put in issue by such pleadings. One of the main matters relied upon by the plaintiff, and largely the one upon which her entire claim rests, is the assertion in the complaint that at a certain time during the lifetime of Grady the plaintiff and he entered into an agreement whereby they should jointly care for and furnish medical attendance to, and incur other expenses in connection with the care and keep of Mary Cary, their sister, during her lifetime, and should equally share the entire expense with reference thereto. Plaintiff alleges her reliance upon such promise and agreement, and claims she thereby incurred expense to the amount of $3,824.75. She has filed her claim against the estate of Grady in one half that amount, less a certain credit hereinbefore stated. The complaint does not allege whether the alleged agreement was in writing or was made orally. We assume from the complaint the alleged agreement was not in writing, but, if entered into at all, was entered into orally.

In the trial court such agreement was claimed and relied upon as an express contract. Whether such contract was in fact made was a question of fact exclusively for the jury. There was some testimony tending to show that such contract was made. There was other testimony which tended to show that such contract was not made. The testimony of Mrs. Grady, the widow of the deceased, was to the effect that she was present at the Nicollet Hotel, in Minneapolis, at the time when said alleged agreement was claimed by the plaintiff to have been made, and did not hear anything of the contract referred to. This tends of course to prove that no contract was made. While negative testimony may not be entitled to as much weight and credit as positive testimony, we must not overlook the fact that the weight of testimony is exclusively a question for the jury. Whether or not there was an express agreement was a disputed question of fact about which there was conflicting testimony either of a positive or negative character, or both, and it was the exclusive duty of the jury to weigh all such testimony. It did so and returned a verdict in favor of the defendant, and such verdict was sufficiently supported by the evidence.

Plaintiff makes a further claim of error in regard to admission of testimony concerning a certain insurance policy for $3,000, to which we have before referred, claiming that the defendant having interposed no plea of payment, all the testimony with reference to the insurance was inadmissible. While it is true that the answer does not contain any allegation of payment, we are of the opinion notwithstanding this, that the testimony brought out by the defendant on cross-examination of Mary Cary in regard to the insurance policy and the disposition of the money received from such policy was competent to show the plaintiff, at the time of filing such claim against the estate, actually and in fact had no claim to file. That she had received from other sources a sufficient amount of money to reimburse herself for all the money, if any, she had expended for the support of Mrs. Cary. One needs but to read the testimony of Mrs. Cary to readily conclude that Mrs. Livingston received as much money from Mrs. Cary as she had paid out for her, and it was immaterial if such money was the proceeds of the insurance policy. If Mrs. Livingston received the money from Mrs. Cary with which to pay Mrs. Cary's expenses of living, doctor bills, etc., she certainly had no claim against the estate of Mr. Grady.

We have examined the instructions of the court with reference to the payments made from such $3,000 fund, and in them find no prejudicial reversible error. Mrs. Livingston had filed a large claim against the estate of Grady. Any testimony which would show that such claim was not owing to her was competent. We do not wish to set out the testimony in question and answers, but the testimony of Mrs. Cary shows in effect that she put the $3,000 in a bank in Syracuse; that she thought Mrs. Livingston drew checks thereon; that she paid for everything for her living for the past six or seven years, and that this included board and clothes and things of that kind, and also doctor bills.

One of the questions asked of Mrs. Cary is as follows:

Q. So you used these $3,000 to pay these living expenses?

A. Yes.

The jury by their verdict simply found in effect that Mrs. Livingston had no claim against the estate of Grady, for the reason that she had received money sufficient from other sources for the purpose of dis-

charging all obligations that she had paid or contracted for in behalf of Mrs. Cary. The jury were the exclusive judges of the weight and credibility of all the testimony, including that of Mrs. Cary, which was in places quite badly shattered. It was their province to believe or disbelieve the testimony of any witness if it appeared to them to be untrue, or to believe that part of the testimony of any witness which appeared to be true, and disbelieve that part which appeared to them to be untrue. The jury has passed upon all the testimony in this case, and the verdict is sustained thereby. With their determination we cannot interfere. The source of the power and duty of the jury in such cases is derived from the Constitution, and not from the consent of the court; nor is their duty to be interfered with by the court so long as there is evidence supporting their verdict.

We have examined the cases cited by the appellant, and find nothing therein which would in any way conflict with the conclusion we have arrived at in this case.

The judgment is therefore in all things affirmed, with costs.

ROBINSON, J. (concurring). The plaintiff and appellant brings this action to recover nearly $2,000 from the estate of James Grady on an alleged contract to contribute to the care of his sister. The plaintiff avers that she and Mary G. Cary are sisters of James Grady; that in 1908 at the Nicollet Hotel, in Minneapolis, it was agreed between Mrs. Livingston and her brother that they should care for their sister Mary, and that on such agreement Mrs. Livingston had advanced and paid for the care of the sister various sums amounting to $3,824.75, while James Grady had paid only $405, and that balance of his share is $1,507.38.

The answer denies that there ever was any such agreement. The jury found a verdict for the defendant, and plaintiff appeals. There was no evidence to sustain a verdict for the plaintiff, and, hence it is needless to consider any assignments of error. The case depends on the testimony of the sister Mary. She testifies that in 1908 she was saleslady in a Detroit house, and she earned from $15 to $25 a week. Then a sister at Minneapolis died and at the time of the funeral, she, Mrs. Livingston, and James Grady met at the Nicollet Hotel, in Minne-

apolis, and James Grady and Mrs. Livingston there promised each other to care for the sister Mary.

Giving full faith and credit to all the testimony by the plaintiff, it fails to show a legal contract. It shows merely a commendable and customary arrangement between prosperous members of the family to contribute to the care and expense of an unfortunate member. At the time of the arrangement in the Nicollet Hotel, the sister Mary was earning from $15 to $25 a week, which should have given her the means of providing for a rainy day. She was then no object of charity.

In December, 1914, James Grady died leaving an insurance policy of $3,000 payable to the sister Mary. She got the money and gave it to Mrs. Livingston, and it was used to pay the expense for which suit is brought without giving Grady any credit. To show that Grady should have no credit, the sister Mary testified that she herself received the $3,000 and paid it out on her debts; that she owed her sister at Salt Lake $1,000 for money loaned, and had sent the sister two $500 checks. Then, on being pressed and cross-examined, she confessed that she did not owe the sister anything, and had never sent her the $1,000, and that all her detailed testimony in regard to the matter was untrue. Hence, all her testimony goes for nothing, and the case presents no proof to charge the estate with any liability.

The court might well have directed a verdict in favor of the defendant, but without any direction the jury returned a verdict for the defendant.

KEYSTONE GRAIN COMPANY, a Corporation, v. J. S. JOHNSON.

(165 N. W. 977.)

New trial — motion for — newly discovered evidence — ground of — trial court — discretion — interference with — when.

1. A motion for a new trial based on the ground of newly discovered evidence is addressed to the sound, judicial discretion of the trial court. The appellate court will not interfere unless a clear abuse of such discretion is shown.

Discretion of trial court — abuse of — not shown.

2. In the instant case it is held that an abuse of discretion has not been shown.

Opinion filed December 12, 1917.

Appeal from the District Court of Burleigh County, Honorable *W. L. Nuessle*, Judge.

Defendant appeals.

Affirmed.

Miller, Zuger & Tillotson, for appellant.

As the basis for a motion for a new trial on the ground of newly discovered evidence, it must appear that such evidence is material, not merely impeaching nor cumulative, and that by the exercise of due diligence it could not have been discovered before the former trial, and that it has been discovered since the trial. 4 Enc. Pl. & Pr. 791.

Fisk, Murphy, & Linde, for respondent.

It is necessary to specify all objections to the order of the court relied upon, and such as are not so pointed out are abandoned. Shuman v. Lesmeister, 34 N. D. 209, 158 N. W. 271.

It is settled that 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; Shuman v. Lesmeister, supra; Davis v. Jacobson, 13 N. D. 430, 101 N. W. 314.

Appellant's specification of error is not broad enough to raise any question as to the sufficiency of the other grounds urged for a new trial in the lower court. Aylmer v. Adams, 30 N. D. 527, 153 N. W. 419.

"Newly discovered evidence to successfully contradict a witness upon a material matter may be cause for allowing a new trial, and it is no objection to such allowance that the evidence may incidentally impeach a witness." 29 Cyc. 920, 921; 1 Hayne, New Tr. & App. Revised ed. §§ 90 and 91; Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; Malmstad v. McHenry Teleph. Co. 29 N. D. 21, 149 N. W. 690; Wagoner v. Bodal, 37 N. D. 594, 164 N. W. 147, and cases cited.

The parol evidence rule is not a rule of evidence, but a rule of substantive law governing the formation of contracts when applied to

written contracts. Musser v. Stauffer, 192 Pa. 398, 43 Atl. 1018; Greenl. Ev. 16th ed. 1, ¶ 305a.

CHRISTIANSON, J. This is an appeal from an order granting plaintiff's motion for a new trial on the ground of newly discovered evidence. The plaintiff is a grain brokerage concern; the defendant is engaged in the real estate business and in farming. On September 6, 1916, the defendant instructed the plaintiff by telegraph to "sell 7,000 flax to arrive. Two dollars or better." The plaintiff immediately complied with the request, and sold for the defendant 7,000 bushels of flax to arrive at $2.02¾ per bushel. The defendant delivered only two carloads of flax, and plaintiffs were required to buy the remainder to fill the contract at $2.68 per bushel. The plaintiff brings this action to recover $1,549.38, the amount it was required to pay in order to fill the contract. It is undisputed that, according to the usages and rules of the Chamber of Commerce, the defendant had twenty days in which to deliver the flax. There is no dispute as to the amount of flax which defendant actually delivered, or the sum which plaintiff was required to pay for the balance required to fill the contract. The only question in dispute between the parties arises with respect to the time when plaintiff was required to close the transaction. Plaintiff claims that, according to the usages and rules of the Chamber of Commerce, it was understood and agreed between the parties that, if the flax was not delivered within twenty days, then the time for delivery should be automatically extended unless the purchaser demanded the flax. Defendant, on the other hand, contends that the delivery was not to be extended beyond the twenty-day period. He further contends that at the expiration of such period he specifically instructed the plaintiff to close the deal and buy at the then prevailing price the necessary flax to make up the difference between the amount delivered and the amount sold. These respective contentions presented the only questions in dispute between the parties upon the trial.

The jury returned a verdict for the defendant. Plaintiff thereupon moved for a new trial on the ground, among others, of newly discovered evidence which it could not with reasonable diligence have produced at the trial. This appeal is from the order granting the motion.

The newly discovered evidence which plaintiff proposed to produce upon a retrial of the action is that of one J. H. Noon, a farmer residing in the vicinity of Wilton. Noon makes affidavit to the effect that on or about October 31, 1916, while en route to attend a fair at Mandan, he met the defendant, Johnson, and plaintiff's agent, Larson, in the lobby of the McKenzie Hotel, in Bismarck. And that during a conversation then had Johnson referred to the flax deal, "and stated in substance and effect that flax had been rapidly advancing in price, and that had the market price of flax gone down he would have had the laugh on Larson and his company, but as it is the laugh is on me." That Johnson further stated in this connection: "I am a sport and am going to deliver the flax just the same." Whereupon Larson explained to Johnson "that it made no difference to his people whether the price went up or down, as all there was in it for his company was the commission on the deal. . . . That during such conversation the said Johnson in no manner stated or intimated that he was not obliged, under his sales contract, to deliver such flax, but on the contrary, as above stated, he unconditionally stated in substance and effect that it was his intention to deliver such flax to fill the contract." Noon further states that he never communicated the facts with respect to such conversation to any person, and that if called as a witness he will appear and testify to the facts stated.

Noon's affidavit is corroborated by the affidavit of Larson. Larson further states that he never communicated to his employers or to plaintiff's attorneys, either the fact of such conversation or the name of Noon, for the reason that Noon's name had escaped his recollection, and he feared criticism for inability to remember such name. Affidavits by two other persons to the effect that Noon is a man of honesty and integrity, whose reputation for truth and veracity has not been questioned, were also submitted.

On this appeal defendant contends: (1) That the evidence was not newly discovered, (2) that it was cumulative and impeaching, and (3) that there was no showing of diligence.

It is elementary that a motion for a new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court. The fact that newly discovered evidence which has a material bearing upon some important or controlling issue in a

case is also cumulative, and incidentally tends to impeach or deny the correctness of testimony given on behalf of the adverse party, does not necessarily preclude the trial court from granting a new trial on the ground of such newly discovered evidence. Aylmer v. Adams, 30 N. D. 514, 523–528, 153 N. W. 419. The determination of this, as well as every other question relative to a new trial on this ground, is primarily a question for the trial court, and the appellate court is not justified in interfering therewith unless the record discloses a clear abuse of discretion. The rules applicable to new trials on discretionary grounds, and the respective functions of trial and appellate courts on such motions, have been so fully discussed by this court in several recent decisions that little remains to be said in regard thereto. See Aylmer v. Adams, 30 N. D. 514, 153 N. W. 419; McGregor v. Great Northern R. Co. 31 N. D. 471, 154 N. W. 261, Ann. Cas. 1917E, 141; State v. Cray, 31 N. D. 67, 153 N. W. 425; Blackorby v. Ginther, 34 N. D. 248, 158 N. W. 354; First International Bank v. Davidson, 36 N. D. 1, 161 N. W. 281; Reid v. Ehr, 36 N. D. 552, 162 N. W. 903; Wagoner v. Bodal, 37 N. D. 594, 164 N. W. 147. It is contended by defendant's counsel that plaintiff was required to show by affidavits of its managing officers and its attorneys that at the time of the trial such officers and attorneys had no knowledge of Noon's proposed testimony. True, it was incumbent upon the plaintiff to show that the evidence was newly discovered. The affidavits submitted, however, show that only three persons were present and participated in the conversation. One of these was the defendant. The other two make affidavit to the effect that they never mentioned such conversation either to plaintiff's officers or attorneys, or to any person whatsoever. If these statements are true they establish almost to a certainty the fact that plaintiff's managing officers and attorneys had no knowledge of the existence of such evidence at the time of the trial.

It will be observed that the proposed testimony of Noon has a direct bearing upon the only question at issue between the parties. The issue was close, and the evidence sharply conflicting. In our opinion the question whether a new trial should be granted on the ground of newly discovered evidence was one peculiarly within the trial court's discretion. Its determination must control, unless a clear abuse of

discretion is shown. No abuse of discretion appears, and the order must be affirmed. It is so ordered.

ROBINSON, J. (concurring). The plaintiff brings this action to recover $1,549.38 as the balance due on the sale of 7,000 bushels of flax at $2.02¾ per bushel. The jury found a verdict in favor of the defendant. The court granted a new trial and defendant appeals. The motion for a new trial was made on the record and on newly discovered evidence.

In September, 1916, the plaintiffs were grain brokers doing business in the Chamber of Commerce, in Minneapolis. Defendant had a good crop of flax and was about to commence threshing it, and the price of flax looked good to him. He sent the plaintiffs a telegram as follows:

September 6, 1916.

Keystone Grain Company,
Minneapolis, Minn.
Sell 7,000 flax to arrive. Two Dollars or better.

The company at once sold for defendant 7,000 bushels of flax at $2.02¾ per bushel. Now it is a rule and custom that when a party sells grain or flax to arrive he has twenty days to deliver and by courtesy the time of delivery may be extended; and, if the seller fails to deliver, the broker must protect himself by purchasing the grain at market price for the buyer. The defendant delivered two carloads of the flax, and, as the price continued to advance, he sold the rest of his flax locally and left the plaintiffs to buy for him enough to fill the contract. They had to pay $2.68 per bushel. The defense is that the plaintiffs should have bought the flax to close the deal at the expiration of twenty days, instead of courteously waiting for defendant to ship the flax. He testifies that, at the time of giving the order to sell the flax, he made such a special arrangement with one Larson, who represented the plaintiffs and solicited the order. Larson testifies to the contrary, and he is strongly corroborated by facts and circumstances. Of course when defendant contracted to sell his flax, he thought $2 a bushel a good price, and day after day as the flax went up a few cents he thought

it was so much nearer the top, and that what goes up must come down, and so when it went to $2.68 he was still anxious for his brokers to hold the deal for him.

As time passed the brokers wrote him letter after letter. On September 25, 26, and on October 3d and 17th they wrote him that the purchaser was anxious to receive the flax and to close the deal. On October 17th they wrote: "Purchaser of this flax has been after us pretty strong the last few days, but we have pursuaded him to hold off a little longer, and not to ask us to buy it in, assuring him that the balance to fill the order would be coming along very soon." It was not until October 23, 1916, that he refused to deliver the flax, and advised the plaintiffs that he had sold his flax locally. Then the brokers promptly purchased at market price to fill the order. By a letter or telegram Johnson might have had his deal closed on any day, but he was disposed to speculate, and to sell his flax locally at the advanced price, and to have his brokers hold the deal till flax went down to the starting point. The facts and circumstances and the direct and positive testimony of Larson do far outweigh the testimony of Johnson in regard to a contract to close out his deal at the end of twenty days. Hence on the record the jury should have found a verdict for the plaintiffs. The great preponderance of the testimony was in their favor, but the motion for a new trial is supported by the affidavit of J. H. Noon. It shows that on October 3d, a week after the lapse of twenty days, at the McKenzie Hotel, in Bismarck, Noon met Johnson, who talked with him concerning the flax deal, and said that the flax had been rapidly advancing in price, and that had the market price gone down he would have had the laugh on Larson and his company, but, as it is, "they have the laugh on us." "I am a sport and I am going to deliver the flax just the same." But Johnson did not need to be a sport in order to observe his contract. That was a matter of common fairness and honesty between man and man. If the flax had gone down, instead of up, Johnson would have availed himself of the contract, and would have made no complaint against his brokers for being over courteous in giving him extra time to deliver his flax. Clearly the court was right in granting a new trial, and the order is affirmed.

THOMAS A. THOMPSON v. C. B. VOLD, Gust Peterson, and Andrew Peterson as Directors of Fort Ransom School District Number 6, Ransom County, North Dakota.

(165 N. W. 1076.)

Vain thing — attempt to do — equity will not — act already perfected — injunction — will not lie.

1. Equity will not attempt to do a vain thing, nor will it, by injunction, attempt to prevent the doing of an act that has already been perfected.

School board — remodeling a building — restrained by injunction — building completed during pending appeal — no supersedeas bond filed — moot question — appeal will be dismissed.

2. Where an injunction is sought in the lower court to restrain a school board from further proceeding with the remodeling of a building, on the ground that, though it has the power only to repair, it is in fact erecting a new building, and such injunction is refused and an appeal taken, but no supersedeas bond is furnished and no stay of proceedings granted, and pending such appeal the work is completed, the matter involved becomes a moot question, and the appeal will be dismissed by the supreme court.

Opinion filed December 13, 1917.

Proceeding to restrain the construction of a school building.

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

Judgment for defendant.

Plaintiff appeals.

Appeal dismissed.

A. C. Lacy, for appellant.

School boards are authorized to "repair" school buildings, and not to remodel or build new ones without further express authorization as by law provided.

"To repair" means to remake; not to make a new thing, but to refit or make good or restore an existing thing. Comp. Laws 1913, § 1184; Walker v. Detroit, 143 Mich. 427, 106 N. W. 1123; Atty. Gen. ex rel. Gibson v. Montcalm County, 141 Mich. 590, 104 N. W. 792.

"To repair" does not in terms include construction or reconstruction. 24 Am. & Eng. Enc. Law, 470; Vincent v. Frelich, 50 La. Ann. 378,

69 Am. St. Rep. 436, 23 So. 373; Levi v. Coyne, 22 Ky. L. Rep. 493, 57 S. W. 790; Farraher v. Keokuk, 111 Iowa, 310, 82 N. W. 773; Naye v. Noezel, 50 N. J. L. 523, 14 Atl. 750; State v. White, 16 R. I. 591, 18 Atl. 179, 1038; 7 Words & Phrases, 6096; 4 Words & Phrases, 2d series, 376.

"School districts can only have and exercise such power as is expressly granted by the law providing for their creation. They are created for special purposes and have only such powers as are 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; Kretchmer v. School Board, 34 N. D. 403, 158 N. W. 993.

"Powers and duties of such school boards are governed by the statute granting and defining such powers, and such statutes should be construed not wholly as a grant of power, but also as a limitation thereon." 35 Cyc. 901, 925; State ex rel. Bean v. Lyons, 37 Mont. 354, 96 Pac. 923.

Kvello & Adams, for respondents.

After the injunction was modified and pending an appeal therefrom, there having been no supersedeas bond filed, the repairing or refitting of the school building was completed, and school sessions conducted and maintained therein, and the building so continuously used. Such being the case, it was useless and idle to further continue the injunction or the appeal. School Dist. v. Thompson, 27 N. D. 459, 146 N. W. 727.

Equity will not attempt to do a vain thing; it will not by injunction attempt to prevent an injury already done, or to prevent the doing of an act that has already been accomplished. 22 Cyc. 759; Chicago, M. & St. P. R. Co. v. Sioux Falls, 28 S. D. 471, 134 N. W. 46; McCurdy v. Lawrence, 9 Kan. App. 883, 57 Pac. 1057.

Bruce, Ch. J. This is a motion to dismiss an appeal from an order setting aside a preliminary injunction. The school district of Fort Ransom comprises a congressional township, and at the time of the action complained of there were four schools in the district. The largest was located in the village of Fort Ransom, and more pupils were in attendance at this school than at the other three schools combined. Complaint was made that the buildings at Fort Ransom were dilapidated and entirely unsuited to the large attendance.

The school board then attempted to obtain authority from the voters to build a larger schoolhouse, but at a special election called for this purpose the authority was refused. Following this election the board of health condemned the building, and ordered the school board to proceed to remedy the defects complained of, but did not direct the method. The school board then again submitted the matter of building a new schoolhouse to the voters, and at the same time a proposition was submitted for the erection of a one-room schoolhouse at a point called Kidville and about 2 miles distant. At this election the proposition for the school at Kidville carried, and the proposition for the new building at Fort Ransom was defeated. It appears, however, that at the time that the preliminary injunction was sought and at the time of the trial no proceedings had been taken to erect the building at Kidville, no site had been purchased, and no bonds had been issued; and it appears from the affidavits that this school would only accommodate or be convenient for about fifteen of the pupils.

At the time that the injunction was sought the school census showed about ninety children who were qualified to attend the school at Fort Ransom; that during the school years 1915, 1916 there were five schools in the district; that the enrolment at Fort Ransom school was eighty, and that the other schools in the district had an enrolment of sixty-nine. The affidavits also tended to show that it would cost about $1,500 to remodel the Fort Ransom school to meet the requirements of the board of health; that even then no provision could be made for an increase in attendance; and that therefore a new building or a new wing would be more economical.

After this second election, and in the exigency created, the school board, under the advice of the county superintendent, proceeded to enlarge the old building. They built a foundation, utilized the larger portion of the old building, and tore down the other section or wing, using the timbers in repairing and remodeling the part left standing. This part they intended to move back a short distance onto the new foundation, and to construct in addition thereto two rooms to take the place of the one room which had been torn down.

At this point injunctional proceedings were instituted by the plaintiff, and after a hearing a temporary injunction was granted. The board then made strenuous efforts to get additional rooms, but was un-

able to do so, and, in failing in this, again made an application to the court to modify the injunctional order and permit it to continue remodeling the old building so as to get the same ready for the 1916 fall term. Upon this application the injunction was annulled, and the board has since completed the building according to the original plans.

This order was as follows: "A temporary injunctional order having been issued in the above-entitled matter on the 26th day of August, 1916, and thereafter and on the 13th day of September, 1916, there came on to be heard in chambers at the courthouse in the city of Lisbon, upon order to show cause heretofore issued in the premises, a motion for a modification of said injunctional order, the said hearing having been adjourned by counsel for the respective parties from September 12, 1916; the defendants were present in court in their official capacity as directors of school district No. 6, and by their counsel, Messrs. Rourke, Kvello, & Adams, and the plaintiff being present personally and by his counsel, A. C. Lacy, Esq., and the court having heard witnesses in support of said application for modification of said temporary injunction, and which witnesses were cross-examined by the plaintiff's attorney; it appearing at the time of the issuance of the temporary injunctional order that the defendants could in all probability obtain other quarters and accommodations in which to hold school pending the settlement of the controversy between the parties hereto; and it now appearing that the defendants are unable to obtain such accommodations or any accommodations at all for said pupils of school No. 7, in said district; and there being in the neighborhood of eighty children without school facilities on account thereof, who unless the temporary injunctional order is modified will be denied school privileges for the coming year; and the court being duly advised in the premises, and deeming it for the best interests of the public, and in order not to deny the school privileges as aforesaid, and an emergency existing in said district.

"It is ordered, adjudged, and decreed that the order heretofore made in the premises be, and the same is hereby, modified in the following particulars, to wit:

"That defendants are no longer restrained from proceeding to remodel and add to the present school building on its present site in the village of Fort Ransom, but that said remodeling and addition when completed,

including the portion left standing, shall not be of larger dimensions than 50x36 with 12 feet walls."

From this an appeal was perfected on the 4th day of December, 1916, by filing a notice of appeal and an undertaking for costs. No stay, however, was obtained or asked for, nor was any supersedeas bond offered or furnished.

Immediately after the modification of the original order, the defendant board proceeded to complete the repairs and building, and the premises have since been used for school purposes.

The defendants move for a dismissal of the appeal on the ground that the question is now a moot question. They maintain that the building has been completed, that the only judgment which could be had on this appeal would be a judgment affirming the order of the trial court or a judgment reversing the order and directing the issuance of a preliminary injunction in the pending action, and that the act sought to be restrained having been performed the issuance of a preliminary injunction would be an idle and useless act.

We can see no escape from this conclusion, "Equity will not attempt to do a vain thing, nor will it by injunction attempt to prevent an injury that has already been sustained or to prevent the doing of an act that has already been perfected." School Dist. v. Thompson, 27 N. D. 459, 146 N. W. 727; Chicago, M. & St. P. R. Co. v. Sioux Falls, 28 S. D. 471, 134 N. W. 46; McCurdy v. Lawrence, 9 Kan. App. 883, 57 Pac. 1057.

While this disposes of the appeal, and nothing more is before us, it may be well to add that the members of this court are of the opinion that the merits of the case are with the defendant school board, and that it was legally justified in the course that it took.

The motion to dismiss the appeal is granted.

H. P. THRONSON, Plaintiff and Appellant, v. SARAH E. BLOUGH, Defendant, and M. I. BROCKETT, an Incompetent, by C. C. Wysong, His Guardian *ad Litem,* Intervener, Respondents.

(166 N. W. 132.)

In an action brought to foreclose a mortgage where a defendant answered, setting up that the mortgage was given to evidence a trust of the land which had been conveyed to the mortgagor by her allegedly incompetent son, and where the alleged incompetent filed a complaint in intervention by his guardian *ad litem, held:*

Foreclosure of mortgage — action for — defense — mortgage as evidence of trust — incompetency of beneficiary — findings of trial court — evidence — supported by.

1. That the evidence supports the findings of the trial court to the effect that the intervener was incompetent to contract, and that such incompetency was known to the plaintiff.

Third person — real party in interest — incompetency of such party — set up by answer — appearance — by guardian ad litem.

2. Where the defendant in a foreclosure proceeding sets up facts indicating that a third person is the real party in interest, and where such third person is incompetent, he may be henceforth considered a party so as to authorize his appearance in the suit by a guardian *ad litem,* under § 7401, Comp. Laws 1913.

Rescission of contract — by person of unsound mind — when authorized.

3. Sections 4343 and 4344, Comp. Laws 1913, which authorize rescission of contracts made by persons of unsound mind, the latter, where persons are not entirely without understanding, construed in connection with §§ 5943 et seq. Comp. Laws 1913, and *held* to authorize a rescission under the evidence in the instant case.

Opinion filed December 14, 1917.

Appeal from District Court of Ward County, *K. E. Leighton,* J.
Affirmed.
Francis J. Murphy, for appellant.

NOTE.—The great weight of authority seems to be in accord with the case of Thronson v. Blough, to the effect that a mortgage of an incompetent person is voidable only, and may be enforced under proper circumstances, as will be seen by an examination of a note in 42 L.R.A.(N.S.) 343, on right to enforce mortgage given by an incompetent who has not been declared such.

This action being one to foreclose a real estate mortgage and to make a collection, and not a sale of collateral, the court could not appoint a guardian *ad litem* for one not a party to such action. Comp. Laws 1913, § 6213; Farmers Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556.

Such appointment cannot be had when the incompetent is not a party to the original action. Comp. Laws 1913, §§ 7401, 8886, 8887.

The note secured by the mortgage is negotiable and was transferred before maturity, and plaintiff took it free from defenses. Comp. Laws 1913, § 6937; Second Nat. Bank v. Werner, 19 N. D. 485, 126 N. W. 100.

Neither duress, fraud, nor undue influence is alleged, and there is an entire want of proof of such matters. Persons not entirely devoid of understanding, whose incapacity has not been judicially determined, may contract, and their contracts are not void. Comp. Laws 1913, §§ 5836, 5844 to 5854; Nelson v. Thompson, 16 N. D. 295, 112 N. W. 1058; Wood v. Pehrsson, 21 N. D. 357, 130 N. W. 1010.

Palda & Aaker, and *I. M. Oseth,* for intervener and respondent.

The original foreclosure was entirely for the purpose of foreclosing a mortgage given as collateral security. All actions shall be tried between the real parties in interest, and if one such party is omitted, and that party happens to be an incompetent, the count has ample power to appoint a guardian *ad litem* and permit intervention. Comp. Laws 1913, §§ 7412, 7413.

Birdzell, J. This is an appeal from a judgment entered in the district court of Ward county, in an action to foreclose a real estate mortgage. The judgment of the district court was in favor of the defendant and intervener. The facts are as follows:

On or about the 6th day of May, 1912, the defendant executed and delivered to her son, M. I. Brockett, a promissory note for $4,000 due five years after date. This note was secured by a real estate mortgage upon the southwest quarter of section 33, township 160, north of range 89, west of the fifth principal meridian. Thereafter, to wit, on the 22d day of August, 1912, Brockett indorsed the note and assigned the mortgage to the plaintiff in this action. Action having been brought for the foreclosure of the above mortgage, the defendant Sarah Blough

answered, setting up the alleged incompetency of Brockett, and that the transaction resulting in the execution of the note and mortgage was in reality a trust transaction whereby M. I. Brockett had transferred to her the title to the land covered by the mortgage, and she had executed in return the note and the mortgage as an evidence of her trust obligation to hold the land for Brockett. She further alleged that during 1911 and 1912 Brockett worked as janitor for the Kenmare National Bank, of which Thronson, the plaintiff, was cashier; and that during this period plaintiff had become fully acquainted with Brockett, knew his mental condition, and was aware of his incompetency to transact ordinary business.

On April 30, 1914, one C. C. Wysong was appointed guardian *ad litem* of Brockett, and later, as such guardian, filed a complaint in intervention, setting up substantially the same facts as were contained in the answer of the defendant.

It appears that the transaction in connection with which the plaintiff became the assignee of the note and mortgage was a land sale whereby Brockett purchased from Thronson for about $1,600 a quarter section of land lying in some sand hills in a comparatively unimproved part of the country; the note and mortgage being assigned to Thronson as security for an unpaid portion of the purchase price, amounting to $600, and for an additional item of personal indebtedness of $226.

The legal questions raised upon this appeal relate wholly to the guardianship and intervention, and will be considered after disposing of the vital question of fact which relates to the intervener's incapacity.

The trial court found that Brockett had been feeble-minded for more than five years and incompetent, and was not of sufficient mind to understand and transact ordinary business; and that the defendant Sarah Blough, mother of Brockett, had had the care and custody of him since his childhood; and that the incompetency of Brockett arose from an illness with which he was afflicted when a small child. There is ample testimony in the record to warrant this finding. His mother testified that he had been crippled ever since he was ten years of age; that he was for two years in an institute for feeble-minded; that he was subject to fits; that he is inclined to fads, or, to use her language, "sometimes he goes horse crazy, sometimes he goes sheep crazy, and sometimes hog crazy; sometimes he is going to Idaho, and sometimes he is

crazy to go there in the mountains." That "he got crazy about an automobile, but I talked him out of it, and then I got him quieted down on that, and the first thing the news came to me he had bought a thirty-five horse power engine and was going out to break prairie. . . ."

There is much more testimony in the record, all going to show that the matter of his incompetency was generally known about Kenmare, where he resided, and that his mother had frequently had occasion to settle or rescind transactions in which he had been duped, and to notify business men not to deal with him. In the face of this evidence, and without the opportunity to observe the demeanor of the alleged incompetent which the trial court had upon the trial of this action, we cannot conclude that the finding of incompetency is not proper. On the contrary, it appears to be well supported in the evidence.

In view of the relation of employer and employee between the plaintiff and Brockett for a considerable period prior to the transaction in question, there can be no doubt that the trial court was justified in finding that the plaintiff knew of Brockett's incompetency.

The appellant argues that the lower court erred in appointing a guardian *ad litem* for Brockett to appear in this action. It is contended that, inasmuch as the plaintiff had a right to foreclose the mortgage which he held as collateral (Farmers Bank v. Riedlinger, 27 N. D. 318, 146 N. W. 556), and inasmuch as the only necessary party defendant in this action was the mortgagor, the court was without jurisdiction of Brockett, who was not a party, and that consequently the appointing of a guardian *ad litem* under § 7401, Comp. Laws 1913, was not authorized.

After the defendant had answered, setting up the facts with respect to the transaction resulting in the mortgage, it would have been improper for the court to have proceeded further with the foreclosure proceeding without making Brockett a party defendant, unless his rights were to be cared for under § 7397, Comp. Laws 1913, considering Mrs. Blough as the trustee of an express trust. In any event, it is apparent that the answer of the defendant discloses that the real party in interest was Brockett; and, for the purpose of having him represented directly by a guardian *ad litem,* he may be considered from that time forth as a defendant.

It is also contended that the transaction between Brockett and Thron-

son cannot be rescinded because of certain statutes in North Dakota. Section 4343, Comp. Laws 1913, provides that a person entirely without understanding has no power to make a contract of any kind. And § 4344 provides that a conveyance or other contract made by a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, "is subject to rescission as provided in the chapter of rescission of this Code." Section 5934, which is part of the chapter governing rescission, provides that a party to a contract may rescind the same in certain cases only, and mentions in five subdivisions various situations warranting rescission. Incompetency of a party to contract is not mentioned in this section, and from this is argued that our statutes failed to provide the intervener a remedy by way of rescission. This interpretation of the statute is, in our opinion, unwarranted. To construe the various sections relating directly to the rescission of contracts as not applicable to rescission for incapacity as authorized by § 4344 is to render this section entirely nugatory. Section 4344 is ample authority for the rescission of a contract for mental incapacity, and the reference therein to the chapter of rescission is merely for the purpose of subjecting the rescission to the general rules governing the operation of this remedy.

We are of the opinion that the judgment of the trial court is correct, and should be affirmed. It is so ordered.

ROBINSON, J. (concurring). This is an action to foreclose a mortgage for $4,000 and interest at 7 per cent from May 6, 1912. The plaintiff appeals from a judgment against him. The judgment is that the mortgage and the assignment of the same be canceled because there was no consideration for either the mortgage or the assignment, and because the latter was made by a feeble-minded person. The mortgage is made by defendant Sarah E. Blough to her incompetent son, to secure a promissory note to him of the same date for $4,000, and interest. The mortgage is on a good quarter section of land, which the incompetent conveyed to his mother without any consideration. She took the title to hold in trust for him, and unwisely made to him the $4,000 note and mortgage. The purpose was to show his interest in the land in case of her death.

The incompetent was doing janitor work in the national bank at

Kenmare. He was a poor feeble-minded cripple, subject to fits, and for safe-keeping he deposited in the bank his good note and mortgage. The cashier looked at the same, and, forgetting two of the Ten Commandments, he coveted the security and contrived to get it for nothing. For a worthless equity in a quarter section of land way off in the hills of Mountrail county he induced the incompetent to transfer to him the good note and mortgage. The transfer was absolute, and as absolute owner the plaintiff brought this action to foreclose for $4,000, and interest and costs and statutory attorneys' fees. Yet, it now appears that the transfer of the note and mortgage was merely collateral to a note for $900, and interest, which the cashier induced the incompetent to make for a quitclaim deed to the worthless equity in a quarter section mortgaged for about twice its value.

On the $900 note there was given a credit of $300 in lieu of a team of horses which was to go with the equity, but still the foreclosure suit was for a straight $4,000 and interest. It must have been brought with the hope of obtaining a default judgment against the simple-minded party,—poor business for a bank cashier to try in that way to get $5,000 from its simple-minded janitor. Truly, the transaction is on its face a gross fraud from the beginning to the end, including the attempted foreclosure. It is no way for bank cashiers to do business; it is a way for them to lose their reputation for honesty, good faith, and fairness. Good faith consists in an honest intention to abstain from taking an unconscientious advantage of another, even through the forms and technicalities of law. Even though the incompetent cripple were a person of sound mind and body, no court should sustain such a deal.

In any view of the case, it is free from all doubt; defendant has been caught with the goods; he has been caught trying to use the courts to obtain an unjust foreclosure judgment for over $5,000, with costs, and $135 attorneys' fees. The cost of this action is no adequate penance.

F. ORTH, Geo. E. Towle, J. R. Orth, and E. B. Orth, Trustees for Citizens State Bank of Regent, North Dakota, Dissolved, Respondents, v. CHARLES PROCISE and Nellie Lee Procise, Defendants, NELLIE LEE PROCISE, Appellant.

(165 N. W. 557.)

Mistakes of law are of two classes:

Mistake of law — by all parties.

1. A mistake common to all parties.

Law — mistake of — by one party — knowledge of — by other party — fraud.

2. A mistake or misapprehension of the law by one party of which the others are aware at the time of contracting, but which they do not rectify.

In this case the good banker fraudulently led the defendant into a mistake of the law and thereby obtained her signature to the promissory note. To sanction such a procedure would be a reproach to the court.

Opinion filed November 16, 1917. Rehearing denied December 14, 1917.

Appeal from the District Court of Hettinger County, Honorable *W. C. Crawford,* Judge.

Defendant appeals.

Reversed.

Jacobsen & Murray (and *E. T. Burke* on oral argument), for appellant.

It is necessary to allege and prove the execution and delivery of a power of attorney in foreclosure proceedings. Comp. Stat. 1913, § 8075.

"An issue of fact in an action for the recovery of money only must be tried by a jury." Comp. Stat. 1913, § 7608.

Evidence to show mistake on the part of both parties, or on the part of only one of the parties, or fraud by one party on the other, is always admissible. Erickson v. Wiper, 33 N. D. 193, 157 N. W. 592; De Rue v. McIntosh, 26 S. D. 42, 127 N. W. 532.

Agreements or representations made by one party to induce the other to execute a written contract may be shown by parol evidence, where the contract was actually executed upon the faith of the parol agreement or

representations, or where they form a part of the consideration for the written contract. 17 Cyc. 672, 716, and 718.

In an action by the payee, the maker of a note may show by parol that he executed the note as an accommodation to the payee and received no consideration. National Citizens Bank v. Bowen, 109 Minn. 473, 124 N. W. 241; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 482; Shalleck v. Munzer, 121 Minn. 65, 140 N. W. 111; 8 Cyc. 252, note 39.

"A contemporaneous writing whereby the parties agreed that notes were to be paid out of a particular fund is a defense." 8 C. J. 741, note 88.

"It is competent, in support of a plea of want of consideration, to prove that the notes in suit were asked for by plaintiff and were given by defendant merely as a matter of form." Independent Brewing Asso. v. Klett, 114 Ill. App. 1; 8 C. J. 745.

Parol evidence subsequent to the execution of a written contract relating to it is admissible. 17 Cyc. 734.

F. C. Heffron, for respondents.

"Defendant knew he was signing a note, and this note in plain, unequivocal terms obligated him to pay a certain amount of money at a certain time. To permit defendant to show, by parol testimony, that at the time he signed the note it was orally agreed that he was not bound by the conditions thereof, but was to be relieved and released from the payment thereof at some future time when payee should take the note of another person in place thereof, is so obviously contradictory to and variant from the terms of the note itself, that its incompetency is self-evident." First State Bank v. Kelly, 30 N. D. 84, 152 N. W. 125, Ann. Cas. 1917D, 1044; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; Plano Mfg. Co. v. Root, 3 N. D. 165, 54 N. W. 924; Moline Plow Co. v. Gilbert, 3 Dak. 239, 15 N. W. 1, 119 U. S. 491, 30 L. ed. 476, 7 Sup. Ct. Rep. 305; Tourtelot v. Whithed, 9 N. D. 467, 84 N. W. 8; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346; Anderson v. Matheny, 17 S. D. 225, 95 N. W. 911; Central Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11; Westphal v. Nevills, 92 Cal. 545, 28 Pac. 678; Colvin v. Goff, 82 Or. 314, L.R.A.1917C, 300, 161 Pac. 568; Armstrong v. Scott, 36 Fed. 63; Moore v. Beem, 83 Ind. 219; Ewing v. Clark, 76 Mo. 545; Farmers &

T. Bank v. Laird, 188 Mo. App. 322, 175 S. W. 116; People's Bank v. Francis, 8 N. D. 373, 79 N. W. 853.

The failure to prove the existence of a power of attorney to foreclose a mortgage, or to offer such power of attorney in evidence, does not bear upon the merits of the case, even though such proof be necessary, which fact is doubtful. Frank v. Davis, 135 N. Y. 275, 17 L.R.A. 306, 31 N. E. 1100.

Robinson, J. Nellie Procise appeals from a judgment for $1,816. It was recovered on a promissory note made by her and her husband to the Citizens State Bank of Regent, North Dakota. Her defense is that she signed the note without any consideration, and that she was induced to sign it by false and fraudulent representations made to her by the bank cashier. Her husband, Charles Procise, was indebted to the bank, and to secure the same he made to it a mortgage on real property, and to release her interest in the same, Nellie Procise signed the mortgage without any covenant to pay the debt. The bank cashier requested her to sign the note with her husband; that she positively refused to do, but the cashier insisted and assured her that the mortgage would not be good without her signature on the note; that it was a mere form, and that she would never be liable on the note, and she signed it relying on such assurances.

The testimony of her husband is clear and positive and uncontradicted. He testifies: "We had just finished our dinner when Orth, the cashier, and Mr. Ruling came to our house. Mr. Orth brought out his papers and I signed them. 'Now, he says, your wife will have to sign the mortgage, Charlie.' So I stepped into the kitchen and asked my wife to come and sign the mortgage. She came and signed it, and Mr. Orth handed her the note to sign. She said, 'I don't have to sign that, do I?' Mr. Orth said: 'She has got to sign the note, Charlie, or the mortgage would be no good.' She protested that it was not necessary, and she absolutely refused to sign the note. Mr. Orth told her that the mortgage would be no good unless she signed the note, and he said: 'You need not be afraid. We just want you to sign the note merely to validate the mortgage, and you cannot be held for it, and we will never try to hold you for it. To give validity to the mortgage it is absolutely necessary for you to sign the note.'" Her testimony is to the same

effect, and so it clearly appears that she signed the note relying on representations which the cashier must have known to be false. Now, it is contended that the defense is inadmissible as it tends to vary the effect of a written instrument.

In a recent well-considered case Mr. Justice Christianson collated many authorities and expressed the rule thus: One of the exceptions seems to be that agreements or representations made prior to a written contract under which the party was induced to sign the contract may be shown; in other words, where a parol contemporaneous agreement was the inducing and moving cause of the contract, or where the parol agreement forms a part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representation, such evidence is admissible. Erickson v. Wiper, 33 N. D. 206, 157 N. W. 592.

To deny the admission of such evidence would be to allow one of the parties to enter into an agreement under false representations, and then to aid him to enforce it against his adversary notwithstanding the fraud practised upon him by holding out to him the fraudulent inducement. Erickson v. Wiper, 33 N. D. 210, 157 N. W. 592.

Section 5842: The consent of parties to a contract must be free and mutual.

Section 5844: An apparent consent is not real or free when it is obtained by duress, menace, fraud, undue influence, or mistake.

There are mistakes of fact and of law.

Section 5855: Mistakes of law are of two classes:

1. A mistake common to all parties.

2. A mistake or misapprehension of the law by one party of which the others are aware at the time of contracting but which they do not rectify.

In this case the good banker fraudulently led the defendant into a mistake of the law, and thereby obtained her signature to the promissory note. To sanction such a procedure would be a reproach to the court.

Judgment reversed.

JOSEPH SCHWINDERMANN v. GREAT EASTERN CASUALTY COMPANY, a Corporation.

(165 N. W. 982.)

Insurance policy — provision in — hernia — loss by injury from — not recovered by — injury from falling — with hernia as result — provision not applicable.

1. A provision in a casualty insurance policy to the effect that the insurance does not cover loss from injuries resulting directly or indirectly from hernia is *held* not applicable, where the insured received an injury by falling from which hernia resulted.

Casualty insurance company — assured — application from — while working at his trade — boiler maker in roundhouse — injury sustained by falling — provisions of policy — waiver of.

2. Evidence showing that the agent of a casualty insurance company solicited an application from the insured while he was working at his trade as a boilermaker in the roundhouse of a railroad company where he was employed; and that, after preliminary proofs of loss had been supplied, the company wrote denying liability upon untenable grounds and making no reference to the circumstances surrounding the accident,—is *held* sufficient to support a finding that the insurance company waived the benefit of a provision in the policy exempting it from liability to an employee while on duty at the roundhouse and repair shop.

Casualty insurance policy — provisions in — limiting liability for loss — specified in one section — does not limit insurance under different sections.

3. A provision in a casualty insurance policy to the effect that no claim shall

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NOTE.—The reported decisions are almost unanimous in holding that where the condition which exempts an insurer from liability under a policy of accident insurance is itself the result of an accident occurring while the policy is in force, the company is none the less liable for the full stipulated amount. In all reported cases in which the policy sued upon contained provisions of exemption or limitation with reference to hernia, and the death or loss of time resulted from hernia caused by an accident, the insurer was held liable for the full amount stipulated in the policy, as will be seen by an examination of the question under consideration, in notes in 8 L.R.A.(N.S.) 1014, and L.R.A.1916B, 621, on applicability of provisions in accident policy exempting insurer, or limiting its liability for disability arising from a specified condition, when such condition is itself the result of an accident occurring after the issuance of the policy.

be valid for more than one of the losses specified is *held* not to limit the insurance under different sections of the policy.

Opinion filed December 15, 1917.

Action upon policy of accident insurance.

Appeal from District Court, Stutsman County, *J. A. Coffey,* J.

Affirmed.

John W. Carr, for appellant.

Where a casualty insurance company policy provides that it shall not cover loss from injuries, fatal or otherwise, resulting wholly or in part, directly or indirectly, from hernia, the assured sustains injury by falling and this is followed by hernia, the loss is partly due, or indirectly due, to hernia, and no recovery can be had. Kelsey v. Continental Casualty Co. 131 Iowa, 207, 8 L.R.A.(N.S.) 1014, 108 N. W. 221; Sweeney v. National Relief Assur. Asso. 52 Misc. 144, 101 N. Y. Supp. 797; Bacon v. United States Mut. Acci. Asso. (Stedman v. United States Mut. Acci. Asso.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399.

While these policies are construed most favorably to the assured, yet the court cannot undertake to make a new contract in disregard of the plain language used by the parties. Peterson v. Modern Brotherhood, 125 Iowa, 562, 67 L.R.A. 631, 101 N. W. 289; Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252, 1 C. J. p. 413.

Words used in such insurance policies must be given the meaning they ordinarily bear, and where it is manifest that it was the intention of the insurer that liability should attach only in given circumstances, the law will uphold the contract according to its true intent and import. Wheeler v. Fidelity & C. Co. 129 Ga. 239, 58 S. E. 709.

A defendant may, under the statutes of this state, set forth as many defenses as he may have. Comp. Laws 1913, §§ 7448, 7449.

M. C. Freerks, for respondent.

An insurance company is liable under a policy providing that it shall not cover loss or disability resulting directly or indirectly from a hernia, where it appears that the hernia is itself an effect or result of an accident. Under such conditions a recovery can be had. Berry v.

United Commercial Travelers, 172 Iowa, 429, L.R.A.1916B, 617, 154 N. W. 598, Ann. Cas. 1918A, 706.

By rejecting the claim for specific reasons stated in its notice of rejection, the company thereby limited its defense in an action to recover, to the grounds urged in the notice of the rejection of the claim, and it waived all other defenses. 1 C. J. p. 488, note 233; Moore v. National Acci. Soc. 49 Wash. 312, 95 Pac. 268, 38 Wash. 31, 80 Pac. 171; Castner v. Farmers Mut. F. Ins. Co. 50 Mich. 273, 15 N. W. 453; Parmeter v. Bourne, 8 Wash. 45, 35 Pac. 586, 757.

BIRDZELL, J. This is an action upon a policy of casualty insurance which was, by stipulation, tried before the district court of Stutsman county without a jury, resulting in a judgment in favor of the plaintiff for $501.97, interest from August 21, 1916, at 6 per cent and costs. The defendant appeals from the judgment. The facts are as follows:

The plaintiff applied to the defendant for certain accident and sickness insurance, and on August 7, 1915, the defendant company issued a policy for which plaintiff paid a premium of $24. The application was solicited by an agent of the defendant company while the plaintiff was at work at his trade, that of a boiler maker, in the roundhouse of the Northern Pacific Railroad Company in Jamestown, and is as follows:

I hereby apply for a policy to be based upon the following representation of facts. I understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event that any one of the following statements, material either to the acceptance of the risk or the hazard assumed by the company, is false, or in the event that any one of the following statements is false and made with intent to deceive. I agree that this application shall not be binding upon the company until accepted either by the secretary at the home office, or by an agent duly authorized to issue policies.

My full name is Joseph Schwindermann.

My age is twenty-four years, one month, height 5 ft. 9½ inches, weight 174.

My address is No. — Town—Jamestown, State—North Dakota.

The duties of my occupation are (describe fully) Boiler maker.

Beneficiary (full name) Charles Schwindermann. Relationship.
Address—St. Paul, Minnesota.

Whom to notify in case of accident—Name—Charles Schwindermann.

Address—St. Paul, Minnesota.

No application for accident, health, or life insurance has been declined or policy canceled except as follows: None.

I have never received or been refused indemnity for any accident or illness except as follows: None.

My habits are temperate, I have no impairment of sight or hearing, and have never been ruptured except as follows: None.

I have not had any medical attendance during the past five years, except as follows: None.

I have never had diabetes, kidney disease, syphilis, or any disorder of the brain, spine, or nervous system, and am in whole and sound and healthy condition, mentally and physically except as follows: In A No. 1 health.

Dated at Jamestown, N. D., this 31st day of July, 1915.

(Signed) Joe Schwindermann.

On November 2, 1915, the plaintiff slipped on a wet cement floor in the roundhouse and was injured. The injury which he claims to have received was a hernia for which he was later operated upon in a hospital at Brainerd, Minnesota. He was discharged from the hospital on November 28th., after which time, according to the testimony of the attending surgeon, there was no further occasion for treatment. But it was necessary that he should refrain from working for a considerable period of time thereafter. Some time after the plaintiff's injury was received, he notified the defendant company, in reply to which notice he received the following letter:

Great Eastern Casualty Company,
56 John Street.
New York, Dec. 10, 1915.

Mr. Joseph Schwindermann,
1110 Seventh Avenue,
Brainerd, Minn.

Dear Sir:

We are in receipt of a preliminary proof in your claim and note that

your disability commenced on November the 2d. You will note by referring to your policy that it requires that written notice of illness must be furnished to the company within ten days from the beginning of the illness disability, and that written notice of the accident must be furnished to the company within twenty days from the date the injuries are received. As you failed to comply with the requirements of your policy, we regret that you have no claim against us.

We further note that your disability was caused by hernia, and we beg to refer you to additional provision B of your policy, wherein you will note that protection is distinctly debarred for hernia.

Yours very truly,
C. S. Wilson,
Assistant Supt. Claim Dept.

FEW—MK.

The appellant relies for reversal upon the effect of certain provisions in the policy of insurance. The first provision relied upon is subdivision B of the "additional provisions." This subdivision is as follows: "This insurance does not cover disappearance, or suicide or any attempt thereat, sane or insane, or loss from injuries fatal or otherwise, except drowning, of which there shall be no external and visible contusion or wound on the exterior of the body at the place of injury, the body itself in case of death not to be deemed such, or from injuries fatal or otherwise resulting wholly or in part, directly or indirectly, from or whole or in consequence of being affected by intoxicants, narcotics, anesthetics, gas, corrosives, poison, infection, poisonous substances, sunstroke, freezing, vertigo, fits, insanity, somnambulism, hernia, war, riot, strikes, dueling, fighting, wrestling, racing, football or polo playing, unnecessary exposure to obvious danger, handling any explosive, violating law, resisting arrest, being in or on any locomotive, freight or hand car, or while violating law or the rules of a corporation, or the rules of a public carrier affecting the safety of its passengers; or while on the right of way, bridge, trestle, or other property of a railway corporation other than stations, platforms, and regular crossings prescribed by law, not being at the time a passenger, any altercation or quarrel, or intentional injury inflicted by himself or any other persons, sane or insane, or while in or on or attempting to get in or out of any

aerial machine or conveyance, or while participating in any motor, vehicle, speed, or endurance contest."

It is contended that the effect of the foregoing provision is to render the policy entirely inapplicable where the injury resulted wholly or in part, directly or indirectly, from hernia. Such is the language of the provision quoted, and, under the universal rule for the interpretation of clauses in insurance policies limiting liability, the language in question is to receive a strict construction against the insurance company. Maryland Casualty Co. v. Hudgins, 97 Tex. 124, 64 L.R.A. 349, 104 Am. St. Rep. 857, 76 S. W. 745, 1 Ann. Cas. 252. The limitation is not to be carried beyond the plain literal meaning of the words employed. The obvious literal meaning of the clause in question is that the insurance does not cover injuries which result from hernia. It is not stated, and consequently cannot be assumed to have been meant, that the insurance was not to cover an injury from which hernia resulted. In other words, under the language of the policy, where hernia is the cause, the insurance is not applicable, but where something else is the cause and hernia the result, the limitation does not apply. See Travelers' Ins. Co. v. Murray, 16 Colo. 296, 25 Am. St. Rep. 267, 26 Pac. 774; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Berry v. United Commercial Travelers, 172 Iowa, 429, L.R.A.1916B, 617, 154 N. W. 598, Ann. Cas. 1918A, 706. See also Travelers' Ins. Co. v. Murray, supra.

It is next contended that the court erred in giving the plaintiff judgment, for the reason that the plaintiff was in a prohibited place at the time the injury was received. Subdivision D of the "additional provisions" is relied upon. This subdivision is as follows: "This policy does not cover persons in mines or where explosives are manufactured, or tunnel workers, or railroad, news company, or government mail-service employees while on duty, excepting those whose duties call them solely in the office and away from track, train, yard, roundhouse, and repair shop." We are of the opinion that the defense afforded by the foregoing provision is not open to the defendant. The defendant's own agent solicited the application while the plaintiff was at work at the roundhouse. And in the application the applicant was required to furnish information in response to the following inquiry, "The duties of my occupation are (describe fully)." To this the plaintiff responded,

"Boiler maker." The knowledge acquired by the agent in soliciting the policy is to be attributed to the company. Comp. Laws 1913, § 6350; French v. State Farmers' Mut. Hail Ins. Co. 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7. From this it follows that the company not only had knowledge of the plaintiff's occupation, but also knowledge of the circumstances surrounding the pursuit of his occupation. In the light of these facts, it is not reasonable to infer that the plaintiff and defendant were contracting with reference to indemnity for accidents that might befall him in that portion of the day when he was comparatively inactive. When he was required to state in his application the duties of his occupation, he might reasonably have assumed that the information was for the purpose of enabling the insurance company to judge as to whether or not it would issue a policy insuring the risk incident to his occupation, in the ordinary way in which he was known to be pursuing it. See Dailey v. Preferred Masonic Mut. Acci. Asso. 102 Mich. 289, 26 L.R.A. 171, 57 N. W. 184, 60 N. W. 694. It should further be noted that paragraph 12 of the "standard provisions" of the policy in question provided that "if the insured shall at any time change his occupation to one classified by the company as less hazardous than that stated in the policy, the company, upon written request of the insured and surrender of the policy, will cancel the same and will return to the insured the unearned premium." The only reasonable inference to be drawn from this provision is that the policy is intended to insure the applicant while in the pursuit of his occupation.

Connecting the foregoing circumstances with the transaction immediately following the loss, there is ample evidence from which waiver might be inferred. It appears that the plaintiff duly submitted to the defendant the preliminary proofs of loss. The reason for requiring the submission of such proofs of loss can be none other than to give the insurer an opportunity to investigate for the purpose of determining whether or not the claim made is one that will be recognized at all. If not recognized, the insurer will ordinarily apprise the defendant of the reason for the denial of the claim; and, if recognized, it will furnish forms for the submission of the final proofs. After receiving the preliminary proofs in this case, the defendant wrote the letter above quoted, wherein it denied liability upon an untenable, technical ground,

and upon a further ground, going to the merits of the insurance contract itself. In this, it was likewise in error as to its obligation as shown above. We are of the opinion that this letter, written under the circumstances shown to have existed in this case, connected with the circumstances surrounding the inception of the policy, is sufficient evidence to support a finding that the insurer waived the benefit of subdivision D of the policy. In fact, the entire conduct of the insurance company, from the issuance of the policy to the writing of the letter assigning reasons for denying liability, is consistent only with the theory that the company considered the policy as binding upon it while the plaintiff was performing the duties incumbent upon him in his vocation. Gans v. St. Paul F. & M. Ins. Co. 43 Wis. 108, 28 Am. Rep. 535.

It is further argued that the trial court erred in permitting recovery under two provisions of the policy, to wit: Under section D, which covers loss of time after thirty days' confinement within the house after any accident, for which the insurance is $150 per month ("if not covered under any preceding section"), and section F, which provides the hospital benefit of $25 per week ("if not covered under any preceding section"). It is claimed that subdivision A of the "additional provisions" limits recovery to the loss under one of these sections. Subdivision A provides: "No claim shall be valid for more than one of the losses herein specified, except that claims under section J shall be payable in addition to any other indemnity due, and under section E as provided thereunder. Any payment under section A or C shall terminate this policy." This position is wholly untenable. The force of the argument depends upon the meaning of the terms "claim" and "losses" in the foregoing subdivisions. It may be that under this provision separate claims must be made for each loss, but it is not stated that the *insurance* shall only extend to one of the losses.

But even assuming that the paragraph in question is susceptible of the interpretation that the insurance shall only extend to one of the losses, a strict interpretation of the provision in question requires that a claim under one section should be invalidated only to the extent that there is an overlapping. But as to this we express no opinion. The right to compensation for the loss of time under section D only arises after the expiration of thirty days from the accident, and the maximum

claim thereunder is $900, or at the rate of $150 per month for six months. On the other hand, the right to the hospital benefit under section F arises at once and is limited to twelve weeks. In the case at bar the right to the hospital benefit had been exhausted before the right to the time insurance under section D accrued. If the claiming or the acceptance of the hospital benefit be construed as depriving the insured of the benefit of his insurance against loss of time, he would be compelled to choose between two provisions of his policy without knowing at the time of his choice the relative value to him of the provisions under which his claims may be made.

It is further argued that the judgment is erroneous because no final proof of loss was ever submitted, but it is elementary that where an insurance company denies liability absolutely, it waives compliance with those provisions of the policy which are merely conditions precedent to the bringing of an action.

Finding no error in the record, the judgment is affirmed.

ROBINSON, J. (concurring). In this case plaintiff recovered a judgment against defendant for $546.67 on an accident insurance policy for which he paid $24. It is made on a written application which does not give the terms or conditions of the policy. It is a document 20x24 inches, printed on two sides. The chances are more than ten to one plaintiff never read it, and that if he did read it he knew not what it meant. It consists of a general covenant to give a limited indemnity for loss by accident, with numerous exceptions and limitations apparently designed to deceive and evade nearly all liability. It is entirely safe to say that such exceptions and evasions were not included in the insurance application, and they formed no part of the contract. The courts have gone altogether too for in holding that a corporation may receive good money for a good and valid insurance contract, and impose on the purchaser a large printed document which makes the insurance a deception. It is no answer to say that, when a party receives such a document he may pay an attorney $5 to read it and pay him $10 to return it and to recover the insurance premium.

As it appears, when the plaintiff signed his insurance application and paid his $24 he was employed as a boiler maker or repairer in the shops of the Northern Pacific Railway Company at Jamestown, and it

was so stated on his application, and the fact was well known to the agent receiving the money. But when rupture or hernia was the result of a severe fall on the floor of the railway shops, and the plaintiff made a proper claim for damages, the company says to him: We did not insure you against accident causing hernia. We do not insure railway company employees on duty in a roundhouse or repair shop. We regret that you have no claim against us. And truly, if such were the fact, it would be sincere cause for regret.

The company wholly rejects the claim, and demurs to the proof because it does not conform to its rules, and it demurs to the suit because it was brought too soon. It insists on the right to make a special code of procedure to govern claims and suits against it, and still its officers regret that the plaintiff has no just claim against them, but assuredly the record shows no such cause for regret. There has been a fair trial, and the findings are well sustained by the evidence.

G. L. STROBECK v. OSCAR BLACKMORE.

(165 N. W. 980.)

Debts — payment in full — amount less than debt — offer of acceptance by creditor — may withdraw such offer — before actual payment.

1. Where a creditor voluntarily offers in writing to accept as full payment of a debt owing to him an amount less than the debt, he is at liberty to withdraw the offer at any time before the amount is received in full satisfaction of the debt.

New consideration — not necessary — for such offer and acceptance — within satisfaction — final payment — withdrawal of offer before.

2. Sections 5826, 5828, and 5833, Comp. Laws 1913, construed and *held* not to require any new consideration for the satisfaction of a debt by the pay-

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NOTE.—The rule that an agreement to accept, or the actual acceptance of, part of a past-due, liquidated, and undisputed indebtedness, in discharge of the whole, without other consideration, is not binding upon the creditor as a discharge or release of the amount remaining unpaid, is very generally adhered to in cases which cannot be taken out of its operation by some distinction, real or fanciful, as will be seen by an examination of the cases collated in notes in 20 L.R.A. 785; 11 L.R.A.(N.S.) 1018, and 21 L.R.A.(N.S.) 1005.

ment of a lesser amount, where there is a written acknowledgment of satisfaction, or where the payment of the lesser sum is made in pursuance of a written agreement to that effect; but such sections do not preclude the withdrawal before final payment of an offer made in writing.

Conditional payment — amount less than debt — withdrawal before compliance with offer — evidence.

3. Evidence examined and *held* to show, at most, only a conditional payment of the lesser amount, and to conclusively show a withdrawal of the creditor's offer before compliance therewith by the debtor; and consequently insufficient to establish an accord and satisfaction.

Opinion filed December 15, 1917.

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

Reversed.

Hitchinson & Lynch, for appellant.

A certified check is not a payment even though the amount is sufficient to cover the obligation; and, assuming the bank had authority to collect the obligation, it could receive nothing but cash without special authority. It does not discharge the debt, nor does it constitute a tender. Schafer v. Olson, 24 N. D. 542, 43 L.R.A.(N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; National Bank v. Johnson, 6 N. D. 180, 69 N. W. 49; 7 C. J. 614, 615; 2 C. J. 627; Griffin v. Erskine, 9 Ann. Cas. 1193, and note 1198, 131 Iowa, 444, 109 N. W. 13; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924; Scott v. Gilkey, 153 Ill. 168, 39 N. E. 265; Moore v. Pollock, 50 Neb. 900, 70 N. W. 541; Buffalo Center Land & Invest. Co. v. Swigart, 176 Iowa, 422, 156 N. W. 701; Comp. Laws 1913, § 7071; 2 Dan. Neg. Inst. 641; 8 C. J. 568; 30 Cyc. 1207.

A party must plead and prove payment, and the burden is upon such party to prove same. Comp. Laws 1913, §§ 5797, 5798, 27 Cyc. 1397.

"An obligation is extinguished by an offer of performance made in conformity with the rules herein prescribed and with an intent to extinguish the obligation." Comp. Laws 1913, § 5800.

An offer of partial performance is of no effect. It must also be made in good faith. Comp. Laws 1913, §§ 5801, 5808, 5809.

It is not only necessary to offer to pay the amount called for by an

obligation, but it is necessary to follow up the offer by an actual tender. Brown v. Smith, 13 N. D. 580, 102 N. W. 171; Swallow v. First State Bank, 35 N. D. 323, 160 N. W. 137, 35 N. D. 608, 161 N. W. 207.

A court of equity cannot depart from the principles of payment, tender, accord and satisfaction, offer and acceptance, and say to the creditor that he must take less than the sum due, where the party making the offer has not placed himself in a position when the court can say that he must pay the lesser amount. Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44; Webster v. McLaren, 19 N. D. 753, 123 N. W. 395; Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656; Chrystal v. Gerlach, 25 S. D. 128, 125 N. W. 633; Troy Min. Co. v. Thomas, 15 S. D. 238, 88 N. W. 106; Hagen v. Townsend, 27 S. D. 457, 131 N. W. 512; Gilia v. Robbins, 134 Minn. 45, 158 N. W. 807; McIntosh v. Johnson, 51 Neb. 33, 70 N. W. 522; New York L. Ins. Co. v. MacDonald, — Colo. —, 160 Pac. 193; Schweider v. Lang, 29 Minn. 254, 43 Am. Rep. 202, 13 N. W. 33; 1 C. J. 527, 529, 533, 539, 543; 1 R. C. L. 177, 203; Reilly v. Barrett, 220 N. Y. 170, 115 N. E. 453; Moore v. Norman, 43 Minn. 428, 9 L.R.A. 55, 19 Am. St. Rep. 247, 45 N. W. 857, 52 Minn. 83, 18 L.R.A. 359, 38 Am. St. Rep. 526, 53 N. W. 810; Bank of Benson v. Hove, 45 Minn. 40, 47 N. W. 449; Curkeet v. Steinhoff, 130 Wis. 146, 109 N. W. 975.

If payment is made on any condition, such condition must be accepted before it can operate to discharge the debt. 30 Cyc. 1187, and cases cited.

The pretended payment on delivery of the check was but a mere conditional offer to pay, and invalid as a tender for any purpose. Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Mann v. Roberts, 126 Wis. 142, 105 N. W. 785; Halpin v. Phenix Ins. Co. 118 N. Y. 165, 23 N. E. 482, 1 R. C. L. 200; Smith v. Black, 9 Colo. App. 64, 47 Pac. 394; 25 Colo. 57, 52 Pac. 1108; Beranek v. Beranek, 95 Neb. 311, 145 N. W. 712; First Nat. Bank v. Day, 188 Mich. 228, 154 N. W. 101; Swallow v. First State Bank, 35 N. D. 608, 161 N. W. 207; 27 Cyc. 1406; Easton v. Littooy, 91 Wash. 648, 158 Pac. 531; Root v. Bradley, 48 Mich. 27, 12 N. W. 896; Canfield v. Conkling, 41 Mich. 371, 2 N. W. 191; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; Breunich v. Wesselman, 100 N. Y. 609, 2 N. E. 385; Hayward v. Chase, 181 Mich. 614, 148 N. W. 214; Reynolds v. Price,

88 S. C. 525, 71 S. E. 51; Parker v. Beasley, 116 N. C. 1, 33 L.R.A. 331, 21 S. E. 955; Tuthill v. Morris, 81 N. Y. 94; Davies v. Dow, 80 Minn. 223, 83 N. W. 50; Holton v. Brown, 18 Vt. 224, 46 Am. Dec. 148; Knollenberg v. Nixon, 171 Mo. 445, 94 Am. St. Rep. 790, 72 S. W. 4_; Post v. Springsted, 49 Mich. 90, 13 N. W. 370; Potts v. Plaisted, 30 Mich. 149; Engle v. Hall, 45 Mich. 57, 7 N. W. 239.

The burden of proving agency is on him who claims it in his own interests. 2 C. J. 562, 564, 927, §§ 669, 670; Fitch v. Englehardt, 34 N. D. 187, 157 N. W. 1038; Schafer v. Olson, 24 N. D. 542, 43 L.R.A. (N.S.) 762, 139 N. W. 983, Ann. Cas. 1915C, 653; McMullen v. People's Sav. & L. Asso. 57 Minn. 33, 58 N. W. 820; Fair v. Bowen, 127 Mich. 411, 86 N. W. 991; Thomas v. Arthurs, 8 Kan. App. 126, 54 Pac. 694.

Where one is kept in ignorance of material facts touching the transaction, he cannot be estopped to assert his rights, after discovery. Quale v. Hazel, 19 S. D. 483, 104 N. W. 215.

F. J. Graham for respondent.

It is the settled law that payment of a debt by a stranger and without the debtor's request, if accepted as such by the creditor, discharges the debt so far as the creditor is concerned. 30 Cyc. 1221.

Ratification of party of an indivisible transaction is a ratification of the whole. Code, § 6332, 2 C. J. p. 467, § 77.

Plea of payment may be sustained by proof of accord and satisfaction. Green v. Hughitt School Twp. 5 S. D. 452, 59 N. W. 224; 30 Cyc. 1180.

Acceptance may be implied from the conduct of the creditor. Prather v. State Bank, 3 Ind. 356; Globe Furniture Co. v. School Dist. 6 Kan. App. 889, 50 Pac. 978; Grandy v. Abbott, 92 N. C. 33; Moore v. Tate, 22 Gratt. 351; Jenkins v. National Mut. Bldg. & L. Asso. 111 Ga. 732, 36 S. E. 945; Voss v. Mutual Ben. L. Ins. Co. 81 Fed. 24.

One cannot change his purpose to the injury of another. Comp. Laws 1913, § 7246.

He who consents to an act is not wronged by it. Comp. Laws 1913, § 7249.

BIRDZELL, J. This is an appeal from a judgment of the district court of Dickey county, quieting title in the plaintiff to certain lands

described in the complaint, and adjudging that certain mortgages held by the defendant and appellant have been fully paid and satisfied. The action is one to quiet title, and the complaint is in the statutory form. The defendant, Blackmore, interposed an answer setting up certain notes and mortgages as liens upon the land which he contends are unpaid. The sole question presented upon this appeal is whether or not the mortgages of defendant and appellant have been satisfied.

The facts are as follows: One Preston Z. Mowry, was formerly the owner of the lands described in the complaint, and, while owning the lands, he and his wife executed mortgages to the defendant, Blackmore, as follows: One dated August 20, 1910, for $5,000; one dated October 28, 1910, for $2,500; one dated March 4, 1912, for $2,500; one dated March 9, 1912, for $2,500; one dated October 26, 1914, for $6,000; and one dated March 3, 1915, for $6,000. No interest was paid on any of the mortgage notes in 1915, and on November 1, 1916, by reason of such nonpayment and the acceleration provision in the otherwise undue obligations, there was due and owing to the defendant, according to the tenor of the various notes, the sum of $28,229. The respondent, however, contends that an accord and satisfaction has been effected whereby the lien of the mortgages has been discharged by the payment of a lesser sum. It appears that Blackmore, who resides at Davis, Illinois, loaned money upon the security of lands in North Dakota, and that one F. B. Dille, cashier of the Farmers & Merchants' Bank of Monango, had acted as his agent in making the loans. In October, 1916, Mowry informed Blackmore that he could not raise the money to meet his obligations and was consequently compelled to dispose of the land. He further requested that Blackmore send the papers, including releases, abstracts, mortgages and notes to the Farmers & Merchants' Bank at Monango for collection, and stated that they would be taken up on or before November 1st. Blackmore complied with this request about October 20th, by forwarding the papers to F. B. Dille, cashier of the bank. For the convenience of the purchasers of the land, these papers were forwarded by Dille to the Fergus Falls National Bank, which, on November 1, 1916, collected $27,911.50 thereon, remitting to Dille in the shape of a certified check for that amount, signed by Strobeck and Ulland. This check was payable to F. B. Dille, cashier. In the letter accompanying the remittance, the cashier of the Fergus Falls

National Bank called attention to the fact that the satisfactions which had been sent by Blackmore were defective, and he asked Dille to "please see that the satisfactions were properly executed before using the funds." He stated, further, that as the money was payable at the Monango bank, the purchasers wished it to be understood that no interest would accrue on the mortgages after November 1st. The amount remitted corresponded with the tabulated statement of the amount due, contained in Dille's letter of transmittal to the Fergus Falls National Bank. The subsequent correspondence between Dille and Blackmore is unimportant except as it shows that Blackmore was kept in ignorance of the amount that had been collected upon the papers, that he refused to acquiesce in the delay in the transmittal of the money owing to him, and that he demanded interest for the use of the money until payment.

It seems that Blackmore was perfectly willing, at least as far as Mowry was concerned, to liquidate the entire indebtedness owing to him on the basis of 7 per cent for the money loaned, and at a similar rate upon overdue interest, even though, under the notes and mortgages, he would have been entitled to collect more. In a letter of October 17, 1916, written to Dille, Blackmore said: "I have dealt with Mr. Mowry a long time, and am very sorry to have him go under, and all I ask of him is to get me 7 per cent for the use of my money. When he returns the principal, and I want it understood that I never expect to charge any of my customers anything extra for failing to get around in time, but I wrote to him that as on one of his notes where there was no coupon I could not collect compound interest, so I would have to take more on the coupon in order to get even.

"You know what I mean. I only want 7 per cent fair, that is all." In another letter of October 26th, Blackmore also says: "I have sent them (the mortgages and notes) and want you to see that I have just 7 per cent on them on all of the time the money is in use. I know that cannot fail to suit *all parties*. I do not know, of course, when they may be paid, but expect them paid November 1st. I told Mowry that I knew I could not collect compound interest, and as he has the use of the money, if no other way, I could charge a higher rate on the unpaid coupons. Thus you will see I only want 7 per cent on all of the money while in use."

It is undisputed that Mowry's obligation to Blackmore, figured at 7 per cent to November 1st, amounted to more than the sum collected by Dille; namely, $27,911.50.

The trial court found that Dille's computation placed the amount at $64.58 too low. It also appears in the findings that the plaintiff, on the 13th day of March, 1917, at the time of the trial of the action, deposited in court $33.48 and interest at 10 per cent from November 1, 1916, to date; and that on the 13th of April, after the trial of the action, plaintiff deposited in court the sum of $32.75 as a balance due the defendant under the settlement. Under the above facts the trial court, having found that the mortgages were satisfied, entered a judgment in favor of the plaintiff.

From the foregoing statement of the undisputed facts, it is manifest that Blackmore, the defendant, has never actually received full satisfaction of the notes, according to their tenor, and it is equally apparent that before the commencement of this action, in fact soon after the partial conditional payment was made, he withdrew the offer he had previously made to settle for a lesser sum. It is argued, however, by the respondent, that Dille was the agent of Blackmore for the purpose of collecting the notes, and that, being such agent, he was bound by the proposition submitted by Dille to the Fergus Falls bank, under which he called for the payment of $27,911.50. Counsel have, however, apparently abandoned this theory; for they have paid into court an additional amount sufficient to equal the principal and 7 per cent upon the indebtedness. Regardless of any concession that might be implied by payment of a balance into court, we are convinced that the proposition of the agent, considering him for the purpose of argument as such, was neither unconditionally accepted by the purchaser of the land nor by anyone on his behalf; for, instead of paying the amount unconditionally, the Fergus Falls bank remitted to Dille directly, and instructed him not to use the funds until satisfactions were properly executed. In no sense could such a remittance with these accompanying instructions be regarded as an unconditional acceptance of Blackmore's proposition made through Dille to settle the entire indebtedness for $27,911.50. This transaction, regarded in the light most favorable to the plaintiff, falls far short of amounting to an absolute payment of the lesser sum.

It is elementary that an executory accord does not operate as a satisfaction of the obligation which is made the subject-matter thereof, and that satisfaction dates only from the time of the complete execution of the accord by the actual acceptance of the thing rendered in satisfaction. Section 5826, Comp. Laws 1913, provides that "*acceptance by the creditor of the consideration of an accord* extinguishes the obligation and is called satisfaction." A mere offer by a creditor to accept less than the amount owing to him in full payment of the obligation is not in itself an offer of accord, because it lacks the element of consideration. If such offer, however, is made in writing and is completely and unequivocally accepted by a full compliance with the proposal, or, if there be an acknowledgment in writing of full satisfaction of a debt, when in fact only part has been paid, the entire debt is extinguished, even though there be no consideration. Comp. Laws 1913, §§ 5828 and 5833. But this is by force of statutory provisions which obviate the necessity of consideration in instances where a creditor makes written acknowledgment of satisfaction, or receives a lesser sum in satisfaction pursuant to a written agreement to that effect. But the facts of this case do not bring it within either of these statutes.

It is apparent that any offer which Blackmore made in writing was revoked before any amount had been received by him in satisfaction, and that any offer which may have been made on his behalf by an agent was withdrawn and the agency revoked before such offer was fully complied with. The creditor had a right to withdraw his offer or terminate his *nudum pactum* agreement at any time he should see fit; and having done so before there was a sufficient compliance to amount to a satisfaction of the obligation owing to him, he has a legal right to insist upon the full payment of his obligation.

It is useless to argue that Dille's acceptance and retention of the certified check for $27,911.50 amounted to a satisfaction or precluded Blackmore from subsequently claiming the amount legally owing to him. Even though Dille be regarded as the agent of Blackmore, it yet appears that the certified check was accompanied with definite instructions going to show that the original proposition, made by Blackmore, through Dille, to the purchaser, was not unconditionally accepted. The Fergus Falls bank, rather, constituted Dille its agent to hold the check pending the

execution of proper satisfactions, which condition has never been complied with. There having been no acceptance by the creditor or by anyone on his behalf of the certified check, the argument of the respondent that the giving of a check of a third person may satisfy a debt of larger amount falls to the ground.

Neither can it be successfully maintained that Blackmore acquiesced in and ratified Dille's action in taking the certified check. On November 3d, Dille wrote Blackmore, inclosing the satisfaction for correction as he was directed to do by the Fergus Falls bank; and in his letter stated, "This will hold up payment of the mortgages, and I hope that you can get these back to us promptly." To this letter, Blackmore promptly replied that he could not see wherein the satisfactions were defective; and, furthermore, that whenever he had had paper due him in the past, he had been given thirty days' time to release the mortgages; and he also stated, "Now, if your man wants this to be a go, he should know that I will not let him keep the use of this money and not get pay for the use of it, so let me know what he says, and then I will know whether to send him the new papers or not." After this date a number of letters passed between the parties, and in them all one negative fact and one positive fact stand out; Dille refrains from apprising Blackmore of the amount collected, and Blackmore insistently demands 7 per cent to the date the money is actually paid to him. Later, on November 23d, Blackmore demanded a return of the papers to him.

There is no finding of fact in this case to the effect that the draft for $27,911.50 was never accepted either by Blackmore or by his agent as a satisfaction of the obligation to pay the larger sum; nor, in view of the record, do we see how such finding could be made. For the foregoing reasons, the judgment of the trial court, decreeing that the defendant and appellant no longer has a lien upon the premises covered by the mortgages, is erroneous and is reversed.

GRACE, J. I dissent.

MARIA STEINWAND, Administratrix of the Estate of George Steinwand, Deceased, v. DANIEL H. BROWN et al.

(166 N. W. 129.)

Adverse claims to real property — action to determine — mortgage foreclosure — adverse possession — for more than ten years — under claim and color of title — all claims barred.

This is an action to determine adverse claims to a quarter section of land. Under a mortgage foreclosure, and under a mortgage which gave to the mortgagee and its grantees the right to the possession of the land, and under a claim and color of title in good faith, the plaintiff and her grantors have been in actual adverse possession of the land for more than ten years. *Held*, that all claims of the defendant are barred by statute.

Opinion filed October 20, 1917. Rehearing denied December 28, 1917.

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

Defendant appeals.

Affirmed.

W. S. Lauder (*Youker & Perry,* of counsel) for appellants.

To entitle a party to foreclose a mortgage by advertisement, all assignments must first be duly recorded. Code, § 8077, subd. 3; Page v. Smith, 33 N. D. 369, 157 N. W. 477, and cases cited; Morris v. McKnight, 1 N. D. 266, 47 N. W. 375; Langmaack v. Keith, 19 S. D. 351, 103 N. W. 210.

A party foreclosing a mortgage by advertisement must not only own the mortgage in fact, but his ownership must appear upon the records in the office of the register of deeds.

Otherwise a party has no right to so foreclose, and the foreclosure and the sheriff's deed issued thereon are wholly void. Hickey v. Richards, 3 Dak. 345, 20 N. W. 428; Hebden v. Bina, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85; D. S. B. Johnston Land Co. v. Mitchell, 29 N. D. 510, 151 N. W. 23.

Every person who has actual notice of circumstances sufficient to put a prudent man upon his inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have con-

structive notice. Code, § 7290, 2 Pom. Equity Jurisprudence, 3d ed. § 637; Roll v. Rea, 50 N. J. L. 264, 12 Atl. 905; Albia State Bank v. Smith, 141 Iowa, 255, 119 N. W. 608; Clark v. Bullard, 66 Iowa, 747, 24 N. W. 561; Ætna L. Ins. Co. v. Bishop, 69 Iowa, 645, 29 N. W. 761; Mathews v. Jones, 47 Neb. 616, 66 N. W. 622; Hubbard v. Knight, 52 Neb. 400, 72 N. W. 473; Brush v. Ware, 15 Pet. 93, 10 L. ed. 672; White v. Foster, 102 Mass. 375; Baker v. Mather, 25 Mich. 51; Higgins v. Dennis, 104 Iowa, 605, 74 N. W. 9.

One who takes a mortgage upon real property has constructive notice of every fact which could have been ascertained by an inspection of the deeds and mortgages on record in the chain of title. Pillow v. Southwest Virginia Improv. Co. 92 Va. 144, 53 Am. St. Rep. 804, 23 S. E. 32; Kirsch v. Tozier, 42 Am. St. Rep. 729, and note, 143 N. Y. 390, 38 N. E. 375; McPherson v. Rollins, 107 N. Y. 316, 1 Am. St. Rep. 826, 14 N. E. 411; Stewart v. Matheny, 14 Am. St. Rep. 539, note.

"Whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry would presumably have lead." Mercantile Nat. Bank v. Parsons, 40 Am. St. Rep. 299, and note, 54 Minn. 56, 55 N. W. 825; Doran v. Dazey, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023; 2 Devlin, Real Estate, §§ 710, 710a; Hingtgen v. Thackery, 23 S. D. 329, 121 N. W. 839; Hall v. Orvis, 35 Iowa, 366; Mosle v. Kuhlman, 40 Iowa, 108; Clark v. Stout, 32 Iowa, 213; State v. Shaw, 28 Iowa, 67.

The defendant is not estopped to assert his rights. Estoppel is essentially an equitable rule. To fix acquiescence upon a party, it must unequivocally appear that he knew or had notice of the fact upon which the alleged acquiescence is founded and to which it refers. Herman, Estoppel, 6th ed. pp. 663 et seq.; Goss v. Herman, 20 N. D. 305, 127 N. W. 78; 12 Am. & Eng. Enc. Law, 547; Kenny v. McKenzie, 23 S. D. 111, 49 L.R.A.(N.S.) 775, 120 N. W. 781; Biddle Boggs v. Merced Min. Co. 14 Cal. 279, 10 Mor. Min. Rep. 334; Bigelow, Estoppel, p. 439; Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927; Brigham Young Trust Co. v. Wagener, 12 Utah, 1, 40 Pac. 764, 8 Enc. Pl. & Pr. 10; Ergenbright v. Henderson, 72 Kan. 29, 82 Pac. 524; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Page v. Smith, 13 Or. 410, 10 Pac. 833; Buck v. Milford, 90 Ind. 291; Meyendorf v. Froh-

mer, 3 Mont. 282, 5 Mor. Min. Rep. 559; Hope Lumber Co. v. Foster & L. Hardware Co. 53 Ark. 196, 13 S. W. 731.

To effect an estoppel by silence it must appear that the person had a full knowledge of the facts and of his rights, that he had an intent to mislead or at least a willingness that others should be deceived, and that the other party was misled by his attitude. 10 R. C. L. pp. 693, 694, subd. 21, and notes; Davidson v. Jennings, 27 Colo. 187, 48 L.R.A. 340, 83 Am. St. Rep. 49, 60 Pac. 354; Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353; Bartlett v. Kauder, 97 Mo. 356, 11 S. W. 67; Cook v. Walling, 117 Ind. 9, 2 L.R.A. 769, 10 Am. St. Rep. 22, 19 N. E. 532.

Plaintiff must rely on the strength of her own title, and not upon the weakness of the title of her adversary. Page v. Smith, 33 N. D. 369, 157 N. W. 477.

Title by prescription is not shown. The legal title has been at all times in defendant, of which fact the mortgage company and its assigns, including plaintiff's testator, have had constructive notice from the record. Page v. Smith, 33 N. D. 377, 157 N. W. 477.

Unimproved and unoccupied land is deemed to be in the possession of the holder of the legal title, and not in the holder of an alleged title acquired under void judicial proceedings, or a void mortgage foreclosure. State Finance Co. v. Beck, 15 N. D. 374, 109 N. W. 357; Page v. Smith, 33 N. D. 376, 157 N. W. 477; Jasperson v. Scharnikow, 15 L.R.A.(N.S.) 1189 note.

Plaintiff's title or claim has not ripened into a perfect title.

"An adverse claim to land may ripen into a perfect title by virtue of the Statute of Limitations; but it is primarily essential that the possession relied upon be actual, and for the full period of time required." Page v. Smith, supra; D. S. B. Johnston Land Co. v. Mitchell, 29 N. D. 510, 151 N. W. 23; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737; J. B. Streeter, Jr. Co. v. Fredrickson, 11 N. D. 300, 91 N. W. 692.

F. J. Graham and *E. E. Cassels,* for respondent.

It is well settled that when an adverse possession of real property has continued for a sufficient length of time so that the remedies of the owner to recover the land have become barred by the Statute of Limitations, the title to such premises is devested and becomes vested in the adverse occupant. Sprecker v. Wakeley, 11 Wis. 433; Rogers v. Benton, 39

Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Brown, Limitation & Adverse Possession, §§ 1–4, and cases cited in notes to § 4; Campbell v. Holt, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; Chapin v. Freeland, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128; Comp. Laws 1913, §§ 7362, 7363, 7381; Dak. Rev. Codes 1877, 2d ed. p. 4, preface.

These sections of our Code came to us with a construction placed upon them, and, in adopting them, we adopted the construction of them. Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, 50 N. Y. 468; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773; Nash v. North West Land Co. 15 N. D. 566, 108 N. W. 792.

A mortgagor's remedies against a mortgagee in possession are conclusively of an equitable nature. Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Jones, Mortg. 6th ed. §§ 715 and 716, and cases cited; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Mears v. Somers Land Co. 18 N. D. 384, 121 N. W. 916; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773.

"If a man knowingly, although he does it passively, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal rights against such person." Shelby v. Bowden, 16 S. D. 531, 94 N. W. 416; Wampol v. Kountz, 14 S. D. 334, 86 Am. St. Rep. 765, 85 N. W. 595; Murphy v. DaFoe, 18 S. D. 42, 99 N. W. 86; Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79; State ex rel. Miller v. Graham, 21 Neb. 339, 32 N. W. 142; Gillespie v. Sawyer, 15 Neb. 536, 19 N. W. 449; Simmons v. Burlington C. R. Co. 159 U. S. 278, 40 L. ed. 150, 16 Sup. Ct. Rep. 1; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 782, 127 N. W. 597; Pom. Eq. Jur. § 865.

There are cases where it is the duty of a person to speak, although the actual state of the title might be ascertained by an examination of the records, and courts have frequently applied the doctrine of estoppel by conduct in such cases, even when the conduct of the party estopped consisted merely of his silence and failure to assert his title at the proper time. Conklin v. Wehrman, 38 Fed. 874; Sumner v. Seaton, 47 N. J. Eq. 111, 19 Atl. 884; Pom. Eq. Jur. §§ 804, 965; Horn v. Cole, 51 N. H. 287, 12 Am. Rep. 111; Bausman v. Faue, 45 Minn. 412, 48 N.

W. 13; Wetzel v. Minnesota R. Transfer Co. 12 C. C. A. 490, 27 U. S. App. 594, 65 Fed. 23; Murphy v. Dafoe, 18 S. D. 42, 99 N. W. 86; Kirk v. Hamilton, 102 U. S. 68, 26 L. ed. 79; Wendell v. Van Rensselaer, 1 Johns. Ch. 344; Bacon v. Northwestern Mut. L. Ins. Co. 131 U. S. 258, 33 L. ed. 128, 9 Sup. Ct. Rep. 787; Kenny v. McKenzie, 25 S. D. 485, 49 L.R.A.(N.S.) 782, 127 N. W. 597.

Robinson, J. The plaintiff brings this suit under the statute to determine adverse claims to a quarter section of land (N. W. ¼ 2–131–64) in Dickey county. On August 4, 1914, Daniel Brown by answer avers that he is the owner in fee of the land and entitled to possession of the same under a patent from the United States. In reply the plaintiff avers that under a mortgage deed made by Brown, a foreclosure of the same, and a sheriff's deed, she and her grantors have been in actual and continuous, open and adverse, possession of the land for more than twenty years and have paid all taxes on the land since 1883. That during all of said time defendant lived within a mile of the land and made no claim to it. The trial court gave judgment quieting plaintiff's title, and defendant appeals. By his answer Brown claims title under a receiver's receipt made to him in December, 1883, and a United States' patent in 1883. He avers that he owns the land and that for more than twenty years he has been in actual possession of the same, and he asks that judgment of the adverse claim of the plaintiff be adjudged void.

The plaintiff claims title under a mortgage dated December 24, 1883, made by Brown to United States Mortgage Company to secure $450 and interest. This mortgage contains a power of sale in case of default. Default was made by failure to pay the principal, interest, or taxes, and on April 19, 1890, pursuant to notice of foreclosure the land was sold to the mortgage company by the sheriff of Dickey county, and an affidavit and certificate of sale was duly made and recorded. There was no redemption, and in May, 1891, the sheriff made to the purchaser a deed of the land, which was duly acknowledged and recorded. Then the mortgage company made to Albert Hilton a contract for the sale of the land, and in February, 1904, it made to Hilton a warranty deed of the land. On June 22, 1905, Hilton made to George Steinwand, hus-

band of the plaintiff, now deceased, a warranty deed recorded June 23, 1905. It was made for the express consideration of $1,760.

The mortgage shows it was given to secure the purchase money which Brown paid for the land. It covenants to pay taxes and contains a power of sale. In case of default, the mortgagee, its successors, and assigns are authorized to enter upon and take possession of the land, to sell and convey the same to the purchaser in fee simple. The mortgage contains also this special power of attorney to sell the land, "and, for the purpose of effecting such sale and making to the purchaser a good and effective title, the said party of the first part (Brown) has constituted and appointed, and does constitute and appoint, the party of the second part or any agent it may select and appoint for that purpose, its true and lawful attorney for him, and in its name and state to sell said premises, and to make to the purchaser thereof a good and sufficient deed or deeds of conveyance, with full covenants of warranty, to the same extent and in like manner as the party of the first part (Brown) might do if personally present with full power of substitution to said second party, and without any power of revocation by said party of the first part."

When a power to sell real property is given to a mortgagee in an instrument intended to secure the payment of money, the power is deemed a part of the security. Rev. Codes, § 3117, Comp. Laws, § 5398. The power is a contract which is protected by the Constitution against impairment. Under the power contained in the mortgage, the mortgagee and its grantees have been in possession of the lands some twenty-two years. If the foreclosure proceeding is valid, the plaintiff has a perfect title, if the foreclosure is void or voidable the plaintiff holding under the mortgagee has all the rights of the mortgagee in possession. His possession is rightful, and the mortgagor cannot question the title or possession of the plaintiff except by a pleading in the nature of a bill to redeem.

This is purely a statutory action. It is a challenge to the defendant to set forth and establish his adverse claim or to abandon it. Defendant becomes practically the plaintiff and takes the affirmative in pleading and proof. Walton v. Perkins, 28 Minn. 413, 10 N. W. 424; Knudson v. Curley, 30 Minn. 433, 15 N. W. 373.

In an action under the statute to determine adverse claims to real property, the defendant is called upon by his answer to disclose the na-

ture of his claim which thereupon becomes the subject of the action. Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662; School Dist. v. Hefta, 35 N. D. 637, 160 N. W. 1005. In this last case this court held that the answer of Peter Hefta was the commencement of an action by him to establish his claim of title to the land. His claim of title was held void because his answer was not served within twenty years after the cause of action accrued.

In this action the defendant is in reality the plaintiff, and his position is precisely the same as if he had commenced the action without any challenging to do so.

In the plaintiff's record of chain of title there is an apparent flaw or defect. The mortgagee transferred its mortgage to one Turner, with a guaranty of payment, and, as no payment was ever made, the mortgagee had to return Turner's money and take back the mortgage, which was in effect the same as canceling the transfer to Turner. The defect in the foreclosure is that there was no record of the reassignment to the mortgagee. In all other respects the foreclosure was regular.

The statute is that to entitle a party to a foreclosure by advertisement it is requisite that the mortgage has been duly recorded and that all the assignments have been duly recorded; but when the reason of a rule ceases so does the rule itself. The purpose of this rule is to give notice to the mortgagor and to a purchaser at the same time that the party attemping to foreclose has a right to do so, as the mortgagee is the only purchaser at a foreclosure sale. The main purpose is to give notice to him, but in this case the mortgagor, Brown, had ample notice. He knew that he had given the mortgage on December 24, 1883, to secure $450, with interest at 6½ per cent payable annually, and that he never paid a cent on the mortgage or the taxes, excepting interest for two years. He knew that on March 6, 1886, he gave to Altman & Company a second mortgage on the same land to secure $185, and did not pay it. He knew that his mortgage became due on the 1st day of November, 1888, and that, if his mortgagees had obtained any money on the mortgage security, they were bound to refund it, and to take back their mortgage before the foreclosure in April, 1890. The record of the reassignment would have been of no possible benefit to Brown. He never looked for it. He would not have known anything about it. He knew that he had given the mortgagee the absolute power to sell and convey

and take possession of the land. His conduct shows that he concluded to let the land go for the two mortgages, and so for twenty-two years he lived within a mile of the land, and never challenged the title of those who held possession under the mortgagee. During all of that time the mortgagee and its grantees have paid the taxes for some twenty years. They have cultivated 60 acres on the east side of the quarter, and they have had 100 acres inclosed by a three-strand barbed-wire fence. They have been in possession of the land in good faith under color and claim of title. Soon after the foreclosure Brown removed from and gave up the land. In 1901 Albert Hilton took possession as a purchaser, and in 1904 the mortgagee made to him a warranty deed. In June, 1905, he conveyed the land by warranty deed to the husband of the plaintiff. This leads to the conclusion that defendant has no title to the land.

But regardless of the foreclosure proceedings, it appears beyond all question that for more than ten years prior to the time defendant served his answer, plaintiffs were in possession of the land under the Brown mortgage and conveyances, which gave them the right to the possession. Hence Brown's only remedy was by bill as counterclaim in the nature of an action to redeem.

On the argument, counsel for defendant took the position that, in case of a decision against him, it would be in furtherance of justice to remand the case for trial on an amended answer in the nature of a bill to redeem. To this the answer is:

1. The defendant has no equity which appeals to the court.

2. It is clear that any defense in the nature of a bill to redeem is barred by statute. Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792.

In a recent case above cited, this court considered the nature of an action to determine adverse claims to real property, and held that the answer of the defendant is the commencement of an action by him to establish his claim or title to the land; that the defendant becomes in effect the plaintiff in the action and tenders the issues, and the plaintiff defends against the issues tendered by the defendant in his counterclaim or cross complaint. In School Dist. v. Hefta, supra, this court held that the answer of Peter Hefta was the commencement of an action by him to establish his claim of title to the land, and his claim of title was held void because his answer was not served within twenty years

after the cause of action accrued. Hence were the case remanded for defendant to present a claim or bill to redeem, the service of his answer would be in effect the commencement of an action by him to redeem.

In Page v. Smith, 33 N. D. 369, 381, 157 N. W. 477, there is some *dictum* to the contrary, but it was an argument outside of the merits of the case.

Judgment affirmed.

On Petition for Rehearing.

PER CURIAM: The counsel for the appellant has filed a petition for rehearing, in which it is urged that important questions presented by the record have not been decided, or, if decided, that the decision is erroneous. It is urged that the foreclosure of the mortgage was valid by reason of the fact that the assignment had not been recorded. Conceding this to be the law, it is still true that one who goes into possession of land under a sheriff's deed, issued in pursuance of a void foreclosure, is in possession under color of title. The real question, then, under the record in this case, is as to the effect of the Statute of Limitations. Possession under color of title is adverse as to all the world. And this is true, even though the foreclosure be void. 1 Cyc. 1093. This character of possession sets in operation the Twenty-year Statute, Comp. Laws 1913, §§ 7363–7367. If, however, the possession be considered as having been taken under the terms of the mortgage, then the plaintiff's right is an equitable right to redeem his title from the effect of the mortgage, and is barred under the Ten-year Statute. Comp. Laws 1913, § 7381; Nash v. Northwest Land Co. 15 N. D. 566, 108 N. W. 792; Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, 50 N. Y. 468; Houts v. Hoyne, 14 S. D. 176, 84 N. W. 773), which, however, this qualification, rendered necessary in this jurisdiction by the doctrine of Nash v. Northwest Land Co. supra, that the mortgagee in possession has held adversely. See also Trimm v. Marsh, 54 N. Y. 599, 13 Am. Rep. 623, note in 46 L.R.A.(N.S.) 506.

The facts disclosed by the record warrant a finding that the claim of the defendant was barred by the adverse holding of the plaintiff, not only for ten years, but for more than twenty years. The mortgage was foreclosed in 1890, and Brown testified that he first learned of the fore-

closure in the fall, after it was completed; whether after the sale or after the issuance of the deed is immaterial. He said that a man came and told him that the mortgage had been foreclosed and that the mortgage company owned the land. He admitted that he never knew he had any title to the land from the time he was told of the foreclosure until he consulted his attorney after the starting of this action. He admitted that from the time he was notified of the foreclosure until after the starting of this action, he had taken no steps whatever to assert any rights he may have had in the land. He had not pastured the land, nor farmed it, nor had he objected when he saw others doing so, although he had lived in the vicinity all of the time. While the direct evidence, as to the change of possession immediately following the foreclosure, is not of a conclusive character, the conduct of Brown in relation to the land during all the years intervening is only consistent with an absolute change of possession following the notice to him that the mortgage had been foreclosed. But even if there were any doubt as to the change of possession following immediately upon the issuance of the sheriff's deed, there can be no doubt whatever that Brown knew that Hilton, Steinwand's grantor, and Steinwand were holding the land as their own, under color of title, for more than ten years previous to the bringing of this action. The evidence shows that the land was cropped annually, beginning in 1894, by different persons having no relation with Brown; that Hilton cropped the land in the years 1901–2–3 and 4, and that he sold it to Steinwand in 1905 with the crop on it; that in 1903 he fenced part of the land; that he was in possession under a contract with the Colonial & U. S. Mortgage Company, and that, during all this time, Brown lived in the vicinity and asserted no claim to the land.

The contention that the Ten-year Statute could not apply as to the counterclaim set up by the defendant is held in the main opinion herein to be without merit. It is well settled that a title which may not amount to a fee simple legal title comes under the protection of such a statute as § 7381, Comp. Laws 1913, and that, where a title or right is thus protected, it affords a proper foundation for affirmative action to protect it from the cloud of a legal title which can no longer be successfully vindicated. Such a statute is more than a statute of repose. See authorities cited in the note in 46 L.R.A.(N.S.) 506. To the extent

that the *dictum* in the case of Page v. Smith, 33 N. D. 369–381, 157 N. W. 477, appears to announce a contrary doctrine, it is overruled.

The rehearing is denied.

STATE OF NORTH DAKOTA, ON THE RELATION OF JOHN J. NEDRELOE, as Sheriff of Ward County, North Dakota v. R. W. KENNARD, as Auditor of Ward County, North Dakota.

(166 N. W. 514.)

Sheriff — salary of — population of county — regulated by — according to last preceding census — state or Federal — increase in salary — begins after such census reported — applies to a present incumbent.

Under the provisions of § 3520 of the Compiled Laws of 1913, as amended by § 6, chapter 112, of the Laws of 1915, which provides "that the salary of the sheriff shall be regulated by the population in his county according to the last preceding official state or Federal census," the increase in salary commences at the beginning of the year after that in which a census is reported, and applies to a present incumbent of the office.

Opinion filed January 24, 1918.

Mandamus to compel the delivery of a salary warrant.

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

Judgment for plaintiff. Defendant appeals.

Affirmed.

O. B. Herigstad, State's Attorney, and *R. A. Nestos,* Assistant State's Attorney, for appellant.

The sheriff's salary is regulated by the population of his county as last officially reported by the state or Federal census, and any change resulting should not take effect during the term of a present incumbent. Comp. Laws 1913, § 3520; Sess. Laws 1915, chap. 112.

Bosard & Twiford, for respondent.

Under the old law the sheriff received the fees in both civil and criminal actions, while under the new law these go into the funds of his

county, and for all services he receives a fixed salary regulated by the last official state or Federal census, and such salary begins at once upon the official report of such census even though this occurs during his term of office. Comp. Laws 1913, § 3520.

BRUCE, Ch. J. This is an appeal from a judgment for a mandamus directing the defendant to deliver to the plaintiff a warrant for the sum of $475 which is claimed to be due as an unpaid portion of the salary of the plaintiff as sheriff for the period between the 1st day of June, 1915, and the 1st day of January, 1917.

The case involves the construction of § 3520 of the Compiled Laws of 1913 as amended or rather re-enacted by § 6 of chapter 112 of the Laws of 1915, and which originally read as follows: "The salary of the sheriff *shall be regulated* by the population in his county according to the last preceding official state or Federal census as follows: provided that no sheriff shall receive more than $1,500 for his personal services in any one year in counties having a population of less than $5,000 . . . $2,700 in counties having a population of 25,000 and not exceeding 26,000 . . . $3,000 in counties having a population of 28,000 and not exceeding 29,000, etc."

Section 3514 allows for the collection of fees, but these are required to be turned into the public treasury, and § 3520 must be construed as automatically fixing the salaries according to the census, from $1,600 up to $3,500, according to such population.

The plaintiff entered into his office on the 1st day of January, 1915. At that time the population of Ward county was, according to the last census, between 25,000 and 26,000, and under the provision of § 3520 the salary was automatically fixed at $2,700 a year. The new census was reported to the county auditor on June 1, 1915, which showed a population in excess of 28,000, and this population would, under the provision of § 3520, have entitled the plaintiff to a salary of $3,000 a year. The only question to be determined by us is whether the increase in salary, from $2,700 to $3,000, took effect immediately upon the report of a new census, or at the beginning of the new year, or not until the beginning of the new term of office.

We are satisfied that the beginning of a new term of office was not necessary. Although the office of sheriff is a constitutional office, the

Constitution also provides that the legislative assembly "shall prescribe the duties and compensation of all county, township, and district officers." See § 173, N. D. Const.

This, § 3520 of the Compiled Laws of 1913 does. It, however, requires no meeting of the board of county commissioners or of any other body, but provides for the automatic *regulation* of the salary, according to the last preceding official state or Federal census. We are of the opinion that this section becomes effective as soon as the census is reported. We are satisfied, however, that as the section throughout seems to contemplate an annual salary, that the increase will in no event begin until the beginning of the new year, and this the trial court held.

Nor do we believe, with counsel for the appellant, that the plaintiff's right to recover an increase of salary from the beginning of the new year was affected by § 8 of chapter 112 of the Laws of 1915, which repealed § 3520 of the Compiled Laws of 1913. Although, indeed, this prior section was repealed, it was at the same time re-enacted, and, as far as the plaintiff is concerned, in identically the same form as before with the exception that the salary for a population of 28,000 is $2,900 rather than $3,000.

Counsel for appellant, indeed, bases his contention upon but one phrase of the act. Although § 8 of chapter 112 of the Laws of 1915 provides that "the salary of the officers herein enumerated shall be the same during the remainder of the term for which they may have been elected or appointed, as they are respectively receiving at the time this act takes effect," it also provides that "the provision of this act shall not apply to the present term of officers elected or appointed prior to the taking effect of this act."

The right to the additional salary was part of the original contract, and not an increase at all, the statute providing that an increase in the population should automatically bring about an increase in the compensation. It is very clear from a perusal of the two acts that not only was no increase in salary effected, but that no change in the salaries of the officers then in office was contemplated.

The judgment of the District Court is affirmed.

ROBINSON, J. (dissenting). This is a mandamus proceeding by

the sheriff of Ward county to compel the county auditor to give him a salary voucher for $25 a month for seven months in 1915 and all of the year 1916, because of the fact that since he took office there has been an increase in the population of the county from 26,000 to 28,000 as shown by the state census reports. The district court directed the additional allowance, advancing the salary from $2,700 to $3,000. When plaintiff sought and accepted the office, the statute was to this effect:

Sec. 3520. The salary of the sheriff shall be regulated by the population in his county, according to the last preceding official state or Federal census; no sheriff shall receive for his personal services in any one year more than $2,700 in counties having a population of 25,000 and not exceeding 26,000; $3,000 in counties having a population of 28,000.

Sec. 3521. In addition to the salary prescribed by the preceding section, the sheriff or his deputy or deputies shall be allowed 10 cents per mile for each and every mile actually and necessarily traveled in the performance of their official duties.

Sec. 3522. The sheriff or his deputy shall be allowed livery or automobile hire not exceeding $5 per day, 40 miles to be considered a day's drive.

Sec. 3520 fairly contemplates that a person accepting the office of sheriff under it shall receive as compensation one uniform salary, neither increasing nor diminishing during his term of office. It gives the sheriff a very liberal allowance as a salary with mileage and livery in excess of the salary.

In Ward county the sheriff's greatest source of income in his mileage and livery. On every process he has 10 cents a mile going and coming. Often he goes in the same direction with several writs, making mileage on each; while passing along at the rate of 20 miles an hour, he may count $1 a mile in addition to the salary. To go precisely half a mile he hires an automobile, and may charge, as in some counties, $2.50. This makes $2 or more in addition to the mileage and salary. Thus in a recent case in Morton county now pending in this court, for summoning a special jury to assess damages, the fees charged by the sheriff were, mileage $55.80, and livery $70. That is the work of one day, and it is no part of the salary.

The sheriffs are commonly clever gentlemen of some political pull, which they use to secure a big salary and big fees. Indeed, there is a great deception in giving a sheriff a "salary" in exchange for the smallest part of his fees. The people do commonly understand that all fees paid the sheriff are turned over to the county treasurer, and that delusion is fostered by the sheriff.

The statute, which names a part or moiety of the sheriff's compensation a salary, does not contemplate any increase of such salary during the time for which he is elected. If an increase of population demand an increase of service, it will be mainly in the mileage or automobile hire, which of itself gives a good salary. Indeed, under a proper law the commissioners of Ward county would find it easy to hire a good competent sheriff for the mileage alone, without any additional salary or automobile hire. There is no reason for holding that, under a fair construction of the statute, that part of the sheriff's compensation which is misnamed a salary should be increased by reason of a change in the census during his term of office.

Order of the district court should be reversed and case dismissed.

STATE OF NORTH DAKOTA EX REL. WILLIAM LANGER, Attorney General, v. CARL R. KOSITZKY, as State Auditor.

(L.R.A.1918D, —, 166 N. W. 534.)

Supreme court — member of — disqualification of — interest in suit pending before — presence of on bench — participation in hearing — proceedings of court — not void by reason thereof — quorum — vote of such member — not necessary for — district judges — may be called to sit.

1. The mere presence of, and participation by, a member of the supreme court in a case in which he may be disqualified on account of his interest in the result, does not render the proceedings and judgment of the court in that case void, where his presence is not necessary to constitute a quorum, and his vote does not determine the result, although § 100 of the state Constitution provides that, in case a judge of the supreme court shall be in any way interested in a case brought before said court, the remaining judges of said court shall call one of the district court judges to sit with them in the hearing of said cause.

Supreme court — always open — writs and orders — district judges called in — order and writs issued and signed by — force and effect of — judges of supreme court — same as.

2. Under § 7340, Comp. Laws 1913, providing the supreme court shall be always open for the issue and return of all writs which it may lawfully issue, and that any judge of said court may order the issuance of any such writ, an order for the issuance of an alternative writ of mandamus, signed by a district judge who, under N. D. Const. § 100, had been called in to sit in the place of a member of said court who was disqualified by reason of his interest, was legally issued.

Writ of mandamus — issued by supreme court — directed to state auditor — warrants for salary of supreme court judges — requiring issuance of — expenses also — payment of — prerogatives — rights — franchises — involves — original jurisdiction.

3. On application to the supreme court for a writ of mandamus directed to the state auditor, to require him to issue his warrant upon the state treasurer for the payment of the expenses of the judges of the supreme court, without the filing of an itemized statement, as provided by § 720, Comp. Laws 1913, and by said § 720, as amended by § 2, chap. 224, Laws 1917, involves the prerogatives, rights, and franchises of the state government, and invokes the original jurisdiction of the supreme court.

Supreme court — judges of — expenses of — paid quarterly — no itemized statements required — legislative act providing for — constitutional.

4. Section 720, Compiled Laws 1913, providing that each judge of the supreme court shall receive the sum of $500 per annum for expenses, to be paid in quarterly payments without filing any itemized statements, is not, if interpreted as providing an additional compensation for the services of the judges of such court, so far as the judges now in office are concerned, unconstitutional as being in violation of § 99 of the state Constitution, providing that the compensation for the services of a judge of the supreme court shall not be increased or diminished during the term for which he shall have been elected.

Supreme court— judges of — salary of — expenses of — act providing for — Constitution — not violated.

5. Section 720, Comp. Laws 1913, and the said section as amended by § 2, chap. 224, Laws 1917, providing that each judge of the supreme court shall receive the sum of $500 per annum for expenses, to be paid in quarterly payments without filing any itemized statement, if interpreted as providing for the payment of "expenses" rather than for "services," are not unconstitutional as being in violation of either § 99 of the Constitution, providing that the compensation for the services of a judge of the supreme court shall not be increased or diminished during the term for which he shall have been elected, or of § 186 of the state Constitution, providing that no bills, claims, accounts, or demands

against the state shall be audited, allowed, or paid until a full itemized statement shall be filed with the officer or officers whose duty it may be to audit the same.

Opinion filed January 24, 1918.

Application by the State of North Dakota, upon the relation of the Attorney General for a writ of mandamus against Carl R. Kositzky, as State Auditor.

Writ allowed.

Wm. Langer, Attorney General, and *D. V. Brennan,* Assistant Attorney General, for petitioner.

"It is elementary, 'except as limited by constitutional provisions,' that the legislature has control over the finances of the state; that its power as to the creation of indebtedness, or the expenditure of state funds, or making appropriations, is plenary, and the exercise of this power cannot be controlled or reviewed by the courts." 36 Cyc. 882.

The state auditor derives his powers from legislative enactments; his duties are all prescribed by statute. N. D. Const. § 83.

It was not, and is not, the duty of the attorney general to act for the state auditor in any matter of this nature. It is the duty of the attorney general to give counsel and advice to state officers when called upon, and this duty was performed in the present instance. Comp. Laws 1913, § 157.

"The law neither does nor requires idle acts." Comp. Laws 1913, § 7266.

"When the reason of a rule ceases, so should the rule itself." Comp. Laws 1913, §§ 7243, 7244.

The legislature did not intend that the state auditor should pass upon or audit the quarterly expense allowance of the justices of the supreme court. The legislature itself made audit of such accounts or allowances. It provided certain sums, payable to certain officers at certain times. It is not the function of courts to review the correctness of legislative determination; "for it must be presumed that the legislature had before it when the statute was passed, any evidence that was required to enable it to act, and the passage of the statute must be deemed a finding by the legislature of the existence of the fact justify-

ing the enactment thereof." State ex rel. Linde v. Packard, 35 N. D. 298, 317, L.R.A.1917B, 710, 160 N. W. 150.

"One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality or obtain a decision as to its invalidity on the ground that it requires the rights of action." 6 R. C. L. pp. 89, 90.

Mere ministerial officers of the state cannot ignore the mandates of the law and decide for themselves the invalidity thereof. 6 R. C. L. p. 92.

The constitutional provision relied upon by respondent applies only to claims which it is made the duty of some officer or board to audit. It does not apply where the legislature has itself determined the amount to be paid, to whom, and when to be paid. State ex rel. McCue v. Lewis, 18 N. D. 125, 134, 119 N. W. 1037.

This court has original jurisdiction in such actions and proceedings as the one at bar. State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450; State ex rel. Packard v. Jorgenson, 31 N. D. 563, 154 N. W. 525.

The power to set at naught a legislative enactment is great and one which even the courts are reluctant to exercise. State ex rel. Linde v. Taylor, 33 N. D. 85, L.R.A.1918B, 156, 156 N. W. 561.

Theodore Koffel, for respondent.

If all the facts present a case permitting the exercise of original prerogative jurisdiction, then the court has a discretion depending upon the particular facts in the case whether to issue the writ. State ex rel. Miller v. Norton, 20 N. D. 180, 127 N. W. 717.

The mere fact that delays would occur if these cases were originally commenced in district court does not present such exceptional circumstances as would constitute a reason for issuing a writ of mandamus by the supreme court to compel action by officers in such matters. State ex rel. Murphy v. Gottbreht, 17 N. D. 543, 117 N. W. 864; State ex rel. Minehan v. Wing, 18 N. D. 242, 119 N. W. 944.

In such proceedings the rights, franchises, privileges, and prerogatives of the sovereignty of the state are not involved to the extent that such original jurisdiction shall be invoked. The petitioner has a plain and adequate remedy at law. State ex rel. McDonald v. Holmes, 16

N. D. 457, 114 N. W. 367; State ex rel. Shaw v. Thompson, 21 N. D. 426, 131 N. W, 231.

There is no extraordinary or peremptory demand or call for the exercise of such jurisdiction in this case. State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450; State ex rel. Wiles v. Albright, 11 N. D. 22, 88 N. W. 729; State ex rel. Wiles v. Heinrich, 11 N. D. 31, 88 N. W. 734.

"No warrant shall be drawn except approved by the auditing board." Comp. Laws 1913, § 375.

The enactment here under consideration was passed to provide the judges with expenses while absent from their usual place of work, and to allow the judges for such, without an itemized statement thereof, and the auditing of the same by the proper board would violate the Constitution. Const. § 99; McCoy v. Handlin, 35 S. D. 487, L.R.A. 1915E, 858, 153 N. W. 361, Ann. Cas. 1917A, 1046; 6 R. C. L. pp. 115–485; Const. § 186; Houtz v. Uinta County, 11 Wyo. 152, 70 Pac. 840.

Chas. M. Cooley, District Judge. This is an original proceeding in the supreme court for a writ of mandamus directing and commanding the state auditor to forthwith credit to the account of the supreme court of the state of North Dakota the appropriation for the additional compensation of the members of said court, provided for in subdivision 3 of chapter 24 of the Laws of 1917, and to issue to the several justices of said court warrants for the quarterly instalments of said additional compensation which became payable at the quarterly periods since on or about January 1, 1917, without the filing of an itemized statement therefor.

This proceeding was instituted by an application to the supreme court for an order directing the issuance of an alternative writ. When the application for such order was presented to the court, four of its five members, deeming themselves disqualified to sit in a matter involving their right to the compensation which is the subject of this controversy, withdrew from any participation in the proceedings, and the remaining member of the court, Justice Robinson, under the provisions of § 100 of the state Constitution, called in four district judges, to wit, W. L. Nuesle, Judge of the Sixth Judicial District; A. T. Cole,

Judge of the Third Judicial District; J. A. Coffey, Judge of the Fifth Judicial District, and Chas. M. Cooley, Judge of the First Judicial District, to sit with him in the further proceedings that might be had in said cause. Justice Robinson and two of the district judges, thus called in, signed the order for the issuance of the alternative writ which was made returnable on December 1, 1917. On that date the supreme court of North Dakota, as above constituted, assembled in the court room of the said court, and heard and considered the issues raised by the alternative writ and the respondents' return thereto.

At the outset objection was made to the jurisdiction of the court on the grounds: (1) That J. E. Robinson, one of the justices of the said court, was disqualified from acting in the matter because of his interest in the result; (2) that the order for the alternative writ was not signed by a majority of the members of said court qualified to act; and (3) that the case is not of public concern involving questions affecting the sovereign rights of the state or its franchises or privileges. It is unnecessary to determine whether Justice Robinson, because of any interest in the result, was disqualified to sit as a member of this court upon the hearing and determination of the issues in this proceeding. The fact remains, that the court, as constituted, included four district judges qualified to act, and who constituted a quorum, and a majority of the members of said court, and who were invested, so far as this controversy is concerned, with the same power and authority, and whose judgment is entitled to the same force and effect as that of the justices who are the regularly elected members of the court. State ex rel. Linde v. Robinson, 35 N. D. 410, 160 N. W. 512; State ex rel. Linde v. Robinson, 35 N. D. 417, 160 N. W. 514.

The mere presence of, and participation by, a member of a judicial body disqualified to act in a particular case, does not necessarily invalidate the proceedings and judgment of that body. Particularly is this true if his presence is not necessary to constitute a quorum, or his vote does not determine the result. State ex rel. Getchel v. Bradish, 95 Wis. 205, 37 L.R.A. 289, 70 N. W. 172, dissenting opinion of Justice Marshall.

Neither under the Constitution nor the statutes of this state is any person or body of persons invested with the power to prevent a justice of the supreme court, disqualified on account of interest from partici-

pating in any case properly coming before that court, nor under the Constitution of this state is the legislature empowered to make any provision for the transfer for any such case to any other jurisdiction.

To hold that the mere participation by any justice of the supreme court in a case in which he is disqualified to act would invalidate the proceedings and judgment of the court, would give to such justice the power, if he so willed, to absolutely bar the door of justice, which should be open to all, against one of the parties. While the Constitution of South Dakota contains no provision for the calling in of other judges in case any member of the supreme court is disqualified for any reason, much of the reasoning of the supreme court of that state in the case of McCoy v. Handlin, 35 S. D. 487, L.R.A.1915E, 858, 153 N. W. 361, Ann. Cas. 1917A, 1046, is applicable to the condition here presented.

Inasmuch as the district judges who were called in, to sit in the place of those who deemed themselves disqualified, became, when so-called, so far as this case is concerned, judges of the supreme court, the order for the alternative writ, which was signed by two of such judges, was legally issued under § 7340, Comp. Laws 1913, which provides that the supreme court shall be always open for the issue and return of all writs which it may lawfully issue, and that any judge of said court may order the issuance of any such writ.

That the proceedings involves the rights, franchises, and privileges of the state government, and that this court had constitutional and statutory authority to exercise original jurisdiction herein, is well settled by the decision of this court in the case of State ex rel. Linde v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450, wherein a similar principle was involved, the difference between the two cases being only in the extent to which the rights, franchises, and privileges of the state were affected.

Upon the merits, this controversy involves the question of the interpretation and constitutionality of § 1, chap. 82, of the Session Laws of 1907 (§ 720, Comp. Laws 1913), and of said § 720, Comp. Laws 1913, as amended by § 2, chap. 224, of the Session Laws of 1917.

Section 1, chap. 82, Laws 1907, provides: "Each judge of the supreme court of this state shall receive the sum of $500 per annum for traveling expenses and moneys expended by him while absent from

his home and while engaged in the discharge of his official duties, to be paid in quarterly payments without filing any itemized statement."

Section 2, chap. 224, Laws 1917, provides: "Each judge of the supreme court who, on account of his official position, has taken up his residence at the capital of this state, or who has been or who may be compelled to absent himself from his legal residence in order to properly discharge his official duties, shall, during his present term of office, receive the sum of $500 per annum for traveling expenses and moneys expended by him while engaged in the discharge of his official duties, to be paid in quarterly payments without filing any itemized statement; provided, however, that the provisions of this section shall not apply to any judge of the supreme court hereafter elected or appointed."

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature, and it is true that this intention "must be the intention as expressed in the statute; and where the meaning of the language used is plain, it must be given effect by the courts, or they would be assuming legislative authority." 36 Cyc. 1106. But it is also true that "every statute must be construed with reference to the object intended to be accomplished by it. In order to ascertain this object it is proper to consider the occasion and necessity of it enactment, the defects or evils in the former law, and the remedy provided by the new one; and the statute should be given that construction which is best calculated to advance its object by suppressing the mischief and securing the benefits intended. For the purpose of determining the meaning recourse may be had to considerations of public policy, and to the established policy of the legislature as disclosed by a general course of legislation. If the purpose and well-ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the whole act." 36 Cyc. 1110.

In pursuance of the general object of enforcing the intention of the legislature it is a rule that the spirit or reason of the law will prevail over its letter. 36 Cyc. 1108.

While, therefore, in both the acts of the legislature above referred to, provision is made for the payment of "expenses," it is proper in inter-

preting these acts to consider other acts of the legislature relating to the same subject-matter, and other parts of the same acts.

In 1903, the annual salary of a judge of the supreme court was $4,000. In that year the legislature passed an act (Laws 1903, chap. 194) which is as follows:

"Sec. 1. Each judge of the supreme court shall, during his present term of office, receive the sum of $100 per month for the purpose of defraying the personal expenses of such judge when away from home in the discharge of the duties pertaining to his office, and for other necessary expenses. Such amount to be payable monthly without the filing of any itemized statement; provided, that the provisions of this section shall not apply to judges hereinafter elected.

"Sec. 2. The judges of the supreme court shall receive an annual salary of $5,000, the payment thereof to begin at the expiration of the present term of each of the present incumbents, and until the expiration of the present term of each of said judges he shall receive an annual salary of $4,000."

On the 1st of January, 1907, § 1, chap. 194, Laws of 1903, became ineffective, as the term of each of the judges in office at the time of the passage of the act had expired, and all were thereafter entitled to an annual salary of $5,000. At the legislative session in 1907, chap. 82, Laws of 1907, above quoted, was passed, and went into effect on its approval by the governor, on March 19, 1907. When the 1913 edition of the Compiled Laws was published, so much of § 2, chap. 194, Laws of 1903, as was then applicable, namely, "the judges of the supreme court shall receive an annual salary of $5,000," appeared as § 719, and § 1, chap. 82, Laws of 1907, appeared as § 720.

At the 1917 session of the legislature an act was passed (Laws 1917, chap. 198) repealing § 720, Comp. Laws 1913. This law did not take effect until July 1, 1917. At the same session there was passed an act (Laws 1917, chap. 224) which provides as follows:

"Sec. 1. Section 719 of the Compiled Laws of North Dakota for the year 1913 is hereby amended and re-enacted so as to read as follows:

" 'Sec. 719. The judges of the supreme court shall each receive an annual salary of $5,500. Provided, however, that the provisions of this

section shall not apply to said judges during their respective present term of office.' "

"Sec. 2. § 720 of the Compiled Laws of North Dakota for the year 1913 is hereby amended and re-enacted so as to read as follows:

" 'Sec. 720. Each judge of the supreme court who on account of his official position has taken up his residence at the capital of this state or who has been or may be compelled to absent himself from his legal residence in order to properly discharge his official duties shall, during his present term of office, receive the sum of $500 per annum for traveling expenses and moneys expended by him while engaged in the discharge of his official duties, to be paid in quarterly payments without filing any itemized statement; provided, however, that the provisions of this section shall not apply to any judge of the Supreme Court hereafter elected or appointed.' "

Thus it will be observed that from 1903, when the salary of the judges of the supreme court was $4,000, their compensation for services has been raised until it is now fixed at $5,500.

If, in arriving at the intention of the legislature when it enacted § 1, chap. 82, Laws 1907, and § 2, chap. 224, Laws 1917, we are permitted to disregard the strict letter of the law, and to consider the spirit or reason of the law, and the object intended to be accomplished, it requires but a casual observation of the various acts which have been quoted to determine that it was the evident intention of the legislature thereby to increase the salary of the then judges of the supreme court, and that the legislature adopted this form of granting this additional compensation in an attempt to avoid the prohibition contained in the North Dakota Constitution, § 99, which provides: "The judges of the supreme and district courts shall receive such compensation for their services as may be prescribed by law, which compensation shall not be increased or diminished during the term for which a judge shall have been elected."

All of the judges of the supreme court now in office were elected for terms which began subsequent to the enactment of § 720, Comp. Laws 1913 (§ 1, chap. 82, Laws 1907) and prior to the time when chap. 198, Laws 1917, repealing said § 720, took effect. Therefore, considered as an act providing for additional compensation for services, § 1, chap. 82, Laws 1907 (§ 720, Comp. Laws, 1913), is not, as to the present

judges, in violation of the constitutional provision above quoted. Nor is the right of the present judges to continue to receive such additional compensation until the expiration of their present terms affected by chap. 198, Laws 1917, repealing said § 720, as that act is unconstitutional as diminishing their compensation for services during the terms for which they have been elected.

But respondent contends that § 1, chap. 82, Laws 1907, and § 2, chap. 224, Laws 1917, should receive a literal interpretation, and that these acts provide for additional compensation for "expenses" rather than for "services." Under that interpretation neither of these acts is unconstitutional, as being in violation of § 99 of the Constitution; for that constitutional provision prohibits, during the term for which a judge is elected, only an increase in his compensation for services, and each of the present judges was entitled to receive the additional compensation provided for by the former act until July 1, 1917, and are entitled to receive the compensation provided for by the latter act until the expiration of their present terms.

Respondent does not contend that the judges are not entitled to this additional compensation under any circumstances; but his contention is that, as far as these acts require the quarterly payments to be made "without filing any itemized statement," they are void, as being in violation of § 186 of this Constitution of this state, which provides: "No money shall be paid out of the state treasury except upon appropriation by law and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state, or any county or other political subdivision, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers whose duty it may be to audit the same."

To audit a claim, account, or demand, means to examine, adjust, pass upon, and settle such claims, account, or demand. An audit of claims and accounts is required for the purpose of determining the amount, if any, to be paid. It involves an exercise of discretion by the auditing officer or board. Under the provisions of the acts in controversy, the amount, the time of payment, and the persons to whom payment shall be made, have been fixed and designated by law, so that there remains nothing for the respondent to do but to perform the

ministerial duty of issuing his warrants to each judge for the amount so fixed.

In the case of McCoy v. Handlin, 35 S. D. 487, L.R.A.1915E, 858, 153 N. W. 361, Ann. Cas. 1917A, 1046, it appears that an act of the legislature of South Dakota provides that when a judge of the supreme court, not legally a resident at the state capital, shall have changed his actual residence thereto, there shall be paid to such judge, for his increased expenses of living, the fixed sum of $50 per month, payable on the certified vouchers of such judge. The court say: "When a claim, based upon a valid law has once been audited and allowed by the auditor himself, or by some other duly authorized person, board, or tribunal, *or the amount thereof is fixed by law,* so that there is no dispute as to the *amount* of the claim, it then becomes the duty of the auditor to allow it, and to issue a warrant upon the state treasurer therefor, provided, of course, that money has been appropriated for the payment thereof. . . . The claim is audited at a fixed amount by the law itself. The defendant is vested with no discretion whatever in the matter of allowing the said sum of money. Mandamus is the proper mode of compelling him to perform the purely ministerial act of issuing the warrant."

Moreover, before it shall become necessary to file with any officer or officers an itemized statement of any claim, account, or demand against the state, or against a county, it must be made to appear that there is some officer or officers "whose duty it may be to audit the same."

It will be noted that the provisions of § 186 of the Constitution relate to the audit of claims and accounts against counties, as well as to those against the state. Yet § 3369, Comp. Laws 1913, provides that the county auditor "shall draw warrants . . . for all debts and demands against the county when the amounts are fixed by law, and which are not directed to be audited by some other person or tribunal." By this latter provision there are excepted from the operation of the constitutional provision all debts and demands against counties when the amounts are fixed by law, and which are not directed to be audited by some other person or tribunal, there being no person whose duty it is to audit such debts and demands.

In the case of the State ex rel. Wiles v. Heinrich, 11 N. D. 31, 88

N. W. 734, the court, referring to the salaries of clerks employed in the office of the county superintendent of schools, say: "The demand of clerks so employed are not fixed by law, and could not, therefore, be audited and paid by the county auditor, as in the case of salaries. . . . The board of county commissioners have the general superintendence of the fiscal affairs of the county, and constitute a board of audit for all claims and demands against their counties, the amounts of which are not fixed by law."

In the case of the State ex rel. Wiles v. Albright, 11 N. D. 22, 88 N. W. 729, the court say: "In ordinary cases of salaries fixed by law, and not paid and actually due, it is not denied that the absolute duty to issue warrants therefor devolves upon the auditor, under the statute, and that he is not bound to submit to the directions of the county commissioners, or anyone else, to withhold the issuing of such warrants. In such cases he has no discretion. The law will compel him by mandamus, to issue warrants for such salaries. In those cases his acts are ministerial merely."

In the case of the State ex rel. McCue v. Lewis, 18 N. D. 125, 119 N. W. 1037, the court had under investigation § 1167, Rev. Codes 1905, as amended by chap. 237, Laws 1907. This section provides that if the county judge of the county from which an indigent inmate of the Institution for the Feeble-Minded is admitted shall certify that such inmate is unable to pay the sum of $50 semiannually to the said institution, it is made the duty of the county auditor to transmit a county warrant for $50 semiannually for each patient so situated, upon presentation of the proper certificate of the superintendent of said institution. Proper certificates were presented to the county auditor of Cass county, and a demand was made upon him for his warrant for the sum of $50 for each of three indigent inmates of said institution from said county. Upon his refusal to comply with such demand, mandamus proceedings were instituted against him. On the part of the respondent, the county auditor of Cass county, it was contended that the act in question contravened § 186 of the Constitution. In answer to that contention, the court said: "Furthermore, § 186 by its language clearly applies only to those accounts or demands, the audit of which is made the duty, by law, of some officer; and, under the act in question, there

is no duty devolving upon the county auditor to audit the claims therein mentioned."

Subdiv. 10 of § 132, Comp. Laws of 1913, provides that it shall be the duty of the state auditor "to audit all claims against the state the payment of which is authorized by law."

This provision made its first appearance in subdiv. 10, § 98, Rev. Codes 1895, and has since been continued in the various revisions and compilations of the Political Code, although it was impliedly repealed by chapter 33, Laws of 1901, by which was created a state auditing board whose duty it was to audit all claims that might come before it. This act, in amended form, appears as § 375 of the Comp. Laws of 1913. By chapter 227, Laws 1915, § 375, Comp. Laws 1913, was further amended. Among other things the said § 375, as amended, provides: "The state auditor shall act as secretary of the state auditing board, and shall receive and file for the consideration of the state auditing board all accounts, claims, or demands against the state, *except such as are now specifically excepted by law.* . . . It shall be the duty of the state auditing board to audit all claims, accounts, bills, and demands against the state, *except such as are now specifically excepted by law.* . . . ."

There is no officer or officers whose duty it is to audit claims and accounts against the state, other than the state auditing board; and it is apparent that it is not the duty of this board to audit any claim or demand against the state that has been specifically excepted by law.

Section 657. Compiled Laws 1913, provides that "no bill, claim, account or demand against the state, *except in cases of salaries* fixed by law, shall be audited, allowed or paid until a full itemized statement in writing shall be filed with the officer or officers, whose duty it may be to audit the same."

This is a specific provision of law excepting salaries from the claims and demands that must be itemized and filed for audit with the state auditing board, and § 1, chap. 82, Laws 1907, and § 2, chap. 224, Laws 1917, are other specific provisions of law of like character.

These acts constitute valid annual appropriations of $500 for each judge of the supreme court. State ex rel. Birdzell v. Jorgenson, 25 N. D. 539, 49 L.R.A.(N.S.) 67, 142 N. W. 450. They contain no provision requiring the quarterly instalments to be audited by anyone. It was entirely competent for the legislature to thus make and

audit its appropriations, and no duty devolves upon the state auditing board, or upon any officer, to audit any claim based upon either of said acts. Inasmuch as there is no officer or officers whose duty it is to audit such claims, there is no officer or officers with whom itemized statements of any such claims must be filed.

Appropriations having been made, not only by the terms of these acts, but by the general budget acts, for the payment of the claims and demands arising under those acts, and the amount of such claims having been fixed by law, and there being no officer or officers whose duty it is to audit such claims, it becomes the ministerial duty of the state auditor, under the provisions of said acts, to issue his warrants for the payment thereof at the times as provided by law.

A peremptory writ will, therefore, issue as prayed.

BRUCE, Ch. J., and CHRISTIANSON, BIRDZELL, and GRACE, JJ. did not participate. Hon. CHAS. M. COOLEY, Hon. A. T. COLE, Hon. J. A. COFFEY and Hon. W. L. NUESSLE, District Judges of the State of North Dakota, sitting by request.

ROBINSON, J. I concur in result.

ROBINSON, J. (concurring). This is an application for a mandamus commanding the state auditor to give to each judge of the supreme court a voucher or warrant for the regular allowance of $500 a year to be paid quarterly as provided by the Laws of 1907, chapter 82.

The statute is in effect: Each judge of the supreme court shall receive the sum of $500 per annum for expenses, to be paid quarterly without filing any itemized statement. It is claimed that this act is void because it does not expressly limit the allowance of $500 a year to judges afterwards elected, and it does not limit the allowance to actual expenses. The act gives a definite allowance to be paid quarterly regardless of any expense. At four successive sessions of the legislative assembly an appropriation has been made for the payment of such allowance, and the same has been regularly paid to the judges until the commencement of the present year.

Allowing for argument that the act did apply to judges then in office, it may be divided into two parts, thus:

1. Each judge of the supreme court now in office shall receive the sum of $500 per annum, payable quarterly.

2. Each judge of the supreme court who may be hereafter elected to office shall receive the sum of $500 per annum payable quarterly. Now if the statute is held void so far as it relates to the judges then in office, manifestly that is no reason for holding it void as to future judges. As to them it can never be claimed that the effect of the statute was to increase their salary or compensation during their term of office. That is self-evident.

It is claimed that the primary purpose of the act was to reimburse the judges for a part of their expenses, and to fix and limit the amount payable without any accounting or auditing, and that such an act is forbidden by the Constitution. It is true that such acts have been frequently passed and sustained. However, this case in no way relates to the right of judges who held office when the act was passed, and on that question it is needless for the court to express an opinion. As to the judges now in office, there is no ground for questioning the constitutional validity of the act.

This proceeding is not in the nature of an action against the state or the state auditor. It is an application by the state to determine the law for the state auditor, and to require him to perform a plain ministerial duty on which he has no discretion. It is a matter of public right and duty relating to the sovereignty of the state. The state auditor might put the state in a deplorable condition were it permissible for him to refuse a voucher to every state officer for his salary or allowance provided by law. No judge would care to hold office if he had to receive his monthly allowance at the end of a suit in the district court and an appeal to the supreme court, and then by a mandamus proceeding to compel payment.

In regard to the right of Justice Robinson to sit in the case, he holds it is a matter of manifest duty and necessity for one of the supreme court judges to sit in every case that comes before this court. Section 100 of the Constitution provides that in case a judge of the supreme court shall be in any way interested in a cause brought before said court, the remaining judges of said court shall call one of the district judges to sit with them on the trial of said cause. The Constitution does not authorize the supreme court judges to improvise a new supreme court composed entirely of district judges. At least one of the supreme court justices must sit in every case that comes before the

court. The case really presents no question of law. It is the plain ministerial duty of the state auditor to give each judge of the supreme court a voucher or warrant for his quarterly allowance accruing since January 1, 1917, as provided by chapter 82, Laws of 1907, and a peremptory mandamus be issued commanding him to give such voucher.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, a Corporation, v. STATE BANK OF UPHAM, NORTH DAKOTA, a Corporation.

(166 N. W. 507.)

Banks — obligor of another — cannot become — charter — statutory provisions — unless permitted by — disposition of own property or securities — necessity of — exception.

1. Unless its charter or the statute expressly permits it, a bank has not the power to become the obligator of another, except as it is necessary to dispose of its own paper and securities.

Bank — action against — defense — ultra vires — benefits received — proof — burden of.

2. Even though a bank which asserts the defense of *ultra vires* has received benefits and the plaintiff may be allowed to recover the value thereof, the burden is on the plaintiff to plead and prove the fact.

Opinion filed January 29, 1918.

Action to recover upon the guaranty of a promissory note.

Appeal from the District Court of McHenry County, Honorable *A. G. Burr,* Judge.

Judgment for defendant.

Plaintiff appeals.

Affirmed.

Greenleaf, Bradford, & Nash, for appellant.

"Prima facie acts and contracts of a corporation are valid, there being no presumption of excessive power attached to them, and parties seeking to avoid such acts or contracts because they are thought to be

beyond the scope of its powers must do so by an affirmative showing." The burden is upon the atacking party. 3 Enc. Ev. 632.

The contract of indorsement being in writing, consideration is presumed,—want of consideration is upon the party claiming it, to prove by a preponderance of the evidence. Comp. Laws 1913, § 5882.

The plea of *ultra vires* can never be set up where the party has received benefits under the contract. 2 Morse, Banks & Bkg. §§ 732, 741.

"The burden of proof in any case is first to show that the act is *ultra vires,* and, if this is shown, the burden is on him who objects to the plea of *ultra vires* and wishes the court to hold that the contract is not void." 2 Morse, Banks & Bkg. § 741a.

D. J. O'Connell, for respondent.

The rule is generally accepted that a bank has not the power to become the guarantor of the obligations of another unless its charter or governing statute expressly permits it. Cottondale State Bank v. Oskamp Nolting Co. 64 Fla. 36, 59 So. 566, Ann. Cas. 1916D, 564; Seligman v. Charlottesville Nat. Bank, 3 Hughes, 647, Fed. Cas. No. 12,642; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N. W. 68; Comp. Laws 1913, § 5150, subd. 8.

What is void *ab initio* cannot be made good by ratification or by any succession of renewals, and no performance on either side can give validity to an unlawful contract. 10 Cyc. 1146 F.

It is the obligation of everyone entering into contracts with a corporation to take notice of the legal limits of its powers. 10 Cyc. 1147.

It is wholly immaterial whether or not defendant benefited by the contract. First Nat. Bank v. Monroe, 135 Ga. 614, 32 L.R.A.(N.S.) 550, 69 S. E. 1123; Houghton v. First Nat. Bank, 26 Wis. 663, 7 Am. Rep. 107; Citizens Cent. Nat. Bank v. Appleton, 216 U. S. 196, 54 L. ed. 443, 30 Sup. Ct. Rep. 364.

The general rule that a written instrument imports a consideration is not applicable to the case at bar. The right of plaintiff to recover back such consideration would depend not on the contract of guaranty, but on the implied contract to recover only to the extent of the consideration received, and that must be pleaded and proved by the plaintiff. Appleton v. Citizens Cent. Nat. Bank, 190 N. Y. 417, 32 L.R.A. (N.S.) 543, 83 N. E. 470.

Defendant is not estopped to assert the defense of *ultra vires.* Plain-

tiff has neither pleaded nor even attempted to prove an estoppel. In any event such doctrine is not applicable to the case here. Sly v. Hunt, 159 Mass. 151, 21 L.R.A. 680, 38 Am. St. Rep. 403, 34 N. E. 187.

BRUCE, Ch. J. This is an action on a promissory note and is brought against the Upham State Bank as an indorsee.

The defense is contained in the paragraph of the answer which alleges that it, the State Bank of Upham, "shows to the court that the defendant corporation was not authorized by the law to guarantee the payment of any note except such notes as were the property of said defendant corporation, or such notes as were legally executed by said defendant corporation, and that if the said corporation defendant did perform or attempt to perform the acts alleged in paragraph 3 of said complaint, then in that case the said act or acts were and are *ultra vires* and void; that there was no legal consideration for said guaranty or attempt at guaranty, and the defendant corporation received no consideration or benefits therefrom; that said defendant corporation is prohibited by the laws of the state of North Dakota from performing the acts referred to in paragraph 3, and the performance of the same was and is void as against public policy."

This defense the trial court held to be conclusive and to have been proved, and, being of this opinion, rendered judgment for the defendant. From this judgment the plaintiff appeals.

The question is, Has a bank power to indorse and guarantee the payment of a note which it does not own? The plaintiff contends that a bank has the power to make contracts, and has such incidental power as shall be necessary to carry on its business and to protect its assets. Defendant maintains that a bank has the power to borrow money, and for that purpose to transfer its assets in shape of negotiable papers, and not otherwise.

We are of the opinion that the trial court was correct in its ruling, and that, unless its charter or the statute expressly permits it, a bank has not the power to become the obligator of another, except as it is necessary to dispose of its own paper and securities. See Cottondale State Bank v. Oskamp Nolting Co. 64 Fla. 36, 59 So. 566, Ann. Cas. 1916D, 564; Seligman v. Charlottesville Nat. Bank, 3 Hughes, 647, Fed. Cas. No. 12,642; Thilmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N.

W. 68; Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; 7 C. J. 595; 3 R. C. L. 425.

The reason for this rule is that a bank is authorized to lend its money, and not its credit, and, "if a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics, and if no compensation was received, there is the additional reason, if any is needed, that such a power is in derogation of the rights and interests of stockholders, and at all events could only be exercised with the consent of all. Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank; for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another." See 1 Morse, Banks & Bkg. 152; Cottondale State Bank v. Oskamp Nolting Co. supra.

In North Dakota we find no such authority conferred either by statute or by the charter. On the other hand, subdivision 8 of § 5150 of the Compiled Laws of 1913, although it relates merely to loans dependent upon real estate security, seems to evidence a different public policy in its provision that, "in selling or disposing of such loans so made, no such association shall have power to guarantee the payment or collection thereof."

This leads us to the second point, and that is, that the contract of indorsement and guaranty involved is not void upon its face, and that the defense of *ultra vires* must not only be pleaded, but proved.

There appears to be no merit to this contention. In the first place the defendant did plead the *ultra vires* nature of the contract, even if such a plea were necessary, and on this we express no opinion. The plaintiff pleaded the execution of the note by one Furgeson, and the guaranty or attempted guaranty of the payment by the defendant through its cashier and the defendant pleaded that the act of the cashier did not bind it, for the reason that such act was *ultra vires* and prohibited by law, and that no benefit accrued therefrom to the defendant.

The plaintiff made no reply to this defense, and the only evidence offered by it was the note and the fact that it had not been paid. A guaranty such as that disclosed by the pleadings was certainly pre-

sumptively *ultra vires*. Thilmany v. Iowa Paper Bag Co. 108 Iowa, 333, 79 N. W. 68. Even if it be the law of North Dakota as it is of some states, and on this we express no opinion, that when a bank which asserts the defense of *ultra vires* has received benefits the plaintiff is permitted to plead and prove the value thereof, and that such plaintiff may recover such benefits, it is nevertheless clear that the burden is on the plaintiff to plead and prove the extent of such benefits. Such a plea, in fact, asserts a new and different cause of action from that of the guaranty. The right of recovery in such cases is based on an implied contract to reimburse plaintiff for any material benefits derived by defendant and loss to the plaintiff, the amount of which, if any, must be alleged and proved by the plaintiff. Norton v. Derry Nat. Bank, 61 N. H. 589, 60 Am. Rep. 334; Oppenheim v. Simon Reigel Cigar Co. 90 N. Y. Supp. 355; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A.(N.S.) 193, 65 Atl. 641.

The judgment of the District Court is affirmed.

ROSE KATHERINE HOELLINGER v. JOHN HOELLINGER.

(166 N. W. 519.)

Judgment — appeal from — divorce to defendant — property — awarding certain to plaintiff — entire judgment open to review — trial de novo in supreme court.

1. Upon an appeal, under § 7846, Comp. Laws 1913, from a judgment awarding the defendant a divorce upon his counterclaim, and awarding the the plaintiff certain property, the entire judgment is open to review and the cause subject to a trial *de novo* in the supreme court.

Divorce action — property — may be divided in — only when a divorce is granted — trial de novo in supreme court — Court must consider propriety of both branches of judgment.

2. Section 4405, Comp. Laws 1913, authorizes a division of property between the parties to a divorce action only when a divorce is granted; and upon an appeal by the party to whom the divorce has been awarded, this court cannot try the case anew, under § 7545, Comp. Laws 1913, without determining the correctness of that portion of the judgment awarding the divorce, even though the appellant challenges directly only that portion of the judgment which relates to the property division.

Recrimination — what constitutes — cruel treatment — both parties guilty of.

3. Under § 4373, Comp. Laws 1913, recrimination consists in the doing of any act which is a cause for divorce, and in this case the evidence shows recrimination in that each of the parties has been guilty of cruel treatment of the other.

Opinion filed January 31, 1918.

Appeal from District Court, Ward County, Honorable *F. E. Fisk,* Special Judge.

Reversed.

McGee & Goss, for appellant.

"As to the quantum of proof required to establish a charge of adultery, the prevailing rule is that, as in other civil actions, such fact need be proved only by a preponderance of the evidence." R. C. L. 328, § 105; Ellett v. Ellett, Ann. Cas. 1913B, 1215, and note, 157 N. C. 161, 39 L.R.A.(N.S.) 1135, 72 S. E. 861; Taft v. Taft, 12 Ann. Cas. 959, and note, 80 Vt. 256, 130 Am. St. Rep. 984, 67 Atl. 703; Chestnut v. Chestnut, 88 Ill. 548; Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Heyman v. Heyman, 210 Ill. 524, 71 N. E. 591; Pittman v. Pittman, 72 Ill. App. 500; Lenning v. Lenning, 73 Ill. App. 224, 176 Ill. 180, 52 N. E. 46; Luther v. Luther, 87 Ill. App. 241; Shoup v. Shoup, 106 Ill. App. 167; Baker v. Baker, 136 Ky. 617, 124 S. W. 866; Allen v. Allen, 101 N. Y. 658, 5 N. E. 341; Farnworth v. Farnworth, 8 Ohio, S. & C. P. Dec. 171; Smith v. Smith, 5 Or. 187; Schulse v. Schulse, 33 Pa. Super. Ct. 325; Lindley v. Lindley, 68 Vt. 421, 35 Atl. 349; McDeed v. McDeed, 67 Ill. 545; Slater v. Slater, 73 Iowa, 764, 35 N. W. 439; Wabeke v. Wabeke, — Iowa, —, 98 N. W. 559; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872.

Where adulterous disposition is shown to exist between the parties at the time of the alleged acts, then mere opportunity with comparatively slight circumstances showing guilt may be sufficient to justify the inference that criminal intercourse has actually taken place. 1 R. C. L. 329; Richardson v. Richardson, 4 Port. (Ala.) 467, 30 Am. Dec. 538; Dunham v. Dunham, 162 Ill. 589, 35 L.R.A. 70, 44 N. E. 841; Thayer v. Thayer, 101 Mass. 111, 100 Am. Dec. 110, 9 R. C. L. 331, citing under note 6, Burke v. Burke, 44 Kan. 307, 21 Am. St. Rep. 283, 24 Pac. 466.

"If an adulterous disposition is shown, and it appears that there was an opportunity for them to commit the offense, these acts are sufficient to establish adultery." 14 Cyc. 694, 696, note.

"Ordinarily, however, where the wife seeks a permanent allowance in a suit for divorce, her proof must be such as is requisite to entitle her to a divorce." 1 R. C. L. 936, and note 15; Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700; Ecker v. Ecker, 22 Okla. 873, 20 L.R.A.(N.S.) 421, 99 Pac. 918; Vigil v. Vigil, 49 Colo. 156, 39 L.R.A.(N.S.) 578, 111 Pac. 333; Davis v. Davis, 134 Ga. 804, 30 L.R.A.(N.S.) 73, 68 S. E. 594, 20 Ann. Cas. 20.

Such allowance is not based on the obligation to support, but on what would be a fair and just division of the common property, considered in the light of the degree of assistance rendered by the wife in its accumulation. 1 R. C. L. 937; Wilkins v. Wilkins, 84 Neb. 206, 133 Am. St. Rep. 618, 120 N. W. 907.

If there are no mitigating circumstances, and it would be inequitable to award her permanent alimony, none should be decreed. Ecker v. Ecker, 20 L.R.A.(N.S.) 424, and note, 22 Okla. 873, 99 Pac. 918; Davis v. Davis, 20 Ann. Cas. 25, and note, 134 Ga. 804, 30 L.R.A. (N.S.) 73, 68 S. E. 594; Methvin v. Methvin, 60 Am. Dec. 670, note; 1 R. C. L. § 85, p. 939.

Where she is chiefly at fault, or leaves the household without sufficient cause, or has been guilty of adultery, she is not entitled to separate maintenance. Helms v. Franciscus, 20 Am. Dec. 402, and note, 2 Bland, Ch. 544; Almond v. Almond, 15 Am. Dec. 781, and note, 4 Rand. (Va.) 662; Ecker v. Ecker, 22 Okla. 873, 20 L.R.A.(N.S.) 421, 99 Pac. 918; Davis v. Davis, 134 Ga. 804, 30 L.R.A.(N.S.) 73, 68 S. E. 594, 20 Ann. Cas. 20; Spitler v. Spitler, 108 Ill. 120; Hickling v. Hickling, 40 Ill. App. 73; Spaulding v. Spaulding, 133 Ind. 122, 36 Am. St. Rep. 534, 32 N. E. 224; Fivecoat v. Fivecoat, 32 Iowa, 198; Gaines v. Gaines, 26 Ky. L. Rep. 471, 19 S. W. 929; Dollins v. Dollins, 26 Ky. L. Rep. 1036, 83 S. W. 95; Robards v. Robards, 33 Ky. L. Rep. 565, 110 S. W. 422; Tuggles v. Tuggles, 17 Ky. L. Rep. 221, 30 S. W. 875; Shafer v. Shafer, 10 Neb. 468, 6 N. W. 768; Harris v. Harris, 31 Gratt. 13; Hedrick v. Hedrick, 28 Ind. 291; Stock v. Stock, 11 Phila. 324; Osgood v. Osgood, 2 Paige, 621; Whitsell v. Whitsell, 8 B. Mon. 50; Bray v. Bray, 6 N. J. Eq. 27; Goldsmith v.

Goldsmith, 6 Mich. 285; Latham v. Latham, 30 Gratt. 307; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 672; Platt Bros. & Co. v. Waterbury, 77 Am. St. Rep. 335 et seq. and note, 72 Conn. 531, 77 Am. St. Rep. 335, 45 Atl. 154.

The practice would seem to be to award either in gross or in instalments according to the circumstances of the case, and so as best to promote the rights and interests of the parties and particularly of the injured wife. 14 Cyc. 777.

It is error to award a specific property allowance in lands or other property. 14 Cyc. 780, and note and cases cited; Williams v. Williams, 6 S. D. 284, 61 N. W. 38.

No division in gross should be made, because the circumstances of this case do not warrant it, nor do they bring the case under the rule and reasons for such allowance in certain given cases. 1 R. C. L. 529; De Roche v. De Roche, 12 N. D. 17, 94 N. W. 767, 1 Ann. Cas. 221.

If any award in gross is here made or permissible, the allowance made is too great. It is excessive. De Roche v. De Roche, 12 N. D. 24, 94 N. W. 767, 1 Ann. Cas. 221; McDonald v. McDonald, 117 Iowa, 307, 90 N. W. 603; Dickerson v. Dickerson, 26 Neb. 318, 42 N. W. 10; 14 Cyc. 779.

Greenleaf, Wooledge, & Lesk, for respondent.

"When a divorce is granted, the court shall make such equitable distribution of the property of the parties thereto as may seem just and proper, and may compel either of such parties to provide for the maintenance of the children of the marriage, and make such suitable allowances to the other party for support during life, or for a shorter period as to the court may seem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." Comp. Laws 1913, § 4405; Laws 1911, chap. 184.

The common property accumulated may be divided in such manner as may seem just to the court, when a divorce is granted to either. Rindlaub v. Rindlaub, 28 N. D. 168, 147 N. W. 725; De Roche v. De Roche, 12 N. D. 17, 94 N. W. 767, 1 Ann. Cas. 221; Peckford v. Peckford, 1 Paige, 274; Peisch v. Ware, 4 Cranch, 352, 2 L. ed. 644; Lawrence v. Lawrence, 3 Paige, 267; Maryland Ins. Co. v. Woods, 6 Cranch, 49, 3 L. ed. 148; 1 R. C. L. 929–932.

In these matters the trial court is invested with large discretion, and its decision should only be reversed for clear abuse of such discretion. Baur v. Baur, 32 N. D. 297, 155 N. W. 792.

In the case of an absolute divorce the allowance of a gross sum is more consistent with the nature of the decree than a periodical allowance, because such a decree is a final winding up of the relations existing between man and wife, and is an absolute breaking of all marital ties. 1 R. C. L. 929; 14 Cyc. 781; Warne v. Warne, 36 S. D. 573, 156 N. W. 60.

The rule is that all wealth from whatever source derived should be considered in the property settlement. Muir v. Muir, 133 Ky. 125, 4 L.R.A.(N.S.) 909, 92 S. W. 314; Canine v. Canine, 13 Ky. L. Rep. 124, 16 S. W. 367.

"When a wife is entitled to any allowance at all, it is proper to give her what at least would be her dower interest in her husband's estate." McKean v. Brown, 83 Ky. 208; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Pereira v. Pereira, 156 Cal. 1, 23 L.R.A.(N.S.) 880, 134 Am. St. Rep. 107, 103 Pac. 488; Van Gorder v. Van Gorder, 54 Colo. 57, 44 L.R.A.(N.S.) 998, 129 Pac. 226; Davis v. Davis, 134 Ga. 804, 30 L.R.A.(N.S.) 73, 68 S. E. 594, 20 Ann. Cas. 20; Ecker v. Ecker, 22 Okla. 873, 20 L.R.A.(N.S.) 421, 99 Pac. 918; 14 Cyc. 768; 2 Bishop, Marr. & Div. 1891 ed. p. 436; Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1075; Nichols v. Roberts, 12 N. D. 193, 96 N. W. 298; Fisher v. Betts, 12 N. D. 197, 96 N. W. 132.

Birdzell, J. This is an action for divorce, and comes before this court upon an appeal from the judgment of the district court of Ward county, decreeing a divorce to the defendant upon his counterclaim, and awarding to the plaintiff certain property as her separate estate; also awarding to the plaintiff the custody of a minor child, Angeline, a daughter, the only child of the marriage, who has since become of age. The appeal is taken under § 7848, Comp. Laws 1913, and the appellant demands a review and a retrial of the entire case in the supreme court. He indicates, however, in his assignment and in the briefs filed in this court, that he desires a review of only that portion of the judgment which awards the division of property. In view of the conclusions reached by this court upon a painstaking study of the

voluminous record, we shall undertake to state only such facts relating to the marital relations as lead to our conclusions, and these will be stated in connection with the discussioin of the questions presented.

This case has been twice argued, the reargument having been ordered by the court for the purpose of clearing up doubts entertained with reference to the legal propriety of disposing finally of the case, as this court is directed to do under § 7846, Comp. Laws 1913, without a thorough consideration and review of that portion of the judgment which awards the defendant a divorce. While respondent does not complain of that portion of the judgment, it is nevertheless insisted on her behalf that the propriety of the property division ordered must be judged in the light of the facts disclosed by the whole record, which, her counsel argue, entitled her to a divorce. While the appellant accepts as correct the portion of the judgment which awards him a divorce upon his cross complaint, and insists that the record warrants the judgment in his favor, he expresses, through his attorney in open court, a willingness to abide the decision of this court as to whether the judgment should not be so modified as to continue the marriage tie. Nevertheless, the appellant contends that this court is powerless to enter any order which will have the effect of modifying the judgment of the lower court in a particular not urged by him upon this appeal. His contention is that, since there was no cross appeal, any portion of the judgment accepted by the appellant as satisfactory cannot be complained of by the adverse party. In this contention, for reasons that will be assigned later, we have concluded that the appellant is in error. It may be remarked here that the statute under which the appeal is taken makes it the duty of the supreme court to effect a final disposition of the case, if justice can be done, without a new trial in the lower court, and to this end this court is authorized to affirm or modify the judgment or direct the entry of a new judgment in the district court.

A brief statement of the procedural facts will lead to a better understanding of the legal questions presented.

It seems that, at the conclusion of the trial, the trial judge made a memorandum decision in which it was stated: "I have come to the conclusion that both parties are to blame, that both parties are guilty of acts sufficient to constitute cruel and inhuman treatment under the statute, and that, therefore, neither party is entitled to a decree of

divorce." The court also held that the custody of the child should be awarded temporarily to the mother, and that she, the mother, should receive $150 monthly, until the further order of the court, for the support of herself and child. Following this decision no formal findings were drawn, and, about three months thereafter, it appears that there was a substitution of attorneys; that motions were filed,—one for the reopening of the case for the purpose of taking further testimony touching the value of defendant's property, and another asking for the division of the defendant's property; that these motions were disposed of by the denial of the former motion and the granting of the latter. The motion granted was in the nature of a petition for division of the property, and it seems to have been based upon the unsatisfactory character of the provision made for the support of the plaintiff. The petition represents to the court that if it is necessary, under the law, that a divorce be granted, in order to make a permanent and equitable disposition of the property of the parties, the plaintiff petitioner "consents and is willing that the court enter a decree of divorce herein in favor of the defendant and against this plaintiff upon the grounds of extreme cruelty, as demanded by the defendant in his answer and counterclaim, if the court finds that the evidence herein is sufficient to support said grounds of extreme cruelty on the part of the plaintiff, without considering the testimony of the plaintiff herein relative to the acts of the defendant in so far as the same affects his right to a decree of divorce on the grounds of extreme cruelty; and provided that the court by granting the defendant a decree of divorce on said grounds can legally, and will, make an equitable division of the property, and by such decree set apart to this plaintiff, absolutely, such of the property of the parties hereto as to the court shall seem just and equitable." And that, "in the event that such permanent division of the property aforesaid cannot be lawfully made herein by the court, then this petition and consent to be of no force and effect whatsoever."

After the presentation of the foregoing petition the court made findings of fact and conclusions of law, and an order for judgment in accordance with the prayer of the petition. The court found the plaintiff guilty of assaults upon the defendant and of some acts termed indiscretions, which acts and conduct caused the defendant mental suffering, and also found or stated that, by reason of the long length

of time intervening between the taking of the testimony and the submission of the case to the court for determination, the court would not undertake to detail in particular any of the various acts of cruelty, which the evidence disclosed, upon the part of the plaintiff, and that the conduct of the defendant toward the plaintiff was partially responsible for and contributed to the same. Upon these findings the court concluded that the defendant was entitled to a divorce from the plaintiff and an equitable division of the property.

It becomes important at this point to determine whether or not this portion of the judgment is open to review upon this appeal, and, if so, whether the court can properly dispose of the appeal without entering into the merits of the whole judgment,—even the part which is not assailed. That portion of the judgment which distributes the property hinges directly upon the part which dissolves the marital status. This action is not brought to determine the separate property rights of the plaintiff and defendant, and there is no action known to the law whereby one spouse may obtain a separate interest in the property of the other while the marriage tie continues. While our law recognizes that there may be a suit for alimony and separate maintenance, independent of proceedings for divorce (Hagert v. Hagert, 22 N. D. 290, 38 L.R.A. (N.S.) 966, 133 N. W. 1035, Ann. Cas. 1914B, 925), the judgment, in so far as it affects the property of the defendant, can do no more than charge it with a lien for the payment of such alimony or maintenance. It is worthy of note in this connection that § 4401, Comp. Laws 1913, makes express provision for the allowance of maintenance in a divorce action where the divorce is denied, and that this section is entirely silent upon the matter of property division. Section 4405, Comp. Laws 1913, provides expressly for a distribution of the property when the divorce is granted. Since there is no proceeding known to the law wherein there may be a distribution of property between a husband and a wife, based upon their inability to continue the normal marital relations, the manifest implication of the foregoing statutes is that there can be no property distribution unless there be a judgment or decree of divorce. 1 Bishop, Marr. Div. & Sep. § 1415; 14 Cyc. 780, 789, 792; Murray v. Murray, 84 Ala. 363, 4 So. 239; Campbell v. Campbell, 37 Wis. 206. It follows from this that, where a judgment decrees both a divorce and a property distribution, the different portions

of the judgment are so far interdependent that any examination into the latter portion necessitates a review of the whole judgment for the purpose of determining the propriety of the judgment of divorce itself. Thus, when the appellant challenges particularly that portion of the judgment setting aside certain property to the respondent, and, to support his challenge, questions the correctness of the findings of fact upon which the distribution was based, he presents questions which involve the correctness of the judgment of divorce. It is the manifest duty of this court, upon an appeal of this character, to review the entire record for the purpose of disposing of the case according to the provisions of the statute under which the appeal is taken, and in divorce cases this duty rests upon the court regardless of the desires of counsel or parties that, if possible, the case be disposed of without affecting the judgment of divorce. We would be prone to adopt this view even if we regarded the question as being an open one in this jurisdiction, but we do not regard the question as being any longer open to dispute.

Where a retrial is had in this court under § 7846, Comp. Laws 1913, and where it is not limited to the review of specific *questions of fact,* the entire record is here for review for the purpose of enabling the court to enter such judgment as is appropriate upon the whole record. As was said by Chief Justice Corliss in the case of Tyler v. Shea, 4 N. D. 377, at page 385, 50 Am. St. Rep. 660, 61 N. W. 468: "The appellant could not ask for a new trial of the case with reference to those provisions of the judgment which were against him, and at the same time insist that the balance of the judgment favorable to him should stand without investigation. When a case is appealed for a new trial, the whole case is open for judicial inspection; and the decision upon such new trial must necessarily be founded upon an examination of the case as broad as that made by the lower court. . . . Where the claim is indivisible, and is all in dispute, the appeal for a new trial gives the defendant the same right to be heard on the whole case which it gives to the plaintiff who appeals. In such a case, the ordinary rule that the respondent cannot complain of those portions of the judgment which are against him, or, indeed of any portion of the judgment, does not apply, because the appellant, by the nature of the relief he seeks by his appealing for a new trial, opens up the entire case to a second investigation."

It is true that the act under which the appeal in that case was taken contained no provision authorizing the appellant to specify in the statement of the case questions of fact that he desired the supreme court to review, as does § 7846, Comp. Laws 1913. But the above quotation is as applicable upon this point to the case at bar as though the statute had never been modified. The appeal is from the entire judgment, the trial is a trial *de novo,* and the appellant cannot complain if this court carries its review of the evidence to the point of determining the correctness of a related portion of the judgment, which must rest upon the facts that he asks this court to review. In brief, the appellant's attempted limited specification of facts is in reality not a specification of facts at all, but rather a specification of conclusions which the appellant contends are erroneous. What he really contends for is the right to have a review of a portion of the judgment appealed from. This court has held that there can be no such thing as a trial *de novo* in the supreme court upon an appeal from a portion of the judgment, and there are excellent reasons why an appellant cannot do indirectly, upon an appeal from a judgment, what he is not permitted to do directly by appealing from a portion of the judgment. See opinion by Young, Justice, in Prescott v. Brooks, 11 N. D. 93–101, 90 N. W. 129. From the rule that there can be no appeal and trial *de novo* as to a portion of the judgment under § 7846, Comp. Laws 1913, it must be accepted as a corollary that there can be no trial *de novo* in this court as to a portion of the judgment, where the whole is appealed from, except, of course, a partial review of questions of fact only. Sound practice requires that this should be so. If an appellant who has appealed from the entire judgment, and who has specified in his notice that he desired a review of the entire case, could subsequently limit his appeal to a review of a portion of the judgment alone, he would have it within his power to thereby unduly prejudice an adverse party. The respondent has the right to rely upon the notice of appeal as removing to this court the entire record for trial *de novo.* It is reasonable to assume that he is contended with the judgment of the lower court as it stands, and that he will be prepared to substantiate it upon a full review in this court. Surely he is not bound to anticipate that the appellant may later on attempt to limit the appeal by asking for a review of certain portions of the judgment only! Such a practice would necessitate a cross appeal

by the respondent in every case as a matter of precaution. Being of the opinion that the entire judgment is here for review, we are now brought to a determination of the facts upon which the correctness of the decision of the trial court depends.

A perusal of the record convinces us beyond peradventure that the statement of the trial court in the memorandum decision rendered at the close of the trial, and upon which no formal findings and conclusions were made, was fully warranted by the testimony.

The record is replete with testimony going to show that both plaintiff and defendant have repeatedly been guilty of acts of cruelty toward one another, and the testimony upon both sides is amply corroborated by witnesses other than the parties themselves, and by the circumstances as they are presented in the record. It appears that for a period of several years there has been lacking the mutual confidence in the fidelity of each to the other that is essential to the enjoyment of an harmonious married life; and it also appears that this lack of confidence was so frequently expressed by both parties as to afford a constant source of friction between them, provoking many quarrels of a more or less violent nature.

It is true that the testimony of the plaintiff and the defendant conflicts with reference to the character of the expressions used by the defendant from time to time, and also with reference to the character of the acts of cruelty of the plaintiff towards the defendant; but a careful reading of all of the testimony bearing upon their frequent quarrels leads irresistibly to the conclusion that both parties were at fault. If the plaintiff was guilty of cruelly treating her husband, it quite conclusively appears that the conduct of the husband towards the plaintiff was such as to arouse her temper, and to provoke the assaults; and to the extent that the defendant was guilty of cruelly treating his wife, it appears that her conduct and her temper largely provoked his acts.

It would serve no good purpose here to narrate in detail the various acts of cruelty testified to by the various witnesses, with a view to weighing and sifting the testimony for the purpose of ascertaining where the exact truth lies with respect to each transaction testified to. After spending a great amount of time in considering the testimony,

we are confident that it amply supports the conclusion that each of the parties has been guilty of cruelty towards the other. This alone is a sufficient reason for denying a divorce.

Bishop on Marriage, Divorce, and Separation, lays down what we regard as the correct rule applicable to cases of this character. It is stated thus: "Recrimination in divorce law is the defense that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony. It bars the suit founded on whatever cause, whether the defendant is guilty or not." 2 Bishop, Marr. Div. & Sep. § 340. And again the rule is stated thus: (§ 365) "It is a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complained-of *delictum* transpired, the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort." Where, as in North Dakota, the legislature has provided the same legal effect for every recognized cause for divorce, it is not for the courts to measure the gravity of the different causes. They should not determine that an offense which, in their judgment, may be a stronger cause for divorce than some other which is recognized by the legislature, overcomes the effect of the complaining party's seemingly lesser offense. In fact, § 4393, Comp. Laws 1913, expressly recognizes as recriminatory any acts on the part of the complaining party which are a cause of divorce against such party. This is even true where a divorce is sought on the ground of adultery, and where the spouse who charges the adultery is guilty of what may be termed a minor cause for divorce. See Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401; Pease v. Pease, 72 Wis. 136, 39 N. W. 133; Church v. Church, 16 R. I. 667, 7 L.R.A. 385, 19 Atl. 224. Note to Ellett v. Ellett, 39 L.R.A.(N.S.) 1135.

It is very earnestly argued on behalf of the appellant that the record establishes a charge made by the defendant in his cross complaint, that the plaintitff had committed adultery. Even though this were established, we would not feel warranted in granting the divorce for the reasons indicated above. But notwithstanding this, we have carefully considered all of the testimony bearing upon this charge, and find it lacking in that degree of directness and circumstantial strength to warrant a finding that the plaintiff was guilty of adultery on any of

the occasions alleged. We feel that the most that can be said of the acts of the plaintiff in her relations with other men is that her acts amounted to indiscretions. There is no evidence in the record going to establish such charge directly, nor is there any evidence proving circumstances to have existed from which the inference of guilt should be drawn.

It is a well-established rule that, where adultery is relied upon as a ground for divorce, the proof must be clear and positive. 14 Cyc. 692, and authorities cited thereunder. And that, where circumstantial evidence is relied upon as establishing the guilt of the accused, the circumstances must be sufficiently strong to warrant "a just and reasonable man" in drawing the inference of guilt. If the circumstances merely create a suspicion of guilt, it is not sufficient. 14 Cyc. 694. We are all agreed that the defendant in this case did not substantiate a charge of adultery by evidence which was legally sufficient to sustain the burden of proof.

Being of the opinion that, under the evidence disclosed by this record, neither party is entitled to the relief prayed for, the questions at issue respecting the property division cannot be disposed of by awarding a division of the property, as was done by the trial court. The evidence, however, bearing upon the valuation of the defendant's property and of the defendant's financial worth is of such an unsatisfactory character that we feel that an injustice might result to this plaintiff by reason of awarding alimony, based upon the evidence taken at the trial, which was had more than two years ago. The case is therefore remanded to the trial court for the taking of additional testimony bearing upon the value of the defendant's property and his financial worth, and the trial court is directed to enter an order providing for alimony to be allowed to the plaintiff in such sum as shall seem to him proper under such evidence and all the circumstances. There shall also be awarded to the plaintiff $1,000 suit money, incident to this appeal, and the defendant and appellant shall pay the costs hereof. The child, Angeline, having become of age during the pendency of this proceeding, requires no further protection by the order of the court. The judgment of the trial court, awarding a divorce and property division,

is reversed and the cause is remanded for further proceedings in accordance with this opinion.

GRACE, J. I dissent.

ROBINSON, J. (dissenting). This is an action for the dissolution of a matrimonial partnership and a division of the partnership property. The district court decreed a dissolution on the ground of cruelty, awarding the plaintiff about $50,000, or one third of the property. The suit was commenced two and one-half years ago, and it has been pending in this court for ten months. In the early summer it was argued at great length, and afterwards, in about three months the arguments were repeated. The argument was only in regard to the property. Now a decision is given reversing the trial court, and holding that on the question of cruelty honors are easy; that the cruelty on one side fairly offsets the cruelty on the other. Hence, the court denies a dissolution of the partnership and a division of the property. It requires John to dole out to Katherine an occasional pittance so she may eat from his hand and partake of the crumbs which fall from his table. The long and specious arguments were well calculated to deceive and mislead the court. It was strenuously contended that Katherine had not been so good and so chaste as John, and that, therefore, she should receive only a small annuity.

The appeal presents no question only on the division of the property. However, in their zeal for supposed righteousness and their bent for old laws and customs, our judges think it well to punish both parties by putting them on probation, keeping them another three years in a state of wedded celibacy, and forcing them to waste a good part of their wealth in another vexatious suit. That is all dead wrong.

Some two decades ago, in the springtime of life, the parties met and entered upon a matrimonial partnership. They had no fear of commencing life with nothing so they grew up with the magic city. By industry, frugality, and good luck they soon commenced to accumulate a fortune. She ate not the bread of idleness. Were it not for her thrift and industry, the chances are there would be no occasion to quarrel over property. By watchful care, industry, and working early and late cooking for 150 to 200 guests at a time, she turned her hotel into

an Alladin's lamp and made wealth for her John to squander. While he made expensive tours over the country, sojourning at Dreamland in Spokane and for several moons with the fair nymphs of Paris and Hong Kong, she kept her hotel and made the wealth; and yet his home-coming messages gave no assurance of devotion, no token that absence makes the heart grow fonder.

However, as Katherine made the wealth, she very unwisely kept the bank account and all the property in the name of her assumed lord and master. In that way she suffered herself to be put in the position of a dependent, and not an equal partner. Had she from the start insisted on courteous treatment and on keeping her share of the property and money in her own name, or on an immediate dissolution of the partnership, then the outcome would have been very different. Then, there would have been no threats to turn her onto the streets without a penny, and no necessity of a suit for a division of the property.

Concerning the cruelty, it is in no way possible to fairly represent it. It is hard to conceive of a course of more continuous, persistent, and heartless cruelty than that inflicted on the plaintiff. Her testimony is circumstantial and credible, and it is in the main well corroborated by several witnesses. It shows that during some ten years on all occasions she was grossly insulted and falsely charged with crime, and beaten and pounded black and blue. She was baited and insulted so as to provoke her to resent it by assaulting the defendant that he might the further pound her. She was treated to a continuous and daily course of nagging and baiting. In 1908, on her return from the hospital after a serious operation, he came home intoxicated, got on her stomach with his knees, pulled her hair, kicked her out of the bed, and mauled her around. She says: "He kept it up for an hour and got so vicious that the daughter, Angeline, called in the night clerk. I was laid up for a good long time after that." In September, 1914, he returned from a trip to the west, and commencing baiting her about her dress, calling her a whore and a chippy until she slapped his face,—and then he beat her black and blue,—struck her head against the wall. Her aged mother was with them, and the result of such treatment was to seriously injure her health, make her a nervous wreck, and cause her a continuous headache. The plaintiff testifies: "He called me whore and bitch every few days, and, by the time my bruises were healed, I

got new ones on top." Then it seems he was always loving and doving the chambermaids, calling them pet names, visiting them in their rooms. She was driven to commence a prior divorce suit. They made up and agreed to forgive and forget, and he at once commenced the same old thing, and worse. He got more violent and more aggravating. It was a constant uproar all the time. When she went to early mass and confession with her daughter, Angeline, John did not think her penance sufficient and so he had to give her a good beating. The daughter, Angeline, testifies: He continued pounding her mama while she was begging him to stop. Angeline testifies that, when she was a child, he beat her fully three times a day. She feared him and ran away, and he ran after her and beat her on the way home. His home was as the Deserted Village:

> "No children run to lisp their sire's return,
> And climb his knees the envied kiss to share."

Of course the plaintiff was a woman of some spirit, and not a dog to lick the hand that beat her; and so it may be that at times she attempted to take her own part and to give blow for blow and abuse for abuse, and that she did not tamely submit to her treatment. That was all very proper and right. But she was by far the weaker of the two, and it is sheer folly to say that she was the aggressor and that she was guilty of love's treason. When the lion and the lamb lie down together, and the latter gets up covered with marks of violence, we must not think that the lamb was the aggressor. Defendant denies the testimony of the plaintiff and all her witnesses. He said they all lied. But his testimony is wholly incredible; it is not true.

He was insanely jealous, and it seems he thought by beating, nagging, and baiting his spouse to drive her to desertion or to submission and affection. To throw off her loneliness and her burden of care and sorrow, she consorted with one or more vivacious lady friends, and played the part of the Merry Wives of Windsor. This the court terms an indiscretion, and doubtless it looked awful bad to John. Like the master Ford of Shakespeare: "He could little understand his wife's love of her lively neighbors' company or the feminine necessity for a change of scene and lively diversion." So he did not make amends by going on his knees and saying to her: "Pardon me, wife. Henceforth

do what thou wilt. I rather will suspect the sun with cold than thee with wantonness."

The trial of this case and the conduct of the appeal is itself a sufficient cause for a divorce. It shows no spirit of gallantry or fairness. It is in keeping with the charge of cruelty made in the complaint. For two weeks the ordeal of the trial was protracted while resort was had to every device to humiliate the plaintiff and besmirch her womanhood. She was openly and persistently and shamefully and falsely charged with crime. She was continuously harassed and insulted by counsel concerning alleged crimes and other vexatious matters. She was treated without respect due to a wife and mother. In all fairness and honor the plaintiff is entitled to an equal share of the property. The trial court awarded her only one third of it, and yet the defendant appeals to this court, and hires lawyers and ex-judges to come here to slander the plaintiff. Her own property held in trust in the name of the defendant is used to hire lawyers to traduce her.

The judgment should be affirmed.

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EVIDENCE—continued.

Relevancy and Materiality.

3. Evidence of prior sales in the same place and of prior shipments may be admitted in a prosecution for the crime of bootlegging, in order to show purpose, intent, and plan, and when the defense is that the transaction was a joint purchase and treat, and not a sale. State v. Stanley, 311.
4. Where one is charged in an information with the keeping and maintaining of a common nuisance at a certain building or place, and the prosecution is against the person only, and is intended to secure the conviction and punishment of such person only, evidence of sales of intoxicating liquors by the defendant, and evidence of sales of intoxicating liquors by defendant's employees, even though the sale of the intoxicating liquors by the employees was not shown to have been made with the knowledge of the defendant, is all competent evidence tending to show that such place or building is one where intoxicating liquors are kept for sale, barter, or gift in violation of law. Whether the defendant had knowledge of the sales of intoxicating liquors at such building or place by his employees is a question of fact for the jury. State v. Wheeler, 456.
5. Where one presented a claim against the estate of a deceased person through the administrator of such estate, and the administrator refused payment thereof, and suit was brought by the claimant against the administrator, and the administrator answered but did not plead payment; notwithstanding such failure to plead payment, it is proper to show by competent testimony that the plaintiff has received money from other sources which reduced, or showed payment of, the claim filed with the administrator, and upon which suit was brought. All such evidence was competent to show that the plaintiff had no claim against the estate. Livingston v. Holt, 556.

Admissibility Under Pleadings.

6. Where the seller in an action of claim and delivery causes a writ of claim and delivery to be issued, and the sheriff by virtue of such writ takes possession of certain grain, and the seller, the plaintiff in the case, introduces testimony to show that the grain taken is the identical grain grown upon the premises described in his complaint, being the same premises which he sold to the defendant, the introduction of such testimony broadened the issues of the complaint in this action and gave the defendant the legal right to introduce testimony tending to prove the grain taken under the writ was not grain grown upon the premises in question, and this even though the defendant's answer was only a general denial; and it was reversible error for the court to exclude such testimony and defendant's offer

EXECUTORS AND ADMINISTRATORS.

Setting aside to surviving wife or husband or minor children exempt property, see Exemptions.

Section 8740, Compiled Laws of 1913, provides: "When a claim accompanied by the affidavit required in this chapter is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allows the claim it must be presented to the county judge for his approval, who must, in the same manner, indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the tenth day," etc. Evidence of the presentment of the claim in question to the administrator, and his rejection thereof, examined and *held* to be sufficient to show a due presentment in pursuance of such section, and to further show that such claim was rejected. Sunberg v. Sebelius, 413.

JUSTICE OF THE PEACE.

APPEAL.

1. On appeal from a justice of the peace, the district court has jurisdiction to permit clerical errors or defects of form in the undertaking on appeal to be corrected by amendment or by the giving of a new undertaking. Great Northern Exp. Co. v. Gulbro, 352.
2. Where an action is commenced in the justice court, and judgment was rendered therein in favor of the plaintiff and against the defendant for the relief prayed for in the complaint, and after entry of such judgment, within thirty days, an appeal is taken to the district court, and notice of appeal is duly served, together with the proper undertaking, and afterwards duly filed in the district court, the district court acquires jurisdiction of such case, and such case is on the calendar of the district court for trial without any necessity of serving notice of trial; such case cannot ordinarily be tried in the district court, however, until the justice of the peace before whom such trial was had, transmits his record, which shall contain a certified copy of the justice's docket, the pleadings, and all notices, motions, and other papers filed in the cause. If the justice, or his successor in office, neglect or refuse to so transmit his record, he may be compelled to do so by the district court. Under § 9170, Compiled Laws of 1913, the plaintiff had a statutory right to have the certified record of the justice of the peace in the district court before he could be required to proceed to trial. Hope Nat. Bank v. Smith, 425.

KNOWLEDGE.

As question for jury, see Evidence, 4.
Sufficiency of proof of, see Evidence, 16.

LAND CONTRACT. See Vendor and Purchaser.

LEVY AND SEIZURE.

As to exemptions, see Exemptions.

The fact that the vendee in a bill of sale, absolute on its face, but given to secure an indebtedness, had other security sufficient to satisfy his demand, is not available as a defense in an action brought by the vendee against an officer who, in disregard and defiance of the vendee's special interest, levies upon and sells some of the chattels covered by such bill of sale. Godman v. Olson, 360.

APPOINTMENT; VACANCY.

1. The provisions in § 2 of chapter 237 of the Laws of 1915, empowering the governor to nominate and the senate to confirm nominations for the offices of members of the state board of regents during the same session of the legislature at which the act creating the offices was enacted, do not vest title to the offices in the appointees, which continue beyond July 1, 1917. State ex rel. Langer v. Scow, 246.
2. Where officers continue in office after their right to hold and occupy the office has ceased, the governor may declare the offices vacant and appoint successors who will hold as vacancy appointees. State ex rel. Langer v. Scow, 246.

COMPENSATION.

3. Section 720, Compiled Laws 1913, providing that each judge of the supreme court shall receive the sum of $500 per annum for expenses, to be paid in quarterly payments without filing any itemized statements, is not, if interpreted as providing an additional compensation for the services of the judges of such court, so far as the judges now in office are concerned, unconstitutional as being in violation of § 99 of the state Constitution, providing that the compensation for the services of a judge of the supreme court shall not be increased or diminished during the term for which he shall have been elected. State ex rel. Langer v. Kositzky, 616.
4. Section 720, Comp. Laws 1913, and the said section as amended by § 2, chap. 224, Laws 1917, providing that each judge of the supreme court shall receive the sum of $500 per annum for expenses, to be paid in quarterly payments without filing any itemized statement, if interpreted as providing for the payment of "expenses" rather than for "services," are not unconstitutional as being in violation of either § 99 of the Constitution, providing that the compensation for the services of a judge of the supreme court shall not be increased or diminished during the term for which he shall have been elected, or of § 186 of the state Constitution, providing that no bills, claims, accounts, or demands against the state shall be audited, allowed, or paid until a full itemized statement shall be filed with the officer or officers whose duty it may be to audit the same. State ex rel. Langer v. Kositzky, 616.

VALIDITY.

VENDOR AND PURCHASER.

1. Where one sold to another a certain tract of land for a specified price payable in yearly instalments, the first of such instalments being due December 1, 1910, and the last being due December 1, 1913, and such contract contained a condition that, if default be made in any of the payments, then the whole of such purchase price and interest should become immediately due and payable; and default was made in the first payment,—the whole sum of such contract became immediately due and payable, and remained due and payable during the continuance of such default. Where such default continues, the payment due each year is not the amount specified in the contract to be payable at a certain time each year, but the whole amount of the contract is due and payable each year. Bentler v. Brynjolfson, 401.
2. Where such contract contains a provision that, until the payment each year of the payment due each year thereunder, the legal title to and possession of all the grains grown on said land shall be in the name of the first parties as owners thereof, such provision is a lien in the nature of a chattel mortgage, and is security for all that is due in a given year. If default is made and continues, the amount due each year is the whole of the purchase price, and such clause in such case secures the whole amount due. Bentler v. Brynjolfson, 401.
3. Where the last specified payment in the contract was due in December, 1913, and such default continued to exist so that the whole amount remaining unpaid upon the contract was due that year, and such contract was continued in force for the year 1914, when there was no specified payment due, the default having continued to exist, the payment due for the year 1914 was the whole amount remaining unpaid upon such contract, and under such security clause the seller had a lien upon the crops of that year for the security thereof, and, in an action of claim and delivery, is entitled to prove his special interest in such crops and his right to possession thereof, and is entitled to judgment for the possession of such crops or the value thereof, where by competent proof he has shown himself to be entitled thereto. Bentler v. Brynjolfson, 401.

VENUE.

1. In an action on an attachment bond the proper place of trial is the county in which the defendant or some of the defendants reside at the time of the commencement of the action. Under § 7417, Compiled Laws of 1913, the right of the defendants in this case to have the trial in the county in which they or some of them reside is an absolute right. Hinsey v. Alcox, 52.

VENUE—continued.

CHARGE.

Sufficiency of evidence to support claim to change of venue, see EVIDENCE, 15.

2. Where a party to an action is, under the law, entitled to a change of venue in civil actions, a demand for such change of venue served before the expiration of the time to answer preserves his right to a change of venue; if the demand for change of place of trial is not consented or agreed to by the party upon whom such demand is served, an application to the court may be made for an order, and an order may be made changing such place of trial in pursuance of such application after the time for answering has expired. Hinsey v. Alcox, 52.

3. In construing § 7418 of the Compiled Laws of 1913, which provides that, "if the county designated for that purpose in the complaint is not the proper county, the action may, notwithstanding, be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, etc.," it is *held*, that a change of venue may not be demanded after an answer has actually been served, even though the time for answering which is provided for by the statute has not expired. McCarty v. Thornton, 551.

VERDICT.

New trial for errors in, see New Trial.

VESSEL.

Situs of, for purpose of taxation, see Taxes, 3–5.

WAIVER.

By insurance company, see Evidence, 17; Insurance, 5–9.
As question for jury, see Trial, 5.

WARRANTY.

In insurance contract, see Insurance, 3, 4.

WATERS.

Injunctive relief to riparian owner, see Injunction, 2.
What is a reasonable use of water as question for jury, see Trial, 6.